

under PURPA must be approved by this Commission. *Idaho Power*, 155 Idaho at 789, 316 P.3d at 1287.

Under PURPA, the purchase rate for PURPA contracts shall not exceed the “incremental cost” to the utility, defined as the cost of energy which, but for the purchase from [the QF], such utility would generate or purchase from another source.” 16 U.S.C. § 824a-3(d); 18 C.F.R. § 292.101(6) (defining avoided costs). However, FERC rules require establishment of “standard rates for purchases from [QFs] with a design capacity of 100 kilowatts or less,” and allow “standard rates for purchases from [QFs] with a design capacity of more than 100 kilowatts.” 18 C.F.R. § 292.304(c)(1), (2). FERC rules provide that standard rates “[m]ay differentiate among [QFs] using various technologies on the basis of the supply characteristics of the different technologies.” 18 C.F.R. § 292.304(c)(3)(ii).

The Commission has established two methods of calculating avoided cost, depending on the size of the QF project: (1) the surrogate avoided resource (SAR) methodology, and (2) the integrated resource plan (IRP) methodology. *See* Order No. 32697 at 7-8. The Commission uses the SAR methodology to establish standard or “published” avoided cost rates. *Id.* Published rates are available for wind and solar QFs with a design capacity of up to 100 kilowatts (kW), and for QFs of all other resource types with a design capacity of up to 10 average megawatts (aMW). *Id.* The Commission established the 100 kW and 10 aMW eligibility caps for published rates in proceedings that the Commission initiated to investigate “disaggregation” – the breaking up of one large project “into smaller projects ‘in order to obtain published avoided cost rates that exceed a utility’s actual avoided cost.’” Order No. 32262 at 3 (Case No. GNR-E-11-01). Ultimately, the Commission addressed the disaggregation problem by setting the eligibility cap for wind and solar QFs to access published avoided cost rates at 100 kW, the FERC-established minimum to qualify for published rates. *Id.* at 9; 18 C.F.R. § 292.304(c)(1).

PURPA and FERC’s implementing regulations are silent as to contract length; consequently, the issue is in the discretion of the state commissions. *See Afton Energy, Inc. v. Idaho Power*, 107 Idaho 781, 785-86, 693 P.2d 427, 431-32 (1984); *Idaho Power*, 155 Idaho at 782, 316 P.3d at 1280. Since PURPA was first implemented in Idaho, this Commission has periodically modified the maximum length for PURPA contracts. *See* Order No. 29029. In 2015, the term for individually-negotiated contracts (those not subject to published rates) was reduced from 20 years to two years. Order Nos. 33357, 33419. The contract term for published

rate contracts remains at 20 years. *See* Order No. 33253 (clarifying that the proceedings concerned the contract term for QFs exceeding the published rate eligibility cap).

2. Commission Jurisdiction and Legal Standard for Declaratory Orders

The Commission has jurisdiction to issue declaratory orders under Title 61 of the Idaho Code and the Idaho Uniform Declaratory Judgments Act of 1933, *Idaho Code* §§ 10-1201 *et seq.* *See Utah Power & Light v. Idaho Pub. Util. Comm'n*, 112 Idaho 10, 12, 730 P.2d 930, 932 (1986). The Idaho Supreme Court has said that a declaratory judgment “must clarify and settle the legal relations at issue, and afford leave from uncertainty and controversy which gave rise to the proceeding.” *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984) (citation omitted). To enter a declaratory judgment, there must be “an actual or justiciable controversy” that is “real and substantial,” and “definite and concrete, touching the legal relations of parties having adverse legal interests.” *Id.* at 516 (citation omitted).

B. Idaho Power’s Petition

Idaho Power states that it received requests for PURPA contracts from five battery storage facilities (self-certified as QFs)¹ asserting they are entitled to published avoided cost rates and 20-year terms. Petition at 2. The five facilities are Franklin Energy Storage One, Two, Three, and Four, LLCs, and Black Mesa LLC. *Id.* at 4. The Black Mesa QF is owned by Redwood Energy, LLC. *See* Redwood Comments.

Idaho Power asserts that, together, the five QFs request contracts for a total of 148 MW of energy storage. Petition at 7. Idaho Power indicates it notified legal counsel for the four Franklin QFs that the proposed projects did not appear to qualify for published rates and 20-year contract terms. *Id.* at 4-5. According to the Company, the Franklin QFs then “purport[ed] to address deficiencies in its applications and demand[ed] that Idaho Power proffer 20-year, published avoided cost rates.” *Id.* at 5. Idaho Power does not describe any such communication with Black Mesa. Idaho Power maintains that none of the storage facilities are eligible for

¹ Petition at 4. Franklin and Black Mesa submitted a FERC Form 556 for each of the proposed projects, self-certifying that the projects are QFs under 18 C.F.R. § 292.207(a). *See* Attachments 1-5 to Petition.

published rates and 20-year contracts, and that it notified Franklin and Black Mesa² accordingly. *Id.*

Idaho Power recognizes that “QF status is within the exclusive jurisdiction [of] and properly before FERC,” thus for purposes of its petition here, the Company does not challenge the QF-status of Franklin and Black Mesa. *Id.* at 6. Idaho Power seeks a declaratory ruling that, for the Franklin and Black Mesa QFs, and other battery storage facilities with nameplate capacities exceeding 100 kW, the proper avoided cost rate is calculated using the IRP methodology, and the proper contract term is two years. *Id.* at 13. The Company also seeks the Commission’s ruling that battery storage facilities with a maximum nameplate capacity of 100 kW are eligible for published avoided cost rates and 20-year contract terms. *Id.* at 14.

Idaho Power notes that “the generation source that energizes all of the Proposed Battery Storage Facilities is solar generation.” *Id.* at 7 (citing Attachments 1-5). Further, the Company asserts “the output profile submitted for each of the Proposed Battery Storage Facilities matches the shape and timing of the generation profile of a solar generator.” *Id.* According to the Company, the potential benefits of an economically viable utility-scale energy storage facility³ cannot be recognized if QFs “are configured in such a manner as to come under published rates,” as proposed by Franklin and Black Mesa. *Id.* at 8. The Company argues that, to realize the potential benefits of energy storage, “operational control and dispatchability of the facility [must] be with the utility charged with serving load,” whereas the Franklin and Black Mesa QFs are structured to “pass[] through as many kW hours as possible...to maximize revenue.” *Id.*

The Company believes that Franklin and Black Mesa are using their QFs to “circumvent the Commission’s rules and requirements in its implementation of PURPA for the state of Idaho.” *Id.* The Company asserts the Franklin and Black Mesa QFs are “nothing more than a pass through of the solar generation [that will energize their batteries], in what appears to be a blatant attempt to manipulate the 100 kW published rate eligibility cap and two-year contract limitation for solar generators.” *Id.* at 9.

² Although Redwood Energy submitted Comments on behalf of Black Mesa as its corporate owner, “Black Mesa Energy, LLC” submitted its Schedule 73 PURPA contract request form to Idaho Power on its own behalf. Attachment 5 to Petition, at 4.

³ The Company states that the potential benefits of economically viable, utility-scale energy storage facilities include “provid[ing] ancillary grid services such as reserve capacity, surge capacity, load-balancing, or voltage support; firming [] variable generation; or time-shifting generation to match load.” Petition at 8.

Idaho Power characterizes the five requests for PURPA contracts as a “large amount of proposed MWs in a very short time . . . similar to the previous wind and solar development,” addressed by the Commission in Order Nos. 32262 and 32176. *Id.* at 10-12. The Company thus argues it is appropriate and necessary for the Commission to grant its requested declaratory relief “extend[ing] the 100 kW published rate eligibility cap to battery storage projects . . . to protect customers from this manipulation of the rules.” *Id.* at 13.

C. Franklin Energy Storage Comments

Franklin opposes Idaho Power’s petition. According to Franklin, a declaratory order is unwarranted because the Company “has failed to identify any adverse legal relations or issues.” Franklin Comments at 1. Franklin asserts there is no “legal controversy” because the Commission’s orders and policy rulings are “clear [and] unequivocal” in supporting Franklin’s entitlement to published avoided cost rates for up to 20 years. *Id.* at 1-2, 11-12.

Franklin points to the Commission’s Order No. 32697, which provides, “We find that a 10 aMW eligibility cap for access to published avoided cost rates for resources other than wind and solar is appropriate to continue to encourage renewable development while maintaining ratepayer indifference.” *Id.* at 7 (quoting Order No. 32697 at 14 (emphasis by Franklin)). Also, Franklin quotes the Commission’s decision to “maintain the eligibility cap at 10 aMW for QF projects other than wind and solar (including but not limited to biomass, small hydro, cogeneration, geothermal, and waste-to-energy).” *Id.* at 10 (quoting Order No. 32697 at 9 (emphasis by Franklin)). Franklin contends this language, making the list of “other” projects non-inclusive, clearly demonstrates the Commission “considered” energy storage as a QF for which the 10 aMW eligibility cap should apply. *Id.* at 10.

Franklin argues that, because the Commission’s Order No. 32697 is clear, there “are no adverse legal interests.” *Id.* at 11. Thus, Franklin asserts, Idaho Power’s request is not for a declaratory order, but is a request for the Commission to reconsider or revise order No. 32697. *Id.* at 2, 4. For such relief, Franklin contends, it and any potentially affected parties must receive notice and the opportunity to present evidence and cross-examine witnesses. *Id.* at 3-4. Franklin also argues that the Commission’s decision in such a proceeding must be prospective only, and thus not apply to its legally enforceable contracts with Idaho Power for the four proposed battery storage QFs. *Id.* at 4-5.

In addition, Franklin challenges – and asks the Commission to disregard – a number of factual assertions in Idaho Power’s petition. Franklin contends that, contrary to the Company’s claims, the Franklin QFs (1) “contemplated” energy sources in addition to solar; (2) have offered to be dispatchable, and “will have the ability to shift load pursuant to dispatch signals from Idaho Power”; (3) and will have the ability – “to varying degrees” – to provide ancillary grid services (such as reserve capacity, surge capacity, load-balancing, or voltage support), firming of variable generation, and time-shifting generation to match load. *Id.* at 14 (emphasis original). According to Franklin, Idaho Power never asked about Franklin’s ability to provide “many, if not all” of these services in its QF output. *Id.* Further, Franklin disputes that its QFs will be a mere “pass through” of solar power, arguing that they would instead “utilize renewable energy as input into the battery storage system . . . [that would then be] used to provide a non-intermittent, dispatchable product.” *Id.* at 15.

Finally, Franklin asserts that it has complied with all of the requirements of the Company’s Tariff Schedule 73, which outlines PURPA contracting procedures, and that as such it has established legally enforceable obligations and is entitled to published rates and 20-year contracts. *Id.* at 17.

D. Redwood Energy Comments for Black Mesa

Redwood Energy, LLC, which owns the Black Mesa QF, submitted brief comments on Black Mesa’s behalf, asserting that it qualifies for published rates “because it is a QF [with] output of less than 10 [aMW] but is not a wind or solar QF that would be restricted to 100 kW.” Redwood Comments. Redwood contends that the Black Mesa QF “has fundamentally different characteristics than a wind or solar project without energy storage.” *Id.* According to Redwood, battery storage “makes output both more predictable and more coincident with system load, thus a higher Net Qualifying Capacity.” *Id.* Redwood asserts that “[e]nergy storage will reduce Idaho Power’s requirements for Resource Flexibility, thus avoiding a cost that would be borne but for” the Black Mesa QF project. *Id.* Redwood further asserts, “This is a dispatchable system that will offer ancillary grid services such as voltage support, load shifting, reserve capacity, load-balancing, [and] firming of variable generation or time-shifting to match load.” *Id.*

E. Staff Comments

The Commission must first address whether there is a legal dispute for which relief can be granted by declaratory order. *See Harris*, 106 Idaho at 516. If the Commission finds there is a legal dispute, it must then determine how to resolve it. In determining an appropriate resolution, the Commission must consider whether the relief requested by the petitioner, or some other relief, is appropriate.

1. A declaratory order is appropriate to resolve the legal dispute about the terms of Idaho Power's contract or obligation to purchase power from the Franklin and Black Mesa QFs.

Staff believes there is a legal dispute that can be properly addressed by a declaratory order. The battery storage QFs sought to enter PURPA contracts with Idaho Power, and the parties disagree on the contractual terms, including the length of contract and the applicable avoided cost rate. Thus the parties have a dispute as to the legal relationship that should exist between them. Further, as discussed below, the dispute is one the Commission can resolve. Based on the FERC's and this Commission's past orders, and information in the QFs' applications for PURPA contracts, Staff does not believe that Idaho Power is legally obligated to purchase energy from the Franklin and Black Mesa QFs at published avoided cost rates and 20-year terms. Accordingly, Staff believes there is an actual, substantial, concrete legal dispute between Idaho Power, and Franklin and Black Mesa that the Commission can resolve. *See Harris*, 106 Idaho at 516-17.

2. Using FERC's analysis as guidance, battery storage facilities should be evaluated by their energy source

Franklin and Black Mesa contend they are clearly entitled to published avoided cost rates because this Commission set the published rate eligibility cap for "wind and solar QFs" at 100 kW (Order No. 32262), and provided that the cap "for other QFs" was 10 aMW (Order No. 32176). Franklin and Black Mesa argue that battery storage QFs are not wind and solar QFs, therefore they are "other QFs." Staff disagrees with this overly simplistic analysis. The issue of how to evaluate a battery storage facility under PURPA was addressed by FERC in an order cited by Franklin, *Luz Development and Finance Corporation*, 51 FERC P 61,078 (1990).

In *Luz*, the developer of a proposed electro-chemical battery storage facility applied to FERC for certification as a qualifying small power production facility under PURPA. *Luz*, 51

FERC P 61,078 at 61,168. The developer argued that its battery storage system's ability to "shift inexpensive off-peak energy for later use to meet peak demands [would] meet the . . . public policy goals of PURPA," therefore it should not be subject to the rules limiting the facility's energy input from fossil fuels to 25%. *Id.* at 61,169-70. FERC rejected the developer's argument, stating that "the primary energy source requirements must be applied to energy storage facilities in the same manner they are applied to conventional small power production facilities." *Id.* at 61,171.

Addressing the developer's arguments about the operational characteristics of its battery storage system, FERC noted

Contrary to Luz's assertion, the primary energy source of the battery system is not the electro-chemical reaction. Rather, it is the electric energy which is utilized to initiate that reaction, for without that energy, the storage facility could not store or produce the electric energy which is to be delivered at some later time.

Id. (emphasis added). In other words, FERC highlighted the battery storage facility's dependence on its energy source as critical to its ability to produce or store energy. Therefore, FERC found that in order for the battery storage facility to be a QF, it must meet the requirements that "the energy input to the facility itself is biomass, waste, a renewable resource, a geothermal resource, or any combination thereof" (or demonstrate that no more than 25% of the energy input is from fossil fuels, and that such uses are consistent with PURPA requirements). *Id.* at 61,172. FERC found that the facility's claimed contributions toward PURPA policy goals did not exempt it from otherwise complying with PURPA rules governing its energy source. *Id.*

Staff agrees that the energy source of a battery system is not an electro-chemical reaction. Staff also believes, consistent with FERC's analysis in *Luz*, that a battery storage facility can be a QF only if its energy source complies with PURPA and PURPA regulations. Thus it is appropriate to look to the Franklin and Black Mesa QFs' energy sources in determining their eligibility for published rates. Although the Franklin and Black Mesa QFs are not solar QFs, their energy sources – as currently proposed – are solar. Franklin contends that "the projects [have] contemplated energy sources in addition to, or in place of, solar." Franklin Comments at 14. But the mere contemplation of an alternate source is insufficient to obligate a utility to

purchase power from a battery storage QF with rates and contract terms based on that hypothetical source.

Franklin asserts that it has established a legally enforceable obligation (LEO) based on its purported completion of the information requested in the Company's Tariff Schedule 73, and that it is entitled to published rates and 20-year terms for its projects. Absent a fully-negotiated contract, a PURPA QF can establish a LEO when the QF "makes a binding commitment to sell power to an electric utility." Order No. 32974 at 1; 18 C.F.R. § 292.304(d). "FERC has given each state the authority to decide when a LEO arises in that state." *Idaho Power*, 155 Idaho at 787, quoting *Power Resource Group, Inc. v. Public Utility Comm'n of Texas*, 422 F.3d 231, 239 (5th Cir. 2005). In 2013, the Idaho Supreme Court affirmed this Commission's determination that a LEO "requires a showing that there would have been a contract but for the actions of the utility." *Idaho Power*, 155 Idaho at 787. The Court in that case affirmed this Commission's finding that a LEO was not established, based on a determination that the utility "did not impede [the QF's] ability to enter into" PURPA contracts. *Id.*

Here, given Franklin's acknowledgment that its non-solar alternative energy sources are "contemplated," or currently theoretical, Staff believes it is appropriate to find that Idaho Power did not impede the formation of a PURPA contract for a non-solar QF. The attachments to Idaho Power's petition, and the comments from Franklin and Black Mesa all indicate that the proposed configurations for the Franklin and Black Mesa QFs identify solar as the energy source. Applying the above analysis, Staff believes the Franklin and Black Mesa QFs, as battery storage facilities, are entitled to contract terms based on their proposed energy source – solar. Because the Franklin and Black Mesa QFs exceed the 100 kW published rate cap for solar QFs, they would be entitled to two-year terms and negotiated avoided cost rates calculated under the IRP methodology.

3. FERC's analysis is consistent with this Commission's orders, which focus on addressing disaggregation

In arguing for its simplistic reading of the Commission's orders – that battery storage is an "other source" eligible for published rates at the 10 aMW cap – Franklin argues that clear and unambiguous statutory language "speaks for itself" and needs "no further interpretation." Franklin Comments at 6, citing *Koon v. Bottolfsen*, 66 Idaho 771, 189 P.2d 345 (1946); *Haworth v. Bernsten*, 38 Idaho 539, 200 P.2d 1007 (1948). However, Franklin ignores that the "objective

of statutory interpretation is to ‘derive the intent of the legislative body that adopted the act’ . . . and ‘provisions should not be read in isolation, but must be interpreted in the context of the entire document.’” *Hayes v. City of Plummer*, 159 Idaho 168, 170, 357 P.3d 1276, 1278 (2015), quoting *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009). Applying these doctrines of statutory interpretation to the Commission’s orders, one must consider the Commission’s intent, as demonstrated by the context of the entire order or orders, rather than a single sentence.

The Commission established Idaho’s published rate eligibility caps in 2011, through proceedings conducted in Case No. GNR-E-11-01. Significantly, the Commission initiated Case No. GNR-E-11-01 to investigate its concern “that large QF projects were disaggregating into smaller QF projects in order to be eligible for published avoided cost rates that may not be just and reasonable to the utility customers or in the public interest.” Order No. 32262 at 4. The generating sources of the projects about which the Commission was concerned were wind and solar. *Id.* at 1.

In its Final Order in Case No. GNR-E-11-01, the Commission stated its intent to “allow[] small wind and solar QFs to avail themselves of published rates,” but prevent large wind and solar QFs from disaggregating to get the more favorable rates that fail to accurately reflect a utility’s avoided cost. Order No. 32262 at 1. The Commission found, “[i]f we allow the current trend to continue, customers may be forced to pay for resources at an inflated rate and, potentially, before the energy is actually needed to serve its customers.” *Id.* at 8. “[W]e emphasize that PURPA and our published rate structure were never intended to promote large scale wind and solar development to the detriment of utility customers.” *Id.* at 8.

Although the Commission considered establishing criteria⁴ to prevent disaggregation, the Commission concluded that it “would be met by attempts to circumvent such criteria,” noting, “[t]he economic incentive [to circumvent criteria] is obvious.” *Id.* Ultimately, the Commission affirmed the “100 kW eligibility cap for wind and solar QFs to access . . . published avoided cost rates.” *Id.* at 9.

⁴ The parties in that proceeding suggested considering “criteria such as ownership, shared facilities, shared agreements, common control, and shared debt and/or equity” to assess whether a group of projects was truly a number of separate small projects, or actually “a single large project disaggregated into several smaller projects to obtain published avoided cost rates.” Order No. 32262 at 7.

Given the Commission's evident concern about disaggregation, it follows that the Commission would be similarly concerned by an effort to subvert the 100 kW eligibility cap for solar QFs in this case. A battery storage QF that would not exist except for its energy source should not be able to evade an eligibility cap that would otherwise be applied to its energy source. FERC recognized that a battery storage QF – by virtue of being a battery storage facility – is not exempt from PURPA rules governing its energy source. *Luz*, 51 FERC P 61,078. Here, Franklin and Black Mesa – battery storage QFs currently intending to use solar as their energy source – should not be exempt from this Commission's eligibility cap which was intended to prevent disaggregation of large solar projects. Accordingly, Staff believes Franklin and Black Mesa, as configured at the time of Idaho Power's petition, are not eligible for published avoided cost rates and 20-year contracts.

4. Staff recommendation

In sum, Staff recommends that the Commission issue a declaratory order providing that the applicable published rate eligibility cap for the Franklin and Black Mesa Battery Storage QFs is determined based on their energy sources. According to Franklin's and Black Mesa's applications for PURPA contracts that they submitted to Idaho Power, the Franklin and Black Mesa QFs are currently configured to use solar as their energy source. Thus the applicable eligibility cap for published rates is 100 kW. Because the Franklin and Black Mesa QFs exceed the 100 kW cap, they are entitled to PURPA contracts with two-year terms and negotiated avoided cost rates calculated using the IRP methodology. Staff believes the declaratory order should be narrowly tailored to address the legal dispute between Idaho Power and the Franklin and Black Mesa QFs. However, given the broader implications of issues raised in this matter, Staff recommends that the Commission initiate a general investigation into the appropriate contract terms for battery storage QFs.

Respectfully submitted this 27th day of April 2017.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 27TH DAY OF APRIL 2017, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. IPC-E-17-01, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

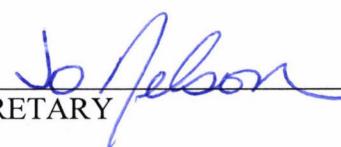
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