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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 Rocky Mountain Power's Motion To Dismiss Sage Grouse Energy Project, LLC's Request For Agency Action

INTRODUCTION

Rocky Mountain Power, a division of PacifiCorp ("Rocky Mountain Power" or the "Company"), pursuant to Utah Admin. Code R746-100-4.D, hereby moves to dismiss Sage Grouse Energy Project, LLC's ("Sage Grouse") Request for Agency Action ("RAA") and Sage Grouse Energy Project, LLC's Errata Request for Agency Action (the "Errata RAA," together with the RAA, the "Request") filed with the Public Service Commission of Utah ("Commission") on May 29, 2015 and June 15, 2015, respectively.

The Request is without merit and is barred (1) as a collateral attack on the Commission's order in Dockets No. 13-035-115 and No. 13-035-116, in violation of Utah Code Ann. §54-7-14 and (2) by res judicata. Accordingly, the Commission should dismiss the Request with prejudice.

Ellis-Hall's unsuccessful attack on the Blue Mountain and Latigo Power Purchase Agreements ("PPA") in 2013 occurred relatively recently. The Commission approved the PPAs in October 2013 and the Utah Supreme Court affirmed the ruling on May 30, 2014 (Per Curiam Order of Summary Affirmance). There is no question that Ellis-Hall itself would be barred from bringing a second action to attack the approval of the PPAs, even with slightly modified legal arguments. In 2013, Ellis-Hall argued the Blue Mountain and Latigo PPAs should be rejected because site control had not been demonstrated as required by Schedule 38. Now, Sage Grouse, under the guise of seeking a "clarification," is mounting a second attack on the approval of the Blue Mountain and Latigo PPAs using, in part, essentially the same arguments. Sage Grouse seeks (among other things) an order that PacifiCorp failed to comply with Schedule 38 by requiring Blue Mountain and Latigo to demonstrate site control.

The Request is barred under Utah Code Ann. § 54-7-14 ("In all collateral actions or proceedings, the orders and decision of the commission which have become final shall be conclusive.") The Request is clearly brought in a collateral proceeding in an effort to undermine the Commission's order in the Blue Mountain and Latigo dockets. The order is final and conclusive in this proceeding. It may not be collaterally attacked.

The Request is also barred by res judicata because Sage Grouse is in privity with Ellis-Hall. Sage Grouse and Ellis-Hall are closely held companies who share a common principal. The common principal actively participated in the first action by Ellis-Hall and made the same site control arguments now advanced by Sage Grouse. Under these circumstances, Ellis-Hall and Sage Grouse are in privity for purposes of res judicata. The remaining elements of claim preclusion and issue preclusion are satisfied because Sage

Grouse is now making arguments that were raised, or could have been raised, in the First Action. In the First Action the Commission ruled that then-effective Schedule 38 describes the due diligence that PacifiCorp may, but is not required to, perform. The Commission's approval of the Blue Mountain and Latigo PPAs on October 3, 2013 were final judgments on the merits.

BACKGROUND

A. Ellis Hall/Sage Grouse First Action.

1. On July 19, 2013, Ellis-Hall filed a Petition to Intervene in Docket No. 13-035-115, Power Purchase Agreement—PacifiCorp and Blue Mountain Power Partners, LLC.

2. The Petition to Intervene stated:

> EHC requests leave to intervene to give the PSC notice of its ownership of certain leases that are within the geographic footprint of the project commonly referred to as the Blue Mountain Wind Project … and its concerns relating to the Project and the manner in which the [PPA] was approved and submitted under the docket**.** EHC believes that its interests in these leases and the subject land will be substantially affected by the current proceeding.

3. On July 19, 2013, Ellis-Hall also filed a Petition to Intervene in Docket No. 13-035-116, Power Purchase Agreement—Latigo Wind Park, LLC. Ellis-Hall objected[1] to the approval of the Blue Mountain and Latigo PPAs. Ellis-Hall claimed, among other things, the PPAs "**do not require Blue Mountain or Latigo to establish site control** or a route for transmission interconnection **as required by PacifiCorp's OATT**." Order Approving Applications (Dockets No. 13-035-115 and No. 13-035-116) (October 3, 2013)

[1] The Ellis-Hall Objection to Approval of the Blue Mountain PPA was filed on a proprietary basis and is not publicly available.

(emphasis added). The Blue Mountain and Latigo dockets are referred to collectively as the "First Action."

4. On September 19, 2013, the Commission held a hearing in both the Blue Mountain and Latigo dockets. Ellis-Hall appeared at the hearing and was represented by counsel.

5. In opposing the approval of the Blue Mountain and Latigo PPAs, Ellis-Hall focused at length on the alleged failure of Blue Mountain and Latigo to establish site control:

> Ellis-Hall's attorney asked Rocky Mountain Power's witness, Paul Clements, whether Blue Mountain provided adequate evidence of site control. "Q: Did they provide you evidence of adequate site control of the proposed site?" (Transcript of Hearing of September 19, 2013, p. 43).
>
> Ellis-Hall questioned Blue Mountain's witness (Michael Cutbirth) on the issue of site control. *See, e.g.*, (Tr., p. 89).
>
> - "Q: Now, Mr. Cutbirth, you would agree with me, wouldn't you, that site control is fundamental to any project?" (Tr. 106).
> - "In any event, you understand that under the Open Access Transmission Service Tariff [sic], you are required to have site control over your route of interconnection to be able to stay on the queue? (Tr. 109).
>
> Ellis-Hall questioned Blue Mountain on the status of its leases in-effect at the time it submitted an interconnection request. (Tr. 110-112).
>
> Ellis-Hall questioned Latigo's witness (Christine Mickell) on the issue of site control, including the definition from the Open Access Transmission Tariff. (Tr. 254-262).

6. At the hearing, Ellis-Hall argued that PacifiCorp's alleged failure to require Blue Mountain and Latigo to demonstrate site control violated the Open Access Transmission Tariff ("OATT"):

> "**It's very simple, your Honor. They had none of the people signed up at the time they were given a position on the queue, which is a requirement of the OATT**….Yet, they've permitted to sign a PPA. The documents under Schedule 38, which are required to demonstrate site control, have been false. And so the approval of this PPA will result in a power purchase agreement being approved for a party that does not have site control, which is an essential element of the PPA." (Tr. 262) (emphasis added).
>
> Ellis-Hall argued PacifiCorp's alleged failure to require Blue Mountain and Latigo to demonstrate site control established the respective PPAs did not meet the public interest requirement. (Tr. 268-270).
>
> "Ellis-Hall asserted that the PSC had unlawfully excused Latigo and Blue Mountain from compliance with the terms of an applicable regulatory tariff, referred to as Schedule 38." Ellis-Hall Consultants, LLC v. Public Service Commission of Utah, 2014 UT 52 ¶ 1, 342 P.3d 256.

7. On October 3, 2013, the Commission issued its Order Approving the Applications.

> The Commission rejected Ellis-Hall's argument that the alleged failure of Blue Mountain and Latigo to "establish site control" constituted a violation of Schedule 38: "…**we find the PPAs at issue in these dockets were negotiated and executed consistent with the requirements of Schedule 38**." (Order Approving Applications, p. 12) (emphasis added).
>
> The Commission held: "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.*).

8. Ellis-Hall appealed the Order Approving Applications to the Utah Supreme Court.[2]

9. The Utah Supreme Court affirmed the Commission's decision to approve the Blue Mountain and Latigo PPAs. Ellis-Hall, 2014 UT 52, ¶¶28-29, 342 P.3d at 262.

B. Ellis Hall/Sage Grouse Second Action.

10. Sage Grouse filed its RRA on May 29, 2015 and its Errata RRA on June 15, 2015. (Docket No. 15-2582-01).

11. The RRA alleges that in approving the Blue Mountain and Latigo PPAs, the Commission "refused to review" whether Blue Mountain and Latigo had established site control. (RRA, p. 1).

12. The RRA asks the Commission to "issue an order" that "**PacifiCorp did not require [Blue Mountain] and Latigo to reasonably demonstrate Site Control as required by Schedule 38, and, therefore, OATT** Part IV." (*Id.*, p. 2) (emphasis added).[3]

13. The RRA also seeks a finding and order "PacifiCorp, [Blue Mountain], 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." (*Id.*).

14. In the Errata RRA, Sage Grouse seeks additional relief regarding the Commission's acknowledgement that it has jurisdiction over PacifiCorp's OATT and that

[2] The Order Approving Applications was a final order on the merits under Rule 41(b) of the Utah Rules of Civil Procedure. *See The Fundamentalist Church v. Horne*, 2012 UT 66, ¶ 22, 289 P.3d 502 (Utah law "defines 'the merits' for res judicata in light of rule 41 of the Utah Rules of Civil Procedure"). Utah R. Civ. P. 41(b) (providing that any dismissal not explicitly provided for in rule 41 "operates as an adjudication on the merits" except those based on jurisdiction, venue, or indispensable party grounds).

[3] Sage Grouse also asks for a finding that the Commission has jurisdiction over the OATT approved by the Federal Energy Regulatory Commission.

as of July 9, 2013, the operative version of Schedule 38 required PacifiCorp to follow its OATT.

C. Sage Grouse Is in Privity with Ellis-Hall.

Although separate legal entities, Sage Grouse Energy Project, LLC, and Ellis-Hall Consultants, LLC, share the same principal who has actively prosecuted the same site control and Schedule 38 issues on behalf of both parties:

15. Kimberly Ceruti is the manager of Ellis-Hall, according to the Utah Department of Commerce, Division of Corporations, as shown in the attached Exhibit A.

16. Ms. Ceruti appeared on behalf of Ellis-Hall and represented Ellis-Hall's interests in the Blue Mountain and Latigo dockets. She filed a Petition to Intervene on behalf of Ellis-Hall in Docket No. 13-035-115 (July 19, 2013), and also in Docket No. 13-035-116 (July 19, 2013).

17. Ms. Ceruti signed a Nondisclosure Agreement on behalf of Ellis-Hall on August 15, 2013, in the Latigo and Blue Mountain dockets.

18. Ms. Ceruti was involved in the acquisition of the assets of Renewable Energy Development Corporation, and she signed a Nondisclosure Agreement on January 13, 2012, with the bankruptcy trustee, as shown in the attached Exhibit B, at pg. 39.

19. In a filing in the United States Bankruptcy Court for the District of Utah, Ellis-Hall Consultants, LLC, and its principal, Tony Hall, through counsel, represented to the Court that Ms. Ceruti is an "agent" of Ellis-Hall for purposes of the nondisclosure agreement between the trustee and Ellis-Hall.

> "The NDA's (sic) executed by Mr. Hall and Ms. Ceruti, as **agents** of EHC are simply unenforceable."

(*Objection by Tony Hall and Ellis-Hall Consultants, LLC, to Trustee's Second Motion for Order (A) Authorizing the Sale of the Debtor's Blue Mountain Wind Assets …*., p. 12) (emphasis added) (See attached Exhibit C).

20. Ellis-Hall and its principal Tony Hall represented to the Bankruptcy Court that Ms. Ceruti was an Executive Director and representative of Ellis-Hall:

> "At all relevant times, Ms. Ceruti served as an Executive Director of EHC…." (See Exhibit C, p. 2).
>
> Ms. Ceruti was a "representative" of Ellis-Hall. (See Exhibit C, p. 3).

21. Ms. Ceruti is also a manager and member of Sage Grouse Energy Project, LLC.

22. Sage Grouse has a pending complaint before the Federal Energy Regulatory Commission ("FERC"), Docket EL15-44-000 (see below).

23. On July 29, 2014, Kimberly Ceruti reinstated Sage Grouse Energy Project, LLC, which was involuntarily dissolved on January 15, 2013, and previously operated under a different name.[4] (See attached Exhibit D).

24. On July 29, 2014, Kimberly Ceruti was added as principal to Sage Grouse Energy Project, LLC. (Ex. D). The form was signed under penalty of perjury as: "Kimberly Ceruti/Manager."

25. On April 2, 2015, Sage Grouse filed a response to PacifiCorp's answer before FERC. It was filed by Kimberly Ceruti, as a member and manager:

> Respectfully submitted,

[4] Eco-Geo Thermal Energy, LLC.

/s/ Kimberly Ceruti
Kimberly Ceruti
Member and Manager of Sage Grouse
Energy Project, LLC

(See attached Exhibit E)

26. In the Sage Grouse FERC Complaint, Sage Grouse and Ellis-Hall share a common principal: "Both Ellis-Hall and Sage Grouse have a principal who is a visible minority." (FERC Complaint, p. 41). (See attached Exhibit F)

D. Sage Grouse Complaint Before the FERC.

27. Sage Grouse filed a complaint under Section 206 of the Federal Power Act with the FERC on February 9, 2015.

28. The Complaint alleges, among other things, that PacifiCorp violated its OATT when it processed the generation interconnection requests of Sage Grouse's competitors Blue Mountain and Latigo. (See attached Exhibit F)

29. Sage Grouse further alleges PacifiCorp violated the OATT when it accepted Blue Mountain's site control documentation. According to Sage Grouse, Blue Mountain's site control documentation was invalid due to Sage Grouse's competing claims of site control on a number of the same parcels.

30. Sage Grouse is engaged in a common plan or agreement with Ellis-Hall wherein Sage Grouse plans to connect its project to the Ellis-Hall project: "…Sage Grouse is connecting into the Ellis-Hall Collector/Connector substation." (FERC Complaint, p. 40).

LEGAL STANDARD

The Utah Rules of Civil Procedure apply in this proceeding. R746-100-1(C). A complaint, petition, or request for relief shall be dismissed where it fails to state a claim

upon which relief may be granted. Utah R. Civ. P. 12(b)(6). In reviewing a motion under Rule 12(b)(6), the Commission must "accept the plaintiff's description of the facts alleged in the complaint to be true, but [it] need not accept extrinsic facts not pleaded nor … legal conclusions in contradiction of the pleaded facts." Osguthorpe v. Wolf Mountain Resorts, L.C., 2010 UT 29, ¶ 10, 232 P.3d 999.

In determining whether a complaint states a claim for relief, courts may consider public records outside the pleadings. RMBT, LLC v. Miller, 322 P.3d 1172, 1174 (Utah Ct. App. 2014). The public records applicable in this case are documents filed with the State of Utah Department of Commerce, Division of Corporations; the Commission; the United States Bankruptcy Court for the District of Utah, and the FERC. These public documents are properly considered in this motion to dismiss.

ARGUMENT

I. The Request Is An Improper Collateral Attack on the Commission's Order Approving the Blue Mountain and Latigo PPAs.

The Request is barred because it is an improper collateral attack on the Commission's final order approving the PPAs between the Company and Blue Mountain and Latigo under Utah Code Ann. § 54-7-14, which provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."

As already demonstrated, the Commission's Order Approving Applications in Dockets No. 13-035-115 and No. 13-035-116 is a final order approving the PPAs between the Company and Blue Mountain and Latigo, respectively. Under section 54-7-14, that order is conclusive and binding in this collateral proceeding. Sage Grouse is clearly seeking through the Request to undermine the order in this proceeding. Sage Grouse is

precluded from making this collateral attack by section Utah Code Ann. §54-7-14. See North Salt Lake v. St. Joseph Water & Irrigation Co., 223 P.2d 577 (Utah 1950); Hi-Country Homeowners Assoc. v. Bagley & Co., 863 P.2d 1, 10 (Utah Ct. App. 1993) (enforcing statute); Manning v. Questar Gas Co., Order of January 10, 2000 in Docket Nos. 99-057-16,17,18 (enforcing statute). Accordingly, the Request should be dismissed.

I. The Second Action is Barred by Res Judicata.

As a second independent ground for dismissal, the Request is barred by res judicata, and fails to state a claim upon which relief may be granted. Sage Grouse is in privity with Ellis-Hall, its current claims were or *could have been* presented in the First Action, and the First Action resulted in a final judgment on the merits. Res judicata applies in administrative proceedings and requires the dismissal of the Sage Grouse Request. Res judicata is "the overall doctrine of preclusive effects to be given to judgments." Brigham Young University v. Tremco Consultants, Inc., 2005 UT 19, ¶ 25, 110 P.3d 678. "The doctrine serves three important purposes: First, it preserves the integrity of the judicial system by preventing inconsistent outcomes; second, it promotes judicial economy by preventing previously litigated issues from being re-litigated; and third, it protects litigants from harassment by vexatious litigation." Fundamentalist Church v. Horne, 2012 UT 66, ¶ 13, 289 P.3d at 506.

Res judicata applies equally to administrative and legal proceedings. See, e.g., Nebeker v. Utah State Tax Comm'n, 2001 UT 74, ¶ 23, 34 P.3d 180 ("claim preclusion applies to proceedings before administrative agencies") ; Career Serv. Review Bd. v. Utah Dep't of Corrections, 942 P.2d 933, 938 (Utah 1997) ("Res judicata … applies

to administrative proceedings in Utah"); Newsday, Inc. v. Ross, 80 A.D. 2d 1, 8 (N.Y. App. Div. 1981) (administrative adjudication binding in subsequent administrative proceeding); City of Hackensack v. Winner, 410 A.2d 1146, 1161 (N.J. 1980) (the policy of res judicata, "finality and repose; prevention of needless litigation; reduction of unnecessary burdens of time and expenses … and basic fairness—have an important place in the administrative field"). In Safir v. Gibson, 432 F.2d 137, 143 (2d. Cir. 1970), Judge Friendly observed "the reason for applying res judicata to administrative agencies is not only to 'enforce repose,' but also to protect a successful party from being vexed with needlessly duplicative proceedings."

"[T]he principles of *res judicata* apply to enforce repose when an administrative agency has acted in a judicial capacity in an adversary proceeding to resolve a controversy over legal rights and to apply a remedy." Utah Dep't Admin. Srvs. v. Public Service Commission, 658 P.2d 601, 621 (Utah 1983). In this case, the Commission acted in a judicial capacity to resolve the contested proceedings to approve the Blue Mountain and Latigo PPAs. In Ellis-Hall, 2014 UT 52, ¶11, the Utah Supreme Court noted its jurisdiction is derived from Utah Code Ann. §78A-3-102(3)(e)(i), which vests the Supreme Court with appellate jurisdiction over "final orders and decrees in formal adjudicative proceedings originating with…the Public Service Commission." Thus, res judicata properly applies in this case.

A. The Second Action is Barred by Claim Preclusion.

"The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion. Claim preclusion corresponds to causes of action; issue preclusion corresponds to the facts and issues underlying causes of action. Claim preclusion 'is

premised on the principal that a controversy should be adjudicated only once.'" Mack v. Department of Commerce, 2009 UT 47, ¶ 29, 221 P.3d 194 (internal citation omitted).

Whether a claim is precluded from re-litigation depends on a three-part test:

> 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.

Id.

For the following reasons, the three-part test is easily satisfied in this case:

1. Sage Grouse Is in Privity With Ellis-Hall.

"The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right." Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978). "The doctrine of privity, which extends the res judicata effect of a prior judgment to nonparties who are in privity with the parties to the first action, is to be applied with flexibility." Amalgamated Sugar Co. v. NL Indus., 825 F.2d 634, 640 (2d. Cir. 1987). Whether parties are in privity "depends mostly on the parties' relationship to the subject matter of the litigation." Press Publ. v. Matol Botanical Int'l, 2001 UT 106, ¶ 20, 37 P.3d 1121.

Sage Grouse is in privity with Ellis-Hall for the following reasons:

First, Sage Grouse and Ellis-Hall share a common principal.

Final adjudication "bars subsequent litigation concerning the same subject matter against officers or owners of a closely held corporation, partners, co-conspirators, agents, alter egos or other parties with similar legal interests." Press Publ., 2001 UT 106, ¶ 20, 37 P.3d 1121. See also Hellman v. Hoenig, 989 F. Supp. 532, 537 (S.D.N.Y. 1998) ("courts have found that corporate defendants and their directors, officers and large shareholders

are in privity because of the identity of interests and close relationship between them"); Midcontinent Broadcasting Co. v. Dresser Indus., 669 F.2d 564, 567 (8th Cir. 1982) ("where, as here, the parties have such a close relationship, bordering on near identity, they are for purposes of res judicata the same parties"). The Restatement (Second) of Judgments, § 59 (2015) recognizes the absence of meaningful distinctions in the case of closely held corporations. "When the corporation is closely held, however, interests of the corporation's management and stockholders and the corporation itself generally fully coincide …. For the purpose of affording opportunity for a day in court on issues contested in litigation, however, there is no good reason why a closely held corporation and its owners should ordinarily be regarded as legally distinct." *Comment e*. Thus, a principal is bound by previous litigation if she actively participated on behalf of the corporation. See id.

Utah law is in accord with these established principles. In Press Publishing, the Utah Supreme Court held corporate defendants were within the claim preclusion branch of res judicata, despite not having appeared or participated in the first action, solely because they **shared the same principals** as the entity in the first action. The original parties were Press Publishing and MBI. MBI was owned by Kalenuik, Bolduc, and Jurak. These principals also owned entities called MPC and MCC. Id. at ¶ 3, n. 3. Kalenuik was an executive of MBI and MPC. Bolduc was an executive of MPC. Jurak is an executive of MBI and MPC. Press Publishing, by counterclaim, alleged MBI and its affiliates conspired to obtain Press's proprietary property. Id. Press's counterclaim named the following corporate defendants: MBI, MCC, and MPC. Id. at n.3. The counterclaim also named the individual defendants Kalenuik, Bolduc, and Jurak, as officers of the corporate

defendants. While the lawsuit was pending, MBI filed a bankruptcy reorganization proceeding in Canada. Id. at ¶ 5. The bankruptcy court issued a notice of disallowance, which denied Press's claims for misappropriation of proprietary information on the merits. Id. at ¶11. In response, the individual and corporate defendants filed a motion for summary judgment to dismiss Press's counterclaims under the doctrine of res judicata. "They argued that because they were privies of MBI, and Press's claims were raised in the [bankruptcy] proceeding, the notice of disallowance … constituted a judgment on the merits barring adjudication of the remaining claims in this action." Id. at ¶13. The trial court granted the motion, and ruled that the pending claims against the corporate affiliates were barred by res judicata. "The court concluded that defendants were privies of MBI, that Press's remaining claims had been presented in the [bankruptcy] proceeding, and that there had been a final judgment on the merits. The court reasoned that, 'many of the Defendants are officers and employees of MBI, who were involved in actually and openly defending the bankruptcy proceeding, thereby becoming privies under the *Searle* rationale.'" Id. at ¶15. The Utah Supreme Court affirmed:

> Thus, the corporate defendants are sister corporations of MBI and the **individual defendants are principals, officers and employees of MBI**. In these respective capacities, defendants defended MBI in the [bankruptcy] proceeding …. Thus, **defendants' legal rights and interests are identical with those of MBI**, meeting the definition of a person in privity with another as set forth in *Searle Brothers*.

Id. at ¶21 (emphasis added).

Similar to the corporate defendants in Press Publishing, Sage Grouse is in privity with Ellis-Hall through its shared manager Kimberly Ceruti. Ms. Ceruti is a manager of Ellis-Hall. (Ex. A). Ms. Ceruti actively participated in Ellis-Hall's opposition to the Blue Mountain and Latigo PPAs. She intervened on Ellis-Hall's behalf. She signed nondisclosure agreements on behalf of Ellis-Hall. She attended the hearing before the

Commission on September 19, 2013, in the Blue Mountain and Latigo dockets, in which Ellis-Hall attacked the site control showings of Blue Mountain and Latigo. Then, having failed to overturn the Commission's approval of the Blue Mountain and Latigo PPAs, Ms. Ceruti, as a member and manager of Sage Grouse filed a complaint before the FERC, and attacked, for a second time, the site control of Blue Mountain and Latigo. This active participation by Ms. Ceruti on issues of common concern to Sage Grouse and Ellis-Hall establishes privity.

Second, Sage Grouse and Ellis-Hall are engaged in a common plan or enterprise. Sage Grouse represented to FERC its project will connect to the Ellis-Hall substation. (FERC Complaint, p. 40). This admission by itself is sufficient to establish privity. Although Sage Grouse does not provide further detail, the right of Sage Grouse to connect to Ellis-Hall's substation is necessarily based on contract, agency, partnership, joint venture, or other consensual arrangement in which Sage Grouse and Ellis-Hall cooperate in their joint interest. The law recognizes privity in these relationships. See, e.g., Press Publ., 2001 UT 106, ¶20 ("final adjudication bars subsequent litigation concerning the same subject matter against...partners, agents…or other persons with similar legal interests").

Third, the fact Sage Grouse advances the same arguments as Ellis-Hall establishes its alleged legal right is intertwined with and overlaps that of Ellis-Hall. The arguments raised by Ellis-Hall in 2013 are identical to the arguments raised now by Sage Grouse:

2013	2015
The Blue Mountain and Latigo PPAs "**do not require Blue Mountain or Latigo to establish site control** or a route for transmission interconnection **as required by PacifiCorp's OATT**." Order Approving Applications (Dkt. No. 13-035-115, 116) (October 3, 2013) (emphasis added).	The instant Request for Agency Action asks the Commission to "issue an order" that "**PacifiCorp did not require [Blue Mountain] and Latigo to reasonably demonstrate Site Control as required by Schedule 38, and, therefore, OATT** Part IV." (Emphasis added.)[5]

For the foregoing reasons, the legal interest of Sage Grouse in this action is identical to that of Ellis-Hall in the First Action. Both Sage Grouse and Ellis-Hall are in competition with Blue Mountain and Latigo in the same geographical area. Both companies seek to improve their competitive position by removing their competitors from the Schedule 38 indicative pricing queue and/or interconnection queue. Both plan to physically interconnect at the Ellis-Hall substation. Although PacifiCorp is not privy to the specific terms of the arrangement between Sage Grouse and Ellis-Hall, the fact they have existing plans to physically connect their facilities at a common substation establishes a joint effort and common interest. In support of their tactical objectives, both companies are making the identical arguments that PacifiCorp failed to apply or enforce Schedule 38 as to site control. The manager of Sage Grouse was intimately involved in the prosecution of the First Action by Ellis-Hall.

Under these circumstances, the parties share a common "relationship to the subject matter of the litigation" and their "legal rights and interests" of Sage Grouse in this Action are identical with those of Ellis-Hall "meeting the legal definition of a person in privity." Press Publishing, 2001 UT 106, ¶ 21, 37 P.3d at 1128.

[5] Although Sage Grouse would now assert that it is raising, for the first time, the more nuanced argument that Schedule 38 expressly incorporates the requirements of the OATT, Utah law of res judicata looks at the operative facts as a whole, and precludes all claims and arguments that not only were brought in the first action, but that "could have been brought in the first action." Gillmor, 2012 UT 38, ¶14.

2. The Current Claims by Sage Grouse Were or Should Have Been Raised in the First Action.

Utah applies the "transactional theory of claim preclusion." Gillmor v. Family Link, LLC, 2012 UT 28, ¶ 13, 284 P.3d 622. Claim preclusion "generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims …. Thus, the transactional theory contemplates a wide variety of considerations, including whether the underlying facts are related in time, space, origin, or motivation." Id. "Under the transactional test, the claims are the same if they 'arise from the same operative facts, or in other words from the same transaction.'" Id.

Both actions are based on the same operative facts. The operative facts are the Commission's decision to approve the Blue Mountain and Latigo PPAs, PacifiCorp's compliance with Schedule 38, and Ellis-Hall's unsuccessful attempts to convince the Commission to reject the Blue Mountain and Latigo PPAs. Ellis-Hall opposed the Commission's approval of the Blue Mountain and Latigo PPAs because these developers allegedly failed to obtain site control. Ellis-Hall claimed that by signing the PPAs, PacifiCorp failed to comply with Schedule 38. Ellis-Hall even claimed that Schedule 38 requires PacifiCorp to comply with its federal Open Access Transmission Tariff.

Both cases allege that PacifiCorp failed to follow Schedule 38 because it did not enforce its site control obligations. The similarity of the factual underpinnings is outcome determinative. Gillmor, 2012 UT 38, ¶ 13. Because the instant Sage Grouse action relies on the same factual allegations and legal arguments as the First Action, it is barred by the claim preclusion branch of res judicata.

3. The First Action Resulted in a Final Judgment on the Merits.

The October 3, 2013, Orders Approving Applications (Dockets No. 13-035-115, and No. 13-035-116), were final judgments on the merits. The Orders Approving Applications were final orders on the merits under Rule 41(b) of the Utah Rules of Civil Procedure, which provides the measuring stick for finality in Utah's res judicata analysis. See Fundamentalist Church, 289 P.3d at 507. (Utah law "defines 'the merits' for res judicata in light of rule 41 of the Utah Rules of Civil Procedure"); Utah R. Civ. P. 41(b) (providing that any dismissal not explicitly provided for in Rule 41 "operates as an adjudication on the merits" except those based on jurisdiction, venue, or indispensable party grounds). The Orders Approving Applications were the basis for the Utah Supreme Court's exercise of jurisdiction in Ellis-Hall: "In 2013, the Utah Public Service Commission approved power purchase agreements between PacifiCorp and two small power producers, Latigo Wind Park and Blue Mountain Power Partners." 2014 UT 52, ¶1.

B. The Second Action Is Barred by Issue Preclusion.

The Commission should also dismiss the Second Action on issue preclusion grounds.

> Issue preclusion applies only when the following four elements are satisfied: (i) the party against whom issue preclusion is asserted was a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication was identical to the one presented in the instant action; (iii) the issue in the first action was completely, fully, and fairly litigated; and (iv) the first suit resulted in a final judgment on the merits.

Moss v. Parr Waddoups, 2012 UT 42, ¶ 23, 285 P.3d 1157.

In the First Action, the Commission decided that 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." (Order Approving Applications, p. 12). This decision

was affirmed by the Utah Supreme Court. Ellis-Hall, 2014 UT 52, ¶¶28-30. PacifiCorp's compliance with Schedule 38 in relation to the Blue Mountain and Latigo PPAs has been finally decided on the merits. Further, Ellis-Hall's "agent" and "Executive Director" Kimberly Ceruti actively participated in the First Action. She appeared and intervened on behalf of Ellis-Hall and sought to obtain an order from the Commission rejecting the Blue Mountain and Latigo PPAs based on arguments PacifiCorp did not comply with Schedule 38. This heavy engagement by the principal of Sage Grouse establishes Sage Grouse is bound by those issues determined adversely to Ms. Ceruti and Ellis-Hall. A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." Restatement (Second) Judgments, §39. The Commission's ruling that PacifiCorp complied with Schedule 38 as it relates to the Blue Mountain and Latigo PPAs established this issue as to Ellis-Hall's privies, including Ms. Ceruti and entities under her direction. Further, although the instant Request was filed by Sage Grouse, not by Ms. Ceruti as an individual, because Sage Grouse is a closely held company, "there is no good reason" why Sage Grouse and its principals "should…be regarded as legally distinct." Restatement (Second) Judgments, §59, *Comment e*.

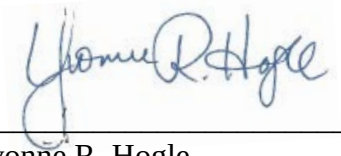
CONCLUSION

For the foregoing reasons, the Commission should dismiss the Request with prejudice. In the alternative, the Commission should allow discovery limited to the relationship between Sage Grouse and Ellis-Hall, and their ownership, operations, and communications, for purposes of fully evaluating Sage Grouse's status as a privy of Ellis-Hall.

DATED: July 15, 2015

Respectfully submitted,

ROCKY MOUNTAIN POWER



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