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**IN THE 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

**DEFENDANT-INTERVENOR'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

**DEFENDANT-INTERVENOR'S MEMORANDUM IN SUPPORT OF MOTION FOR
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Defendant-Intervenor Idaho Power Company (“Idaho Power”), by and through its counsel of record, hereby respectfully submits this Memorandum in Support of Motion for Summary Judgment.

I. INTRODUCTION

Plaintiffs’ entire case is based upon a fundamentally flawed and blatantly erroneous claim that the allegedly offending party, the Idaho Public Utilities Commission (“IPUC”), has repeatedly and explicitly disavowed. According to Plaintiffs, in ruling upon Idaho Power’s Petition for Declaratory Relief (“Petition”) regarding the rates and terms of any contracts it must enter into with Plaintiffs under the Public Utility Regulatory Policies Act of 1978 (“PURPA”), the IPUC determined Plaintiffs’ Qualifying Facility (“QF”) status, thereby intruding upon the exclusive jurisdiction of the Federal Energy Regulatory Commission (“FERC”). Contrary to Plaintiffs’ claim, not only did Idaho Power assume Plaintiffs’ QF status for purposes of its Petition, but so too did the IPUC in ruling upon that Petition. In fact, the IPUC expressly stated as such in both orders at issue in this matter and described Plaintiffs’ argument to the contrary as “a frivolous effort to contrive a legal basis for reconsideration.” (Ex. 12, p. 3.¹) Therefore, because the IPUC did not determine Plaintiffs’ QF status, their entire operative First Amended Complaint fails. It also fails because it, and the claim asserted therein, is time-barred and constitutes an improper collateral attack on the IPUC’s final orders that have preclusive effect. Consequently, because there are no material facts that are in dispute and Idaho Power is entitled to summary judgment as a matter of law, its instant motion must be granted.

¹ All exhibits cited to herein are attached to the Declaration of Donovan E. Walker (“Walker Decl.”) filed concurrently herewith.

II. SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS

Under Local Rule 7.1(b)(1), a party moving for summary judgment “shall file a separate statement of all material facts...which the moving party contends are not in dispute.” L.R. 7.1(b)(1). In accordance with this Court’s prior order, the parties worked together and submitted to this Court a Stipulated Statement of Facts and Legal Issues. (*See* Dkts. 22, 37.) All of the undisputed material facts pertinent to the instant motion are contained in the parties’ Stipulated Statement of Facts and Legal Issues and, therefore, Idaho Power respectfully directs this Court’s attention to that document, Docket 37, for use as Idaho Power’s statement of undisputed material facts under Local Rule 7.1(b)(1).

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts Regarding PURPA, FERC’s Regulations and the IPUC’s Implementation Thereof

Congress enacted PURPA “to reduce the dependence of electric utilities on foreign oil and natural gas and to control consumer costs.” *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 384 (5th Cir. 2014); *also FERC v. Mississippi*, 456 U.S. 742, 745 (1982) (“*Mississippi*”). To accomplish these goals, PURPA directs FERC to promulgate rules mandating that electric utilities purchase energy from cogeneration and small power production facilities, which are known as QFs. *Id.*; *also Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 67 (1st Cir. 2017); 16 U.S.C. § 824a-3(a), (b). Despite seeking to promote energy generation by QFs, Congress did not intend to do so at the expense of American consumers and, as such, PURPA strikes a balance between these two interests. *Exelon*, 766 F.3d at 384. For example, “PURPA requires utilities to purchase power generated by [QFs], but also mandates that the rates that utilities pay for such power ‘shall be just and reasonable to the electric consumers of the electric utility and in the public interest.’” *Id.* (citing 16 U.S.C. § 824a-3(a)(2), (b)(1)). Additionally, the rates utilities are to pay

QFs for their power cannot exceed the “incremental cost to the electric utility of alternative electric energy.” *Allco*, 875 F.3d at 67; 16 U.S.C. § 824a-3(b). PURPA defines “incremental cost” as “the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.” 16 U.S.C. § 824a-3(d). In accordance with PURPA’s directive, “FERC promulgated regulations requiring utilities to purchase electricity from QFs ‘at a rate equal to the utility’s full avoided cost.’” *Allco*, 875 F.3d at 67; 18 C.F.R. § 292.304(b)(2).

PURPA also requires state regulatory authorities to implement FERC’s rules. *Mississippi*, 456 U.S. at 751; *also* 16 U.S.C. § 824a-3(f). A state commission such as the IPUC can comply with its implementation obligations by “issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC’s rules.” *Id.* FERC provides state agencies “great latitude in determining the manner of implementation of [FERC’s] rules, provided that the manner chosen is reasonably designed to implement the requirements” of FERC’s regulations. *Exelon*, 766 F.3d at 385. Given this substantial latitude, FERC is “reluctant to second guess the state commission’s determinations.” *Cal. Pub. Utils. Comm’n*, 133 FERC ¶ 61,059, at P 24 (2010) (“*CPUC*”).

Under PURPA and FERC’s regulations, states are responsible for regulating and authorizing agreements under which a utility purchases energy from a QF, including “determin[ing] the specific parameters” of any such agreement. *Power Res. Grp. v. Pub. Util. Comm’n of Tex.*, 422 F.3d 231, 238 (5th Cir. 2005); *also Idaho Power Co. v. Idaho Pub. Utils. Comm’n*, 155 Idaho 780, 786-89 (2013). As part of this responsibility, states calculate the avoided cost rates, determine if and when a legally enforceable obligation is established and determine the length and terms of any agreement. *Id.*; *also Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 695

(D.C. Cir. 2017); *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 785-86 (1984); 18 C.F.R. § 292.304(c)(1), (2). With respect to determining avoided cost rates, one factor to be considered is “the terms of any contract including the duration of the obligation.” *CPUC*, 133 FERC ¶ 61,059, at P 23; *also* 18 C.F.R. § 292.304(e)(2)(iii). Also, avoided cost rates may “differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.” *Id.*; *also* 18 C.F.R. § 292.304(c)(3)(ii).

To date, FERC has only considered battery storage QFs in one decision, finding that:

[T]he 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. Since this energy is the primary energy source of the facility, it is necessary to look to the source of this energy as the ultimate primary energy source of the facility.

Luz Dev. & Fin. Corp., 51 FERC ¶ 61,078, at 61,171 (1990).

Idaho has implemented PURPA consistent with federal and state law. The IPUC has the authority and is the appropriate state forum to establish avoided cost rates, to set standard/published rate eligibility caps that exceed the 100 kilowatt (“kW”) minimum, to review and approve contracts and to resolve disputes between QFs and electric utilities. I.C. §§ 61-502, 61-503; *Idaho Power Co.*, 155 Idaho at 786-89; *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 816 (1992); *Empire Lumber Co. v. Wash. Water Power Co.*, 114 Idaho 191, 192 (1987); *Afton Energy*, 107 Idaho at 785-86. The IPUC has implemented PURPA by issuing general procedures and engaging in case-by-case analysis. *Rosebud Enters., Inc. v. Idaho Pub. Utils. Comm’n*, 128 Idaho 609, 615 (1996).

Of relevance, FERC’s regulations require state commissions to set “standard rates for purchases from [QFs] with a design capacity of 100 kilowatts or less,” and permit them to set

“standard rates for purchases from [QFs] with a design capacity of more than 100 kilowatts.” 18 C.F.R. § 292.304(c)(1), (2). Consistent with these regulations, the IPUC has established two methods for calculating avoided cost rates that depend upon the QF’s size: (1) the surrogate avoided resource (“SAR”) method; and (2) the integrated resource plan (“IRP”) method. *See* IPUC Order No. 32697, pp. 7-8 (2012). Similarly consistent with FERC’s regulation that standard rates “[m]ay differentiate among [QFs] using various technologies...,” 18 C.F.R. § 292.304(c)(3)(ii), the IPUC has set the eligibility cap for wind and solar QFs to access published avoided cost rates at 100 kilowatts (kW). IPUC Order No. 32697, p. 13. Published avoided cost rates are available for QFs of all other resource types with a design capacity of up to 10 average megawatts (aMW). *Id.* at pp. 7-8. The IPUC established these eligibility caps while investigating “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’” – by solar and wind QFs. IPUC Order No. 32262, p. 3 (2011).

As for the length of PURPA contracts, the IPUC has established 20-year terms for standard published rate contracts. *See* IPUC Order No. 33357, pp. 1, 7 (2015). For non-standard, IRP-based contracts, the IPUC found that a two-year term was reasonable, consistent with PURPA’s intent and FERC’s regulations and appropriately balanced the competing interests of protecting ratepayers and developing QF power generation. *Id.* at p. 25.

B. Facts Regarding Idaho Power

Idaho Power is a vertically integrated electric utility engaged in the business of generating, purchasing, transmitting and distributing electrical energy. Idaho Power is subject to the provisions of PURPA, as implemented by the rules and regulations of the IPUC and FERC.

C. Facts Regarding Plaintiffs' QF Applications

In January 2017, Plaintiffs each filed a Form 556, entitled "Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility" ("Form 556"), with FERC, in which they each self-certified themselves to be battery storage QFs. (Dkt. 37, Stipulated Fact ["SF"] 4; Exs. 1-4.) Pursuant to the Form 556s, each of Plaintiffs' battery storage facilities has a nameplate design capacity of 32,000 kW, is located on the same site and is being developed by Alternative Power Development, LLC. (Dkt. 37, SF 1; Exs. 1-5.) Additionally, the primary energy source for each battery storage facility is solar. (*Id.*) Specifically, not only does each QF's hourly generation output profile generally match the shape, timing and output of a solar generation profile, (Walker Decl., ¶ 17; Exs. 1-4, Generation Profile), but Plaintiffs' respective Form 556s describe each facility's power source as follows:

The energy storage system that comprises the energy storage Qualifying Facility is designed to, and will, receive 100% of its energy input from a combination of renewable energy sources such as wind, solar, biogas, biomas, etc. *The current initial design utilizes solar photovoltaic (PV) modules mounted to single-axis trackers to provide the electric energy input to the Qualifying Facility's battery storage system. The PV modules are planned to be connected in series/parallel combinations to solar inverters, rated approximately 2.5 MWac each, (subject to change).*

(Exs. 1-4, Form 556, p. 9, emphasis added.)

In late January 2017, Plaintiffs submitted to Idaho Power their respective Schedule 73 Qualifying Facility Energy Sales Agreement Request ("Schedule 73"), along with their Form 556 and a generation output profile. (Dkt. 37, SF 5; Exs. 1-4.) In their Schedule 73 applications, Plaintiffs each requested published avoided cost rates and a 20-year contract from Idaho Power. (*Id.*) Idaho Power responded to Plaintiffs' applications with a letter dated February 9, 2017. (Dkt. 37, SF 6; Ex. 6.) In that letter, Idaho Power notified Plaintiffs' counsel that the applications were

incomplete, identified several deficiencies and stated that “it does not appear that your proposed projects qualify for Rate 4 Option – Non-Levelized Non-Fueled Rates and a twenty (20) year contract term.” (Ex. 6.) Plaintiffs’ counsel responded by letter dated February 10, 2017, purporting to address the deficiencies in Plaintiffs’ applications and demanding that Idaho Power proffer 20-year, published avoided cost rates for each facility. (Dkt. 37, SF 7; Ex. 7.) By letter dated February 27, 2017, Idaho Power responded, stating that it did not agree that Plaintiffs were eligible for published rates and 20-year contracts and notifying Plaintiffs’ counsel that it had filed its Petition with the IPUC that same day. (Dkt. 37, SF 8; Ex. 8.)

D. Facts Regarding the Underlying Administrative Actions and Orders

On February 27, 2017, Idaho Power filed its Petition, in which it asked the IPUC for a determination of Plaintiffs’ proposed battery storage projects’ eligibility for published avoided cost rates and 20-year contract terms. (Dkt. 37, SF 9; Ex. 9.) In its Petition, Idaho Power argued that Plaintiffs’ proposed facilities’ eligibility for published rates should be limited to the 100kW available to solar QFs based upon the facilities’ fuel source. (Ex. 9.) Idaho Power did not dispute Plaintiffs’ QF self-certification as battery storage facilities and, in fact, it asked the IPUC to assume the validity of these self-certifications without prejudice to Idaho Power’s ability to separately challenge them before FERC, the proper authority to determine QF status. (*Id.* at p. 6.)

On July 13, 2017, the IPUC issued Order No. 33785, in which it issued its ruling on Idaho Power’s Petition. (Dkt. 37, SF 10; Ex. 10.) In this Order, the IPUC acknowledged that Idaho Power had not and was not challenging Plaintiffs’ asserted QF status and confirmed that “[t]he battery storage facilities’ QF status is a matter within FERC’s jurisdiction and is not at issue in this case.” (Ex. 10, pp. 3, 11.) In this Order, the IPUC also determined that, because the primary energy source of Plaintiffs’ battery storage facilities is solar and their design capacities exceed 100

kW, Plaintiffs are not entitled to published avoided cost rates and 20-year contracts and, instead, are entitled to negotiate two-year contracts that use Idaho's IRP-based avoided cost methodology, identical to solar and wind QFs. (*Id.* at pp. 12-13.)

On August 3, 2017, Plaintiffs filed a Petition for Reconsideration of Order No. 33785. (Dkt. 37, SF 11; Ex. 11.) Plaintiffs' only basis for error was that the IPUC improperly determined Plaintiffs' QF status. (Ex. 11.) On August 29, 2017, the IPUC issued Order No. 33858, in which it denied Plaintiffs' Petition for Reconsideration and stated in pertinent part as follows:

[Plaintiffs] assert[] that, contrary to *Indep. Energy Producers*, we determined the QF status of battery storage facilities in the Final Order. We did not. [Plaintiffs'] mischaracterization of our Final Order is a frivolous effort to contrive a legal basis for reconsideration.

(Dkt. 37, SF 12; Ex. 12, p. 3.)

Plaintiffs had 42 days from the date of Order No. 33858 to file a Notice of Appeal to the Idaho Supreme Court under Idaho Code § 61-627 and Idaho Appellate Rule 14(b). *See* I.C. § 61-627; I.A.R. 14(b). Plaintiffs, however, never filed any such appeal and, in fact, to date they have not appealed either IPUC Order No. 33785 or 33858 to any state court in Idaho. (Dkt. 37, SF 13.) Instead, on December 14, 2017, two months *after* the time within which Plaintiffs had to file an appeal of the IPUC's decision had expired, they filed a Petition for Declaratory Order and Petition for Enforcement Pursuant to Section 210(h) of the Public Utility Regulatory Policies Act of 1978 with FERC ("FERC Petition"). (Dkt. 37, SF 14; Ex. 13.) On February 15, 2018, FERC issued a Notice of Intent Not to Act, in which it declined to initiate an enforcement action pursuant to Section 210(h)(2)(A) of PURPA as requested by Plaintiffs. (Dkt. 37, SF 15, Ex. 14.)

In light of FERC's refusal to act, on May 30, 2018, Plaintiffs commenced the instant lawsuit against the IPUC by filing their Complaint for Violation of the Federal Power Act, the

Public Utilities Regulatory Policies Act of 1978, and Federal Energy Regulatory Commission Regulations. (Dkt. 1.) Two days later, on June 1, 2018, Plaintiffs filed their First Amended Complaint in which they substituted three IPUC's Commissioners in as party defendants. (Dkt. 2.) In their operative complaint, Plaintiffs again allege, as they did before the IPUC and FERC, that, in making its ruling as to the rates and contract terms that Plaintiffs are eligible for with respect to their proposed battery storage facilities, the IPUC improperly determined Plaintiffs' QF status. (Exs. 11, 13; Dkts. 1, 2.) To rectify this allegedly improper action by the IPUC, Plaintiffs ask this Court to find that IPUC Order Nos. 33785 and 33858 are erroneous and that, instead of being limited to two-year contracts that use Idaho's IRP-based avoided cost methodology, they are entitled to published avoided cost rates and 20-year contracts.

IV. ARGUMENT

A. Summary Judgment Standard

This Court is familiar with the standards that govern a motion for summary judgment, which are that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

B. Idaho Power is Entitled to Summary Judgment Because Plaintiffs' Claim is Time-Barred

As with any other claim, Plaintiffs' instant challenge to the IPUC's orders must be brought within the applicable limitations period. Neither PURPA nor FERC's regulations contain any such period. *See* 16 U.S.C. § 824a *et seq.*; 18 C.F.R. § 292.101 *et seq.* As a result, and because there is no federal limitations period directly applicable to PURPA enforcement actions under Section 210(h), courts addressing this issue have applied the “well-settled” rule that “if Congress fails to include a statute of limitations in a statute, courts should – with few exceptions – impose a state

limitations ‘most closely analogous’ to the federal act in need.” *N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, LP*, 117 F.Supp.2d 211, 246 (N.D.N.Y. 2000) (“*NYSEG*”). An exception to this rule is when applying a state limitations period would “frustrate or interfere with the implementation of national policies or be at odds with the purpose or operation of federal substantive law.” *Id.* PURPA enforcement actions, however, “fall[] squarely inside the rule, not the exception.” *Id.* at 247.

In *NYSEG*, when the Northern District of New York addressed this issue, it determined that the most closely analogous state limitations period was the one applicable to the appeal of final agency actions. *See id.* at 246-47. It further held that, because the plaintiff failed to commence its PURPA enforcement proceeding within this limitations period, the claim was time-barred. *Id.*

Under Idaho law, any IPUC decision must be appealed within 42 days of the date any application for rehearing is denied. I.A.R. 14(b); *see Neal v. Harris*, 100 Idaho 348, 350 (1979) (noting that Idaho Appellate Rule 14 limits the time to appeal IPUC decisions). Specifically, Idaho Appellate Rule 14(b) provides in pertinent part as follows:

(b) Appeals From an Administrative Agency. An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission...within 42 days from the date evidenced by the filing stamp of the clerk or secretary of the administrative agency on any decision, order or award appealable as a matter of right. ... The time for an appeal from such decision, order or award of the public utilities commission begins to run when an application for rehearing is denied, or, if the application is granted, after the date evidenced by the filing stamp on the decision on rehearing.

Here, the IPUC issued Order No. 33858 denying Plaintiffs’ Motion for Reconsideration on August 29, 2017. (Dkt. 37, SF 12; Ex. 12.) Pursuant to Idaho Appellate Rule 14(b), Plaintiffs had 42 days therefrom – until October 10, 2017 – to appeal that order and, in turn, the IPUC’s Order No. 33785 that was the subject of Plaintiffs’ Motion for Reconsideration. I.A.R. 14(b). Plaintiffs

failed to comply with this limitations period and, in fact, to date they have not appealed either of the IPUC's orders to any state court in Idaho. (Dkt. 37, SF 13.) Instead, the *first* attempt Plaintiffs made to challenge the orders was when they filed their FERC Petition on December 14, 2017, *over two months after the limitations period had already expired*. (Dkt. 37, SF 13, 14.) Consequently, Plaintiffs' instant lawsuit, and the claim asserted therein, is time-barred and, as such, Idaho Power is entitled to summary judgment.

C. Idaho Power is Entitled to Summary Judgment Because Plaintiffs' Untimely Challenge of the IPUC's Orders Constitutes an Improper Collateral Attack on Final Orders That Have Preclusive Effect

As noted, Plaintiffs never appealed IPUC Order Nos. 33785 or 33858 to any Idaho state court, nor did they challenge those orders in any other court or administrative agency within the applicable 42 day limitations period set forth in Idaho Appellate Rule 14(b). (*See* Section IV.B, *supra*.) As a result, these orders became final, conclusive and beyond this Court's jurisdiction to review. *See e.g.*, I.A.R. 21 (the failure to file a timely notice of appeal is jurisdictional and requires automatic dismissal of the appeal); *Welch v. Del Monte Corp.*, 128 Idaho 513, 516 (1996) (holding that failing to timely appeal an order of the Idaho Industrial Commission results in the findings of fact and conclusions of law contained therein becoming conclusive and precluding further adjudication of those facts and issues). As a result, Plaintiffs are now barred from attacking those orders collaterally through the instant federal action. *NYSEG*, 117 F.Supp.2d at 247-48; *also* I.C. § 61-625 ("All orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally"). The strong public policy considerations supporting the rule prohibiting collateral attacks on final orders has long been recognized by the Idaho Supreme Court:

The legislature has afforded the orders of the [Idaho Public Utilities] Commission a degree of finality similar to that possessed by judgments made by a court of law. I.C. s 61-625 reads as follows:
... "All orders and decisions of the commission which have become

final and conclusive shall not be attacked collaterally.” ... Final orders of the Commission should ordinarily be challenged either by petition to the Commission for rehearing or by appeal to this Court as provided by I.C. ss 61-626 and -627; Id. Const. Art. 5, s 9. A different rule would lead to endless consideration of matters previously presented to the Commission and confusion about the effectiveness of Commission orders.

Utah-Idaho Sugar Co. v. Intermountain Gas Co., 100 Idaho 368, 373-74 (1979).

Not only does the final and conclusive nature of the IPUC’s orders bar collateral attacks like Plaintiffs’ instant lawsuit, but it also results in those orders having preclusive effect in any subsequent proceedings, including the instant one. For example, the Third Circuit held that federal common law rules of preclusion give preclusive effect to the factual findings and legal conclusions contained in an unreviewed state utility commission’s decision to the same extent as would the state courts. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F.3d 129, 135 (3d Cir. 1998); *see also Dias v. Elique*, 436 F.3d 1125, 1128 (9th Cir. 2006) (“Federal courts give the same preclusive effect to the decisions of state administrative agencies as the state itself would”). Of importance, in *Crossroads* the Third Circuit found that there is “no provision of PURPA that seeks to limit common law rules of preclusion from applying to state agency decisions relating to utility regulation” and concluded that, “[g]iven the substantial role given state utility agencies by Congress in enacting PURPA, ... Congress did not intend to prevent application of common law rules of preclusion.” *Id.* As such, the Third Circuit gave preclusive effect to the state agency’s decision “to the same extent as would the [state’s] courts.” *Id.*

Based upon this law, the factual findings and legal conclusions in the IPUC’s orders are entitled to preclusive effect before this Court to the same extent that they would be in Idaho’s state courts. *Id.*; *see also J & J Contractors/O.T. Davis Const., A.J.V. v. State*, 118 Idaho 535, 537 (1990) (“The doctrine of claim preclusion, or res judicata, applies to the effect of administrative

decisions”). As already discussed, under Idaho law, IPUC orders receive “a degree of finality similar to that possessed by judgments made by a court of law.” *Utah-Idaho Sugar*, 100 Idaho at 373. Additionally, as the record shows (1) Plaintiffs had a full and fair opportunity to litigate whether the IPUC improperly determined their QF status through their prior Motion for Reconsideration (*see* Ex. 11); (2) that issue is the *identical* issue Plaintiffs now raise in the present lawsuit, (*see* Ex. 11; Dkts. 2, 29); and (3) the IPUC issued a final order on the merits via Order No. 33858, (*see* Ex. 12), that is now final and conclusive. *See Ticor Title Co. v. Stanion*, 144 Idaho 119, 124 (2007) (delineating the elements of issue preclusion and claim preclusion). Consequently, because Plaintiffs’ current lawsuit constitutes an improper collateral attack on final orders that have preclusive effect, Idaho Power is entitled to summary judgment.

D. Idaho Power is Entitled to Summary Judgment Because, Contrary to Plaintiffs’ Sole Contention, the IPUC Did Not Determine Plaintiffs’ QF Status, Nor Are Plaintiffs Entitled to a Certain Rate or Contract Term

Plaintiffs’ *entire* lawsuit is based upon the allegation that, in ruling upon Idaho Power’s Petition and finding that Plaintiffs are not entitled to standard/published avoided cost rates and 20-year contracts, the IPUC improperly determined Plaintiffs’ QF status and denied them certain rates and contract terms to which they are “entitled.” (*E.g.*, Dkt. 2, ¶¶ 7-13.) Plaintiffs’ claim misrepresents both the facts and the law and is entirely meritless.

1. The IPUC Did Not Determine Plaintiffs’ QF Status

In its Petition, Idaho Power explicitly stated that it was not challenging Plaintiffs’ QF status and that, for purposes of its Petition, it wanted the IPUC to assume the validity of Plaintiffs’ QF status and determine, based upon the facts presented in Plaintiffs’ Schedule 73 applications and Form 556s, whether Plaintiffs are entitled to published avoided cost rates and 20-year contracts. (Ex. 9, pp. 6-7.) In ruling upon that Petition, the IPUC did as Idaho Power asked and did not

question, let alone determine, Plaintiffs' QF status. (Ex. 10, pp. 3, 10-11.) The IPUC plainly stated this fact in its order, when it acknowledged that "[t]he battery storage facilities' QF status is a matter within FERC's jurisdiction **and is not at issue in this case.**" (*Id.* at p. 11, emphasis added.) The IPUC confirmed this in its order denying Plaintiffs' Motion for Reconsideration, in which Plaintiffs, as they currently do, argued that the IPUC improperly determined their QF status:

[Plaintiffs] argue[] that the Final Order is "unreasonable, unlawful, erroneous or not in conformity with the law" and should be reconsidered because it infringed on FERC's jurisdiction to determine QF status. [Plaintiffs'] only legal authority for its argument is *Indep. Energy Producers*, 36 F.3d at 856, in which the Ninth Circuit Court of Appeals opined that the authority to make QF status determinations belongs to FERC, not the states. **[Plaintiffs] assert[] that, contrary to *Indep. Energy Producers*, we determined the QF status of battery storage facilities in the Final Order. We did not. [Plaintiffs'] mischaracterization of our Final Order is a frivolous effort to contrive a legal basis for reconsideration.**

[Plaintiffs] contend[] we determined that the primary energy source behind a battery storage QF *is* the QF, based on a misreading of FERC's decision in *Luz Development and Finance Corporation*, 51 FERC ¶ 61,078. Franklin Petition at 9. This Commission did not find that the primary energy source behind a battery is the QF, nor did we assert that *Luz* stands for such a proposition. In the Final Order, we explicitly recognized that "battery storage facilities' QF status is a matter within FERC's jurisdiction" and ***we acknowledged the self-certifications of [Plaintiffs'] QFs.*** Final Order No. 33785 at 3, 10-11. Consistent with FERC's analysis in *Luz*, we looked to the primary energy source of [Plaintiffs'] battery storage QFs to determine the projects' eligibility to particular avoided cost rates and contract terms.

(Ex. 12, pp. 2-3, emphasis added.) As shown, the record speaks for itself that, contrary to Plaintiffs' claim, the IPUC did not determine Plaintiffs' QF status and, instead, simply determined which rates and terms Plaintiffs were eligible for in their contracts with Idaho Power, something the IPUC undeniably has the responsibility and authority to decide. (*See* Section III.A., *supra.*)

In making that determination, the IPUC understandably looked to the primary energy source for Plaintiffs' battery storage facilities. (*See* Ex. 10, pp. 9-13; Ex. 12, pp. 2-4.) Both applicable case law and FERC's regulations expressly authorize the IPUC to do so. For example, in *Luz, supra*, when evaluating battery storage facilities, FERC found that:

[T]he 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. Since this energy is the primary energy source of the facility, it is necessary to look to the source of this energy as the ultimate primary energy source of the facility.

Luz, 51 FERC ¶ 61,078, at 61,171. Additionally, according to FERC's regulations, in determining avoided cost rates to be included in a QF's contract with a utility company, state agencies may not only consider the contract's duration, but they may also "differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies." *CPUC*, 133 FERC ¶ 61,059, at P 23; *also* 18 C.F.R. § 292.304(c)(3)(ii), (e)(2)(iii).

In accordance with this authority, the IPUC, in ruling upon Idaho Power's Petition, looked to Plaintiffs' own Schedule 73 applications and Form 556s and, based upon the information provided therein, properly determined that the primary energy source for Plaintiffs' battery storage facilities is solar. (*See* Ex. 10, pp. 11-12; Ex. 12, p. 3; *also* Walker Decl., ¶ 17; Exs. 1-4, Form 556, p. 9, and Generation Profile.) Consequently, since those battery storage facilities are larger than 100 kW, the IPUC again properly determined that Plaintiffs are not eligible for 20-year contracts and standard avoided cost rates. (*Id.*) Instead, they are only eligible for two-year contracts using Idaho's IRP methodology. (*Id.*) This was a proper exercise of the IPUC's authority and was not in any way a determination on Plaintiffs' QF status that intruded upon FERC's exclusive jurisdiction.

In fact, FERC's exclusive jurisdiction as it relates to the determination of a facility's QF status merely extends to (1) certifying and/or decertifying facilities as QFs; and (2) evaluating whether a QF remains in compliance with the operating and efficiency standards that facilities must comply with to be certified as and/or remain certified as a QF. *See Indep. Energy Prods. Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 853-59 (9th Cir. 1994). As shown, the IPUC did not do any of these things. Therefore, because the IPUC did not improperly determine Plaintiffs' QF status, Idaho Power's motion must be granted.

2. PURPA Does Not Entitle Plaintiffs to Any Specific Rate or Contract Term

Plaintiffs appear to believe that PURPA "entitles" them to 20-year contracts and standard avoided cost rates. (*See e.g.*, Dkt. 2, ¶¶ 7-13.) Not so. The *only* thing that Plaintiffs are "entitled" to as self-certified QFs under PURPA is the triggering of its provisions mandating that Idaho Power agree to purchase Plaintiffs' power at "just and reasonable rates" that do not exceed the "incremental cost to [Idaho Power] of alternative electric energy." *E.g.*, *Exelon*, 766 F.3d at 384; *Allco*, 875 F.3d at 67; 16 U.S.C. § 824a-3(a)(2), (b)(1); 18 C.F.R. § 292.304(b)(2). The First Circuit recently confirmed this fact: "Section 210 of PURPA does not create a contract. Rather, it merely creates an obligation to enter into a contract at a regulation-specified rate." *Allco*, 875 F.3d at 70-71. As already discussed, the setting of this rate, i.e., the avoided cost rate, is left to the IPUC, as is the determination of the length of any contract and other terms thereof. Consequently, contrary to Plaintiffs' contention, neither PURPA nor FERC's regulations entitle them to 20-year contracts with Idaho Power at standard avoided cost rates.

V. CONCLUSION

Based upon the foregoing, Idaho Power respectfully requests that this Court enter summary judgment in its favor on Plaintiffs' operative First Amended Complaint.

DATED this 26th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 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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