Peter J. Richardson, ISB# 3195
515 N. 27th Street
Boise, Idaho 83702
Telephone (208) 938-7901
Facsimile: (208) 938-7904
Attorney for Plaintiffs

Robert C. Huntley, ISB# 2188
R. HUNTLEY LAW, PLLC
815 West Washington Street
Boise, ID 8701
Telephone (208) 388-1230
Facsimile: (208) 388-0234
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FRANKLIN ENERGY STORAGE ONE, LLC, FRANKLIN ENERGY STORAGE TWO, LLC FRANKLIN ENERGY STORAGE THREE, LLC, FRANKLIN ENERGY STORAGE FOUR, LLC

Plaintiffs,

vs.

PAUL KJELLANDER, KRISTINE RAPER and ERIC ANDERSON, in their official capacity as Commissioners of the IDAHO PUBLIC UTILITIES COMMISSION,

Defendants,

and,

IDAHO POWER COMPANY,

Defendant-Intervenor.

Case No.: 1:18-cv-00236-REB

FRANKLINS' REPLY BRIEF TO DEFENDANTS RESPONSE TO FRANKLIN'S MOTION FOR SUMMARY JUDGMENT

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I
INTRODUCTION

Plaintiffs' hereby respectfully submit their Reply Brief to Defendants' Response to Plaintiffs' Motion for Summary Judgment. Defendants' opening argument asserts the Court does not have jurisdiction over Plaintiffs' Complaint because, they assert, the Commission's order is an "as-applied" claim. Because this "as-applied" vs. implementation' issue is fully briefed in Plaintiffs' Response Brief to Idaho Power's Motion to Dismiss, and Plaintiffs' Response Brief to Idaho Power Motion for Summary Judgement and Plaintiffs' Reply Brief to Idaho Power's Response to Franklins' Motion for Summary Judgment, Plaintiffs' arguments there will not be repeated here.

II
ERRONEOUS FACTUAL ASSERTION

While a little poetic license may be excusable as the Defendants attempt to vigorously defend their position -- bold misstatements of fact are not. Defendants begin their argument on page 7 of their Brief by asserting that:

> Plaintiffs' Motion relies on a misconstruction of the roles of the PUC under PURPA. Plaintiffs' erroneously contend that Defendants' ruled that its battery storage facilities were not QFs. *See Plaintiffs' Motion* at 5, 7, 9 – 15.

Then, the Defendants identify what they term a "false conflict" between this misstatement and the recognition (by all parties, Franklin included) that FERC has exclusive jurisdiction over QF status determinations. Perhaps, Plaintiffs' Complaint was too subtle for the Defendants. While Franklin has never asserted the IPUC ruled their projects were not QFs, Franklin has asserted the IPUC ruled their projects are not battery storage QFs which is a QF status recognized by FERC in *Luz.*[1]

[1] *Luz Development and Finance Corporation* 51 FERC ¶ 61,078 (1990).

Franklin has asserted that the IPUC:

> [E]stablished a policy of denying qualifying power production facilities (Qualifying Facilities or QFs) *see* 16. U.S.C. 824a-3(a)(1), that are energy storage qualified power production facilities their rights under PURPA.[2]
>
> [D]enied Plaintiffs their right to the Idaho Commission's established avoided cost rates and contract terms that the Idaho Commission has made available for all QFs other than wind or solar.[3]
>
> [F]ound that [because] the Franklin Energy Storage batteries are energized with solar energy, they concluded that the franklin Energy Storage QF projects are only entitled to the solar or wind avoided cost rate and contract terms and conditions.[4]

What the IPUC has denied is the Franklin projects' status as battery storage facilities in a new implementation plan in which the Idaho Commission addresses for the very first time (and without jurisdiction to do so) the eligibility of energy storage QFs to the benefits of PURPA.[5]

III
THE JOHNSON ACT IS NOT APPLICABLE TO PURPA COMPLAINTS

Plaintiff assert that the Johnson Act unambiguously imposes a jurisdictional bar to this Court's ability to hear this matter. Although, "the burden of showing that the conditions have been met is on the party invoking the Johnson Act,"[6] the Defendants' entire argument consists of a single conclusory paragraph with no analysis or discussion (e.g. no "showing") of how each of the conditions in the Johnson Act applies in this matter. Although those conditions are accurately

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[2] Complaint at ¶ 22. Dkt. no. 2.

[3] *Id.* at ¶ 27.

[4] *Id. at* ¶ 57.

[5] The lack of the IPUC's jurisdiction to adjudicate a QF's "eligibility" for the benefits of PURPA are addressed in detail in the Plaintiffs' Reply to Idaho Power's Response to Plaintiffs' Motion for Summary Judgment and the Plaintiffs' Response to Idaho Power's Motion for Summary Judgment.

[6] *Nucor v. Nebraska Pub. Power Dist.*, 891 F.2d 1343, 1346 (8th Cir 1989).

quoted by the Defendants, they provide no analysis of how, or even whether, they are applicable to this Commission's jurisdiction in the context of a state commission's implementation of PURPA.

The Johnson Act does prohibit this Court's jurisdiction when a state utility commission issues a ratemaking decision that meets a four-part test. The four parts of the test include, (1) jurisdiction is based solely on repugnance of the order to the Federal Constitution, (2) the order does not interfere with interstate commerce, (3) the order has been made with notice and hearing, and (4) a plain and speedy remedy may be had in state court.

Defendants' cite two cases in support of its assertion that the Johnson Act, "mandates dismissal."[7] Neither case cited by Defendants deals with the Johnson Act's applicability (or non-applicability) in the PURPA implementation context. Had the Defendants' researched this issue prior to making the bold assertion that the Johnson Act "mandates dismissal" they would have realized that their assertion is completely off point. Federal courts are unanimous in their rejection of the Johnson Act as a bar to their review of PURPA implementation complaints/claims.

A cogent summary of the extant case law rejecting Defendants' claim that the Johnson Act "mandates dismissal" in the PURPA enforcement context is provided in *Occidental Chem. Corp. v. La PSC,* 494 F. Supp. 2d 401, 412 (MD LA 2007). The *Occidental* Court rejected the very first condition of the Johnson test, observing that, "PURPA claims . . . are based on alleged violation of federal statutes. The claims are not solely constitutional in nature." The Eighth Circuit went into more detail in its rejection of the Johnson Act as a bar to federal court jurisdiction in the PURPA context:

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[7] *US West v. Nelson*, 146 F.3d 718 (9th Cir. 1998) and *US West v. Tristani,* 182 F.3d 1202 (10th Cir. 1999).

> Jurisdiction is not based "solely" either on diversity or on "repugnance" of the … order to the Federal Constitution. It is based, in part at least, on the theory, not at all insubstantial, that the [rate order] was in conflict with and preempted by the Federal Power Act. It is true, of course, that a federal statute overrides conflicting state law only because of the Supremacy Clause of the Federal Constitution. In a sense, therefore, a preemption claim always asserts repugnance of state law to the Federal Constitution. But such a claim does not usually require that the Constitution itself be interpreted.[8]

The First Circuit Court of Appeals has also weighed in on this issue, declaring that the Johnson Act "does not apply to claims based upon congressional statute or federal administrative rulings, even though these commands are ultimately backed up by the Supremacy Clause (and are therefore arguably 'constitutional' claims). The case law on this point is so clear that no further discussion of the point is required."[9] The Fourth and Ninth Circuits are in accord.[10] The Third Circuit, likewise, has held that preemption claims based on PURPA do "not rely solely on constitutional grounds," and thus the Johnson Act does not apply.[11] It is thus perplexing that the Defendants' would have bothered to cite to the Johnson Act in light of the overwhelming and uniform agreement among the Circuits that it simply does not apply in PURPA enforcement proceedings.

IV.
THE 11th AMENDMENT AND COOPERATIVE FEDERALISM

The remaining issue raised in the Defendants' Response that is not addressed elsewhere by the Plaintiffs in this Docket's pleadings is its Eleventh Amendment and cooperative federalism arguments. However, these arguments are based on the out-of-left-field assertion that Plaintiffs are asking the Court to "direct… a state agency to conform its conduct to state law.[12] Plaintiffs

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[8] *Ark. Power & Light Co. v. Mo. Pub. Serv. Comm'n*, 829 F.2d 1444, 1449 (8th Cir. 1987).
[9] *Pub. Serv. Co. v. Patch,* 167 F.3d 15, 25 (1st Cir. 1998).
[10] *Aluminum Co. of Am. V. Utils. Comm'n,* 713 F.3d 1024, 1028 (4th Cir. 1983) and *Int'l Bd. Of Elec. Workers v. Pub. Serv. Comm'n*, 614 F.2d 206, 209-211 (9th Cir. 1980).
[11] *Freehold Cogeneration Assocs. v. Bd. Of Regulatory Comm'rs of N.J.,* 44 F.3d 1178, 1186-1187 (3rd Cir. 1995).
[12] Defendants' Response Brief at P. 5.

here are, of course, not asking the state to "conform its conduct to state law," but are asking the Court to require the state to conform its conduct to a federal law – PURPA. Such a request is in harmony with the Eleventh Amendment.

The Defendants' tired Eleventh Amendment argument has long been put to rest. For example, in *North Am. Natural Res., Inc. v. Michigan Pub. Serv. Comm'n* 41 F. Supp. 2d 736, 741 (WD Mich 1998) the Court held that the Eleventh Amendment does not bar claims against a state public service commission for allegedly violating PURPA. Where a state officer's actions are violating or will violate federal law, those actions are outside the state's authority and "the state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.* (Quoting from *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). Under this exemption to immunity, jurisdiction exists for prospective injunctive relief to enjoin ongoing violations by state officials of federal law. *Seminole Tribe v. Florida,* 517 U.S. 44, 73, 116 S.Ct. 1114, 1132, 134 L.Ed. 252 (1996).

V.
BATTERY STORAGE FACILITIES ARE QFs

Defendants' observe that the IPUC ruled that "neither PURPA nor FERC's implementing regulations identifies battery storage as a renewable resource eligible for QF status and the benefits provided by the act. (sic) [PURPA]."[13] This conclusion is, of course, wrong. While it is true that neither the Act nor FERC's regulations specifically identify battery storage projects as QFs, FERC has, in fact, ruled that battery storage facilities are QFs that are eligible for the benefits of PURPA. Perplexingly, the IPUC must have been aware of this fact when it issued its

[13] Response Brief at p. 8.

order because it actually cited to the very case in which FERC issued its ruling that battery storage facilities are renewable QFs – *Luz.*[14] Specifically FERC declared that:

> In sum, energy *storage facilities such as the proposed Luz battery system are a renewable resource for purposes of QF certification*. However, such facilities are subject to the requirement that the energy input to the facility is itself biomass, waste, a renewable resource, a geothermal resource, or any combination thereof…[15]

The fact that the IPUC actually believed (incorrectly) that energy storage facilities are not stand alone QFs independent of the source of renewable energy inputs belies any assertion on the part of the Defendants that they were merely exercising their "discretion under PURPA" in their denial of the energy storage QF status of the Franklin projects.

VI.
CONCLUSION

For the reasons stated herein and for the reasons stated in Plaintiffs' Motion for Summary Judgment, the Court is respectfully requested to grant their Motion for Summary Judgment.

/s/ Robert C. Huntley, Esq.

/s/ Peter J. Richardson Esq.

Attorneys for the Plaintiffs

Dated this 30th, day of November 2018.

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[14] *Luz Development and Finance Corporation,* 51 FERC ¶ 61,078 (1990). Pagination citations are to original FERC order.

[15] Id. at pp 9 – 10. Emphasis provided.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2018, I caused a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons;

Brandon Karpen brandon.karpen@puc.idaho.gov

Scott Zanzig scott.zanzig@ag.idaho.gov

Steven B. Anderson sba@aswblaw.com

Wade L. Woodard wlw@aswblaw.com

Donovan E. Walker dwalker@idahopower.com