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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of:

BLUE MOUNTAIN POWER PARTNERS,
LLC

Complainant,

vs.

PACIFICORP d/b/a/ ROCKY MOUNTAIN
POWER

Respondent.

Docket No. 16-035-47

**BLUE MOUNTAIN’S RESPONSE TO
PACIFICORP’S MOTION TO
DISMISS BLUE MOUNTAIN’S
FORMAL COMPLAINT**

Complainant Blue Mountain Power Partners, LLC (“Blue Mountain”) respectfully submits the following Response to the *Motion to Dismiss Blue Mountain’s Formal Complaint* (the “Motion”) filed with the Public Service Commission (the “Commission” or “PSC”) by Respondent PacifiCorp d/b/a Rocky Mountain Power (“PacifiCorp”) pursuant to Rules R746-100-3 and 63G-4-204 of the Utah Administrative Code.

INTRODUCTION

PacifiCorp argues in its Motion that Blue Mountain’s Formal Complaint should be dismissed because, according to PacifiCorp, the Complaint “has not been properly brought on

behalf of Blue Mountain” and because the Complaint “has not been filed by anyone with established legal authority to represent Blue Mountain in this proceeding.” Motion at 2.

PacifiCorp’s Motion is nothing more than a transparent attempt to delay these proceedings. Its Motion lacks merit and should be denied. PacifiCorp fails to disclose to the PSC that it dealt extensively, and virtually exclusively, with Greenbriar both in connection with all negotiations relating to the Power Purchase Agreement between Blue Mountain and PacifiCorp (the “PPA”) during the months of May, June and early July 2013 and with regard to all issues that arose relating to the PPA after it was signed on July 3, 2013. Greenbriar was PacifiCorp’s contact on nearly all communications it had with Blue Mountain regarding the PPA and, to Blue Mountain’s knowledge, no communication was sent by PacifiCorp pertaining to the PPA following its execution to which Greenbriar was not an addressee. The only exceptions to this were at most a couple communications that PacifiCorp addressed to *both* Greenbriar and Champlin Windpower, LLC (“Champlin”) the other owner and manager of Blue Mountain Wind Holdings, LLC (“BMWV”), with BMWV being the company that holds all membership interests and managerial control of Blue Mountain. As more fully demonstrated below, PacifiCorp knew that Greenbriar was the managing member of Blue Mountain and that it had authority to speak on Blue Mountain’s behalf and take actions, including the filing of the present Complaint, in Blue Mountain’s name. For PacifiCorp to now claim that Greenbriar has failed to allege facts in the Complaint establishing that it has the right to bring the Complaint on behalf of Blue Mountain is disingenuous and ignores PacifiCorp’s extensive prior dealings with Greenbriar.

RESPONSE TO PACIFICORP'S "FACTUAL BACKGROUND"

1. The Complaint names Blue Mountain, LLC as the Complainant and is asserted by Blue Mountain. Nowhere in the Complaint does it state that the Complaint was "brought" by "Greenbriar Capital Corp. d/b/a/ Blue Mountain Power Partners, LLC." Indeed, Paragraph 1 of the Complaint, that PacifiCorp cites to support its claim that the Complaint states that it was brought by Greenbriar reads as follows: "Blue Mountain is a Delaware limited liability company, headquartered in California and registered in good standing to conduct business in Utah."

2. Admit.

3. Although the Complaint does not expressly plead the legal relationship between Greenbriar and Blue Mountain, PacifiCorp was indisputably well-aware that Greenbriar was the controlling owner and manager of Blue Mountain through its nearly two years of consistent dealings with Greenbriar and Ciachurski acting on behalf of Blue Mountain on matters relating to the negotiation and performance of the Power Purchase Agreement entered into by Blue Mountain and PacifiCorp.

STATEMENT OF RELEVANT FACTS

1. Blue Mountain is a Delaware limited liability company formed on March 27, 2012. [See Declaration of Jeffrey Joseph Ciachurski dated January 11, 2017 ("Ciachurski Decl.") at ¶ 3].

2. BMWH is also a Delaware limited liability company, which was formed by Champlin on May 31, 2012. [See Ciachurski Decl. at ¶ 4]. At the time Champlin originally formed BMWH, it was BMWH's sole member. [See *id.*].

3. However, pursuant to the terms and provisions of BMWH's *Amended and Restated Limited Liability Company Agreement* dated July 31, 2013 (BMWH's "A&R Operating Agreement"), Champlin agreed to admit Greenbriar as a member of BMWH and transfer to Greenbriar a Fifty Percent (50%) ownership interest in BMWH. [See Ciachurski Decl. at ¶ 5].

4. In addition to Greenbriar receiving 50% of the membership interests in BMWH, Champlin agreed that Greenbriar's ownership interest in BMWH would be increased to Sixty-Six and Two-Thirds Percent (66 and 2/3%) upon the occurrence of certain events related to the PPA (which for reasons discussed in the Complaint did not occur because of the actions of PacifiCorp). [See Ciachurski Decl. at ¶ 6, Ex. 1 thereto, BMWH's A&R Operating Agreement at p. 1, Recitals, ¶ B].

5. Further, BMWH's A&R Operating Agreement granted to Greenbriar the option of purchasing Champlin's remaining ownership percentage in BMWH at a set purchase price, which, if exercised, would result in Greenbriar being the sole owner of BMWH. [See Ciachurski Decl. at ¶ 7].

6. BMWH was formed for the purpose of serving as the holding and managing company for Blue Mountain. BMWH owns 100% of the membership interests of Blue Mountain, is Blue Mountain's sole manager, and has all rights and authority to act on behalf of Blue Mountain and in its name. [See Ciachurski Decl. at ¶ 8].

7. Indeed, BMWH's A&R Operating Agreement expressly provides that the "principal asset of the Company is 100% of the Project Company Membership Interests, which in turn owns all rights in and to the Project." [See Ciachurski Decl. at ¶ 9, Ex. 1 thereto, BMWH's A&R Operating Agreement at p. 1, Recitals, ¶ C]. The Operating Agreement defines

“Project Company” as “Blue Mountain Power Partners, LLC, a Delaware limited liability company” and the “Project” as “An approximately eighty (80) megawatt wind electric generation facility to be located in San Juan County, Utah, and commonly identified as the ‘Blue Mountain Wind Energy Project.’” [*Id.*, Ex. 1 thereto, BMWH’s A&R Operating Agreement at p. 6, §§1.45 and 1.43, respectively].

8. As also set forth in BMWH’s A&R Operating Agreement, BMWH’s was a manager-managed LLC and Greenbriar, as a member of the Company, was granted the right to appoint one of BMWH’s two managers. [*See* Ciachurski Decl. at ¶ 10, Ex. 1 thereto, BMWH’s A&R Operating Agreement at p. 19, § 6.1]. The Operating Agreement specifically provides that Greenbriar appointed Ciachurski as manager of BMWH. [*Id.*, Ex. 1 thereto, BMWH’s A&R Operating Agreement at p. 20, § 6.2(a)(ii)]. Champlin appointed Michael D. Cutbirth as its appointed manager of BMWH. [*Id.*].

9. Accordingly, because Greenbriar has the vested right to trigger the option to buy Champlin’s remaining ownership percentage in BMWH, this infers under both U.S. GAAP and IFRS rules that Greenbriar has majority control of BMWH and that Blue Mountain is therefore a consolidated subsidiary of Greenbriar. [*See* Ciachurski Decl. at ¶ 11]. As such, Greenbriar is deemed to be the parent and majority owner of Blue Mountain and Champlin is deemed to hold the minority interest in Blue Mountain. [*Id.*].

10. Although Greenbriar became a majority owner of BMWH shortly after the PPA was executed between Blue Mountain and PacifiCorp on July 3, 2013, Greenbriar (through its Chief Executive Officer, Ciachurski) was the sole negotiator of the PPA on behalf of Blue Mountain with PacifiCorp beginning in May 2013. [*See* Ciachurski Decl. at ¶ 12]. Greenbriar

continued to exclusively negotiate the PPA on Blue Mountain's behalf until it was executed by Blue Mountain and PacifiCorp on July 3, 2013. [*Id.*]. Because many of these negotiations occurred via telephone calls, PacifiCorp knew that it was negotiating the terms of the PPA with Ciachurski/Greenbriar during the months of May, June and early July 2013. [*Id.*].

11. After Greenbriar became a member, majority owner, and manager of BMWH in late July 2013, Greenbriar, on Blue Mountain's behalf, dealt with PacifiCorp extensively, and virtually exclusively, on all issues relating to the PPA. [*See* Ciachurski Decl. at ¶ 13].

12. All conference calls between PacifiCorp and Blue Mountain relating to PPA held before it was executed were led by Ciachurski/Greenbriar. [*See* Ciachurski Decl. at ¶ 14]. Additionally, Greenbriar's President, Cliff Webb, and its wind energy finance counsel, Ed Zaelke of the law firm of Akin Gump, participated in each of these calls. [*Id.*]. Also, all calls were attended by Greenbriar's banker's legal counsel, Edward Kayukov. [*Id.*]. On the other hand, the conference calls were not always attended by Cutbirth or any other representative of Champlin. [*Id.*]. PacifiCorp knew and understood that Greenbriar represented Blue Mountain at these calls, that representatives from Champlin were or may not be in attendance, and that Greenbriar had authority as Blue Mountain's manager to act and make decisions on its behalf on matters discussed during the calls. [*Id.*].

13. All emails sent by PacifiCorp to Blue Mountain relating to the PPA after its execution were addressed to Greenbriar email addresses. [*See* Ciachurski Decl. at ¶ 15].

14. All other written communications sent by PacifiCorp to Blue Mountain regarding the PPA and the Project were also sent nearly always to Greenbriar alone (on all but one occasion of which Greenbriar is aware). [*See* Ciachurski Decl. at ¶ 16].

15. For example, on June 3, 2014, Tom Fishback, Project Manager for PacifiCorp, sent a letter addressed to “Jeff Ciachurski” of “Greenbriar Capital Corp” at Greenbriar’s address in Newport Beach, California “Re: Blue Mountain Power Partners, LLC – Blue Mountain Wind II / LGIQ0426 – Acknowledgment of Notice to Suspend Project”, in which Mr. Fishback acknowledges Blue Mountain’s notice of suspension of work and states that once the suspension is ended by Blue Mountain, PacifiCorp will provide modified dates for interconnection. [*See* Ciachurski Decl. at ¶ 17, Ex. 2 thereto, 6/3/2014 letter from PacifiCorp to Blue Mountain addressed to Ciachurski at Greenbriar].

16. Also, as referenced in the Complaint, in the fall of 2014, PacifiCorp contacted Blue Mountain and expressed an interest in purchasing the Project from Blue Mountain. PacifiCorp contacted Greenbriar’s President, Webb, to notify Blue Mountain of PacifiCorp’s potential interest in purchasing the Project. To Greenbriar’s knowledge, PacifiCorp never attempted to contact Champlin or Cutbirth to discuss with them its interest in the purchase of the Project from Blue Mountain. [*See* Ciachurski Decl. at ¶ 18].

17. After PacifiCorp contacted Greenbriar to discuss a purchase of the Project, PacifiCorp negotiated the potential purchase solely with Greenbriar, acting on behalf of Blue Mountain. [*See* Ciachurski Decl. at ¶ 19]. Indeed, on September 5, 2014, PacifiCorp and Greenbriar signed a Mutual Confidentiality Agreement prepared by PacifiCorp relating to the exchange of confidential information between PacifiCorp and Greenbriar pertaining to PacifiCorp’s performance of due diligence relating to its interest in purchasing the Project. [*Id.*, Ex. 3 thereto, Mutual Confidentiality Agreement between PacifiCorp and Greenbriar dated 9/5/2014]. PacifiCorp had Greenbriar execute the Mutual Confidentiality Agreement because it

understood that Greenbriar was the manager and majority owner of Blue Mountain, and thus the owner of the confidential information to be disclosed pursuant to the Agreement. [*Id.*].

18. Following the execution of the Mutual Confidentiality Agreement, representatives from PacifiCorp reviewed Blue Mountain documents in a data room at Greenbriar. [*See* Ciachurski Decl. at ¶ 20]. All Blue Mountain documents were stored at Greenbriar because of its status as manager and majority owner of Blue Mountain. [*Id.*]. These documents included the BMWH A&R Operating Agreement which was reviewed by PacifiCorp and which establishes that Greenbriar controls 100% of Blue Mountain based on its 50% vested majority interest in BMWH and additional vested option to buy the remaining ownership interest in Blue Mountain from Champlin upon payment of the purchase price set forth in the Operating Agreement. [*Id.*].

19. On February 11, 2015, PacifiCorp sent a letter addressed to “Cliff Webb” as “President” of “Greenbriar Capital Corporation”, which PacifiCorp expressly identifies as “**Partner on behalf of Blue Mountain Power Partners, LLC**”, at Greenbriar’s offices in Newport Beach. [*See* Ciachurski Decl. at ¶ 21, Ex. 4 thereto, 2/11/2015 Letter from PacifiCorp to Webb of Greenbriar and Cutbirth of Champlin]. This is further evidence that PacifiCorp understood that Greenbriar was the acting partner or manager of Blue Mountain. The letter was also addressed to Cutbirth as President of “Champlin Windpower, LLC” and emailed to Webb as well. This is the only letter or other written communication of which Greenbriar is aware that PacifiCorp sent to Champlin or Cutbirth after execution of the PPA. [*Id.*]. PacifiCorp sent the letter to notify Blue Mountain that PacifiCorp rejected Blue Mountain’s claim, asserted by Greenbriar on Blue Mountain’s behalf, that a Force Majeure event had occurred under the PPA. [*Id.*]. Greenbriar believes that if PacifiCorp did not recognize Greenbriar’s authority to act as

manager of Blue Mountain and to take actions and make decisions on its behalf, PacifiCorp would not have addressed such a critical letter to Webb, Greenbriar's President. [*Id.*].

20. PacifiCorp was also aware that Greenbriar funded all of Blue Mountain's activities after the execution of the PPA, given that PacifiCorp and Greenbriar explicitly discussed this fact during multiple conversations. [*See* Ciachurski Decl. at ¶ 22].

21. In addition to the foregoing, neither Champlin nor Cutbirth has ever objected to any regulatory filing Greenbriar has made on behalf of Blue Mountain as majority owner and manager of it despite their knowledge of these filings. [*See* Ciachurski Decl. at ¶ 23].

22. Further, neither Champlin nor Cutbirth has ever objected to any to any expense Greenbriar has incurred on behalf of Blue Mountain related to the PPA or the Project. [*See* Ciachurski Decl. at ¶ 24].

23. Importantly, when Greenbriar filed its original complaint against PacifiCorp with the PSC regarding PacifiCorp's breaches of the PPA, which the PSC rejected because Greenbriar mistakenly failed to prepare the complaint in the proper form in compliance with the Commission's rules, Cutbirth expressly stated to Ciachurski that he was "ok" with Greenbriar filing a complaint on behalf of Blue Mountain against Pacific. [*See* Ciachurski Decl. at ¶ 25, Ex. 5 thereto, October 6, 2015 Email from Cutbirth to Ciachurski re: "Blue Mountain Power Partners"]. Neither Cutbirth or Champlin have withdrawn their approval of the filing of a Complaint by Blue Mountain against PacifiCorp or communicated to Greenbriar that they oppose the filing of the present Complaint. Therefore, even if Cutbirth's approval of a filing of a complaint against PacifiCorp by Blue Mountain is required, Cutbirth has given Greenbriar that approval. [*Id.*].

ARGUMENT

I. PacifiCorp’s Argument that the Complaint is Procedurally Improper Because of an Alleged Failure to Establish that the Complaint Has Actually Been Brought By Blue Mountain Lacks Merit and Ignores Facts Known to PacifiCorp.

PacifiCorp argues that the Complaint should be dismissed as procedurally improper. To support its argument that the Complaint is procedurally improper, PacifiCorp alleges that Blue Mountain’s Complaint does not establish that it has actually been brought by Blue Mountain directly and, instead, that the caption and signatory page of the Complaint indicate that Greenbriar filed the Complaint. PacifiCorp’s argument is devoid of merit and is disingenuous given that PacifiCorp is well-aware that Greenbriar possesses the authority to act on behalf of Blue Mountain as its manager.

While PacifiCorp claims the Complaint states that it was brought by Greenbriar and not by Blue Mountain directly, the caption of the Complaint makes clear that Blue Mountain is the named Complainant on the Complaint and it therefore the party asserting the Complaint. PacifiCorp also points to the fact that the signatory page is signed by Ciachurski, CEO of Greenbriar. This is accurate but Blue Mountain could not sign the Complaint by affixing its company name “Blue Mountain, LLC” to the signature line. Blue Mountain is an entity (limited liability company) and as such, has no ability to act independently and must act through the individuals who manage and/or own it. Therefore the Complaint had to be filed by an individual acting on behalf of Blue Mountain.

As the facts above demonstrate, Greenbriar had authority to act on Blue Mountain’s behalf through its Chief Executive Officer, Ciachurski, who signed the Complaint for Blue Mountain, as one of Blue Mountain’s managers. Perhaps, more importantly, PacifiCorp

indisputably knew that Ciachurski and Greenbriar possess the authority to act on behalf of Blue Mountain as it has participated in many calls with Greenbriar and Ciachurski acting in their capacity as manager and owner of Blue Mountain and has sent multiple emails and letters to them pertaining to key issues relating to the PPA and the rights of Blue Mountain thereunder.

PacifiCorp further claims that Complaint does not include any facts to explain the relationship between Blue Mountain and Greenbriar, such as facts that Greenbriar is an owner or member of Blue Mountain. PacifiCorp therefore contends that the Complaint fails to establish that Greenbriar was authorized, or has standing, to bring the Complaint on behalf of Blue Mountain. Again, PacifiCorp fails to disclose to the Commission that it had dealt extensively and virtually exclusively with Greenbriar as owner and manager of Blue Mountain beginning months before the PPA was signed and continuing thereafter until PacifiCorp sent notice to Greenbriar that it had rejected its claim that a Force Majeure event had occurred under the PPA and was therefore terminating the PPA. Because of PacifiCorp's continual dealings with Greenbriar both during the negotiations of the PPA and on all issues relating to the PPA following its execution, including PacifiCorp's coordination to review Blue Mountain documents at Greenbriar when it expressed an interest in purchasing the Project from Blue Mountain, the types of allegations PacifiCorp claims are missing were not necessary to give PacifiCorp notice of Greenbriar's right and authority to sign the Complaint on behalf of Blue Mountain, as its owner and manager.

Under Rule 8 of the Utah Rules of Civil Procedure,¹ “a pleader is required only to make a short and plain statement of his claim.” *Rosenlof v. Sullivan*, 676 P.2d 372, 374 (Utah 1983) (citing Utah R.Civ.P. 8(a)). “[A] complaint is required only to . . . give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.” *Id.* (quotations and citations omitted); *see also Williams v. State Farm Ins. Co.*, 656 P.2d 966, 971 (Utah 1982) (same).

Greenbriar did not allege facts outlining the details of the ownership of Blue Mountain or assert specifics regarding its authority to file the Complaint on behalf of Blue Mountain because it knew that PacifiCorp was well aware of Greenbriar’s right and authority to act on behalf of Blue Mountain. [See Ciachurski Decl. at ¶ 26]. Greenbriar referred to Blue Mountain as a “DBA” of Greenbriar as a short-hand way to bypass in depth explanation of the structure of its majority ownership of Blue Mountain through its ownership of BMWH, which it felt was unnecessary given PacifiCorp’s extensive history of dealing with Greenbriar and PacifiCorp’s indisputable knowledge that Greenbriar possesses the authority to act on behalf of Blue Mountain, including the right and authority to file the Complaint in this matter. [*Id.*]. Greenbriar simply did not imagine that PacifiCorp would raise such a senseless and demonstrably meritless challenge to Greenbriar’s authority as owner and manager of Blue Mountain to file the Complaint. [*Id.*].

Further, PacifiCorp implies that Blue Mountain has refused to bring this Complaint directly. This is false. Blue Mountain’s other manager and owner, Cutbirth and Champlin have

¹ As PacifiCorp notes in its Motion, 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.

approved Greenbriar's filing of the Complaint. Thus, PacifiCorp attempt to imply, without any evidence or proof whatsoever, that a disagreement may exist between the owners of BMWH, the sole owner of Blue Mountain, regarding whether PacifiCorp should be held accountable for its breaches of the PPA, is unfounded. No disagreement exists and both Champlin/Cutbirth and Greenbriar/Ciachurski, as the sole members and managers of BMWH (the 100% owner of Blue Mountain), agree that a complaint against PacifiCorp should be filed. [*See* Ciachurski Decl. at ¶ 26].

Given PacifiCorp's indisputable knowledge that Greenbriar is the owner and manager of Blue Mountain and possesses the authority to act in the name and on behalf of Blue Mountain, and given PacifiCorp's extensive, long-term dealings with Greenbriar on issues pertaining directly to Blue Mountain, all as set forth in detail in the Statement of Facts section of this Response above, Greenbriar is forced to assume that PacifiCorp's present Motion is merely a transparent attempt to unnecessarily delay these proceedings so that it can avoid having to address the merits of Blue Mountain's claims against it.

II. PacifiCorp's Claim that Ciachurski Has Failed to Establish that He is Authorized to Represent Blue Mountain is also Meritless.

PacifiCorp asserts that Blue Mountain's Complaint is improper and should be dismissed because it was signed by Ciachurski and because Ciachurski has not established that he is authorized to represent Blue Mountain. This argument by PacifiCorp also lacks merit.

PacifiCorp admits that under the rules of the Commission, non-attorneys, like Ciachurski, are allowed to "represent their principals' interests in [a] proceeding" before the Commission provided that they establish that they are an "officer or employee" of the principal. [*See* PacifiCorp's Motion at 5 (quoting Utah Admin. Code r. R746-100-6)]. In other words, if it is

established that Ciachurski is an officer or employee of Blue Mountain, then he is permitted to represent Blue Mountain in this proceeding.

PacifiCorp argues that the Complaint only alleges that Ciachurski is an officer of Greenbriar and does not establish that he is an officer of Blue Mountain. As with PacifiCorp's claims regarding Greenbriar's status, its argument regarding Ciachurski is disingenuous and withholds from the Commission critical facts of which PacifiCorp is indisputably aware. As the facts above demonstrate, PacifiCorp dealt extensively with Ciachurski both during the negotiation of the PPA and after its execution. PacifiCorp participated in multiple calls with Ciachurski and exchanged multiple written communications with him as the manager appointed by Greenbriar for BMWH and, in turn, Blue Mountain. PacifiCorp cannot argue in good faith that Ciachurski has failed to establish that his is an officer of Blue Mountain. It has repeatedly brought issues to his attention regarding Blue Mountain's obligations under the PPA and discussed with him potential solutions to those issues. Accordingly, PacifiCorp's argument that Blue Mountain's Complaint should be dismissed on this ground should be rejected as well.

CONCLUSION

For the reasons set forth above, including those outlined in the Statement of Relevant Facts section of this Response, PacifiCorp's Motion to Dismiss Blue Mountain's Formal Complaint should be denied by the Commission.

DATED this 11th day of January, 2017.

RESPECTFULLY SUBMITTED

/s/ Jeffrey Ciachurski

Jeffrey Joseph Ciachurski

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 11th day of January 2017 on the following:

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