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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Issues	DOCKET NO. 14-035-140 **OBJECTION TO MOTION TO STAY OF ELLIS-HALL CONSULTANTS, LLC**

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power" or the "Company"), pursuant to Utah Admin. Code R746-100-4.D, hereby responds in opposition to the Motion to Stay ("Motion") filed by Ellis-Hall Consultants, LLC ("Ellis-Hall") on June 9, 2015. In addition, the Company has permission to represent that Sun Edison, LLC ("Sun Edison") and Utah Clean Energy ("UCE") join and support this Objection.

The Motion is without merit, is untimely and would interfere with the prompt and orderly conduct of this proceeding and is barred by claim preclusion and as a collateral attack on a final Commission order. Accordingly, the Motion should be denied.

INTRODUCTION

Rocky Mountain Power filed its quarterly compliance filing for avoided cost input changes in Docket No. 14-035-40 on August 22, 2014. The Company filed its capacity

contribution study for wind and solar resources ("Study") with testimony, supporting exhibits and work papers on October 9, 2014 in Docket No. 12-035-100. In response to comments filed by the Division of Public Utilities ("Division"), the Office of Consumer Services ("Office") and UCE, the Commission opened this docket for a comprehensive consideration of all issues related to Schedule 38 of the Company's tariff. The Commission invited parties to identify issues to be considered in the docket by October 31, 2014 and held a status and scheduling conference on November 6, 2014. Comments were filed by the Division, the Office, UCE and SunEdison. On November 7, 2014, the Commission issued a Scheduling Order noticing technical conferences for December 22, 2014 and January 6, 2015 and a further status and scheduling conference for January 21, 2015.

The technical conferences were held as scheduled. In addition, UCE and Scatec Solar North America, Inc. ("Scatec") filed petitions to intervene. On January 9, 2015, Rocky Mountain Power filed a motion for expedited approval of the Study. The Commission gave the parties notice that it would address how to proceed on that motion and the other issues at the status and scheduling conference on January 21, 2015. At the conference, all parties agreed to an expedited schedule to consider the Study and to address other issues in the docket. Pursuant to that schedule, the Division and UCE filed testimony on April 28, 2015.

In the meantime, SunEdison, Wind Song, Inc. ("Wind Song"), Ecoplexus, Inc. ("Ecoplexus") and Ellis-Hall petitioned to intervene, with Ellis-Hall's petition being filed last on April 8, 2015. In addition, the Commission amended the schedule slightly to accommodate settlement discussions between the parties.

On May 5, 2015, Rocky Mountain Power filed a Settlement Agreement in which the Company, the Division, the Office, UCE, SunEdison and Scatec agreed upon a resolution of all

issues in the docket with the exception of the Study. Intervenors were notified of settlement discussions, and a draft of the Settlement Agreement was circulated among all parties. Although Wind Song, Ecoplexus and Ellis-Hall did not sign the Settlement Agreement, they did not object to it. Following a hearing on May 26, 2015, at which no party objected to the Settlement Agreement, the Commission approved the Settlement Agreement by order dated June 9, 2015. Ellis-Hall did not appear at the hearing.

The Company, the Division, the Office and UCE filed further testimony on May 28 and June 11, 2015, on the remaining issue, the Study, in accordance with the schedule established by the Commission. Ellis-Hall did not file testimony. On June 15, 2015, Rocky Mountain Power notified the Commission that the parties filing testimony had agreed to submit the remaining issue to the Commission based on the filed testimony and that they were willing to waive cross-examination of the testimony. The Company requested that all testimony filed be admitted and that the hearing, scheduled for June 18, 2015, be cancelled unless the Commission had questions for the witnesses. On June 16, 2015, the Commission issued its order admitting the evidence filed in the proceeding and cancelling the hearing previously set for admission and cross examination of that evidence.

On June 9, 2015, Ellis-Hall filed the Motion requesting that the Commission stay this proceeding pending resolution of a docket commenced by Sage Grouse Energy Project, LLC ("Sage Grouse") on May 29, 2015, asking the Commission to clarify its jurisdictional authority over PacifiCorp's Open Access Transmission Tariff ("OATT"), and a complaint filed by Sage Grouse with the Federal Energy Regulatory Commission ("FERC"), seeking clarification of PacifiCorp's OATT Site Control provisions. Ellis-Hall claims that "there is outstanding confusion regarding the Commission's responsibilities under [the Public Utility Regulatory

Policies Act] PURPA to properly oversee PacifiCorp's application of FERC's OATT as adopted by Schedule 38." (Motion ¶ 3.) In fact, Ellis-Hall is raising through Sage Grouse the same arguments it made in earlier dockets before the Commission in which it opposed approval of Power Purchase Agreements ("PPAs") between the Company and Blue Mountain Power Partners ("Blue Mountain") and Latigo Wind Park ("Latigo"). It is attempting a meritless and untimely attack on the Commission's order approving those PPAs, as well as the Utah Supreme Court's affirmance of that order.

The Motion is without merit. There is no confusion about the respective jurisdiction of the Commission and FERC under PURPA and with regard to the Company's OATT. The Motion is also untimely and would interfere with the prompt and orderly conduct of this proceeding. Ellis-Hall is attempting through the Motion to raise issues that were decided or should have been raised in the prior proceeding and are, therefore, barred under the doctrine of claim preclusion. Finally, Ellis-Hall's efforts in the Sage Grouse proceedings are an improper collateral attack on the orders of the Commission and the Utah Supreme Court approving the Blue Mountain and Latigo PPAs. This matter should not be stayed pending the outcome of such a collateral attack.

ARGUMENT

The Motion continues a pattern of improper attempts by Ellis-Hall to challenge the decision of the Commission approving PPAs between the Company and Blue Mountain and Latigo. Rather than accepting the Commission's decision, which was upheld by the Utah Supreme Court, Ellis-Hall seeks to collaterally attack the ruling through actions such as the Motion in this docket. The Commission should deny the Motion.

A. The Motion Lacks Merit

The premise of the Motion is that there is confusion about the jurisdiction of the

Commission and the FERC with respect to the Company's OATT and the application of the OATT to Schedule 38 that should be resolved before the Commission issues its order in this docket. This premise is without any basis.

The Commission does not have jurisdiction over the Company's OATT and has never claimed that it has such jurisdiction. FERC has exclusive jurisdiction over the OATT. *See* 16 U.S.C. §§ 824(b), 824(d), 824(e); *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581, 584 (5th Cir. 2006) ("The Federal Power Act ('FPA') gives FERC exclusive jurisdiction to regulate the transmission and wholesale sale of electric energy in interstate commerce.") The Settlement Agreement does not ask the Commission to exercise jurisdiction over the OATT, but rather asks the Commission, for now and for purposes of simplicity, to adopt the same procedures and requirements as contained in the OATT for Schedule 38.

The Commission clearly has jurisdiction to determine the terms and conditions of PPAs between the Company and QFs. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). If Ellis-Hall, or any other party, believes that terms and conditions of PPAs are inconsistent with PURPA and FERC's regulations under PURPA, it is free to seek review of the Commission's order approving the contract either in the Utah appellate courts or before FERC. *See* Utah Code Ann. § 63G-4-403; Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978, 23 F.E.R.C. 61,304 at p. 61,644 (1983) (explaining statutory and regulatory framework for pursuing PURPA enforcement actions); *see also Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485 (D.C. Cir. 1997) (explaining PURPA's statutory enforcement scheme). Indeed, Ellis-Hall has already availed itself of these procedures by seeking review of the Commission's order approving the Blue Mountain and Latigo PPAs. However, contrary to Ellis-Hall's position, the order was affirmed and is now final

and unassailable. *See Ellis-Hall Consultants v. Public Service Comm'n*, 2014 UT 52.

Nothing in the Settlement Agreement asks the Commission to approve any term or condition of any PPA under Schedule 38. Moreover, nothing in the Settlement Agreement is inconsistent with PURPA or FERC's regulations. There is no reason to stay this proceeding based on a claim in other proceedings that an untimely complaint about two approved PPAs ought to be "resolved" again. If that were the case, there could never be a standardization of the process for obtaining a PPA and the general terms and conditions of PPAs, and there would be no purpose for Schedule 38. However, the parties that actively participated in this case, including representatives of other QFs, have concluded that the provisions of Schedule 38 resolved by the Settlement Agreement are fair and reasonable and in the public interest. And the Commission has accepted and approved the Settlement Agreement. Its implementation should not be stayed.

There is simply no meritorious basis for Ellis-Hall's Motion, and it should be denied.

B. The Motion Is Untimely

This docket and the filings underlying it have been in process for several months. The issue on which the Motion apparently seeks a stay was resolved by stipulation of all of the parties that have participated in the proceeding and by a Commission order issued after a hearing on the stipulation that was held two weeks before Ellis-Hall filed its Motion. There is nothing to stay.

Ellis-Hall chose to file its petition to intervene nearly eight months after the first filing that gave rise to this docket and over six months after the Commission requested the parties to identify the issues in the docket. Ellis-Hall's petition to intervene was filed three months after Rocky Mountain Power requested, and all other parties agreed to, expedited consideration of the issues in the docket. Even after its intervention late in the process, Ellis-Hall chose not to accept

the invitation to participate in settlement discussions or to comment on the Settlement Agreement. It has not filed any comments or testimony and did not appear at the hearing on the Settlement Agreement or register any objection to it. Its motion to stay proceedings was filed the same day the Commission issued its order approving the Settlement Agreement.

Ellis-Hall's Motion to stay proceedings after the proceedings were essentially concluded is an affront to the Commission and the parties that have taken the time to study the issues, participate in technical conferences, conduct discovery, file comments and testimony and participate in settlement discussions and a hearing to approve the Settlement Agreement.

The order granting Ellis-Hall intervention in this proceeding expressly provided that

> The Commission may condition intervenor's participation in these proceedings based upon such factors as … how intervenor's participation will affect the just, orderly and prompt conduct of the proceedings.

Order Granting Intervention, Docket No. 14-035-140 (Utah PSC May 19, 2015). It is apparent that Ellis-Hall's only attempt to participate in this proceeding, the Motion, is designed to adversely affect the just, orderly and prompt conduct of the proceeding. The Motion should be denied.

C. The Motion Is Barred by Claim Preclusion

The doctrine of claim preclusion prevents a party from attempting to retry issues that either were raised and decided or could have been raised in a prior proceeding. *Mack v. Utah State DOC*, 2009 UT 47, ¶ 29, 221 P.3d 194 (explaining that for a claim to be barred it "must have been presented in the first suit or be one that could and should have been raised in the [prior] action"). Although it is not applicable to administrative proceedings such as rate cases or similar proceedings, claim preclusion is applicable when the Commission, acting in a judicial capacity, has considered evidence and made findings and conclusions with respect to the rights

and obligations of adverse parties with respect to property or contract rights. *See, e.g., Utah Dept. of Admin. Serv. v. Public Service Comm'n*, 658 P.2d 601, 621 (Utah 1983) ("In contrast to the lack of finality that exists as to orders fixing public utility rates, the principles of *res judicata* apply to enforce repose when and administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy.") *See also Allen v. Moyer*, 2011 UT 44, ¶ 8, (explaining that "to encourage finality and judicial economy, we have applied claim preclusion to administrative agency determinations" and citing *Utah Dept. of Admin. Serv.*, 658 P.2d at 621).

Ellis-Hall's issue in this and Sage Grouse's proceedings is an attempt to retry issues decided in Docket Nos. 13-035-115 and 13-035-116 involving PPAs between the Company, on one hand, and Blue Mountain and Latigo, other the other hand. In those dockets, Ellis-Hall opposed approval of PPAs with these QFs who are its competitors on the grounds, among others, that the QFs allegedly did not have control of their sites sufficient to justify the PPAs. Ellis-Hall argued that the Company had not complied with Schedule 38 and its OATT with regard to site control issues. The Commission rejected Ellis-Hall's claims and the Commission's decision was affirmed by the Utah Supreme Court. *See Ellis-Hall Consultants vs. Public Service Comm'n*, 2014 UT 52. Ellis-Hall raised or had the opportunity to raise the same issues in those dockets that it is attempting to raise again in this docket and in the Sage Grouse dockets. Accordingly, Ellis-Hall's claims are barred by the doctrine of claim preclusion.

D. Ellis-Hall's Efforts Are an Improper Collateral Attack on the Commission's Order Approving the Blue Mountain and Latigo PPAs

Utah Code Ann. § 54-7-14 provides that "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." The Commission's Order Approving Applications in Docket Nos. 13-035-115 and 13-035-116 is a

final order approving the PPAs between the Company and Blue Mountain and Latigo, respectively. Under section 54-7-14, that order is conclusive and binding in this collateral proceeding. As already further demonstrated, Sage Grouse and Ellis-Hall are clearly seeking through their actions to undermine that order. All of these collateral attacks are precluded by section 54-7-14. *See North Salt Lake v. St. Joseph Water & Irrigation Co.*, 223 P.2d 577 (Utah 1950). Accordingly, the Motion should be denied.

CONCLUSION

For the foregoing reasons, Ellis-Hall's Motion should be denied.

DATED: June 24, 2015.

RESPECTFULLY SUBMITTED,

Rocky Mountain Power

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