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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of:

BLUE MOUNTAIN POWER
PARTNERS, LLC,

Complainant,

v.

PACIFICORP d/b/a ROCKY MOUNTAIN
POWER,

Respondent.

Docket No. 16-035-47

**RESPONDENT'S MOTION TO STRIKE
PARAGRAPHS 89-93 IN BLUE
MOUNTAIN'S FORMAL COMPLAINT**

I. RELIEF SOUGHT¹

Pursuant to Rules R746-100-3 and 63G-4-204 of the Utah Administrative Code and Rule 12(f) of the Utah Rules of Civil Procedure, PacifiCorp d/b/a Rocky Mountain Power (“Rocky Mountain Power”) hereby moves the Public Service Commission of Utah (“Commission” or “PSC”) to strike paragraphs 89 through 93 of the Formal Complaint and Request for Declaratory and Injunctive Relief and Request for Agency Action (the “Complaint”) purportedly filed on behalf of Complainant Blue Mountain Power Partners, LLC (“Blue Mountain”). These paragraphs contain confidential settlement and mediation information and their inclusion violates the Utah Uniform Mediation Act, Utah Rules of Evidence Rule 408, and the terms of the Power Purchase Agreement between Blue Mountain and Rocky Mountain Power. As such, these paragraphs should be stricken from the Complaint.

II. FACTUAL BACKGROUND

Unless otherwise noted, the following background facts are taken from the Complaint. For purposes solely of this motion, the Commission may accept the following facts as true.²

1. Rocky Mountain Power and Blue Mountain entered into a power purchase agreement (“PPA”) on or about July 3, 2013. Compl. ¶ 4.
2. Blue Mountain filed a Notice of Dispute on February 16, 2015 to request initiation of the dispute resolution process under Article 24 of the PPA. Compl. ¶ 85.

¹ This Motion to Strike is filed concurrently with Rocky Mountain Power’s Motion to Dismiss the Complaint. If the Commission grants that Motion to Dismiss, this Motion to Strike will be moot.

3. Under the terms of the PPA, all negotiations pursuant to the dispute resolution process of Section 24 are confidential. *See* PPA, Ex. A to Blue Mountain Complaint at ¶ 24.3.

4. The Complaint contains confidential information related to the dispute resolution process that occurred under the PPA. Compl. ¶¶ 89–93.

III. ALL REFERENCES TO CONFIDENTIAL SETTLEMENT AND MEDIATION COMMUNICATIONS SHOULD BE STRICKEN FROM THE COMPLAINT

Under Rule 12(f) of the Utah Rules of Civil Procedure,³ the Commission “may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Courts have used this rule to strike confidential settlement and mediation communications from pleadings. *See, e.g., Parker v. Bancoklahoma Mortg. Corp.*, 113 F.3d 1246 (10th Cir. 1997) (granting motion to strike references to confidential settlement information from plaintiff’s brief); *In re Marriage of Reich*, 32 P.3d 904, 908 (Or. Ct. App. 2001) (striking confidential mediation communications in a motion to dismiss).

Paragraphs 89 through 93 of Blue Mountain’s Complaint contain confidential information from a settlement mediation. This information is protected by both contract and statute. Under paragraph 24.1 of the PPA, “all negotiations pursuant to this clause are confidential.” *See* PPA, Ex. A to Blue Mountain Complaint at ¶ 24.3. By inserting confidential settlement information into the Complaint, Blue Mountain has breached the PPA.

³ The Utah Rules of Civil Procedure shall govern in situations for which there is no provision in the Rules of the Public Service Commission. Utah Admin. Code r. R746-101-1.

In addition, the Utah Uniform Mediation Act provides that mediation communications are privileged, that they are not subject to discovery or admissible in evidence, and that a party may prevent another person from disclosing mediation communications. *See* Utah Code Ann. § 78B-10-104. Likewise, under the Utah Rules of Evidence, any “conduct or statement made in compromise negotiations” is not admissible to “prove or disprove liability for or the validity or amount of a disputed claim.” Utah R. Evid. 408.

Because the information wrongfully disclosed by Blue Mountain is confidential and not subject to discovery or admissible in evidence, it is not allowed to be considered by the Commission or any other adjudicatory body. The information was included in violation of both contract and statute, and it should be stricken from the Complaint.

IV. CONCLUSION

For the reasons set forth above, Rocky Mountain Power respectfully requests that the Commission strike paragraphs 89 through 93 in Blue Mountain’s Complaint.

DATED December 23, 2016.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

This is to certify that on December 23, 2016 a true and exact copy of the foregoing
RESPONDENT'S MOTION TO STRIKE PARAGRAPHS 89-93 IN BLUE
MOUNTAIN'S FORMAL COMPLAINT was emailed to the following:

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