
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
NOTICE OF DENIAL OF REQUEST
FOR DECLARATORY RULINGS
AND ORDER DENYING MOTION
TO DISMISS AND MOTION TO
STRIKE AS MOOT

ISSUED: October 22, 2015

PROCEDURAL BACKGROUND

On May 29, 2015, Sage Grouse Energy Project, LLC ("SG") filed a document it designated as "[SG's] Request for Agency Action" ("Initial Request"). On June 8, 2015, Ellis-Hall Consultants, LLC ("Ellis-Hall") filed a Petition to Intervene. On June 9, 2015, Ellis-Hall filed comments in support of SG's Request. On June 15, 2015, SG filed a document styled "Errata [SG's] Request for Agency Action" ("Errata Request"). The Errata Request modifies certain portions of the Initial Request but otherwise seeks the same relief (hereinafter the "Initial Request" and "Errata Request" are referred to collectively as the "Request"). On June 29, 2015, the Commission granted Ellis-Hall intervention.

On July 15, 2015, the Division of Public Utilities ("Division") and the Office of Consumer Services ("Office") each submitted comments on the Request, asserting the Commission should deny it because SG lacked standing to seek the requested relief, had failed to meet the applicable standards under the Utah Administrative Code for a declaratory ruling and posed questions that were not ripe for review. Also on July 15, Rocky Mountain Power, a division of PacifiCorp ("RMP") filed a Motion to Dismiss the Request. RMP argues the Request

is a statutorily barred collateral attack on a prior Commission order and is barred by common law principles of *res judicata*.

On August 13, 2015, SG filed a reply to the Division's and the Office's comments, asserting it has standing and that its Request raises issues properly before the Commission. The same day, SG filed a Motion to Strike RMP's Motion to Dismiss and response to that motion. On August 24, 2015, RMP filed a response to SG's motion to strike.

DISCUSSION

1. The Commission Treats SG's Request as a Request for Multiple Declaratory Rulings as Opposed to a Request for Agency Action, and the Request was Deemed Denied 60 Days after Filing by Operation of Statute.

While SG styled its filing as a "Request for Agency Action," the Request does not actually ask the Commission to take any specific action that falls within its statutorily enumerated authority. Consequently, the procedural posture of this proceeding has been confused. On closer examination, SG's Request is not a request for agency action but a request for multiple declaratory rulings, which are governed by Utah Code Ann. § 63G-4-503 and Utah Admin. Code R746-101-3. Specifically, the Request seeks four separate "declaratory orders," inviting the Commission to declare: (1) "[a]s of July 9, 2013, the operative version of Schedule 38 required PacifiCorp to follow its OATT and apply those procedures for studying the generation interconnection, which included PacifiCorp's OATT's Site Control requirements" (Errata Request at 4); (2) "[t]he Commission had and continues to have jurisdiction over PacifiCorp's OATT as adopted by Schedule 38" (Errata Request at 5); (3) "PacifiCorp did not require [Blue Mountain Power Partners, LLC ("BMPP") and Latigo Wind Park, LLC ("Latigo")] to reasonably demonstrate Site Control as required by Schedule 38, and, therefore, OATT Part

IV” (Initial Request at 2, 9); and (4) “PacifiCorp, BMPP, and Latigo have fraudulently misappropriated land rights belonging to other Interconnection Customers and Qualified Facility (“QF”) owners to obtain the Commission’s approval of their respective PPAs” (*Id.*).¹

Accordingly, the Commission treats the Request as a petition for multiple declaratory rulings.

Under Utah Code Ann. § 63G-4-503(7), “[u]nless the petitioner and the agency agree in writing to an extension, if any agency has not issued a declaratory order within 60 days after receipt of the petition for a declaratory order, the petition is denied.” After SG filed its incorrectly styled Request, the parties engaged in motion practice with RMP filing a motion to dismiss and SG filing a response and a motion to strike. Having reviewed all of the filings in this docket, the Commission concludes that SG’s Request is a request for declaratory relief that was denied, by operation of statute, 60 days after its filing. While the misstated nature of the pleading and the motion practice served to delay this conclusion, the outcome is correct.

2. On the Merits, the Commission Declines to Issue a Declaratory Ruling because SG Failed to Comply with the Requirements for Requesting Such Relief and Otherwise Failed to Articulate a Cognizable Issue for Commission Review.

Those who wish to obtain a declaratory order from the Commission must file a petition that complies with the following requirements: (1) be clearly designated as a request for a declaratory ruling; (2) identify the statute, rule or order to be reviewed; (3) describe adequately the facts and circumstances in which applicability is to be reviewed; (4) describe the reason or

¹ In addition to these requests for declaratory relief, SG also requests that Commissioner White “disclose his past, current, and any anticipated future affiliations with PacifiCorp.” (Request at 2.) The Commission does not address the disclosure request in this Order but responds by separate letter, which the Commission issues concurrently.

need for the review; (5) include an address and telephone number where petitioner can be reached; and (6) be signed by the petition or petitioner's duly authorized representative and be notarized. Utah Admin. Code R746-101-3.

SG's Request complies with only one of these six requirements: it contains the address and telephone number where the petitioner can be reached. As noted, the Request is not "clearly designated" as a request for declaratory ruling but is inaccurately styled as a "Request for Agency Action." Additionally, the Request is not signed and notarized as the rule requires. More substantively, the Request does not adequately identify the statute, rule or order to be reviewed, describe the facts and circumstances in which applicability of the statute, rule or order is to be reviewed and describe the reason or need for the review. Instead, the Request presents a hodgepodge of allegations, most of which concern issues the Commission has already decided (*e.g.*, previously approved power purchase agreements) or plainly fall outside the Commission's jurisdiction (*e.g.*, the allegation that two non-utility, non-parties have "misappropriated land rights").

SG premises its first request for a declaratory order, relating to which version of Schedule 38 was operative as of July 9, 2013, on its assertion that the Commission's secretary is not authorized to give notice of the Commission's approval of tariff sheets, and SG's Request does not so much seek a determination or clarification from the Commission on this issue as challenge the Commission's existing practice. As the Division noted in its comments:

The common practice of the Commission as has been done for many years is for the Commission to issue an order at the conclusion of a docket and within that order direct the Company to prepare a set of tariff sheets that reflect the Commission's order. The final order is the Commission's adoption of the new Tariff and the review is a clerical function to ensure that the order is complied with.

(Division Comments at 5-6.) The Division accurately describes the Commission’s practice. The Commission generally adopts changes to a tariff through an order that expressly or implicitly instructs the Company to submit tariff sheets compliant with the order. If the tariff sheets the Company subsequently submits are consistent with the order, the Commission frequently gives notice of its approval of the tariff sheets through its secretary. We believe this practice is consistent with the secretary’s role as prescribed by statute. *See* Utah Code Ann. § 54-1-7 (“Under the direction of the commission the secretary shall ... conduct its correspondence, give notice of all hearings, determinations, rulings and orders of the commission, prepare for service papers and notices required by the commission, and perform other duties the commission may prescribe.”). In any event, the Commission’s long-standing reliance on its secretary to issue such letters makes plain the Commission’s view of the matter. SG has offered no explanation as to why a declaratory ruling on this subject would be helpful or is necessary, and the Commission declines to issue one.

SG’s second request for a declaratory order asks the Commission to declare it “had and continues to have jurisdiction over PacifiCorp’s OATT as adopted by Schedule 38,” which is nonsensical. PacifiCorp’s Open Access Transmission Tariff (“OATT”) is filed with and enforced by the Federal Energy Regulatory Commission (“FERC”). While the Commission acknowledges it has a role in regulating and allocating interconnection costs under the Public Utility Regulatory Policies Act and attendant federal regulations,² PacifiCorp’s OATT is a FERC-approved

² *See e.g.*, 18 CFR § 292.306 (“Each State regulatory authority ... shall determine the manner for payments of interconnection costs, which may include reimbursement over a reasonable period of time.”)

document and a matter of federal regulation. The Commission also acknowledges it recently approved tariff language for Schedule 38, stipulated to by the parties in the pertinent docket, wherein PacifiCorp agreed that in processing applications to interconnect qualified facilities greater than 20 megawatts it would “generally follow[] the procedures for studying the generation interconnection described in the Company’s [OATT].”³ The Commission’s approval of this tariff language does not amount to the Commission’s comprehensive adoption of PacifiCorp’s OATT, a document that spans approximately 750 pages inclusive of attachments and appendices, or of Part IV, which comprises approximately 60 of those pages. The Commission declines SG’s request to issue a declaratory ruling providing otherwise.

SG’s third and fourth requests ask the Commission to issue declaratory rulings finding “[RMP] did not require BMPP and Latigo to reasonably demonstrate Site Control” and “[RMP], BMPP, and Latigo have fraudulently misappropriated land rights.” These simply are not appropriate subjects for a declaratory ruling from this Commission. Neither of these requests ask the Commission to interpret or clarify a rule, statute or order. Rather, both seek findings of fact

³ See Order Approving Settlement Agreement on Schedule 38 Procedures dated June 9, 2015, *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140.

but are not attached to any request for relief, let alone relief that we are statutorily empowered to grant.⁴

ORDER

The Commission is mindful of its obligation to issue declaratory orders where appropriate to provide guidance to individuals and entities concerning the Commission's interpretation of applicable statutes, rules and orders. In order to do so, the Commission must be presented with a petition for declaratory ruling consistent with the Commission's rules, which presents an issue that is sufficiently discrete and defined to be susceptible to review. SG's Request fails on both counts. While SG's request was denied by operation of statute 60 days after it was filed, having reviewed all of the filings in this docket, the Commission affirms its denial of SG's Request. In light of this Order, the Commission does not reach the merits of RMP's motion to dismiss or SG's motion to strike it, both of which the Commission denies as moot.

⁴ While the Request is entirely unclear as to what SG would have the Commission do with respect to these allegations, the Commission notes that it approved the two power purchase agreements at issue more than two years ago. *See Order Approving Applications dated October 3, 2013, In the Matters of the Applications of Rocky Mountain Power for Approval of Power Purchase Agreements with BMPP and Latigo*, Docket Nos. 13-035-115, 13-035-116. Intervenor Ellis-Hall filed an appeal, and the Supreme Court of Utah affirmed the Commission's decision. *Ellis-Hall Consultants, LLC v. Public Service Commission of Utah*, 2014 UT 52, 342 P.3d 256. In other words, the Commission considers its approval of these two power purchase agreements well settled.

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DATED at Salt Lake City, Utah, this 22nd day of October, 2015.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#270132

Notice of Opportunity for Agency Review or Rehearing

Pursuant to §§ 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this written Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of §§ 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on the 22nd day of October, 2015, a true and correct copy of the foregoing was delivered upon the following as indicated below:

By Electronic-Mail:

Sage Grouse Energy Project, LLC (sage.grouse@hotmail.com)

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