

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF BLACK MESA ) CASE NO. IPC-E-20-17**  
**ENERGY, LLC’S FORMAL COMPLAINT TO )**  
**ESTABLISH A LEGALLY ENFORCEABLE )**  
**OBLIGATION ) ORDER NO. 34957**  
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On March 17, 2020, Black Mesa Energy, LLC, (“Black Mesa”) filed a formal complaint against Idaho Power Company (“Idaho Power”) asserting that Black Mesa had formed two legally enforceable obligations (“LEO” or “LEOs”) that require Idaho Power to buy the energy from Black Mesa’s Qualifying Facilities (“QF” or “QFs”) pursuant to the Public Utility Regulatory Policies Act of 1978 (“PURPA”). Black Mesa asserted each LEO commits Idaho Power to buy the net output of Black Mesa’s QFs for 20 years at the published avoided cost rates for “Other” facilities approved by the Idaho Public Utilities Commission (“IPUC”) and in effect on the date of its complaint. Black Mesa Formal Complaint at 1. Specifically, Black Mesa asserted its QFs are eligible for “the published, non-levelized, non-fueled avoided cost rates for ‘Other’ facilities.” *Id.* at 8.

The parties were given the opportunity to brief the issues. Order Nos. 34663, 34715, 34747. Now, having reviewed the record, we deny Black Mesa’s claim that it established a LEO.

**BACKGROUND**

PURPA “established a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.” *Idaho Power v. Idaho Public Utilities Comm’n*, 155 Idaho 780, 782 (2013) [hereinafter *Grouse Creek*] citing *Federal Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 767 (1982). PURPA requires electric utilities to buy energy and capacity from QFs (the “must-purchase obligation”). 18 C.F.R. § 292.303(a). QFs are independent power producers that meet federally established fuel and size requirements and have filed a notice of self-certification with, or been certified by, the Federal Energy Regulatory Commission (“FERC”). 18 C.F.R. § 292.203(a). PURPA caps a QF’s maximum size at 80 MW. 16 U.S.C. § 824a-3(a); *see also* 18 C.F.R. § 292.204(a). The “primary energy source of the [QF]

must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.” 18 C.F.R. § 292.204(b). Electric utilities must buy the energy and capacity produced by QFs at the utility’s incremental (marginal) cost of energy, which is referred to in the regulations as the “avoided cost.” 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304(a). It is the price the utility would pay for energy or capacity but for its purchase from the QF.

FERC requires states to offer standard (also called “published”) avoided cost rates for QFs that have a design capacity of 100 kW or less. 18 C.F.R. § 292.304(c)(1). FERC gives states the discretion to offer standard rates for QFs with a design capacity above 100 kW. 18 C.F.R. § 292.304(c)(2). The IPUC established a project eligibility cap of 100 kW for wind and solar QFs. Order Nos. 32176 at 9, Case No. GNR-E-10-04; 32697 at 13, Case No. GNR-E-11-03. Other types of resources have a project eligibility cap set at 10 average MW (“aMW”), calculated based on the QF’s output over a month. *See* Order Nos. 32176 at 9; 32697 at 14. QFs below the project eligibility cap are eligible for avoided cost rates calculated using the surrogate avoided resource method (“SAR Method”). *See e.g.*, Order No. 32697 at 7-8. The SAR Method assumes Idaho Power’s marginal resource is always a hypothetical combined cycle combustion turbine (“CCCT”) natural gas plant and calculates the costs to build the hypothetical CCCT, fuel it, and pay the operation and maintenance costs necessary to keep the plant in working order, then converts these costs into rates. *Id.*

QFs above the project eligibility cap are eligible for avoided cost rates calculated using the incremental cost integrated resource plan method (“IRP Method” or “negotiated rates”). *See id.* at 17. The IRP Method calculates the marginal value of energy on Idaho Power’s system on an hourly basis using Idaho Power’s preferred portfolio of resources acknowledged in its most recent Integrated Resource Plan (“IRP”). Idaho Power’s preferred portfolio of resources consists of Idaho Power’s actual owned resources, resources under contract, and resources Idaho Power forecasts adding to or retiring from its system over the IRP’s 20-year planning horizon. A forecasted generation profile specific to the QF is then applied to the IRP Method model to determine the marginal costs that the QF would cause Idaho Power to avoid. *See id.* at 20-21. The marginal costs, as determined by the IRP Method model, are the starting point of negotiations between the QF and the utility, allowing the parties to adjust for any unique operational

characteristics of the QF, such as dispatchability, that might allow the utility to offset more or less costs. *See* Order No. 32697 at 2.

QFs below the project eligibility cap are eligible for 20-year contracts and QFs above the project eligibility cap are eligible for two-year contracts. Order No. 33357 at 25, Case No. IPC-E-15-01. In reducing the contract term for projects above the project eligibility cap, the IPUC determined that the first capacity deficit date, beyond which the QF is eligible for capacity payments, is to be determined when the QF enters its initial IRP Method contract. *Id.* “As long as the QF renews its contract and continuously sells power to the utility, the QF is entitled to capacity based on the capacity deficiency date established at the time of its initial contract.” *Id.* at 25-26. This allows the QF to receive capacity payments when the QF offsets the utility’s need for capacity while ensuring ratepayers do not pay for a commodity they are not receiving.<sup>1</sup> The utility’s first capacity deficit date is determined in a proceeding following Commission acknowledgment of the utility’s IRP. *E.g.*, Order No. 34649 at 4, IPC-E-19-20.

In establishing a different project eligibility cap for wind and solar QFs, the IPUC determined that wind and solar QFs are intermittent resources with unique characteristics that allow large QFs to disaggregate into smaller QFs to either take advantage of the FERC-established project size threshold of 80 MW or the state-established project eligibility cap. Order No. 32697 at 13. To deter disaggregation and hold ratepayers harmless, the IPUC established a project eligibility cap of 100 kW for wind and solar QFs. *Id.* at 13-14. PURPA requires avoided cost rates to be “just and reasonable to the electric consumer of the electric utility and in the public interest” to “[n]ot discriminate against [QFs]” and the electric utility not “pay more than the avoided costs for purchases.” 18 C.F.R. § 292.304(a). The IPUC has recognized that the IRP Method more accurately values the energy and capacity produced by QFs. *E.g.*, Order No. 32176 at 10 (stating, “We believe that the IRP Methodology appropriately assesses when the QF is capable of delivering its resources against when the utility is most in need of such resources. The resultant pricing is reflective of the value of QF energy to the utility.”).

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<sup>1</sup>A utility must only purchase capacity from a QF when the utility is capacity deficient. *See City of Ketchikan et al.* 94 FERC ¶ 61293 (March 15, 2001) stating “[A]n avoided cost rate need not include capacity unless the QF purchase will permit the purchasing utility to avoid building or buying future capacity. Thus, while utilities may have an obligation under PURPA to purchase from a QF, that obligation does not require a utility to pay for capacity that it does not need.”

The LEO concept was created by FERC in its regulations implementing PURPA. At the time Black Mesa's purported cause of action arose, the LEO concept was found in 18 C.F.R. § 292.304(d),<sup>2</sup> which stated,

Purchases 'as available' or pursuant to a [LEO]. Each [QF] shall have the option either:

- (1) To provide energy as the [QF] determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
- (2) To provide energy or capacity pursuant to a [LEO] for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the [QF] exercised at 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). In creating the concept, FERC stated,

Paragraph (d)(2) permits a [QF] to enter into a contract or other [LEO] to provide energy or capacity over a specified term. Use of the term '[LEO]' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible [QF] merely by refusing to enter into a contract with the [QF]. . . . The Commission intends that rates for purchases be based, at the option of the [QF], on either the avoided costs at the time of delivery or the avoided costs calculated at the time the obligation is incurred. This change enables a [QF] to establish a fixed contract price for its energy and capacity at the outset of its obligation or to receive the avoided costs determined at the time of delivery.

45 Fed. Reg. 12214, 12224 (Feb. 25, 1980). The LEO "is FERC's response to the reluctance of traditional electric utilities to purchase power from nontraditional electric generation facilities, a problem identified by Congress which could hinder the development of such nontraditional

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<sup>2</sup> FERC amended 18 C.F.R. § 292.304 by Order 872-A, 173 FERC ¶ 61,158, 85 Fed. Reg. 86656 (December 30, 2020), which became effective on February 16, 2021. 18 C.F.R. § 292.304(d) is now 18 C.F.R. § 292.304(d)(1). Other LEO revisions include: the addition of 18 C.F.R. § 292.304(d)(1)(iii), which states, "The rate for delivery of energy calculated at the time the obligation is incurred may be based on estimates of the present value of the stream of revenue flows of future locational marginal prices, or Competitive Prices during the anticipated period of delivery." FERC also added 18 C.F.R. § 292.304(d)(3), which states, "A [QF] must demonstrate commercial viability and financial commitment to construct its facility pursuant to criteria determined by the state regulatory authority or nonregulated electric utility as a prerequisite to a [QF] obtaining a [LEO]. Such criteria must be objective and reasonable." Because these regulatory amendments were made after Black Mesa's purported cause of action arose, they do not apply to the analysis in this case.

facilities.” *Power Resource Group, Inc. v. Public Utility Comm’n of Texas*, 422 F.3d 231, 238 (5th Cir. 2005). “According to the FERC, it is up to the State, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a [LEO] is incurred under State law.” *Rosebud Enterprises v. Idaho Public Utilities Comm’n*, 128 Idaho 609, 623-24 (1996) citing *W. Penn Power Co.*, 71 FERC ¶ 61,153, 61,495 (May 8, 1995); see also *Power Resource Group*, 422 F.3d at 238.

The Idaho Supreme Court has reviewed IPUC determinations on LEOs at least five times, and on each occasion the Court upheld the IPUC’s determination. Four times, the Court upheld the IPUC’s determination that the QF had not established a LEO. *Empire Lumber Co. v. Washington Water Power Co.*, 114 Idaho 191 (1987) [hereinafter *Empire Lumber*]; *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812 (1992) [hereinafter *A.W. Brown*]; *Rosebud Enterprises v. Idaho Public Utilities Comm’n*, 131 Idaho 1 (1997); *Grouse Creek*, 155 Idaho 780 (2013).

On one occasion, the Court upheld the IPUC’s determination that the QF had established a LEO. The Court found,

The IPUC recognized that [the QF] was delayed in its efforts to determine project viability by [the utility]. The IPUC’s effort to correct the effect of this delay is within its authority. The IPUC decision is not a final determination of avoided costs, but puts [the QF] in the position of determining the viability of its project using rates that reflect the time frame [the QF] should have been able to proceed but for the delays caused by [the utility].

*Rosebud Enterprises, Inc. v. Idaho Public Utilities Comm’n*, 128 Idaho 609 (1996).

Following the most recent LEO litigation, *Grouse Creek*, the IPUC approved Idaho Power’s Schedule 73—Cogeneration and Small Power Production Schedule – Idaho (“Schedule 73”). Order No. 33197, Case No. IPC-E-14-24. Schedule 73 sets forth the contracting procedures, timelines, and conditions for a QF to obtain an Energy Sales Agreement (“ESA”) from Idaho Power.<sup>3</sup> In approving Schedule 73, the IPUC stated, “The intent of creating rules and timelines to guide the negotiations process for PURPA projects, as discussed in great depth through the workshops, is to create more certainty for both parties, to ensure that both parties are bargaining

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<sup>3</sup> An ESA is interchangeably referred to in this docket as a “contract” or as a “Power Purchase Agreement” or “PPA”.

in good faith, and to prevent avoided cost rates from becoming stale.” Order No. 33197 at 5 *citing* Order No. 33048 at 5-6, Case No. AVU-E-14-03. Schedule 73 provides,

Prices and other terms and conditions will become final and binding on the parties under only two conditions:

i. The prices and other terms contained in an ESA shall become final and binding upon full execution of such ESA by both parties and approval by the Commission, or

ii. The applicable prices that would apply at the time a complaint is filed by a [QF] 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 ‘[LEO]’ has arisen and, but for the conduct of [Idaho Power], there would be a contract, and
- b) the [QF] can deliver its electrical output within 365 days of such determination.

Idaho Power Schedule 73-5(1)(d).

In IPC-E-17-01, Idaho Power petitioned the IPUC for a declaratory order to determine the proper eligibility cap for several battery storage projects, including Black Mesa. The IPUC determined that the project eligibility cap for the battery storage QFs at issue was to be determined based on the primary energy source that charged the batteries. The IPUC based its decision on its interpretation of *Luz Development and Finance Corporation*, 51 FERC ¶ 61,078 (1990), a declaratory order issued by FERC.

FERC confirmed that energy storage facilities are not renewable resources/small power production facilities *per se*. [*Luz* at 61,171]. Electric input is required to produce electric output from a storage facility. *Id.* at 61,172. For this reason, in order to qualify as a PURPA resource, the primary energy source behind the battery storage must be considered. We must, then, look to Franklin’s and Black Mesa’s primary energy sources in order to determine their eligibility under PURPA. The primary energy source for Franklin and Black Mesa is solar generation. Moreover, the energy generation output profiles for the battery storage facilities are a direct reflection of the solar generation that operates as the primary energy source for the battery storage facilities. [Citation omitted].

Accordingly, we find it appropriate to base Franklin’s and Black Mesa’s eligibility under PURPA on its primary energy source – solar.

Order No. 33785 at 11-12.

The IPUC also denied Franklin Energy's claim that it had established LEOs for its four QFs. *Id.* at 12. The IPUC determined, "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 [LEO]." *Id.* (emphasis in original).

Franklin Energy requested reconsideration of Order No. 33785. The IPUC denied reconsideration in Order No. 33858 and Franklin Energy appealed the IPUC's decision pursuant to 16 U.S.C. §824a-3(h)(2)(B). FERC declined to bring an enforcement action against the IPUC. *Franklin Energy Storage One LLC, et al.*, 162 FERC ¶ 61110 (Feb. 15, 2018). Franklin Energy then sued the IPUC in the United States District Court for the District of Idaho.

On January 17, 2020, the Idaho District Court granted in part and denied in part Franklin Energy's motion for summary judgment. The Idaho District Court permanently enjoined the IPUC from

enforcing or applying either [Order No. 33785 or Order No. 33858] to [Franklin Energy's] 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.

2020 WL 265278 at \*18. The District Court of Idaho denied Franklin Energy's motion for summary judgment in part. "The Court specifically declines 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.*

On January 21, 2020, Idaho Power petitioned the IPUC to determine the avoided cost rates and contract terms applicable to energy storage QFs in Idaho. On October 2, 2020, the IPUC determined that energy storage QFs are capable of easy disaggregation and the IRP Method is superior to the SAR Method in calculating avoided cost rates and recognizing project-specific

attributes and therefore the IPUC established a 100 kW project eligibility cap for energy storage QFs. Order No. 34794 at 11, IPC-E-20-02.<sup>4</sup>

### **IPUC JURISDICTION**

The IPUC has jurisdiction over this matter under *Idaho Code* §§ 61-501, -502 and -503. The IPUC 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. In addition, the IPUC 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 IPUC may enter any final order consistent with its authority under Title 61 and PURPA.

### **FINDINGS OF FACT**

Black Mesa 1 and Black Mesa 2 are each QFs self-certified with FERC. Declaration of Brian Lynch in Support of Black Mesa’s Motion for Summary Judgment at 3. Each QF is designed to have a net output of 20 MWac and be operated to generate less than 10 aMW on a monthly basis. *Id.* Black Mesa 1 and Black Mesa 2 propose to use a common interconnection to Idaho Power’s electrical system and separate the electric generating equipment by at least one mile. *Id.* On each FERC Form 556, Black Mesa selected the box “Other renewable resource” and described each QF as an “energy storage system [QF].” *Id.*

Black Mesa submitted a Schedule 73 application to Idaho Power for its original QF (now Black Mesa 1) in February 2017. Black Mesa Formal Complaint at 7. In response, Idaho Power informed Black Mesa that it had “filed an application to the [IPUC] requesting a declaratory order that determines the contract term and avoided cost pricing methodology for which your proposed project may be eligible.” Black Mesa Formal Complaint at 7. Idaho Power’s petition for declaratory order initiated IPC-E-17-01. Black Mesa did not appeal the IPUC’s decision in IPC-E-17-01. *See* Black Mesa Formal Complaint at 8.

On January 17, 2020, the Idaho District Court granted Franklin Energy’s motion for summary judgment in part and denied Franklin Energy’s motion for summary judgment in part.

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<sup>4</sup> This too was after Black Mesa’s purported cause of action arose and, therefore, we do not apply the outcome of IPC-E-20-02 to this case.



On January 18, 2020, Black Mesa submitted Schedule 73 applications to Idaho Power for Black Mesa 1 and Black Mesa 2 asserting it was entitled to 20-year contracts and published non-levelized, non-fueled avoided cost rates for “Other” facilities. Black Mesa Formal Complaint at 8.

On January 21, 2020, Idaho Power petitioned the IPUC to establish avoided cost rates and contract terms applicable to PURPA energy storage QFs. Idaho Power Answer to Motion for Summary Judgment at 6. This petition initiated IPC-E-20-02. *Id.* at 6-7. Black Mesa did not intervene.

On January 24, 2020, Black Mesa submitted unilaterally signed ESAs to Idaho Power with Black Mesa’s preferred terms. Black Mesa Formal Complaint at 9; Exh. 6. Idaho Power did not sign the ESAs sent by Black Mesa. The proposed ESAs contained non-levelized, non-fueled avoided cost rates for Other projects published June 1, 2019. *Id.* Exh. 6, p. 48, 96. The proposed ESAs were for a 20 year term. *Id.* at 15, 63. The ESAs did not contain liquid security deposit provisions. *See* Commission Staff Brief at 9; Black Mesa Formal Complaint Exh. 6. The ESAs listed the Commercial Operation Date for Black Mesa 1 and Black Mesa 2 as June 1, 2023. Black Mesa Formal Complaint, Exh. 6 p. 39, 87. Despite the distant Commercial Operation Date included in the ESAs, Black Mesa later alleged it could produce energy within 365 days. Declaration of Brian Lynch at ¶ 28.

On February 3, 2020, Idaho Power responded to Black Mesa’s Schedule 73 applications. Idaho Power Answer and Motion to Dismiss, Att. 1, Idaho Power Letter Dated Feb. 3, 2020. Idaho Power informed Black Mesa that Idaho Power did not agree that Black Mesa’s QFs were entitled to 20-year contracts at published rates, and informed Black Mesa that Idaho Power had petitioned the IPUC to determine the proper avoided cost rates and contract terms for energy storage QFs. *Id.* Idaho Power identified two deficiencies with Black Mesa’s Schedule 73 applications. Idaho Power stated, “The schedule of estimated deliveries provided with your Applications appear to have the same output shape as that of a solar project.” *Id.* Idaho Power quoted Black Mesa’s FERC Form 556 filing included with its Schedule 73 application and stated,

However, based on the generation profile submitted with your Applications, the battery storage project will be capable of producing on average 91-95% of its nameplate capacity each hour over a continuous 7-hour period in July. In addition, there are several days identified in July that the battery storage project will be capable of providing its full output (20 MWac) over continuous 9-

hour periods. Please provide an hourly generation profile consistent with the capability of your proposed battery storage facility that represents the generation output you intend to deliver.

*Id.*

On February 5, 2020, Black Mesa responded to Idaho Power. Supplemental Declaration of Brian Lynch, Exh. 1, Brian Lynch Letter Dated Feb. 4. 2020. Black Mesa replied to Idaho Power's first assertion of deficiency by stating: "Although your observation in this regard may be accurate, it does not allege (nor even infer) a deficiency. Therefore, we have no choice but to treat this observation for what it is, a mere observation and not an assertion of a deficiency."

*Id.* Black Mesa responded to Idaho Power's second assertion of deficiency by stating: "Your request suggests that you have rejected (or at best, ignored) our submission of the 8,760 hourly spreadsheets submitted with our Schedule 73 applications. Those spreadsheets do contain our 'hourly generation profiles that are consistent with the capability of our proposed battery storage facilities that we intend to deliver.'" *Id.*

Idaho Power responded to Black Mesa's February 5, 2020 letter on February 18, 2020. Idaho Power Answer and Motion to Dismiss, Att. 1, E-Mail Dated Feb. 18, 2020. Idaho Power reiterated that Black Mesa's applications contained inaccurate generation profiles and reiterated its disagreement that Black Mesa was entitled to published avoided cost rates and a 20-year contract term. *Id.*

In Black Mesa's 2020 application to Idaho Power for Black Mesa 1 and Black Mesa 2, Black Mesa stated its QFs "will provide scheduled, dispatchable power output in forward looking time intervals ranging from 5-240 minutes pending final system design." Idaho Power Answer and Motion to Dismiss, Att. 1, E-Mail From Brian Lynch Dated Jan. 18, 2020. The FERC Form 556 included with the Schedule 73 applications for Black Mesa 1 and Black Mesa 2 listed the begin operation date as December 1, 2022. *Id.* The Schedule 73 applications for Black Mesa 1 and Black Mesa 2 listed the Commercial Operation Date as June 1, 2023. *Id.* Black Mesa described Black Mesa 1 in its FERC Form 556 as follows:

The project consists of an energy storage system [QF] providing scheduled and dispatchable electricity in forward-looking time blocks. The energy storage system that comprises the energy storage [QF] is designed to, and will, receive 100% of its energy input from a combination of renewable energy sources such as wind, solar, biogas, biomass, etc. The current initial design utilizes solar photovoltaic (PV) modules mounted to single-axis trackers to

provide the electric energy input to the [QF]’s battery storage system. The PV modules are planned to be connected in series/parallel combinations to solar inverters, rated approximately 2.5 MWac each, (subject to change). The proposed electric energy storage [QF] will consist of an electro-chemical battery and will have a maximum power output capacity of 20 MWac for a sustained time period of 5 – 240 minutes. The Facility will consist of an alternating current (AC) to direct current (DC) control system. The [QF] will be utilized to provide the purchasing utility with pre-scheduled and dispatchable AC energy within pre-determined time blocks. The sole source of electric power and energy provided to the purchasing utility will be the electro-chemical reaction giving rise to the discharge of electric power and energy by the battery. In turn, the sole direct source of energy input provided to the battery Facility will be, as described above, renewable sources.

*Id.* Black Mesa described Black Mesa 2 in the same manner in its FERC Form 556 but stated, “The proposed electric energy storage [QF] will consist of an electro-chemical battery and will have a maximum power output capacity of 20 MWac for a sustained time period of 5 – 60 minutes.” *Id.* Black Mesa described its resource for both QFs as “The energy storage (battery) system will take its input from 100% renewable energy sources such as wind, solar, biogas, biomass, etc. The system is designed with flexibility to most efficiently utilize the resources available at the site, at the present time as well as in the future.” *Id.*

On March 17, 2020, Black Mesa filed a formal complaint with this Commission.

On July 29, 2020, Black Mesa filed a Motion to Stay Briefing Schedule. Black Mesa stated, “The parties are currently engaged in discussions that could obviate the need for further briefing.” The IPUC suspended the briefing schedule to allow the parties to negotiate. Order No. 34747. On November 13, 2020, Black Mesa submitted a Motion to Reinstate Briefing Schedule. Black Mesa stated,

Idaho Power Company and Black Mesa have utilized the additional time provided by the Commission’s stay of the original briefing schedule to engage in settlement discussions. Those discussions have now concluded with no definitive resolution, therefore Idaho Power and Black Mesa respectfully, and jointly, request the Commission reinstate a briefing schedule in this matter.

### **LEGAL STANDARDS**

Historically, the IPUC has analyzed numerous factors in determining whether a QF has established a LEO. The general test, as summarized by the Court is:

IPUC has authority, under state and federal law, to require that before 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, 6 (1997) *citing* *A.W. Brown*, 121 Idaho at 815 (1992). Because there is no contract signed by both parties, the question is whether Black Mesa submitted a meritorious complaint.

In Idaho, a LEO requires a commitment made by the QF that is reciprocal to the utility's must-purchase obligation under 18 C.F.R. § 292.303(a). In *A.W. Brown*, the Court upheld the IPUC's determination that the QF had not reciprocally committed to sell to the utility, and therefore had not established a LEO. The Court cited the IPUC's finding,

Taken together, the implementing regulations and comments appear to mean that a [QF] is entitled to receive avoided cost rates if it obligates itself to the delivery of energy or capacity and if that obligation is legally enforceable against the [QF]. This is the essence of the relationship between a [QF] and the utility: the utility must pay avoided cost rates, but in return the utility is entitled to know that the facility is obligated to deliver capacity and energy and that obligation is legally enforceable.

*A.W. Brown*, 121 Idaho 812, 818 (1992) *citing* Order No. 23271, Case No. IPC-E-88-9. "While a QF is entitled to a PURPA contract or a [LEO], its offer to sell power to a utility must be firm, binding, and unconditional." Order No. 33419 at 16 *citing* Order No. 32974; *Whitehall Wind v. Montana Public Service Commission*, 347 P.3d 1277 (Mont. 2015). The QF must be "ready, willing and able to sign a contract with [the utility]." *Empire Lumber*, 114 Idaho at 193. The Court has also distinguished a LEO and an option.

We deem it clear that the intent of PURPA is not to require an electric utility company to enter into a contract to purchase electrical power from an entity which in essence only desires to obtain an option to sell some amount of electrical power to be generated at some plant of unknown size or capacity. Such an entity must first become a QF, and in the instant case any concrete facts relating to the proposed generation facility were not known by [the utility] during the negotiation process, and such facts, as were defined, became known only following the filing of the complaint with the [IPUC].

*Empire Lumber*, 114 Idaho at 194.

In *Grouse Creek*, the Court upheld the IPUC's determination that a LEO had not been formed stating,

Considering FERC's declared purpose for adopting the concept of a [LEO] and the broad discretion that IPUC has in implementing FERC's rules and in determining the requirements for a [LEO], we again affirm IPUC's requirement that a finding of a [LEO] requires a showing that there would have been a contract but for the actions of the utility.

*Grouse Creek*, 155 Idaho at 787.

### CONCLUSIONS OF LAW

Based on our review of the record and the legal standards, we find that Black Mesa did not establish a LEO with Idaho Power for either Black Mesa 1 or Black Mesa 2. Black Mesa did not establish that either QF would have a contract on IPUC-approved terms but for the actions of the utility. Relatedly, Black Mesa did not demonstrate that its QFs were sufficiently mature.

Within the jurisdictional framework of PURPA, FERC is tasked with determining whether a facility is a QF. This is a yes or no determination. FERC does not determine which avoided cost rates the QF is eligible to receive. PURPA and Title 61 of Idaho Code grant the IPUC the exclusive jurisdiction to determine eligibility for contract terms such as avoided cost rates and duration. *See* 16 U.S.C. § 824a-3(f); *Idaho Code* § 61-502; *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 785-86 (1984). State utilities commissions "play the primary role in calculating avoided costs and overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated by [FERC]." *Independent Energy Producers Ass'n, Inc. v. California Public Utilities Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994).

In this instance, the IPUC had not established the project eligibility cap for energy storage QFs. Idaho Power sought clarification on which project eligibility cap applied to the QFs. The project eligibility cap, under the IPUC's implementation of PURPA, determines whether the QF is eligible for IRP Method rates and two-year contracts or SAR Method rates and 20-year contracts. Idaho Power understood that it is required to purchase the energy and capacity from the QF, and that the QF was entitled to have the rates determined at the outset of the contract or LEO under the then-current version of 18 C.F.R. § 292.304(d)(2)(ii). Idaho Power did not seek to evade this duty, rather Idaho Power only sought clarification on the appropriate method of calculating the rates and term of the contract. Some showing of bad faith or intransigence by Idaho Power is necessary to deem Black Mesa's complaint meritorious and, therefore, grant a LEO. The

substantial and competent evidence provided by the parties to form this record shows no such bad faith. Utilities subject to PURPA have a duty not only to contract with and accept the energy produced by a QF but also to ensure that ratepayers are not harmed by the purchase. 18 C.F.R. § 292.304(a). Idaho Power was not being intransigent or engaging in delay tactics. To the contrary, Idaho Power was fulfilling its obligations under the Act.

Idaho Power's assertions of deficiency to Black Mesa's Schedule 73 applications are further evidence of Idaho Power's continued engagement with Black Mesa. Schedule 73 requires Idaho Power to notify the QF within 10 business days if Idaho Power determines that the QF has not provided sufficient information. Schedule 73-5, 1(b). Idaho Power did so. Schedule 73 also requires that Idaho Power be in "satisfactory receipt" of information before Idaho Power provides a QF with an indicative pricing proposal. Idaho Power determined it was not in satisfactory receipt of pertinent information and requested additional information. Black Mesa's responses did not address Idaho Power's stated concerns in any meaningful way.

Instead of addressing Idaho Power's concerns, Black Mesa unilaterally executed ESAs with published avoided cost rates and 20-year terms and sent the ESAs to Idaho Power for countersignature. The take-it-or-leave-it approach employed by Black Mesa, without negotiating in good faith to address the utility's concerns, shows that Black Mesa was not ready, willing, and able to enter a contract on terms that would be approved by the Commission. *See Empire Lumber*, 114 Idaho at 193. Therefore, Idaho Power did not have any assurance that Black Mesa was able to commit to the type of reciprocal obligation required by Idaho precedent to form a LEO. *See A.W. Brown*, 121 Idaho at 818. Even beyond the Company's attempt to address deficiencies in the Schedule 73 applications, the record further reflects Idaho Power's willingness to negotiate with Black Mesa, as the parties jointly suspended the briefing schedule to allow further negotiations. *See Order No. 34747* (granting the Joint Motion to Stay Briefing Schedule submitted by Black Mesa).

Black Mesa has consistently declined to provide Idaho Power with pertinent information about its QFs, including the technology it intends to use to generate and store electricity. Similar to *Empire Lumber*, we find that "concrete facts relating to the proposed generation facility were not known by [the utility] during the negotiation process, and such facts, as were defined, became known only following the filing of the complaint with the [IPUC]." *Empire Lumber*, 114 Idaho at 194. Black Mesa never committed to a resource type to generate

the electricity that would charge the battery, nor did it ever commit to a battery technology to discharge the energy. While this may be sufficient to self-certify as a QF (a FERC determination, not ours) it is not sufficient to establish a LEO under decades of Idaho precedent. Black Mesa repeatedly stated that its project designs were “initial,” “subject to change” or “pending final system design.” It never described its battery technology as anything more than an “electro-chemical” battery. In its Schedule 73 applications, Black Mesa stated, “The proposed electric energy storage [QF] will consist of an electro-chemical battery and will have a maximum power output capacity of 20 MWac for a sustained period of 5 – 240 minutes.” Formal Complaint, Exh. 1, Exh. 5. Five to 240 minutes is a large range. Additionally, for Black Mesa 2, there is a discrepancy between what Black Mesa represented on its Schedule 73 application (where it listed 5-240 minutes) and on its FERC Form 556 (where it listed 5-60 minutes).

The Idaho Supreme Court has deemed it clear “that the intent of PURPA is not to require an electric utility company to enter into a contract to purchase electrical power from an entity which in essence only desires to obtain an option to sell some amount of electrical power to be generated at some plant of unknown size or capacity.” *Empire Lumber*, 114 Idaho at 194. Based on the facts before us, Black Mesa’s unilaterally executed ESAs and failure and/or unwillingness to provide details of its QFs evidence an attempt to establish nothing more than an option to sell energy to the utility at some later date.

The weight of the evidence supports the proposition that Black Mesa 1 and Black Mesa 2 were not sufficiently mature to establish a LEO. Black Mesa made contradictory statements about the timing by which it could deliver energy to Idaho Power. In the unilaterally executed ESAs Black Mesa sent to Idaho Power, by which Black Mesa purported to bind itself, Black Mesa indicated that it could deliver energy by June 2023. Later, Black Mesa stated it could deliver energy within one year of a final Commission determination. Given the vague descriptions of its technology, we find the 2023 timeframe to be more plausible. Black Mesa also did not include delay deposits in the ESAs it sent to Idaho Power that would compensate Idaho Power, and its ratepayers, if Black Mesa did not meet the June 2023 online date and the utility had to cover the shortfall of otherwise expected QF energy. This omission in the ESAs belies Black Mesa’s own assessment of its projects’ maturity.

Black Mesa did not establish that it would have a contract but for the actions of Idaho Power. Furthermore, Black Mesa refused to provide sufficient information to demonstrate that its


QFs were mature. It was Black Mesa's actions that prevented contract formation and its complaint is not meritorious.

**ORDER**

IT IS HEREBY ORDERED that Black Mesa's formal complaint is denied for the reasons described above.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code § 61-626.*

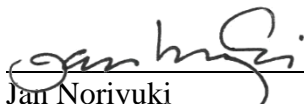
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 17<sup>th</sup> day of March 2021.

  
\_\_\_\_\_  
PAUL KJELLANDER, PRESIDENT

  
\_\_\_\_\_  
KRISTINE RAPER, COMMISSIONER

  
\_\_\_\_\_  
ERIC ANDERSON, COMMISSIONER

ATTEST:

  
\_\_\_\_\_  
Jan Noriyuki  
Commission Secretary

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