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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 REBUTTAL BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

COMES NOW, Black Mesa Energy, LLC ("Black Mesa") and respectfully lodges its Rebuttal Brief in Support of its Motion for Summary Judgment in response to the briefs filed by Idaho Power Company ("Idaho Power" or the "Company") and the Staff of the Idaho Public Utilities Commission ("Staff") pursuant to that Notice of Briefing Schedule issued in Order No. 34849 by the Idaho Public Utilities Commission ("Commission" or "IPUC").

Although, the Commission's Staff did not take a position either opposing or supporting Black Mesa's Motion for Summary Judgment, Black Mesa takes this opportunity to correct a couple of misperceptions expressed in Staff's Brief.

Idaho Power's Brief, on the other hand, warrants substantive rebuttal. Although it is replete with forcefully asserted (albeit erroneous) statements of both law and fact, it fails to identify any facts that actually contest the Black Mesa's projects' entitlement to 20-year contract

terms utilizing published avoided cost rates applicable to "other" qualifying facilities ("QFs") under the Commission's implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Idaho Power's legal arguments are equally unpersuasive. Idaho Power's attempts to resuscitate the losing battle that it (and this Commission) litigated in *Franklin Energy Storage v. Kjellander*.[1] Although the name of the QFs may have changed (Franklin to Black Mesa), should Idaho Power prevail here, then all of the facts from the Franklin ligation will back on the table in this docket. Simply put, Idaho Power invites this Commission to disregard the lessons learned in the *Franklin* litigation with respect to its invited intrusion into an arena reserved exclusively to the Federal Energy Regulatory Commission ("FERC").

Nothing in either Idaho Power's or Staff's briefs offer any justification for this Commission to do anything other than 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.

II. ARGUMENT

There is no material dispute of fact that the Black Mesa QFs each created a legally enforceable obligation ("LEO") to sell energy and capacity to Idaho Power pursuant to the

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

Commission's implementation of PURPA for "Other" QFs entitled to published rates no later than the date of the complaint, March 17, 2020. Idaho Power and the Staff have not refuted that as of 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 in Black Mesa's Motion for Summary Judgment, the Black Mesa QFs are entitled to LEOs under any reasonable application of the applicable legal standards. The Commission should therefore grant summary judgment in Black Mesa's favor.

A. The District Court's Decision in *Franklin* Instructs the Appropriate Commission Treatment of the "Other" Status of the Black Mesa QFs as of the Date the LEOs Were Created.

It is important to clear the waters that Idaho Power attempts to roil with respect to exactly what the federal court did, and exactly what it did not do, in *Franklin*. Idaho Power asserts as follows:

> [T]he Federal District court specifically declined to order the IPUC to grant the proposed Franklin battery storage QFs published rates and 20-year contracts as "other" QFs, instead referencing the "jurisdictional divide" between state and federal authorities and deferring to the Commission's determination as to proper avoided cost rates and purchasing terms and conditions for proposed battery storage QFs.[2]

Idaho Power argues that the " 'jurisdictional divide' between the state and federal authorities" appears to give this Commission complete discretion to determine the proper avoided cost rates and contract terms and conditions for proposed battery storage QFs.[3] Unfortunately, Idaho Power only tells half the story. The Commission's discretion is, in fact, constrained by the court's opinion in *Franklin*.

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2 Idaho Power Answering Brief at p. 8.
3 Idaho Power Answering Brief at p. 8.

That constraint is found in the court's ruling that enjoined the IPUC from considering the energy source input into the Franklin energy storage QFs for the purpose of classifying those QFs in any way other than as energy storage QFs. The court stated:

> Defendants [the three PUC Commissioners] are permanently enjoined from enforcing or applying either of such IPUC final orders to Plaintiffs' facilities as if such facilities are classified as something other than energy storage QFs, to include but not be limited to classifying Plaintiffs' facilities as if they are "solar QFs" under the IPUC's prior implementation plan. Defendants are further permanently enjoined from considering the energy source input into Plaintiffs' energy storage QFs for the purpose of classifying the QFs in any way other than as energy storage QFs.[4]

Idaho Power concedes (and it is largely true) that the Black Mesa projects are similarly[5] situated to Franklin's projects with respect to seeking Schedule 73 PURPA contracts with Idaho Power. Hence, the court's *Franklin* ruling, as Idaho Power suggests, is also instructive as to this Commission's treatment of the Black Mesa projects.[6] In *Franklin*, the court, prohibited the Commission from applying any qualifying facility classification to the Franklin projects other than as energy storage QFs. Therefore, under essentially "identical" facts, this Commission is prohibited from failing to recognize Black Mesa's entitlement to claim to be energy storage QFs and hence, an "other" QF under the Commission's implementation of PURPA. Schedule 73 then requires that "other" QFs such as the Black Mesa "other" QFs are entitled to 20-year contracts with published avoided cost rates and contract terms.

The "jurisdictional divide" reference by the court and cited by Idaho Power may seem

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4 *Franklin Energy Storage One, LLC*, 2020 U.S. Dist. LEXIS 8892 at *54.

5 Idaho Power uses the word "identical." *See* Idaho Power Answering Brief at p. 8.

6 The court's decision is simply an articulation of the well settled principle of law that FERC has exclusive jurisdiction as to the classification of qualifying facilities. *Franklin Energy Storage One, LLC*, 2020 U.S. Dist. LEXIS 8892, at *34 (stating all parties agree that "'[t]he structure of PURPA and [FERC's] regulations, reflect Congress's express intent that [FERC] exercise *exclusive authority* over QF status determinations.' *Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994)").

like two-way street, but in fact it is a complete prohibition that prevents the Commission from reclassifying the Black Mesa Projects as anything other than energy storage QFs. It is true that federal courts do not have the authority to order the Commission to order the application of specific contract rates and terms to a specific QF, but such limitation exists purely because such relief "involves the application of a state regulatory agency's rules to Plaintiffs as individual petitioners."[7] That type of "relief is properly pursued before the IPUC," not the federal court.[8] But this Commission, likewise, does not have the authority to question the Black Mesa projects' QF status as energy storage QFs, which in turn qualifies the Black Mesa QFs to the "other" rates under the implementation in effect at the time of LEOs in this case.

The bottom line is that the Commission is constrained to applying its implementation plan using the QF classification that Black Mesa choose in the self-certification process at FERC. Idaho Power's brief correctly observed that federal courts defer "to the Commission's determination as to proper avoided cost rates and purchasing terms and conditions."[9] But, the inevitable corollary to this Commission's ability to set avoided cost rates, is that this Commission must accept, without alteration, the QF classifications that the Black Mesa projects selected through FERC's QF certification processes.

B. Schedule 73 and the IPUC's Implementation of PURPA Established Black Mesa's Entitlement to 20-Year Contracts at the Published Avoided Cost Rates at the Time of Creation of the Black Mesa QFs' LEOs

Black Mesa classified its projects with FERC as energy storage QFs. Therefore, this Commission has no other legal choice but to accept that classification when it applies whatever

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7 *Franklin Energy Storage One, LLC*, 2020 U.S. Dist. LEXIS 8892 at *52.

8 *Id.* at **52-53 (citing *Winding Creek Solar LLC, v. Peevey*, 293 F.Supp.3d 980, 993-994 (N.D. Cal. Dec. 6, 2017)).

9 Idaho Power Answering Brief at p. 8.

PURPA implementation plan it has adopted.[10] This Commission's implementation plan, at all times relevant to Black Mesa's contract entitlement, is embedded in Idaho Power's Tariff Schedule 73, which requires the Commission to treat the Black Mesa projects as "other" QFs that are entitled to 20-year contract terms using published avoided cost rates.

The distinction between the Commission's legitimate authority to set avoided cost rates for different classes of QFs and the prohibition against the Commission actually determining what class any particular QF falls into is the dynamic that is causing Idaho Power analytical difficulties. At no time when Black Mesa made its PURPA contract requests of Idaho Power, and at no time when Black Mesa created its two LEOs, did the Idaho Commission have an implementation plan specific to energy storage QFs. Instead, it had an implementation plan with an eligibility determination set forth in Schedule 73 that provided:

> Eligibility Cap means for all Qualifying Facilities except wind and solar Qualifying Facilities, 10 average megawatts in any given month. For wind and solar Qualifying Facilities, "Eligibility Cap" means 100 kilowatts ("kW") nameplate capacity.[11]

There is nothing ambiguous about the Commission's eligibility criteria for the three different enumerated classes of qualifying facilities. Black Mesa, of course, is neither a wind nor a solar qualifying facility. It bears repeating that for "all Qualifying Facilities except wind and solar" the Commission set the Eligibility Cap at "10 average megawatts in any given month."[12] This is of course entirely consistent with the applicable Commission order implementing PURPA up through the date of creation of the LEO in this case, and indeed even until October 2, 2020, when the Commission first implemented a storage-specific rate category different from the catch-all

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10 *Franklin Energy Storage One, LLC*, 2020 U.S. Dist. LEXIS 8892, at *34.
11 Idaho Power's Schedule 73 at p. 1.
12 *Id.*

"other" rate category.[13]

Thus, Black Mesa was taking *the only avenue open to it* pursuant to this Commission's implementation of PURPA when it asked Idaho power to tender rates and contract terms and conditions pursuant to Rate Option "4. Non-Levelized Non-Fueled Rates." That option provides, in its entirety:

> Non-Levelized Non-Fueled Rates. These rates shall apply to Qualifying Facility projects at or below the Eligibility Cap when the Customer chooses to supply output including energy and capacity under a contract based on Non-Levelized Avoided Cost Rates for Non-Fueled Facilities. These rates shall apply to Facilities that do not use fossil fuels as their primary fuel, and shall be fixed for the term. The rates are subject to a Seasonal Factor, a Daily Shape Adjustment, and Integration Charges.

Black Mesa relied on the integrity of the Commission-approved tariff, quoted above, when it made its good faith requests for two separate contracts "based on Non-Levelized Avoided Cost Rates for Non-Fueled Facilities" for its qualifying facilities that are neither wind nor solar qualifying facilities.

Idaho Power apparently disagrees that it must comply with extant tariffs – even absent an order granting it relief from those tariffs. It characterizes its position thusly:

> Idaho Power has no obligation to blindly accept and acquiesce to any demand for rates and purchase terms that a potential QF brings to Idaho Power.[14]

The Company goes on to point out that: "*The rates and purchase terms are the exclusive province of the IPUC to establish.*"[15] The Commission did set the rates and purchase terms when it adopted Schedule 73. Contrary to Idaho Power's assertion, Black Mesa does not rely on Schedule 73 in some sort of bad faith game of "gotcha." Nor does it randomly assert just "any demand for rates." Black Mesa has never questioned the Commission's "exclusive province" in

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13 *See* Black Mesa Motion for Summary Judgment at pp. 8-15.

14 Answering Brief at p. 10.

15 *Id.*

setting avoided cost rates and contract terms. In fact, quite the opposite is true – Black Mesa is relying on the Commission's legitimate determinations as to Idaho Power's avoided cost rates and contract terms. Black Mesa is simply requesting that Idaho Power stop hiding the ball and comply with its tariff schedule 73 through which this Commission implements PURPA.

The crux of Idaho Power's opposition to the Black Mesa projects is that it simply does not want to comply with the parameters of Schedule 73 -- Idaho Power argues that Schedule 73 is "incorrect" and "harmful" and "not proper" and not "lawful" and that reliance on its terms is nothing more than a "game of 'gotcha.'" [16] The appropriate time for Idaho Power to question the legitimacy of Schedule 73 was when the Commission was in the process of adopting that tariff and not many years after the fact. Incredibly, Idaho Power makes the claim that it has the unilateral authority to suspend the effectiveness of its tariff schedules:

> When a QF brings a demand to the utility under Schedule 73 that it is not entitled to, the utility is not obligated to move forward by offering incorrect rates and contacts to that QF. The Commission expects and demands that the utility not take actions that would be harmful to its customers and expects the utility to bring questions regarding the lawful rates and purchase terms of PURPA purchase to it for resolution. This is exactly what Idaho Power did.[17]

As pointed out in Black Mesa's Motion for Summary Judgment, the filed rate doctrine prohibits just this type of unilateral, ad hoc disregard for the application of duly adopted tariffs. Most decidedly, the Commission does not "expect and demand that the utility not take actions" that are required in its tariffs. Indeed, it is illegal for a utility to "not take actions" that are required in its tariffs. A utility's intentional failure to comply with Commission-approved tariffs is a criminal act for which fines and imprisonment are provided for under Idaho Code Sections 61-706

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16 *Id* at p. 12.

17 *Id.*

through 61-709. Black Mesa pointed out in its Motion for Summary Judgment that at all times relevant to the creation of Black Mesa's LEO, the Commission had issued no order staying or modifying the applicability of Schedule 73.[18] Although, Idaho Power's response ignores this fact, it is fatal to the Power Company's assertion that it has the unilateral ability to disregard the requirements of that Tariff.

Idaho Power does not have some reserved mysterious esoteric obligation to protect ratepayers from the application of its own tariffs whenever it believes that a particular tariff may no longer be "proper." Indeed, there would be no need to have a public utility commission at all if such complete discretion were allowed to be exercised by utilities. Idaho Power is fully empowered to seek temporary relief from its tariffs, but in this case it did not do so – leaving the "other" rates available to the Black Mesa QFs until lawfully changed on October 2, 2020.

Idaho Power is not challenging the *applicability* of Schedule 73 to the Black Mesa projects. Idaho Power is actually challenging the very terms and foundational definitions in that Schedule. There is no question that the Black Mesa projects meet and fully complied with all of the definitional requirements in Schedule 73 and are therefore entitled to Option 4 Non-Levelized Non-Fueled rates and a 20-year fixed-price contract as provided for in that tariff. Idaho Power's assertion that Black Mesa was not "entitled to" the Schedule 73 rates is an argument that it wished to change Schedule 73's criteria for entitlement such that Black Mesa would then (at some later time) become no longer entitled to that Tariff. This is evidenced by Idaho Power's own argument:

> The Commission expects and demands that the utility not take actions that would be harmful to its customers and expects the utility to bring questions regarding the lawful rates and purchase terms of PURPA purchases to it for resolution. This is exactly what Idaho Power did in response to Black Mesa's demands. As soon a[s] [sic] practically

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[18] Black Mesa Motion for Summary Judgment at p. 23.

> feasibly, and within Schedule 73's initial ten-day response time, Idaho Power responded to Black Mesa in writing that it did not agree that Black Mesa was eligible for the rates and terms its [sic] had requested – and – that Idaho Power had additionally initiated proceedings at the IPUC seeking its determination as to the proper rates and terms for the QF's proposed purchase.[19]

But at the time Idaho Power initiated proceedings at the IPUC seeking its determination as to the proper rates and terms for the QF's proposed purchase, the Commission already had a PURPA compliant implementation plan applicable to Black Mesa QFs. Idaho Power was not asking the Commission to implement a plan for energy storage QFs, it was asking the Commission to *change* its implementation plan for energy storage QFs such that they would no longer be eligible for 20-year fixed-price contracts. Idaho Power never bothered to explain why it believes the Black Mesa projects are not entitled to the rates in the existing Schedule 73. Rather, it argued that the existing Schedule 73 should be changed to ex post facto eliminate the ability for the Black Mesa projects to their legitimate entitlement to 20-year fixed-price contracts.

C. Idaho Power Cannot Defeat Black Mesa's Claim to LEOs with Idaho Power's Non-Sequitur Argument that It Did Not Refuse to Contract with Black Mesa.

In defense against the LEO claim, Idaho Power incorrectly contends that it did not refuse to contract with Black Mesa. Idaho Power asserts that it:

> did not refuse to contract with Black Mesa. On both occasions alleged by Black Mesa (2017 and 2020) Idaho Power followed the procedure set forth in Schedule 73. . . . [O]n both occasions [Idaho Power] filed a proceeding with the Commission to determine the proper avoided cost rate and contract terms and conditions for proposed battery storage QFs – also within the initial 10-day response time of Schedule 73. [20]

Nowhere in Schedule 73 is it provided that a proper response to a Schedule 73 request for a contract is for the utility to file an application to terminate the applicability of Schedule 73.

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19 Idaho Power Answering Brief at p. 12.

20 Idaho Power Answering Brief at p. 9; *see also id.* at p. 10 (stating that "Idaho Power did not refuse to contract with Black Mesa").

Rather than "contract with Black Mesa" Idaho Power initiated a proceeding with the express intent of avoiding the requirement that it "contract with Black Mesa" as an "other" QF. No matter how many times Idaho Power claims that black-is-white and up-is-down, and that it did not refuse to contract with Black Mesa, Idaho Power's inconvenient reality is that black-is-black, up-is-up, and Idaho Power has been in a continual state of refusal to contract with Black Mesa since at least January 21, 2020, when Black Mesa submitted its two Schedule 73 applications.

Idaho Power incorrectly asserts that the fact that it filed its application for a declaratory ruling justifies its refusal to contact with Black Mesa. Idaho Power states:

> The Commission has ruled that a reasonable dispute between the parties regarding contract terms and conditions in the same context where the utility files the dispute with the Commission for resolution, does not constitute intransigence or a failure to negotiate on the part of the utility, and DOES NOT trigger the creation of a LEO. Order No. 33785, p 12, Case No. IPC-E-17-01.[21]

There is no similarity between the "reasonable dispute" referenced by the Commission in Order No. 33785 and Idaho Power's current refusal to contract with Black Mesa.

The faux[22] dispute between Franklin and Idaho Power was a one-sided cosmetic "dispute" that was created by Idaho Power out of whole cloth, which is apparent from the Commission's order that is cited by Idaho Power, where the Commission stated:

> Franklin further maintains that it has established a legally enforceable obligation (LEO) requiring Idaho Power to purchase its energy. Franklin Comments at 17. However, Franklin has failed to prove that Idaho Power impeded Franklin's ability to enter into PURPA contracts. *See Idaho Power,* 155 Idaho at 787. To the contrary, Idaho Power notified the battery storage facilities that the utility did not believe the projects were entitled to 20-year, published rate contracts and requested the projects "supplement your Applications with additional information that verifies eligibility for the requested rates and terms, or modify your Applications to request rates and terms that your proposed projects may qualify for."

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21 Idaho Power Answering Brief at p. 14. Emphasis in original.

22 Idaho Power's belief that a tariff (as written) may no longer be in the public intertest cannot reasonably be bootstrapped into a faux dispute over the applicability of its terms.

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> We decline to interpret a reasonable dispute between the parties regarding contract terms and conditions as intransigence or a failure to negotiate on the part of the utility. Therefore, we find that no action (or inaction) of the utility has triggered the creation of a legally enforceable obligation.[23]

Idaho Power created the "dispute" upon which the Commission hung its hat by responding to Franklin that it needed "additional information" in order to verify "eligibility for the requested rates and terms."

No such dispute exists with respect to the Black Mesa contract requests. In response to the Black Mesa requests for contracts, Idaho Power skipped the pretense of a "dispute" and simply asserted that Schedule 73 was not applicable while informing Black Mesa of its application seeking a declaratory order -- effectively pulling Schedule 73 out from under the Black Mesa contract requests. Idaho Power's response to the Black Mesa request did not assert a dispute as to the applicability of Schedule 73 to its projects. Schedule 73 is plainly written, unambiguous and succinct. It is not suspectable to disputes as to its applicability. Idaho Power's response to the Schedule 73 requests by Black Mesa provides, in part:

> Regardless of the deficiency in your Applications,[24] Idaho Power does not agree that your proposed projects are eligible for published avoided cost Rate Option 4, Non-Levelized Non-Fueled Rates, with a 20-year contract term. [Reference to the *Franklin* litigation omitted – which is discussed in detail infra.]
>
> On January 21, 2020, Idaho Power filed a petition with the Idaho Public Utilities Commission to established avoided cost rates applicable to PURPA energy storage QFs. The outcome of the filed petition will determine the contract term and avoided cost pricing methodology for which your proposed project may be eligible. *See* IPUC Case No. IPC-E-20-02.[25]

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23 Order No. 33785 at p. 12 (underscoring and parentheticals in original).

24 The alleged deficiency was addressed by Black Mesa the very next business day to which Idaho Power has never responded. *See* Declaration of Brian Lynch ISO Black Mesa's Motion for Summary Judgment, at Exhibit 1 (Dec. 11, 2020).

25 *See* Idaho Power Motion to Dismiss, at Attachment No. 1 (containing February 3, 2020, letter from Michael Darrington to Brian Lynch).

Idaho Power did not bother to contrive a dispute this time. It simply asserted that it does not agree that the projects are eligible under Schedule 73 and that it was filing an application to "establish avoided cost rates applicable to PURPA energy storage QFs." Not mentioned is the fact that the Commission's Schedule 73 already had established avoided cost rates for energy storage QFs to which the Black Mesa projects were entailed.

Idaho Power is asking the Commission to engage in the prohibited practice known as "retroactive ratemaking" which is a universally prohibited ratemaking construct. Idaho law recognizes a general prohibition on retroactive ratemaking. The Idaho Supreme Court has explained:

> I.C. § 61-502 provides that:
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> > Whenever the commission . . . shall find that the rates . . . are unjust, unreasonable, discriminatory or preferential, . . . or that such rates . . . are insufficient, the commission shall determine the just, reasonable or sufficient rates . . . to be thereafter observed. . . .
>
> This section provides only prospective relief.[26]

Idaho Power's attempt to impose the results of its declaratory ruling request relative to the treatment of energy storage QFs in a retroactive fashion runs afoul of this well-established principle prohibiting retroactive ratemaking and should not be tolerated by this Commission.

D. Staff's Brief Identifies No Reason to Deny Black Mesa's Entitlement to LEOs.

Nothing in Staff's Brief contradicts Black Mesa's LEO claims. The Commission Staff, in its brief, aptly notes as follows:

> Under Idaho's implementation of PURPA, a LEO requires reciprocal obligations. The utility is obligated to purchase … because of the must-purchase obligations of PURPA.

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[26] *Utah Power & Light vs. Idaho Pub. Utils. Comm'n*, 107 Idaho 47, 52, 685 P.2d 276, 281 (1984).

> [citation omitted] The QF too must demonstrate that it has incurred an obligation. "Under either a contract or LEO there are reciprocal obligations: a QF unconditionally commits itself to sell power to the utility and the utility commits to buy that power from the QF." Order No. 32861 at 18, IPC-E-11-15.[27]

Reciprocity of obligation can, of course, be challenging to demonstrate when one part to the reciprocal arrangement is noncompliant.

Idaho Power has been noncompliant in that it refused to comply with its obligation to respond to Black Mesa's Schedule 73 overtures with the required indicative pricing and contract terms. Staff's agrees:

> Based on the record, Idaho Power never provided Black Mesa with indicative pricing. In response to Black Mesa's 2017 Schedule 73 application Idaho Power filed a petition for declaratory order. Following Black Mesa's 2020 Schedule 73 application (and the district court order in *Franklin*), the Company submitted a petition to establish an energy storage QF category.[28]

Black Mesa was challenged by the failure of the supposed reciprocating party (Idaho Power) to take the next step in the Schedule 73 "dance" that has been carefully and thoughtfully choreographed by the Commission. Black Mesa's good faith compliance with Schedule 73 should, under any reasonable interpretation of the Commission's LEO precedent, entitle Black Mesa to its requested contracts and terms.

Black Mesa did not passively wait for the (as of yet still to be received) responses from Idaho Power to its Schedule 73 requests. It took the unusual and unrequired step of actually executing power purchase agreements that were drafted to almost exactly copy recently approved power purchase agreements executed by Idaho Power and approved by the Commission. In transmitting those executed power purchase agreements, Black Mesa made it clear that it was

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27 Commission Staff Brief at p. 8.

28 *Id.* at p. 11.

unequivocally and unconditionally committing itself to deliver power to the utility.[29] In sum, all of the salient facts for delivery of the output from the Black Mesa projects were unequivocally settled at the time Black Mesa made its Schedule 73 requests and also at the time Black Mesa tendered executed contracts to Idaho Power. Deficiencies that Idaho Power alleged were immediately addressed by Black Mesa and the output profile of the projects were confirmed.

Staff highlights the requirement for a QF to obtain commercial operation within 365 days of the Commission's determination of a LEO. Schedule 73 requires that the project be able to deliver "its electrical output within 365 days of such determination" with such determination being defined as follows:

> The indicative pricing proposal provided to the Customer pursuant to Section 1.c will not be final or binding on either party. Prices and other terms and conditions will become final and binding on the parties under only two conditions:
>
> ...
>
> ii. The applicable prices that would apply at the time a complaint is filed by a Qualifying Facility with the Commission shall be final and binding upon approval of such prices by the Commission and a final non-appealable determination by the Commission that:
>
> (a) a "legally enforceable obligation" has arisen and, but for the conduct of the Company, there would be a contract, and
>
> (b) the Qualifying Facility can deliver its electrical output with 365 days of such determination.[30]

But Black Mesa's LEO claims are consistent with this 365-day requirement. Staff points out that the contacts tendered by Black Mesa as well as the Schedule 73 applications all identified the first energy date as May 1, 2023. Staff continues by intimating that there may be a disconnect between the May 2023, date, and the Declaration of Mr. Lynch in which he states that

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29 *See* Idaho Power's Answer and Motion to Dismiss, at Attachment No. 3 (containing January 24, 2020, transmittal letters from Black Mesa to Idaho Power, which states: "Black Mesa here by enters into a legally enforceable obligation to provide such capacity and energy to Idaho Power...")

30 Idaho Power's Schedule 73 at p. 5.

the projects will be able to produce energy withing 365 days of the Commission's final determination. Of course, the two dates (Schedule 73 date) and the on-line date after a successful complaint procedure are not equivalent. Had Idaho Power complied with its obligations under Schedule 73, the May 2023 date would control as it would have been the mutually agreed on-line date. However, Black Mesa, having to resort to the Commission's established complaint process, is obligated to adhere to the accelerated on-line date required in that process – which Black Mesa has committed to do. Black Mesa made good faith efforts to comply with Schedule 73 and Black Mesa reasonably assumed Idaho Power was going to respond in good faith as well, in which case the May 2023 date would be in the power purchase agreement. Idaho Power's bad faith actions required Black Mesa to file its complaint, which in turn forces Black Mesa to commit to meet the Commission's accelerated online date. Any intimation that Black Mesa's commitment was somehow unsettled or contingent because of the 365 day on-line requirement is therefore misplaced.

Staff also noted that the power purchase agreements submitted by Black Mesa omitted certain provisions that Staff submits should be included the agreements, but any such discrepancy does not foreclose the creation of the LEO claims. As Staff acknowledged, the LEO claims are not contingent upon the Commission approving the precise non-rate and non-term-length provisions of the written agreements submitted by Black Mesa. Each LEO claim in the Complaint requests the Commission order use of the non-rate terms and non-term-length contract provisions proposed in the power purchase agreement 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.[31]

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[31] Black Mesa's Complaint at pp. 13-15.

The Complaint reflects the reality that the precise non-rate provisions of the Commission-approved PURPA contracts are not all identical, and it would not be possible to correctly guess which provisions would ultimately be considered reasonable for the contracts proposed here. Staff specifically recommends that any agreements contain certain liquid security deposit requirements in the agreements and use of standard seasonal adjustments to the published rates.[32] Black Mesa agrees that inclusion of the liquid security deposit provision and seasonal adjustment provisions suggested by Staff is a provision within the Commission's discretion to order to be included in the final executed documents, and therefore omission of those items from the documents to date does not foreclose the creation of the LEOs.

Finally, Staff states that certain evidence was missing from the record with respect to Black Mesa's response to Idaho Power's contention that Black Mesa failed to properly submit an annual, hourly output profile with its Schedule 73 application.[33] The Declaration of Brian Lynch attested as follows:

> On behalf of Black Mesa, I responded to Idaho Power via letter dated February 4, 2020, to clarify 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. I also explained that Black Mesa did not agree with Idaho Power's legal assertions made in Idaho Power's letter. My letter dated February 4, 2020, is attached hereto as Exhibit 1 to this Declaration. [34]

Staff notes that Idaho Power has characterized this letter dated February 4, 2020, as a correspondence made on February 5, 2020, and suggests that the record may be missing an

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32 Staff Brief at p. 9.

33 Staff's Brief at pp. 12-13.

34 Declaration of Brian Lynch ISO of Black Mesa's Motion for Summary Judgment, at ¶ 19.

additional correspondence. The discrepancy is due to the fact that Mr. Lynch send the email attaching his letter on February 5, 2020, and Black Mesa is submitting a Supplemental Declaration of Brian Lynch to include in the record that email dated February 5, 2020.[35] The email dated February 5, 2020, does not add anything substantive to the analysis, but the record is now complete on the point.

III. CONCLUSION

Neither Idaho Power's nor Staff's briefs in this matter offer any valid reason to reject Black Mesa's request that this Commission issue an order granting summary judgment in its 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.

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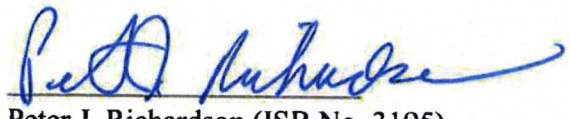
35 Supplemental Declaration of Brian Lynch ISO of Black Mesa's Motion for Summary Judgment, at ¶ 5 & Ex. 1.

DATED this 21st day of January 2021

RICHARDSON ADAMS, PLLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st of January 2021, a true and correct copy of the within and foregoing BLACK MESA ENERGY'S REBUTTAL IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT in Docket No. IPC-E-20-17 was served, pursuant to Commission Order No. 34602, exclusively via electronic mail to:

Idaho Public Utilities Commission
Jan Noriyuki, Secretary
Edward Jewell, Deputy Attorney General
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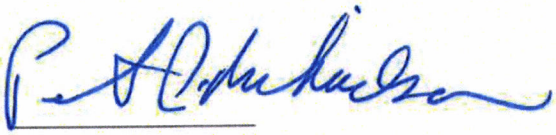
By: 
Peter J. Richardson (ISB No. 3195)