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Attorneys for Ellis-Hall Consultants, LLC

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE APPLICATION OF
ROCKY MOUNTAIN POWER FOR
APPROVAL OF POWER PURCHASE
AGREEMENT BETWEEN PACIFICORP AND
BLUE MOUNTAIN POWER PARTNERS,
LLC

Docket No. 13-035-115

***MEMORANDUM IN SUPPORT OF
MOTION TO DISQUALIFY COUNSEL***

INTRODUCTION

Pursuant to Utah R. Prof. Conduct 1.6 and 1.18, Ellis-Hall Consultants, LLC (“Ellis-Hall”) hereby moves to disqualify Mr. Dodge as counsel for Blue Mountain Power Partners (“Blue Mountain”) on the basis that Mr. Dodge formed an attorney-client relationship with Ellis-Hall, accepted Ellis-Hall’s confidential communications, disclosed Ellis-Hall’s confidential information, and is now taking a direct and adverse representation to Ellis-Hall’s interests.

BACKGROUND FACTS

1. In early 2013, Mr. Tony Hall met Mr. Gary Dodge at a Public Services Commission (“PCS”) hearing and informed Mr. Dodge that he, on behalf of Ellis-Hall, sought representation before the PSC concerning Ellis-Hall’s wind project.

2. Mr. Dodge gave Mr. Hall his business card and offered to meet with him.

3. On February 8, 2013, Mr. Hall met with Mr. Dodge for approximately two hours.

4. During this conversation, Mr. Dodge elicited confidential information from Mr. Hall regarding Ellis-Hall’s objectives, the status of its project, Ellis-Hall’s strategies, the fact that Blue Mountain’s project was adverse to Ellis-Hall’s project, the fact that Blue Mountain had improperly used land subject to Ellis-Hall’s leases, and data from Ellis-Hall’s project to obtain pricing from PacifiCorp, etc.

5. This exchange of information went far beyond determining whether a conflict existed and thereby created an attorney-client relationship between Mr. Dodge and Ellis-Hall.

6. Sometime after the initial consultation, Mr. Dodge called Mr. Hall and informed him that Wasatch Wind objected to Mr. Dodge’s representation of Ellis-Hall and, on that basis, he would not represent Ellis-Hall.

7. Despite Mr. Dodge’s refusal to represent Ellis-Hall, Mr. Dodge subsequently agreed to represent Blue Mountain.

8. Mr. Dodge has repeatedly violated his duties pursuant to this attorney-client relationship:

a. Mr. Dodge continues to represent Blue Mountain adverse to Ellis-Hall;

- b. Mr. Dodge unethically disclosed Ellis-Hall's confidential information to impugn Ellis-Hall's motives before the PSC;
- c. On information and belief, Mr. Dodge has also shared Ellis-Hall's confidential information with both Blue Mountain and Wasatch Wind.

9. Wood Balmforth, on behalf of Ellis-Hall, communicated with Mr. Dodge Ellis-Hall's objection to his continued conflicted participation in this matter.

10. Mr. Dodge subsequently offered to withdraw from the matter.

11. On August 1, 2013, Wood Balmforth sent a letter to Mr. Dodge accepting his offer to withdraw (attached hereto as Ex. 1).

12. Mr. Dodge failed to withdraw.

ARGUMENT

Mr. Dodge formed an attorney-client relationship with Ellis-Hall when Mr. Dodge initially met with Ellis-Hall and elicited Ellis-Hall's confidential information. Due to this attorney-client relationship, neither Mr. Dodge nor his firm may represent Blue Mountain in this matter or disclose any information that he received from Ellis-Hall because Blue Mountain's position in this litigation is adverse to Ellis-Hall.

The Utah Rules of Professional Conduct expressly protect the confidential information shared between an attorney and a client as well as a potential client. *See* Utah R. Prof. Conduct, Rules 1.6 and 1.18. Indeed, "[a] lawyer . . . shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d)." Utah R. Prof. Conduct Rule 1.18. Representation is permissible under paragraph (d) where there is written consent by both the client and prospective client, *or* "if the lawyer who received the information took reasonable measure to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; *and* the disqualified lawyer is timely screened . . . ; *and* written notice is promptly given to the prospective client." Utah R. Prof. Conduct Rule 1.18 (emphasis added). None of these occurred in this case.

In 2005, the Utah State Bar Ethics Advisory Opinion Committee (the "Committee") provided further guidance through its Ethics Opinion 05-04 (the "Opinion"). 2005 Westlaw 2234101 (attached hereto as Ex. 1). The Committee's Opinion states:

In most circumstances, the obligation of confidentiality attaches when a prospective client consults with the attorney in contemplation of retaining the

attorney, *even if that attorney is not ultimately retained and never advises the client. . . . Absent consent, the attorney may not undertake representation of another party in the same or substantially factually related matter if the attorney acquired relevant confidential information from the prospective client.*

An attorney may avoid disqualification by strictly limiting the information acquired during the initial consultation or by explicit agreement and waiver prior to the initial consultation. Under the Utah Rules of Professional Conduct in effect on the date of issuance of this Opinion, *if the attorney is disqualified, the entire firm of that attorney is also disqualified.*

Utah Ethics Advisory Op. 05-04, 2005 WL 2234101 (emphasis added).

In coming to this Opinion, the Committee noted that an “attorney/client relationship is established *when a party seeks and receives the advice of an attorney in matters pertinent to the lawyer’s profession.*” *Id.* Utah Ethics Advisory Op. 0504 (citing Utah Ethics Advisory Op. 97-02, 1997 WL 45141) (emphasis in original). Indeed, “[a]n attorney/client relationship can arise from brief informal conversations, in person or by telephone, even though no fee is ever discussed or charged and no contract of employment is signed.” *Id.* (citations omitted). The Committee also stated that if there is “some ambiguity in the nature of the client-attorney relationship, the law generally imposes the burden on the lawyer to clearly and affirmatively negative the existence of the client-lawyer relationship.” *Id.* (citations omitted).

Mr. Dodge formed an attorney-client relationship with Ellis-Hall in early February 2013 by eliciting confidential information regarding Ellis-Hall’s objectives, the status of its project, Ellis-Hall’s strategies, the fact that Blue Mountain’s project was adverse to Ellis-Hall’s project, that Blue Mountain had improperly used land subject to Ellis-Hall’s leases, and data from Ellis-Hall’s project to obtain pricing from PacifiCorp, etc. Mr. Dodge has violated and continues to violate his professional and ethical duties by taking a conflicted and adverse position against Ellis-Hall without Ellis-Hall’s written consent. Consequently, Mr. Dodge and his firm must be

disqualified from participating in this matter and refrain from disclosing any additional information obtained from Ellis-Hall to anyone, including but not limited to Blue Mountain and/or Wasatch Wind.

CONCLUSION

Mr. Dodge and Ellis-Hall have an attorney-client relationship. Pursuant to Utah's Rules of Ethics, Mr. Dodge cannot represent an interest adverse to Ellis-Hall and must safeguard all confidential information in his possession. Consequently, Mr. Dodge and his firm must be disqualified from this action.

DATED this 26th day of August, 2013.

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/s/ Stephen Q. Wood

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2013, a true and correct copy of the forgoing ***MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY COUNSEL*** was served via e-mail to the following:

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