Mary Anne Q. Wood (3539)
Stephen Q. Wood (12403)
WOOD BALMFORTH LLC
60 E. South Temple, Suite 500
Salt Lake City, UT 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061
E-mail: mawood@woodbalmforth.com
swood@woodbalmforth.com

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 ***REPLY IN SUPPORT OF MOTION TO COMPEL BLUE MOUNTAIN POWER PARTNERS, LLC***

Blue Mountain Power Partners, LLC ("Blue Mountain") asserts that Ellis-Hall's Motion to Dismiss should be denied because Blue Mountain claims that it has produced "all responsive documents; there is nothing left to produce." Response at 3. Blue Mountain's assertion that it has produced all responsive documents is specious. Blue Mountain has not. Blue Mountain objected to Ellis-Hall's discovery requests asserting a litany of improper boilerplate objections. Based on these improper objections, Blue Mountain only produced the documents it self-servingly deemed to be "relevant" to Ellis-Hall's claims. Moreover, Blue Mountain produced these documents after the deadline set by the Commission's Scheduling Order and after Ellis-Hall filed its Motion to Compel.

Blue Mountain's boilerplate objections and its unsubstantiated refusal to produce relevant documents finds no support in Utah law.

The Utah Supreme Court has held that the purpose of discovery is "to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible." *Rahofy v. Steadman*, 2010 UT App 350, ¶ 7, 245 P.3d 201, 204 (citations omitted).

All parties are entitled to reasonable access to "all evidence bearing on the controversy between them, including that in control of adverse parties. This, of course, requires the absolute honesty of each party in answering discovery requests and complying with discovery orders."[1] "Complete and accurate responses to discovery are required for the proper functioning of our system of justice."[2] "The parties have a duty to provide true, explicit, responsive, complete and candid answers to discovery, and their attorneys have a continuing duty to advise their clients of their duty to make honest, complete, non-evasive discovery disclosures, as well as the spectrum of sanctions they face for violating that duty."[3] "Providing false or incomplete discovery responses . . . subjects the offending party and its counsel to sanctions."[4]

Courts uniformly recognize that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." *Systemic Formulas, Inc. v. Kim*, 1:07-CV-159 TC, 2009 WL 1444226 (D. Utah 2009). [5] Moreover, failing to respond in the appropriate timeframe subjects the noncomplying party to sanctions under Rule 37. *See Aurora*

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[1] *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 609 (D. Neb. 2001) citing *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 91 F.R.D. 574, 576 (S.D.N.Y. 1981).
[2] *Id*. citing *Averbach v. Rival Mfg. Co.*, 879 F.2d 1196, 1201 (3d Cir. 1989).
[3] *Id*. at 610 citing *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 616 (5th Cir. 1977); Fed. R. Civ. P. 26(g).
[4] Id. citing *Hogue v. Fruehauf Corp.*, 151 F.R.D. 635, 637 (C.D. Ill. 1993).
[5] Because Utah R. Civ. P. 34(1) and Fed. R. Civ. P. 34(a) are "substantially similar, reliance on cases interpreting the [Fed. R. Civil P.] is appropriate." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54,¶ 7 n.2.

Credit Services, Inc. v. Liberty W. Dev., Inc., 129 P.3d 287, 289 (Utah App. 2006); citing *W.W. & W.B. Gardner, Inc. v. Park W. Vill., Inc.*, 568 P.2d 734, 738 (Utah 1977) (affirming default judgment pursuant to rule 37, where defendant failed to respond to discovery within thirty days, because "[a] defendant may not ignore with impunity the requirements of [r]ules 33 and 34, and the necessity to respond within thirty days").

Blue Mountain's boilerplate, unsubstantiated objections are textbook examples of what courts have routinely deemed to be improper objections and evasive and incomplete disclosures.[6] If a party withholds discovery based on an objection, the objection must be specific, non-boilerplate, and supported by particularized facts where necessary to demonstrate the basis for the objection.[7] Contrary to Blue Mountain's suggestion, the "mere statement by a party that the interrogatory [or request for production] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection."[8]

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[6] *U.S. ex rel. O'Connell v. Chapman Univ.*, 245 F.R.D. 646, 649-50 (C.D. Cal. 2007) (finding that objections stating overbroad, unduly burdensome, unduly redundant, oppressive, calls for narrative "***are general or boilerplate objections, which are not proper objections***."); *Paulsen v. Case Corp.*, 168 F.R.D. 285, 289 (C.D. Cal. 1996); *Burns v. Imagine Films Entm't, Inc.*, 164 F.R.D. 589, 592-93 (W.D.N.Y. 1996)(general objections that discovery request was overbroad, vague and unduly burdensome were not sufficiently specific to allow court to ascertain objectionable character of discovery request and were improper); *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990)(objections that requests were overly broad, burdensome, oppressive, and irrelevant were insufficient to meet party's burden to explain why discovery requests were objectionable); *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir.1985) (conclusory recitations of expense and burdensomeness are not sufficiently specific to demonstrate why discovery is objectionable); *Burns*, 164 F.R.D., 592-93; *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 58 (D.D.C. 1984)("General objections are not useful to the court ruling on a discovery motion.").

[7] *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 573 (D. Md. 2010) citing *Hall v. Sullivan*, 231 F.R.D. 468, 470 (D. Md. 2005); *Thompson v. Dep't of Hous. & Urban Dev.*, 199 F.R.D. 168, 173 (D. Md. 2001); *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 38-39 (D. Md. 2000).

[8] *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) (quoting *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980)); *see also Oleson*, 175 F.R.D. 560, 565 ("The

Furthermore, arguing the merits of a party's claim, as Blue Mountain has repeatedly done, is not a proper way to state an objection and does not satisfy Blue Mountain's burden. *See Incorp Services, Inc. v. Nevada Corp. Services, Inc.*, 209-CV-01300GMNGWF, 2010 WL 2540607 (D. Nev. 2010) (holding that Defendant improperly "chose to argue the merits of Plaintiff's claims, rather than address the specific discovery requests to which Plaintiff seeks to compel further responses . . . therefore, Defendant has failed to carry its burden to show that the discovery requests are overly broad or irrelevant.").

Blue Mountain attempts to excuse its discovery misconduct by accusing Ellis-Hall of refusing to respond to Blue Mountain's discovery requests and claiming that "Ellis-Hall objections demonstrate[] its contempt for these proceedings, knowing full well that inadequate time exists for Blue Mountain to enforce Ellis-Hall's discovery obligations." Response at 3. Blue Mountain's rhetoric and its claim that Ellis-Hall is somehow at fault for Blue Mountain's failure to file timely discovery requests is ironic. Blue Mountain is the party that demanded an expedited scheduling order in this matter. Having done so, Blue Mountain is hardly in a position to argue that it is Ellis-Hall's fault that Blue Mountain filed untimely discovery requests.

Furthermore, even if Blue Mountain's allegations were meritorious, they do not excuse Blue Mountain's failure to provide Ellis-Hall discovery. "***A party may not excuse its failure to comply with discovery obligations by claiming that its opposing party is similarly delinquent***. Nor may a party condition its compliance with its discovery obligations on receiving discovery from its opponent."[9]

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litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request.") (citation omitted).

[9] *Genentech, Inc. v. Trustees of U. of Pennsylvania*, C 10-02037 LHK PSG, 2011 WL 7074208

Here, Blue Mountain failed to produce highly relevant documents by the deadline set in the Commission's Scheduling Order. Blue Mountain's Response fails to substantiate its objections or cite a single case that supports the manner in which Blue Mountain made its objections or refused to provide discovery. The fact that Ellis-Hall did not have access to highly relevant documents before it filed its Objection and still does not have documents with a little more than a week before the Commission's hearing prejudices Ellis-Hall.

Blue Mountain's failure to produce relevant documents without substantial justification is a violation of Utah law that prejudices Ellis-Hall's ability to support its claims in this matter. The Commission should grant Ellis-Hall's Motion to Compel and impose appropriate sanctions on Blue Mountain under Utah Rule of Civil Procedure 37(d) and 37(e)(2).

CONCLUSION

Blue Mountain's response to Ellis-Hall's Motion to Compel is devoid of any legal or factual support that Blue Mountain's failure to provide requested discovery was substantially justified. Consequently, under Utah Rules of Civil Procedure 37(d) and 37(e)(2) the Commission should impose appropriate sanctions on Blue Mountain including deeming matters asserted in Ellis-Hall's objection as established and awarding Ellis-Hall its reasonable costs and attorney's fees.

(N.D. Cal. 2011); citing *Fresenius Med. Care Holding Inc. v. Baxter Int'l.*, Inc., 224 F.R.D. 644, 653 (N.D.Cal.2004).

DATED this 11th day of September, 2013.

WOOD BALMFORTH LLC

/s/ Stephen Q. Wood

Mary Anne Q. Wood
Stephen Q. Wood
60 E. South Temple, Suite 500
Salt Lake City, UT 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061
E-mail: mawood@woodbalmforth.com
swood@woodbalmforth.com
Attorneys for Ellis-Hall Consultants, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2013, a true and correct copy of the forgoing ***REPLY IN SUPPORT OF MOTION TO COMPEL BLUE MOUNTAIN POWER PARTNERS, LLC*** was served via e-mail to the following:

Rocky Mountain Power:

Mark Moench	mark.moench@pacificorp.com
Yvonne Hogle	yvonne.hogle@pacificorp.com
Daniel. E. Solander	daniel.solander@pacificorp.com
David L. Taylor	dave.taylor@pacificorp.com

Division of Public Utilities:

Patricia Schmid	pschmid@utah.gov
Justin Jetter	jjetter@utah.gov
Chris Parker	chrisparker@utah.gov
William Powell	wpowell@utah.gov

Office of Consumer Services:

Brent Coleman	brentcoleman@utah.gov
Michele Beck	mbeck@utah.gov
Cheryl Murray	cmurray@utah.gov

Blue Mountain Power Partners, LLC

Gary A. Dodge	gdodge@hjdlaw.com
Phillip Russell	prussell@hjdlaw.com

/s/ Stephen Q. Wood