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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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<p>In the Matter of:</p> <p>BLUE MOUNTAIN POWER PARTNERS, LLC</p> <p style="text-align: center;">Complainant,</p> <p>vs.</p> <p>PACIFICORP d/b/a/ ROCKY MOUNTAIN POWER</p> <p style="text-align: center;">Respondent.</p>	<p>Docket No. 16-035-47</p> <p style="text-align: center;"><b>BLUE MOUNTAIN’S RESPONSE TO PACIFICORP’S MOTION TO STRIKE PARAGRAPHS 89-93 IN BLUE MOUNTAIN’S FORMAL COMPLAINT</b></p>
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Complainant Blue Mountain Power Partners, LLC (“Blue Mountain”) respectfully submits the following Response to the *Motion to Stike Paragraphs 89-93 of 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.

Specifically, PacifiCorp argues that paragraphs 89-93 (the “Paragraphs”) of Blue Mountain’s Formal Complaint and Request for Declaratory and Injunctive Relief and Request for Agency Action (the “Complaint”) “contain confidential settlement and mediation

information” and that therefore the inclusion of the Paragraphs in the Complaint violates the Utah Uniform Mediation Act, Rule 408 of the Utah Rules of Evidence, and the terms of the Power Purchase Agreement executed between Blue Mountain and PacifiCorp on July 3, 2013 (the “PPA”). As demonstrated below, PacifiCorp’s Motion lacks merit and the Commission should deny its request that the Paragraphs be stricken from the Complaint.

**RESPONSE TO PACIFICORP’S “FACTUAL BACKGROUND”**

1. Admit.
2. Admit.
3. Blue Mountain admits that “all negotiations” pursuant to the dispute resolution process under Section 24 of the PPA are confidential but disagrees that the information set forth in Paragraphs 89-93 disclose any information about the parties’ negotiations or attempts in good faith to resolve or settle disputes arising out of or relating to the PPA or any exchange of relevant information made by Pacificorp that occurred during or in connection with the mediation.
4. Blue Mountain disputes that the Complaint contains any confidential information related to the dispute resolution process that occurred under the PPA in that no information about settlement negotiations exchanged between the parties is referenced in the complaint and no “relevant information” provided by PacifiCorp in connection with the dispute resolution process under the PPA is mentioned.

## ARGUMENT

### **PacifiCorp Makes No Attempt to Explain What Confidential Information is Contained in Paragraphs 89-93 of the Complaint and Its Arguments that these Paragraphs Should be Stricken Lack Merit.**

#### **The PPA**

PacifiCorp argues in its Motion that “Paragraphs 89 through 93 of Blue Mountain’s Complaint contain confidential information from a settlement mediation.” [See PacifiCorp’s Motion at 3]. PacifiCorp does not explain what confidential information is contained in these Paragraphs or even what information the Paragraphs contain. It simply asserts that the Paragraphs contain information regarding a settlement mediation and that under the PPA “all negotiations pursuant to [paragraph 24.1 of the PPA] are confidential.” [Id.].

PacifiCorp does not, and cannot allege, allege that the information contained in the Paragraphs discloses information about the dispute resolution or settlement negotiations exchanged between the parties during the mediation because none of the Paragraphs contain such information. Additionally, none of the Paragraphs mention or reference any information provided by PacifiCorp in connection with mediation or any offers made by it. Further, the Complaint does not even mention any of the positions taken by PacifiCorp during the mediation. The Paragraphs simply allege details about the dispute resolution process in which the parties engaged as required by the PPA and that PacifiCorp failed to engage in this process or mediation in good faith as it terminated the PPA mid-way through the dispute resolution process.

In particular, Paragraph 89 of the Complaint merely sets forth the assertions made by Blue Mountain in its mediation brief and makes no reference whatsoever to any claims, assertions or positions taken by PacifiCorp in the mediation.

Paragraph 90 of the Complaint alleges only that Judge Cassell held a mediation conference between Blue Mountain and PacifiCorp on August 11, 2015 and contains no information about any negotiations that occurred during this mediation conference.

Paragraph 91 simply alleges that the parties were unable to resolve their dispute during the mediation conference and therefore, as agreed beforehand by the parties, Judge Cassell prepared a “Proposed Resolution of Dispute” after the conference. The allegations in Paragraph 91 disclose no information about the negotiations that were exchanged during the mediation conference only the fact that the parties were unable resolve their dispute. Also, in describing Judge Cassell’s Proposed Resolution of Dispute, Blue Mountain makes no reference whatsoever to any position taken by PacifiCorp during the mediation conference and only alleges that Judge Cassell agreed with Blue Mountain’s position. Blue Mountain is free to allege the details of its position taken at mediation. This information is not confidential and does not qualify as “negotiations”.

Paragraph 92 alleges further details about Judge Cassell’s Proposed Resolution of Dispute. For the same reasons explained with regard to Paragraph 91, none of the allegations in Paragraph 92 contain confidential negotiations or other confidential information.

Paragraph 93 alleges only that PacifiCorp rejected Judge Cassell’s recommendations and refused to have any further dealings with Blue Mountain and mentions that on the same day that he issued his recommendations, PacifiCorp formally terminated the PPA. These allegations do not relate to PacifiCorp’s negotiations during mediation or the dispute resolution process. Rather, Blue Mountain alleged the facts in Paragraph 93 to demonstrate the lack of good faith demonstrated by PacifiCorp in connection with the mediation.

For these reasons, PacifiCorp is incorrect in claiming that Blue Mountain breached the PPA by including Paragraphs 89-93 in its Complaint. Therefore, these Paragraphs should not be stricken.

**The Utah Uniform Mediation Act**

PacifiCorp also asserts that Blue Mountain's inclusion of the Paragraphs in the Complaint violates the Utah Uniform Mediation Act, which PacifiCorp claims provides that mediation communications are privileged, not subject to discovery or admissible in evidence, and that a party may prevent another party from disclosing such communications. [See PacifiCorp's Motion at 3-4]. PacifiCorp's reliance on the Utah Uniform Mediation Act (the "Act") is misplaced.

Section 78B-10-103(3) of the Act provides that the rules against discovery, use as evidence and disclosure of mediation communications as privileged do not apply "if the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged." Utah Code Ann., §78B-10-103(3). The PPA constitutes a signed record of the parties that set forth the requirements and limitations relating to mediation and what is confidential in any dispute resolution process by the parties that was negotiated and signed by PacifiCorp and Blue Mountain years before mediation occurred. Specifically, Section 24.2.1(e) of the PPA provides as follows:

All verbal and written communications between the Parties and issued or prepared in connection with this Section 24.2 shall be deemed prepared and communicated in furtherance, and in the context, of dispute settlement, and shall be exempt from discovery and production, and shall not be admissible in evidence (whether as admission or otherwise) in any litigation or other proceedings for the resolution of the dispute.

Accordingly, the provisions of the PPA not the Act apply to the parties' mediation and determine what is protected from disclosure, admissibility and production. *See also* Utah Code Ann., § 78B-10-106 (“(1) There is not privilege [against disclosure, admissibility, or discovery] under Section 78B-10-104 for a mediation communication that is (a) in an agreement evidenced by a record signed by all parties to the agreement . . .”).

**Rule 408 of the Utah Rules of Evidence**

PacifiCorp further contends in passing that Paragraphs 89-93 are not admissible under Rule 408 of the Utah Rules of Evidence. PacifiCorp contends that under Rule 408, 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.” [PacifiCorp’s Motion at 4 (quoting Utah R. Evid. 408)]. PacifiCorp correctly cites Rule 408 but apparently misunderstands its meaning and applicability in this case.

PacifiCorp ignores the fact that none of the Paragraphs describe and specific conduct or statement made in compromise negotiations by PacifiCorp. As explained above, nothing about PacifiCorp’s statements, filings, positions or otherwise are described in any of the Paragraphs at issue. PacifiCorp also fails to account for the limitation expressly set forth in Rule 408 on the scope of the admissibility of a statement or conduct made in settlement or compromise negotiation. As quoted by PacifiCorp in its Motion, Rule 408 precludes the admissibility of conduct or statements made during settlement negotiations only to the extent the other party attempts to introduce such “to prove or disprove liability for or the validity or amount of a disputed claim.” Even if the Paragraphs alleged information of conduct or statements made by PacifiCorp during the mediation, none of the Paragraphs are contained in the Complaint for the

purpose of using PacifiCorp's statements or conduct to prove liability or the validity or amount of a disputed claim. *See Broadcort Capital Corp. v. Summa Med. Corp.*, 972 F.2d 1183, 1194 (10th Cir. 1992) ("Rule 408 only bars admission of evidence relating to settlement discussions if that evidence is offered to prove 'liability for or invalidity of the claim or its amount'"); *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 770 (10th Cir. 1997) (holding that party could offer evidence under Rule 408 relating to settlement discussions to show "it was not at fault for any delay" or to show that the other party "acted in bad faith"). Blue Mountain included the Paragraphs to demonstrate that PacifiCorp failed to engage in a good faith dispute resolution process and relied on Blue Mountain's own position and arguments to Judge Cassell to show that he ultimately found that PacifiCorp breached the PPA.

None of Paragraphs 89-93 disclose any confidential information of PacifiCorp. Accordingly, the information contained in these paragraphs is not precluded from discovery, production or admissibility under the PPA, the Act, or Rule 408.

### **CONCLUSION**

For the reasons set forth above, PacifiCorp's Motion to Strike Paragraphs 89-93 of Blue Mountain's Complaint should be denied by the Commission.

DATED this 11<sup>th</sup> day of January, 2017.

RESPECTFULLY SUBMITTED

/s/ Jeffrey Ciachurski

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Jeffrey Joseph Ciachurski

**CERTIFICATE OF SERVICE**

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

PUBLIC SERVICE COMMISSION:        [psc@utah.gov](mailto:psc@utah.gov)

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/s/ Jeffrey Ciachurski\_\_\_\_\_