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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 RESPONSE TO PLAINTIFFS' 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 files this memorandum in opposition to Defendant's Motion for Summary Judgment filed on September 5, 2018.

This dispute stems from an as-applied adjudication of the PUC's policy regarding pricing and duration of contracts for qualified facilities ("QFs"). The relevant facts are as follows: Idaho Power asked the PUC to resolve a question about the appropriate contract terms between Plaintiffs' QFs and Idaho Power. The PUC made a determination that relied on clear authority to evaluate the proper contract category and length. Plaintiffs were disappointed with the PUC's ruling, and requested reconsideration. Once reconsideration was denied, state law required Plaintiffs to appeal the decision to the Idaho Supreme Court within 42 days. Plaintiffs failed to exercise this right. Rather, long after the period for appeal expired, they petitioned the Federal Energy Regulatory Commission ("FERC") to initiate a federal district court proceeding under Section 210(h) of the Public Utility Regulatory Policies Act (16 U.S.C. § 824a-3(h)) ("PURPA") to challenge the PUC's order, arguing that the PUC had improperly made a QF status determination. When FERC declined to pursue a federal district court action on behalf of Plaintiffs, they filed their complaint in this case.

Plaintiffs assert subject matter jurisdiction with all the complacent certitude of a homeless cat. However, their Amended Complaint and Motion for Summary Judgment simply fail to establish: why this matter is not in state court, where it belongs; how it is not time-barred; and how this action is not barred by the Eleventh Amendment. Put another way, this Court lacks

[1] While Plaintiffs named the individual Commissioners of the Idaho Public Utilities Commission as defendants in this proceeding to invoke *Ex Parte Young*, 209 U.S. 123, 159-160 (1908), Defendants maintain that Plaintiffs' claims are barred by Idaho's Eleventh Amendment sovereign immunity. *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254-255 (2011). Nonetheless, in order to avoid confusing references, in this response, Defendants will refer to the "Idaho Commission" or "PUC" as the source of various orders discussed in this motion.

subject matter jurisdiction over Plaintiffs' untimely and improper attempt to collaterally attack the PUC's ruling. PURPA specifically vests jurisdiction over as-applied challenges in state, not federal, court. And state statutes of limitation apply to such challenges. Under Idaho law, Plaintiffs' action is time barred.

Even ignoring these fatal deficiencies, Plaintiffs' claims lack merit because they present a fundamental misreading of the requirements of PURPA, the regulations of FERC in implementing PURPA, and the State's role in the administration of PURPA. *See* 18 C.F.R. pt. 292. Furthermore, Plaintiffs present the Court with alternative definitions of "determining," "adjudicate," and "reclassification." These distorted definitions are the foundation for Plaintiffs' case, and are not supported by the plain meaning of those words. For the reasons set forth below, Plaintiffs' motion should be denied.

ARGUMENT

A. Plaintiffs' fail to establish subject matter jurisdiction

This Court does not have subject-matter jurisdiction over Plaintiffs' complaint. PURPA specifically 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)). It is well established that 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).

Illustrating the Congressional intent to vest regulatory authority with state jurisdictions, the Johnson Act, 28 U.S.C. § 1342, unambiguously prohibits the United States District Courts

from interfering with certain orders issued by State administrative agencies such as the PUC. Briefly, the Johnson Act mandates dismissal when:

> 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.

Id. All four prerequisites for Johnson Act dismissal apply to this case— repugnance of the order to the Federal Constitution (Supremacy Clause); the PUC's order does not affect interstate commerce; the PUC's orders were made after reasonable notice and the opportunity for a hearing; and there is a plain, speedy and efficient remedy in Idaho Courts. *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). The Johnson Act's jurisdictional bar is merely one of many fatal flaws infecting Plaintiffs'' Amended Complaint.

In addition to being jurisdictionally barred by the Johnson Act, Plaintiffs' claims are also time-barred. The time for initiating PURPA Section 210(h) enforcement proceedings is governed by applicable state statutes of limitations. In this case, the applicable statute of limitations in Idaho requires that an appeal of a Public Utilities Commission decision be made within 42 days of any decision, order or award appealable as a matter of right. Idaho Appellate Rule 14(b) ("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."). *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 Commission's Final Order for Reconsideration in the underlying matter was issued August 29, 2017. *Id*. Plaintiffs filed their Section 210(h) petition for enforcement action against

Defendants with FERC on December 14, 2017, 106 days after the final Commission Order, and its claims with this Court 167 days after FERC rejected Plaintiffs' request.

Further, as an arm of the state, the PUC is 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). The Eleventh Amendment also bars a federal court from directing a state agency to conform its conduct to state law—the very request made by Plaintiffs. *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."); *Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005).

B. Plaintiffs fail to understand the difference between federal and state law issues: *Cooperative federalism under PURPA*

When federal statutes, like PURPA, concern areas traditionally regulated by the states, federal statutes are read to shield state authority unless the clear and manifest purpose of Congress is to preempt state action. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-4 (1993). To determine whether a federal law preempts state action, the Court should ascertain the Congressional intent of the federal law. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-138 (1990). Federal law does not occupy the entire field of electric utility regulation ("field preemption"). Thus, Plaintiffs appear to argue that the scope of FERC's jurisdiction over rate-setting for sales and purchases between utilities and QF's invokes conflict preemption. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (explaining that conflict preemption is "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (internal citations omitted)).

There is no dispute that the Federal Power Act gives FERC authority to regulate sales of electricity at wholesale in interstate commerce. *See* 16 U.S.C. § 824(b)(1). States may not act in this area unless Congress creates an exception. *Id.* § 824(b). PURPA contains one such relevant exception: Under PURPA's implementation scheme, section 210(f), 16 U.S.C § 824a-3(f), directs each state regulatory authority to implement the FERC's § 210(a) rules for each electric utility over which it had ratemaking authority. PURPA does not require that a state commission adopt a specific rate or rate scheme. Rather, the authority may implement § 210(a) "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. 742 at 749–51; *see also Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n,* 36 F.3d 848 at 856 (1994).

In Idaho, the PUC is the PURPA implementing authority. Idaho Power Company is an electric public utility subject to the PUC's regulatory jurisdiction. Idaho Code § 61-119. The PUC is authorized and required 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. The actions taken by the PUC are squarely within its defined role under PURPA.

As the Commission made clear in its order, contrary to Plaintiffs' assertion, the Idaho PUC found that the "battery storage facilities' QF status is a matter within FERC's jurisdiction and is not at issue in this case." IPUC Order No. 33785 at 11 (Answer, Exhibit 6). Rather, the question before the Idaho PUC was not QF status, but what contract terms to apply to Franklin's QFs. Consistent with its statutory and FERC-delegated authority, the PUC determined Franklin's QFs were "eligible for two-year . . . contracts" with negotiated (non-standard) rates. *Id.* at 13.

Simply put, Defendants accepted Plaintiffs' self-certification of QF status, and resolved a dispute of what contract terms and rates applied. Defendants' actions fall squarely within the power granted to state regulating authorities to implement the FERC's § 210(a) rules. Because Congress explicitly assigned this authority to state regulators, it cannot be preempted by federal law.

C. Plaintiffs' motion is not supported by their own rendition of facts.

Plaintiffs' Motion relies on a misconstruction of the roles of the PUC under PURPA. Plaintiffs erroneously contend that Defendants' ruled that its battery facilities were not QFs. *See Plaintiffs' Motion* at 5, 7, 9-15. Based on this fallacy, Plaintiffs conclude the PUC usurped FERC's authority to certify the facilities as QFs. Nonetheless, Plaintiffs concede that there is no dispute over their QF status, and that "[a]ll Parties agree that the battery storage facilities' QF status is a matter within FERC's jurisdiction." Plaintiffs' Statement of Material Facts 2 and 4. Without that false conflict, Plaintiffs have no basis to assert error by the PUC.

Plaintiffs also incorrectly assert the PUC failed to properly implement PURPA, claiming they are "entitled to contract terms and conditions reserved for 'all other projects,' [i.e., 20-year contracts]." Plaintiffs' Brief at 7. This assertion fails because it presumes Plaintiffs are entitled to standard 20-year contracts. What Plaintiffs fail to recognize is that State commissions are obliged to implement PURPA, in their discretion, by setting avoided cost rates, including standard rates, and implementing FERC rules at the local level. 16 U.S.C. § 824a-3(f); *Portland Gen. Elec.*, 854 F.3d 692; *Idaho Power Co.*, 155 Idaho at 782, 316 P.3d at 1280. Plaintiffs' requested relief, that the Court "require Idaho Power to tender twenty (20) year contracts at published rates," will violate the very notion of state discretion in implementing PURPA.

Plaintiffs argue that the Commission has devised a "simple dichotomy between solar/wind QFs and all QFs other than wind/solar." Plaintiffs' Brief at 4. Plaintiffs state that this

"dichotomy" does not contemplate energy storage QFs. *Id*. From there, Plaintiffs draw the conclusion that the PUC has only two options: initiate a proceeding to "explicitly" address such QFs, or grant the QF its requested 20-year contract. *Id*. at 4-5. This argument ignores the fact that the Idaho PUC performs legislative as well as judicial functions, and is thus "not so rigorously bound by the doctrine of stare decisis that [it] must decide all future cases in the same way as . . . similar cases in the past." *Intermountain Gas Co. v. Idaho Pub. Util. Comm'n*, 540 P.2d 775, 781 (1975) (citing *Federal Communications Comm'n v. WOKO, Inc.*, 329 U.S. 223 (1946); *Federal Trade Comm'n v. Crowther*, 430 F.2d 510 (1970)). Moreover, regulators are permitted to analyze such issues on a case-by-case basis, as occurred in this instance. 18 C.F.R. § 292.401. "So long as regulatory bodies adequately explain their departure from prior rulings," such rulings are "not arbitrary or capricious." *Intermountain Gas Co.*, 540 P.2d at 781.

The PUC observed that neither PURPA nor FERC's implementing regulations "identifies battery storage as a renewable resource eligible for QF status and the benefits provided by the act." IPUC Order No. 33785 at 10 (Answer, Exhibit 6).[2] Consequently, in considering what eligibility cap should apply, the PUC exercised its duty and discretion under PURPA, FERC regulations, and applicable case law. Beyond its shifting and false assertion that the PUC determined that Plaintiffs' battery storage facilities are not QFs, Plaintiffs fail to identify any basis to question the PUC's valid exercise of its statutorily-delegated authority in determining which contract terms to apply to QFs. Further, because Plaintiffs' requested relief would itself violate PURPA by improperly prohibiting the Idaho PUC from carrying out its statutory duty, this Court should reject Plaintiffs' motion.

[2] Franklin describes this observation as "inexplicable," despite including the PUC's citation to *Luz* at 61,171, in which FERC acknowledged, "[n]either the statute nor the final rule refers specifically to energy storage systems." Plaintiffs' Brief at 5.

D. *Independent Energy Producers Association* Is Inapplicable

Plaintiffs attempt to analogize the PUC's ruling in this matter to *Indep. Energy Producers Ass'n v. Cal. Pub. Util. Comm'n*, 36 F.3d 848 (9th Cir. 1994) ("IEPA"). Plaintiffs' Brief at 9-12. That attempt is misconceived. In IEPA, the Court opined that the authority to make QF status determinations belongs to FERC, not the states.

The relevant facts in IEPA are as follows: An association of independent QFs brought an action against the California Public Utilities Commission (CPUC) in an effort to prevent the CPUC from implementing a program that delegated authority to electric utilities to enforce PURPA requirements and FERC regulations. An essential part of the CPUC enforcement program included provisions that "authorize[d] the Utilities to make QF status determinations." IEPA at 853. Additionally, the CPUC program authorized utilities to disconnect QFs not in compliance with federal operating and efficiency standards. *Id*. at 859.

Plaintiffs' comparison is strained and depends on facts not present in this case. Specifically, unlike IEPA, the PUC here plainly – and consistent with the Ninth Circuit Court's decision – determined Plaintiffs' facilities "are self-certified as QFs," and "battery storage facilities' QF status is a matter within FERC's jurisdiction and is not at issue in this case."[3]

[3] Plaintiffs quote PUC Order No. 33785, implying a finding that Plaintiffs are not QFs. This quote is out of context. See Plaintiffs' Brief at 11. Read in context, the Idaho PUC conveyed unmistakably that it is the role of FERC – not the PUC – to determine QF status. Thus the PUC's order should not be read to make a presumption about a battery storage facility's QF status:

> Indeed, FERC acknowledged [in *Luz Dev. & Fin. Corp.*, 51 FERC P 61,078, 61,171 (1980)] that "[n]either the statute nor the final rule refers specifically to energy storage systems. …Consequently, our ruling on the narrow declaratory issue before us should not be read to presume that [the Idaho PUC] 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.

IPUC Order No. 33785 at 10-11 (internal citation omitted).

IPUC Order No. 33785 at 3, 11. Furthermore, the PUC did not implement any scheme to disqualify a QF, or impose reduced avoided cost rates.

E. Defendants may look to a QF's primary energy input

In analyzing this case, the PUC looked to the FERC reasoning in *Luz Dev. & Fin. Corp.*, 51 FERC P 61,078 (1990). The PUC agreed with FERC's determination that it is necessary to consider a battery storage facility's primary energy source in evaluating the QF as a PURPA resource. IPUC Order No. 33785 at 11 (Answer, Exhibit 6). The PUC found that Plaintiffs' primary energy source was solar generation, and the energy generation output profiles of the QFs directly reflect the QFs' primary energy source as solar. *Id.* at 11-12. Accordingly, the PUC determined the 100 kW eligibility cap (used for solar QFs) should apply. *Id.* at 12.

Plaintiffs admit that the Franklin projects are powered by solar energy. Plaintiffs' Brief at 14-15. They argue that the source of energy could change in the future. *Id*. However, unless and until that occurs, there is no basis to question the PUC's valid exercise of its statutorily-delegated authority and discretion in determining which contract terms to apply to Plaintiffs' QFs.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Summary Judgment. It is unsupported by the uncontested facts, and is beyond the Court's jurisdiction.

DATED this 26th day of October 2018.

OFFICE OF THE ATTORNEY GENERAL

/s/ Brandon Karpen
Brandon Karpen
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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