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Before the Public Service Commission of Utah

In the Matter of the Utah Public Service Commission Exercising Jurisdiction over Schedule 38 and, as Adopted, PacifiCorp's OATT Part IV	Docket No. 15-2582-01 The Office of Consumer Services' Response to Request for Agency Action.

The Office of Consumer Services hereby requests the Public Service Commission of Utah ("Commission") deny the Request for Agency filed by Sage Grouse Energy Project, LLC ("Sage Grouse"). Sage Grouse lacks standing to bring the Request for Agency Action and asks this Commission to relitigate a question that the Supreme Court of Utah has answered definitively on identical facts and should, therefore, be denied with prejudice.

Sage Grouse asks for Commission orders as follows; (1) an order that the version of Schedule 38 operative as of July 9, 2013 required PacfiCorp to follow its OATT and apply those procedures for studying the generation interconnection, which included the OATT site control requirements (2) an order that the Commission had and continues to have jurisdiction over PacficCorp's OATT as adopted in Schedule 38. (3) an order that PacifiCorp did not require BMPP and Latigo to reasonably demonstrate Site Control as required by Schedule 38, and,

therefore, the OATT Part IV and (4) and order recognizing that PacfiCorp, BMPP and Latigo have fraudulently misappropriated land right belonging to other Interconnection Customers and Qualified facility ("QF") owners to obtain the Commission's approval of their respective PPA's.[1]

As to requests "1" and "3" , to the degree Sage Grouse is seeking these orders for the purpose of conditioning approval of the Latigo and Blue Mountain PPAs upon some action by PacfiCorp the request is improper as set forth below in arguments "A" and "C". As to request "2" such a declaratory order is not properly before the Commission at this time for the reasons set forth in argument "C" and "D" below. Finally, request "4" is predicated on an opinion as to motive that has no substantiation in this pleading. As described in argument "A" and "C" below, the Commission has declined to take such a position in the referenced PPA hearing as a condition of approving the PPAs. That decision was upheld by the Utah Supreme Court and Sage Grouse presents no policy reason why the Commission should do so at this time.

PROCEDURAL HISTORY

1. On July 9, 2013 Rocky Mountain Power ("RMP" or "Company") filed an Application for Approval for a Power Purchase Agreement ("PPA") between RMP and Blue Mountain Power Partners, LLC ("Blue Mountain") in Docket 13-035-115.

2. On August 12, 2013 Ellis-Hall Consultants, LLC ("Ellis-Hall") was granted intervention in the Blue Mountain Docket.

3. On July 9, 2013 RMP filed an Application for approval of a Power Purchase Agreement between RMP and Latigo Wind Park, LLC ("Latigo") in Docket 13-035-116.

4. On August 12, 2013 Ellis-Hall was granted intervention in the Latigo Docket.

[1] This summary incorporates the various versions of the requested relief stated in the original Sage Grouse filing and the subsequently filed "Errata" .

5. Sage Grouse never intervened in either docket.

6. On September 19, 2013 the Commission held an evidentiary hearing on the request for approval of the Blue Mountain and Latigo PPAs.

7. During the September 19, 2013 hearing Ellis-Hall repeatedly asserted its belief that under Schedule 38 the Blue Mountain and Latigo PPAs could not be approved by the Commission unless the applicants could demonstrate "site control" under the PacfiCorp Open Access Transmission Tariff ("OATT").[2]

8. On October 3, 2013 the Commission issued an order approving the Blue Mountain and Latigo PPAs and rejecting Ellis-Hall's assertions regarding the necessity of demonstrating site control.

9. Ellis-Hall appealed to the Supreme Court of Utah challenging the Commission's approval of the Latigo and Blue Mountain PPAs. On November 21, 2014 the Court issued its decision sustaining the Commission's approval of the PPAs and rejecting all of Ellis-Halls claims including a specific assertion by Ellis-Hall that such approval required a determination of site control. *See Ellis-Hall Consultants, LLC v Public Service Commission of Utah, 2014 UT 52, ¶17, 342 P3d 256.*

10. On May 29. 2015 Sage Grouse Energy Project, LLC ("Sage Grouse") filed with the Public Service Commission a Request for Agency Action ("Request").

11. On June 8, 2015 Ellis-Hall Consultants, LLC ("Ellis-Hall") filed a Petition to Intervene.

12. On June 9, 2015 Ellis-Hall submitted Comments in Support of Sage Grouse Energy Project, LLC's Request for Agency Action

13. On June 15, 2015 Sage Grouse filed an Errata to the request for agency action

[2] *See* Confidential Hearing transcript page 265 lines 16-23, page 268 lines 22-25 and page 269 lines 1-7.

ARGUMENT

A. The Sage Grouse Lacks Standing to Bring this Request.

The Request for Agency Action asks the Commission to re-visit its decision ~~to~~ approving the Latigo and Blue Mountain PPAs in October 2013. Sage Grouse did not intervene in the relevant dockets at that time and has alleged no fact that would demonstrate that it has any legal interest in the Latigo and Blue Mountain proceedings. These facts are fatal to its standing, either under the statutory test for standing set out in the Administrative Procedure Act, the traditional test for standing or the alternative test for standing.

Under Utah law, standing is a basic pre-requisite for an individual or entity to seek redress in an adjudication. This requirement is not modified simply because this matter is before the Commission rather than court.[3] "The threshold requirement that [the Petitioner] have standing is equally applicable whether he seeks declaratory or injunctive relief." *Jenkins v. Swan,* 675 P.2d 1145, 1148 (Utah 1983.)

The Administrative Procedure Act provides the requirements and procedures establishing statutory standing to challenge a decision from a formal adjudicative proceeding before the Public Service Commission. Utah Code Ann. § 63G-4-301(1)(a), (f); *Uhilg v. Public Serv. Com'n,* 2014 UT App. 232, ¶ 5, 336 P.3d 1104. Specifically, section 63G-4-301(1)(a) allows challenges to an agency action from "parties to any adjudicative proceeding." "Party means the agency or other person commencing an adjudicative proceeding, all respondents, all person

[3] "We recognize that administrative agencies are part of the executive branch and not the judicial branch; however, they are vested with adjudicative functions, and the same policies that apply to standing before the judicial branch also apply to controversies before administrative agencies." Utah Chapter of Sierra Club v. Utah Air Quality Bd., 2006 UT 74, ¶ 12, 148 P.3d 960, 966

permitted . . . to intervene . . . and all persons authorized by statute or agency rule to participate as parties." Section 63G-4-301(1)(f); *Uhilg*, 2014 UT App. at ¶ 5.

In *Uhilg,* the appellant participated in a public hearing but never sought to intervene in the adjudicative proceeding. After the Commission ruled, the appellant filed a Request for Review or Rehearing of the Commission's action. *Uhilg*, 2014 UT App. at ¶¶ 2-3. The Commission denied the request on the grounds that the appellant never sought to intervene. Therefore, he was not party to the action and lacked standing to challenge the Commission ruling under sections 63G-4-301(1)(a), (f). *Id.* at ¶¶ 3, 4. The Court of Appeals affirmed adopting the Commission's reasoning. *Id.* at ¶ 5.

Here, Sage Grouse never sought to intervene in the challenged dockets and has not alleged that it is authorized as a party under any statute or agency rule. Therefore, under sections 63G-4-301(a), (f), Sage Grouse does not have standing to challenge this Commission's ruling approving the PPAs in the Latigo and Blue Mountain dockets. *Uhlig*, 2014 UT App. 232 Accordingly, the instant Request for Agency Action must be dismissed.

Even if Sage Grouse had statutory standing under the Utah Administrative Procedure Act, it still would have to allege it had standing to bring its Request for Agency Action under either the traditional test for standing or the alternative test for standing. *Sierra Club*, 2006 UT at ¶¶ 17, 19-20, 35.

In order to allege standing under the traditional test "the petitioning party must allege that it has suffered or will suffer some distinct and palpable injury that gives it a personal stake in the outcome of the legal dispute." *Id.* at ¶ 19 (citations, quotations and alterations omitted.) To assert a "distinct and palpable injury" a party must allege facts satisfying a three part test.

> First, the party must assert that it has been or will be adversely affected by the challenged actions. Second, the party must allege a causal relationship between the injury to the party, the challenge actions and the relief requested. Third, the relief requested must be substantially likely to redress the injury claimed. *Id.* (citations, quotations and alterations omitted.)

An alleged injury does not satisfy these three requirements if the claimed harm is too attenuated. *Id*. at ¶ 28. Normally, the "determination of what claimed interest are sufficient and what interests are too attenuated must be made on a case-by-case basis, taking into account all relevant facts and the policies underlying [the] standing requirement." *Id.* In the instant case, however, the analysis is simpler. Sage Grouse has not alleged any connection to the challenged action and therefore has not alleged any injury, attenuated or not, what so ever. Accordingly, Sage Grouse has not alleged facts demonstrating that it has standing under the traditional test.

For the same reasons, Sage Grouse has not alleged facts sufficient to meet Utah's alternative test for standing. If a party fails to allege a sufficient injury under the traditional test, it may nevertheless obtain standing under Utah's alternative test for standing, i.e., alleging sufficient fact showing that "it is an appropriate party raising issues of significant public importance." *Id.* at ¶ 35.

To demonstrate that it is an "appropriate party," a showing must be made that the party has "interest necessary to effectively assist the [tribunal] in developing and reviewing all relevant legal and factual questions and that the issues are unlikely to be raised if the party is denied standing." *Id.* at ¶ 36 (quotations and citations omitted.) Again, because Sage Grouse has alleged no connection to the challenged action, it has not alleged sufficient facts that it could assist this Commission in reviewing any legal or factual issues. Nor has it alleged any facts showing that if it is denied standing the issues are unlikely to be raised. Accordingly, Sage Grouse fails to meet the requirements of standing under Utah alternative standing test.

Finally, Sage Grouse has also failed to allege that it raises an "issue of significant public importance." Essentially, Sage Grouse argues that this Commission should have required Blue Mountain and Latigo to reasonably demonstrate site control before approving the PPAs. (Sage Grouse Request for Agency Action at pg. 2.) However, to qualify as "an issue of significant public

importance," the issue must directly impact the community at large, not only particular litigants to a proceeding. *BV Lending, LLC v. Jordanelle Special Serv. Dist.,* 2013 UT App. 9, ¶ 16, 294 P.3d 656. Moreover, the fact that other parties might suffer the same alleged injury in the future does not change this result. If "that were to happen such individuals or entities would themselves have standing to challenge the [Commission's action] in the context of their own injuries." *Id.* at ¶ 16. Accordingly, Sage Grouse has failed to allege its claims constitute an "issue of significant public importance."

In sum, because Sage Grouse did not intervene and fails to allege any connection to the challenged agency action, it has failed to establish every element of any applicable standing doctrine under Utah law. Accordingly, Sage Grouse's Request for Agency Action must be dismissed.

B. Sage Grouse Has Not Demonstrated That It Is Entitled to Relief Pursuant To UAC R746-101.

Buried in the Errata to its Request for Agency Action Sage Grouse seeks a declaratory order from the Commission. As a first order of business the Office notes that nowhere does Sage Grouse provide the necessary reference to the statutory or regulatory authority under which the action is requested as required by UCA 63G-4-201. It simply asks, as part of the "conclusion", that the Commission declare that PacfiCorp failed to do certain things.

Assuming that Sage Grouse intends to bring the action under UAC R476-101 it has failed to meet the most basic pleading requirement of rule. Specifically R746-101-3A(1) requires that the petition "be clearly designated a request for a declaratory ruling" and more importantly part A(4) requires that Sage Grouse describe the "reason or need for the review". Nowhere does Sage Grouse state why this rehash of issues that were expressly litigated before the Commission in the original docket should now be revisited by the Commission. The proper time to consider the question of whether there is any reason for the Commission to examine the extent of its authority over the timing or content of transmission

agreements is when there is an actual case in controversy requiring the Commission to address those questions.

C. The Question Of The Timing of Transmission Contracts Relative To The Approval of PPAs has Been Definitively Decided By the Utah Supreme Court.

Sage Grouse is attempting to have the Commission initiate jurisdiction over PacfiCorp's management of the OATT and the QF transmission contracts in the Blue Mountain and Latigo Dockets. This same request was made by Ellis-Hall in the original hearing on the requested approval of the Latigo and Blue Mountain PPAs. The Commission declined to exercise such jurisdiction and determined that the "public interest" did not require that approval of the PPAs be conditioned on the existence of a completed transmission contract. This was the subject of the appeal by Ellis-Hall to Utah Supreme Court.

In its ruling on the appeal the Supreme Court made clear that ~~the~~ Schedule 38 does not require that transmission contracts be completed before a PPA can be approved by the Commission. *Ellis-Hall, 2014 UT at ¶17* It went on to clarify that the scope of the Commission's obligations under Schedule 38 was to ensure that the rates in the PPA were "just and reasonable". *Id at ¶22* Based on that guidance, there is no reason that the Commission should now change its current policies regarding approvals of PPAs.

D. The Scope and Timing for the Commission's Exercise Of Its Jurisdiction Over the PacfiCorp OATT Is Not Properly Before The Commission In This Docket

The recently enacted Schedule 38 provides for Commission review of transmission issues over which it has jurisdiction.[4] This is done as part of the formal and informal dispute mechanism created by the Commission. The current matter is not brought as part of that mechanism, in part, because Sage Grouse has no standing to pursue the question. There is no case in controversy in which Sage

[4] P.S.C.U. No. 50 Original Sheet No. 38.11

Grouse is involved. Seeking a broad declaratory order that the Commission review or reconsider factual questions on matters in which the affected parties are not participating is not the proper way to insure a full and complete consideration of the issues or the scope of the Commission's jurisdiction. Sage Grouse's simple assertion of such facts as it determines to be relevant does not comport with effective administrative review.

E. Sage Grouse's Assertion That P.S.C.U. N. 44 Electric Service Schedule No. 38 Is Not Altered By Subsequent Commission Actions Is Without Merit

Sage Grouse asserts that the various versions of Schedule 38 promulgated by the Commission following the February 24, 2003 Order are not valid. This is simply wrong. Sage Grouse asserts that "acknowledgment " or "approval" of tariff modifications by the Commission Secretary does not constitute binding Commission action. In fact, it is precisely through such acknowledgments and approvals that the Commission promulgates its decisions.

Without context, Sage Grouse takes snippets of the statute to support its specious claim that, despite numerous published revisions of Schedule 38 published by the Secretary over the last twelve years, the operation of Schedule 38 has never been altered since 2003.[5] A plain reading of the Statute shows that the Secretary does not act upon his/her own authority but is, in fact, the official vehicle through which the Commission provides public notice of changes to such things as Schedule 38:

> *Under the direction of the commission the secretary shall* superintend its clerical business, conduct its correspondence, *give notice of all hearings, determinations, rulings and orders of the commission,* prepare for service papers and notices required by the commission, and perform other duties the commission may prescribe Utah Code Ann. § 54-1-7 (emphasis added)

[5] In its "Errata" Sage Grouse acknowledges that there has been one modification to the Schedule 38 in 2013 that is valid .

Clearly, the statute contemplates that there will be a variety of ways, in addition to "Orders", that the Commission can express its will and that the Secretary is the vehicle through which such expressions will be made.[6]

Based on the foregoing the Office respectfully requests that the Commission deny Sage Grouse's Request for Agency Action.

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[6] In any event, the apparent difficulty Sage Grouse has determining which is the current version of Schedule 38 was clarified subsequent to its May 29, 2015 filing by the promulgation of orders in Docket 14-035-140. See *Order Approving Settlement Agreement on Schedule 38 Procedures* found at http://www.psc.state.ut.us/utilities/electric/elecindx/2014/documents/26679614035140oasaostep.pdf and *Order Approving Capacity Contribution Study and CF Method and Values* found at http://www.psc.state.ut.us/utilities/electric/elecindx/2014/documents/26715514035140oaccsacmv.pdf