Office of the Secretary
Service Date
July 10, 2020

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE FORMAL COMPLAINT OF BLACK MESA ENERGY, LLC TO ESTABLISH A LEGALLY ENFORCEABLE OBLIGATION	))))	**CASE NO. IPC-E-20-17** **ORDER NO. 34715**

On March 17, 2020, Black Mesa Energy, LLC ("Black Mesa") filed a formal complaint against Idaho Power Company ("Idaho Power" or "Company") seeking a Commission determination that Black Mesa established two legally enforceable obligations ("LEO" or "LEOs") with Idaho Power; one for Black Mesa 1 and one for Black Mesa 2, each a qualifying facility ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA").

On April 2, 2020, the Commission issued a Summons to Idaho Power notifying the Company that a formal complaint had been filed against it and directing the Company to answer the complaint within 21 days.

On April 23, 2020, the Company filed an Answer and Motion to Dismiss.

On April 28, 2020, Black Mesa filed a Motion to Extend Time.

On May 6, 2020, the Commission granted Black Mesa's Motion to Extend Time. Order No. 34663.

On May 15, 2020, Black Mesa filed an Answer to Idaho Power's Motion to Dismiss.

Now, the Commission denies Idaho Power's Motion to Dismiss and sets briefing deadlines for the parties.

BACKGROUND

Black Mesa first attempted to sell its energy and capacity to Idaho Power in 2017 as a single 20 MW energy storage QF. In February 2017, Black Mesa submitted to Idaho Power a Schedule 73 Application requesting a 20-year contract with published avoided cost rates. In response to Black Mesa's Application and similar Applications filed by other energy storage QFs—Franklin Energy Storage One, Franklin Energy Storage Two, Franklin Energy Storage Three, and Franklin Energy Storage Four (collectively, the "Franklin Energy QFs")—Idaho Power petitioned the Commission "to issue an order determining the proper contract terms, conditions, and avoided cost pricing to be included in [PURPA] contracts requested by several battery storage facilities." IPC-E-17-01 Petition for Declaratory Order.

The Commission issued Order Nos. 33785 and 33858 in IPC-E-17-01 determining that Black Mesa and the Franklin Energy QFs were eligible for the same contract term and avoided cost pricing methodology as solar QFs. Order No. 33785 at 11-12. Solar QFs up to 100 kW are eligible for published avoided cost rates calculated by the Surrogate Avoided Resource ("SAR") Method and a 20-year contract. Solar QFs above 100 kW are eligible to receive avoided cost rates calculated by the Integrated Resource Plan ("IRP") Method and a two-year contract. The Franklin Energy Storage QFs appealed the Commission's decision to the United States District Court for the District of Idaho pursuant to 16 U.S.C. § 824a-3(h)(2)(B).

In January 2020, the district court held that the Commission violated PURPA and usurped the jurisdiction of the Federal Energy Regulatory Commission ("FERC") by determining the "QF status" of the energy storage QFs. The district court held that the Commission "impermissibly classified the QF status of Plaintiffs' energy storage facilities that are certified under such Act as energy storage facilities. Classifying such facilities as 'solar QFs' is outside the Commissioners' authority as state regulators and therefore in violation of federal law." *Franklin Energy Storage One, LLC et al. v. Kjellander et al.*, Case No. 1:18-cv-00236-REB. The district court prohibited the Commission 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." However, the district court "specifically decline[d] to order Defendants to require utilities under their jurisdiction to afford energy storage QFs all rights and privileges afforded to 'other QFs' under the IPUC's PURPA implementation plan." *Id.*[1]

Following the district court's decision, Black Mesa states it "immediately reiterated its request for a fixed-rate 20-year PPA utilizing the published, non-levelized, non-fueled avoided cost rates for 'Other' facilities for Black Mesa Energy 1 storage QF and submitted a request for its Black Mesa Energy 2 storage QF." Formal Complaint at 8. For its part, Idaho Power immediately petitioned the Commission to initiate a proceeding to "determine the proper avoided cost rates as well as contract terms and conditions applicable to, and to be included in [PURPA] contracts requested by energy storage [QFs]." Petition Case No. IPC-E-20-02. The Commission is currently processing Idaho Power's petition to determine the project eligibility cap for entitlement to

[1] The Commission is appealing the district court's order. Ninth Circuit Case No. 20-35146. Idaho Power is also appealing the district court's order. Ninth Circuit Case No. 20-35144.

published avoided cost rates and the contract term for energy storage facilities in Case No. IPC-E-20-02.

In IPC-E-17-01, the Commission denied Black Mesa's claim that it had established a LEO at that point in time.

> The facts and evidence in this case reveal that the parties were in active negotiations which resulted in Idaho Power's Petition for a declaratory ruling. 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.

Id. at 12. The district court did not determine whether Black Mesa formed a LEO with Idaho Power.

LEGALLY ENFORCEABLE OBLIGATIONS UNDER IDAHO'S IMPLEMENTATION OF PURPA

FERC rules implementing PURPA give QFs the opportunity to form a LEO with the purchasing utility.

> Each qualifying facility shall have the option . . . [t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d)(2). In creating this opportunity for QF developers, FERC stated,

> Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.

45 Fed. Reg. 12214, 12224 (February 25, 1980).

FERC established the LEO concept but left it to the states to determine the specific parameters required to establish a LEO. "FERC has given each state the authority to decide when a LEO . . . arises in that state." *Power Resource Group, Inc. v. Public Utility Comm'n of Texas*,

422 F.3d 231, 239 (5th Cir. 2005); *Idaho Power Company v. Idaho Pub. Util. Comm'n*, 155 Idaho 780, 316 P.3d 1278, 1285 (2013). In Idaho, a QF can establish a LEO with an electric utility by filing a meritorious complaint with the Commission that demonstrates the QF would have a signed contract with the utility but for the intransigent conduct of the utility. "[B]efore a developer can lock in a certain rate, there must be either a signed contract to sell at that rate or a meritorious complaint alleging that the project is mature and that the developer has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the conduct of the utility." *Rosebud Enterprises, Inc. v. Idaho Public Utilities Comm'n*, 131 Idaho 1 (1997); *see also A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 815 (1992) (stating, "[B]efore a QF can lock-in a certain rate, there must be a signed contract to sell at that rate or a meritorious complaint alleging that the project was mature and that the developer had attempted, and failed, to negotiate a contract with the utility."). Because there is no duly executed contract between Black Mesa and Idaho Power, the question is whether Black Mesa filed a meritorious complaint with the Commission establishing that the project is mature and there would be a contract but for the conduct of the utility.

Schedule 73 details the contracting procedures and timelines Idaho Power and QFs must abide by when negotiating PURPA Energy Sales Agreements ("ESA" or "ESAs"). In establishing Schedule 73, the Commission stated: "The intent of creating rules and timelines to guide the negotiations process for PURPA projects . . . is to create more certainty for both parties, to ensure that both parties are bargaining in good faith, and to prevent avoided cost rates from becoming stale." Order No. 33197 at 5.

COMMISSION FINDINGS AND DECISION

The Commission has jurisdiction over this matter under *Idaho Code* §§ 61-501, -502 and -503. The Commission is empowered to investigate rates, charges, rules, regulations, practices, and contracts of public utilities and to determine whether they are just, reasonable, preferential, discriminatory, or in violation of any provision of law, and to fix the same by order. *Idaho Code* §§ 61-502 and 61-503. The Commission has the authority to determine the merits of any complaint "setting forth any act or thing done or omitted to be done by any public utility including any rule, regulation or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation of any provision of law or of any order or rule of the commission[.]" *Idaho Code* § 61-612. The Commission determines the procedure to process

formal complaints. IDAPA 31.01.01.054. In addition, the Commission has authority under PURPA and FERC regulations to set avoided costs, to order electric utilities to enter into fixed-term obligations for the purchase of energy from QFs, and to implement FERC rules. The Commission may enter any final order consistent with its authority under Title 61 and PURPA.

After reviewing the filings to date, the Commission believes the record would benefit from further development. We therefore deny Idaho Power's Motion to Dismiss and establish briefing deadlines for the parties. Doing so gives the parties full opportunity to highlight pertinent facts and make arguments about how the facts apply to the legal standard for creating a LEO.

ORDER

IT IS HEREBY ORDERED that Idaho Power's Motion to Dismiss is denied.

IT IS FURTHER ORDERED that Black Mesa will submit its brief on the merits by August 6, 2020. Idaho Power will submit its reply brief by September 3, 2020.

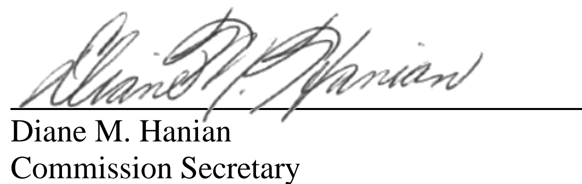
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 10th day of July 2020.

PAUL KJELLANDER, PRESIDENT

KRISTINE RAPER, COMMISSIONER

ERIC ANDERSON, COMMISSIONER

ATTEST:



Diane M. Hanian
Commission Secretary

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