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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' REPLY BRIEF TO PLAINTIFFS' RESPONSE TO DEFENDANTS' 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 (collectively "Defendants"), through counsel reply as follows to Plaintiffs' Response to Defendants' Motion to Dismiss or, in the alternative, Cross-Motion for Summary Judgment. Briefly, Plaintiffs' Amended Complaint must be dismissed with prejudice because this Court lacks subject matter jurisdiction, Plaintiffs' claims are time-barred, and the Amended Complaint is facially implausible with no legal or factual support. Plaintiffs' entire case is based on a specious claim that Defendants determined Plaintiffs' QF status, which is indisputably false.

SUMMARY OF ISSUES AND ANSWERS

1. Did Defendants challenge Plaintiffs' self-certification as "qualifying facilities" under PURPA?
   Answer: No. Defendants accepted Plaintiffs' self-certification of QF status as battery QFs.

2. Does the Court have subject matter jurisdiction?
   Answer: No. The Idaho Supreme Court has exclusive subject matter jurisdiction over the matters raised in Plaintiffs' Complaint, which challenges the Idaho Public Utilities Commission's determination of the duration, pricing and other terms of the power purchase agreement for which Plaintiffs are eligible under PURPA.

3. What statute of limitations applies?
   Answer: Idaho Code § 61-627 and Idaho App. R. 14 required Plaintiffs to seek judicial review in the Idaho Supreme Court within 42 days after the PUC denied the Plaintiffs' request for reconsideration.

ARGUMENT

1. Whether Plaintiffs are Battery QFs Was Never at Issue or Decided by the Public Utilities Commission ("PUC")

There is no dispute that FERC has exclusive jurisdiction to determine QF status. Nonetheless, Plaintiffs' parsing of Defendants' ordering language results in what it calls "active and blatant determination of the QF status of the Franklin projects." Plaintiffs' Reply, Dkt 46 at 2. A plain and simple reading of the PUC's order belies Plaintiffs' attempt to re-characterize the

decision. Plaintiffs offer a moving target, claiming on one hand that Defendants did not accept Plaintiffs self-certification, while conceding on the other hand that Defendants accepted the self-certification, but improperly evaluated the QF when determining what contract terms were appropriate.

On July 13, 2017, the PUC issued Order No. 33785. Therein, Defendants stressed that "[t]he battery storage facilities' QF status is a matter within FERC's jurisdiction and is not at issue in this case." Answer, Exhibit 6. Defendants also exercised their discretion as allowed by FERC's PURPA regulations (18 C.F.R. § 292.304(c)(2)), to find that the primary energy source is solar and the capacities of Plaintiffs' facilities exceed the 100 kW eligibility cap for published rates. *See* Defendants' Motion at 14 (Dkt. 42-1). Defendants thus determined that Plaintiffs were entitled to two-year contracts with rates to be negotiated with Idaho Power using Idaho's IRP-based avoided cost method.

On August 3, 2017, Plaintiffs petitioned the PUC for reconsideration. Plaintiffs' sole point of error was, and continues to be, that Defendants improperly determined Plaintiffs' QF status. On August 29, 2017, Defendants issued Order No. 33858 denying reconsideration. Defendants again explained:

> [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

(Answer, Exhibit 7). The question before the PUC was never QF status. Rather, it was simply: what contract terms (duration and rates) apply to Franklin's QFs? Defendants fully accepted Plaintiffs' self-certification of QF status, and merely resolved a dispute between Idaho Power and Plaintiffs of what contract length and rates should apply. In determining these issues, Defendants

exercised their discretion to implement FERC's § 210(a) rules well within the parameters set by federal law.

a. Defendants applied *Luz Dev. And Fin. Corp.*, 51 FERC ¶ 61,078 to decide what contract terms should apply to Plaintiffs' battery QFs.

In *Luz*, FERC considered battery storage QFs and provided the following guidance:

> [T]he primary energy source of the battery system is not the electrochemical 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) (emphasis supplied). Under PURPA, the PUC, not FERC, is the appropriate forum to establish avoided cost rates, set rate eligibility, review and approve contracts, and resolve disputes between QFs and electric utilities. I.C. §§ 61-502, 61-503; *see also, Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 155 Idaho 780 at 786-89; *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 816 (1992). Specific to this case, the PUC also has the authority under FERC's PURPA regulations (18 C.F.R. § 292.304(c)(2)) to determine whether and to what extent to make standard rates (or "published rates" as they are termed in the underlying PUC decision), available to facilities with nameplate ratings that exceed 100 Kw. Consistent with this authority, the PUC has implemented PURPA through a case-by-case analysis. *Rosebud Enters. Inc. v. Idaho Pub. Utils. Comm'n*, 128 Idaho 609, 615 (1996). Contrary to Plaintiffs' assertion, in deciding what contract terms apply between a utility and a QF, the PUC is not required to ignore the QF's actual characteristics. Rather, the PUC can, and did, look to the QF's description of itself before FERC in deciding what contract terms should apply to the power being sold.

In this case, Defendants looked to *Luz* to guide their evaluation of what contract terms apply. In so doing, Defendants: (1) accepted Plaintiffs' self-certification of battery QF status; and (2) looked to the primary source of energy supplying Plaintiffs' batteries to determine what rates apply. Because Plaintiffs' primary (and only) claimed source of energy was solar, Defendants found that the contract terms and rates applicable to solar QFs were appropriately applied to Plaintiffs' facilities.

It's true that, because Plaintiffs operate "battery QFs," they would deliver solar energy stored in batteries, and not directly from the solar panels that generated that energy as would a more typical QF that sells solar power to a utility (i.e., a standard "solar QF"). But Plaintiffs step beyond this to claim Defendants found the primary energy source *is* the QF. This is simply not true:

> 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.

Answer, Exhibit 7. The plain language of the PUC's orders speaks for itself. Defendants did not determine Plaintiffs' QF status. They determined which rates and terms should apply to the Plaintiffs QF in their contracts with Idaho Power. Defendants would engage in a similar analysis when deciding what contract terms should apply to a battery QF fed by wind power, water power, or some other source. The PUC would scrutinize the battery QF, decide where its energy comes from, and decides contract length and rates based on that analysis. The PUC indisputably has the responsibility and authority to make such determinations.

Finally, Plaintiffs incorrectly claim that "[a]ccording to the IPUC, an energy storage QF using solar energy for 51% of its energy inputs will be deemed a solar QF for PURPA implementation purposes. However, energy storage facilities, such as the Franklin QFs, have the ability, and are specifically allowed by FERC, to vary the sources of renewable energy inputs." Plaintiffs' Reply, Dkt. 46 at 8. This hypothetical set of facts was not at issue before the PUC and the PUC made no ruling with respect to them. In this case, solar energy was Plaintiffs' primary and *only* claimed generation source.

2. This Court Lacks Subject Matter Jurisdiction

Despite Plaintiffs' strenuous and strained attempt at rhetorical re-characterization, their claim is plainly a challenge to the Defendants' order determining contract terms. This is an as-applied claim that is properly rooted in state courts. While Plaintiffs claim Defendants' determined their QF status, the reality is that Plaintiffs simply do not like the contract terms for which they are eligible.

Even assuming, for the sake of argument, that Plaintiffs had a cognizable grievance with the Defendants determination concerning the contract terms for which Plaintiffs' battery QFs are eligible, that grievance would have to be redressed through state court appellate review. *See* 16 U.S.C. § 824a–3(g), section 210(g) of PURPA. Section 824a-3(g)) makes clear that applications of PURPA rules — such as Defendants' ruling that Plaintiffs seek to attack with its complaint — must be heard in state court. The federal courts lack jurisdiction over such claims. *See, e.g., Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 388-391 (5th Cir. 2014).

Section 210 of PURPA creates "an overlapping scheme of federal and state judicial review of state regulatory actions taken pursuant to PURPA." *Allco Renewable Energy v. Mass. Elec. Co.*, 875 F.3d 64, 67 (1st Cir. 2017). Section 210 limits actions by a QF in federal court to

implementation challenges, 16 U.S.C. § 824a-3(h)(2)(B). Claims by QF relating to how a state or utility executes its responsibilities under PURPA are defined as "as-applied challenges," and must be brought in state court. 16 U.S.C. § 824a-3(g). *See Snow Mountain Pine Co. v. CP National Corp.*, FERC Docket No. EL84–25–000, issued March 19, 1985; *See also, Portland General Electric Co. v. Federal Energy Regulatory Comm'n*, 854 F.3d 692, 698 (D.C. Cir. 2017)(stating, "State-based adjudication serves as the mainstay for enforcing PURPA rights [,]" and "the statute channels actions under this subsection into 'the appropriate State court[.]'") Here, Plaintiffs present an as-applied claim.

As-applied claims most commonly involve issues related to whether a specific state agency's order properly implements PURPA regulations, or whether a state agency properly interpreted its own rules. *See Exelon*, 766 F.3d at 389-91. Further, as-applied claims frequently question assigned rates under a state's implementation plan, and whether they are "non-discriminatory, just and reasonable." *See Greensboro Lumber Co. v. Georgia Power Co*., 643 F.Supp. 1345, 1374-75 (N.D. Ga. 1986); *Mass. Inst. of Tech. v. Mass. Dept. of Pub. Utils*., 941 F.Supp. 233, 236-38 (D. Mass. 1996).

Here, the substance of Plaintiffs' claim is that Defendants improperly applied the Idaho PUC's own PURPA implementation scheme when it determined the contract terms and rates that apply to Plaintiffs' facilities. This is a paradigmatic as-applied claim, over which PURPA Section 210(g) vests exclusive jurisdiction in the Idaho Supreme Court.

a. The Eleventh Amendment Bars Plaintiffs' Complaint

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 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.")

Plaintiffs allege that Defendants' actions violate PURPA by usurping FERC's authority to determine QF status -a federal function. As Defendants have demonstrated, however, Defendants did not determine QF status. Instead, Defendants accepted that Plaintiffs were battery QFs and then decided what contract terms should apply to them (a state function). Because QF contract terms are a matter of state, not federal, law, the Eleventh Amendment bars Plaintiffs claims. *See New York v. FERC*, 535 U.S. 1, 24 (2002); *Conn. Light & Power*, 324 U.S. 575, 525-26 (1945). *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254-255 (2011), *Ex Parte Young*, 209 U.S. 123, 159-160 (1908). Plaintiffs apparently recognized this deficiency when they filed their Amended Complaint, which replaced the PUC as the Defendant with the individual PUC Commissioners in their official capacities. It is well settled that even when a suit is commenced against individual officials, the State has a continuing interest in the litigation whenever state policies or procedures are at stake. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 262 (1997). Plaintiffs cannot invoke the fiction of *Young* because the requested relief intrudes upon a clear state function: the determination of applicable terms of a QF. "The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case." *Id.*

3. The Statute of Limitations Bars Plaintiffs' Complaint

Plaintiffs do not address the merits of Defendants statute of limitations defense. Rather, they simply allege that because Defendants allegedly exceeded their authority, "any claimed statute of limitations must fail…." *See* Response, Dkt. 47 at 9.

PURPA and FERC regulations are silent as to applicable time limitations. Likewise, this Court should "impose [the] state limitations 'most closely analogous' to the federal act in need." *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 applicable state limitations period is clearly spelled out: Plaintiffs must appeal the PUC's decisions within 42 days after the PUC denied their request for reconsideration. *See* 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 Neal v. Harris*, 100 Idaho 348, 350 (1979) (noting that Idaho Appellate Rule 14 limits the time to appeal PUC decisions).

The PUC's Final Order on Reconsideration was issued August 29, 2017. Plaintiffs filed their section 210(h) enforcement action against Defendants with FERC on December 14, 2017, 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.

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CONCLUSION

For the foregoing reasons, and those set forth in Defendants' moving papers, the Court should dismiss Plaintiffs' First Amended Complaint in its entirety. It is unsupported by the uncontested facts, and is beyond the Court's jurisdiction.

DATED this 14th day of December 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 14th day of December, 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 14th day of December, 2018.

/s/ Brandon Karpen
Brandon Karpen