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Before the Public Service Commission of Utah

In the Matter: Review of Electric Service Schedule No. 38, Qualifying Facilities Procedure, and other Related Procedural Issues	Docket No. 14-035-140 The Office of Consumer Services' Response to Petition for Review and Rehearing

The Office of Consumer Services ("Office") hereby files its Response to Ellis-Hall Consultants, LLC's ("Ellis-Hall") Petition for Review and Rehearing of the Commission's June 9, 2015 Order. For reasons set forth more fully below, the Office respectfully requests that the Public Service Commission ("Commission") deny the request for rehearing.

Background

On June 9, 2015, the Commission issued its Order Approving Settlement Agreement on Schedule 38 Proceedings. On July 2, 2015, Ellis-Hall Consultants LLC attempted to file with the Commission a "Petition for Review and Rehearing and Reply in Support of its

Motion to Stay." The Office of Consumer Services was never served with a copy of the petition. The last day for Ellis-Hall to file a valid petition was July 9, 2015.

Ellis-Hall apparently seeks guidance from the Commission on how the Commission will treat a request for approval of an as yet unfiled Schedule 38 Power Purchase Agreement ("PPA") at some indeterminate time in the future. ("[t]he full *future* impact of PacifiCorp's changes to Schedule 38, in light of Sage Grouse's jurisdictional question is unknown.") (Ellis-Hall Petition for Rehearing page 2.)(Emphasis in original.) It then appears that Ellis-Hall requests that unless and until these "future" impacts are pre-judged by the Commission that the Commission delay implementation of the tariff containing those changes

Argument

A. The Commission Should Dismiss The Ellis-Halls Petition for Rehearing because Ellis-Hall Failed To Timely File The Petition.

Utah Code §63G-4-301(1)(a) states that a request for review of an agency Order must be filed within 30 days after the issuance of the Order. Under Commission rule Utah Administrative Code r. 746-100-3(D) Certificate of Service, "[a] filing is not complete without [a] certificate of service." This certificate certifies "that a true and correct copy of the pleading was served upon each of the parties in the manner and on the date specified." While it is true that there is a certificate of service attached to the pleading, the certification of service is false. Statements on the mailing certificate allege that the Petition for Review was electronically mailed to all parties on July 2, 2015. Contrary to that statement, none of the individuals listed for the Office of Consumer Services ever received a copy of the petition. On information and belief, the Office further asserts that no such e-mail was sent to Rocky Mountain Power, the Division of Public Utilities, Utah Clean Energy and SunEdison.

Simply attaching a mailing certificate without actually effectuating service does not meet the requirements of R746-100-3 and the filing is not complete. Utah Code §63G-4-301(1)(b) sets forth the requirements for a proper filing as follows:

> (b) The request shall:
>
> (i) be signed by the party seeking review;
> (ii) state the grounds for review and the relief requested;
>
> (iii) state the date upon which it was mailed; and
>
> (iv) *be mailed to the presiding officer and to each party.*

Utah Code Ann. § 63G-4-301 (emphasis added) It is clear from the statute that actual notice to the parties on the mailing certificate is required. Failing to perfect the filing by sending the required notices to the parties as required by Rule and statute is fatal to the petition. The filing was not completed within the required 30 days and should be dismissed. *See Maverik Country Stores, Inc. v Utah Industrial Commission of Utah,* 860 P2d 944,-950 (Utah Ct. App. 1993)("[the statute] requires, as a prerequisite to the agency taking jurisdiction over a review, actual delivery of the necessary document to the agency within the thirty day time limit.")

B. Ellis-Hall Provides No Legal or Factual Support Justifying A Reconsideration Of The Most Recent Orders Approving Modifications To The Schedule 38 Tariff.

Ellis-Hall's Petition for Review and Rehearing of this Commission's June 9, 2015, Order, filed jointly with its Reply Memorandum for its Motion to Stay, is inadequately briefed and provides no legal analysis to support rejecting this Commission's considered ruling. Separating the arguments related to the Petition for Rehearing from the remainder of the pleading reveals that Ellis-Hall only seeks the Commission to reconsider its inclusion of the word "generally" in Part II B. of Schedule 38, as adopted by this Commission's June 9,

2015 Order. However, other than the bald assertions that this term may have been included in the Schedule without this Commission's knowledge and is impermissibly vague, Ellis-Hall provides no legal or factual analysis as to why this Commission erred in adopting this wording. Moreover, it is not evident how this wording is in any way inappropriate, given the nature and history of Schedule 38. Accordingly, the Petition for Review and Rehearing must be denied.

Ellis-Hall styles its instant pleading as a "Petition for Review and Rehearing and Reply in Support of its Motion for Stay." (Ellis-Hall Pleading pg. 1) However, the body of the pleading makes no distinction between what arguments are directed at its Petition to Review and what arguments are directed to its Motion to Stay. This presents a difficulty for the responding parties because while it is appropriate to file a Response to the Petition for Review, the process for briefing the Motion to Stay has been completed. Accordingly, it is necessary to deconstruct the pleading to tease out the arguments relating solely to the Petition for Rehearing. This is no easy task considering the degree that the two arguments are conflated.[1]

However, the majority of the arguments in the pleading seem to apply solely to the Motion for a Stay because they do not presuppose the existence of the June 6th Order, i.e., arguments relating to timing, prejudice, "confusion" over this Commission's jurisdiction

[1] For example, Ellis-Hall argues that it "filed its motion to say because the full *future* impact of PacifiCorp's changes to Schedule 38, in light of Sage Grouse's jurisdictional question is unknown." (Ellis-Hall Pleading at pg. 2)(emphasis in original.) However, the "Sage Grouse's jurisdictional question" deals with issues occurring in the past, .i.e., the approval of the Blue Mountain and Latigo PPA's. (Sage Grouse's Request for Agency Action at pg. 1-2, 5-9) Moreover, the issue of the "future impact of PacifiCorp's changes to Schedule38" has been addressed and resolved by this Commission's June 9th Order adopting the proposed changes to Part II B. of Schedule 38. Therefore, it could be assumed that this argument is directed at the Petition for Review but the sentence, by the terms of its first clause, is clearly directed to its Motion to Stay. Such confusion permeates Sage Grouse's pleading.

over PacifiCorp's OATT. Accordingly, the Office will disregard these arguments and only address the positions that, at least arguably, recognize the existence of the June 6th Order. There are only two arguments that fall under this category, the contention that the word "generally" was inadvertently included in Part 2. B. of the revised stipulation, which modifies the word "follows" in describing the manner which PacifiCorp manages its OATT, and the contention that the term "generally" is impermissibly vague. (Ellis-Hall pleading at pg. 6-7.)

First, Ellis-Hall's implies that the term "generally" was surreptitiously included in the revised Schedule 38 apparently without this Commission's knowledge. This argument is meritless. Ellis-Hall speculates that the Commission was unaware of this inclusion because the technical process used to create the redline failed to separately highlight a change within a paragraph that was already highlighted for being moved to a different page in the tariff. However, Ellis-Hall does not allege that the Commission somehow relied on the unedited version in adopting the revised Schedule 38 in its June 9th ruling.

More to the point, the underlying contention that this Commission was careless in adopting the revised version of Schedule 38 radically contradicts the record. This Commission conducted hearings on the proposed settlement. The provision which Ellis-Hall speculates escaped the Commission's notice, Part 2. B., was the subject of separate briefing. (May 22, 2015, Comments of Sun Edison LLC.) This Commission took the matter under advisement for fourteen days before approving the stipulation under the conditions that several specific technical changes be made to the proposed version of Schedule 38. (June 9, 2015, Order Approving Settlement Agreement.) Clearly, the Commission acted carefully and deliberately in approving the revised Schedule 38. Ellis-Hall's speculations to the contrary are baseless.

Finally, the contention that the term "generally" is too vague and grants PacifiCorp with too much discretion in its dealing with QFs also fails. Schedule 38 is not meant to

read like the tax code. Rather, it is written to provide the broad procedures for QFs to sell power to utilities under PURPA and by necessity grants a degree of discretion to PacifiCorp, and in some cases QFs, to allow these businesses to complete these complex transactions. *See Ellis-Hall Consultants v. Public Ser. Comm'n*, 2014 UT 52, ¶ 16, 324 P.3d 256 (Schedule 38 grants parties discretion regarding interconnection agreements.) In fact, the revised Schedule 38 is replete with broad terms which implicitly grant the parties a degree of discretion in their dealings, such as "general or generally," "typically," "reasonable," "unreasonably," "adequate," "timely," "may," etc. *See* P.S.C.U. 50 Schedule 38, Preface, ¶¶ 1, 3, 4, 5, 6; Part I, A, B 2, 4, 5 (b), (d); Part II, B. In this context, the word "generally" cannot be considered overly vague and Ellis-Hall cites to no authority to the contrary.

In sum, the portions of Ellis-Hall's pleading that can arguably apply to its Petition for Reconsideration are unavailing. Accordingly, this Commission must deny the Petition for Rehearing.

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Office of Consumer Services