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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

<p><b>IN THE MATTER OF THE UTAH PUBLIC SERVICE COMMISSION EXERCISING JURISDICTION OVER SCHEDULE 38 AND, AS ADOPTED, PACIFICORP'S OATT PART IV</b></p>	<p>Docket No. 15- 2582-01</p> <p><b>DIVISION OF PUBLIC UTILITIES' RESPONSE TO COMMISSION ACTION REQUEST</b></p>
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Pursuant to Utah Code Ann. § 54-4-1.5, 54-4a-1 and Utah Admin. Code r746-100 the Utah Division of Public Utilities (“Division”) hereby responds to the Public Service Commission of Utah’s (“Commission”) May 29, 2015 Action Request and recommends that the Commission dismiss the Request for Agency Action for failure to meet the pleading requirements for requesting declaratory order and for lack of standing. Moreover as to the two power purchase agreements (“PPA”) that are challenged the matters have been decided with finality by the Commission and the Utah Supreme Court.

## **INTRODUCTION**

On May 29, 2015 Sage Grouse Energy Project, LLC (“Sage Grouse”) filed a Request for Agency Action with the Commission. On May 29, 2015 the Commission issued an Action Request directing the Division to review the request and make recommendations.

Sage Grouse requests 5 separate actions from the Commission. It requests the Commission do the following:

- I. Declare that P.S.C.U No. 44 was the version of Schedule No. 38 as of July 9, 2013,
- II. Declare that the Commission has jurisdiction over PacifiCorp’s interconnection process for QFs,
- III. Declare that PacifiCorp did not require two prior QFs to demonstrate site control adequately,
- IV. Declare that PacifiCorp and two QFs “fraudulently misappropriated land rights, and
- V. Disclose Jordan White’s affiliations with PacifiCorp.

## **DISCUSSION**

The Division recommends that the Commission dismiss the Request for Agency Action. Sage Grouse’s filing has not met the requirements of Utah Admin. Code r746-101 for seeking declaratory order from the Commission. Sage Grouse has failed to claim facts that would support standing to bring its claims with respect to Schedule No. 38, interconnection jurisdiction, or the two PPAs it seeks to challenge. Moreover the two PPAs it seeks to review have been finally decided by this Commission and the Utah Supreme Court. Sage Grouse has no standing and no articulable legal interest in these PPAs. There is no relief this Commission can provide that would resolve the claims made by Sage Grouse. For these reasons the Commission should

dismiss the Request for Agency Action. Finally the fifth claim with respect to Jordan White is outside of the knowledge of the Division.

**I. SAGE GROUSE HAS REQUESTED A DECLARATORY ORDER AND HAS NOT PROPERLY MET THE REQUIREMENTS OF UTAH ADMIN CODE R746-101-2.**

Sage Grouse seeks “determination of legal rights, duties, privileges, immunities, or other legal interests.” As such it is seeking a declaratory order under Utah Code Ann. § 63G-4-503 and must comply with Utah Admin Code r746-101. Sage Grouse has failed to clearly designate its request as required by Rule 746-101-3(a). It has failed to adequately describe facts and circumstances in which its request might be applied. *Id.* It has further failed to include a statement that “no public utility under the Commission’s Jurisdiction will be adversely affected by a ruling favorable to the petitioner” as required by Rule 746-101-2(D). For this reason alone the Request for Agency Action is improperly filed and should be dismissed until Sage Grouse meets the minimum filing requirements to seek a declaratory order from the Commission.

**II. SAGE GROUSE LACKS STANDING**

Sage Grouse has failed to claim a distinct and palpable injury and therefore lacks standing. A precondition to seeking relief before the Commission is that the party must establish standing. The same rules of standing that apply whether in court or administrative proceedings. “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).

In Utah there are two tests used to establish standing. The “traditional test” is a 3 part inquiry that requires a showing that a party has or will suffer a distinct and palpable injury by establishing that (1) it will be adversely affected by the action, (2) there is a causal relationship between the injury and the relief requested, and (3) the relief requested is substantially likely to

redress the injury. *Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 17, 148 P.3d 960, 967 (Utah 2006). The second test of standing is the “alternative test.” A party may meet this burden by demonstrating that it has “the interest necessary to effectively assist the court 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.

Sage Grouse fails both tests. With respect to the traditional test, Sage Grouse has failed to establish how it is likely to be adversely affected by the Commission’s actions. It has not claimed any injury that is the result of Schedule No. 38 or interconnection jurisdiction nor has it claimed any direct injury resulting from the PPAs it is seeking to challenge. Its claims of injury are vague assertions property rights disputes that are unrelated to interconnection or Schedule No. 38.

Sage Grouse has further failed to explain how the relief requested would be substantially likely to redress any injury it may have. The recurring theme of the vague claims made by Sage Grouse revolve around validity of lease options on certain lands. The Commission does not have jurisdiction to establish rights in real property between non-utilities. Whether these lease options are valid or not is simply not within the jurisdiction of the Commission to determine. An investigation and determination of the legal interests in lease options would have little utility. As such it is unclear how a Commission order with respect to the site control would meaningfully affect Sage Grouse. It would not change the rights to the property. The PPAs it request to be reviewed are approved with finality. There is no relief available at this time from the Commission that would redress this. Sage Grouse fails the traditional test for standing.

With respect to the alternative test Sage Grouse has not shown that it has an interest necessary to effectively assist in developing all relevant legal and factual questions. Sage

Grouse has not claimed facts that support its interest or connection with the challenged PPAs other than vague assertions regarding property rights disputes. It has not made any claims that the jurisdiction over interconnection of QFs is unlikely to be raised otherwise. In fact it seems reasonably likely that they might be raised in a future actual dispute with a party who has proper standing with a real dispute regarding interconnection of a QF. Sage Grouse does not meet the requirements of the alternative test.

Sage Grouse has not claimed any distinct and palpable injury upon which standing may be found nor established that it is an appropriate party under the alternative test. Therefore the Commission should dismiss the Request for Agency Action for lack of Standing.

### **III. CURRENT AUTHORIZED VERSION OF SCHEDULE NO. 38 IS P.S.C.U NO. 50.**

Sage Grouse's initial request for agency action asserted that versions of Schedule no. 38 that have been adopted by the Commission since 2003 were ineffective. The result according to Sage Grouse was that the 2003 version remains the effective Schedule No. 38 today. Sage Grouse later filed Errata in which it recognized that the updates to Schedule 38 resulting from 12-035-101 docket were made part of the current Schedule No. 38 in effect. Sage Grouse further stated that "for purposes of Sage Grouse's Jurisdictional arguments, the changes are immaterial." (Sage Grouse Errata at p.4). For this reason and because the Commission recently issued its Order in Docket No. 14-035-140 updating the language of Schedule No. 38, the issue regarding the language of Schedule No. 38 is moot.

The claim that the Commission cannot authorize its agents to act on its behalf is incorrect. The Commission may act in a variety of ways to approve tariff filings. The common practice of the Commission as has been done for many years is for the Commission to issue an order at the conclusion of a docket and within that order direct the Company to prepare a set of

tariff sheets that reflect the Commission's order. The final order is the Commission's adoption of the new Tariff and the review is a clerical function to ensure that the order is complied with. The commission secretary is plainly given broad authority to make the final review on behalf of the Commission. Utah Code Ann. § 54-1-7 states in relevant part that the secretary "superintended its clerical business... and perform other duties the commission may prescribe." Review and approval of tariff filings for compliance with the Commission orders are plainly within the authority of the commission secretary. P.S.C.U No. 50 Schedule No. 38 was properly approved in Docket No. 13-035-184 and is the current authorized version of Schedule No. 38.

Moreover, as discussed, Sage Grouse has not made any claim that it has been subject at any time to any prior versions of Schedule No. 38 or the current version. It lacks standing to challenge whether any previous version of Schedule No. 38 might have applied to it. If Sage Grouse is subject to the Schedule No. 38 at some future time and at that time believes that Schedule No. 38 is not being followed correctly or the incorrect version is being applied it should file a complaint. To do so now would be inefficient use of the Commission's time as the result would only be a hypothetical application.

#### **IV. THE COMMISSION'S JURISDICTION OVER INTERCONNECTION AGREEMENTS WITH SCHEDULE NO. 38 QUALIFYING FACILITIES IS NOT RIPE FOR REVIEW.**

Sage Grouse claims that the Commission has jurisdiction over Schedule No. 38 interconnection agreements. This is not disputed by the Division. FERC has plainly stated that "When an electric utility is obligated to interconnect under Section 292.303 of the Commission's Regulations, that is, when it purchases the QF's total output, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs. Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures*, 104 FERC 61103,

¶¶ 813-14 (July 24, 2003). There is no agency action necessary on behalf of the Commission to address this matter. The Commission has jurisdiction, it has been recognized in the recent Schedule No. 38 Docket No. 14-035-140, and has been addressed in the updated tariff. (*See 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, Comments of SunEdison, LLC in Support of Settlement Agreement, May 22, 2015).

Sage Grouse then goes on to conclude that, because the FERC has declined to exercise exclusive jurisdiction over interconnection agreements of this type, that “the Commission must exercise jurisdiction over PacifiCorp’s compliance with OATT Part IV because it is required by Schedule 38.” Sage Grouse seeks the Commission to look back at approved PPAs under prior version of Schedule No. 38 and review PPAs that have been finally approved. The application of that jurisdiction in the prior case is not appropriately part of this docket. Facts have not been claimed to give Sage Grouse an interest in those prior PPAs.

The application of jurisdiction going forward is not ripe for review. There has been no assertion of facts relevant to Sage Grouse that involve Commission exercise of jurisdiction over interconnection agreements. This matter is properly left to be further reviewed when an actual case or controversy regarding Schedule No. 38 and the interconnection process is before the Commission.

## **CONCLUSION**

The Commission should dismiss the Request for Agency Action. Sage Grouse seeks declaratory relief and has failed to meet the minimum filing requirements to make such a request. It has not complied with Utah Admin Code r746-101. Sage Grouse has further failed to claim

sufficient facts or interest in either Schedule No. 38, the interconnection process, or the two PPAs it challenges to establish standing. It has failed to establish any distinct or palpable injury. Rather it merely makes claims as to treatment of past PPAs that have been decided with finality by this Commission and the Utah Supreme Court. Sage Grouse's claims with respect to the approval by the commission secretary of tariff sheets post Commission order are without merit. For these reasons the Commission should dismiss the Request for Agency Action with respect to the issues related to Schedule No. 38 and interconnection jurisdiction.

Submitted this 15th day July, 2015.

*/s/ Justin C. Jetter*

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