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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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	)	Docket No. 15-2582-01
In the Matter of the Utah Public Service	)	
Commission Exercising Jurisdiction	)	Rocky Mountain Power’s Response to
Over Schedule 38 and, as Adopted,	)	Motion to Strike of Sage Grouse
PacifiCorp’s OATT Part IV.	)	Energy Project, LLC and Reply to
	)	Sage Grouse Energy Project, LLC’s
	)	Response to Rocky Mountain Power’s
	)	Motion to Dismiss, the Responses of
	)	the Division of Public Utilities and
	)	Office of Consumer Services to Sage
	)	Grouse Energy Project, LLC’s
	)	Request for Agency Action and Ellis-
	)	Hall’s Objection to Motion to Dismiss
	)	

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Rocky Mountain Power, a division of PacifiCorp (“Rocky Mountain Power” or the “Company”), pursuant to Utah Admin. Code R746-100-4(D) and the Commission’s Second Notice Amending Comment Period issued July 22, 2015 in this matter, hereby responds to the motion to strike filed by Sage Grouse Energy Project, LLC (“Sage Grouse”) on August 13, 2015 and replies to Sage Grouse’s response to the Company’s motion to dismiss, the responses of the Division of Public Utilities (“Division”) and Office of Consumer Services (“Office”) to Sage Grouse’s request for agency action and Ellis-Hall Consultants, LLC’s (“Ellis-Hall”) objection to

the Company's motion to dismiss and the responses of the Division and Office to Sage Grouse's request for agency action ("Request").

Based on a review of the pleadings, it is apparent that Sage Grouse's Request is improper and should be dismissed and that its motion to strike the Company's motion to dismiss should be denied. If Sage Grouse were a qualifying facility ("QF") and if it were seeking to enter into a Power Purchase Agreement ("PPA") with Rocky Mountain Power under Schedule 38, it might conceivably have the right to invoke the dispute resolution process in Schedule 38 through a complaint before the Commission. However, Sage Grouse is not a QF and it is not seeking a PPA with Rocky Mountain Power under Schedule 38.<sup>1</sup> Instead, it is a potential independent power producer whose complaint is that its position in the PacifiCorp Transmission interconnection queue is lower because Rocky Mountain Power entered into PPAs with Blue Mountain Power Partners, LLC ("Blue Mountain"), and Latigo Wind Park, LLC ("Latigo"), Sage Grouse's competitors. To the extent Sage Grouse is seeking to have the Commission revoke its prior approval of the Blue Mountain and Latigo PPAs, its Request is an improper collateral attack on a prior final Commission order. To the extent Sage Grouse is seeking some other relief; the relief sought is outside the Commission's jurisdiction or would amount to an improper advisory opinion.

In addition, Sage Grouse has made repeated unsupported allegations of fraud against Rocky Mountain Power, Blue Mountain, and Latigo and has claimed that the Commission, Division and Office are essentially doing Rocky Mountain Power's bidding, abdicating their

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<sup>1</sup> Sage Grouse's proposed 199.2 MW facility exceeds the 80MW size limit required to be categorized as a small power production facility and obtain QF status from the Commission. *See* 16 U.S.C. § 796(17)(A)(ii) (defining "small power production facility" as a "facility which is an eligible solar, wind, waste, or geothermal facility . . . [that] has a power production capacity, which, together with any other facilities located at the same site (as determined by the Commission), *is not greater than 80 megawatts*")(emphasis added).

responsibilities and failing to protect the public interest. If such arguments were advanced by counsel, they would raise issues of professional responsibility. Made by a party appearing pro se through its manager, they raise issues of professionalism and civility.

### **INTRODUCTION**

On February 9, 2015, Sage Grouse filed a complaint against the Company before the Federal Energy Regulatory Commission (“FERC”) in Docket No. EL 15-44-000. In that complaint, Sage Grouse makes allegations similar to those made in its pleadings in this matter. In response to the Company’s filings demonstrating that the FERC complaint fails to allege, let alone prove, that the Company has done anything improper in its attempts to assist Sage Grouse with its proposed project for which the FERC is empowered to take action under the Federal Power Act, Sage Grouse has made two further filings before the FERC, but has failed to add any facts beyond unsubstantiated hearsay to support its claim. In addition, Sage Grouse filed the Request with the Commission on May 29, 2015, seeking an order that: (1) the 2003 version of Schedule 38 continues to be in effect, (2) the Commission has jurisdiction over the Company’s OATT Part IV, (3) the Company did not require Blue Mountain and Latigo to reasonably demonstrate site control as required by Schedule 38, (4) the Company, Blue Mountain and Latigo have fraudulently misappropriated land rights to obtain approval of Power Purchase Agreements (“PPA”) between the Company and Blue Mountain and Latigo, and (5) Jordan White (now Commissioner White) should disclose his past, current and any anticipated future affiliation with the Company. While it is difficult to understand exactly what relief Sage Grouse is seeking that the Commission is empowered to grant, Sage Grouse seems to be complaining that the Commission should not have approved PPAs between Rocky Mountain Power and Blue Mountain and Latigo on the grounds that the Company, Blue Mountain and Latigo have

committed fraud with respect to certain land rights and that Blue Mountain and Latigo failed to demonstrate site control, that the Commission, Division and Office had failed to do their duty and apparently that Commissioner White was biased in his role as hearing officer as a result of his prior employment with the Company. On June 15, 2015, Sage Grouse filed an Errata, admitting that it had overlooked orders approving subsequent versions of Schedule 38, but maintaining that these changes were immaterial.

On June 15, 2015, Rocky Mountain Power filed a motion to dismiss the Request. The motion was based on the premise that the Request was a collateral attack on the Commission's earlier order approving the PPAs and barred by res judicata. On July 15, 2015, the Division and Office filed their responses to the Request. They both requested that the Request be dismissed or denied based on Sage Grouse's failure to properly request a declaratory ruling under Utah Administrative Code. R746-101, because Sage Grouse lacks standing and because the Commission's order approving the Blue Mountain and Latigo PPAs were final, among other things.

On August 13, 2015, Sage Grouse responded to the foregoing and moved to strike the Company's motion to dismiss. Sage Grouse argued that the motion to dismiss is improper in a regulatory proceeding, violates the Utah Rules of Civil Procedure and seeks adjudication of an affirmative defense. Sage Grouse also claimed that the motion to dismiss should be denied because the Company is estopped from making its arguments, the Commission is estopped from applying res judicata, collateral estoppel does not bar the Request, Sage Grouse is not in privity with Ellis-Hall, Sage Grouse has a constitutional right to be heard, and the Commission should investigate the Company's fraudulent conduct. In response to the Division and Office, Sage Grouse claimed it has standing because it filed the Request and represents the public interest, the

Request may be a request for a declaratory ruling, but it is a proper one, and that the Company and Latigo misappropriated Sage Grouse's land rights in order to put Latigo ahead of Sage Grouse in the interconnection queue. Sage Grouse also argued that the Commission Secretary cannot overrule a Commission order. Ellis-Hall's response argued that Ellis-Hall is not in privity with Sage Grouse and that standing is irrelevant.

Rocky Mountain Power will not impose upon the Commission by responding blow-by-blow to each of Sage Grouse's mishmash of arguments. Many of them simply reflect Sage Grouse's lack of familiarity with civil and regulatory procedure and administrative law. For example, motions to dismiss are clearly permitted in administrative proceedings, the fact that a party may not have a direct interest in the matters on which it seeks a declaratory ruling is both relevant and determinative on whether a matter should be allowed to proceed, no one has a constitutional right to a hearing on complaints that are legally deficient, the Commission Secretary clearly has authority to provide notices of Commission decisions, including the efficacy of tariff changes, and Commissioner White's employment some years ago by the Company does not forever disqualify him from hearing matters involving the Company, and does not do so in this case.

More importantly, regardless of Sage Grouse's and Ellis-Hall's attempt to dress their arguments as something else, they are complaints about the fact that the Commission approved the Blue Mountain and Latigo PPAs despite Ellis-Hall's claims that they did not have sufficient site control because of disputes about land rights. That issue has already been heard and decided and any attempt to undo it is a collateral attack on a final Commission order. On the other hand, Sage Grouse's request that the Commission declare that Rocky Mountain Power, Blue Mountain

and Latigo have fraudulently misappropriated property rights causing damage to Sage Grouse is clearly beyond the Commission's jurisdiction.

Rocky Mountain Power agrees with the additional reasons for dismissal provided by the Division and Office. The Company will not repeat those arguments, but adopts them here for purposes of efficiency, simply noting that neither Sage Grouse nor Ellis-Hall has adequately rebutted them.

The Company continues to believe that there is privity between Sage Grouse and Ellis-Hall and that its res judicata arguments are well taken. However, based on the allegations of Sage Grouse and Ellis-Hall, if the Commission does not conclude that there is sufficient reason to dismiss the Request without the necessity of making findings of fact on issues of privity, the Company requests that the Commission allow the matter to proceed limited solely to discovery on those issues. There are sufficient grounds to dismiss the Request even absent privity between Ellis-Hall and Sage Grouse, so the Company will not argue privity in this reply.

### **ARGUMENT**

#### **I. A Motion to Dismiss Is Entirely Proper in this Matter, and the Motion to Strike Should Be Denied.**

Rule R746-100-4(D) provides that “[m]otions directed toward initiatory pleadings shall be filed before a responsive pleading is filed.” Clearly, a motion to dismiss is contemplated by this rule. If there were any doubt, the Commission has adopted the Utah Rules of Civil Procedure to govern procedures in circumstances not addressed in its procedural rules. Utah Admin. Code R746-100-1(C). Motions to dismiss are contemplated under the Utah Rules of Civil Procedure, and they are likewise to be filed prior to or simultaneously with an answer to a complaint. Utah R. Civ. P. 12(b).

The purpose of a motion to dismiss is to avoid the necessity of the parties and the court or administrative agency wasting time and resources with discovery and further proceedings in dealing with a complaint that is legally defective. Contrary to the misguided implication of Sage Grouse's observation that "[interestingly, PacifiCorp does not touch at all on the merits of Sage Grouse's Request," Sage Grouse Motion and Response at 1, the purpose of a motion to dismiss is precisely to avoid the necessity of dealing with the merits when a complaint is legally deficient.<sup>2</sup> Section 63G-4-204 of the Utah Code, cited by Sage Grouse, simply contemplates that a responsive pleading will be filed; it does not preclude the filing of a motion to dismiss. The filing of a motion to dismiss suspends the time for filing a substantive response or answer to a complaint. Utah R. Civ. P. 12(b). Filing a motion to dismiss does not waive the right of a party to raise other defenses or to answer any allegation if the motion is denied. *Id.*

Sage Grouse raises frivolous technical issues with the Company's motion. The requirement that a memorandum be filed in support of a motion is fully satisfied by the inclusion of the memorandum within the motion as the Company did in this case. The Commission has accepted this practice for years, and Sage Grouse's own motion to strike is consistent with it. The requirement that the argument in support of a motion be ten pages or less without leave of court is also satisfied in Rocky Mountain Power's motion. Apparently, Sage Grouse does not realize that only the pages within the argument section of the memorandum are counted in the page limit. In any event, the practice before the Commission is that page limits, if any, for briefs or pleadings are specified by the Commission in individual cases. Furthermore, Sage Grouse has clearly exceeded the page limit in its response to the motion to dismiss -- its argument is over 22 pages.

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<sup>2</sup> See *Oakwood Village LLC v. Albertson's Inc.*, 104 P.3d 1226 (2004).

Finally, Sage Grouse argues that the motion to dismiss should be stricken because it is an attempt to seek adjudication of an affirmative defense on the pleadings. Motions to dismiss are almost always based on issues that may also be affirmative defenses. The point of Rule 8 of the Utah Rules of Civil Procedure is that affirmative defenses must be raised no later than a responsive pleading, not that they cannot be raised in a motion to dismiss. They can be raised in motions to dismiss. The cases cited by Sage Grouse say nothing about striking a motion to dismiss because it raises an affirmative defense. Instead, they deal with whether an affirmative defense may be adjudicated based on the record of the complaint and motion.<sup>3</sup> The issue is whether there are contested issues of fact essential to a decision about whether the complaints states a claim or whether it is barred because of lack of jurisdiction or standing or for some other reason. If so, the motion cannot be granted without allowing some development of facts through discovery. Here, the only relief ultimately sought by the Request that the Commission is empowered to grant is a collateral attack on the Commission's prior final order approving the Blue Mountain and Latigo PPAs. There are no disputed facts on this issue. Thus, the Request is legally defective and should be dismissed. Surely, the motion to dismiss should not be stricken.

**II. The Other Aspects of the Request Are beyond the Commission's Jurisdiction.**

Other than seeking an order that the Company did not require Blue Mountain and Latigo to reasonably demonstrate site control before entering into PPAs with them, an issue already raised by Ellis-Hall and decided by the Commission in the prior dockets, the only substantive relief Sage Grouse seeks is an order that the Company, Blue Mountain and Latigo have fraudulently misappropriated land rights belonging to other interconnection customers to obtain approval of their PPAs. As already noted by the Division, the Commission does not have

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<sup>3</sup> See e.g., Tucker v. State Farm Mut. Auto. Ins. Co., 2002 UT 54, 53 P.3d 947, 949-950 (2002).

jurisdiction to establish rights in real property between non-utilities. Response of Division at 4. And Sage Grouse does not make any direct allegation that the Company has misappropriated any land right belonging to it, only that the Company did not require Blue Mountain and Latigo to adequately demonstrate their land rights before entering into PPAs with them. Clearly, resolving disputes about land rights between competing power producers is not within the jurisdiction of the Commission.

Sage Grouse also refers to the “damages” it has incurred as a result of the alleged misappropriation. Certainly the Commission does not have jurisdiction to consider the “damages” that Sage Grouse may have incurred as a result of any alleged misappropriation of its or Ellis-Hall’s land rights.<sup>4</sup>

The problem is that Sage Grouse’s real dispute is not with the Company, but is rather with competing generating projects. Sage Grouse is attempting to use the Commission and its resources (not to mention the resources of the Company, the Division and the Office) to pursue this fundamentally commercial dispute. The complaint is not about the Company’s actions, it is about competing claims to land rights by Blue Mountain and Latigo, on the one hand, and Sage Grouse and Ellis-Hall, on the other.

Sage Grouse initiated its dispute with the Company immediately after submitting its interconnection request. Sage Grouse entered the interconnection queue on August 25, 2014, but on October 1, 2014, before the Company could conduct any studies in relation to the Sage Grouse interconnection request and, in fact, on the same day the Company and Sage Grouse scheduled their initial scoping meeting on its interconnection request, Sage Grouse requested dispute resolution proceedings with the Company. The issue in dispute was not the Company’s

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<sup>4</sup> *Richcraine Corp. v. Utah Power & Light Co.*, 2000 WL 1643593 (Utah P.S.C.) (*citing Denver & RGR v. PUC*, 73 Utah 139, 272 P. 939 (1928)).

study results or cost estimates, but rather the property rights of Blue Mountain. The Company has not wished to become the mediator of these disputes, and the Commission should not resolve these commercial disputes either.

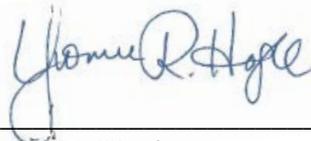
### **CONCLUSION**

The Commission's Order Approving Applications in Dockets Nos. 13-035-115 and 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 improperly to undermine the order in this proceeding. Otherwise, Sage Grouse's Request does not state claim for relief that the Commission is empowered to grant. In addition, Sage Grouse lacks standing to bring the Request and to seek the declaratory relief it is claiming. Accordingly, the Request should be dismissed.

DATED: August 24, 2015

Respectfully submitted,

ROCKY MOUNTAIN POWER



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