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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FRANKLIN ENERGY STORAGE ONE, LLC, FRANKLIN ENERGY STORAGE TWO, LLC, FRANKLIN ENERGY STORAGE THREE, LLC, FRANKLIN ENERGY STORAGE FOUR, LLC,

Plaintiffs,

vs.

PAUL KJELLANDER, KRISTINE RAPER and ERIC ANDERSON, in their official capacity as Commissioners of the IDAHO PUBLIC UTILITIES COMMISSION,

Defendants,

and,

IDAHO POWER COMPANY,

Defendant-Intervenor.

Case No.: 1:18-cv-00236-REB

DEFENDANT-INTERVENOR'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT [DKT. 40]

Defendant-Intervenor Idaho Power Company ("Idaho Power"), by and through its counsel of record, hereby respectfully submits this Reply in Support of Motion to Dismiss Plaintiffs' First Amended Complaint [Dkt. 40].

INTRODUCTION

Plaintiffs' sole basis for its allegations in this matter is their claim that the Idaho Public Utilities Commission ("IPUC") improperly determined their Qualifying Facility ("QF") status. However, the undisputed, and undisputable, record clearly shows that the IPUC did not make any determination as to Plaintiffs' QF status. In fact, the IPUC accepted Plaintiffs' self-certified QF status and acknowledged that QF status determinations are exclusively for the federal authority and not at issue in the IPUC proceedings. The IPUC expressly acknowledged, in both its Final Order and Final Order on Reconsideration, that it was not making a determination as to Plaintiffs' QF status. Assuming Plaintiffs to be QFs entitled to the mandatory purchase obligation by Idaho Power under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), the IPUC then determined which avoided cost rate and purchase terms Plaintiffs are eligible for in the state of Idaho. The IPUC can lawfully and properly consider a QF's generation type and generation characteristics in determining the appropriate avoided cost rate and purchase terms. Determination of the appropriate avoided cost rate and purchase terms is not only a function that is expressly dedicated to the state authority by PURPA, but it is also an as-applied determination regarding Plaintiffs QFs that is within the exclusive authority and jurisdiction of the state authority. Such as-applied claims must be brought within state court and, as such, this Court lacks jurisdiction.

ARGUMENT

A. Plaintiffs' Argument That Their First Amended Complaint Constitutes an As-Implemented Challenge Misstates the Facts, Ignores Their Own Pleadings and is Contrary to Law

In an effort to avoid a finding that their First Amended Complaint constitutes an as-applied challenge, Plaintiffs try to obfuscate the issues by misstating the facts and Idaho Power's

arguments and ignoring their own pleadings and what they expressly allege and ask for therein. When all relevant and accurate information is evaluated, that information and applicable law compel a finding that Plaintiffs' claim is an as-applied challenge over which this Court lacks subject matter jurisdiction. *See Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014) ["*Exelon*"] ("Federal courts have exclusive jurisdiction over implementation challenges, while state courts have exclusive jurisdiction over as-applied challenges.").

Plaintiffs assert two positions in opposition to the argument that their claim is an as-applied challenge. First, they contend that Idaho Power "suggests that, because Plaintiffs are not challenging an implementation plan adopted by a promulgated rule, that Plaintiffs' claims are therefore as-applied claims." (Dkt. 48, § II, p. 1.) Second, they maintain that, at Idaho Power's request, the IPUC fundamentally changed and abandoned its original implementation plan under PURPA and replaced it with a plan that is "facially unlawful in that it vests with the IPUC the alleged authority to make eligibility determinations under PURPA." (*Id.*, § III, pp. 2-6.) Both of these arguments are fatally flawed and contrary to the facts and the law.

1. Idaho Power's As-Applied Argument is Based Upon the IPUC's Orders, the Substance of Plaintiffs' Challenge and the Relief They Seek

Contrary to Plaintiffs' contention, Idaho Power's as-applied argument is not based upon, let alone dependent upon, whether Plaintiffs are challenging an implementation plan that was adopted by a promulgated rule. It makes no difference as to whether the state implementation of PURPA is pursuant to promulgated rule or on a case-by-case basis - either is equally valid and lawful. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). To support their erroneous position, Plaintiffs reference two sentences in Idaho Power's 3.5 page argument on this issue. (*See* Dkt. 48, § II, pp. 1-2; *also* Dkt. 40-1, § III.B, pp. 10-13.) Plaintiffs presumably latch onto this inaccurate contention and ignore the remainder of Idaho Power's argument because the ignored portions undercut Plaintiffs' position.

Idaho Power's as-applied argument is, as it should be, based upon the actions taken by the IPUC, the substance of Plaintiffs' challenge thereto and the nature of the relief they seek from this Court. As noted in Idaho Power's Motion to Dismiss (but conveniently ignored by Plaintiffs in their Response), in their own pleadings Plaintiffs confirm that their challenge is that the IPUC improperly applied its own PURPA implementation plan by determining that Plaintiffs are not eligible for 20-year contracts with standard/published avoided cost rates and, instead, are only eligible to negotiate two-year contracts with Idaho Power using Idaho's integrated resource plan ("IRP") avoided cost methodology. (*See* Dkt. 40-1, § III, pp. 12-13.) For example, in their First Amended Complaint, Plaintiffs allege the following:

> The [IPUC's] ruling deprives [Plaintiffs] of their right to the Idaho Commission's more favorable contract terms and rates available to all "other" QFs and instead restricts them to the less favorable contract terms and rates that are available, under the Idaho Commission's implementation of PURPA, to just solar and wind QFs. *** The [IPUC's] actions denied Plaintiffs their right to the Idaho Commission's established avoided cost rates and contract terms that the Idaho Commission has made available for all QFs other than wind or solar.

(Dkt. 2, ¶¶ 13, 27, emphasis added; *also* Dkt. 2, ¶¶ 44-58.) Likewise, in their Motion for Summary Judgment Plaintiffs ask this Court to enter summary judgment in their favor "declaring and requiring the [IPUC] honor Plaintiff's 'other QF' status and require Idaho Power Company to tender twenty (20) year contracts at published rates consistent with their status as 'other QFs' pursuant to established IPUC requirements…." (Dkt. 29, pp. 1-2, emphasis added.)

These examples show that Plaintiffs' challenge to the IPUC's orders is not that the IPUC's method or plan for implementing PURPA is inconsistent with or contrary to the Federal Energy Regulatory Commission's ("FERC") regulations but, rather, that its application of that plan to

Plaintiffs is improper. (Dkt. 2, ¶¶ 13, 27, 44-58; Dkt. 29, pp. 1-2; *see also* Exs. 10, 12.[1]) Stated differently, Plaintiffs concede that they are not arguing that the IPUC's methods for calculating avoided cost rates are unlawful, or that the caps it has placed for eligibility to certain contract terms are unlawful. (*Id.*; Dkt. 48, p. 3.) Thus, when stripped to its basics, the only thing Plaintiffs challenge is whether the IPUC, in ruling upon Idaho Power's Petition for Declaratory Order ("Petition"), adhered to and/or properly applied its own PURPA implementation plan by refusing to find that Plaintiffs are eligible for the contract rates and terms that are applicable to "other" QFs. (*Id.*; *see also* Exs. 10, 12.)

Such a challenge is unequivocally an as-applied challenge. Courts have described as-applied challenges as those that, among other things: (1) allege that a state agency, such as the IPUC, "failed to adhere to its own implementation plan in its dealings with a particular qualifying facility," *Greensboro Lumber Co. v. Georgia Power Co.*, 643 F.Supp. 1345, 1374 (N.D. Ga. 1986); or (2) involve "a contention that the state agency's…implementation plan is unlawful, as it applies to or affects an individual petitioner."[2] *Exelon*, 766 F.3d at 388. Such as-applied claims include questions on whether a state agency's order properly implements FERC's regulations, whether a state agency properly interpreted its own rules, whether the rates under a state's PURPA implementation plan are "non-discriminatory, just and reasonable" and whether a state agency's adoption of a certain charge to be imposed against a particular class of customers complies with FERC's regulations. *See e.g., id.* at 389-91; *Greensboro Lumber*, 643 F.Supp. at 1374-75; *Mass. Inst. of Tech. v. Mass. Dept. of Pub. Utils.*, 941 F.Supp. 233, 236-38 (D. Mass. 1996). As shown and according to this law, Plaintiffs' current challenge falls squarely within the sphere of an as-

[1] All exhibits cited to herein are attached to the Declaration of Donovan E. Walker that was filed contemporaneously with Idaho Power's moving papers. (*See* Dkts. 38-4, 39-2.)

[2] As-implemented challenges, on the other hand, are those involving "claims that a state agency has failed to properly implement FERC's regulations governing the purchase of energy from QFs." *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 68 (1st Cir. 2017).

applied challenge that must be brought within state court and, as such, this Court lacks jurisdiction. *Exelon*, 766 F.3d at 388.

2. The IPUC Did Not Abandon/Replace Its PURPA Implementation Plan With a New Plan That Allows it to Make QF Status Determinations

Plaintiffs' argument that their challenge is an as-implemented challenge because the IPUC abandoned and replaced its PURPA implementation plan with a new one that grants it authority to make QF eligibility determinations is unavailing as the IPUC did no such thing. (*See* Dkt. 48, § III, pp. 2-6.) 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 also 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.) That is all the IPUC did in this case – nothing more, nothing less. (*See* Exs. 10, 12.) Idaho Power did not request, nor did the IPUC create, a brand new implementation scheme for specific application to Plaintiffs in particular or energy storage QFs in

general. (*Id.*; *also* Ex. 9.) And, even if it did, such a challenge would still be an as-applied challenge under the case law discussed in the preceding section.[3] (*See* Section A.1, *supra*.)

To support their erroneous position that the IPUC created a new implementation plan, Plaintiffs misstate not only the IPUC's orders, but also misstate and/or misunderstand the exclusive jurisdiction reserved to FERC as it relates to determining an entity's QF status or eligibility. For example, Plaintiffs claim that "the IPUC abandoned [its original] plan in favor of a new plan that is facially unlawful in that it vests with the IPUC the alleged authority to make eligibility determinations under PURPA." (Dkt. 48, pp. 5-6.) Not so. The only "eligibility" determinations that the IPUC's orders evince is its granted authority to determine the avoided cost rates and contract terms for which Plaintiffs, as self-certified QFs, are eligible considering all of the different factors, including the technologies used to power their facilities. (*See* Exs. 10, 12.) This, however, is 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; 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.* The IPUC did not do either of these things in its orders, nor through those orders did it adopt a new plan that vests it with the authority to do so as Plaintiffs inaccurately claim. (*See* Exs. 10, 12.)

Finally, Plaintiffs seem to believe that simply because they allege (albeit erroneously) that the IPUC's implementation plan is unlawful, such a claim is "by definition [an] implementation claim[] and not [an] as-applied claim[]." (*See* Dkt. 48, p. 6.) Once again, Plaintiffs fail to cite to

[3] Plaintiffs claim that "[t]he determination of what avoided cost 'methodology' is applicable to an entire class of QFs and the determination of essential contracting provisions applicable to an entire class of QFs are quintessential implementation questions." (Dkt. 48, p. 5.) Tellingly, Plaintiffs fail to cite to any legal authority supporting this bold assertion, presumably because there is none.

any legal authority supporting their position that a simple allegation, regardless of whether it is factually accurate, dictates whether a particular challenge is deemed to be an as-applied or an as-implemented challenge. (*See id.*) They cannot do so because, as the authority discussed above in Section A.1, *supra*, shows, whether a claim is an as-applied or as-implemented challenge is dependent upon the nature of the action taken by the state commission and the type of relief sought.

Here, as thoroughly discussed above, the gravamen of Plaintiffs' claim is that the IPUC, in ruling on Idaho Power's Petition and refusing to grant Plaintiffs 20-year contracts with published avoided cost rates, failed to adhere to its own PURPA implementation plan. (*See* Dkt. 2, ¶¶ 13, 27, 44-58; Dkt. 29, pp. 1-2; *see also* Exs. 10, 12.) Such a claim is unequivocally an as-applied claim over which this Court lacks subject matter jurisdiction. *E.g.*, *Greensboro Lumber*, 643 F.Supp. at 1374; *Exelon*, 766 F.3d at 388. Therefore, Idaho Power's motion should be granted.

B. Plaintiffs Failed to Timely Exhaust Their Administrative Remedies and Neglected to Address This Failure in Their Response

Plaintiffs' Response fails to properly address Idaho Power's argument regarding Plaintiffs' failure to exhaust their administrative remedies and, as such, that Response fails to comply with Local Rule 7.1. Despite acknowledging that Idaho Power made arguments addressing both the as-applied challenge and the failure to exhaust administrative remedies, Plaintiffs address only the as-applied argument in their Response because they state "[they] have addressed the second argument fully in their Response Brief to Idaho Power's Motion for Summary Judgment and in their Reply Brief to Idaho Power's Response to Plaintiff's Motion for Summary Judgment" and, since "those arguments are squarely before the court, they will not be repeated [in Plaintiffs' instant Response]." (Dkt. 48, § 1, p. 1.)

Plaintiffs' refusal to address both of Idaho Power's arguments in their Response violates Local Rule 7.1(c)(3).[4] According to this rule, a party's response brief "must contain all of the reasons and points and authorities relied upon by the responding party." L.R. 7.1(c)(3). This rule fosters efficiency and thoroughness and holds parties to the page limitations imposed by Local Rule 7.1. By refusing to comply with this basic rule, Plaintiffs improperly force Idaho Power and this Court to waste time reviewing multiple documents to locate missing arguments. Such a tactic is not appropriate, nor should it be condoned. As such, because Plaintiffs improperly fail to address Idaho Power's failure to exhaust administrative remedies argument in their Response, this Court should treat that unaddressed argument as conceded or deem this failure to "constitute a consent to…the granting of [Idaho Power's] motion…." *See* L.R. 7.1(e)(1) (stating that "if an adverse party fails to timely file any response documents required to be filed under [Local Rule 7.1], such failure may be deemed to constitute a consent to…the granting of said motion…."); *see also Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.D.C. 2014) (holding that the court may treat unaddressed arguments as conceded when party in opposition only addresses certain arguments).

Although this failure is sufficient justification for this Court to grant the instant motion on this argument, *see* L.R. 7.1(c)(3), (e)(1), for this Court's convenience, Idaho Power will address the arguments raised in Plaintiffs' *other* briefs in this Reply. According to Plaintiffs' Response Brief to Idaho Power's Motion for Summary Judgment (Dkt. 47) and Reply Brief to Idaho Power's Response to its Motion for Summary Judgment (Dkt. 46), it appears that Plaintiffs are maintaining that Idaho Power's failure to exhaust administrative remedies argument fails because (1) the IPUC, by determining Plaintiffs' QF status, acted without jurisdiction to do so and, thus, Plaintiffs may

[4] Plaintiffs did the same thing in their Reply Brief to Idaho Power's Response to its Motion for Summary Judgment. (*See* Dkt. 46.) Despite Idaho Power having raised five arguments in its Response to Plaintiffs' Motion for Summary Judgment, (*see* Dkt. 38), Plaintiffs address only three of these arguments in their Reply and direct this Court and Idaho Power to other documents it filed to find their positions to the remaining two arguments. (*See* Dkt. 46, § 1, p. 1.) By doing so, Plaintiffs exceeded the ten (10) page limitation for reply briefs set forth in Local Rule 7.1(b)(3).

attack the IPUC's lack of jurisdiction at any time and under any circumstances; and (2) there is no analogous state statute of limitations applicable to Plaintiffs' current action. (*See* Dkt. 46, § II, pp. 1-3; Dkt. 47, § III, pp. 9-14.)

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.2, *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 for Plaintiffs' second argument, there is indeed a time period within which they were required to appeal the IPUC's orders and their failure to do so results in a failure to timely exhaust their administrative remedies and a corresponding lack of jurisdiction in this Court to consider their instant lawsuit. According to Plaintiffs, 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, pp. 9-14.) Plaintiffs' argument is contrary to case law addressing this issue.

A district court lacks subject matter jurisdiction over a PURPA enforcement action if the plaintiff fails to timely exhaust its administrative remedies by petitioning FERC to bring an enforcement action before suing in federal court. *See e.g., N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, LP*, 117 F.Supp.2d 211, 246-47 (N.D.N.Y. 2000) ("*NYSEG*") (PURPA enforcement actions not filed within the state limitations period for challenging agency orders are

time-barred); *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002) (a district court lacks subject matter jurisdiction if a plaintiff fails to exhaust its administrative remedy by petitioning FERC to bring an enforcement action prior to suing in federal court); I.A.R. 21 (the failure to file a timely notice of appeal is jurisdictional and requires automatic dismissal of the appeal); *see also* 16 U.S.C. § 824a-3(h)(2)(B).

In *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 petition FERC to bring an enforcement action within this 42-day time period and, therefore, that enforcement action was time-barred which, in turn, means Plaintiffs failed to timely exhaust their administrative remedies and, as such, this Court lacks jurisdiction over Plaintiffs' instant lawsuit. *See e.g.*, *NYSEG*, 117 F.Supp.2d at 246-47; *Niagara Mohawk*, 306 F.3d at 1269-70; I.A.R. 21. Consequently, Idaho Power's motion should be granted.

CONCLUSION

Based upon the foregoing arguments, and those set forth in Idaho Power's moving papers, Idaho Power respectfully requests that this Court dismiss Plaintiffs' First Amended Complaint in its entirety.

DATED this 14th day of December, 2018.

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/s/ *Steven B. Andersen*
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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:

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