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Attorneys for Respondent

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

**REPLY IN SUPPORT OF  
RESPONDENT'S MOTION TO DISMISS  
BLUE MOUNTAIN'S FORMAL  
COMPLAINT**

PacifiCorp d/b/a Rocky Mountain Power (“Rocky Mountain Power”) respectfully submits this reply memorandum in support of its Motion to Dismiss Blue Mountain Power Partners, LLC’s (“Blue Mountain”) Formal Complaint.<sup>1</sup>

## **I. INTRODUCTION**

Rocky Mountain Power’s Motion to Dismiss argues that Blue Mountain’s Complaint should be dismissed as improper for two reasons. First, the four corners of the Complaint do not indicate that it has actually been brought by Blue Mountain. The pleading states that it was submitted by “Greenbriar Capital Corp. d/b/a/ Blue Mountain Power Partners, LLC.” A pleading by Greenbriar Capital d/b/a “any other name” is still a complaint brought by Greenbriar. Greenbriar has no standing. Second, it does not establish that Jeff Ciachurski—a non-lawyer—is authorized to bring this action on behalf of Blue Mountain.

Blue Mountain argues in its opposition that this is a “transparent attempt to delay these proceedings.” (Opp’n at ii.) Such a statement ignores legal realities. Greenbriar Capital (a corporation) is a different legal entity from Blue Mountain (an LLC). Rocky Mountain Power has a duty to ensure that this action is authorized and brought by the entity with standing under the Power Purchase Agreement.

Blue Mountain’s opposition contains two major flaws. First, Blue Mountain’s Opposition does not rely on facts that were pled in the Complaint. Rather, Blue Mountain attempts to rely on new facts that were not in the Complaint—including a nine-page declaration.

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<sup>1</sup> Although the Complaint does not establish that it was properly brought on behalf of Blue Mountain, this memorandum will refer to the Complainant as “Blue Mountain” for convenience.

But adjudicatory bodies are only allowed to look at the facts alleged in the complaint itself when deciding a motion to dismiss. Blue Mountain cannot fix the deficiencies in its Complaint by referring to new facts in its Opposition and accompanying exhibits. The Complaint itself must plead the required information. By relying on this external information, Blue Mountain highlights the deficiencies in its own pleading.

Second, even if the new information Blue Mountain added in the Opposition had been included in the Complaint, the information still does not establish that Greenbrier Capital can bring this Complaint or that Jeff Ciachurski is authorized to bring any action on behalf of Blue Mountain. To the contrary, the Opposition demonstrates that Greenbrier Capital is *not* a member of Blue Mountain. It also demonstrates that a different entity, Blue Mountain Wind Holdings, LLC, “holds all membership interests and managerial control of Blue Mountain.” (Opp’n at ii.) Yet Blue Mountain Wind Holdings, LLC is not even referenced in the Complaint. Thus, the new information in the Opposition highlights that the Complaint must be dismissed; it does not salvage the Complaint.

As both the Complaint and the Opposition fail to establish that Greenbrier Capital can bring an action on behalf of Blue Mountain, the Motion to Dismiss should be granted.

## **II. ARGUMENT**

### **A. The Facts Alleged in the Complaint Do Not Establish that This Action Is Brought on Behalf of Blue Mountain**

Blue Mountain’s Complaint fails to establish that this action is properly brought on behalf of Blue Mountain by Greenbrier Capital. Blue Mountain concedes this, admitting that “the Complaint does not expressly plead the legal relationship between Greenbrier and Blue

Mountain.” (Opp’n at iii.) Despite this admission, Blue Mountain makes two arguments to avoid dismissal. Notably, neither argument is that the allegations pled in the Complaint are sufficient. Instead, Blue Mountain attempts to rely on new facts, not in the Complaint, to establish that Greenbriar Capital had authority to act on Blue Mountain’s behalf. Blue Mountain also argues that Rocky Mountain Power was “well-aware that Greenbriar possesses the authority to act on behalf of Blue Mountain as its manager.” (Opp’n at 1.) Both of these arguments focus on allegations that are not pled in the Complaint and fail.

In deciding a motion to dismiss under Rule 12(b)(6), it is well-established that courts “should not look beyond the confines of the complaint itself.” *Thompson v. Washington Nat’l Ins. Co.*, No. 2:14-CV-00660-DN, 2015 WL 8346166, at \*3 (D. Utah Dec. 8, 2015). Thus, when deciding a motion to dismiss, courts should “not accept extrinsic facts not pleaded.” *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 7, 342 P.3d 224, 228. This includes facts that are included for the first time in an opposition memorandum, as courts do not consider facts raised in oppositions to motions to dismiss that are not included in the Complaint. *See, e.g., Thompson*, 2015 WL 8346166, at \*1 (“because Ms. Thompson has attached materials to her Opposition Memorandum that are neither attached to the Complaint nor referenced therein, they cannot be considered when deciding Washington’s Motion to Dismiss”); *Jensen v. Gale*, No. 1:13-CV-00030 DN, 2014 WL 7246948, at \*2 (D. Utah Dec. 18, 2014) (rejecting “Mr. Jensen’s attempt to allege new or different facts in his Opposition to Defendants’ Motion [to Dismiss]” because “only statements of fact alleged in the Complaint will be considered”).

Here, Blue Mountain asks the Commission to look beyond the confines of the Complaint in order to find the necessary facts to survive a motion to dismiss. This is not allowed. Thus, even if the new facts that Blue Mountain now alleges for the first time in its Opposition did show that Greenbriar Capital had authority to act on Blue Mountain's behalf (which, as shown below, they do not), Blue Mountain cannot rely on these facts. This information must be included in the Complaint in order for the Complaint to state a claim.

Similarly, Blue Mountain cannot assert that Rocky Mountain Power was "well-aware" that Greenbriar Capital possesses the authority to act on behalf of Blue Mountain as its manager to survive this motion. Regardless of whether this is true (it is not), the obligation to properly plead facts in a complaint cannot be excused away simply because the Complainant thinks the Respondent is already aware of a certain fact. Otherwise, this argument could be used to defeat pleading requirements in every case. Any complainant could claim the respondent "knew" other allegations that were omitted. Such a (baseless) assertion does not excuse a failure to plead.

In short, Blue Mountain does not plead sufficient facts in the Complaint to demonstrate that this action is properly brought by or on behalf of Blue Mountain. It is brought by Greenbriar Capital. Greenbriar Capital is not a party to the PPA and lacks standing to assert the claims at issue. Rocky Mountain Power's Motion should therefore be granted.

**B. The Information Included in Blue Mountain's Opposition Still Does Not Establish that This Action Is Brought on Behalf of Blue Mountain**

Even assuming that the new facts Blue Mountain included in its Opposition could save an improperly pleaded Complaint (which, as described above, they cannot), the facts alleged in Blue

Mountain's Opposition do not establish that this action is properly brought on behalf of Blue Mountain, rather than by Greenbriar Capital.

The Complaint states that it was submitted by "Greenbriar Capital Corp. d/b/a/ Blue Mountain Power Partners, LLC." But Greenbriar Capital and Blue Mountain are two separate legal entities. Greenbriar Capital d/b/a "any name" is still Greenbriar Capital. Greenbriar Capital is not in privity with Rocky Mountain Power. Furthermore, the Complaint does not allege any facts to explain the relationship between the two entities. For instance, it does not allege that Greenbriar Capital is either an owner or member of Blue Mountain.

Rather, the Opposition actually demonstrates that Greenbriar Capital is *not* a member or manager of Blue Mountain. According to the Opposition, the sole member, manager, and 100% owner of Blue Mountain is Blue Mountain Wind Holdings, LLC. (Opp'n at ii.) This entity is not mentioned in the Complaint, even though it appears to be the only entity that can authorize an action for Blue Mountain according to the Opposition.

Blue Mountain Wind Holdings, in turn, has two members, Champlin Windpower, LLC, and Greenbriar Capital, each with a 50% ownership interest.<sup>2</sup> The Opposition asserts that Blue Mountain Wind Holdings is a manager-managed LLC, and that Greenbriar Capital and Champlin were each granted the right to appoint one of Blue Mountain Wind Holdings' two managers.

Notably, while Greenbriar Capital could appoint one of the managers for Blue Mountain Wind

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<sup>2</sup> The Opposition notes that Greenbriar Capital should be "deemed" to be majority owner of Blue Mountain Wind Holdings because it has a vested option to buy Champlin's remaining ownership (Opp'n at v), but an option to buy does not change the legal reality until it is actually exercised. As such, according to the Opposition, Greenbriar Capital remains a 50% owner of Blue Mountain Wind Holdings—not the owner or even a majority interest owner.

Holdings, it is not a manager of Blue Mountain Wind Holdings itself, and it certainly is not a manager of Blue Mountain, the purported plaintiff in this case.

By demonstrating that Greenbriar Capital is two-levels removed from Blue Mountain, and by asserting that Blue Mountain Wind Holdings is the sole member of Blue Mountain, the facts asserted in the Opposition demonstrate that the Complaint has been improperly brought. Greenbriar Capital is not a member of Blue Mountain and has no standing or authority to submit the Complaint on behalf of Blue Mountain. As a result, the Complaint should be dismissed.

**C. The Opposition Still Does Not Establish that Jeff Ciachurski Is Authorized to Represent Blue Mountain as the CEO of Greenbriar Capital Corp.**

Blue Mountain's Complaint was signed by Jeff Ciachurski in his role as the Chief Executive Officer of Greenbriar Capital. He does not purport to be an officer or employee of Blue Mountain in the Complaint. Yet Blue Mountain recognizes that to qualify for the exception that allows "officers or employees of parties" that are not attorneys to "represent their principals' interests in the proceeding" (Utah Admin. Code r. R746-100-6), Ciachurski must be an officer or employee of Blue Mountain. (Opp'n at 4-5.)

As discussed above, Greenbriar Capital and Blue Mountain are two separate legal entities. Ciachurski does not demonstrate that he is an "officer or employee" of Blue Mountain by holding himself out as the chief executive officer of Greenbriar Capital. Yet that is how Ciachurski signed the Complaint. As such, Mr. Ciachurski has not established that he is authorized to represent Blue Mountain in this proceeding. The Complaint should be dismissed on this ground as well.

### III. CONCLUSION

For the reasons set forth above and in the Motion to Dismiss, Rocky Mountain Power respectfully requests that the Commission dismiss Blue Mountain's Complaint in its entirety.

DATED January 23, 2017.

RESPECTFULLY SUBMITTED,

*/s/ D. Matthew Moscon* \_\_\_\_\_

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Yvonne R. Hogle

Sam Meziani

Rocky Mountain Power

D. Matthew Moscon

Michael R. Menssen

Stoel Rives LLP

*Attorneys for Respondent*

*Rocky Mountain Power*



**CERTIFICATE OF SERVICE**

This is to certify that on January 23, 2017 a true and exact copy of the foregoing **REPLY**  
**IN SUPPORT OF RESPONDENT’S MOTION TO DISMISS BLUE MOUNTAIN’S**  
**FORMAL COMPLAINT** was emailed to the following:

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/s/ Rachel D. Tolbert