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**Before the Public Service Commission of Utah**

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| **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<br><br>Sage Grouse Energy Project, LLC's Reply to the DPU's and OCS's Responses. |

## INTRODUCTION

On July 15, 2015, Rocky Mountain Power ("PacifiCorp") filed a motion to dismiss Sage Grouse's May 29, 2015 Request for Agency Action (the "Request"). On this same day, the Division of Public Utilities ("DPU") and the Office of Consumer Services ("OCS") filed responses.[1]

Misplaced arguments are one thing. The DPU's and the OCS's responses are, however, quite another.

The mission of the DPU is to promote the "public interest" and to assure that Utah customers "have access to safe, reliable service at reasonable prices."[2] Similarly, the OCS is "Utah's utility consumer advocate."[3] The crux of Sage Grouse's Request is consistent with these

[1] PacifiCorp, the DPU, and the OCS are herein referenced collectively as "Responders."
[2] *See* http://publicutilities.utah.gov/about.html.
[3] *See* http://ocs.utah.gov/.

goals.[4] Sage Grouse asks the Commission to definitively state whether or not it will exercise jurisdiction over PacifiCorp's administration of its Large Generator Interconnection Process ("LGIP"). Indeed, Sage Grouse argues that the Commission *should* oversee and regulate PacifiCorp's administration of its LGIP as adopted by Schedule 38. This is good for Utah rate-payers and the public at large.

What is now obvious is that the Commission's jurisdiction is not limited by Schedule 38 and has never been limited by Schedule 38, at least since 2003. As the DPU now acknowledges, "the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs." DPU Response 6 (quoting FERC Order 2003). Rather than make this known years ago, the DPU and the OCS sat silently for a decade watching the Commission defer its judgment to PacifiCorp and thereby misapply the law. Granted, mistakes can happen. But what is now occurring is terrifying. The DPU and the OCS are attempting to sweep institutional errors under the rug. This is not a simple mistake. It is not right. And it is an abdication of their responsibilities to protect Utah rate-payers and the public by ensuring that fraud is not occurring in the Utah electric market.

[4] The LGIP is a matter of great public importance. The LGIP seeks to protect the public against, among other things, the risks associated with speculative projects. Indeed, PacifiCorp will argue, as it has done in the past, that if a speculative project fails that the rate-payers are not at risk because they have no responsibility to purchase the power. Such an argument is both disingenuous and wrong. When a project fails, PacifiCorp's network resource planning is undermined. The consequent is that PacifiCorp must replace those renewable resources by purchasing the energy from the power market at higher costs to the rate-payer or by increasing the use of its own carbon-emitting thermal power production—a direct undermining of PURPA's anti-monopolistic policies. This is PacifiCorp's backdoor way to circumvent state and federal regulation to continue using its carbon emitting facilities. This risk burdens the Utah rate-payers. As explained below, these are PacifiCorp's own concerns in another Commission docket.

## DISCUSSION

Taken together, PacifiCorp's, the DPU's, and the OCS's responses are a tautological mess of inconsistency and misstatements. For example, on the one hand, the DPU and the OCS contend that Sage Grouse's claims are barred for lack of standing. Yet, PacifiCorp contends Sage Grouse's claims are barred under *res judicata* because it, Sage Grouse, allegedly raised these arguments before . . . presumably with standing. The whole of these arguments do not stand. What is clear is that the DPU and the OCS do not want a decision on the matter because each of them are culpable for a decade of illegal acts by PacifiCorp. It is time to set things right.

### I. SAGE GROUSE HAS STANDING.

The DPU and OCS conclude that Sage Grouse does not have standing because it alleged no fact that would demonstrate that it has any legal interest. This is not correct. Because a request for agency action is not a typical pleading in civil litigation, Sage Grouse hereby incorporates the statements made herein and in its reply to PacifiCorp as allegations further supporting its Request.

The Utah Supreme Court has noted that "standing is a jurisdictional requirement that must be satisfied before a court may entertain a controversy between two parties." *Jones v. Barlow*, 2007 UT 20, ¶ 12, 154 P.3d 808 (Utah 2007) (internal citations omitted). Indeed, "[i]n Utah, as in the federal system, standing is a jurisdictional requirement." *Gregory v. Shurtleff*, 2013 UT 18, ¶ 11, 299 P.3d 1098 (Utah 2013). There are, however, significant differences between the federal and Utah systems.

"Unlike the federal system, the judicial power of the state of Utah is not constitutionally restricted by the language of Article III of the United States Constitution requiring 'cases' and 'controversies,' since no similar requirement exists in the Utah Constitution." *Id.* at ¶ 12.

Consequently, Utah law provides three different test by which a party may show standing: the statutory test, the traditional common law test, and the alternative or public-interest test. *See Gregory v. Shurtleff*, 2013 UT 18, ¶ 14, 299 P.3d 1098 (Utah 2013) ("[T]he statutory and the traditional common law tests are not the only avenues to gain standing; Utah law also allows parties to gain standing if they can show that they are an appropriate party raising issues of significant public importance . . . ."). Indeed, "[a] plaintiff who has ***not*** been granted standing to sue by statute must ***either*** show that he has or would suffer a 'distinct and palpable injury that gives rise to a personal stake in the outcome' of the case ***or*** meet one of the two exceptions to standing recognized in cases involving 'important public issues.'" *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 17, 82 P.3d 1125 (Utah 2003) (emphasis added).

Sage Grouse meets each of these three independent tests.

### A. The Commission Should Ignore the DPU's and OCS's Strawman Arguments.

Before getting to the meat of the standing analysis, Sage Grouse will make a brief point. The OCS contends that statutory standing in this instance follows from Utah Code Ann. § 63G-4-301. This is simply not correct. Section 63G-4-301, and the OCS's citation to *Uhilg*, 2014 UT App. 232 pertain to agency rehearings and appeals. Sage Grouse, however, is not seeking an adjudicative proceeding to seek review of an agency order. The OCS's argument is completely misplaced. The Commission should reject the OCS's argument on its face.

It appears that the OCS presupposes that Sage Grouse is raising an issue previously litigated, perhaps under *res judicata*. This is not the case because Sage Grouse was not a party to any such action. Sage Grouse, however, is unsure what legal theory supports this notion because it was not argued. Because this defense was not raised in its initial response, the argument is now waived pursuant to Utah R. Civ. P. 12(h). Accordingly, the entirety of the OCS's response

does not follow. Although unnecessary, Sage Grouse will make two brief notes. First, any *res judicata* requires standing in the first instance—something that the DPU and OCS now argue against. Second, this matter has very little to do with the previous BMPP and Latigo PPA Dockets. For the sake of economy, Sage Grouse hereby adopts and refers the Commission to its reply to PacifiCorp in this matter. Such reference, however, is not necessary because the Commission need go no further than the DPU's and OCS's own responses.

The DPU contends that "the two power purchase agreements . . . that are challenged the matters [*sic*] have been decided with finality by the Commission and the Utah Supreme Court." DPU Response 1. The DPU is correct on this point. The approval of the BMPP and Latigo PPAs have been adjudicated. Similarly, the OCS contends that the "question of the ***timing*** of transmission contracts [LGIA] relative to the approval of PPAs has been definitively decided by the Utah Supreme Court." OCS Response 8 (emphasis added). Although unartfully said, the OCS is also correct as it relates to the past Schedule 38 language as a matter of Utah law.

These contentions, however, have nothing to do with Sage Grouse's Request. Sage Grouse is ***not*** challenging the validity of the BMPP and/or Latigo PPAs. And, Sage Grouse is ***not*** challenging the timing of the LGIA relative to the PPA. Sage Grouse has said no such thing. In fact, Sage Grouse's relief will not affect the validity of either the BMPP or the Latigo PPAs under Utah law. The Commission should reject the DPU's and OCS's strawman arguments.

**B. <u>The Statutory Standing Test.</u>**

The statutory standing test is a matter of statutory interpretation. *See e.g. Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 7, 82 P.3d 1125 (Utah 2003) ("statutory standing . . . regardless of whether it satisfies traditional standing requirements . . . is [an issue] of statutory interpretation . . . ."). Under Utah law:

> It is well settled that when faced with a question of statutory interpretation, [the] primary goal is to evince the true intent and purpose of the Legislature. The best evidence of the legislature's intent is the plain language of the statute itself. Thus, when interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning.

*Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶ 14, 267 P.3d 863 (internal citations omitted).

In addition, statutory interpretation requires the Commission to "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).

In this case, Sage Grouse has statutory standing for two reasons.

**1. Request for Agency Action**

The Rules state that "[p]arties to a proceeding before the Commission, as defined in Section 63G-4-103, may participate in a proceeding . . . . ." Rule 746-100-5. Thus, standing in this matter is determined by whether or not Sage Grouse meets the definition of a "party." A party is further defined as "the agency or other person commencing an adjudicative proceeding . . . ." Utah Code Ann. § 63 G-4-103(f).

The Rules further state that "[p]ersons requesting Commission action shall be required to file in writing, requesting agency action." Rule 746-100-3(H)(2).[5] Indeed, the Utah Code states that "all adjudicative proceedings shall be commenced by . . . a notice of agency action, if proceedings are commenced by the agency; or . . . a ***request*** for agency action, if proceedings are commenced by persons other than the agency." Utah Code Ann. § 63G-4-201 (emphasis added).

[5] This section goes on to state that the "Commission shall not act on illegible or incomplete complaints and shall return those complaints to the complainant with instructions for correction or completion." Consequently, if Sage Grouse's allegations are insufficient, it will, on instruction of the Commission, correct the oversight.

A "person" is defined as "an individual . . . or entity of any character . . . ." Utah Code Ann. § 63G-4-103(g). Section 63G-4-201(2) then goes on with eleven additional requirements for a *notice* of agency action. In contrast, the requirements for a *request* for agency action are few:

> (a) Where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings, that person's request for agency action shall be in writing and signed by the person invoking the jurisdiction of the agency, or by that person's representative, and shall include:
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> (i) the names and addresses of all persons to whom a copy of the request for agency action is being sent;
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> (ii) the agency's file number or other reference number, if known;
>
> (iii) the date that the request for agency action was mailed;
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> (iv) a statement of the legal authority and jurisdiction under which agency action is requested;
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> (v) A statement of the relief or action sought from the agency; and
>
> (vi) A statement of the facts and reasons forming the basis for relief or agency action.
>
> . . .
>
> (b) The person requesting agency action shall file the request with the agency and shall mail a copy to each person to have a direct interest in the requested agency action.

Utah Code Ann. § 63G-4-201(3)(a)-(b).

Thus, statutory standing to file a request for agency action with the Commission is liberal, and extends to both parties and persons. Sage Grouse is such a party and person. Sage Grouse, therefore, has standing. It is odd that state agencies would argue to contrary.

In contrast, intervention for formal adjudicative proceedings rely on a narrower statutory standing requirement that sounds in traditional standing. "The person who wishes to intervene . . . shall include . . . a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceedings . . . ." Utah Code Ann. § 63G-4-207(1). This language demonstrates that the legislature knows how to require an intervenor to meet more rigorous standing requirements, if it so chooses. The fact that it did not for a request for agency action is dispositive. *See Marion Energy, Inc. v. KFJ Ranch*

*Partnership*, 267 P.3d 863, 2011 UT 50 (Utah 2011) (requiring adjudicators to "give effect to omissions in statutory language by presuming all omissions to be purposeful."). Thus, it is clear that the legislature intended for public voices to be heard.

In this case, Sage Grouse meets all the statutory standing requirements, as explained above.[6] No party makes any tenable argument to the contrary.[7] Sage Grouse has statutory standing.

**2. Request for Declaratory Ruling and Order.**

In the alternative, the Commission should find that Sage Grouse has statutory standing and construe Sage Grouse's Request as a Petition for Declaratory Ruling and Order pursuant to Rule 746-101-2. Indeed, if the Commission rules that Sage Grouse does not have standing, such dismissal will be due to lack of subject matter jurisdiction, without prejudice, and *res judicata* will not apply. *Compare Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 2006 UT 74 (Utah 2006) (stating that "standing triggers the court's, or the agency's, subject matter jurisdiction") *with In re D.A.*, 2009 UT 83, ¶ 37, 222 P.3d 1172 ("A claim dismissed for lack of subject matter jurisdiction does not constitute an adjudication on the merits."). Consequently, Sage Grouse will refile for a Petition for Declaratory Ruling and Order and the parties will be back precisely where they are right now.

The OCS's arguments against such a petition are not problematic. Sage Grouse has stated the Rule under which the petition is brought. The need for reason or review is set forth in

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[6] Even if an error was made, "[d]effects in pleadings which do not affect substantial rights of the parties shall be disregarded." Rule 746-100-3(F).

[7] The OCS contends that Sage Grouse does not state the regulatory authority under which the Request is brought. This is simply not true. Sage Grouse explains that the Request is brought pursuant to Utah Code Ann. § 63G-4-201 and Rule 746-100-3, which, of course, sets forth requests for agency action. Sage Grouse is concerned with the OCS's misrepresentation that Sage Grouse did not meet this citation requirement.

the following traditional standing section. And any explanation of the "rehash" is set forth in Sage Grouse's reply to PacifiCorp's Motion to Dismiss, which Sage Grouse already referenced and incorporated for this brief.

### 3. The Commission Should Reject the DPU's and the OSC's Arguments Because They Misstate the Law.

Both the DPU and the OSC misstate the law as it pertains to standing.

The DPU's argument that Sage Grouse failed to include a statement that "no public utility under the Commission's Jurisdiction [*sic*] will be adversely affected" is wrong. DPU Response 3. This is not what the rules require. This statement is only required if the petitioner elects to not serve a copy of the petition to the utility. Rule 746-101-2. Sage Grouse served PacifiCorp in this matter. This rule, therefore, does not apply.[8] Nevertheless, Sage Grouse appreciates the DPU now affirming its policy that "no public utility under the Commission's jurisdiction will be adversely affected." Although unfortunate, this certainly explains the DPU's recent conduct, dereliction, and inconsistent application of the rules when PacifiCorp is involved.

Next, the OSC makes the bold statement that "[e]ven if Sage Grouse had statutory standing under the Utah Administrative Procedure Act, it still would have to allege it had standing to bring its Request for Agency Action under either the traditional test for standing or the alternative test for standing." OCS Response 5. The OCS's argument is a complete fabrication and contradicts recent Utah Supreme Court holdings that show three ***different*** avenues to establish standing. *See Gregory v. Shurtleff*, 2013 UT 18, ¶ 14, 299 P.3d 1098 (Utah 2013) ("[T]he statutory and the traditional common law test**s** are not the only avenue**s** to gain

[8] On May 29, 2015 at 4:49 p.m., Sage Grouse not only served multiple persons at PacifiCorp, but also served Mr. Jetter, Ms. Schmid – Lead Attorney for the DPU, Mr. Parker - the Director of the DPU, and Mr. Powell - Manager of the Energy Division for the DPU. The DPU was well-aware that service was properly effected to PacifiCorp.

standing; Utah law also allows parties to gain standing if they can show that they are an appropriate party raising issues of significant public importance . . . .") (emphasis added); *see also, Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 17, 82 P.3d 1125 (Utah 2003) (stating that "[a] plaintiff who has not been granted standing to sue by statute" must meet either the traditional or alternative standing tests).

The basis of the OCS's confusion is premised on a misunderstanding of *Utah Chapter of Sierra Club v. Utah Air Quality Bd.* *See* OCS Response 5 (citing 2006 UT 74, ¶¶ 17, 19-20, 35, 148 P.3d 960). The OCS cites to very specific paragraphs in this case but gives no explanation or parenthetical explaining how they are relevant. They are not. In *Sierra Club*, statutory standing was not at issue. And the court certainly made no comment, even in dicta, that traditional standing was necessary where statutory standing was first met. Period. The OCS's citation is a red herring and misrepresents law that clearly demonstrates that statutory, traditional, and alternative standing are three independent forms of standing.

Sage Grouse meets the statutory standing test for the reasons set forth above. Consideration of the traditional or alternative tests is irrelevant. Nevertheless, Sage Grouse will argue these as alternative grounds.

### C. Traditional Standing

The Supreme Court of Utah has held:

> To establish standing under our traditional test, the party bringing a constitutional challenge must show three things: (1) that the party has been or will be adversely affected by the challenged actions, (2) that a causal relationship exists between the injury to the party, the challenged actions and the relief requested, and (3) that the relief requested is substantially likely to redress the injury claimed.

*State v. Roberts*, 345 P.3d 1226, ¶ 46, 2015 UT 24 (internal citations omitted).

Sage Grouse meets each of these elements in this matter.

### 1. Sage Grouse Has Been and Will Continue to Be Adversely Affected If the Commission Does Not Take the Requested Action.

Sage Grouse has been and will be adversely affected if the Commission does not take the requested actions for three independent reasons:

a. BMPP and Latigo Misappropriated Sage Grouse's Land Rights to Leapfrog Sage Grouse in PacifiCorp's Interconnection Queue.

To initiate an Interconnection Request, an Interconnection Customer must submit, among other things, documentation reasonably demonstrating Site Control for the Interconnection Customer's interconnection. OATT § 38.3.1. When PacifiCorp deems the Interconnection Request complete, PacifiCorp grants the Interconnection Customer a position on its Interconnection Queue. This is important because, under the law, PacifiCorp must provide available interconnection capacity to a QF Interconnection Customer to facilitate its sales to the Company. Once all of the interconnection capacity is reserved, PacifiCorp may charge the QF Interconnection Customer the costs to upgrade the network to increase the interconnection capacity.

In this case, Latigo and BMPP submitted to PacifiCorp Interconnection Requests containing fraudulent claims to land rights that they not only did not own, but that were exclusively owned by Sage Grouse (or its predecessor Summit Wind). Nevertheless, PacifiCorp deemed their Interconnection Requests complete and assigned BMPP and Latigo Interconnection Queue numbers 384 and 426, respectively. Later, PacifiCorp deemed complete Sage Grouse's Interconnection Request and assigned Sage Grouse interconnection queue number #614.[9]

[9] Sage Grouse notes that PacifiCorp's Feasibility Study mischaracterized Sage Grouse's project as a non QF. Sage Grouse is a QF and will file a self-certification as QF with FERC as required under the rules.

The result is that Latigo and BMPP now hold more favorable lower Interconnection Queue numbers and, therefore, higher priority positions than Sage Grouse. This means that BMPP and Latigo, through fraud, reserved all the remaining interconnection capacity leaving Sage Grouse to pay millions of dollars in otherwise misapplied network system upgrade costs. Due to these misapplied costs, Sage Grouse's project is currently not economically viable.

It is important to note that BMPP's and Latigo's fraud were not single occurrences. In fact, PacifiCorp must require a reasonable demonstration of Site Control at various times throughout the LGIP, e.g. to execute an Interconnection System Impact Study Agreement. OATT § 42.2. Rather than enforce the LGIP, however, PacifiCorp permitted Latigo and BMPP to squat on the Interconnection Queue when they should have been deemed withdrawn. The result is that PacifiCorp's lack of compliance with the LGIP and failure to deem withdrawn BMPP's and Latigo's respective Interconnection Requests directly and negatively affect Sage Grouse's pecuniary interests.

In this matter, Sage Grouse will show that not only were BMPP's and Latigo's claims of Site Control demonstrably fraudulent, but that PacifiCorp knew they were fraudulent and refused to deem withdrawn their respective Interconnection Requests. Had PacifiCorp done as required, BMPP and Latigo would have lost their Interconnection Queue numbers and their fraudulently reserved interconnection capacity would have accrued to Sage Grouse.

The Commission is the only Utah agency that has jurisdiction to review this matter and Sage Grouse has standing to bring it.

b. <u>Sage Grouse Must Know Where to Dispute PacifiCorp's Characterization of Sage Grouse's Interconnection Study Process.</u>

Sage Grouse's Request also seeks clarification regarding the Commission's jurisdiction over PacifiCorp's OATT, as adopted by Schedule 38. In light of Sun Edison's recent arguments,

it appears that the Commission's jurisdiction extends beyond Schedule 38 and to complete oversight of PacifiCorp's LGIP. Regardless of the scope of the outcome, Sage Grouse seeks to challenge PacifiCorp's administration of its LGIP but must know where to bring the complaint.[10] For example, Sage Grouse needs to clarify this process before expending approximately $150,000 for the remainder of the LGIP in order to properly evaluate the risks and costs of the project. Sage Grouse already filed a notice of dispute with PacifiCorp in October 2014 identifying the concerns in its Request before the Commission. PacifiCorp dismissed Sage Grouse's notice. This adversely affected Sage Grouse's ability to negotiate under Schedule 38. In fact, PacifiCorp is refusing to negotiate with Sage Grouse at all. Consequently, this matter and Sage Grouse are now properly before the Commission.

Sage Grouse has been, continues to be, and will continue to be actually harmed if the Commission does not permit the proceeding to continue. This constitutes a "distinct and palpable injury that give [Sage Grouse] a personal stake in the outcome of the legal dispute." *Packer v. Utah Attorney General's Office*, 2013 UT App 194, ¶ 9, 307 P.3d 704.

c. PacifiCorp Has Recently Refused to Negotiate Anything with Sage Grouse.

On June 10, 2015, after Sage Grouse filed this Request, PacifiCorp's Yvonne Hogle cut off communication with Sage Grouse and has refused to negotiate anything regarding Sage Grouse's project. In fact, Ms. Hogle refused to continue communications with Sage Grouse unless Sage Grouse withdraws its complaint. Sage Grouse's project cannot continue without

[10] For example, on October 2014, Sage Grouse commissioned PacifiCorp to conduct an interconnection feasibility study for its Qualified Facility project. After PacifiCorp published the study on January [date] 2015, Sage Grouse only then learned that PacifiCorp erroneously conducted the study as a non-QF and attributed millions of dollars of erroneous upgrades. In order to plan for the success of its project, Sage Grouse must know if it can come to the Commission for relief.

PacifiCorp's participation in negotiation discussions. Sage Grouse's project is, therefore, completely stalled. Sage Grouse hereby asks that the Commission to order PacifiCorp to resume negotiations with Sage Grouse.

**2. A Casual Relationship Exists Between Sage Grouse's Injury and BMPP's and Latigo's Fraud and the Relief Requested, which Relief Is Substantially Likely to Redress the Injury Claimed.**

Sage Grouse also meets the final two elements of traditional standing.

As explained above, BMPP's and Latigo's fraudulent claims have actually and proximately caused injury to Sage Grouse. This is because PacifiCorp, BMPP, and Latigo's fraud have directly allowed them to remain on the Interconnection Queue and thereby reserve valuable interconnection capacity, needed to facilitate sales to PacifiCorp, that should be given to Sage Grouse. Indeed, if the Commission declares, as it should, that PacifiCorp, BMPP, and Latigo fraudulently misappropriated Sage Grouse's land rights and that BMPP and Latigo did not reasonably demonstrate Site Control, then PacifiCorp is required to deem withdrawn their Interconnection Requests. Sage Grouse, as an Interconnection Customer on the Interconnection Queue, will then be granted interconnection capacity saving it millions of dollars. At the very least, BMPP's favorable interconnection upgrade costs will inure to Sage Grouse, again saving millions in dollars. PacifiCorp's, BMPP's, and Latigo's damages to Sage Grouse will be greatly, albeit not wholly, remedied.

A Commission order granting Sage Grouse's relief will also settle the current confusion over whether the Commission exercises jurisdiction over interconnection. This is important so that Sage Grouse, and others, know where they can seek relief for problems arising with interconnection.

### D. Alternative Standing.

In addition to statutory and traditional standing, Sage Grouse also has alternative standing.

"Parties may gain alternative or public-interest standing if they can show that they are an appropriate party raising issues of significant public importance." *Cedar Mountain Envtl., Inc. v. Tooele Cnty.*, 2009 UT 48, ¶ 8, 214 P.3d 95. "This test breaks down to two elements: (1) is the plaintiff an appropriate party; and (2) does the dispute raise an issue of significant public [importance]." *Gregory v. Shurtleff*, 2013 UT 18, ¶ 15, 299 P.3d 1098 (citations omitted). Sage Grouse meets both of these elements.

#### 1. Sage Grouse is an Appropriate Party.

"The 'appropriateness' of a party under the public-interest standing doctrine is a question of *competency*." *Gregory v. Shurtleff*, 2013 UT 18, ¶ 29, 299 P.3d 1098 (Utah 2013) (noting the party's policy concerns and status as an entity focused on the issue at hand) (emphasis in original). Indeed, "an appropriate party has the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions." *Id.* at ¶ 15 (internal citations omitted). "A party meets this burden by demonstrating that it has the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions and that the issues are unlikely to be raised if the party is denied standing." *Id.* ("[A] court addressing standing under the alternative test does not need to determine which party seeking to intervene is the most appropriate party in comparison to any other potential party, but rather needs to determine only which parties are, in fact, appropriate parties to a full and fair litigation of the dispute in question."). *Id.*

In this case, Sage Grouse is competent. As explained above, Sage Grouse has the interest necessary to assist the Commission in developing and reviewing the relevant legal and factual questions and these issues will unlikely be raised if Sage Grouse is denied standing. This is evident from the fact that, before Sage Grouse filed its Request, the Commission had conceded its jurisdictional authority to PacifiCorp's judgment for the better part of the decade; and no one, including the DPU or the OCS, have done anything about it. Now that the issue has been brought forward, the DPU and the OCS have opposed any discussion on the matter. What is very apparent is that the Utah government entities charged with protecting the public want this matter quashed and never raised.

**2. This Matter is One of Significant Public Importance.**

Sage Grouse's Request raises an issue of significant public importance. As explained below, Sage Grouse seeks to expose fraud in the energy electrical markets. This affects every member of the Utah public for five reasons.

First, if PacifiCorp's, BMPP's, and Latigo's conduct is permitted to continue, the rate-payers will be financially supporting fraud. This is against the public interest. *See* FERC Prohibition of Energy Market Manipulation ("Of particular concern to the Commission are cases involving the greatest harm to the public, where there is either significant gain to the violator or significant loss to the victims of the misconduct.").[11]

Second, an important purpose of the LGIP is to study projects and thereby identify and mitigate risk to the electrical transmission system. If projects, such as BMPP and Latigo are not studied correctly, their electrical generation will have an unknown impact on the electrical transmission system. This puts the transmission system, and the public, at risk. *See id*.

[11] http://www.ferc.gov/enforcement/market-manipulation.asp

Third, if BMPP's or Latigo's projects do not reach commercial operation, PacifiCorp's resource planning will be wrong. PacifiCorp will necessarily seek additional energy to meet the demand. In fact, PacifiCorp's Bruce Griswold has acknowledged that if a project is unable to perform, there will be a "need for PacifiCorp to make market purchases to cover for the energy and capacity anticipated from the QF."[12] Thus, either PacifiCorp will acquire the necessary supply from the market at premium prices or will produce the energy itself. This, in turn, will undermine the anti-competitive purposes in PURPA and the Federal Power Act. *See* PURPA § 207.

Fourth, the Utah Constitution provides protection of property rights and access to the courts. Particularly where the Commission has regulatory oversight over PacifiCorp's LGIP, it should not deny Sage Grouse its day in Court to raise concerns that PacifiCorp's LGIP fraud touches on Sage Grouse's developmental rights. As explained in Sage Grouse's reply to PacifiCorp's improper motion to dismiss, to do so would violate the Utah Constitution—a per se matter of public interest.

Fifth, the reate-payers and the public should be gravely concerned with the relationship with PacifiCorp and the Commission, the DPU, and the OCS. This should be all the more apparent since the DPU has done what it has never done before—object to a party's petition for intervention. Sage Grouse fully intends to expose violations of Utah Code Ann. §§ 54-1-11 or

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[12] *See* http://www.psc.utah.gov/utilities/electric/13docs/1303522/242006Exhibit%20F%20-%20Corres%20from%20PacifiCorp%20Energy%20to%20Artie%20Powell%202-22-2013.pdf

In this letter, PacifiCorp takes the affirmative position that an LGIA is required before entering into a PPA. This timing issue was resolved by the Utah Supreme Court in the BMPP and Latigo PPA dockets. This is not the subject of Sage Grouse's Request. Nevertheless, the public interest concern associated with a failed project similarly applies.

54-4a-5. This says nothing, of course, of the DPU's and OCS's unprecedented effort to bar a request for agency action that will expose their own dereliction in protecting the public.

Accordingly, Sage Grouse has alternative standing as an appropriate party raising multiple matters of significant public importance.

## II. SAGE GROUSE'S REQUEST IS PROPERLY BEFORE THE COMMISSION.

### A. The Commission Should Reject the OCS's Argument.

The OCS contends that Sage Grouse did not bring this matter as part of the dispute resolution under P.S.C.U. No. 50 Original Sheet No. 38.11 (the "New Schedule 38"). The OCS then draws the illogical conclusion that this is because, ostensibly, Sage Grouse does not have standing. Apart from bewilderingly incoherent, this argument is also flat wrong.

First, Sage Grouse filed its Request on May 29, 2015. The Commission, however, did not approve the New Schedule 38 until June 9, 2015. Consequently, the OCS's argument that Sage Grouse did not follow a dispute resolution process that had not yet been approved makes absolutely no sense.

Second, what this argument has to do with standing completely evades Sage Grouse.

Third, the OCS also appears to come to bat for BMPP and Latigo to represent their interests. Indeed, the OCS contends that Sage Grouse's Request is not proper because it asks the Commission to consider "factual questions on matters in which the affected parties are not participating." OCS Response 9. This argument is utterly bizarre and highlights Sage Grouse's concerns that state agencies, like the OCS, are not independent or objective. Sage Grouse served BMPP and Latigo notice of these proceedings on May 29, 2015 at 4:52p.m. They chose not to enter. The time to do so is now past. The fact that BMPP and Latigo have not entered this proceeding to explain themselves was their own decision. It is not left to the OCS to defend their

interests. Sage Grouse needs to do nothing else. The OCS should not advocate for one party over another, particularly where fraud is concerned.

Fourth, in October 2014, Sage Grouse submitted a notice of dispute to PacifiCorp regarding the fraudulent Site Control issues identified in its Request. PacifiCorp dismissed them outright, refused to discuss these issues with Sage Grouse, and stated that its only obligation was to schedule a meeting with Sage Grouse. Thus, whatever Schedule 38 says about dispute resolution has already been met. Sage Grouse has fulfilled any dispute resolution obligations with PacifiCorp. This matter is properly before the Commission.

### B. The Commission Should Reject the DPU's Mootness Argument.

In a similar vein, the DPU argues that Sage Grouse's Request is moot now that the New Schedule 38 is approved.[13] The Commission should reject the DPU's argument because it mischaracterizes both Sage Grouse's Request and the law.

First, mootness does not apply to proceedings before the Commission. The jurisprudential concept of mootness "is an essential element of the principles defining the scope of the ***judicial power vested in the courts by the Utah Constitution***, not a simple matter of judicial convenience or ascetic act of discretion." *Gregory v. Shurtleff*, 2013 UT 18, ¶ 67, 299 P.3d 1098 (emphasis added). Thus, the doctrine applies to "***courts*** of general jurisdiction [that] have no power to decide abstract questions or to render declaratory judgments. . . ." *Utah Transit Authority v. Local 382 of Amalgamated Transit Union*, 2012 UT 75, ¶ 19, 289 P.3d 582;

[13] Apparently, there is also confusion as to how and when the New Schedule 38 was approved. The OCS contends that it was approved in Dkt. No. 14-035-140. OCS Response 10 n.6. On the other hand, the DPU contends that New Schedule 38 was approved in Dkt. No. 13-035-184. Sage Grouse respectfully asks, which is it? The Commission should make a concerted effort to streamline its docket so orders are easily attainable. Failure to do so jeopardizes due process requirements if the general public, including Sage Grouse, cannot reasonably find Commission orders.

*see also*, *Barnett v. Adams*, 2012 UT App 6, ¶ 4, 273 P.3d 378 (noting that mootness is a matter of "judicial policy") (emphasis added); *see also*, *Gregory*, 2013 UT 18 at ¶ 67 (stating that it is mootness that forecloses "the use of judicial power to issue advisory opinions"). This cannot apply to the Commission because it is not a court of general jurisdiction with judicial power vested by the Utah Constitution. Indeed, in contrast to such courts, the Commission ***has*** power to issue declaratory judgments and advisory opinions. *See* R746-101-2 (emphasis added). Thus, mootness cannot apply to Commission proceedings.

Second, even if mootness applies to Commission proceedings, it cannot be properly applied in this case. "A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants." *N.F. v. G.F.*, 2013 UT App. 281, ¶ 7. Schedule 50 does nothing to lessen the effects of Sage Grouse's requested relief on Sage Grouse's rights. Indeed, Sage Grouse's Request, among other things, seeks a declaration that the Commission's jurisdiction reached PacifiCorp's, BMPP's, and Latigo's application of the LGIP and that the LGIP in these instances was riddled with fraud. As explained above, these determinations will directly affect the upgrades costs of Sage Grouse's own project. This inquiry has absolutely no bearing on the New Schedule 38, and vice-versa. Indeed, it would be bizarre for the Commission to rule that PacifiCorp can escape malfeasance simply by changing its governing procedures. PacifiCorp violated its LGIP. PacifiCorp violated the law. Changing Schedule 38 does nothing to avoid adjudication of these claims.

Third, even if mootness were applicable in *this* case, and it is not, the mootness public interest exception applies. "The public interest exception to the mootness doctrine arises when the case [1] presents an issue that affects the public interest, [2] is likely to recur, and [3] because

of the brief time that any one litigant is affected, is capable of evading review." *In re Adoption of L.O.*, 2012 UT 23, ¶ 9, 282 P.3d 977.

In this case, as explained above, this matter (substantially) affects the public interest. PacifiCorp's failure to follow its LGIP will certainly recur as it has for the past decade without a Commission order on the subject. This is ever evident from the fact that PacifiCorp ***still*** fails to take the position that the Commission has jurisdiction to ensure that PacifiCorp fully complies with its LGIP—and not "generally" so as the New Schedule 38 provides. Lastly, the issues raised in Sage Grouse's Request are "capable" of evading review because PacifiCorp has every right to bring, and the Commission to approve, revisions to Schedule 38. If this matter is indeed moot, this mechanism will permit parties to continuously change the rules of the game so that PacifiCorp, the DPU, and the OCS can deem such concerns "moot" and thereby sweep such improprieties under the proverbial rug. This is precisely what has occurred in this case.[14]

### C. <u>The Commission Should Reject the DPU's Ripeness Argument.</u>

The DPU concludes its brief with an argument that Sage Grouse's Request is not ripe. The DPU's argument is void any legal citation and legally deficient. DPU Response 6-7.

The ripeness doctrine, similar to mootness, does not apply to Commission proceedings. Ripeness for adjudication exists to avoid hypothetical advisory opinions. *Nelson v. Nelson*, 2004 UT App 254, ¶ 5, 97 P.3d 722 ("It has been previously observed that this court does not render advisory opinions . . . . Where there exists no more than a difference of opinion regarding the hypothetical application of a piece of legislation . . . the question is unripe for adjudication."). The Commission, unlike courts, may offer such opinions. R746-101-2.

[14] This concern is further met if the Commission rules that the Commission Secretary has the unilateral ability to acknowledge and approve PacifiCorp Schedule 38 filings as it has done in the past.

Even if ripeness were relevant, and it is not, Sage Grouse's Request is ripe. As explained herein, Sage Grouse has multiple interests currently affected in this matter. Sage Grouse has also exhausted its resolution dispute process with PacifiCorp. For example, Sage Grouse is positioned behind BMPP and Latigo on the Interconnection Queue due to their fraudulent claims to land rights they did not and do not own. This directly impacts Sage Grouse's pecuniary interests. Sage Grouse's Request is ripe for review.

## III. THE COMMISSION SECRETARY CANNOT OVERRULE A COMMISSION ORDER.

Sage Grouse is not sure whether the OCS has, again, misunderstood Sage Grouse's Request or is simply trying to misrepresent its position. For example, the OCS ignores Sage Grouse's errata noting that the Commission has, at times, ordered changes to Schedule 38. The OCS does nothing, however, to sort through valid and invalid orders as argued by Sage Grouse.[15]

The OCS also appears to misunderstand Sage Grouse's argument referring to the Commission Secretary. Sage Grouse does not dispute that the Commission Secretary has power to issue "notices" of Commission rulings or orders. *See* OCS Response 9. This does not mean, however, that the Commission Secretary has power to unilaterally "make" rulings or orders. Thus, void a Commission order permitting a change to Schedule 38, the Commission Secretary's approval or acceptance of such a change is improper. The OCS argues nothing to the contrary.

The DPU similarly contends that Utah Code Ann. § 54-1-7 gives the Commission Secretary the responsibility to "superintend its clerical business . . . and perform other duties the commission may prescribe." This does not, however, extend to "[r]eview and approval of tariff filings for compliance with the Commission orders." DPU Response 6. Indeed, this cannot be a

[15] Sage Grouse's position is that the orders in its Errata are the only valid orders changing Schedule 38 prior to the New Schedule 38.

prescribed duty where the Commission has not followed the rulemaking laws necessary to augment the Commission Secretary's duties. *See* Utah Code Ann. § 63G-3-301; *see also,* R746-100-14. Consequently, for these purposes, the Commission Secretary's duties are limited to what the law provides—giving "notice" of orders issued by the Commissioners. The Commission Secretary cannot unilaterally deem accepted or approved revisions to Schedule 38 without an order of the Commissioners.

## CONCLUSION

Sage Grouse has statutory, traditional, and alternative standing in this matter. PacifiCorp's fraudulent conduct has directly harmed Sage Grouse. A Commission order deeming BMPP's and Latigo's interconnection requests withdrawn will remedy much of this damage. The Commission should deny the DPU's and OCS's arguments as baseless.

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 Reply to the DPU's and OCS's Responses*** were hand-delivered to:

Gary L. Widerburg
Commission Secretary
Public Service Commission of Utah
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and true and correct copies were electronically mailed to the addresses below:

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