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EDWARD J. JEWELL
DEPUTY ATTORNEY GENERAL
IDAHO PUBLIC UTILITIES COMMISSION
PO BOX 83720
BOISE, IDAHO 83720-0074
(208) 334-0314
IDAHO BAR NO. 10446

Street Address for Express Mail:
11331 W. Chinden Blvd., Ste. 201-A
BOISE, IDAHO 83714

Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

BLACK MESA ENERGY, LLC,)	
Complainant,)	CASE NO. IPC-E-20-17
)	
vs.)	
)	COMMISSION STAFF BRIEF
IDAHO POWER COMPANY,)	
Respondent.)	
_____)	

The Staff of the Idaho Public Utilities Commission, by and through its attorney of record, Edward J. Jewell, submit the following brief pursuant to Commission Order No. 34849.

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 23, 2020, the Company filed an Answer and Motion to Dismiss. Idaho Power asserted it acted within the bounds of federal and state law and the applicable rules, regulations, tariffs, and schedules pertinent to Idaho’s implementation of PURPA. Answer and Motion to Dismiss at ¶ 45. Idaho Power asserted that Black Mesa has failed to state a claim upon which relief can be granted. *Id.* at ¶ 44.

On April 28, 2020, Black Mesa moved the Commission under Rule 57.03 to extend Black Mesa's deadline to answer the Company's Motion to Dismiss from May 7, 2020 to May 15, 2020.

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.

On July 10, 2020, the Commission denied Idaho Power's Motion to Dismiss and established briefing deadlines for the parties. Order No. 34715.

On July 29, 2020, Black Mesa submitted a Motion to Stay Briefing Schedule. Black Mesa indicated that the parties were engaged in discussions that might resolve the issues and that Idaho Power concurred in its request to stay the briefing schedule.

On August 5, 2020, the Commission stayed the briefing schedule until further notification. Order No. 34747.

On November 13, 2020, Black Mesa submitted a Motion to Reinstate Briefing Schedule. Black Mesa indicated that discussions had not resolved the issues and therefore the parties jointly requested to reinstate the briefing schedule.

On November 25, 2020, the Commission issued a Notice of Reinstatement of Briefing Schedule. Order No. 34849. The Commission approved the parties' requested briefing deadlines and provided Commission Staff the opportunity to file a brief. *Id.*

On December 14, 2020, Black Mesa submitted its Initial Brief.

Now, Commission Staff submits this brief to advise the Commission on the legal standard and to identify decision points for the Commission to analyze when determining whether Black Mesa met the legal standard to establish LEOs for Black Mesa 1 and Black Mesa 2.

BACKGROUND ON LEOs

The LEO concept was created by the Federal Energy Regulatory Commission ("FERC") in its rules implementing PURPA. Although the LEO concept was created by FERC, it is within the authority of the state regulatory authorities, not FERC, to determine when a LEO is incurred in each state. *Idaho Power Co. v. Public Utilities Comm'n*, 155 Idaho 780, 785, 316 P.3d 1278, 1285 (Idaho 2013) [hereinafter *Grouse Creek*] (citing *Power Resource Group, Inc. v. Public Utility Comm'n of Texas*, 422 F.3d 231, 239 (5th Cir. 2005)). In implementing PURPA, "states must provide for legally enforceable obligations as distinct from contractual obligations . .

. . .” *Power Resource Group, Inc.*, 422 F.3d at 238. States have “broad discretion . . . in implementing FERC’s rules and determining the requirements for a [LEO].” *Grouse Creek*, 155 Idaho at 787.

The LEO is a protection afforded to QFs. “An LEO is a significant protection for a QF that is dealing with an intransigent electric utility. By committing itself to sell its output to an electric utility, a QF has an alternate non-contractual route to pursue. It does not require signatures or all of the attendant features of a contract.” *Grouse Creek*, 155 Idaho at 793 (J. JONES, concurring). A LEO is designed to ensure that the utility cannot refuse to purchase energy or capacity from a QF simply by refusing to agree to the reasonable terms of a contract. “FERC specifically adopted the concept of a [LEO] to prevent utilities from circumventing the ‘must purchase’ PURPA provision ‘merely by refusing to enter into a contract with the QF.’” Order No. 32861 at 18 quoting *Power Resource Group*, 422 F.3d at 238 quoting 45 Fed.Reg. 12,214, 12,224 (Feb. 25, 1980). FERC has described the LEO concept as

a QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state’s implementation of PURPA.

JD Wind 1, LLC et al., 129 FERC ¶ 61,148 (Nov. 19, 2009).¹ LEOs, as distinct from contracts, can arise prior to the execution of a contract. “The Idaho PUC acknowledges that a legally enforceable obligation may be incurred prior to the formal memorialization of a contract to writing.” Memorandum of Agreement Between the Federal Energy Regulatory Commission and the Idaho Public Utilities Commission. “Indeed, an LEO may be formed unilaterally, through the actions of a QF.” *Grouse Creek*, 155 Idaho at 1290 (J. JONES, concurring).

Under the federal regulations in effect at the pertinent times of this dispute,² the QF had the opportunity to receive avoided cost rates calculated at the time the LEO is incurred for the

¹ Staff notes that FERC declaratory orders are not binding on this Commission. The Idaho Supreme Court and the D.C. Court of Appeals have recognized they are “legally ineffectual apart from [their] ability to persuade . . .” *Grouse Creek*, 155 Idaho at 1286 citing *Industrial Cogenerators v. F.E.R.C.*, 47 F.3d 1231 (D.C. Cir. 1995).

² FERC finalized Order 872 after Black Mesa filed its formal complaint. Order 872 allows states to choose whether QFs have the right to fix rates for the duration of the obligation at the time they establish a LEO. Additionally Order 872 will make LEO formation dependent on a showing of commercial viability and a financial commitment to construct the facility. These changes can be implemented prospectively. 173 FERC ¶ 61,158.

duration of the obligation. 18 C.F.R. § 292.304(d)(2); *See also* 45 Fed. Reg. 12214, 12224 (Mar. 1980). A LEO, as a pre-contractual obligation, determines the avoided cost rates the QF is entitled to receive for the term of the obligation but does not dictate all the terms to be included in a full contract. Other terms of the contract can be determined by the parties or the Commission. *See generally* 45 Fed. Reg. 12214, 12224 (Mar. 1980); *Grouse Creek*, 155 Idaho at 787; Idaho Power Schedule 73-5, 1(d).

PROCEDURAL BACKGROUND

In February 2017, Black Mesa submitted an application to Idaho Power pursuant to Idaho Power's Schedule 73—Cogeneration and Small Power Production Schedule – Idaho (“Schedule 73”). Black Mesa also self-certified itself as a QF with FERC. At that time, the project was a single QF. In response, Idaho Power petitioned for declaratory order with the Commission requesting the Commission determine the proper contract terms, conditions, and avoided cost rates for contracts requested by battery storage facilities including Black Mesa. This petition began IPC-E-17-01. In IPC-E-17-01, the Commission held that it would look to the primary energy source of an energy storage QF when determining how to classify a QF with energy storage. Order No. 33785 at 11-12. Because the QFs at issue there, Black Mesa and Franklin Energy Storage 1-4, proposed to use solar as the primary energy input, and because the Commission determined that the energy generation output profiles for the QFs reflected the use of solar generation, the Commission determined those QFs were eligible for the same treatment that solar QFs receive in Idaho. *Id.* Specifically, those QFs would be subject to a 100 kW project eligibility cap for published avoided cost rates and 20-year contracts. Since Black Mesa and Franklin 1-4 were larger than the 100 kW project eligibility cap, the Commission determined they were entitled to 2-year contracts with avoided cost rates calculated by the incremental cost Integrated Resource Plan method (“IRP Method”).

In IPC-E-17-01, the Commission found that Black Mesa and Franklin had not established LEOs.

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.

Order No. 33785 at 12 (emphasis in original).

Franklin appealed the Commission's decision in IPC-E-17-01. Franklin petitioned FERC to pursue an enforcement action against the Commission for failure to implement FERC's regulations pursuant to 16 U.S.C. § 824a-3(h)(2)(B). FERC declined to do so, which allowed Franklin to bring an action against the Commission in federal district court alleging that the Commission was failing to implement FERC's regulations lawfully. 162 FERC ¶ 61,110 (Feb. 15, 2018). In *Franklin Energy Storage One, et al. v. Kjellander et. al.*, 2020 WL 265278, the United States District Court for the District of Idaho held that the Commission could not classify energy storage QFs based on their primary energy input. Thus, the Commission was enjoined from classifying the Franklin QFs as solar QFs. The court declined the plaintiffs' request that the court order the Commission to classify energy storage QFs as "other" QFs. "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." Memorandum Decision at *18. The court stated,

Under PURPA, a QF may bring judicial actions before FERC and in federal court against state regulatory commissions to require the implementation of PURPA's rules but not their application. 16 U.S.C. § 824a-3(f), (h)(2)(B). Thus, this Court will stop short of granting the full relief Plaintiffs seek. Instead, those additional issues may be taken up in further proceedings, subject to the rulings and constraints of this decision, if Plaintiffs choose to pursue such further proceedings.

Id. The Commission's determination that Black Mesa and Franklin had not established LEOs was not argued on appeal and therefore was not addressed by the court.

The court issued its decision on Friday January 17, 2020. On Saturday January 18, 2020, Black Mesa "reiterated" its previous request for an ESA with Idaho Power and resubmitted a Schedule 73 application for the Black Mesa QF (now Black Mesa 1) and submitted a Schedule 73 application with Idaho Power for Black Mesa 2. On Tuesday January 21, 2020, (Monday was a holiday), Idaho Power initiated IPC-E-20-02 by filing a "petition to establish avoided cost rates applicable to PURPA energy storage qualifying facilities." On March 17, 2020, Black Mesa filed the formal complaint that initiated this docket. On October 2, 2020, the Commission issued a final order in IPC-E-20-02 that established an energy storage QF category and determined that energy storage QFs are subject to a 100 kW project eligibility cap for 20-year contracts and published

avoided cost rates. Order No. 34794. Energy storage QFs above the project eligibility cap are entitled to 2-year contracts calculated by the IRP Method. *Id.*

THE FORMAL COMPLAINT

Black Mesa describes its QFs as two 20 MW-AC facilities that will be operated to generate less than 10 aMW monthly. Formal Complaint at 3. Black Mesa states that they will use a common interconnection to Idaho Power's grid, but their electric generating equipment will be separated by at least a mile. Formal Complaint at 3-4. In its FERC Form 556 for each QF, Black Mesa indicates that the QF is an "Other renewable resource" not a wind or solar QF and then further describes its QFs as an "energy storage system Qualifying Facility."³ Black Mesa has been non-committal in its description of the renewable resources that will charge its energy storage QF. In its Schedule 73 application, Black Mesa states, "The energy provided to Idaho Power will be 100% from the battery storage system. The system will be charged from a renewable energy source such as wind, solar, biomass, etc. Initial designs consist of a PV solar facility to charge the system." Formal Complaint, Exh.1, Exh. 5. Similarly, in the FERC Form 556 that Black Mesa attached to its formal complaint for its 2020 Schedule 73 application, Black Mesa states,

The project consists of an energy storage system Qualifying Facility providing scheduled and dispatchable electricity in forward-looking time blocks. The energy storage system that comprises the energy storage Qualifying Facility 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 Qualifying Facility'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 Qualifying Facility 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. The Facility will consist of an alternating current (AC) to direct current (DC) control system. The Qualifying Facility will be utilized to provide the purchasing utility with pre-scheduled and dispatchable AC energy within pre-determined time blocks. The sole source of

³ Black Mesa indicates that FERC "accepted the Form 556s." Formal Complaint at 4. But FERC Form 556s are self-certifications that are not reviewed by FERC when submitted. Form 556 itself it states, "Note: a notice of self-certification does not establish a proceeding, and the Commission does not review a notice of self-certification to verify compliance." Formal Complaint, Exh. 1 at 7. A QF can elect to pay a fee and have FERC certify the QF if it desires pursuant to 18 C.F.R. § 292.207(b).

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.

Formal Complaint, Exh. 5, p.16.

Black Mesa asserts that Black Mesa 1 and Black Mesa 2 are each entitled to 20-year contracts at the published avoided cost rates for “other” QFs in effect on the date it filed its complaint. Formal Complaint at 14. Specifically, Black Mesa elected the non-levelized, non-fueled published avoided cost rates for “other” QFs. *Id.* Black Mesa further alleges that it is entitled to the

non-rate terms and non-term-length contract provisions in the PPA unilaterally executed by Black Mesa for the Black Mesa [QFs], submitted to Idaho Power on or about January 24, 2020; or, should Idaho Power object to any such contract provisions, such other contract provisions as the Commission determines, within the bounds of its lawful discretion, to be just and reasonable.

Id. at 15.

DISCUSSION

Under the Commission’s implementation of PURPA, because there is no signed contract, the relevant question is whether Black Mesa submitted a meritorious complaint. A meritorious complaint, as defined by Idaho case law, is one that sufficiently alleges that the QF is mature and demonstrates that the QF would have a contract but for the actions 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.”); *see also Grouse Creek*, 155 Idaho at 1285.

When analyzing whether the QF would have a contract but for the actions of the utility, the Commission and the Idaho Supreme Court have examined whether the QF unconditionally

obligated itself to sell to the utility. Staff believes it is also appropriate to analyze whether Idaho Power complied with Schedule 73 when determining whether the QF would have a contract but for the actions of the utility. Similarly, Schedule 73 provides guideposts for determining whether the project is mature by requiring a Commission determination that the QF can deliver energy within 365 days.

A. Did Black Mesa Unconditionally Obligate Itself to Perform?

Under Idaho's implementation of PURPA, a LEO requires reciprocal obligations. The utility is obligated to purchase the energy and capacity from the QF because of the must-purchase obligation of PURPA. 18 C.F.R. § 292.303(a). 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. The QF "must show that but for the actions of the utility it was otherwise entitled to a contract [or LEO]. In most cases this will entail making a comprehensive binding offer[.]" *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 817, 828 P.2d 841, 846 (1992). Similarly, in *Rosebud Enterprises*, the Court held that the QF had not established a LEO because "Rosebud made its willingness to commit to 'a definite agreement' expressly conditioned on its obtaining concessions from vendors, financiers, and suppliers." 131 Idaho 1, 6, 951 P.2d 521, 526 (1997). "A [LEO] is a binding commitment to deliver power to the utility. A LEO does not exist when the QF has not unconditionally obligated itself to provide power 'and remains free to walk away from the transaction without liability.'" Order No. 32861 at 20. "While a QF is entitled to a PURPA contract or a legally enforceable obligation, its offer to sell power to a utility must be firm, binding, and unconditional." Order No. 33419 at 16, IPC-E-15-01, AVU-E-15-01, PAC-E-15-01, *citing* Order No. 32974; *see also Whitehall Wind v. Montana Public Service Commission*, 347 P.3d 1277 (Mont. 2015).

Black Mesa's effort to meet this requirement was to unilaterally execute ESAs with Idaho Power by taking what it described as common contract terms found in similar ESAs, putting in project-specific information, and sending it to Idaho Power for countersignature. When sending the ESA to Idaho Power for counter signature, Black Mesa stated, "While our commitment, evidenced by the enclosed 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." Exh. 6, at 1. In response, Idaho Power stated "your attempt to unilaterally sign

contracts containing rates, terms, and conditions, none of which Idaho Power has seen before, and send it in purporting to create a LEO is improper and does not comply with IPUC procedures and tariffs nor with Idaho law.” Idaho Power Answer and Motion to Dismiss, Exh. 1 (Email dated February 3, 2020).

Staff reviewed the ESAs sent by Black Mesa to Idaho Power. Nearly all the terms are identical to published rate contracts recently approved by the Commission. Staff identified the omission of liquid security deposit provisions that are included in similar contracts and the insertion of terms describing the QF as an “Other” resource that are not included in similar contracts. Staff determined that the avoided cost rates included in the ESAs were the SAR Method rates in effect in January 2020 to which Black Mesa claims it is entitled. At an annual level, the rates were correct. However, Staff notes that Black Mesa did not apply high load and light load adjustments that are included in SAR Method rates and Black Mesa applied a seasonalization factor of 74% rather than the Commission approved 73.5%. Additionally, Black Mesa applied an Annual Factor that steps down its projected output over the years. Staff believes this is to acknowledge battery degradation that results from the battery aging and being cycled. While this may be a reasonable term, especially considering the QF has the opportunity to adjust its forecasted output monthly, it has not been approved by the Commission. If the Commission determines Black Mesa established a LEO and is entitled to an ESA, Staff believes the Commission should consider a similar term. A LEO does not require a fully executed contract but the terms of the submitted ESA are useful in analyzing whether Black Mesa unconditionally obligated itself to sell energy to the utility.

B. Did Idaho Power Comply with the Terms of Schedule 73?

Idaho Power’s responsibilities when negotiating with a QF are spelled out in Schedule 73. Schedule 73 sets forth the conditions and contracting procedures for a QF to obtain a PURPA ESA with the Company in its Idaho service territory. In approving Schedule 73, the Commission 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 in good faith, and to prevent avoided cost rates from becoming stale.” Order No. 33197 at 5, IPC-E-14-24, *citing* Order No. 33048 at 5-6, AVU-E-14-03. Schedule 73 was approved by the Commission following the latest LEO litigation and its relevance to the LEO analysis has not been squarely addressed.

Under Schedule 73, the QF must submit an application for indicative pricing containing specific information laid out in the tariff. Schedule 73-4, 1(a). If the Company determines that the QF has not provided sufficient information, the Company shall notify the QF within 10 business days of determined deficiencies. Schedule 73-5, 1(b). For QFs eligible for published rates, as Black Mesa asserts it is, the Company must provide an indicative pricing proposal within 10 business days of satisfactory receipt of information, or within 20 days for QFs above the project eligibility cap. Schedule 73-5, 1(c). The indicative pricing proposal does not become binding until either a full contract is executed or the Commission issues a final non-appealable determination by the Commission that a LEO has arisen and that the QF can deliver its output within 365 days of such determination. Schedule 73-5, 1(d)(ii). The Commission, in approving Schedule 73 stated, "Such pricing is not final or binding on either party and is intended to provide indicative pricing early in the process to enable the QF developer to make preliminary determinations regarding its proposed project." Order No. 33197 at 2.

Schedule 73 requires "satisfactory receipt" of information prior to Idaho Power providing an indicative pricing proposal. Schedule 73, 1(c). If, after receiving the indicative pricing proposal, the QF desires the Company to draft an ESA, Schedule 73, 1(e) requires the QF to provide the Company with additional information including evidence of site control for the entire contracting term, anticipated timelines for completion of key milestones including: licenses, funding, engineering and drawings, significant equipment purchases, construction agreements, and signing of third-party transmission agreements, where applicable.

Once the QF submits this second round of information, the Company again has 10 business days to notify the QF in writing if it has determined there is a deficiency. Schedule 73-6, 1(f). Following satisfactory receipt of the information, the Company has 15 business days to provide the QF a draft ESA with a "comprehensive set of proposed terms and conditions." Schedule 73-6, 1(g). Once again, this draft is not a binding proposal and is to serve as the basis of subsequent negotiations. *Id.* The QF has 90 calendar days to review the draft ESA and either indicate in writing that it is ready to execute an ESA or provide the Company with written comments and proposals based on the draft ESA. Schedule 73-6, 1(h). The QF's written intent to accept or written comments and proposals are a prerequisite for the Company to negotiate or draft a final ESA. *Id.*

During the ESA negotiations, Idaho Power must not “unreasonably delay negotiations” and shall “respond in good faith to any additions, deletions, or modification to the draft ESA.” Schedule 73-7 1(j). Idaho Power may request to visit the site of the proposed QF and shall update its pricing proposals “at appropriate intervals to accommodate any changes to the Company’s avoided cost calculations, the proposed [QF] or proposed terms of the draft ESA[,]” and include revised terms, standards, or requirements, and may request “any additional information from the [QF] necessary to finalize the terms of the ESA and to satisfy the Company’s due diligence with respect to the [QF].” *Id.*

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. Idaho Power also identified two alleged deficiencies in Black Mesa’s 2020 Schedule 73 applications. First, Idaho Power stated,

In accordance with Schedule 73 Section 1.b., the Applications are deficient regarding Section 1.a.iv., which requires the Schedule of estimated [QF] electric output, in an 8,760-hour electronic spreadsheet format. The schedule of estimated deliveries provided with your Applications appear to have the same output shape as that of a solar project.

Idaho Power Answer and Motion to Dismiss, Att. 1, E-Mail dated February 3, 2020. Second, Idaho Power also found Black Mesa’s projected contribution to the grid in July to be improbable and therefore a deficiency.

The form 556 documents provided with your Applications state, ‘The project consists of an energy storage system [QF] providing scheduled and dispatchable electricity in forward-looking time blocks. . . 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.’ 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. (emphasis added).

Idaho Power's reference to a stated output duration of 5 – 60 minutes appears to be taken from Black Mesa's statements for Black Mesa 2 in the FERC Form 556 included for that project. In the Schedule 73 application for Black Mesa 1, Black Mesa states, "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." Idaho Power Answer and Motion to Dismiss, Att. 2 (E-Mail from Brian Lynch dated January 18, 2020 3:26 PM). Similarly, in its FERC Form 556 included with its Schedule 73 application for Black Mesa 1, Black Mesa states, "The project will provide scheduled, dispatchable power output in forward looking time intervals ranging from 5 – 240 minutes pending final system design. . . ." *Id.* (emphasis added). In the Schedule 73 application for Black Mesa 2, Black Mesa makes an identical Schedule 73 statement regarding the duration of its output capacity, of 5 – 240 minutes. Idaho Power Answer and Motion to Dismiss, Att. 2 (E-Mail from Brian Lynch dated January 18, 2020 1:41 PM). However, in the FERC Form 556 included for Black Mesa 2, it states, as quoted by Idaho Power, "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.* (emphasis added).

In response to Idaho Power's assertion of deficiencies, Black Mesa responded on either February 4 or February 5, 2020.⁴ Black Mesa asserts that its response "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." Black Mesa Motion for Summary Judgment at 22.

In summary, the Company did not provide an indicative pricing proposal. Instead, Idaho Power alleged deficiencies and petitioned the Commission to prospectively establish an energy storage category of QFs within Idaho's implementation of PURPA. Black Mesa responded

⁴ E-Mail from Idaho Power to Brian Lynch dated February 18, 2020, acknowledges a February 5, 2020 letter sent by Black Mesa to Idaho Power. Idaho Power Answer and Motion to Dismiss at Att. 1. The Declaration of Brian Lynch references a February 4, 2020 response to Idaho Power's statements of deficiencies. The actual response does not appear to be on the record at this time.

to the deficiencies (the contents of the response not appearing on the record at this time), but didn't subsequently receive confirmation from the Company that the deficiencies were addressed.

C. Is the Project Mature?

The analysis of whether the project is mature overlaps with the analysis of whether the QF would have a contract but for the actions of the utility because the QF must be mature in order to demonstrate that it is ready, willing, and able to deliver energy or capacity to the utility. In *Empire Lumber Co. v. Washington Water Power Co.*, the Court stated,

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.

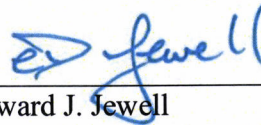
114 Idaho 191, 193-94, 755 P.2d 1229, 1231-32 (1987). In *Empire Lumber*, the Court upheld a Commission determination that the QF had not established a LEO because salient facts were still unsettled such as the capacity and location of the proposed facility at the time the QF filed its complaint with the Commission. In *A.W. Brown*, the Court repeated the statement that PURPA requires more detail from a QF and also found that the QF was not adequately developed to create a LEO. *A.W. Brown*, 121 Idaho 812, 817, 828 P.2d 841, 846 (1992). Schedule 73 requires the Commission to determine that the QF can deliver its output within 365 days of a Commission determination that the QF established a LEO. Schedule 73-5, 1(d).

From January 18, 2020, when Black Mesa filed its Schedule 73 application with Idaho Power, the nameplate capacity and location of Black Mesa 1 and Black Mesa 2 have been consistent. However, Black Mesa has made numerous statements in its Schedule 73 applications and FERC Form 556's that characteristics of its facilities are "pending final system design" or reference the "current initial design." Black Mesa Formal Complaint, Exh. 5, p.1, 3, 16. Additionally, in the ESAs submitted by Black Mesa to Idaho Power, Black Mesa lists its First Energy Date as May 1, 2023 and its Operation Date as June 1, 2023. Its Schedule 73 applications likewise indicate the projects will come online in June 2023. However, Black Mesa alleges in its complaint that it would be able to produce energy within 365 days and reiterated such in the Declaration of Brian Lynch. Declaration of Brian Lynch at ¶ 28. The Declaration of Brian Lynch describes the development activities that Black Mesa has continued to pursue including site control, interconnection, procurement, and permitting. *Id.* at ¶ 23 – 27.

CONCLUSION

The Commission must determine whether Black Mesa 1 and Black Mesa 2 were mature as of March 17, 2020, when Black Mesa submitted its formal complaint. Case law states that the QF must allege that it is mature and Schedule 73 states that the Commission must determine that the QF can provide energy within 365 days of a final non-appealable Commission determination that the QF has established a LEO. The Commission must also determine whether Black Mesa would have a signed contract but for the actions of the utility. In determining whether Black Mesa would have a contract but for the actions of the utility, the Commission must determine whether Black Mesa unconditionally obligated itself to sell energy to Idaho Power, or whether it remained free to walk away. Additionally, Idaho Power's compliance or non-compliance with Schedule 73 is instructive in determining whether Black Mesa would have a contract but for the actions of the utility.

Respectfully submitted this 11th day of January 2021.




Edward J. Jewell
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 11TH DAY OF JANUARY 2021, SERVED THE FOREGOING **COMMISSION STAFF BRIEF**, IN CASE NO. IPC-E-20-17, BY E-MAILING A COPY THEREOF, TO THE FOLLOWING:

DONOVAN E WALKER
REGULATORY DOCKETS
IDAHO POWER COMPANY
PO BOX 70
BOISE ID 83707-0070
E-MAIL: dwalker@idahopower.com
dockets@idahopower.com

PETER J RICHARDSON
GREGORY ADAMS
RICHARDSON ADAMS
515 N 27TH STREET
BOISE ID 83702
E-mail: pete@richardsonadams.com
greg@richardsonadams.com



Keri J. Hawker
Legal Assistant