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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.	Case No. 1:18-cv-00236-REB **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT**

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

Defendants Paul Kjellander, Kristine Raper, and Eric Anderson, in their official capacities as Commissioners of the Idaho Public Utilities Commission ("PUC") (collectively "Defendants"),[1] respectfully move this Court to dismiss the First Amended Complaint ("Complaint") of Franklin Energy Storage One through Four ("Plaintiffs") with prejudice, or alternatively grant Defendants summary judgment, because: (A) this Court lacks subject matter jurisdiction over the Complaint because the Complaint raises as-applied challenges to state regulatory adjudications, which the Public Utility Regulatory Policies Act ("PURPA") requires be brought in state courts; (B) the Complaint fails to state a facially plausible claim for relief; (C) the Complaint is barred by the applicable limitations period; and (D) the Complaint is barred by Idaho's Eleventh Amendment immunity. *See* Fed R Civ. P. 12(b) and 56, and Dist. Idaho Loc. Civ. R. 7.1, *see also Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996), *Anderson v. Liberty Lobby. Inc*., 477 U.S. 242, 256 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1462 (9th Cir.1992).

[1] Plaintiffs named the individual Commissioners of the Idaho Public Utilities Commission as defendants in this proceeding, rather than bringing suit against the Commission itself, in an apparent effort to invoke the "fiction" of *Ex Parte Young*, 209 U.S. 123, 159-160 (1908) that the subject of Plaintiffs' claims is an unauthorized act of State officials in contravention of federal law, and that Plaintiffs' claims are therefore not barred by Idaho's Eleventh Amendment sovereign immunity. *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254-255 (2011). Indulging Plaintiffs' use of the *Ex Parte Young* "fiction" for purposes of this motion, Defendants will nonetheless refer to the "Idaho Commission" or "PUC" as the source of various orders discussed in this motion, in order to avoid potentially confusing references with regard to the incumbencies of different Commissioners.

I. STATEMENT OF FACTS

A. PURPA and the Federal Energy Regulatory Commission ("FERC") Rules

In 1978, in a move to promote energy conservation, Congress enacted the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in various sections of 16 U.S.C. (1985 & Supp. 1997)) (PURPA). PURPA was passed to promote the development of cogeneration and small power production facilities (qualifying facilities or QFs). In enacting PURPA, Congress recognized two major obstacles to QF development. *See FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982). First, Congress recognized that utilities were reluctant to engage with QFs and buy power from them. *Id*. Second, QFs were reluctant to take on the financial burden of traditional utility regulation. *Id*.

Section 210(a), 16 U.S.C. § 824a-3(a), directed the FERC to promulgate rules requiring electric utilities to purchase energy from QFs, as the FERC deemed necessary to "encourage cogeneration and small power production." Section 210(b) of PURPA, 16 U.S.C. § 824a-3(b), provided that the rules promulgated by the FERC ensure that the rates for power purchases from a QF be "just and reasonable" to the electric consumers of the electric utility, and not exceed the "incremental cost to the electric utility of alternative electric energy" (commonly called the utility's "avoided cost"). Under PURPA's implementation scheme, section 210(f), 16 U.S.C § 824a-3(f), directed each state regulatory authority to implement the FERC's section 210(a) rules for each electric utility over which it had ratemaking authority. In 1980, FERC promulgated PURPA rules for state regulatory authorities to implement section 210(a) rules. Those rules provide that utilities must purchase QF power at a rate equal to the utility's avoided cost. 18 C.F.R. §§ 292.101(b)(6) and 292.304(b)(2).

Importantly, PURPA does not require that a state public utilities commission adopt a specific rate or rate scheme. The state commission may implement PURPA "by issuing regulations, resolving disputes on a case-by-case basis, or by adopting any other means that reasonably give effect to FERC's regulations." *FERC v. Mississippi*, 456 U.S. at 749–51; *see also Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848 at 856 (1994). Likewise, FERC's regulations afford state commissions a "wide degree of latitude" in determining how to implement PURPA. *Cal. Pub. Util. Comm'n*, 133 FERC ¶ 61,059, at ¶ 24 (2010). As long as an implementation plan is consistent with federal law, FERC does not "second-guess" the state commission. *Id*.

The Idaho PUC is the state agency that regulates public utilities in Idaho. Idaho Code §§ 61-129, 61-501. Idaho Power Company, with whom Plaintiffs sought a contract under PURPA, is an electric public utility subject to the PUC's regulatory jurisdiction. Idaho Code § 61-119. As a state utility commission, the PUC is authorized to implement PURPA, including by setting avoided cost rates and ordering electric utilities to enter PURPA contracts with QFs. *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 695 (D.C. Cir. 2017); 16 U.S.C. § 824a-3(a), (b); Idaho Code §§ 61-502, 61-503.

B. The PUC's Management of PURPA Contract Size and Terms

On February 7, 2011, the PUC issued Order No. 32176. The Order temporarily reduced the eligibility cap for published avoided cost rates[2] from 10 aMW to 100 kW for wind and solar generation resources (QFs). Answer, Exhibit 13, at 9.[3] The PUC distinguished wind and solar

[2] Pursuant to FERC rules, published or standard avoided cost rates are required only for small qualifying facilities with a design capacity of 100 kilowatts(kW) or less. 18 C.F.R. § 292.304(c).

[3] Throughout this memorandum, Defendants invite the Court's attention to documents that were referenced in, but not made exhibits to, Plaintiffs' Complaint, and were therefore included as exhibits to

resources from "other" resources because wind and solar resources are "non-firm" resources; they only intermittently supply power and must be "firmed" by ancillary services to assure system reliability. Answer, Exhibit 13, at 9. On December 18, 2012, the PUC issued Order No. 32697 reaffirming its findings and permanently set the cap for published avoided cost rates at 100 kW for wind and solar resources. Answer, Exhibit 14, at 13.

On August 20, 2015, the PUC issued Order No. 33357, finding that large QF PURPA contracts with twenty-year terms exacerbated overestimations of avoided costs causing rates under such contracts to be unjust, unreasonable and inconsistent with the public interest. Answer, Exhibit 4, at 23. To remedy this situation, the PUC ruled that IRP-based contracts[4] under Idaho's administration of PURPA would be limited to two-year terms, but still subject to the "must purchase" obligation incumbent on all utilities under PURPA. Answer, Exhibit 4, at 26. On November 5, 2015, the PUC denied reconsideration of Order No. 33357. Answer, Exhibit 5.

C. Plaintiffs' Proceedings Before the PUC

Plaintiffs own and operate battery storage facilities, described as "qualifying small power producers" under PURPA. Answer, Exhibit 1 at 3. Plaintiffs' self-certified their batteries as QFs via FERC Form 556. *Id*. In late 2017, Plaintiffs asked Idaho Power to sign PURPA energy sales agreements under which Idaho Power would buy Plaintiffs' energy at published avoided cost

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Defendants' Answer. Defendants refer to these exhibits to their Answer which, for brevity, have not been included a second time in support of this motion.

Additionally, as the PUC explained in Order No. 32176 at 1, the expression "eligibility cap" refers to the requirement of FERC's PURPA rules (18 C.F.R. § 292.304(c)(1) and (2)) that "standard" rates must be established for qualifying facilities with nameplate generating capacity of 100 kW or less, and may, in the discretion of state regulatory commissions, be established for larger qualifying facilities. *See* Answer, Exhibit 3.

[4] In Idaho, larger QFs are required to individually negotiate their PURPA contracts using each utility's integrated resource plan ("IRP") as a starting point for negotiations with the regulated utility. An IRP is a flexible planning document that shares the utility's plans for adequately and reliably serving its customers.

rates and 20-year terms. Answer, Exhibit 6 at 3, 338 P.U.R. 4th 157 (2017) (reconsideration denied, IPUC Order No. 33858, Answer, Exhibit 7). Solar generation was the primary energy source for Plaintiffs' battery storage QFs, and those facilities' energy generation output profiles directly reflect "the solar generation that operates as the primary energy source for the battery storage facilities." Answer, Exhibit 6 at 12.

Soon after Plaintiffs asked for the energy sales agreement, Idaho Power questioned whether Plaintiffs' QFs were eligible for the requested published rates and 20-year contracts, and requested Plaintiffs provide further information. *Id*. Idaho Power then petitioned the PUC for a declaratory order determining the proper contract terms, conditions, and avoided cost pricing. *Id*. at 1 (summarizing Idaho Power's Petition in Case No. IPC-E-17-01).

D. Procedural History

On February 27, 2017, the Idaho Power Company petitioned the PUC for a declaratory order on the proper contract terms, conditions, and avoided-cost pricing for five battery storage facilities with a design capacity of more than 100 kilowatts – among which were Plaintiffs' QFs – that were requesting contracts under PURPA. Answer, Exhibit 6, at 1. The PUC found declaratory relief was appropriate. *Id*. at 10 (citing Idaho Code §§ 10-1201 *et seq*.; *Utah Power & Light v. Idaho Pub. Util. Comm'n*, 730 P.2d 930, 932 (1986); *Harris v. Cassia County*, 681 P.2d 988, 992 (1984)). The PUC noted that the "battery storage facilities' QF status is a matter within FERC's jurisdiction and is not at issue in this case." *Id*. at 11. Thus, the sole question before the PUC was what avoided cost rates and contract terms apply to Plaintiffs' self-certified QFs.[5] In other words, were Plaintiffs' QFs eligible for the PUC's standard, published avoided

[5] FERC's Form 556 explicitly states, self-certification does not constitute a determination of QF status by FERC. Nonetheless, it is important to reiterate that Defendants accepted, without question,

cost rates and 20-year contract terms? Or were the Plaintiffs' QFs and Idaho Power required to negotiate rates and two-year contracts? Consistent with its statutory and FERC-delegated authority, the PUC determined the Plaintiffs' QFs were eligible for negotiated (non-standard) avoided cost rates and two-year contracts. *Id*. at 12-13.

On July 13, 2017, the PUC issued Order No. 33785. Answer, Exhibit 6. Relying on the FERC's analysis in *Luz Development & Finance Corp.*, 51 FERC ¶ 61,078 (1990) (Answer, Exhibit 12), the PUC found that Plaintiffs' "primary energy source" should determine the type of PURPA contract and terms for which Plaintiffs' QFs are eligible. As FERC explained:

> [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. Applying that analysis, the PUC concluded that Plaintiffs' "primary energy source" was solar generation for purposes of deciding what contract term and rates Plaintiffs were eligible to receive. The PUC observed that Plaintiffs' own documents showed that their storage facilities exclusively obtained energy from solar generation, which caused the energy generation output profile to directly reflect that solar generation. Answer, Exhibit 6, at 12; *see also* Answer, Exhibits 9-11, at 9 ¶ 7h (quoted in Plaintiffs' Complaint at ¶ 51) ("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

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Plaintiffs' QF self-certification, making a determination only on the contract terms that apply to a particular QF.

planned to be connected in series/parallel combinations to solar inverters, rated approximately 2.5 MWac each").

The PUC explained that, under PUC Order No. 32697, facilities whose "primary energy source" came from wind or solar generation, and that had design capacities of more than 100 kilowatts, were only eligible to receive two-year contracts at negotiated (non-standard) rates. Answer, Exhibit 6, at 2-3 (*citing* PUC Order No. 32697 (Answer, Exhibit 14)). Accordingly, the PUC concluded "storage facilities with design capacities that will exceed 100 kW each and with solar as their primary energy source…are eligible for two-year, negotiated (IRP methodology) contracts." Answer, Exhibit 6, at 12-13.

Plaintiffs filed a timely petition for reconsideration of Order No. 33785. On August 29, 2017, in Order No. 33858, the PUC denied Plaintiffs' petition for reconsideration, and observed:

> Franklin's 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. Franklin asserts that, contrary to *Indep. Energy Producers*, we determined the QF status of battery storage facilities in the Final Order. We did not. *Franklin's mischaracterization of our Final Order is a frivolous effort to contrive a legal basis for reconsideration.*
>
> Franklin contends 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 Franklin's QFs. Final Order No. 33785 at 3, 10-11. Consistent with FERC's analysis in *Luz*, we looked to the primary energy source of Franklin's battery storage QFs to determine the projects' eligibility to particular avoided cost rates and contract terms.

Answer, Exhibit 7 at 3 (emphasis added). Plaintiffs did not seek further state judicial review of the PUC's decision on the rates and duration of the PURPA power purchase agreement for which they

were eligible. Idaho Code §§ 61-627, Idaho Appellate Rule 14(b) (Appeal from the PUC must be filed within 42 days). Instead, on December 14, 2017, Plaintiffs petitioned FERC under PURPA section 210(h)(2) (16 U.S.C. § 824a-3(h)(2)) to commence a PURPA enforcement action in federal district court against the PUC. Answer, Exhibit 1. On February 15, 2018, FERC issued a "Notice of Intent Not to Act" and declined to initiate an enforcement action. *Franklin Energy Storage One, LLC, et al.*, 162 FERC ¶ 61,110 (2018). Answer, Exhibit 2. On May 30, 2018, Plaintiffs filed this action citing jurisdiction under 16 U.S.C. § 824a-3(h)(2)(B). Plaintiffs filed their first amended Complaint on June 1, 2018.

On September 4, 2018, this Court held a scheduling conference, and ordered the parties to file a proposed stipulated statement of facts and legal issues by October 19, 2018. (Docket No. 22). Rather than follow the Court's direction, the next day, on September 5, 2018, Plaintiffs moved for summary judgment. (Docket Nos. 23-29).

II. APPLICABLE STANDARDS

Defendants' motion argues the Court should dismiss Plaintiffs' Complaint with prejudice, or grant summary judgment against the Plaintiffs, because the (A) the Court lacks subject matter jurisdiction over the Plaintiffs' claims; (B) the Amended Complaint fails to state a facially plausible claim upon which relief may be granted;(C) the Plaintiffs' claims are time-barred; and (d) Plaintiffs' claims are barred by Idaho's Eleventh Amendment immunity. The standards for deciding a motion to dismiss and summary judgment motion are set forth below.

A. Standard for Motion to Dismiss

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a motion to dismiss should be granted where the plaintiff fails to state a claim upon which relief can be granted. A complaint may be dismissed as a matter of law for one of two reasons: "(1) lack of a cognizable legal theory,

or (2) insufficient facts under a cognizable legal claim." *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). The inquiry under Rule 12(b)(6) is whether the plaintiff's allegations are sufficient under Fed. R. Civ. P. 8(a). The primary test of the requisite sufficiency is that a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In evaluating the plausibility of claims alleged in a complaint, the Court need not accept the truth of legal conclusions or characterizations couched as factual allegations. "While a complaint . . . does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Rule 8 does not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009), *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988) ("[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim.").

In deciding a Rule 12(b)(6) motion, the court generally should not consider materials outside the complaint and pleadings. *See Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1997). However, the court may consider attachments to the complaint and any document referred to in (even if not appended to) the complaint, where authenticity is unquestioned. *Id.* at 622-23. A court may also take judicial notice of matters of its own records, *In re Korean Air Lines Co., Ltd., Antitrust Litigation*, 642 F.3d 685, 689 n.1 (9th Cir. 2011), public records, such as records of other courts and reports of administrative bodies. *Barron v. Reich*, 13 F.3d 1370 (9th Cir. 1994). The Court may also consider documents physically introduced into the record by a defendant, and may

assume that its contents are true in considering a motion to dismiss. *See Davis v. HSBC Bank*, 691 F.3d 1152, 1160 (9th Cir. 2012); *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

B. Standard for Summary Judgment Motion.

Defendants have alternatively moved for summary judgment. Summary judgment is appropriate when a moving party shows "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). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims...." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Rather, there must be a genuine dispute of material fact "that may affect the outcome of the case." *Id.* at 248.

A moving party is entitled to summary judgment if that party shows that each issue of material fact is not or cannot be disputed. To show that a fact is not in dispute, a party may cite to particular materials in the record, or show that the materials cited fail to establish a genuine dispute, or that the adverse party cannot produce admissible evidence to support the fact. *See* Fed. R. Civ. P. 56(c)(1)(A) & (B); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex*, 477 U.S. at 322).

Rule 56(e)(3) authorizes the Court to grant summary judgment "if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it." A scintilla of evidence to support the non-moving party's position is insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rather, "there must be evidence on which the jury could reasonably find for the [non-moving party]." *Id.*

IV. ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction over the Complaint

This Court does not have subject matter jurisdiction over Plaintiffs' Complaint because the Complaint brings "as-applied" claims that federal law requires plaintiffs to raise in state courts. PURPA allocates jurisdiction between federal district courts (PURPA section 210(h)(2) (16 U.S.C. § 824a-3(h)(2)), and state courts (PURPA section 210(g) (16 U.S.C. § 824a)).[6] Challenges to a state regulatory commission's application of its PURPA implementation rules made pursuant to PURPA section 210(g) – "as-applied" claims – must be brought in the state's appellate courts, through the state appellate processes generally available for review of that regulatory commission's determinations. *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 698 (D.C. Cir 2017) ("State-based adjudication serves as the mainstay for enforcing PURPA rights. PURPA section 210(g)…permits 'any person' to 'bring an action against any electric utility [or] qualifying small power producer…to enforce any requirement' created by a state's implementation of PURPA…Reflecting Congress's judgment[7] that 'federal rights granted by PURPA can

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[6] Section 210(g)(1) of PURPA (16 U.S.C. § 824a-3(g)(1)) provides that "Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) in the same manner, and under the same requirements, as judicial review may be obtained under section 123 (16 U.S.C. § 2633) in the case of a proceeding to which section 123 (16 U.S.C. § 2633) applies." Section 123(c)(1) of PURPA (16 U.S.C. § 2633(c)(1) provides:

> Any person . . . may obtain review of any determination made under subtitle A or B or under this subtitle with respect to any electric utility . . . in the appropriate State court if such person (or the Secretary) intervened or otherwise participated in the original proceeding or if State law otherwise permits such review. Any person . . . may bring an action to enforce the requirements of this title in the appropriate State court, except that no such action may be brought in a State court with respect to a utility which is a Federal agency. Such review or action in a State court shall be pursuant to any applicable State procedures.

[7] Congressional intent in this arena is abundantly clear: orders affecting rates of public utilities are the province of state rate-making bodies. To wit, the Johnson Act, which may bar this very action, provides:

appropriately be enforced through state adjudicatory machinery,'…the statute channels actions under this subsection into 'the appropriate State court,'") (citations omitted); *Exelon Wind I, LLC v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014) ("PURPA provides for two types of review of a state utility regulatory authority's actions: implementation and as-applied challenges. . . . Federal courts have exclusive jurisdiction over implementation challenges, while state courts have exclusive jurisdiction over as-applied challenges"); *Pwr. Res. Grp. v. Pub. Utils. Comm'n of Texas*, 422 F.3d 231, 235 (5th Cir. 2005) ("Federal courts may not hear 'as applied' claims, because jurisdiction over such claims is reserved to the state courts").

As the Court is aware, as-applied challenges are those under which the plaintiff argues that an action, even though generally constitutional, operates unconstitutionally as to plaintiff because of the plaintiff's particular circumstances. 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

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> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where: (1) Jurisdiction is based solely on … repugnance of the order to the Federal Constitution; and, (2) The order does not interfere with interstate commerce; and, (3) The order has been made after reasonable notice and hearing; and, (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342 (1988). All four prerequisites for barring federal jurisdiction are present in this case. First, the PUC's order affects rates chargeable by Idaho Power; second, Plaintiffs repeatedly invoke this Court's jurisdiction solely on the ground that the PUC orders are repugnant to the Federal Constitution—the preemption doctrine derives directly from the Supremacy Clause of the United States Constitution; third, interstate commerce is not raised or touched by the PUC orders in question; fourth, the order was made after reasonable notice and a written hearing (*see American Public Gas Asso. v. Federal Power Comm.*, 498 F.2d 718, 722-723 (stating that evidentiary submissions in written format satisfy hearing requirements, *citing City of Chicago v. FPC*, 458 F.2d 731, 743-744 (1971), *cert. denied*, 405 U.S. 1074 (1972)); and finally, a plain, speedy, and efficient remedy could have been had by Plaintiffs in the Idaho courts. Any future order entered by the PUC with respect to the merits of this matter could be appealed promptly to the appropriate State court. *US West v. Nelson*, 146 F.3d 718, 723-726 (9th Cir. 1998); *U.S. West v. Tristani*, 182 F.3d 1202, 1207-1211 (10th Cir. 1999). Given the other shortcomings of Plaintiffs' Complaint, Defendants will reserve fully briefing the question of the Johnson Act's authority over this action to any proceeding, if any, that may persist beyond the Court's ruling on Defendants' present motion.

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). Plaintiffs' Complaint here unmistakably alleges the existence of an as-applied claim. Plaintiffs allege that the PUC violated PURPA by considering Plaintiffs' primary generation source, and that, but for the actions of the PUC, it should and would have gained more lucrative and longer-term contracts with Idaho Power.

More particularly, Plaintiffs' Complaint attacks the PUC's regulation of standard rates available to particular QFs larger than 100 kW. *See* Complaint, ¶ 46. The availability of standard rates is governed by FERC's PURPA regulations. Under FERC's PURPA regulations, 18 C.F.R. § 292.304(c)(2) (Answer, Exhibit 3), the PUC has absolute discretion to determine whether to establish and how to apply standard rates for QFs with a design capacity of more than 100 kilowatts. In applying these rates, the PUC has further discretion to "differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies." 18 C.F.R. § 292.304(c)(3)(ii) (Answer, Exhibit 3).

Plaintiffs' challenge to the PUC's determination, in Order No. 33785, that Plaintiffs' battery units were ineligible for the standard rates and twenty-year power purchase agreements rests on the PUC's application of its eligibility criteria to the specific characteristics of Plaintiffs' battery units. Answer, Exhibit 6 at 10-13. The eligibility issue before the PUC, and the fact-specific inquiry the PUC undertook to resolve that issue, clarify that Plaintiffs' challenge to that determination can only be viewed as an "as-applied" PURPA claim. As a result, the federal courts have no jurisdiction over Plaintiffs' claim because it is premised on Defendants' application of PURPA implementation rules to the specific characteristics of Plaintiffs' battery units. As Plaintiffs stated in their FERC Form 556 Qualifying Facility Self-Certifications (Answer, Exhibits

8 through 11 at 9 ¶ 7h; Complaint at ¶ 51): "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." A battery storage system with a different energy input would require a different analysis as to its eligibility for standard rates or a longer-term power purchase agreement.

Any challenge that Plaintiffs proposed to make to PUC Order Nos. 33785 and 33858 should have been brought before the Idaho Supreme Court pursuant Idaho Code § 61-627, the required path to judicial review of PUC orders in the Idaho judicial system. *See Idaho Pwr. Co. v. Idaho PUC*, 155 Idaho 780, 788, 316 P.3d 1278 (2013) (Idaho Supreme Court review of PUC findings concerning the alleged establishment of a "legally enforceable obligation" under 18 C.F.R. § 292.304(d)(2)). Such challenge must be filed, pursuant to Idaho Appellate Rule 14(b), within 42-days after the PUC denied the Plaintiffs' petition for reconsideration in Order No. 33858, which issued on August 27, 2017. Answer, Exhibit 7. Having failed to appeal the PUC's decision to the Idaho Supreme Court, Plaintiffs cannot collaterally attack PUC Order Nos. 33785 and 33858 in this Court. This Court should thus dismiss Plaintiffs' Complaint with prejudice for lack of subject matter jurisdiction.

B. Plaintiffs' Complaint Lacks Facial Plausibility

The gravamen of Plaintiffs' Complaint is that Defendants, in Order No. 33785 (Answer, Exhibit 6), found "that energy storage systems are not distinct QFs but, instead are defined by the nature of the source of their energy input" and that "[t]his ruling contravenes an express FERC ruling on the nature of energy storage QFs." Complaint at ¶¶ 13, 58. Defendants properly described this contention as "a mischaracterization of our Final Order" and "a frivolous effort to

contrive a legal basis for reconsideration." Answer, Exhibit 7 at 3. Undeterred, Plaintiffs continue to reassert this mischaracterization as the sole ground for their Complaint.

Plaintiffs' Complaint fails to state a claim for relief that is plausible on its face. In reviewing the dismissal of a complaint, Rule 8 requires a court to inquire whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-679 (2009). Here, Plaintiffs' claim depends entirely on a mischaracterization of the PUC's Order No. 33785 as disputing the status of Plaintiffs' battery units as "qualifying facilities" under PURPA. That claim is directly refuted by the plain text of Defendants' orders. As the PUC plainly explained:

> [O]ur ruling on the narrow declaratory issue before us should not be read to presume that this Commission deems battery storage to be a legitimate qualifying facility eligible for the benefits of PURPA and subject to the Act's implementing regulations under FERC. *The battery storage facilities' QF status is a matter within FERC's jurisdiction and is not at issue in this case*.

Answer, Exhibit 6, at 11 (emphasis added). The PUC reiterated in its Order No. 33858, denying Plaintiffs' request for reconsideration, that it "looked to the primary energy source of Franklin's battery storage QFs to *determine the projects' eligibility to particular avoided cost rates and contract terms*." Answer, Exhibit 7, at 3 (emphasis added).

FERC precedent explains that the critical fact when determining the classification of a QF is whether the "primary energy source" of a small power production facility is biomass, waste, renewable resources, geothermal resources, or any combination thereof. *McKee Products, Inc.*, 45 FERC ¶ 61,534, 62,327 (1988). Examining energy storage facilities, in *Luz Dev. & Fin. Corp.*, 51 FERC ¶ 61,078 (1990) FERC found:

> [PURPA] makes no distinction between energy storage facilities and conventional small power production facilities with regard to the application

> of the definition of a primary energy source….the primary energy source of the battery system is not the electro-chemical reaction [of the battery]. 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.

Answer, Exhibit 12 at 61,172. Adopting long-settled FERC policy, Defendants explained that "consistent with FERC's reasoning in *Luz*, we concluded that Franklin was eligible for two-year contracts at negotiated avoided cost rates" because the primary energy source of Plaintiffs' batteries is solar.[8] Answer, Exhibit 7, at 3. Plaintiffs' efforts to portray this finding as disputing the QF eligibility *vel non* of Plaintiffs' battery units goes beyond lacking plausibility. Accordingly, while drawing all reasonable inferences in Plaintiffs' favor, the Amended Complaint simply fails to state a claim on which relief can be granted and should thus be dismissed with prejudice.

C. Plaintiffs' Claims are Time-Barred

The timing of PURPA section 210(h) enforcement proceedings are governed by applicable state limitations periods. In this case, the applicable limitations period required the Plaintiffs to appeal the PUC's decisions within 42 days after the PUC denied the Plaintiffs' request for reconsideration. Idaho Appellate Rule 14(b) ("The time for an appeal from such decision, order or award of the [PUC] begins to run when an application for rehearing is denied."). *See New York State Elec. & Gas Corp. v. Saranac Power Partners L.P.*, 117 F.Supp.2d 211, 246-47 (N.D. New York 2000) (*citing Reed v. United Transp. Union*, 488 U.S. 319, 323 (1989)). The PUC's Final Order for Reconsideration in the underlying matter was issued August 29, 2017. *Id*. Plaintiffs filed their section 210(h) enforcement action against Defendants with FERC on December 14, 2017,

[8] Plaintiffs do not dispute that the primary energy source for its QF facilities are solar arrays. In fact, Plaintiffs fail to even claim or produce any evidence that solar arrays are not the only source of energy production for the QF facilities.

106 days after the PUC's Final Order, and its claims with this Court 167 days after FERC rejected Plaintiffs' request. Plaintiffs' claims are, therefore, time-barred.

D. Plaintiffs' Complaint Is Barred by the Eleventh Amendment

The PUC is an arm of the state protected by the Eleventh Amendment. *See Sable Commc'ns of Cal., Inc. v. Pac. Tel. & Tel. Co*, 890 F.2d 184, 191 (9th Cir. 1989); *see Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Niagara Mohawk Power Corp. v. FERC*, 162 F. Supp. 2d 107, 143-44 (N.D.N.Y. 2001); *N. Am. Natural Res., Inc. v. Mich. Pub. Serv. Comm'n*, 41 F. Supp. 2d 736, 741-42 (W.D. Mich. 1998), *vacated on other grounds in N. Am. Natural Res., Inc. v. Strand*, 252 F.3d 808 (6th Cir. 2001). The Eleventh Amendment also bars a federal court from directing a state agency how to conform its conduct to state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-106 (1984) ("[It] is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). As demonstrated below, the Eleventh Amendment bars Plaintiffs' challenge to PUC actions within the PUC's statutory authority—that is the implementation of PURPA within Idaho.

The Complaint alleges in ¶¶ 27, 28, and 58 that Defendants' actions violate PURPA by usurping FERC's jurisdiction to make determinations of QF status of particular PURPA projects. Contrary to what Plaintiffs' imply, Defendants did not make a QF status determination. Rather, Defendants exercised their discretionary authority in determining the applicable terms of a QF contract. And the terms of QF contracts are a matter of state, not federal, law. *See New York v. FERC*, 535 U.S. 1, 24 (2002); *Conn. Light & Power*, 324 U.S. 575, 525-26 (1945).

Nothing in PURPA or FERC's regulations restrict the PUC from defining contract terms, including looking to the primary source of QF generation. In other words, federal law does not control. Rather, the PUC determination of at issue is an application of the PUC's permitted

discretion on the allowance of standard rates for projects having a design capacity over 100 kW (18 C.F.R. § 292.304(c)(2)). PURPA section 210(g)(1), 16 U.S.C. § 824a-3(g)(1), entrusts the review of this determination to the Idaho Supreme Court, not to the federal courts. The Eleventh Amendment thus bars Plaintiffs' claims.

V. CONCLUSION

The Complaint should be dismissed without leave to amend. Plaintiffs' claims implausibly depend on a fundamental mischaracterization of Defendants' action. The Plaintiffs claims also are "as-applied" claims that must be raised in Idaho state courts. Further, even if the Plaintiffs "as-applied" claims weren't implausible and within this Court's jurisdiction to decide, the Court should still dismiss those claims as barred by Idaho's 42-day limitations period. Lastly, the Eleventh Amendment immunizes Defendants against Plaintiffs claims.

Accordingly, for these reasons as set forth more fully above, Defendants respectfully request this Court grant Defendants' Motion and dismiss Plaintiffs' Complaint with prejudice for failure to state a claim for relief under FRCP 12(b), or in the alternative, enter summary judgment against the Plaintiffs and for Defendants under FRCP 56 because the material facts are undisputed and Plaintiffs' claims fail as a matter of law.

DATED this 26th day of October 2018.

OFFICE OF THE ATTORNEY GENERAL

/s/ Brandon Karpen
Brandon Karpen
Deputy Attorney General
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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RESPECTFULLY SUBMITTED this 26th day of October, 2018.

/s/ Brandon Karpen
Brandon Karpen