- 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 Procedural Issues	DOCKET NO. 14-035-140 ORDER DENYING MOTION TO STAY AND DENYING PETITION FOR REVIEW AND REHEARING

ISSUED: July 21, 2015

I. PROCEDURAL HISTORY AND BACKGROUND

This docket was initiated by the compliance filing of PacifiCorp, dba Rocky Mountain Power ("RMP"), on October 9, 2014, to update the avoided cost pricing for Qualifying Facilities ("QF") projects larger than three megawatts. Those QF projects are governed by RMP's tariff, Electric Service Schedule No. 38 "Qualifying Facility Procedures" ("Schedule 38"). On October 27, 2014, we issued a Notice of Status and Scheduling Conference indicating the broad scope of this docket's review of Schedule 38. Subsequently in this docket, we provided notice of multiple technical conferences, dates for filing of testimony, and a hearing.

On April 8, 2015, Ellis-Hall Consultants, LLC ("Ellis-Hall") filed a petition to intervene. On May 5, 2015, six parties in this docket filed a settlement agreement ("settlement") proposing to resolve all docket issues except for the capacity contribution study for wind and solar resources ("capacity contribution study") filed on October 9, 2014 by RMP. The parties who signed the settlement ("settling parties") are RMP, the Office of Consumer Services ("Office"), the Division of Public Utilities ("Division"), Utah Clean Energy ("UCE"), SunEdison, LLC ("SunEdison"), and Scatec Solar North America, Inc. ("Scatec"). On May 19, 2015, we granted leave to intervene in this docket to Ellis-Hall.

On May 26, 2015, we held a hearing to consider the settlement. RMP, the Division, and the Office each provided a witness who testified in support of the settlement. UCE proffered its support of the settlement. Ellis-Hall did not participate in the hearing, and no party at the hearing indicated any opposition to the settlement. We issued an order approving the settlement on June 9, 2015.

Also on June 9, 2015, Ellis-Hall filed a Motion to Stay the proceeding, and on July 2, 2015, Ellis-Hall filed a Petition for Review and Rehearing of our June 9, 2015 order approving the settlement. On June 26, 2015, we issued an order approving the capacity contribution study. However, the arguments raised by Ellis-Hall in their Motion to Stay and in their Petition for Review and Rehearing relate only to our order approving the settlement. Ellis-Hall does not raise any objection to the capacity contribution study.

On June 24, 2015, RMP, the Division, and the Office filed responses to Ellis-Hall's Motion to Stay. On July 2, 2015, Ellis-Hall filed a document jointly titled as a Petition for Review and Rehearing, and a reply to the responses to its Motion to Stay. On July 17, 2015, the Office filed a response to Ellis-Hall's Petition for Review and Rehearing.

II. SUMMARY OF ELLIS-HALL'S FILINGS

In its Motion to Stay, Ellis-Hall references a separate docket ("Sage Grouse Request")[1] at the Public Service Commission of Utah ("PSC") and alleges that confusion exists regarding the PSC's responsibilities under the Public Utility Regulatory Policies Act (Pub.L. 95-617, 92 Stat.

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[1] *In the Matter of the Utah Public Service Commission Exercising Jurisdiction Over Schedule 38 and, as Adopted, PacifiCorp's OATT Part IV, Sage Grouse Energy Project, LLC's Request for Agency Action,* Docket No. 15-2582-01.

3117, enacted November 9, 1978) (“PURPA”) to oversee the Open Access Transmission Tariff (“OATT”) of PacifiCorp Transmission Service (“PacifiCorp Transmission”), a tariff that PacifiCorp Transmission files with the Federal Energy Regulatory Commission (“FERC”).

Ellis-Hall references a separate FERC complaint filed by Sage Grouse Energy Project, LLC (“Sage Grouse FERC Complaint”), and asks us to stay this docket until both of those other dockets are concluded. Ellis-Hall argues that the settlement’s changes to Schedule 38 have impacts that cannot be fully evaluated until the conclusion of both separate dockets.

In its Petition for Review and Rehearing/Reply to Motion to Stay, Ellis-Hall restates its assertion that the settlement creates uncertainty about our jurisdiction over the OATT requirements and should not be approved until after the conclusion of the two separate Sage Grouse dockets. Ellis-Hall argues that the full impact of the settlement is unknown until after the resolution of the Sage Grouse dockets, and states that it has an interest in clear, predictable, and consistent enforcement of Schedule 38.

Ellis-Hall argues that the PSC has primary jurisdiction over interconnection agreements and that the OATT should become a provision of Schedule 38. Ellis-Hall claims the word “generally” was added to Schedule 38 in connection with language indicating PacifiCorp Transmission’s need to comply with its OATT without being called out in red-line, and argues the change creates uncertainty about PacifiCorp practices and PSC jurisdiction.

III. SUMMARY OF RESPONSES

A. RMP

RMP argues that the allegation of confusion regarding the jurisdiction of the PSC and FERC with respect to the OATT is without merit, asserting that FERC has exclusive jurisdiction over the OATT while the PSC has jurisdiction over the terms of a Power Purchase Agreement ("PPA") between RMP and a QF. RMP states that the settlement does not constitute approval of any specific PPA term and is not inconsistent with PURPA or with FERC regulations. RMP also alleges the Motion to Stay is untimely because Ellis-Hall intervened late in the docket after issue identification and settlement negotiations had taken place, and filed the motion after the settlement had been filed with the PSC and after the PSC had conducted a hearing to consider the settlement.

B. Division

The Division argues that interconnection jurisdiction has been adequately addressed and that a stay would be disruptive to the goals of Schedule 38. The Division states that the settlement recognizes and addresses a jurisdictional issue by adopting PacifiCorp Transmission's OATT into Schedule 38 and by outlining the PSC dispute resolution process. The Division points out that the settlement solves problems with the Schedule 38 process and that a stay would perpetuate the problems that led to this docket, a result the Division states would not be in the public interest. The Division also notes the lateness of the Motion to Stay in connection with earlier events in this docket.

C. Office

The Office joins RMP and the Division with concerns over the timeliness of the Motion to Stay, noting that Ellis-Hall had a representative present at a technical conference in this docket held on December 2, 2014. The Office points out other opportunities Ellis-Hall could have utilized earlier in the docket, and notes the legal discretion of the PSC, as affirmed by the Utah Court of Appeals in a case with analogous facts, to determine a matter to be untimely.

The Office claims a stay would cause harm to ratepayers by delaying the benefits of a more efficient process to determine QF approval prices and updated capacity contribution values. The Office further argues that the settlement ensures consistency between the OATT and Schedule 38 and does not create any confusion warranting a stay, and explicitly states that it does not modify any legal jurisdictional principles. Finally, the Office claims Ellis-Hall failed to identify any specific way in which it would be prejudiced by implementation of the settlement.

In its response to Ellis-Hall's Petition for Review and Rehearing, the Office claims the petition is untimely and that Ellis-Hall failed to perfect its filing because Ellis-Hall did not deliver the Petition to the parties as Ellis-Hall alleged to have done in its certificate of service. The Office further argues that Ellis-Hall does not provide a legal or factual analysis pointing to any specific error of the PSC in approving the settlement, and failed to delineate between its Motion to Stay and its Petition for Review and Rehearing.

With respect to Ellis-Hall's contention that the word "generally" was inappropriately added to Schedule 38, the Office notes the word was underlined as new language in context of an entire paragraph of language that was new because it had been moved from a different location

in the tariff. The Office also argues that the term “generally” is not vague in context of the rest of Schedule 38, which “by necessity grants a degree of discretion to PacifiCorp, and in some cases QFs, to allow these businesses to complete these complex transactions.”[2]

IV. DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

A. Ellis-Hall’s Motion to Stay was untimely, but we are unable to determine, based on the record before us, that Ellis-Hall’s Petition for Review and Rehearing was untimely.

RMP, the Division, and the Office all assert the untimeliness of Ellis-Hall’s Motion to Stay. The Office also calls into question the timeliness of Ellis-Hall’s Petition for Review and Rehearing. For the following reasons, we find that the Motion to Stay was not filed in a timely manner, and conclude that to grant the motion would materially impair the proceedings. However, we are left with an insufficient record to find that the Petition for Review was untimely.

The Motion to Stay was filed on June 9, 2015, over one month after the settlement was filed and approximately two weeks after we held a hearing to consider it. Ellis-Hall has offered no explanation for its absence from the hearing and has not even alleged it was unaware of its right to attend the May 26 hearing to contest the settlement. The legal precedent provided by the Office appears relevant and factually similar. Both cases involved an intervenor who had notice of the earlier proceedings and chose not to participate in them.

Ellis-Hall participated in this docket prior to the hearing date, made no attempt to reschedule the hearing, did not participate in the hearing, and made a Motion to Stay

[2] *The Office of Consumer Services’ Response to Petition for Review and Rehearing*, p. 6, July 17, 2015, Docket No. 14-035-140.

approximately two weeks later. We conclude, as did the Utah Court of Appeals in the case cited by the Office, that "at this late stage, [to grant the Motion to Stay] would materially impair the proceedings because it would require all the parties to duplicate expenditures of time and money to accommodate a party who was well aware of the proceedings and yet decided to postpone intervention."[3]

The Office's allegations regarding Ellis-Hall's service of its Petition for Review and Rehearing, if accurate, also would make that petition untimely. While we have no reason to doubt the Office's allegations, we do not have any affidavit evidence on which to base a finding on the issue. Parties are cautioned that misrepresentations made to the PSC, in certificates of service or otherwise, are not taken lightly and will seriously impair a party's credibility before the PSC.

B. Ellis-Hall has failed to point to any authority to support the position that a settlement agreement must resolve all jurisdictional issues.

We note the statement of SunEdison that "[i]t appears to have been widely assumed by many in Utah that [FERC] has exclusive jurisdiction over large QF interconnection agreements involving PacifiCorp's transmission system."[4] We further note that the stipulation includes tariff language recognizing the potential of PSC jurisdiction over some large QF interconnection agreements.[5]

[3] *The Office of Consumer Services' Response to Motion to Stay by Ellis-Hall Consultants, LLC,* p. 4, quoting *In re Questar Gas Co.,* 2007 UT 79, ¶ 37, 175 P.3d 545.
[4] *Comments of SunEdison, LLC in Support of Settlement Agreement*, p. 2, May 22, 2015, Docket No. 14-035-140.
[5] "The Commission has both informal and formal dispute resolution processes which can be reviewed on the Commission website at the following address: http://www.psc.utah.gov/complaints/index.html. These processes are available for any matter as to which the Commission has jurisdiction, which may include (i) QF PPA contracts, (ii) small QF interconnection agreements (less than 20 MW), and (iii) large QF interconnection agreements (more than 20 MW), so long as all of the QF output is sold exclusively to the [utility]. To the extent any portion of the QF

The settlement clarifies many Schedule 38 procedures. The settlement recognizes that not all jurisdictional issues have been fully resolved by using the term "may" with respect to both FERC and PSC jurisdiction in some instances. The settling parties agree that the settlement improves the Schedule 38 process.

We note that Ellis-Hall has pointed to no legal authority that would require us to resolve all potential jurisdictional issues prior to approving a settlement. A settlement does not negate the need for any issues to be adjudicated in the future. In this matter, we found the settlement to be in the public interest. Nothing in Ellis-Hall's filings causes us to reconsider that finding. Further, we conclude that the existence of some potentially unresolved jurisdictional issues does not warrant a stay, review, or rehearing of our approval of the settlement.

C. RMP's use of "generally" in Sheet No. 38.10 complies with Utah Admin. Code R746-405-2.D.6 and is not impermissibly vague.

Ellis-Hall alleges that Sheet No. 38.10 inaccurately reflects the addition of the word "generally" without any reference to an applicable legal standard. Ellis-Hall also alleges the term makes the tariff unenforceable.

Despite Ellis-Hall's failure to address the legal standard applicable to filing of modified tariff sheets, we note that the applicable standard is contained in Utah Admin. Code R746-405-2.D.6, which states: "If a change is proposed on a tariff sheet, both clean and marked-up versions of the tariff sheet shall be included as part of the advice letter filing. The marked-up version of

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output is sold to anyone other than the [utility], a QF generation interconnection may be subject to FERC jurisdiction. Nothing in this Schedule will affect the jurisdiction of the Commission or FERC, and all parties will retain any and all rights they may have under any applicable state or federal statutes or regulations." Stipulation, Tariff Sheet No. 38.11.

the proposed revised tariff sheet shall indicate deleted text by strike-through and additional text by underline."

All of Sheet No. 38.10 is underlined. That underlining brings attention to all parties that the entirety of the language requires evaluation. We conclude that the language complies with the requirements of Utah Admin. Code R746-405-2.D.6, and that the language received fair and adequate evaluation in this docket.

With respect to the alleged vagueness of the term "generally," we agree with the Office that one of the purposes of Schedule 38 is to provide both PacifiCorp and QFs the opportunity to negotiate complex transactions within a transparent framework but with some room for negotiation. The Office has pointed out many other instances of similar words within Schedule 38.[6] In addition, we note that a primary purpose of this docket, and the settlement we approved in this docket, was to evaluate areas in which the discretion provided by Schedule 38 should be tightened. The settling parties chose some areas to replace terms like "generally" and "timely" with more specific guidelines, and chose some areas in which to maintain discretion for negotiation. The complaint processes with the PSC and FERC provide opportunities for redress if one party feels another has abused that discretion. Considering those general objectives of Schedule 38 and the settlement in this docket, and the opportunity for use of complaint processes to address disputes, we conclude that the use of the term "generally" in Sheet No. 38.10 was a conscious decision of the settling parties and is not impermissibly vague.

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[6] *The Office of Consumer Services' Response to Petition for Review and Rehearing,* p. 5-6, July 17, 2015, Docket No. 14-035-140.

D. It would violate the public interest to grant a stay, review, or rehearing of our prior approval of the stipulation.

The approved settlement serves the public interest because it provides a "more streamlined and efficient QF approval process."[7] The use in the settlement of the term "may" with respect to some jurisdictional issues simply recognizes that the Commission may have to clarify or adjudicate those issues on a case-by-case basis in the future.

None of the settling parties have asked us to stay, review, or rehear our approval of the settlement. The settling parties all agree, and we previously found, that approval of the settlement is in the public interest because the changes it implements to Schedule 38 will improve the effectiveness of this tariff. Nothing in the settlement prevents further clarification of jurisdictional issues in other proceedings. Nothing in the settlement prevents Ellis-Hall from presenting its positions in other proceedings. For these reasons we find that to stay, review, or rehear our approval of the settlement would violate the public interest, and we conclude that Ellis-Hall has failed to point to any legal precedent that would require or encourage us to do so.

ORDER

We deny Ellis-Hall's Motion to Stay, and we deny Ellis-Hall's Petition for Review and Rehearing.

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[7] *The Office of Consumer Services' Response to Motion to Stay by Ellis-Hall Consultants, LLC*, p. 5, June 24, 2015, Docket No. 14-035-140.

DATED at Salt Lake City, Utah, this 21st day of July, 2015.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#267576

Notice of Opportunity for Judicial Review

This Order constitutes final agency action. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after the final agency action.

CERTIFICATE OF SERVICE

I CERTIFY that on the 21st day of July, 2015, a true and correct copy of the foregoing was delivered upon the following as indicated below:

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