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

PLAINTIFFS' RESPONSE BRIEF TO IDAHO POWER'S MOTION TO DISMISS

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I.
INTRODUCTION

Franklin Energy Storage Plaintiffs respectfully lodge this Response Brief to Idaho Power's Motion to Dismiss for lack of subject matter jurisdiction. Idaho Power argues only two issues in support of its Motion to Dismiss. It first argues that the Plaintiffs' Complaint should be dismissed because it is an "as-applied" challenge beginning on page 10. It also argues that Plaintiffs' have failed to exhaust their administrative remedies (based on their statute of limitations argument). Plaintiffs have addressed the second argument fully in their Response Brief to Idaho Power's Motion for Summary Judgment and in their Reply Brief to Idaho Power's Response to Plaintiff's Motion for Summary Judgment. Because those arguments are squarely before the court, they will not be repeated here. The only argument yet to be fully addressed then, is the "as-applied" argument, which like Idaho Power's statute of limitations argument is fatally flawed.

II.
THE IDAHO COMMISSION IMPLEMENTS PURPA BY ORDER AND NOT BY PROMULGATING REGULATIONS

Idaho Power appears to place great legal significance in the fact that the Plaintiffs are challenging implementation *orders* (as opposed to implementation *rules*) issued by the Idaho Commission. It suggests that, because Plaintiffs are not challenging an implementation plan adopted by a promulgated rule, that Plaintiffs' claims are therefore as-applied claims. For instance, at p. 11 Idaho Power asserts: "As-applied claims include questions on whether a specific state agency's *order,* as opposed to a particular state *rule,* properly implemented FERC's regulations and whether a state agency properly interpreted its own rules.[1]" Also on page 12, Idaho Power

[1] Idaho Power Memorandum in Support of Motion to Dismiss at p. 11. *Emphasis in original.* Herein "Memorandum."

concludes, based on its 'rule vs. order' understanding, that, "it is beyond reproach that Plaintiffs' challenge is not an implementation challenge because they are not arguing that the IPUC 'promulgated regulations which are inconsistent with or contrary to [FERC's] regulations.[2]'" Idaho Power neglects to inform the Court that the IPUC has never promulgated any rules or regulations implementing PURPA. There are simply NO Idaho rules implementing PURPA. Rather than implementing PURPA via rules, as it is allowed to do under PURPA, the Idaho Commission implements PURPA on an ad hoc order-by-order and case-by-case basis. It is well settled that a state commission can comply with PURPA "by resolving disputes on a case-by-case basis, or taking any other action reasonably designed to give effect to FERC's rules." *FERC v. Mississippi,* 456 U.S. 742, 751, 102 S. Ct. 2126, 72 L. Ed 2d 532 (1982). Thus, it is of no moment that Plaintiffs are alleging the IPUC's failure to implement PURPA is the result of its extra-jurisdictional *orders* rather than its non-existent *rules*. A state commission can therefore fail to implement PURPA by issuing flawed orders just as easily as it can fail to implement PURPA by promulgating flawed regulations.

III.
"WIND OR SOLAR" VS. "ALL OTHER QFs"

The foundation of the Power Company's argument is that Franklin is asserting an "as-applied" claim (that would not be jurisdictional to this Court) as opposed to an implementation claim (that is jurisdictional to this Court). Idaho Power sums up this argument thusly:

> Plaintiffs do not claim that the IPUC's two methods for calculating avoided costs are unlawful, or that the IPUC's eligibility caps for solar and wind QFs, on the one hand, and all "other" QFs, on the other hand, are unlawful. Instead, Plaintiffs claim that the IPUC, in ruling upon Idaho Power's Petition, failed to adhere to its *own* implementation plan in

[2] *Id.* at p. 12. Citing *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utilities Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304, 61,644 (1983)

its dealings with Plaintiffs by refusing to grant them the contract rate and terms applicable to "other" QFs.[3]

Idaho Power either fails to understand, or simply ignores, the essence of the Commission's decision at issue in this proceeding. There are two distinct implementation plans in play – the original plan and the new implementation plan. To clear up Idaho Power's misunderstanding each is explained below.

A. The Original Implementation Plan

As relevant here, the Idaho Commission originally implemented PURPA (via several orders – not rules) by dividing all QFs into two categories. The first category the Idaho Commission devised is applicable to all wind and solar QFs larger than 100 kW.[4] This category of QFs is limited to two-year contracts and negotiated ("IRP"-calculated) avoided cost rates.[5] The other (second) category is a catch-all category that requires utilities to offer twenty-year contracts at published rates for "all other" (other than wind or solar) QFs smaller than 10,000 kw.[6]

This is the extent of the Idaho Commission's original implementation plan (as relevant here): *wind and solar QFs are entitled to two-year contracts and negotiated rates while all other QFs are entitled to twenty-year contracts at published rates*. There are no embellishments or subtle nuances to this plan. It is complete, and it is understandable. Plaintiffs do not, and have not, challenged this original implementation plan. As Idaho Power notes, Plaintiffs do not assert that this original implementation plan suffers from any legal flaws. Indeed, the Plaintiffs would have been satisfied had the Idaho Commission merely applied this implementation plan in response

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[3] *Id.* a p. 13.

[4] Plaintiffs' projects are all larger than this 100 kw threshold.
[5] IPUC Order No. 32697. Dkt. no. 4-14.
[6] Plaintiff's projects are all smaller than 10,000 kw – which is measured on a 10,000 average monthly basis, the details of which are not relevant to this analysis.

to Idaho Power's Petition for Declaratory Order. However, the Idaho Commission did NOT apply its original implementation plan to the Franklin QFs. Rather than simply living with the natural consequences of their original plan, the Defendants chose to adopt a new and fundamentally different implementation plan.

B. The New Implementation Plan

Idaho Power upset the Commission's apple cart by asking it to change the original implementation plan to address how battery storage QFs should be treated for purposes of determining the appropriate methodology for calculating avoided cost rates, determining contract term (length), and determining the other essential contact terms because the original plan clearly and unequivocally provided that "all other" (that is other, than wind or solar) QFs are entitled to twenty-year contacts at published rates.

Initially, in its Petition for Declaratory Order, Idaho Power explicitly acknowledged the Commission's original implementation plan and summarized its operative provisions as follows:

> After separate lengthy and contested proceedings, the Commission determined as part of its *implementation of PURPA* for the state of Idaho: (1) the published, or standard, avoided cost rate eligibility cap for wind and solar QFs is set at 100 kW, consistent with 18 C.F.R. 292.304(c), Order no. 32262; and (2) the maximum contract term for proposed QF projects that are larger than the published rate eligibility cap is two years. The published rate eligibility cap for all other generation types remains at the previously established 10 average megawatts ("aMW") on a monthly basis and all proposed projects that are eligible for published rates have the previously established maximum contract term of 20 years available to them.[7]

Thus, Idaho Power conceded the fact that the Idaho Commission, as "part of its implementation of PURPA," had created the wind/solar vs "all other" QF dichotomy. This implementation plan was the status quo at the time Idaho Power filed its Petition for a Declaratory ruling at the IPUC.

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[7] Idaho Power Petition for Declaratory Order at p. 2. Emphasis provided. Dkt. No. 7-5 at p. 55.

Not satisfied with the results of Franklins' requested application of the Commission's *original implementation plan*, Idaho Power proposed an entirely new implementation plan for energy storage QFs. According to Idaho Power's Petition for Declaratory ruling:

> Idaho Power seeks a declaratory ruling from the Commission that proposed battery storage facilities over 100 kW are eligible for negotiated avoided cost rates determined by the incremental cost Integrated Resource Plan ("IRP") methodology and a maximum, contract term of two years – and that battery storage facilities up to a maximum nameplate capacity of 100 kW are entitled to published avoided cost rates and a 20-year maximum contract term.

This is not a request to apply the simple wind/solar vs. "all other" dichotomy which would have been an "as-applied" activity. It is, rather, a request for the Commission to create a new plan for implementing PURPA for a class of QFs (energy storage) that is not contemplated or even mentioned in the original implementation plan. The determination of what avoided cost "methodology" is applicable to an entire class of QFs and the determination of essential contracting provisions applicable to an entire class of QFs are quintessential implementation questions.

That is, Idaho Power sought *not to apply* the Idaho Commission's original implementation plan rather but to fundamentally change that plan for the purpose of preventing Franklin from securing twenty-year contracts at published avoided cost rates as would have occurred under the original implementation plan. Thus, Idaho Power mistakenly asserts that Franklin complains, "the IPUC, in ruling upon Idaho Power's Petition [for Declaratory Order quoted above] failed to adhere to its *own* implementation plan.[8]" Franklin would have been happy had the IPUC applied its now abandoned implementation plan. However, the IPUC abandoned that plan in favor of a new plan that is facially unlawful in that it vests with the IPUC the alleged authority to make eligibility

[8] Idaho Power Memorandum at p. 13. Emphasis in original.

determinations under PURPA.[9] Allegations that an implementation plan is unlawful (as Franklin asserts herein) are, by definition implementation claims and not as-applied claims. Simply put, Implementation claims are claims alleging that a state commission has failed to implement PURPA, either by not promulgating rules (or orders) under Section 210(f) or by promulgating rules (or orders) that do not comply with federal law. See, e.g., *Power Res. Group, Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.2d 231, 235 (5th Cir. 2005); *Indep. Energy Producers Assn'n v. Cal. P.U.C.*, 36 F.3d 848, 856 (9th Cir. 1994).

IV.
CONCLUSION

Based upon the foregoing, Franklin respectfully requests that this Court deny Idaho Power's Motion to Dismiss.

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:

Brandon Karpen brandon.karpen@puc.idaho.gov

Scott Zanzig scott.zanzig@ag.idaho.gov

[9] This point is fully briefed in Plaintiff's Reply to Idaho Power's Response to Plaintiffs' Motion for Summary Judgment and in its Response to Idaho Power's Motion for Summary Judgment.

Steven B. Anderson sba@aswblaw.com

Wade L. Woodard wlw@aswblaw.com

Donovan E. Walker dwalker@idahopower.com