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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

PLAINTIFFS' REPLY BRIEF TO IDAHO POWER'S RESPONSE TO FRANKLINS' MOTION FOR SUMMARY JUDGMENT [DKT. 38]

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I.
INTRODUCTION

Plaintiffs respectfully lodge this Reply Brief to Idaho Power's Response to Franklins' Motion for Summary Judgment.[1] Idaho Power's first two issues dealing with the statute of limitations ("time-barred) and collateral estoppel are fatally reliant on the Idaho Power's assumed (albeit non-existent) jurisdiction of the IPUC's determination of Franklins' QF status. These first two issues have been fully briefed by Plaintiff's in their Response Brief to Idaho Power's Motion for Summary Judgment. The Power Company's third argument inaccurately asserts the IPUC's decision is permissible as an application of a preexisting implementation plan – this argument is addressed below. In its fourth argument, Idaho Power makes the unsupported assertion that the IPUC did not determine Franklins' QF status. Idaho Power Company's procedural arguments rely entirely on this inaccurate assertion. Although this 'implementation vs. "as-applied"' issue is addressed in Plaintiffs' Response Brief to Idaho Power's Motion for Summary Judgment, we do however, provide a synopsis of our response to the Power Company's denial that the IPUC determined the QF status of the Franklin Projects here due to the central role it may play in the Court's analysis. Finally, almost as an afterthought, Idaho Power attempts, but fails to refute Franklins' impossibility argument, this issue is also addressed below. In short, Franklin will address Idaho Power's '"as-applied" vs. as-implemented' argument and its attempt to refute Franklin's impossibility argument in this Reply, but we begin with a review of the central jurisdiction question.

II.
THE IDAHO COMMISSION's DETERMINATION OF THE FRANKLIN PROJECTS' QF STATUS IS AN INTRUSION INTO FERC's EXCLUSIVE JURISDICTION

[1] Herein "Idaho Power's Response."

A. The IPUC Impermissibly Determined Plaintiffs' QF status

The Idaho Commission's lack of subject matter jurisdiction is central to Idaho Power's arguments. Although Defendants and Defendant-Intervenor all concede FERC's exclusive jurisdiction to make QF classifications, the Idaho Commission's intrusion into FERC's jurisdiction to classify QFs and determine their status is clearly evidenced by its orders. In its original order in this matter the IPUC ruled:

> FERC confirmed that energy storage facilities are not renewable resources/small power production facilitates *per se. Id.*[2] 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 (sic) 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… Accordingly, we find it appropriate to base Franklin's (sic) and Black Mesa's eligibility under PURPA on its primary energy source --- solar.[3]

To parse the operative language from the Idaho Commission's decision is to highlight its active and blatant determination of the QF status of the Franklin projects:

> We must…determine their eligibility under PURPA…. [and] we base Franklin's (sic) and Black Mesa's eligibility under PURPA on … solar[4]

When given the opportunity to reconsider its original order the IPUC 'doubled down' on its intrusion into FERC's exclusive authority to make QF eligibility determinations:

> In the Final Order [33785, DKT no. 4-6], we … looked to the primary energy source of Franklin's (sic) battery storage QFs to determine the projects' eligibility to particular avoided cost rates and contract terms.

The IPUC's active determination of Franklins' "eligibility under PURPA" contradicts Idaho Power's assertion that the IPUC "assume[d] Plaintiffs' QF status."[5] Had the IPUC actually "assumed" the QF status of the Franklin projects it would have paid deference to FERC's

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[2] Citing to *Luz Dev. and Fin. Corp.*, 51 FERC ¶ 61,078.
[3] Idaho Power Original Order no. 33785 at pp. 11 -12. DKT. no. 4-6. Emphasis provided.
[4] *Id.*
[5] Idaho Power Response at p. 1.

unequivocal holding in *Luz* that "energy storage facilities. . . are a renewable resource for purposes of QF certification"[6] and to the Ninth Circuit's decision in *Indep. Energy Prods. Ass'n, Inc. v. Cal. Publ. Utils. Comm'n,* 36 F.3d 848, 859 (1994) that "the state may not . . . intrude into the Commission's [FERC] exclusive jurisdiction to make QF status determinations."

FERC, thus, has exclusive jurisdiction to determine QF status, including fuel input/usage standards. As a result, the Idaho Commission's decisions were made without jurisdiction to do so. For this reason alone, and for the reasons addressed in Plaintiff's Response Brief to Idaho Power's Motion for Summary Judgment, the Power Company's res judicata, collateral estoppel, statute of limitations arguments must all fail.

III.
"AS-APPLIED" VS. IMPLEMENTED – A.K.A. ONE CANNOT APPLY AN IMPLEMENTATION PLAN THAT DOES NOT EXIST

A. Overview of the "as-applied" vs. Implemented Analysis

There is no single definition of how to distinguish the difference between an "as-applied" action of a state PUC or an implementation action. Regardless, however, the distinction between an "as-applied" claim and an implementation claim is jurisdictional under PURPA. That is an "as-applied" claim is properly brought in state court, while an implementation claim is properly brought in federal court. The primary distinguishing factors in deciding whether a challenge to a state PUC's action is an "as-applied" challenge is whether the decision is fact-based (e.g. the collection and calculation of avoided cost data) rather than policy based (such as determining the appropriate avoided cost methodologies or general policies and guidelines), *Tenn. Power Co.,* 77 FERC ¶ 61,125 (1996). Strong evidence of a policy-based implementation action is one that applies to multiple, or an entire class of QFs. Whereas an "as-applied" action typically will only

[6] *Luz* supra at pp. 10 – 11.

be applicable to a single QF. That is an "as-applied" action is one when "the state agency's …implementation plan …applies to or affects an individual petitioner." *Power Res. Group v. Klein,* 422 F.3d 231, 235 (5th Cir. 2005). Here, of course, the IPUC's decision is designed to affect an entire class of QFs, to wit: all battery storage QFs.

B. Moving the Goal Posts

It is initially important to recall that this entire case was initiated by Idaho Power for the sole purpose of altering the status quo established by the IPUC's implementation of PURPA. Prior to Idaho Power's Petition for a Declaratory Ruling, the IPUC had, through a series of individual orders,[7] implemented PURPA for two broad classes of QF: (1) wind/solar QFs and (2) "all other" QFs, with the former entitled to just two-year contracts and the latter entitled to twenty-year contracts.

Relying on the IPUC's then existing implementation plan, Plaintiffs sought twenty-year contracts for their battery storage QFs from the Power Company. Instead of complying with the PUC's implementation plan by tendering twenty-year contracts for these "other" than wind/solar QFs, Idaho Power sought to change the IPUC's implementation plan by lodging its Petition for Declaratory Order with the Commission. Thus, as Franklin approached the goal line (tendered twenty-year contracts) and after having complied with all IPUC and Power Company requirements for obtaining twenty-year contracts, the IPUC moved the goal posts out of reach. It did so by changing its implementation plan from all-QFs-other-than-wind-or-solar-are-entitled-to-twenty-year-contracts to all-QFs-other-than-wind-or-solar-*or-battery-storage-QFs* are entitled to twenty-year contracts. The Commission moved the goal posts because Idaho Power, not satisfied with

[7] The IPUC has never formally promulgated rules implementing PURPA. Rather, it implements PURPA on case by case, decision by decision basis, relying on the precedential effect of its orders over time to develop its implementation 'plan' or 'scheme.'

the status quo under the IPUC's then existing implementation plan, sought to amend the IPUC's implementation plan by moving battery storage QFs from the "all other category" and expanding the wind/solar category to now read wind/solar/battery storage QFs. Changing the rules in the middle of the game is not only unfair and illegal – it can only be accomplished by "implementing" new/amended regimens implementing PURPA. An application (e.g. "as-applied") of the IPUC's implementation plan would have resulted in the Power Company tendering twenty-year contracts to the Franklin Projects. In the regulatory arena this (moving the goal posts) is also known as 'retroactive ratemaking' and the practice is universally prohibited by public utility laws across the country, Idaho included.[8]

C. Idaho Power initiated the proceeding below as an implementation proceeding

Idaho Power's Petition to the IPUC for a Declaratory Order, (the initiating pleading in this case) made two important concessions that debunk its claims that the IPUC was simply engaged in an "as-applied" exercise. In its Petition for Declaratory Order before the IPUC, Idaho Power admitted that it was asking for a new implementation plan for battery storage facilities. Second, it requested that its proposed new implementation plan apply to an entire class of QFs, as opposed to a single QF. In fact, the Power Company cited the *large number* of energy storage facilities as a primary reason for the IPUC to amend its implementation of PURPA to include battery storage QFs in the "other" category. Idaho Power's Petition for Declaratory Ruling to the IPUC pled that:

> Idaho Power has now received, in a little over two weeks' time, *multiple requests* for a total of 148 MW from proposed battery storage facilities and disagrees with the Proposed Battery Storage Facilities as to the *proper application of the Commission's implementation of PURPA* with regard to published avoided cost rate eligibility and the maximum contract term applicable to such projects.[9]

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[8] "A pervasive and fundamental rule underlying the utility rate-making process is that rates are exclusively prospective in application…" *Pub. Serv. Comm'n v. Diamond State Tel. Co.*, 468 A.2d 1285 (Del. 1983). See also *Utah Power & Light v. IPUC*, 107 Idaho 47 (1984).

[9] Idaho Petition for Declaratory Order at p. 7. Dkt. no. 38-7 at p. 20. Emphasis provided.

Idaho Power's request clearly did not apply to a single, or even a couple QFs. Idaho Power's request to change the Commission's implementation plan was, in fact, designed to be generally applicable to "multiple" QFs in the broad class of "battery storage facilities." In addition, the Power Company's use of the phrase "proper application of the Commission's implementation" is a misnomer in that it was actually asking the Commission to change its implementation plan which heretofore was clear and unambiguous in its "application" to either wind/solar QFs or "all other" QFs.

Additional evidence that the Power Company was seeking an implementation order from the IPUC and not an application of an existing plan is its request that the Idaho PUC, "extend the 100 kW published rate cap to battery storage QFs."[10] Of course 'extending' (e.g. broadening) an existing rule (the 100 kW rate cap) to an entirely new (and heretofore unknown to the IPUC) class of QFs is not, by definition, an application of an existing rule (a.k.a. not an "as-applied" action.) Thus, the Power Company's claim that the IPUC was merely applying an existing implementation plan must fail.

D. Idaho Power is Judicially Estopped From Making its "as-applied" Argument Because it Initiated this Controversy by Asking the IPUC to **Implement** PURPA for Battery Storage Facilities

Idaho Power is playing fast and loose with the Court by now arguing the Idaho Commission was merely engaged in an "as-applied" analysis. The Power Company initiated this case at the IPUC by arguing just the opposite. Thus, the concept of judicial estoppel precludes Idaho Power from arguing here against its own position in the lower tribunal. In *Russell v. Rolfs,* 893 F.2d 1033 (9th Cir. 1990), Judge Trott outlined the basic parameters of judicial estoppel:

[10] *Id.* at p. 13. Dkt no. 38-7 at p. 26

> 'The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, in invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. *See* 1B *Moore's Federal Practice* para.405[8], at 238-42 (2d Ed. 1988).

The distinction between an "as-applied" vs. an implementation decision is an important one in that federal district courts have exclusive jurisdiction over PURPA implementation challenges and state courts have exclusive jurisdiction over PURPA "as-applied" challenges.[11] Idaho Power now asserts this matter belongs in state court based on its representation to the Court that the IPUC engaged in an "as-applied" analysis, yet its Petition for Declaratory Order before the IPUC argued just the opposite. Idaho Power initiated this entire proceeding by petitioning the Idaho Commission to issue a declaratory order *implementing PURPA* for battery storage facilities.

In its Petition for Declaratory Order that initiated this docket before the IPUC, Idaho Power makes multiple references to the fact that it was *requesting the IPUC to implement PURPA* for the energy storage class of QFs. First, Idaho Power admits that the Commission had *never* implemented any PURPA policy with respect to battery storage facilities:

> The status of and applicability of the Commission's implementation of PURPA with regard to proposed battery storage facilities was not considered and/or addressed in the Commission's determinations as to published rate eligibility cap, differentiation of applicable avoided cost rates to different generation technologies, or its determinations regarding other contractual terms and conditions, such as contract term.

In short, Idaho Power asserted (admitted) that the Idaho Commission had no implementation plan in place for battery storage QFs. In addition, Idaho Power asserted to the Idaho Commission that:

> [it] seeks a determination from the Commission as to the proper avoided cost rates, as well as the proper contractual terms and conditions applicable to the Proposed Battery Storage Facilities Schedule 73 requests for PURPA pricing and contracts.[12]

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[11] *Exelon Wind, I, LLC v. Nelson,* 766 F.3d 380, 388 (5th Cir. 2014).
[12] Idaho Power Petition for Declaratory Order at p. 5. Dkt. no. 38-7 at 19.

The determination of proper avoided cost rates, contractual term and contractual conditions are quintessentially implementation functions, as applied claims are found when the Commission "failed to adhere to its own implementation plans."[13] The Idaho Commission had already implemented a plan for wind/solar and "all other" QFs, but clearly had no implementation plan specific to battery storage QFs. Thus, an "as-applied" request would not have requested the IPUC make an *initial* determination as to avoided cost rates or contract term or contract conditions. An "as-applied" request would have simply asked the Commission to impose its already implemented avoided cost rates, contract term and contract conditions, e.g. "adhere to its implementation plans." More damaging, however, for Idaho Power's position is that it explicitly conceded (quoted above) in its petition to the IPUC that the Commission had *never* implemented PURPA for energy storage QFs. Thus, Idaho Power is judicially estopped from asserting now that the Idaho Commission was engaged in an "as-applied" exercise rather than responding to its request to implement a new regime for battery storage QFs.

IV.
IDAHO POWER FAILS TO GRASP THE CONCEPT OF PREEMPTION AND MISSTATES THE BLACK LETTER OF THE APPLICABLE LEGAL STANDARD

Franklins' Brief succinctly observed that it is physically impossible to comply with the IPUC's new implementation plan and FERC's definition of an energy storage QF. According to the IPUC, an energy storage QF using solar energy for 51% of its energy inputs will be deemed a solar QF for PURPA implementation purposes. However, energy storage facilities, such as the Franklin QFs, have the ability, and are specifically allowed by FERC, to vary the sources of renewable energy inputs. Thus, one day the primary energy input may be solar and the next day the primary energy input may be wind or geothermal or biomass or hydro. Each change in the

[13] *Occidental Chem Corp. v. La. PSC,* 494 F.Supp.2d 401, 410 (MD LA 2007)

primary energy input, according to the Idaho implementation scheme will result in a potentially different avoided cost rate and different contract term and different contract conditions. Pursuant to the new IPUC implementation scheme, one day Franklins' QFs may be entitled to a twenty-year contract (primary energy input biomass for example) and the next day they will be entitled to a two-year contract (primary energy input wind for example) and the following day they may revert to a twenty-year contract (primary energy input waste energy for example). Clearly an absurd result on its face, but hardly an extreme example of the real-world operational ability of an energy storage QF. FERC has unequivocally ruled that the magnitude and variety of renewable energy inputs to a battery storage QF is *irrelevant* to its eligibility as a QF under PURPA.[14] Thus, the Idaho implementation scheme is impossibly at odds with the Federal definition of an energy storage QF which definition is completely *indifferent as to the magnitude* of any individual renewable energy input to the energy storage QF.

Idaho Power's Response does not address this impossibility hurdle. Instead, it argues that the concept of Federal Preemption does not apply to orders of the IPUC or apparently even to FERC orders either. Idaho Power complains that, "Plaintiffs do not challenge a state law; instead, they challenge the IPUC's decision …"[15] and that "Plaintiffs do not identify a single federal law that is in conflict with the IPUC's decision…"[16] The Power Company's arguments are simply wrong. PUC orders (not just "state *law*") that conflict with FERC orders (not just federal *law*) are subject to federal preemption.[17]

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[14] *Luz, supra at pp 10 – 11.*
[15] Idaho Power Response at p. 20.
[16] *Id.*
[17] *Hughes v. Talen Energy Marketing, LLC,* 136 S. Ct. 1288, 1297, 194 L. Ed 2d 414 (2016), *Coalition for Competitive Electricity v. Zibelman,* 272 F. Supp. 3d 554, 567-568 (SD NY 2017).

V. FRANKLIN DOES NOT ASSERT A *FLAWED APPLICATION* OF THE IPUC's IMPLEMENTATION OF PURPA – RATHER IT ASSERTS A FLAWED IMPLEMENTATION OF PURPA

Idaho Power wrongly asserts that "the gravamen of Plaintiff's challenge is that the IPUC improperly applied its own PURPA implementation plan."[18] Plaintiff's would have been satisfied had the Idaho Commission *applied* its implementation plain that was in existence as of the time the plaintiffs made their request for PURPA contracts with Idaho Power. The Commission in response to Idaho Power's Petition for Declaratory Order, however, devised a new implementation plan that is fatally flawed in that it attempts to place the IPUC in the shoes of FERC by making QF eligibility determinations under PURPA and it denies the very existence of battery storage QFs. Thus, Idaho Power's assertion (cited above) is misleading at best. The text of the Franklin's complaint at paragraph 13, reproduced below, is clear on this point:

> The Defendant's ruling is based on their finding that that (sic) energy storage systems are not distinct QFs but, instead are defined by the nature of the source of their energy input. This ruling contravenes an express FERC ruling on the nature of energy storage QFs. The Defendant's ruling deprives the Franklin Energy Storage projects of their right to the Idaho Commission's more favorable contract terms and rates available to all "other" QFs and instead restricts them to the less favorable contract terms and rates that are available, under the Idaho Commission's implementation of PURPA, to just solar and wind QFs.

The implementation action at issue here is the Commission's improper classification of all battery storage facilities rather its acceptance of battery storage facilities at face value pursuant to their status as FERC certified energy storage QFs. Had the Commission properly implemented PURPA by deferring to FERC's jurisdiction to classify QFs, the *result* would have been an application of the Commission's pre-existing implementation plan. However, the Idaho Commission did not improperly apply its existing implementation plan – it created a new implementation plan that improperly classifies the Franklin Energy Storage QFs as solar QFs.

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[18] Idaho Power Response at p. 15. Dkt no. 38 at p. 20.

DATED this 30th day of November 2018.

/s/ Robert C. Huntley, Esq

/s/ Peter J. Richardson, Esq.

Attorneys for Plaintiffs

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.

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