Steven B. Andersen (ISB 2618)
sba@aswblaw.com
Wade L. Woodard (ISB 6312)
wlw@aswblaw.com
ANDERSEN SCHWARTZMAN WOODARD BRAILSFORD, PLLC
101 South Capitol Boulevard, Suite 1600
Boise, ID 83702-7720
Telephone: 208.342.4411
Facsimile: 208.342.4455

Donovan E. Walker (ISB 5921)
dwalker@idahopower.com
IDAHO POWER COMPANY
1221 West Idaho Street (83702)
P. O. Box 70
Boise, ID 83707
Telephone: 208.338.5317
Facsimile: 208.338.6936
Attorneys for Defendant-Intervenor Idaho Power Company

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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [DKT. 39]

Defendant-Intervenor Idaho Power Company ("Idaho Power"), by and through its counsel of record, hereby respectfully submits this Reply in Support of Motion for Summary Judgment [Dkt. 39].

A. The IPUC Did Not Determine or Reclassify Plaintiffs' QF Status, Refuse to Recognize Energy Storage Facilities as QFs or Deprive Plaintiffs of Any Rights to Which They Are Entitled Under PURPA by Adopting a New PURPA Implementation Plan That Allows It to Make QF Eligibility Determinations

In their Response to Idaho Power's Motion for Summary Judgment, Plaintiffs continue to regurgitate the same fundamentally flawed arguments that they assert in their other pleadings and motions - namely, that in ruling upon Idaho Power's Petition for Declaratory Order ("Petition"), the Idaho Public Utilities Commission ("IPUC") determined Plaintiffs' Qualifying Facility ("QF") status, thereby intruding upon the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") and denying Plaintiffs rights to which they claim they are entitled under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). (*See* Dkt. 47, §§ II, IV, pp. 1-9, 14-16.) More specifically, Plaintiffs argue that the IPUC intruded upon FERC's exclusive jurisdiction to make QF status and eligibility determinations by allegedly adopting a new PURPA implementation plan that allowed it to "reclassify" Plaintiffs' QF status from energy storage QF to solar QF and actually making such a "reclassification." (*Id.*) Similarly, Plaintiffs contend that the IPUC impermissibly refused to recognize their energy storage QF status and that such a QF is distinct from its energy source by improperly inquiring into the primary energy source powering their facilities to determine their eligibility for PURPA benefits. (*Id.*) Plaintiffs' arguments are not supported by the facts or the law and, instead, are directly contrary to them.

As evidenced by the IPUC's two orders at issue in this case, the IPUC did not "reclassify" Plaintiffs' QF status, did not refuse to recognize energy storage QFs as a distinct QF class and did not adopt a new PURPA implementation plan that authorizes it to make QF status determinations.

(*See* Ex. 10, pp. 10-12; Ex. 12, pp. 2-3.) In fact, the IPUC explicitly rejected Plaintiffs' arguments to the contrary in its Final Order on Reconsideration:

> [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; *see also* Ex. 10, pp. 10-12.) As the IPUC's orders show, it expressly acknowledged Plaintiffs' self-certified energy storage QF status and did not make, alter or reclassify that status in ruling upon Idaho Power's Petition. (*Id.*)

Instead, the only thing the IPUC did is assume, as Idaho Power requested, the validity of Plaintiffs' QF status and, based upon the facts and information contained in Plaintiffs' own applications, determine the avoided cost rates and contract terms for which Plaintiffs are eligible under the IPUC's PURPA implementation scheme. (*See* Ex. 9, pp. 6-7; Exs. 10, 12.) The IPUC is expressly authorized to do this under PURPA and FERC's regulations and, in doing so, is

allowed to "differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies." *E.g., Power Res. Grp. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 238 (5th Cir. 2005); *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 695 (D.C. Cir. 2017); *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 155 Idaho 780, 786-89 (2013); *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 785-86 (1984); *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, at P 23, 24 (2010) ("*CPUC*"); *also* 18 C.F.R. §§ 292.304(c)(1), (c)(2), (c)(3)(ii), (e)(2)(iii). Notably, Plaintiffs concede this fact in their First Amended Complaint when they allege that "PURPA grants to state regulatory commissions, such as the [IPUC], the authority to set terms, conditions and even the rates that regulated investor owned utilities must pay QFs for their electrical output." (Dkt. 2, ¶ 7, p. 3; *also* Dkt. 47, p. 15 ["Idaho Power states the obvious in that 'the setting of this rate [avoided cost rate], is left to the IPUC, as is the determination of the length of any contract and other terms thereof.'"].)

Pursuant to the above authority, in determining what contract terms and rates a particular QF is eligible for under its PURPA implementation plan, the IPUC is entitled to evaluate the energy source powering the particular QF and to differentiate among QFs using different energy sources. *E.g.*, 18 C.F.R. § 292.304(c)(3)(ii). Consistent with this authority and with FERC's holding in *Luz Dev. & Fin. Corp.*, 51 FERC ¶ 61,078 (1990), in ruling upon Idaho Power's Petition and evaluating the rates and contract terms for which Plaintiffs are eligible, the IPUC looked to and based its opinion on the primary energy source powering Plaintiffs' facilities which, as they concede, is solar.[1] (*See* Exs. 10, 12; *also* Dkt. 37, Stipulated Fact ["SF"] 1.) That is all the IPUC

[1] Plaintiffs claim that Idaho Power's quotes from *Luz* are "deceptively out of context" because other portions of *Luz* "make[] clear that regardless of the magnitude and regardless of the composition of renewable energy input(s) to a storage facility, the storage facility is nevertheless a QF." (Dkt. 47, pp. 2-7, emphasis in original.) This is a distinction without a difference and is irrelevant since, as already noted, the IPUC assumed Plaintiffs' QF status. (*See* Exs. 10, 12.)

did in this case which, under the law discussed above, is well within its granted, and exclusive, authority.

Despite this fact, Plaintiffs continue to argue that only FERC may look at a facility's primary energy source "to determine [its] eligible status as a QF" and that the IPUC "has no role in making any determination as to a project's 'eligibility under PURPA.'" (Dkt. 47, pp. 6-7.) Such an argument misstates not only the IPUC's authority, but it also misstates and/or shows a fundamental misunderstanding of the exclusive jurisdiction reserved to FERC as it relates to determining an entity's QF status or eligibility. For example, as discussed in the preceding paragraphs, the IPUC undeniably does have the authority to make "eligibility" determinations under PURPA as to the avoided cost rates and contract terms a particular QF is eligible for under the IPUC's PURPA implementation plan. And, as the IPUC's orders at issue in this case establish, those are the only "eligibility" determinations that the IPUC made relating to Plaintiffs. (*See* Exs. 10, 12.)

These "eligibility" determinations are vastly different than the QF status or eligibility determinations over which FERC has exclusive jurisdiction. *See* 18 C.F.R. §§ 292.201-292.211; *also Indep. Energy Prods. Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 853-59 (9th Cir. 1994). Those determinations extend only to (1) certifying and/or decertifying facilities as QFs;

Plaintiffs also argue that FERC's use of the term "primary energy source" does not mean a single dominant source but, rather, means "any combination" of renewable energy sources and, by focusing on the fact that Plaintiffs' facilities are fueled primarily by solar power, the IPUC improperly re-defined the phrase "primary energy source." (Dkt. 47, pp. 4-5.) This argument is non-sensical and inapposite as such term referenced by Plaintiffs is only relevant to determine QF status by FERC. As already discussed, the IPUC has the express authority to consider and differentiate between QFs that are powered by different technologies, and, therefore, regardless of whether the IPUC re-defined any particular phrase, which it did not, it was nevertheless allowed to evaluate and base its ruling regarding the appropriate avoided cost rate and purchase terms eligibility on the fact that Plaintiffs' facilities are primarily powered by solar energy. *E.g.*, 18 C.F.R. § 292.304(c)(2)(iii).

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. *Id.* Understandably, when a state commission such as the IPUC makes one of those limited determinations or grants itself or the utilities under its purview the authority to do so, it intrudes upon FERC's jurisdiction. *Id.* The IPUC, however, did not do either of these things in its orders pertaining to Plaintiffs. (*See* Exs. 10, 12.)

Nor did the IPUC deny Plaintiffs the full avoided cost rates or any other benefits to which they are allegedly entitled under PURPA. Plaintiffs' argument to the contrary is based upon one out-of-context sentence from *Independent Energy Products*, *supra.* (*See* Dkt. 47, p. 6.) In particular, Plaintiffs allege that:

> Simply put, "What the state may not do, however, is to intrude into the Commission's [FERC] exclusive jurisdiction to make QF status determinations by denying to certified QF the full avoided cost rates to which they are entitled." [*Indep. Energy*, 36 F.3d at 859.] Which is exactly what the Idaho Commission did here.

(*Id.*) This contention is fatally flawed and Plaintiffs' quotation of that one sentence from *Independent Energy Products* is misleading. For example, that case involved a state commission's adopted program under which utility companies were authorized to (1) monitor the compliance of the QFs from which they purchased electric energy to ensure that those QFs were in compliance with federal operating and efficiency standards; and (2) suspend payment of the avoided cost rate specified in the parties' executed PURPA contract and replace it with a lower "alternative" avoided cost rate if the utility determined that a QF was not complying with the federal standards. *Indep. Energy*, 36 F.3d at 852-53. As the Ninth Circuit correctly held, such a program usurps FERC's exclusive jurisdiction to make QF status determinations because it allows the utility companies to

effectively decertify any QF that they deem to be out of compliance with federal standards and, in turn, deny them the full avoided cost rates already agreed to in their contracts. *Id.* at 852-59.

When the single sentence relied upon by Plaintiffs is analyzed in the context of the entire *Independent Energy Products* case, it is clear that neither that case, nor the specific sentence relied upon by Plaintiffs, assists them or supports their current arguments. Rather, that case supports Idaho Power's position because, not only did the IPUC not do anything remotely similar to what was at issue in *Independent Energy Products*, but there also is not yet a signed contract between Plaintiffs and Idaho Power that either Idaho Power or the IPUC improperly modified so as to deprive rights already agreed to and vested in Plaintiffs. Thus, the IPUC did not intrude upon FERC's exclusive jurisdiction, nor did it exceed its own. Instead, it acted entirely consistent with the authority expressly granted to it under PURPA and FERC's regulations by merely determining what avoided cost rates and contract terms Plaintiffs are eligible for under its PURPA implementation plan and, as such, Idaho Power's motion should be granted.

B. The IPUC Did Not Unilaterally or Permanently Eliminate the Entire Class of Energy Storage QFs From PURPA Eligibility

Plaintiffs also allege that, through its orders, the IPUC effectively eliminated the entire class of energy storage QFs from eligibility under PURPA by refusing to recognize them as a distinct QF class which, in turn, will thwart PURPA's goal of "uniform federal authority over the determination of QF status" and "will surely result in a balkanization of energy storage QFs' status across the country." (Dkt. 47, § II.B, pp. 7-9.) While these arguments do not merit much attention, three points are worth mentioning. First, as already thoroughly discussed above, the IPUC did not refuse to recognize energy storage QFs as a distinct QF class. (*See* Section A, *supra*; *see also* Exs. 10, 12.) Second, pursuant to the Form 556 currently located on FERC's website, through which a facility can seek QF certification or make its own self-certification, facilities can still seek

certification under PURPA as an energy storage QF if they so desire. Third, because FERC retains exclusive jurisdiction to determine whether a certain facility qualifies as a QF under PURPA and complies with all requirements necessary to remain certified as such, and nothing in the IPUC's orders alters this, PURPA's "uniformity goal" will not be thwarted.

While each state may ultimately treat energy storage QFs differently by providing them with different avoided cost rates and contract terms than other states, this is true for any other type of QF as well. This is so because, under PURPA and FERC's regulations, each state is given the exclusive authority and substantial latitude to determine and value these items and to assure that the retail electric customers of the utility are not harmed and remain neutral to the transaction and costs of PURPA. *See e.g.*, *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 67 (1st Cir. 2017); *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 384-85 (5th Cir. 2014); *Power Res. Grp.*, 422 F.3d at 238; *Portland Gen. Elec.*, 854 F.3d at 695; *Idaho Power Co.*, 155 Idaho at 786-89; *CPUC*, 133 FERC ¶ 61,059, at P 24; 16 U.S.C. §§ 824a-3(a)(2), (b)(1), (d); 18 C.F.R. §§ 292.304(a)(1)(i), (a)(2), (b)(2), (c)(1), (c)(2), (c)(3)(ii), (e)(2)(iii). Had Congress desired uniformity in the rates and contract terms that states provide to QFs, it would not have granted them the authority and latitude that it did to decide these items and, instead, would have set these rates and terms itself. For these reasons, Plaintiffs arguments lack merit and Idaho Power's motion should be granted.

C. Plaintiffs' Arguments on the Inapplicability of Idaho Power's Collateral Estoppel, Claim Preclusion and Statute of Limitations Arguments Are Incorrect and, According to Applicable Law, They All Apply and Defeat Plaintiffs' Claim

According to Plaintiffs, Idaho Power's collateral estoppel, claim preclusion and statute of limitations arguments fail because, by allegedly determining Plaintiffs' QF status, the IPUC acted without jurisdiction to do so and, as such, under "black letter law" that Plaintiffs fail to identify or

cite, "concepts such as res judicata, claims preclusion and/or issue preclusion and statute of limitations are irrelevant." (Dkt. 47, § III.A, pp. 9-10.) Additionally, with respect to Idaho Power's statute of limitations argument, Plaintiffs also claim that there is no analogous state statute of limitations that applies and that it would be impossible for Plaintiffs to comply with the limitations period identified by Idaho Power and the deadlines set forth in FERC's enforcement scheme. (*Id.*, § III.B, pp. 10-14.)

Plaintiffs' first argument can be dealt with swiftly, as Idaho Power has already shown that, contrary to Plaintiffs' assertion, the IPUC did not determine Plaintiffs' QF status. (*See* Section A, *supra*; *see also* Exs. 10, 12.) Thus it did not intrude upon FERC's exclusive jurisdiction or exceed its own jurisdiction. Instead, the IPUC has jurisdiction to issue the declaratory orders that it did under Title 61 of the Idaho Code and the Idaho Uniform Declaratory Judgments Act of 1933. *See e.g.*, I.C. §§ 10-1201 *et seq.*; *Utah Power & Light Co. v. Idaho Pub. Utils. Comm'n*, 112 Idaho 10, 12 (1986); *Harris v. Cassia County*, 106 Idaho 513, 516-17 (1984); *see also* IPUC Order No. 33667, pp. 5-6; IPUC Order No. 29480, p. 16. As a result, Idaho Power's collateral estoppel, claim preclusion and statute of limitations defenses all apply. And, for the reasons set forth in Idaho Power's moving papers relating to its collateral estoppel and claim preclusion defenses, neither of which Plaintiffs address in their Response, Idaho Power's motion should be granted on these grounds.[2]

Idaho Power's motion should also be granted on Idaho Power's statute of limitations argument because, contrary to Plaintiffs' contention, there is indeed a time period within which

[2] Other than arguing that Idaho Power's collateral estoppel and claim preclusion defenses do not apply because the IPUC lacked the jurisdiction to issue the rulings that it did, Plaintiffs do not address, let alone substantively analyze, these defenses in their Response. (*See* Dkt. 47, § III.A, pp. 9-10.) Thus, the substance of Idaho Power's arguments are unchallenged.

Plaintiffs were required to appeal the IPUC's orders and their failure to do so results in their claim being time-barred. To avoid this result, Plaintiffs argue that the 42-day time period set forth in Idaho Appellate Rule 14(b) within which a party must appeal an adverse IPUC decision is not a "statute of limitations" because it is not found in Idaho Code § 5-201 *et seq.* and because filing such an appeal "does not constitute the commencement of a 'civil action'" and, therefore, it is not analogous to any other Idaho statute of limitations and does not apply. (*See* Dkt. 47, § III.B pp. 10-14.) Plaintiffs' argument is contrary to case law addressing this issue.

In *N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, LP*, 117 F.Supp.2d 211, 246-47 (N.D.N.Y. 2000) ("*NYSEG*"), the Northern District of New York addressed the statute of limitations applicable to a PURPA enforcement action brought under Section 210(h), just like Plaintiffs' instant action. (*See* Dkt. 2, ¶¶ 1-4.) In that case, the Court held that, because Congress did not include a statute of limitations in PURPA, the most closely analogous state limitations period should apply and govern which, according to the Court, was the statute addressing the time to challenge an agency action. *NYSEG*, 117 F.Supp.2d at 246-47. Because the plaintiff in *NYSEG* failed to comply with that time period, the Court held that the claim was time-barred. *Id.*

Here, the time period within which a party must challenge an adverse IPUC decision is 42 days from the date of that decision. *See* I.A.R. 14(b). Plaintiffs failed to comply with this limitations period in any state, federal or administrative forum. Specifically, not only have Plaintiffs to date failed to appeal either of the IPUC's orders in any state court in Idaho, but the first attempt they made to challenge them was through their December 14, 2017 enforcement petition to FERC, which was already two months after the limitations period had expired. (Dkt. 37, SF 13, 14.) Therefore, Plaintiffs' claim is time-barred.

Additionally, it is not impossible for Plaintiffs to comply with this 42-day limitations period while also giving FERC the 60 days to which it is entitled to evaluate whether or not to bring an enforcement action at a QF's request. To the contrary, Plaintiffs could have (and should have) filed their state court appeal and/or their FERC enforcement action request within that time period, which would then trigger FERC's 60-day response time. Finally, because the IPUC's decisions did not deal with the federal question of QF status, but were limited to the exclusive state determination as to the proper avoided cost rate and purchase terms, such review and appeal could only be made in the state jurisdiction. Consequently, for the reasons discussed above, Plaintiffs' lawsuit and the claim asserted therein, are not only time-barred, but are also barred as an improper collateral attack on final orders that have preclusive effect. Therefore, Idaho Power's motion should be granted.

D. Conclusion

Based upon the foregoing arguments, and those set forth in Idaho Power's moving papers, Idaho Power respectfully requests that this Court enter summary judgment in its favor on Plaintiffs' operative First Amended Complaint

DATED this 14th day of December, 2018.

ANDERSEN SCHWARTZMAN
WOODARD BRAILSFORD, PLLC

/s/ *Steven B. Andersen*
Steven B. Andersen
Attorneys for Defendant-Intervenor Idaho Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 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:

Peter J. Richardson	peter@richardsonadams.com
Robert C. Huntley	rhuntley@huntleylaw.com
Brandon Karpen	brandon.karpen@puc.idaho.gov
Scott Zanzig	scott.zanzig@ag.idaho.gov

/s/ *Steven B. Andersen*

Steven B. Andersen