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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' RESPONSE BRIEF TO DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT

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I
INTRODUCTION

Plaintiff's hereby respectfully submit their Response Brief to Defendant's Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Judgment. Defendants' assert arguments in support of their Motion/Cross Motion, which have all been addressed in Plaintiff's other Responses and Replies filed contemporaneously with this Response. In respect to the Court's time, our Responses/Replies will not be repeated here. Rather, Plaintiffs will only address new or revised arguments presented by the Defendants' Motion/Cross Motion.

II
THE COURT'S SUBJECT MATTER JURISDICTION HAS BEEN WELL ESTABLISHED

Defendants' initial argument (beginning on page 12 of their Memorandum) asserts the Court does not have jurisdiction over Plaintiffs' Complaint because the Commission's order is an "as-applied" claim. This ""as-applied" vs. implementation' issue is fully briefed in Plaintiffs' Response Brief to Idaho Power's Motion to Dismiss and Reply Brief to Idaho Power's Response to Plaintiff's Motion to Dismiss. Plaintiffs' arguments there will not be repeated here. As established therein, the lack of IPUC subject matter jurisdiction is also dispositive of statute of limitations arguments.

III.
JOHNSON ACT EQUIVOCATION

In their Motion/Cross Motion Defendants raise the Johnson Act, in a footnote, as a possible defense.[1] They raised the same argument in their Response to our Motion for Summary Judgment.[2] However, in the instant pleading, (Memorandum in Support of Motion/Cross Motion), the Defendants equivocate as to the applicability of the Johnson Act. In their Response to our Motion for Summary Judgment, Defendants boldly asserted that the Johnson Act is "merely one of many fatal flaws infecting Plaintiffs" (sic) Amended Complaint."[3] However, in the Memorandum at issue here, they tentatively assert only that the Johnson Act "may bar this .. action" and that "Defendants will reserve fully briefing the question of the Johnson Act's authority over this action" to some future proceeding.[4] Despite taking a raincheck on "fully briefing the question," Defendants do cite the Court to some cases but, once again, they apparently take care to avoid reference to the many, unanimous circuit court decisions that have unequivocally declared that the Johnson Act is inapplicable to PURPA enforcement actions.[5] For the reasons set forth in Plaintiffs' Reply to Defendants' Response (cited below) and because Defendants have decided not to "fully brief" their position, the Court should disregard further consideration of the Johnson Act.

IV.
AS-APPLIED vs. IMPLEMENTATION

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[1] Defendants' Memorandum in Support of Motion/Cross Motion at fn 7, pp 12 -13. Dkt. no. 41-1.

[2] Defendants' Memorandum in Response to Plaintiff's Motion for Summary Judgment at pp. 3 – 4.

[3] *Id.* at p. 4.

[4] *Id.*

[5] *See* Franklin's Reply Brief to Defendants' Response to Franklin's Motion for Summary Judgment a pp. 2 – 4.

That the IPUC was implementing a new plan to deal with battery storage QFs is fully briefed in Plaintiffs' Reply Brief to Idaho Power's Response to Plaintiffs' Motion for Summary Judgement and in Plaintiffs' Response to Idaho Power's Motion for Summary Judgment. The PUC Commissioners' Brief here, however asserts as part of its "as-applied" claim that:

> It is well settled that before an as-applied challenge is ripe the appellant must have obtained a final decision from the entity charged with implementing the regulation and must have sought compensation through state remedies unless doing so would be futile. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson city,* 473 U.S. 172 at 194-95 (1985)[6]

Plaintiffs' here are not seeking compensation. In addition, however, the *Williamson* decision deals with the potential taking of property without just compensation due to restrictive planning and zoning regulations – a decision and controversy totally unrelated to whether the Idaho Commission may usurp FERC's exclusive jurisdiction in making QF eligibility determinations under PURPA.

Immediately following Defendants' unusual citation to *Williamson,* Defendants then build a strained bridge from that planning-and-zoning-just-compensation-puzzlement by next making this inaccurate assertion:

> More particularly, Plaintiffs' Complaint attacks the PUC's regulation of standard rates available to particular QFs larger than 100 kW. *See* Complaint, ¶ 46.

Plaintiffs have never "attacked the PUC's regulation of standard rates available to particular QFs." What Plaintiffs do challenge is the PUC's improper classification of an entire class of QFs (energy storage QFs) based on their primary energy input. By implementing PURPA in such a way as to deny energy storage QFs their status as distinct QFs, the result is the application of a different set of standard rates that were set by the Idaho Commission. Plaintiffs simply do not attack the Idaho

[6] 105 S.Ct. 3108, 87 L. Ed. 2d 126.

Commissions "regulation of standard rates available to particular QFs." The paragraph from Plaintiff's Complaint cited by the Defendants' (¶46) makes no such claim. It is, in fact, no more than a simple abbreviated summary of the IPUC's PURPA implementation plan that was in existence before the Commission adopted its new implementation plan dealing with energy storage QFs:

> 46. The Idaho Commission has established standard-offer avoided cost rates, with a contract term of up to twenty-years for all QFs (other than solar or wind QFs) if those non-wind or non-solar QFs have an electrical generating capacity of ten average monthly megawatts (10aMW) or less. *See* IPUC Order Nos. 33357 and 33419. For wind and solar QFs, the Idaho Commission allows wind and solar QFs of up to 100 kW [footnote omitted] similar twenty-year contracts at published rates. [footnote omitted] However, it limits the availability of its published rate 'standard offer' contracts to just two years for solar and wind QFs that are larger than 100 kW. The Idaho Commission ruled that:
>
> > After careful consideration, the Commission [Idaho PUC] ultimately determined that it was appropriate to maintain the 100 kW eligibility cap for published avoided cost rate for wind and solar QFs.
>
> *See* IPUC Order No. 32697, at p. 3.
> And:
>
> > This Commission [Idaho PUC] is confident that, with other changes to the avoided cost methodologies incorporated in the Order, changing eligibility from 10 aMW for resources other then wind and Solar is unnecessary at this time. We find that a 10 aMW eligibility cap for access to published avoided cost rates for resources other than wind and solar is appropriate…
>
> *See* IPUC Order No. 32697, at p. 15
> Finally:
>
> > We 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.
>
> *See* IPUC Order No. 32176 at p. 9, (parenthetical in original.)

Apparently, the Defendants have confused the concepts of QF status and the IPUC's avoided cost rate setting function under PURPA. The former is exclusively FERC's domain while the latter is a function delegated to the states under PURPA

The Idaho Commission's original implementation plan depended on the classification FERC gives to different classes of QF (solar/wind or "all other" classes of QF). The PUC does not have the authority to determine who is, or in not, in each class of QF – that role is FERC's exclusive duty. Here, of course, the IPUC has intruded into that prohibited arena by denying the very existence of the energy storage class of QF. They do so despite the fact that FERC has explicitly recognized that energy storage QFs constitute a distinct class of QFs that is separate and apart from the energy input to the storage system. This fact is highlighted by the selective quote from *Luz* employed by the Defendants. Omitted from all quotes from *Luz* by the Defendants and the Intervenor (Idaho Power) is the operative finding of that decision, to wit:

> In sum, energy storage facilities such as the proposed Luz battery system are a renewable resource for purposes of QF certification.[7]

It is noteworthy for this analysis that FERC did not rule that energy storage facilities are QFs based on the primary energy input to the storage system. In fact, FERC's ruling is agnostic as to the energy input to the storage system -- as long as the energy input is from a renewable energy source.[8] This, of course, is in direct conflict with the Idaho Commission's determination that the dominant energy input to the storage system determines the facility's eligibility for benefits conferred by PURPA, e.g. for purposes of QF certification. Thus, according to the Idaho Commission, a battery storage system that uses solar as its dominant energy input is not an energy storage QF for purposes of QF certification, but rather it is a solar QF. This conflation of the primary energy input with the nature of the QF, in addition to being preempted by PURPA, raises

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[7] *Luz Development and Finance Corporation* 51 FERC ¶ 61,078 at p. 9, (1990).

[8] *See* Plaintiff's Response Brief to Idaho Power's Motion for Summary Judgment and Plaintiff's Reply Brief to Idaho Power's Response to Franklin's Motion for Summary Judgment.

impossibility concerns, both legal and physical. It is *physically* impossible to reconcile the IPUC's determination of the primary energy input with the fact that primary energy inputs have the very real potential to vary over time and in magnitude for this class of QF. For example, one day (or even hour or minute) the primary renewable input may be solar but the next day/hour/minute it may be wind or geothermal or biomass or waste. And, of course, it is *legally* impossible to reconcile because the Idaho Commission's order is in direct conflict with FERC's *Luz* decision quoted above.

V.
CONCLUSION

For the reasons stated herein and for the reasons stated in Plaintiffs' other Responses and Replies filed contemporaneously herewith, the Court is respectfully requested to deny the Plaintiffs' Motion to Dismiss or in the Alternative 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.

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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