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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 Sage Grouse Energy Project, LLC's Motion to Strike and Reply to Rocky Mountain Power's Motion to Dismiss

INTRODUCTION

On July 15, 2015, Rocky Mountain Power ("PacifiCorp") filed a motion to dismiss ("PacifiCorp's Motion") Sage Grouse's May 29, 2015 Request for Agency Action (the "Request"). Interestingly, PacifiCorp does not touch at all on the merits of Sage Grouse's Request. There is good reason for this. Rather, PacifiCorp desperately attempts to summarily kill any discussion of its serious malfeasance. Nevertheless, the whole of PacifiCorp's disingenuous and factually-intensive motion is improper and legally unsound. The Commission should strike PacifiCorp's Motion, estop its arguments, and, in the alternative, deny it outright.

The crux of PacifiCorp's Motion is that Sage Grouse's Request has already been decided in the Blue Mountain Power Partners, LLC ("BMPP") and Latigo Wind Park, LLC ("Latigo") Power Purchase Agreement ("PPA") Dockets. The Commission should reject PacifiCorp's revisionist argument. In the BMPP and Latigo PPA Dockets, ***PacifiCorp*** repeatedly argued against Ellis-Hall – not Sage Grouse – that the Commission did not have jurisdiction over interconnection issues. Surprisingly, the Commission's presiding officer, Jordan White, a five-

year attorney veteran with PacifiCorp, agreed. With no analysis or case citation, Mr. White adopted PacifiCorp's position, refused to exercise jurisdiction over PacifiCorp's OATT, and punted interconnection related matters for another time.[1] Apart from disturbing, this, by law, neither constitutes a complete, full, and fairly litigated claim or issue, nor constitutes a final judgment on the merits. Thus, *res judicata* cannot apply.

The Commission has long deferred its regulatory decisions to PacifiCorp's judgment. PacifiCorp has, in turn, abused its influence and perpetuated massive fraud in its Large Generator Interconnection Process ("LGIP"), as adopted by Schedule 38. It is time for the Commission to exercise is statutory authority, definitively set forth its own jurisdictional bounds, and investigate PacifiCorp's fraudulent conduct.

ARGUMENT

PacifiCorp's Motion is a flailing attempt to avoid investigation into its administration of its LGIP, as adopted by Schedule 38. The Commission should strike PacifiCorp's Motion. The Commission should also reject PacifiCorp's *res judicata* because Sage Grouse has no obligation to anticipate an affirmative defense in the pleading stage. Even if it did, the Commission should deny PacifiCorp's Motion because PacifiCorp does not understand and cannot meet a single element of *res judicata*. Sage Grouse deserves its constitutionally protected day in Court.

In the end, the Commission should investigate PacifiCorp's fraudulent administration of its LGIP and require PacifiCorp to remedy the harm it has caused to Sage Grouse.

[1] Sage Grouse agrees that the Commission's jurisdiction does not extend to resolve contractual, tort, quiet title actions, or the like between two parties. If Sage Grouse is incorrect, it hereby explicitly asks for the Commission's correction on the matter.

I. THE COMMISSION SHOULD STRIKE PACIFICORP'S MOTION BECAUSE IT IS IMPROPER.

Pursuant to Utah R. Civ. P. 12(f), Sage Grouse hereby moves the Commission to strike PacifiCorp's ill-conceived Motion for three reasons.

A. The Rules Do Not Provide For a Motion to Dismiss.

The Rules state that "[r]esponsive pleadings to applications, petitions, or requests for agency action shall be filed in accordance with Section 63G-4-204." Rule 746-100-3(K)(1). Utah Code Ann. § 63G-4-204 sets forth the requirements for a "written response." Thus, there ***is*** a provision that covers the situation of PacifiCorp's response. And, this provision omits any mention that a motion to dismiss constitutes a proper "written response." Under Utah's standard for statutory interpretation, the Commission must, therefore, "give effect to omissions in statutory language by presuming all omissions to be purposeful." *Marion Energy, Inc. v. KFJ Ranch Partnership*, 267 P.3d 863, 2011 UT 50 (Utah 2011). PacifiCorp's motion to dismiss is, therefore, improper. The Commission should strike PacifiCorp's Motion. And, because PacifiCorp has long exceeded the time to file a proper response, the Commission, as it has done to others, should now bar PacifiCorp from participating in this action.

B. PacifiCorp's "Motion" Violates the Utah Rules of Civil Procedure.

Even if the administrative rules provide for a motion to dismiss brought under the Utah Rules of Civil Procedure, PacifiCorp's motion fails to follow them.

The Rules require that "[a]ll motions . . . shall be accompanied by a supporting memorandum." Utah R. Civ. P. 7(c)(1). PacifiCorp's Motion contains no such memorandum. In addition, Rule 7 specifically requires that "[a] motion shall be in writing and state succinctly and with particularity the relief sought." Utah R. Civ. P. 7(b)(1). Indeed, PacifiCorp's "motion" "shall not exceed 10 pages of argument without leave of the court . . . upon ex parte application

and a showing of good cause." Utah Rule Civ. P. 7(c)(2). There is nothing succinct about PacifiCorp's "motion." With no such motion or order, PacifiCorp's argument drones on for the better part of twenty-pages, however those pages are titled. Indeed, PacifiCorp's "argument" provides no factual analysis but attempts to improperly reference its "background" section "[a]s already demonstrated." PacifiCorp's Motion 10. Thus, the Commission should either strike PacifiCorp's motion for skirting page limitations by improper references or because it's actual "argument," void factual analysis, makes no intelligible argument.[2]

C. PacifiCorp's Motion Improperly Seeks Adjudication of an Affirmative Defense on the Pleadings.

The whole, misplaced thrust of PacifiCorp's Motion is that the Commission should dismiss Sage Grouse's Request on the basis of *res judicata*. *Res Judicata*, of course, is an affirmative defense. *See Rothey v. Walker Bank & Trust Co.*, 754 P.2d 1222, 1225 (Utah 1988) ("Utah Rules of Civil Procedure requires that affirmative defenses such as . . . res judicata, etc., be set forth in the responsive pleadings."). Under Utah law, however, "complaints do not have to anticipate affirmative defenses to survive a motion to dismiss unless the allegations of the complaint itself set forth ***everything*** necessary to satisfy the affirmative defense." *Zoumadakis v. Uintah Basin Medical Center, Inc.*, 2005 UT App 325, ¶ 6, 122 P.3d 891 (internal citations omitted) (emphasis added). Indeed, "affirmative defenses, which often raise issues outside of the complaint, are not generally appropriately raised in a motion to dismiss under rule 12(b)(6)." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7, 53 P.3d 947 (noting the narrow

[2] Sage Grouse also notes that PacifiCorp, as well as the other parties, are now barred from raising any additional affirmative defenses because they were not raised in their response. *See Rothey v. Walker Bank & Trust Co.*, 754 P.2d 1222, 1225 (Utah 1988) (stating that when a party does not properly set forth an affirmative defense in its response the defense is waived under Utah R.Civ.P. 12(h)). Consequently, the parties have no right to file responses to the others' arguments unless those defenses were already raised.

exception is where the complaint raises the necessary facts for an affirmative defense such as dates and times that trigger a statute of limitations defense).

Sage Grouse's Request says nothing of the elements of *res judicata* or any other of PacifiCorp's affirmative defenses because Sage Grouse had no obligation to do so. Consequently, PacifiCorp cannot prove as a matter of law that it is now entitled to *res judicata*. The Commission should reject PacifiCorp's poorly conceived "motion."

II. STANDARD OF REVIEW

Assuming that PacifiCorp's Motion is proper, and it is not, PacifiCorp has still misapplied the proper standard. On a motion to dismiss, the courts accept the "description of facts alleged in the complaint to be true." *Reynolds v. Woodall*, 2012 UT App 206, ¶ 10, 285 P.3d 7. Furthermore, the courts must "draw all reasonable inferences from these facts in a light most favorable to the plaintiff." *First Equity Fed., Inc. v. Phillips Dev., LC*, 2002 UT 56, ¶ 3, 52 P.3d 1137.

PacifiCorp, however, attempts to skirt this rule by misapplying the judicial notice doctrine under Utah R. Evid. 201. Although true that a court can take judicial notice of documents at any time during litigation, PacifiCorp does not understand what this means. The Utah Court of Appeals has favorably echoed the federal approach on this matter:

> A Court can take judicial notice that a pleading was filed or that a judgment was entered. Likewise, a Court can take judicial notice that court filings contained certain allegations, or that findings of fact were made by another Court. But the ***truth*** of these allegations and findings are not proper subjects of judicial notice.

State v. Cooper, 2011 UT App 412, ¶ 15 n.8, 275 P.3d 250 (Utah App. 2011) (emphasis).[3]

[3] "Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are 'substantially similar' to the federal rules." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7 n.2., 53 P.3d 947.

If Sage Grouse had made an allegation that a document was or was not filed with a state agency, then PacifiCorp's exhibits may have purpose. That, however, is not the issue at hand. Rather, PacifiCorp is attempting to improperly use its exhibits to prove the truth of the facts contained therein. This is not proper.

There is a time for PacifiCorp to authenticate documents and provide foundation. At this phase of the matter, however, PacifiCorp cannot do so. The Commission should reject PacifiCorp's Motion.

III. PACIFICORP IS JUDICIALLY ESTOPPED FROM RAISING ITS "COLLATERAL ESTOPPEL" AND "*RES JUDICATA*" ARGUMENTS.

"Under judicial estoppel, a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained." *3D Construction and Development, L.L.C. v. Old Standard Life Insurance Co.*, 2005 UT App 307, ¶ 11, 117 P.3d 1082 ("The purpose behind judicial estoppel is to discourage machinations by the parties that subvert the integrity of the judicial system."). "This doctrine prevents parties from playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation." *Id.* (internal citations omitted). Consequently, judicial estoppel applies where the following elements are met: "(1) the prior and subsequent litigation involve the same parties or their privies; (2) the prior and subsequent litigation involve the same subject matter; (3) the prior position was 'successfully maintained;' and (4) the party seeking judicial estoppel has relied upon the prior testimony 'and changed his position by reason of it.'" *Orvis v. Johnson,* 2008 UT 2, ¶ 11, 177 P.3d 600 (citations omitted).

As explained below, Sage Grouse vigorously disputes that it is in privity with Ellis-Hall or that Sage Grouse's Request involves the same subject matter as the BMPP and Latigo PPA

Dockets. If Sage Grouse is incorrect, as required for PacifiCorp to succeed in its *res judicata* arguments to dismiss this matter, then the first and second elements of judicial estoppel are met. In such a case, PacifiCorp's argument in those earlier dockets was undoubtedly "successfully maintained." Thus, the third element would also be met. The only question, therefore, is whether PacifiCorp provided testimony that caused Ellis-Hall to change its behavior. In such a case, this element is met.

Per public filings, Ellis-Hall challenged PacifiCorp's, BMPP's, and Latigo's compliance with PacifiCorp's OATT in the BMPP and Latigo PPA Dockets. In particular, Ellis-Hall contended that PacifiCorp did not require BMPP and Latigo to, among other things, establish Site Control under the tariff. In response, other parties argued that the Commission did not have jurisdiction over Ellis-Hall's concerns and that Ellis-Hall should raise the question in another forum:

> PacifiCorp's Mr. Clements repeatedly testified:
>
> > Many of the issues raised by Ellis-Hall are not relevant to the approval of this power purchase agreement . . . .
>
> 9.19.13 Tr. 17:13-15.
>
> > [PacifiCorp] is aware of timing constrains that are very real and very impactful for [BMPP] and Latigo, and if we were to set a schedule that had a Commission approval beyond 60 or 90 days, it is [PacifiCorp's] understanding that these projects would not be able to be constructed as planned . . . .
>
> 8.2.13 Tr. 16:25-17:5.
>
> > If there are issues with the interconnection process, that is not relevant to approval of these Power Purchase Agreements . . . . [T]hey can open a separate docket to address those issues.
> >
> > . . .

> If [Ellis-Hall] has concerns with how [PacifiCorp] has administered Schedule 38, there are other avenues to address those concerns. Those concerns are not relevant or pertinent to the scheduling of dockets for [BMPP] or Latigo.

8.2.13 Tr. 34:10-25.

> [PacifiCorp's] position is that, first of all, these are the Company's applications, and in these particular dockets, we are filing for Commission approval for Power Purchase Agreements between the Company and these counterparties. And so it's the Company's application for approval of a Power Purchase Agreement that I think that is pertinent for this proceeding today.

8.2.13 Tr. 15:17-24.

Indeed, Mr. Clements testified regarding the *timing* of the LGIA and PPA—not PacifiCorp's *compliance* with the LGIA. *See* 8.2.13 Tr. 33:18-4. Sage Grouse's Request does not raise that as an issue in this matter.

Similarly, Mr. Dodge for BMPP argued:

> The first [of Ellis-Hall's claimed interests] is . . . that the data that was collected on leases they claim to own. By the way, they state they own it . . . . But that is not an issue this Commission will ever resolve. It doesn't have the power to resolve the issue as to whether [Ellis-Hall] or [BMPP] has the right to data or the right to underlying leases. That is not something relevant to this proceeding. This proceeding is on the Company's request to approve a Power Purchase Agreement.
>
> …
>
> [Ellis-Hall] claim[s] that there's impact as to transmission. . . . It is not before this Commission. It's a FERC issue. It's a legal issue, whether the transmission interconnection process has been complied with under Pac-Trans tariff. It has nothing to do with this case.

8.2.13 Tr. 37:8-15; 38:12-22.

> There is a fairly limited role of the Commission . . . . That is why I am imploring the Commission to identify the issues you want to hear and to tell them no on the issues you don't—that isn't relevant to your consideration . . . . The FERC rules are not before you and Mr. Clements can answer anything to be answered about Schedule 38, which is the issue before you.

9.16.13 Tr. 40:8; 22- 41:5.

Mr. Justin Jetter on behalf of the Division of Public Unities echoed this line of incorrect reasoning:

> [W]e're not here today to create a record for some party. We're here to provide the Commission the information it needs to make decisions on a couple of power purchase agreements. And we're going way down these side roads into new evidence that is fairly far beyond that was proposed during the comments.

9.19.13 Tr. 268:6-12.

The Commission repeatedly accepted these positions—that PacifiCorp's compliance with its LGIP was not at issue and not within the jurisdiction of the Commission:

> The focus here again, and I have heard your arguments, but, again, the precise focus is what is the Commission's consideration about these PPA's.

9.16.13 Tr. 39: 2-4.

> So back to the issue of Mr. Fishback. I was not persuaded. I laid out what the issues—I am not persuaded that his attendance from Portland is necessary to address those issues. These are--I just don't believe it's necessary that the Commission's consideration of the PPA between these two separate counterparties.

9.16.13 Tr. 53:24-54:4.

> I just want to make sure we're clear that we're focused, again, here on the PPA at hand . . . .

9.19.13 Tr. 85:2-5.

> Again, this docket is strictly with respect to the PPA between Latigo and Rocky Mountain Power. And I don't see the relevance, unless you have another line, about preferential treatment. In other words, there's a Schedule 38 process for complaints . . . . There's a process for a dispute resolution in Schedule 38.

9.19.13 Tr. 212:12-16, 23-24.

> The LGIA is part of the pro forma Open Access Transmission Tariff that is governed by the Federal Energy Regulatory Commission. ***We do not have jurisdiction*** in the state of Utah over the terms and conditions of that.

9.19.13 Tr. 253:18-22 (emphasis added).

> [Y]ou are making an issue as to whether or not they have proper site control and whether or not PacifiCorp did its due diligence. And that's at issue, according to you. But again, I just haven't been convinced yet that this kind of repetitious line of questioning is pertinent to the examination of the PPA they had . . . .

9.19.13 Tr. 268:16-21.

And, again, on August 2, 2013, the Commission emphasized that "the subject matter of this docket . . . is the PPA between the counter parties." 8.2.13 Tr. 6-8.

Based on the foregoing, parties, including PacifiCorp and the Division of Public Utilities, successfully opposed Ellis-Hall by arguing (1) that the Commission did not have jurisdiction over questions relating to PacifiCorp's administration of its interconnection process requirements, and (2) that the Commission should limit the scope of the BMPP and Latigo PPA Dockets to "the PPA between the counter parties." *Id.* Indeed, the Commission narrowed the issue to the approval of the BMPP and Latigo PPAs, explicitly leaving the door open to resolve interconnection concerns at a later time. It is inequitable, and frankly, dishonest, for PacifiCorp to now attempt to prejudice Sage Grouse (through a misapplication of privity) as it has so done.[4] PacifiCorp should be estopped from making any such *res judicata* argument.

IV. THE COMMISSION IS ESTOPPED FROM APPLYING *RES JUDICATA*.

As explained above, the Commission did not exercise jurisdiction over LGIP matters in the BMPP and Latigo PPA Dockets and bifurcated questions relating to the PPA and LGIA. In the end, the reason that the Commission narrowed the subject matter is irrelevant. The Commission narrowed the matters in the BMPP and Latigo PPA Dockets and avoided questions touching on interconnection. Nevertheless, PacifiCorp

[4] If there is any ambiguity in the Commission's jurisdictional decision it must be construed against the prevailing parties who suggested the language, including PacifiCorp. *See Dahl v. Dahl*, 2015 UT 23, ¶ 19, 345 P.3d 566 (Utah 2015) ("[W]e will construe any ambiguities in the order against the prevailing parties who drafted it.").

now argues that the Commission should forget what it said when it limited the proceedings and hold that LGIP questions should have been brought back then . . . despite the Commission then saying they could not. *See e.g.* 9.16.13 Tr. 39:2-4 (The Commission stating, "[t]he focus here again, and I have heard your arguments, but again, the precise focus is what is the Commission's consideration about these PPA's").

Sage Grouse's research reveals no case law supporting PacifiCorp's bizarre theory of judicial sandbagging. Such an asinine fact pattern is better left where it belongs—with absurd fiction. Indeed, PacifiCorp's argument is entertainingly similar to *Monty Python and the Holy Grail*. In the cult classic, the "Knights Who Say . . . Ni!" require King Arthur to find a shrubbery to continue on his quest. Arthur does so, only to return to find the Knights abandoning their prior instruction in favor of requiring Arthur to find yet another (slightly higher) shrubbery and to cut down the mightiest tree in the forest with a herring.

The Commission, within the scope of its discretion, asked for a proverbial shrubbery and got it. It cannot, as PacifiCorp asks, now change the rules. The Commission is, therefore, estopped from changing the rules at PacifiCorp's request and belatedly enlarge the scope of the BMPP and Latigo PPA Dockets after it affirmatively narrowed it. To do otherwise (assuming PacifiCorp's other arguments have merit, and they do not) would be a gross violation of Sage Grouse's (and others') due process rights. The Commission cannot apply *res judicata* to this matter.

V. COLLATERAL ESTOPPEL DOES NOT APPLY WHERE SAGE GROUSE'S REQUEST DOES NOT COLLATERALLY ATTACK A PRIOR COMMISSION ORDER AND, EVEN IF DID, IS UNWARRANTED IN THIS CASE.

PacifiCorp contends that Sage Grouse is attempting to collaterally attack the Commission's approval of the BMPP and Latigo PPAs in violation of Utah Code Ann. § 54-7-14. PacifiCorp Mot. 10. PacifiCorp argues that Sage Grouse should be estopped from doing so. Oddly, PacifiCorp then later makes a throw-away argument that Sage Grouse's Request is barred under the *res judicata* branch of issue preclusion. *See* PacifiCorp Motion 19-20. What PacifiCorp fails to realize, however, is that collateral estoppel and issue preclusion are one and the same. *See Buckner v. Kennard*, 2004 UT 78, ¶ 12, 99 P.3d 842 (stating, "issue preclusion, also known as collateral estoppel . . . ."). Regardless, Sage Grouse is not collaterally attacking any prior order. Issue preclusion, therefore, does not apply.

A party seeking to invoke issue preclusion must establish that:

> (1) the issue decided in the prior adjudication is identical to the one presented in the instant action; (2) the party against whom issue preclusion is asserted was a party, or in privity with a party, to the prior adjudication; (3) the issue in the first action was completely, fully, and fairly litigated; and (4) the first suit resulted in a final judgment on the merits."

Id. at ¶ 13.

PacifiCorp cannot meet any of these elements—particularly on the pleadings. The Commission should reject PacifiCorp's arguments and deny the motion.

A. Sage Grouse Is Not Collaterally Attacking a Prior Commission Order Because the Issues Are Not Identical.

1. The Commission Already Defined the Scope of the Subject Matter in the BMPP and Latigo PPA Dockets.

PacifiCorp argument grossly misrepresents Sage Grouse's Request for something that it is not.

Sage Grouse's Request is clear on its face, seeking clarification and an order recognizing four points:

(1) As of July 9, 2013, the operative version of Schedule 38 required PacifiCorp to follow its OATT and apply those procedures for studying the generation interconnection, which included PacifiCorp's OATT's Site Control requirements.
(2) The Commission had and continues to have jurisdiction over PacifiCorp's OATT as adopted by Schedule 38.
(3) PacifiCorp did not require BMPP and Latigo to reasonably demonstrate Site Control as required by Schedule 38, and, therefore, OATT Part IV;
(4) PacifiCorp, BMPP, and Latigo have fraudulently misappropriated land rights belonging to other Interconnection Customers and Qualified Facility ("QF") owners to obtain the Commission's approval of their respective PPAs.
(5) Disclose Jordan White's affiliations with PacifiCorp.

Sage Grouse Request 2 (as revised by Sage Grouse's Errata).

Thus, the only mention of "PPAs" is in mere reference to a motive. In contrast, on August 2, 2013, the Commission clarified the issue before it in the BMPP and Latigo PPA Dockets, emphasizing that "the subject matter . . . is the PPA between the counter parties." 8.2.13 Tr. 6-8.

Contrary to PacifiCorp's chimera, Sage Grouse has not sought to undo BMPP's or Latigo's PPAs. That is not at all what Sage Grouse's Request seeks. In fact, Sage Grouse's Request has nothing to do with the PPAs between these parties. Rather, Sage Grouse seeks a determination that, among other things, PacifiCorp, BMPP, and Latigo committed fraud during the LGIP—regardless of the PPAs.

This distinction is evident in the Supreme Court of Utah's opinion of the BMPP and Latigo PPA Dockets in *Ellis-Hall Consultants, LLC v. Public Service Commission of Utah*, 2014 UT 52, ¶ 12, 342 P.3d 256 (the "Supreme Court Case"). There, Ellis-Hall argued that:

> (a) the PSC failed to require strict compliance with the terms of Schedule 38, which Ellis-Hall views as nondiscretionary; (b) PacifiCorp engaged in discrimination in its application of the terms of Schedule 38—applying them leniently to Latigo and Blue Mountain but strictly to Ellis-Hall—in a manner inconsistent with the "public interest;" and (c) the terms of the Latigo and Blue Mountain power purchase agreements were too vague to be enforceable.

Ellis-Hall Consultants, LLC, 2014 UT 52 at ¶ 12.

In response to these positions, the Court held, (a) "Schedule 38 does not prescribe the due diligence that PacifiCorp *must* perform but rather acts as a check on the due diligence PacifiCorp *may* perform;" *Id.* ¶ 17; (b) the "avoided cost rates are a safe-harbor of reasonableness in advancing the public's interest in protecting ratepayers;" *Id.* at ¶ 25; and (c) that the question of PPA enforceability is resolved "by the avoided-cost terms of the Latigo and [BMPP] power purchase agreements." *Id.* at ¶ 29.

Sage Grouse's Request touches on none of these issues or holdings. Indeed, Sage Grouse is not asking for a determination that PacifiCorp failed to follow Schedule 38 by permitting BMPP and Latigo to enter into PPAs before executing LGIAs, what constitutes the public's interest in approving rates, or whether the BMPP and Latigo PPAs are enforceable or should otherwise be approved. Sage Grouse's Request makes no such challenge. Rather, Sage Grouse is asking for direction regarding the Commission's jurisdictional reach over PacifiCorp's LGIP, and a determination that, regardless of the validity of BMPP's and Latigo's PPAs, PacifiCorp participated in fraud before this Commission. The fact that the PPAs are now approved and valid does not mean that the Commission should avoid investigating whether or not PacifiCorp,

BMPP, and/or Latigo committed fraud in the process. And it does not mean that the Commission cannot take action against these parties' interconnection requests.

2. The Commission Should Reject PacifiCorp's Examples that the BMPP and Latigo PPA Dockets Are "Identical" to Those Raised in Sage Grouse's Request.

PacifiCorp argues that Sage Grouse's Request makes the same arguments that Ellis-Hall made in the BMPP and Latigo PPA Dockets. In addition to what is explained, *supra*, PacifiCorp's own examples hurt, rather than help, its argument.

PacifiCorp's contention that the arguments between the two matters are "identical," is false. For example, PacifiCorp includes a nifty table to show how similarly Ellis-Hall's and Sage Grouse's positions align. PacifiCorp's Motion 17. This table has multiple problems. The quote taken is a statement taken from the Commission's October 3, 2013 order—not Ellis-Hall. And the statement addresses whether the BMPP and Latigo PPAs required PacifiCorp to follow its OATT. This is not Sage Grouse's argument. Rather, as can again be seen in PacifiCorp's nifty table, Sage Grouse seeks a determination that PacifiCorp did not require Site Control as required by ***Schedule 38***. The BMPP and Latigo PPAs are not at issue in this matter.

To reject this prong, however, the Commission need go no further than PacifiCorp's own statements. PacifiCorp summarily concludes that the arguments are "identical." *See* PacifiCorp's Motion 16. But then, PacifiCorp acknowledges that Sage Grouse is asserting a "more nuanced argument that Schedule 38 incorporates the requirements of the OATT." PacifiCorp's Motion 17 n.5. If Sage Grouse's argument is more nuanced, then it is not "identical." The Commission should reject PacifiCorp's argument.

B. Sage Grouse Is Not a Privy of Ellis-Hall.

PacifiCorp cannot meet any of the elements necessary to succeed in their argument. The privity element is, therefore, moot. Nevertheless, Sage Grouse will demonstrate that PacifiCorp has not carried its burden to demonstrate privity as needed to carry its affirmative defense.

1. The Requisite Relationship Between Ellis-Hall and Sage Grouse Does Not Exist.

PacifiCorp properly states that "[t]he definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal rights." PacifiCorp Motion 12 (quoting *Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978). Indeed, "privity depends mostly on the parties' relationship to the subject matter of the litigation." *Press Pub., Ltd. v. Matol Botanical Intern., Ltd.*, 2001 UT 106, ¶ 20, 37 P.3d 1121. PacifiCorp ignores, however, the proper test for examining this relationship.

The Supreme Court of Utah has long-held that "[t]he term 'privity' denotes mutual or successive relationship to the same rights or property." *Taylor v. Barker*, 262 P. 266, 70 Utah 534 (Utah 1927). Indeed, "[t]he general rule is that agents and principals do not have any mutual or successive relationship to rights of property and are not, as a consequence thereof, in privity with each other." *Searle Bros. v. Searle*, 588 P.2d 689 (Utah 1978). Thus, Ms. Kimberly Ceruti's position with Ellis-Hall means very little.

Instead, PacifiCorp must show that there is a "mutual or successive relationship." *See Id.* This it cannot do because Sage Grouse and Ellis-Hall are not only separate companies but have completely different ownership and management structures. In fact, Ellis-Hall, Tony Hall, and Ellis-Hall's majority owners have absolutely no ownership interest in Sage Grouse. Nor are they managers or employees of Sage Grouse. In fact, as far as Sage Grouse knows, they have little interest in Sage Grouse's success other than as a potential customer accessing Ellis-Hall's

substation, as explained below. On the other-hand, Sage Grouse's principal, Kimberly Ceruti, is a minority member of Ellis-Hall with less than a 5% interest. And, Sage Grouse's manager, Michelle McDaniels, has no affiliation with Ellis-Hall either as an owner, employee, or manager.

Contrary to what PacifiCorp would have this Commission believe, this fact pattern is different in almost every respect to *Press Pub., Ltd. V. Matol Botanical Intern, Ltd.*, 2001 UT 106, ¶ 21, 37 P.3d 1121.

First, in *Matol*, three persons owned and directed multiple other entities. *Id.* They all had common ownership and management, and, therefore, the same legal rights and interests. *Id.* Thus, in *Matol*, the interest between the persons and entities were "mutual." As explained above, that is not, in any way, similar to the relationship between Sage Grouse and Ellis-Hall because they have completely different ownership and management structures. PacifiCorp's analogy is wholly misplaced.

Second, PacifiCorp grossly overstates the *Matol* holding. In *Matol*, the Court decided as it did due to the parties' prior argument seeking joint liability, which, the Court noted, was "based, in part, on a corporate disregard and piercing the corporate veil theory that the three individual owners operated all the various Matol entities as a partnership, creating new corporations and changing their cash flow at will." *Id.* at 22. In other words, the *Matol* parties *admitted* privity to benefit themselves under other legal theories. No such admission exists in this case.

If there is any lingering question on the issue of privity, the Commission cannot resolve it as this phase of litigation. As with every other argument in PacifiCorp's motion, there are, at best, mixed-question of law and fact that cannot be resolved on a motion to dismiss.

2. PacifiCorp is Estopped From Making the Nonsensical Argument that Sage Grouse and Ellis-Hall Are in a Common Plan or Enterprise.

It support for its privity argument, PacifiCorp contends that Sage Grouse and Ellis-Hall are engaged in a common plan or enterprise because Sage Grouse will connect to the Ellis-Hall substation. Apart from being far outside the pleadings, PacifiCorp is estopped from making this wholly dishonest claim.

Three elements are required for equitable estoppel:

> [F]irst, a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; next, reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act or failure to act; and, third, injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Youngblood v. Auto-Owners Ins. Co., 158 P.3d 1088, 2007 UT 28, ¶ 14 (Utah 2007).

Each of these elements are met in this case.

First, the reason that Sage Grouse intends to connect to the Ellis-Hall substation is because PacifiCorp's Tom Fishback ***told*** Sage Grouse that it ***must*** connect to the Ellis-Hall substation as a matter of good utility practice so that the rate-payers do not have to pay for additional charges. Second, Sage Grouse reasonably relied on this statement and, therefore has every intention, as a necessity, to connect to Ellis-Hall's substation. Third, to allow PacifiCorp to now repudiate Mr. Fishback's statement to establish privity between Ellis-Hall and Sage Grouse would unjustly permit PacifiCorp to escape an important investigation into whether it committed fraud on the basis that Sage Grouse did exactly what PacifiCorp instructed it to do in the first instance. PacifiCorp's disingenuous argument is not right and should not be tolerated.

In any event, Ellis-Hall has made it clear to Sage Grouse that Sage Grouse must pay market rates for the use of its substation. This is by no means a "common plan."

C. Sage Grouse's Request Was Not Previously Completely, Fully, and Fairly Litigated.

The issues in this matter, if they were raised or should have been raised in the BMPP and Latigo PPA Dockets, which Sage Grouse disputes, were not completely, fully, or fairly litigated.

First, as explained, *supra*, the Commission avoided any discussion regarding PacifiCorp's administration of its LGIP in regard to BMPP or Latigo. Indeed, the Commission explicitly held that it did not have jurisdiction to hear this issue. Thus, PacifiCorp's administration of its LGIP was not completely litigated. In fact, it never began.

Second, Mr. Tom Fishback was PacifiCorp's (prior) Manager of the Interconnection Queue. He is *the* person with information regarding PacifiCorp's administration of its LGIP. In the BMPP and Latigo PPA Dockets, Ellis-Hall attempted to call Mr. Fishback as a witness. Even Mr. Dodge admitted that Mr. Fishback was relevant for inquiry into the LGIP. 9.16.13 Tr. 34:12-20 ("To the extent the Commission decides that whether or not FERC rules [LGIP] were violated . . . then Mr. Fishback might have a [*sic*] more relevance than if not."). Nevertheless, the Commission declined the request on the basis that interconnection questions were outside the subject matter of the proceeding. *See* 9.16.13 Tr. 53:24-54:4 ("I am not persuaded that [Mr. Fishback's] attendance from Portland is necessary to address . . . the PPA between these two separate counterparties."). Sage Grouse fully intends to do what the Commission has previously denied—depose Mr. Fishback. The fact that PacifiCorp desperately wants to avoid this discovery is not a saving exception to the rule.

Third, the BMPP and Latigo PPA Dockets were expedited matters preventing a typical discovery process and motion practice.

Fourth, Sage Grouse did not have occasion to discover some of its evidence of fraud until long after the Commission ruled in the BMPP and Latigo PPA Dockets in October 2013. For

example, in February 2014, Ms. Gail Johnson received a maintenance notice from PacifiCorp stating that PacifiCorp was going to require access to maintain a transmission easement on the Johnsons' land. This was the first time PacifiCorp contacted the Johnsons about that easement maintenance in twenty years. The Johnsons then realized that this was because PacifiCorp planned to permit Latigo to use PacifiCorp's transmission lines across the Johnson land so that Latigo could interconnect to Latigo's point of interconnection, Pinto substation. This was also Sage Grouse's first indication that Latigo had lied when Latigo's Christine Mikell represented that Latigo was not using that route. And, this was Sage Grouse's first indication that PacifiCorp had doctored Latigo's feasibility study checklist. Sage Grouse had no reason to know any of this until February 2014—months after the Commission issued a decision in the Latigo and BMPP PPA dockets. This is particularly the case where Latigo also filed documents with San Juan County stating that it would use other lands surrounding the Johnsons' land in order to interconnect, which directly contradicted documents filed with PacifiCorp.

In the odd case that Sage Grouse's rebuttal to PacifiCorp's affirmative defense is not obvious on its face, then it must be left for the trier of fact on the evidence—not the pleadings.

The subject matter in Sage Grouse's Request was not, therefore, completely, fully, and fairly litigated.

D. <u>The Prior Litigation Did Not Result in a Final Judgment on the Merits.</u>

Any claims or issues of similarity between the BMPP and Latigo PPA Dockets did not result in a final judgment on the merits.

"A claim dismissed for lack of subject matter jurisdiction does not constitute an adjudication on the merits." *In re D.A.*, 2009 UT 83, ¶ 37, 222 P.3d 1172; *see also*, Utah R. Civ. P. 41(b) ("[A]ny dismissal not provided for in this rule, ***other than a dismissal for lack of***

jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.").

As explained, *supra*, the Commission refused to consider any argument regarding the interconnection process on the basis that it did not have jurisdiction. *See* 9.19.13 Tr. 253:18-22 ("The LGIA is part of the pro forma Open Access Transmission Tariff that is governed by the Federal Energy Regulatory Commission. ***We do not have jurisdiction*** in the state of Utah over the terms and conditions of that.") (emphasis added).

Thus, the matter before the Commission did not result in a final judgment on the merits.

E. <u>Collateral Estoppel Is Not Warranted in this Matter.</u>

Even assuming that PacifiCorp could meet the elements of collateral estoppel, and it cannot, collateral estoppel does not apply in this case.

Under Utah law, "application of the doctrine of collateral estoppel may be unwarranted in circumstances where it purposes would not be served." *See 3D Construction and Development, L.L.C. v. Old Standard Life Insurance Co.*, 2005 UT App 307, ¶ 21, 117 P.3d 1082 (citations omitted). These purposes include: "(1) preserving the integrity of the judicial system by preventing inconsistent judicial outcome; (2) promoting judicial economy by preventing previously litigated issues from being relitigated; and (3) protecting litigants from harassment by vexatious litigation." *Id.* at ¶ 21. Indeed, "collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care." *Id.* at ¶ 22. Consequently, collateral estoppel "is not an inflexible, universally applicable principle," but may be limited where "the underpinnings of the doctrine are outweighed by other factors." *Id.* Such scenarios include "where, for example, a party had little incentive to defend vigorously." *Id.* at ¶ 23. Each of these is met.

In addition to what has been said before, there is no danger that there will be inconsistent judicial outcomes or that previously litigated issues will be relitigated. This is because Sage Grouse does not seek any order regarding BMPP's or Latigo's PPAs. Those PPAs are approved, and this matter does not seek to change that outcome. Rather, Sage Grouse only seeks a determination relative to PacifiCorp's administration of its LGIP with BMPP and Latigo. Because those policies are not served in the instant case, collateral estoppel is not appropriate.

Collateral estoppel is also not appropriate because other considerations outweigh its application. Indeed, Sage Grouse had no incentive to participate, let alone vigorously, in the BMPP or Latigo PPA dockets. For instance, after the Commission repeatedly refused to exercise jurisdiction over PacifiCorp's interconnection there was absolutely no reason for Sage Grouse to intervene. In addition, PacifiCorp did not publish Sage Grouse's Feasibility Study until January 21, 2015. In this study, Sage Grouse learned of multi-million dollar upgrades. Although Sage Grouse does not accept this study as proper, this is the first time that Sage Grouse was given a number for interconnection upgrades. Indeed, if PacifiCorp was forced to deem withdrawn Latigo and BMPP from the interconnection queue, millions of valuable interconnection capacity would inure to Sage Grouse as the next Qualified Facility. Sage Grouse could not have known the dollar value of this impact back in 2012 or 2013. The Commission should reject PacifiCorp's argument.

VI. SAGE GROUSE'S REQUEST IS NOT BARRED BY CLAIM PRECLUSION.

PacifiCorp's fact-intensive argument of claim preclusion is similarly misplaced. In order to assert claim preclusion, PacifiCorp must meet three elements:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Gillmor v. Family Link, LLC, 2012 UT 38, ¶ 10, 284 P.3d 622 (Utah 2012).

A. <u>Sage Grouse and Ellis-Hall Are Not Privies.</u>

As explained, *supra*, Sage Grouse and Ellis-Hall Are Not Privies.

PacifiCorp also makes the passing argument that Ellis-Hall raised the "identical" argument now raised by Sage Grouse. As explained, *supra*, this is not the case. Furthermore, this misplaced argument has nothing to do with privity but the second element of claim preclusion—whether the claim to be barred must have been brought or have been available in the first action.

B. Sage Grouse's Claims Are Not the Same as Those Asserted by Ellis-Hall and Could Not Have Been Brought in the Ellis-Hall Action.

In *Gillmor*, the Supreme Court of Utah definitively held that Utah's claim preclusion doctrine follows the transactional test:

> Under the transactional test, claims or causes of action are the same as those brought or that could have been brought in the first action if they arise from the same operative facts, or in other words from the same transaction. The phrase transaction or a series of transactions connotes a natural grouping or common nucleus of operative facts. Additionally, determinations of whether a certain factual grouping constitutes a transaction or series of transactions should be made pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Gillmor, 2012 UT 38 at ¶ 14 (internal citations omitted).

PacifiCorp thereby contends that Sage Grouse raises the same arguments raised previously by Ellis-Hall. This is not correct for three independent reasons.

1. Ellis-Hall's Argument Regarding PacifiCorp's OATT is Different from Sage Grouse's Argument Regarding Schedule 38.

As explained, *supra*, the matter now before the Commission is different than those raised by Ellis-Hall in the BMPP and Latigo PPA Dockets.

2. Sage Grouse's Claims Could Not Be Brought Where the Commission Refused to Exercise Jurisdiction Over those Claims.

As explained, *supra*, Sage Grouse's claims could not be brought in the BMPP and Latigo PPA Dockets because the Commission refused to exercise jurisdiction over PacifiCorp's adherence to interconnection.

3. PacifiCorp Does Not Pass the *Gillmor* Transactional Test.

Contrary to PacifiCorp's contention, *Gillmor* is not its friend. Central to the Court's *Gillmor* holding are factors completely ignored by PacifiCorp—time, space, origin, and motivation. Indeed, claim preclusion is not proper when the "underlying facts giving rise to the claims arise from actions of different parties in different periods of time." *Id.* at ¶ 17.

Consistent with *Gillmor*, times have changed—particularly for Sage Grouse. At the time of the BMPP and Latigo PPA Dockets, Sage Grouse did not have an interconnection queue number. And, it did not have a feasibility study that would demonstrate the impact that BMPP or Latigo had on the interconnection capacity. Consequently, Sage Grouse, at that time, had no standing to bring any argument in the matter because it could not calculate a cognizable injury. Indeed, there was no way to begin to calculate a damage without a feasibility study completed.

After three-years, Sage Grouse now has an interconnection queue position and has the results of PacifiCorp's Feasibility Study. That study shows millions of dollars of upgrades that would not be necessary if PacifiCorp had deemed withdrawn BMPP's and Latigo's

interconnection requests and interconnection queue numbers. Sage Grouse now has standing to bring this matter.

In addition, motivations are much different. Motivations underlying the BMPP and Latigo PPA Dockets were to respond to impending, time-sensitive PPA approvals. That is not the matter now before the Commission. Rather, Sage Grouse, due to PacifiCorp's improper Feasibility Study, now seeks to lay claim to Latigo's and/or BMPP's reserved interconnection capacity.

Furthermore, it is important to remember that "claim preclusion applies when the issues are the same, the facts are the same, and the evidence is the same as in the previous litigation." *Peterson v. Armstrong*, 2014 UT App 247, ¶ 11, 337 P.3d 1058. The facts and evidence are not the same. As demonstrated herein, time has opened additional evidence demonstrating all sorts of fraud. *See* Sage Grouse's Request. And, this time, Tom Fishback will be deposed.

C. There Is No Final Judgment on the Merits of Sage Grouse's Request.

"On the merits is a term of art that means that a judgment is rendered only after a court has evaluated the relevant evidence and the parties' substantive arguments." *In re D.A.*, 2009 UT 83, ¶ 37. No such judgment was rendered for two reasons.

First, as explained herein, the Commission did not evaluate the relevant evidence or the parties' substantive arguments regarding PacifiCorp's LGIP. In fact, the Commission stymied discovery and presentation of that evidence—particularly regarding Mr. Fishback.

Second, even if all the other elements were met, there was no final judgment on the merits of Sage Grouse's Request. Indeed, "a claim dismissed for lack of subject matter jurisdiction does not constitute an adjudication on the merits." *In re D.A.*, 2009 UT 83, ¶ 37; *see also*, Utah R. Civ. P. 41(b) ("[A]ny dismissal not provided for in this rule, ***other than a dismissal***

for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.") (emphasis added). No such final judgment occurred. The Commission dismissed Ellis-Hall's arguments relating to PacifiCorp's, BMPP's, and Latigo's compliance with the LGIP on the basis that the Commission lacked jurisdiction. For example, the Commission stated:

> Again, this docket is strictly with respect to the PPA between Latigo and Rocky Mountain Power. And I don't see the relevance, unless you have another line, about preferential treatment. In other words, there's a Schedule 38 process for complaints . . . . There's a process for a dispute resolution in Schedule 38."

9.19.13 Tr. 212:12-16, 23-24.

> The LGIA is part of the pro forma Open Access Transmission Tariff that is governed by the Federal Energy Regulatory Commission. ***We do not have jurisdiction*** in the state of Utah over the terms and conditions of that."

9.19.13 Tr. 253:18-22 (emphasis added).

Lastly, jurisdiction aside, the Commission bifurcated the review of BMPP's and Latigo's LGIPs and PPAs. Thus, the interconnection issues were never litigated.

As a matter of law, this does not constitute a judgement on the merits.

VII. SAGE GROUSE MUST BE GIVEN ITS DAY IN COURT.

The Commission should deny PacifiCorp's Motion because it will violate Sage Grouse's constitutional rights: No person shall be deprived of life, liberty, or property, without due process of law. Utah Const. art. I, § 7.

The Supreme Court of Utah has further explained:

> The words "life, "liberty," and "property" are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term "property," in this clause, embraces all valuable interests which a man may possess outside of himself; that is to say, outside of his life and liberty. It is not confined to mere tangible property but extends to every species of vested right.

Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶ 39, 44 P.3d 663 (Utah 2002).

The Utah Constitution also provides:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. art. I, § 11.

The Supreme Court has further stated that the "clear language of the open courts provision guarantees access to the courts and a judicial procedure that is based on fairness and equality." *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 38, 44 P.3d 663. Indeed, "[a]t a minimum, a day in court means that each party shall be afforded the opportunity to present claims and defenses, and have them properly adjudicated on the merits according to the facts and the law." *Id.* at ¶ 42. Thus, "[w]hen ensuring litigants have received due process of law, ***our policy is to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy***." *Id.* at ¶ 41; *see also, State v. Relyea*, 2012 UT App 55, ¶ 47, 288 P.3d 278 ("[D]ue process is flexible and, being based on the concept of fairness, should afford the procedural protections that the given situation demands.") (emphasis added).

Not losing the forest for the trees, PacifiCorp and other parties encouraged the Commission to refuse to exercise jurisdiction over PacifiCorp's LGIP. Thus, no one was permitted to depose PacifiCorp's Tom Fishback. Discovery was limited. No one was permitted to investigate the matter. The process was bifurcated. And then it was expedited. Since the

Commission's decision, actions have been taken to continue and hide the fraud. And now, *today*, millions and millions of dollars are at stake for Sage Grouse. This is not fair. Sage Grouse has a right to its day in court.

VIII. THE COMMISSION SHOULD, *SUA SPONTE*, INVESTIGATE PACIFICORP'S FRAUDULENT CONDUCT.

Independent of Sage Grouse's Request, the Commission should investigate PacifiCorp's fraudulent conduct. Utah law provides:

> The [C]omission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do ***all*** things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction . . . .

Utah Code Ann. § 54-4-1 (emphasis added).

Sage Grouse contends that PacifiCorp knowingly accepted fraudulent Site Control documentation from BMPP and Latigo in order to expedite their position on the interconnection queue. Nevertheless, PacifiCorp wants to make this matter about many things that it is not. For example, PacifiCorp wants to argue that this is about disputed property rights. PacifiCorp's strawman is a white-wash of the issue. It is undisputed that BMPP claimed rights to land (the Stephen and Bonnie Meyer property) as Site Control through a contract that neither BMPP nor its predecessor (REDCO), ever executed. *See* PacifiCorp Motion Ex. B at 18 (omitting any execution by REDCO to make the contract a contract). It is undisputed that Latigo submitted as Site Control claims to land subject to a mere meteorological agreement with ***no*** right to developing the land for energy generation. It is undisputed that, not only was Latigo's Site Control claim a fraud, but that Latigo's principal, Christine Mikell, later ***admitted*** to the San Juan County building committee that Latigo did not have Site Control. BMPP's and Latigo's land right claims in their respective interconnection requests constitute fraud.

Whether or not Sage Grouse is the proper party to raise these issue now, as the proper time, is a red herring. Sage Grouse can prove that PacifiCorp committed fraud. PacifiCorp has not, and cannot, deny the underlying facts sustaining this fraud. Thus, it would be a sad day, indeed, for the Commission, colloquially known as the PacifiCorp Service Commission, to prove its moniker accurate. The Commission, regardless of Sage Grouse, should do its duty, exercise its statutory jurisdiction, and hold PacifiCorp accountable for violating the law. Anything less would be a gross miscarriage of justice and a disservice to the citizens and rate-payers of Utah.

CONCLUSION

The Commission should strike PacifiCorp's Motion as improper. In the alternative, PacifiCorp is estopped from making arguments that contradict those it made, and that were adopted, by the Commission. In the alternative, the Commission should deny PacifiCorp's application of *res judicata* because none of the elements are met. The Commission should allow these proceedings, and the investigation into PacifiCorp's fraud, to continue.

Respectfully Submitted,

/s/ Michelle McDaniels
Michelle McDaniels
Manager of Sage Grouse Energy Project, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2015, an original and ten (10) true and correct copies of the foregoing ***Sage Grouse Energy Project, LLC's Motion to Strike and Reply to Rocky Mountain Power's Motion to Dismiss*** were hand-delivered to:

Gary L. Widerburg
Commission Secretary
Public Service Commission of Utah
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Salt Lake City, UT 84111

and true and correct copies were electronically mailed to the addresses below:

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/s/ Michelle McDaniels
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Manager of Sage Grouse Energy Project, LLC