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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

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In the Matter of:

BLUE MOUNTAIN POWER PARTNERS,  
LLC

Complainant,

vs.

PACIFICORP d/b/a/ ROCKY MOUNTAIN  
POWER

Respondent.

**Docket No. 13-035-\_\_\_\_\_**

**FORMAL COMPLAINT, REQUEST  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND  
REQUEST FOR AGENCY ACTION**

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Pursuant to Utah Code Ann., §§ 63G-4-201, 204 and Utah Admin. Code § R746-100-3.A, Greenbriar Capital Corp. d/b/a Blue Mountain Power Partners, LLC (“Blue Mountain”) submits its Formal Complaint and Request for Declaratory and Injunctive Relief and Request for Agency Action, seeking relief from the wrongful termination by PacifiCorp d/b/a Rock Mountain Power (“PacifiCorp”) of the Power Purchase Agreement executed by and between Blue Mountain and PacifiCorp dated July 3, 2013 (the “PPA”), which PPA was approved by that the Public Service Commission (the “Commission” of “PSC”) on October 3, 2013 (the pricing terms of PPA are

confidential and therefore Blue Mountain has attached hereto as Exhibit “A” only certain non-confidential, basic terms of the PPA).

### **FACTS**

1. Blue Mountain is a Delaware limited liability company, headquartered in California and registered in good standing to conduct business in Utah.

2. PacifiCorp is a public utility that provides retail electric service in the State of Utah and conducts its electric utility business in the State of Utah under the assumed name of Rocky Mountain Power, and is subject to the Commission’s jurisdiction.

### **Execution of a Power Purchase Agreement by Blue Mountain and PacifiCorp**

3. Under the Public Utility Regulatory Policies Act (“PURPA”), the Federal Energy Regulatory Commission (“FERC”) rules implementing PURPA and Utah Code Ann. § 54-12-2, PacifiCorp has an obligation to purchase electricity made available to it by a qualifying facility (“QF”) in the state of Utah at the rates and under the terms and conditions established by the Commission.

4. Blue Mountain, after extensive negotiations, entered into a power purchase agreement (the “PPA”) with PacifiCorp on or about July 3, 2013.

5. Under the terms of the PPA, Blue Mountain was to construct, own, operate and maintain a 80 megawatt (“MW”) wind power QF project located near Monticello, San Juan County Utah (the “Project”) and PacifiCorp would purchase all of the power output generated by the Project according to the pricing methodology set forth in the PPA. The PPA complies with the Commission’s orders in Docket No. 03-035-14, which governs the avoided cost methodology.

6. The PPA defines the “Scheduled Commercial Operation Date” for the Project as “November 30, 2015, subject to extension due to an event of Force Majeure . . .” [Ex. A hereto, PPA at 13]. If Blue Mountain failed to meet the Scheduled Commercial Operation Date, then under the PPA, it would be required to pay liquidated damages for up to six months, at which time, if commercial operation has still not occurred, the PPA could be terminated by PacifiCorp. [See *id.* at 18].

7. The PPA also requires in Section 2.2(a) the posting of security in the event that Blue Mountain cannot demonstrate that it meets the credit standards set forth in the PPA within 30 days after the approval of the PPA by the Utah Public Service Commission under generally accepted standards of it providing final and non-appealable approval. [Ex. A hereto, PPA at 17].

8. In order to timely complete the Project, Blue Mountain knew it needed to have fully accomplished each of the following at least 18 to 24 months *prior* to the completion deadline for the wind farm: (i) obtain approval by the PSC of a PPA that is not subject to challenge; (ii) complete all wind studies showing a satisfactory wind resource; (iii) secure all of the land rights needed for the site, making sure that there are no underlying encumbrances on the land; (iv) finalize all transmission and interconnection rights and contracts; (v) complete all environmental surveys showing no harm to wildlife or habitat that cannot be mitigated; (vi) obtain, to the extent required, all required licenses and permits from the local, state and federal governmental agencies; and (vii) secure all financing, including tax equity financing for the Project.

9. Only after each of the foregoing tasks have been accomplished, could Blue Mountain then proceed to order turbines and a main power transformer for the Project. Blue Mountain could also then negotiate a construction and installation contract with a contractor.

Based on the experience of its members, Blue Mountain recognized that it would take approximately 10 to 12 months once the turbines and main power transformer had been ordered before they would be ready to be delivered on site at the Project. The physical act of receiving turbines and installing a wind farm of 80 MW requires an additional approximately 10 to 14 weeks.

10. Blue Mountain believed that the deadlines set forth in the PPA for completion of the Project were tight, but reasonable. Further, Blue Mountain was strongly motivated to make these deadlines because, at the time it executed the PPA with PacifiCorp, all wind projects that commenced construction prior to December 31, 2013, qualified for the federal production tax credits (“PTC”) (set forth in Internal Revenue Code Section 45) if such projects were completed on or before December 31, 2015.

11. And, although both Blue Mountain and PacifiCorp maintained the belief that Blue Mountain had sufficient time to accomplish all of these tasks before December 31, 2015 when the parties signed the PPA in July of 2013, they also recognized that any delay could mean that Blue Mountain would have to double up on its construction efforts or delivery of the turbines at best, or, at worse, risk missing the PTC deadline.

12. Nevertheless, because Blue Mountain reasonably expected that the PSC would grant approval of the PPA no later than October of 2013, it felt that even waiting until final approval of the PPA was granted still allowed sufficient time to complete the Project. In fact, under the terms of the PPA, the PPA would not become effective until it was approved by the PSC. Specifically, Section 2.1 of the PPA provides that the PPA “shall become effective when it is executed and delivered by both Parties and has been approved by the Commission (the ‘Effective Date’).” [Ex. A, PPA at 17].

13. As a result, Blue Mountain found it prudent and reasonable to wait until the PPA was approved by the PSC (and such approval was non-appealable) before starting the most significant development tasks on the Project, including the purchases of the wind turbines. This was due to the fact that Blue Mountain needed to present an approved and non-appealable power purchase agreement to equipment vendors and contractors necessary to provide the turbines and construction given that Blue Mountain calculated that completion of its Project would take approximately 20 to 22 months in total.

14. However, in an abundance of caution, after signing the PPA with PacifiCorp and before its approval by the PSC, Blue Mountain accelerated its financial efforts to complete all of the required development tasks it could to construct the wind farm. Thus, while Blue Mountain had performed some work to develop the Project site for its wind farm prior to the execution of the PPA, Blue Mountain began working in earnest on the construction of the Project site of the wind farm after Blue Mountain and PacifiCorp signed the PPA. Indeed, by the end of December 2013, Blue Mountain and/or its members had invested over \$5 million in incurred costs and expenses for the construction and development of the wind farm, the majority of which was invested after the PPA was signed, including Blue Mountain's investment of on-site construction costs for building roads, and constructing eight (8) concrete turbine foundations during the fall of 2013 to ensure that the project met the "commencement of construction" requirements then in effect in order to qualify for the federal PTC available for wind energy production.

**Final Approval of the PPA was Extensively Delayed Due to Challenges Filed by Ellis-Hall**

15. The parties anticipated no issues with the PSC approving the PPA but understood that completion of the approval process could take up to two months. Thus, many of the requirements, deadlines and prices as specified in the PPA contemplated that the Effective Date would be no later than the fall of 2013 in order to provide time for Blue Mountain to procure wind turbines, finance, and complete construction of Blue Mountain's Project.

16. PacifiCorp knew that the Effective Date of the PPA was of prime importance to meeting the Scheduled Commercial Operation Date and to meet the deadline of the expiration of federal PTC and that the viability of the Project relied on Blue Mountain's receipt of the PTC.

17. Less than a week after the execution of the PPA, PacifiCorp petitioned the Commission to approve the PPA on or about July 9, 2013 as PSC Docket No. 13-035-115 (the "115 Docket").<sup>1</sup>

18. PacifiCorp's request for approval of the PPA was challenged by Ellis-Hall Consultants, LLC ("Ellis-Hall") after it intervened in the matter.

19. Ellis-Hall's challenge to the validity of the PPA was based, in large part, on its alleged concerns about "the manner in which the [PPA] was approved and submitted under this docket." [115 Docket, Petition for Intervention Filed by Ellis-Hall Consultants, LLC]. Ellis-Hall asserted that PacifiCorp applied Utah Tariff Schedule No. 38, the tariff that governs QF pricing and power purchase agreement negotiations, in a discriminatory manner against Ellis-Hall with regard to the Blue Mountain PPA. Specially, Ellis-Hall claimed that it alone was required by

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<sup>1</sup> In addition, on July 9, 2013, PacifiCorp filed Docket No. 13-035-116 with the Commission requesting approval of a power purchase agreement it had entered into with Latigo Wind Park, LLC (also a QF) ("Latigo"), relating to a 60 WM wind farm project being constructed by Latigo in the same general area as Blue Mountain's Project.

PacifiCorp to comply with certain requirements, such as obtaining a grid connection, before PacifiCorp would execute a PPA with Ellis-Hall while PacifiCorp imposed no such requirement on either Blue Mountain and Latigo. [See, e.g., *id.*, Reporters Transcript of August 2, 2013 Commission Hearing re Rescheduling of Continued Scheduling Conference at 5, 20, 27].

20. During the August 2, 2013 hearing before the Commission regarding the Rescheduling of the Continued Scheduling Conference, PacifiCorp opposed Ellis-Hall's request that a 90-day schedule for decision (including a 45-day discovery period) be set in the matter because it would prevent Blue Mountain (and Latigo) from being able to complete the Project on time. PacifiCorp stated at the hearing:

[T]he Company is aware of timing constraints that are very real and very impactful for Blue Mountain and Latigo, and if we were to set a schedule that had a Commission approval beyond 60 or 90 days, it is the Company's understanding that these projects would not be able to be constructed as planned and currently contemplated in the Power Purchase Agreements as filed.

[115 Docket at 16-17].

21. At the same hearing, Mr. Jetter from the Division of Public Utilities pointed out that "it's important from the Division's perspective, to recognize that we are running up against the time limit for a federal production tax credit" and that the Division did not think that "there has been any intentional delay on behalf of these wind companies" because they "filed these [PPAs as] expeditiously as they can, with respect to some prior orders from the Commission on Schedule 38" regarding whether the "previous calculations would stay in place for this set of contracts." [*Id.* at 17-18]. Jetter further stated that a 90-day delay for discovery would prohibit Blue Mountain (and Latigo) from completing their respective projects:

So in relation to that, I think that it would be potentially an unjust result if we delayed the scheduling in this set of dockets so long that it would effectively kill these wind projects.

[*Id.* at 18].

22. Latigo brought an expert to the hearing, Andrew Fales, to discuss what effect a 90-day period for decision by the Commission (as requested by Ellis-Hales) and the resulting inability to complete enough work on time to qualify for the tax credit would have on projects like Blue Mountain's and Latigo's. Mr. Fales stated:

So under the Section 45 of the Internal Revenue Code, the production tax credit expires at the end of this year, unless the project has begun construction or met a safe harbor requirement, and in order to begin construction, it has to be of a significant nature, the IRS said in one of their notices. And significant nature includes building – or clearing the roads, digging foundations, pouring foundations, those kinds of things. And so those kinds of activities haven't begun, which costs millions of dollars, then the project does not qualify for the production tax credit.

On the other hand, if the project spends five percent of the project costs by the end of the year on turbines, or roads, or foundations, or collection lines, or whatever the case may be, then the project is, quote/unquote, safe harbored for the purpose of the production tax credit and will be considered to be under construction by the end of this year.

Now if you have a 60 megawatt wind project, such as Latigo, and you kind of assume of number between \$1,500 of KW and \$2,000 of KW, that's -- let's call it \$100 million. So in order to qualify the site through safe harbor mechanism where you'd have to spend five percent of the present cost, you would have to spend \$5 million. ***Now in order to finance that \$5 million, the financing community requires an approved PPA because that is the security behind all the financing.*** Typically, it's highly-rated entities, from a credit prospective, and so ***we have worked very diligently and negotiated a PPA with PacifiCorp that is financeable, and we believe we have one, but we are being held up in order to qualify the site for the production tax credit.***

And we've spent significant sums of money that runs into the millions of dollars before the end of the year unless this -- unless the Commission can approve our PPA within a timely manner. Typically, after the PPA gets approved, it takes, roughly, 60 days to close the financing. And it can be done in short of 30 days, but it's -- that is a real hard -- that is a real hard thing to do. ***So if the Commission***

*issued an order at the end of this year, for example, approving the PPA's, that would not give us significant -- sufficient time to arrange the financing to spend the millions of dollars that would be required.*

*In addition, we have security deposits, under the PPA, that are due before the end of the year, and we have interconnect deposit that runs, as well, that run collectively, millions of dollars that are due, as well, prior to the end of year, in order to keep our project on schedule, in order to meet the requirement under the contract we have negotiated with PacifiCorp.*

[*Id.* at 24-26 (emphasis added)]. Mr. Fales further explained, in response to Ellis-Hall's claim that Latigo was dilatory in its efforts to make the necessary investment to secure its energy credit and therefore should not be heard to complain about any additional time taken by the Commission in approving the PPAs, that "*financing cannot be secured in this industry without an approved Power Purchase Agreement.* So to insinuate anything other than that is just not true, given the reality of the market." [*Id.* at 29 (emphasis added)]. Mr. Fales comments relating to Latigo apply with equal force to Blue Mountain with the exception that Blue Mountain's Project is approximately 27% larger and thus Blue Mountain's Project and therefore required even larger amounts of work and financing to meet the PTC deadline.

23. PacifiCorp noted for the record during the hearing that it had performed "considerable due diligence" and more than it typically did with regard to the Blue Mountain Project and that it felt that Blue Mountain's "Power Purchase Agreement is in the public's interest and should be approved." [*Id.* at 36].

24. On September 19, 2013, the Commission held a hearing on the approval of the Blue Mountain and Latigo PPAs.

25. On October 3, 2013, the Commission issued an Order in which it approved the PPA between Blue Mountain and PacifiCorp (as well as the Latigo PPA). [*See* 115 Docket, Order

Approving Applications and Denying Intervention of Mrs. Corinne Roring issued 10/3/2013, at 1].

26. On November 4, 2013, Ellis-Hall filed a confidential Petition objecting to the Commission's approval of the Blue Mountain PPA and requesting review or rehearing by the Commission. [See 115 Docket, Petition for Review or Rehearing Objecting to Approval of Blue Mountain Power Purchase Agreement filed 11/4/2013 ("Petition for Rehearing")]. Ellis-Hall filed a substantially identical petition in the 116 Docket challenging the approval of Latigo's PPA. Ellis-Hall argued in its Petition for Rehearing, among other things, that the Commission erred in approving Blue Mountain's PPA because, due to the lack of specificity, the PPA is unenforceable as a matter of law and because the rules governing the PPAs were applied inconsistently by PacifiCorp.

27. On November 25, 2013, the Commission issued an Order denying Ellis-Hall's Petition for Rehearing. [See 115 Docket, Order Granting Motions to File Over-Length Petitions and Denying Petitions for Review of Rehearing issued on 11/25/2013]. The Commission found in its Order that throughout the 115 Docket and under its Petition for Rehearing, Ellis-Hall, "a wind generation developer, attempts to use the Schedule 38 process to thwart the power purchase agreements of competing wind generation facilities." [Id. at 3]. The Commission rejected Ellis-Hall's claim that the Blue Mountain PPA is unenforceable due to lack of specificity fails based on the review of the PPA conducted by the Division of Public Utilities, the Office of Consumer Services, and Utah Clean Energy, each of which "took no issue" with the enforceability of the PPAs and the testimony of Paul Clements given on behalf of PacifiCorp. [Id. at 8-9]. Additionally, regarding the issue of discriminatory treatment asserted by Ellis-Hall (i.e. that PacifiCorp allegedly

treated Blue Mountain and Latigo differently than Ellis-Hall in negotiating their PPAs), the Commission found this claim to be “outside the scope of our consideration of the Blue Mountain and Latigo PPAs in these proceedings” and emphasized that “[g]iven the clearly expressed legislative intent to foster QF development, it would not serve the public interest to deny Latigo and Blue Mountain the benefit of PPAs they negotiated in good faith, based on PacifiCorp’s conduct as alleged by Ellis-Hall” and therefore its Order “expresses no findings or conclusions as to whether or not Ellis-Hall has a grievance against PacifiCorp with respect to Ellis-Hall’s negotiations for a PPA.” [*Id.* at 11].

28. Blue Mountain continued construction work on the project site of its wind farm Project during the fall and winter of 2013 in an attempt to allow it to qualify for the federal PTC. Due to the actions of Ellis-Hall in repeatedly challenging the enforceability of Blue Mountain’s PPA before the Commission, nearly all development work such as pursuing the purchase and supply of wind turbines, entering into construction contracts, and other similar activities were put on hold starting in January 2014, because the entire wind energy community was aware through the public filings before the PSC, that the PPA was in serious jeopardy of being approved without being challenged again by Ellis-Hall. This is due to the fact that, as Latigo’s expert had testified, until its PPA was finally approved by the Commission, Blue Mountain would be unable to develop its Project.

29. Therefore, given the date on which the Commission entered its Order on Ellis-Hall’s Petition for Rehearing on November 25, 2013, Blue Mountain was prevented from purchasing wind turbines and performing the remaining work needed to meet the deadlines of the PPA.

30. Blue Mountain's Project was further delayed when Ellis-Hall made several additional challenges to the validity of Blue Mountain's PPA following the Commission's denial of Ellis-Hall's Petition for Rehearing.

31. First, on December 23, 2013, Ellis-Hall filed Writ of Review with the Utah Supreme Court in which it argued that the Commission erred when it approved Blue Mountain's PPA and that the PPA was unenforceable. Ellis-Hall filed a similar Writ challenging the validity of Latigo's PPA. Ellis-Hall named Blue Mountain and Latigo as respondents in the proceedings before the Utah Supreme Court. The two actions were later consolidated.

32. Ellis-Hall's challenge of, among other things, the PSC's approval of Blue Mountain's PPA before the Utah Supreme Court further delayed resolution of the issue of whether Blue Mountain's PPA was valid or not.

33. After the completion of briefing by the parties in Ellis-Hall's Writs of appeal of the PSC's approval of the PPAs before the Utah Supreme Court, the Court held oral argument on Ellis-Hall's Writs. Prior to oral argument, Blue Mountain requested an expedited ruling from the Court. Blue Mountain made this request because it knew that until the Court issued its decision the approval of the PPA was not final and therefore it could not obtain the turbines and complete enough of the Project for the contractual deadline of November 30, 2014. Blue Mountain also recognized, however, that at that late date, even if the Court issued an expedited ruling, it would be extremely difficult for Blue Mountain to complete enough of the Project by the PPA deadlines.

34. It is important to note that since the filing on December 23, 2013 by Ellis-Hall, PacifiCorp did nothing to expedite the proceedings before the Utah Supreme Court hearing. Indeed, at this point it became clear to Blue Mountain that PacifiCorp was allowing the Ellis-Hall

litigation and complaints to trudge along in order to “run the clock” on the Blue Mountain PPA. PacifiCorp had several reasons to do this. First, PacifiCorp knew that if the Blue Mountain PPA were to expire, it would allow PacifiCorp to rid itself of its liability issues with Ellis-Hall. Second, PacifiCorp recognized that the price of Blue Mountain’s PPA would cost PacifiCorp an additional \$66 Million over market price than if the PPA was not approved or performed (this figure is backed by the filing made by Office of Consumer Services at the original PPA approval hearing before the PSC). Third, PacifiCorp understood that a termination of the PPA for nonperformance suited PacifiCorp original goal made clear during its fight with Blue Mountain prior to the parties’ execution of the PPA where Blue Mountain had to take PacifiCorp before the PSC to request that it order PacifiCorp follow the pricing rules promulgated by the PSC (which had changed subsequent to the PPA’s issuance). And, fourth, PacifiCorp wanted Blue Mountain’s application for access of 80MW of transmission access to run out its application timeline, giving more transmission access to PacifiCorp.

35. On May 30, 2014, the Utah Supreme Court held oral argument on Ellis-Hall’s Writs. At the hearing, the Court issued a ruling from the bench denying Ellis-Hall’s challenges to the validity of the Blue Mountain and Latigo PPA and upholding the Commission’s approval the PPAs. The Court issued its written opinion for its May 30, 2014 ruling on November 21, 2014, and the matter was finally remitted to the Commission on December 9, 2014. The PSC’s approval of the PPA therefore did not become truly final until December 21, 2014 – 30 days after the Court issued its written opinion upholding the Commission’s prior approval of the PPA, when no further appeal of the PSC’s approval could be taken.

36. Ellis-Hall initiated a second, independent challenge to Blue Mountain's PPA, while its Writ challenging the PPA before the Utah Supreme Court was still pending. Specifically, on March 3, 2014, Ellis-Hall filed a formal complaint against PacifiCorp before the Commission. In its formal complaint, Ellis-Hall asserted that PacifiCorp had wrongfully changed the pricing methodology to be applied to Ellis-Hall's wind farm project from indicative avoided cost pricing using the market proxy pricing method to using the partial displacement differential revenue requirement pricing ("PDDRR") method.

37. Although Ellis-Hall's formal complaint was directed towards PacifiCorp, Ellis-Hall continued to argue for the invalidation of the Blue Mountain's PPA. For example, Ellis-Hall argued to the Commission in April 2014:

While Latigo and Blue Mountain executed PPAs before the Commission's August 16, 2013 Order, those PPAs were not approved by the Commission until October 3, 2013. Consequently, under Schedule 38 the prices given to Latigo and Blue Mountain were not final because they had not been "approved by the Commission." Accordingly, if Schedule 38 mandates that PacifiCorp update indicative pricing until the pricing is finalized as the Division and the OCS now claim, PacifiCorp should have updated Latigo's and Blue Mountain's pricing under the PDDRR method, purportedly "the sole method for determining avoided costs" after August 16, 2013. Division Comments, at 8; OCS Comments, at 5-10. PacifiCorp did not do so. . . . Neither the Division nor the OCS made any claim that the failure to update Latigo or Blue Mountain pricing violated Schedule 38. However, they now take this position as to Ellis-Hall, even though Ellis-Hall was in the queue and similarly situated to Blue Mountain.

[Docket No. 14-035-24, Ellis-Hall Consultants' Reply Comments filed 4/11/2014 at 13-14].

38. On April 25, 2014, the Commission entered an Order dismissing Ellis-Hall's formal complaint against PacifiCorp. [See Docket No. 14-035-24, Order Approving Ellis-Hall Consultants, LLC's Motion for Leave to File Over-Length Reply Comments and Dismissing Complaint]. However, as with the Commission's Order approving Blue Mountain's PPA, Ellis-

Hall filed a Petition for Review or Rehearing of the Commission's Order dismissing Ellis-Hall's Complaint with the Commission on May 27, 2014. The Commission denied Ellis-Hall's Petition on June 17, 2014.

39. On May 27, 2015, Ellis-Hall filed yet another Petition for Review and Rehearing against PacifiCorp with the PSC in Docket 12-2552-01 regarding the pricing PacifiCorp agreed to pay Blue Mountain in the PPA and arguing that PacifiCorp had acted improperly in failing to offer the same pricing methodology to Ellis-Hall. When the PSC again denied the Petition, Ellis-Hall appealed the issue to the Utah Supreme Court. The Court ultimately ruled on July 28, 2016, that PacifiCorp acted improperly in refusing to enter into a power purchase agreement with Ellis-Hall under the same pricing methodology that PacifiCorp offered Blue Mountain and Latigo. *See Ellis-Hall Consultants v. Public Service Commission of Utah*, 2016 UT 34, ¶ 37, -- P.3d --. Thus, PacifiCorp's conduct, which the Court found to be wrongful, was the cause of Ellis-Hall's challenges and therefore the delay in Blue Mountain's ability to perform under its PPA.

40. Accordingly, it was not until December 21, 2014, at the earliest, following the Utah Supreme Court's rejection of Ellis-Hall's Writ before it challenging the PSC's original approval of the PPA. that Blue Mountain, for the first time, had an approved, valid and enforceable PPA pursuant to which it was authorized to begin work on its Project. This occurred more than seventeen (17) months after PacifiCorp and Blue Mountain executed the PPA.

41. Prior to the Utah Supreme Court's ruling and the PSC's final decision on Ellis-Hall's formal complaint against PacifiCorp, the status of Blue Mountain's PPA was in question for nearly a full year after Blue Mountain and PacifiCorp submitted the PPA for approval by the Commission. During the period of Ellis-Hall's claims before the PSC and during the pendency of

proceedings before the Utah Supreme Court by Ellis-Hall challenging the PPA, Blue Mountain prudently undertook a substantial amount of construction work. Although Blue Mountain took considerable risk in investing approximately \$5 million towards the construction of the Project when it had no formally approved PPA, Blue Mountain was precluded (as Latigo's expert had opined) from obtaining the wind turbines and other key equipment or performing any other development work on it's Project until there was a final, formal approval of the PPA.

**Ellis-Hall's Challenges to the Approval of the PPA Qualify as Events of Force Majeure Under the Provisions of the PPA**

42. Blue Mountain's PPA contains a Force Majeure clause. Specifically, Section 14.1 of the PPA defines "Force Majeure" or "an event of Force Majeure" as follows:

14.1 Definition of Force Majeure. "Force Majeure" or "an event of Force Majeure" means an event that (a) is not reasonably anticipated as of the date hereof, (b) is not within the reasonable control of the Party affected by the event, (c) is not the result of such Party's negligence or failure to act, and (d) could not be overcome by the affected Party's use of due diligence in the circumstances.

[Ex. A, PPA at 50, §14.1].

43. Pursuant to Section 14.2 of the PPA, upon the occurrence of event of Force Majeure:

Neither Party shall be liable for any delay or failure in its performance under this Agreement, nor shall any delay, failure, or other occurrence or event become an Event of Default, to the extent such delay, failure, occurrence or event is substantially caused by conditions or events of Force Majeure duration [sic] of the continuation of the event of Force Majeure, for the same number of days that the event of Force Majeure has prevailed . . .

[Ex. A, PPA at 51, §14.2].

44. On May 14, 2014, Blue Mountain sent a letter to PacifiCorp reminding it of the event of Force Majeure caused by Ellis-Hall's pending Writ before the Utah Supreme Court.

45. There was no need for Blue Mountain to provide notice to PacifiCorp within the “5-day” period of the occurrence of the Force Majeure event under Section 14.3 of the PPA given that PacifiCorp, as a party to Ellis-Hall’s appeal to the Utah Supreme Court and as the respondent against whom Ellis-Hall had filed its formal complaint with the PSC, indisputably knew that the validity and enforceability of Blue Mountain’s PPA had been challenged in both matters and therefore PacifiCorp was already aware that a event of Force Majeure had occurred.

46. Indeed, even after the Utah Supreme Court issued its decision dismissing Ellis-Hall’s Writ in late May 2014 and the PSC rejected its Petition for Rehearing on the Commission’s dismissal of Ellis-Hall’s formal complaint against PacifiCorp in mid-June 2014, Ellis-Hall has continued to challenge and attack the validity and enforceability of the PPA as well as levy accusations against the officers of both PacifiCorp and Blue Mountain before the PSC in an attempt to halt Blue Mountain’s Wind Project.<sup>2</sup>

47. The actions taken by Ellis-Hall in challenging the validity and enforceability of the PPA constitute Force Majeure events under the PPA because they caused delays in Blue Mountain’s ability to timely perform its obligations under the PPA, including preventing Blue Mountain from obtaining the equipment it required to construct the Project’s wind farm, before the November 30, 2015 deadline for completion of the Project set forth in the PPA.

48. At the time Blue Mountain entered into the PPA with PacifiCorp in July of 2013, Blue Mountain did not and could not anticipate that Ellis-Hall would challenge the validity and enforceability of the PPA before the PSC, repeatedly request reconsideration of the PSC’s approval

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<sup>2</sup> Ellis-Hall’s other challenges to Blue Mountain’s Project and the conduct of PacifiCorp are discussed more fully below.

of the PPA, or obdurately refuse to accept the PSC's decision and pursue an appeal before the Utah Supreme Court. Ellis-Hall's actions were not the result of conduct by Blue Mountain; rather Ellis-Hall has consistently claimed that PacifiCorp is at fault because of its alleged treatment of Ellis-Hall in a manner that differed from PacifiCorp's treatment of Blue Mountain and Latigo. Further, no amount of effort or due diligence by Blue Mountain could have changed its inability to acquire equipment for the Project during the nearly 17-month period that the validity of its PPA was in question because of Ellis-Hall's challenges.

49. Accordingly, the Force Majeure events caused by Ellis-Hall's attack on Blue Mountain's PPA clearly meet the required parameters set forth in Section 14.1 of the PPA for Force Majeure in that: (i) they were not reasonably anticipated, (ii) not within the reasonable control of Blue Mountain, (iii) were not the result of Blue Mountain's negligence or failure to act, and (iv) could not be overcome by Blue Mountain's use of due diligence in the circumstances. Indeed, regarding this last point, no amount of effort or due diligence by Blue Mountain could have removed or impacted the delays caused by Ellis-Hall's challenges. PacifiCorp alone had the ability to resolve the challenges.

50. Under Section 14.4 of the PPA, an event of Force Majeure entitles Blue Mountain for a day-for-day extension of all of the dates, milestones and deadlines set forth in the PPA.

**Blue Mountain Notified PacifiCorp that Ellis-Hall's Challenges to the PPA Constituted a Event of Force Majeure**

51. Blue Mountain interpreted Ellis-Hall's repeated challenges to the PSC's approval of the PPA, including its filing of a formal complaint against PacifiCorp with the PSC and its Writ

of Petition with the Utah Supreme Court after the PSC had initially approved the PPA as an event of Force Majeure under the terms of the PPA.

52. On May 14, 2014, after the Force Majeure had been continuing for approximately 7 months, Blue Mountain sent a letter to PacifiCorp reaffirming that an event of Force Majeure was continuing as a result of the appeal of Ellis-Hall to the Utah Supreme Court concerning the approval of the PPA by the PSC (“Force Majeure Claim No. 1”).

53. PacifiCorp neither responded to nor contested Blue Mountain’s May 14, 2014 notice reaffirming the event of Force Majeure and reminding PacifiCorp of its existence. However, during a telephone conference call on July 25, 2014 between Cliff Webb, President of Greenbriar Capital Corp., a managing partner of Blue Mountain, and Bruce Griswold, Director of Short-Term Origination and QF Contracts at PacifiCorp, and an authorized officer of PacifiCorp to speak and act on behalf of PacifiCorp regarding matters relating to the PPA, Mr. Griswold voluntarily and without qualification stated that the Ellis-Hall’s challenges to the PPA and PacifiCorp’s actions were a “debacle” which qualified as a Force Majeure event under the PPA, and that it was of “extraordinary length.”

54. Blue Mountain relied on Mr. Griswold’s statement in understanding both parties agreed that the Ellis-Hall challenges to the PPA, which delayed its approval, constituted an event of Force Majeure under the PPA. Blue Mountain continued activities and expenses on the basis that a valid event of Force Majeure had occurred and was not in dispute by PacifiCorp.

55. PacifiCorp had an obligation to timely respond if it disagreed with Blue Mountain. It knew that Blue Mountain was continuing to heavily invest in the project believing a Force Majeure event had occurred. There was no indication to the contrary by PacifiCorp that the Ellis-

Hall caused delays were anything but an event of Force Majeure until PacifiCorp abruptly changed its position in early 2015 (as discussed more fully below).

**Blue Mountain Suspended its Efforts to Complete the Project When PacifiCorp Represented that It Wanted to Purchase the Project and Blue Mountain's Rights Under the PPA**

56. Although Blue Mountain believed that an event of Force Majeure had occurred as a result of the delays caused by Ellis-Hall's multiple challenges to the PSC's approval of the PPA, Blue Mountain continued to perform construction work on the Project during the entire period that Ellis-Hall challenged the validity of the PPA. And, after the Utah Supreme Court issued its ruling from the bench on Ellis-Hall's appeal and the PSC rejected Ellis-Hall's Petition for rehearing of its formal complaint against PacifiCorp on June 17, 2014, Blue Mountain earnestly continued to bid and acquire wind turbines and other equipment needed for the Project and engaging in the development required to complete the Project (albeit on a delayed schedule due to Force Majeure).

57. Blue Mountain continued to invest money, resources, and time in the project. Blue Mountain was continuing activities and expenses on the basis that its Force Majeure was valid and not in dispute by PacifiCorp.

58. Had PacifiCorp disagreed with Blue Mountain's position that Ellis-Hall had caused an event of Force Majeure, PacifiCorp had an obligation to timely respond in writing and advise Blue Mountain that it disagreed with the Force Majeure conclusion as it knew that Blue Mountain was continuing to invest in the project believing a Force Majeure event had occurred and that, therefore, the deadline for completion had been extended.

59. On September 4, 2014, PacifiCorp contacted Blue Mountain and represented that it wanted to purchase the Blue Mountain Project, including its rights under the PPA. The parties

subsequently entered into a Mutual Confidentiality Agreement dated September 5, 2014. And, on September 8, 2014, PacifiCorp and Blue Mountain held a conference call for the sole purpose of discussing PacifiCorp's purchase of the Blue Mountain Project.

60. During the conference call on September 8<sup>th</sup>, in which Blue Mountain had six (6) individuals participate on its behalf, Blue Mountain specifically asked PacifiCorp what its intention was with regard to buying the Blue Mountain PPA and Project. PacifiCorp emphatically stated that its sole reason to purchase the PPA was to terminate the PPA. Blue Mountain offered to sell the Project and PPA to PacifiCorp for \$25 Million.

61. Blue Mountain understood that PacifiCorp's interest in purchasing the Project from Blue Mountain was based on the fact that PacifiCorp had determined that it would be cheaper for it to "buy out" Blue Mountain than to perform its purchasing obligations under the PPA according to the pricing methodology set forth therein.

62. That PacifiCorp wished to buy out Blue Mountain in the fall of 2014 further demonstrates PacifiCorp agreed that Ellis-Hall's challenges to the approval of the PPA qualified as an event of Force Majeure under the PPA. Blue Mountain relied on PacifiCorp's representation that it wished to purchase the Project to understand that both parties were of mutual understanding that the Ellis-Hall caused delays were Force Majeure. This is based on the fact that if there was no event of Force Majeure, PacifiCorp could have terminated the PPA without having to purchase Blue Mountain's rights thereunder based on a failure to meet the deadlines set forth in the PPA.

63. Following the execution of the Mutual Confidentiality Agreement with PacifiCorp, Blue Mountain, believing PacifiCorp had a good faith interest in purchasing the Project from it,

provided access to PacifiCorp to Blue Mountain's confidential data room in mid-September 2014 and followed with confidential responses to questions and inquiries submitted by PacifiCorp.

64. After Blue Mountain provided PacifiCorp access to all of its confidential documents, and provided confidential responses to its questions, PacifiCorp went dark and communicated nothing to Blue Mountain. Indeed, after several weeks of silence and without any concluding discussion or any negotiations, PacifiCorp simply notified Blue Mountain on October 10, 2014 that it was "passing" on the Project (this is literally the only word appearing in the email sent by PacifiCorp to notify Blue Mountain that it would not be pursuing the purchase). PacifiCorp refused to provide additional details regarding its decision to "pass" on the Project despite Blue Mountain making several calls to it requesting this information. To this date, PacifiCorp has not explained whether it had a legitimate interest in making the purchase in the first instance.

65. During the same period of time that PacifiCorp was claiming it was interested in purchasing the Project, Sage Grouse Energy Project, LLC an affiliate project of Ellis-Hall ("Sage Grouse") filed a Notice of Dispute dated October 1, 2014 with PacifiCorp seeking withdrawal of the Large Generator Interconnection Agreement ("LGIA") executed between PacifiCorp and Blue Mountain on May 5, 2014 under the terms of the PPA. Blue Mountain had filed a Notice of Suspension of the LGIA on May 14, 2014 with the PSC because of Ellis-Hall's pending challenges to the PPA at that time. PacifiCorp acknowledge the Notice of Suspension of the LGIA on June 13, 2014. Ellis-Hall's Notice of Dispute of the LGIA represented a further challenge to the status of Blue Mountain's Project and ultimately would cause issues for Blue Mountain in acquiring equipment for the Project.

66. PacifiCorp's efforts in investigating a purchase of the Project, during which Blue Mountain suspended its efforts on completing any additional work on the Project, ended up causing Blue Mountain several months of additional delay.

67. Blue Mountain considers the above activities as bad faith by PacifiCorp and it gaining significant commercial advantage over Blue Mountain as to schedules and critical project timing.

68. Despite Blue Mountain's best efforts, the delays (i) in obtaining a final approval of the PPA from the PSC and the Utah Supreme Court due to Ellis-Hall's multiple challenges to the PPA's validity based on its underlying claims against PacifiCorp; and (ii) in putting the Project on hold to respond to PacifiCorp's representation that it intended to purchase the Project, prevented Blue Mountain from obtaining the equipment necessary to complete the Project in time to meet the PPA deadlines and the PTC deadline of December 31, 2015.

**PacifiCorp's Denies Blue Mountain's Request for an Extension of the Performance Deadlines Set Forth in the PPA Claiming for the First Time that No Force Majeure Event Had Occurred**

69. In early January 2015, after learning that the PTC deadline had been extended until December 31, 2016, Blue Mountain made a formal request for an extension of the deadlines and prices contained in the PPA based on the Force Majeure event caused by Ellis-Hall's challenges to the PPA (Force Majeure No. 1) and because of PacifiCorp's conduct, both of which occurred at a time turbine prices were escalating in price. Prior to this date, Blue Mountain had made several informal requests to PacifiCorp to extend the PPA's deadlines but PacifiCorp had ignored each of these informal requests.

70. In response to Blue Mountain's formal request for an extension of the PPA deadlines, PacifiCorp requests a telephone conference call with Blue Mountain to discuss the issue.

71. On January 28, 2015, PacifiCorp and Blue Mountain held a conference call to discuss amending the dates of commercial operation in the PPA. During this conference call PacifiCorp informed Blue Mountain for the first time that it was PacifiCorp's position that Ellis-Hall's challenges to the validity of the PPA, all of which were based on Ellis-Hall's dispute with PacifiCorp's conduct, did not qualify as events of Force Majeure under the PPA, and that Blue Mountain out to have known about a potential Ellis Hall dispute at the time of the execution of the PPA. This serious, but wholly unfounded and nonsensical, assertion by PacifiCorp was disturbing to Blue Mountain. Based on these claims, PacifiCorp refused to extend the deadlines for performance under the PPA.

72. At the time Blue Mountain made its request, an extension of dates was critical to allow Blue Mountain time to construct the project given the delays to the PPA's approval caused by Ellis-Hall's challenges to the PPA and the delays caused by PacifiCorp's misleading intention to buy the Project.

73. Since PacifiCorp had not acted or contested Blue Mountain's Notice of Force Majeure dated May 14, 2014, including its informal request for extensions of commercial operation dates, and PacifiCorp's misleading intention to buy the Project to retire the PPA, PacifiCorp had great leverage in January 2015 to now not cooperate and to take the position that the Ellis-Hall delays were not Force Majeure in order to force Blue Mountain to meet deadlines under the PPA that could not be met (due to the delays) and thereby prevent Blue Mountain from having any ability to complete the Project thereby effectively killing it.

74. On February 11, 2015, PacifiCorp sent a letter to Blue Mountain in which it formally rejected, for the first time, Blue Mountain's claims that Ellis-Hall's challenges to its PPA qualified as a Force Majeure event under the PPA.

75. Blue Mountain responded by sending PacifiCorp a letter dated February 16, 2015, providing formal notification of a Notice of Dispute with regard to resolution of the Ellis-Hall Force Majeure Claim and requested initiation of the dispute resolution process provided by Article 24 of the PPA.

76. In its February 11, 2015 letter, PacifiCorp takes the position that the actions of Ellis-Hall in challenging the PPA should have been reasonably anticipated since the PPA approval process is a public process and potential opposition should be anticipated. Although Blue Mountain understood that because the approval of its PPA would be a public process and that, as with any public process, there is a potential that a person might oppose the approval of the PPA, Blue Mountain was not privy to PacifiCorp's dealings with Ellis-Hall and could not have anticipated that Ellis-Hall would continue to mount challenges to the validity of Blue Mountain's PPA based on wrongful conduct alleged against PacifiCorp. As noted above, the Utah Supreme Court has recently determined that PacifiCorp did, in fact, engage in wrongful conduct with regard to Ellis-Hall and therefore should have anticipated the challenges that Ellis-Hall made to the PPA. PacifiCorp wanted the Blue Mountain PPA to terminate for many reasons, including, at a minimum, to extinguish Ellis-Hall's claim against PacifiCorp that it had refused to execute a power purchase agreement with Ellis-Hall containing the same pricing scheme as in Blue Mountain's PPA.

77. Importantly, PacifiCorp failed to inform or advise Blue Mountain either prior to or at the time of the signing of the PPA of PacifiCorp's past problems and then-existing dispute with Ellis-Hall. Had PacifiCorp done so, Blue Mountain would have been made aware of the critical need to propose reasonable language specifically addressing PPA approval delays during PPA negotiations, and to establish a timeframe for completing the Project that took into account Ellis-Hall's potential challenges to the validity of the PPA.

78. By refusing to ultimately acknowledge legitimate Force Majeure delays, PacifiCorp has continued to prevent Blue Mountain from acquiring equipment, completing the project and partnering its interests to a creditworthy third-party entity qualified to meet the Credit Requirements of the PPA.

**Blue Mountain Sends a Second Notice of a Force Majeure Event When Sage Grouse Files a Complaint with the Federal Energy Regulatory Commission Regarding the LGIA**

79. On the same day that PacifiCorp sent its letter to Blue Mountain claiming for the first time that Ellis-Hall's challenges to the PPA based on PacifiCorp's conduct do not qualify as an event of Force Majeure under the PPA (i.e. February 11, 2016), Sage Grouse (an affiliate of Ellis-Hall) filed a complaint with the Federal Energy Regulatory Commission ("FERC") against PacifiCorp alleging that PacifiCorp improperly granted the LGIA to Blue Mountain (the "FERC Action").

80. On February 24, 2015, Blue Mountain, after learning of Sage Grouse's filing, sent a notice to PacifiCorp declaring Force Majeure as a result of the FERC Action ("Force Majeure Claim No. 2"). PacifiCorp never responded to Blue Mountain's claim of Force Majeure No. 2 and to Blue Mountain's knowledge the FERC Action is still on going.

81. Despite PacifiCorp's inaction on Blue Mountain's Claim No. 2, this event together with PacifiCorp's refusal to extend PPA deadlines under Force Majeure Claim No. 1, has resulted in Blue Mountain's inability to meet PacifiCorp's Credit Requirements until such event and schedule extensions are resolved.

82. In addition, as discussed above, on May 27, 2015, Ellis-Hall filed a Petition for Review and Rehearing with the PSC in Docket 12-2552-01 regarding the pricing PacifiCorp agreed to pay Blue Mountain in the PPA and arguing that PacifiCorp had acted improperly in failing to offer the same pricing methodology to Ellis-Hall. This claim ultimately was decided by the Utah Supreme Court. Specifically, the Court recently ruled that PacifiCorp acted improperly in refusing to enter into a power purchase agreement with Ellis-Hall under the same pricing methodology that PacifiCorp offered Blue Mountain and Latigo, which was the underlying basis for Ellis-Hall's challenges that delayed Blue Mountain's ability to perform under its PPA. The Court's decision in this case further demonstrates that Blue Mountain had no control over the challenges to the PPA by Ellis-Hall and that PacifiCorp's actions were the sole cause of the Force Majeure events relating to Ellis-Hall.

### **PacifiCorp Terminated the PPA During the Dispute Resolution Process**

83. By the time PacifiCorp sent Blue Mountain its February 11, 2015 letter claiming that the Ellis-Hall actions in preventing a final approval of the PPA did not qualify as events of Force Majeure under the PPA, which was sent nearly 9 months after Blue Mountain sent its May 14, 2014 letter reconfirming that Ellis-Hall had caused a Force Majeure, Blue Mountain had invested nearly \$6 million in the development of the Blue Mountain wind project and, at the time, was in conversations with several partners wishing to help build the wind project.

84. Blue Mountain believes that it is not by coincidence that between July of 2013 and February of 2015, power prices had fallen significantly – from about \$61 per MWh at the time the Blue Mountain PPA was signed to approximately \$45 to \$50 per MWh at the time of the PacifiCorp letter, but during the same period wind turbine prices had increased.

85. As noted above, shortly after the receipt of the PacifiCorp letter dated February 11, 2015, Blue Mountain filed a Notice of Dispute on February 16, 2015 and requested initiation of the dispute resolution process under Article 24 of the PPA.

86. Former Federal District Judge Paul Cassell was selected by the parties to act as the mediator for the dispute resolution.

87. During the pendency of the dispute resolution process as required by the PPA, PacifiCorp issued to Blue Mountain a Notice of Termination of the PPA first on April 8, 2015 and then again on April 22, 2015. PacifiCorp claimed in these Notices that Blue Mountain had not posted a security bond that it asserted was required by the PPA and that, as a result, PacifiCorp was formally terminating the PPA. Prior to issuing its Notice of Termination, PacifiCorp had never requested a security bond or claimed that it was due or past due.

88. In a subsequent Notice of Dispute dated May 13, 2015, Blue Mountain advised PacifiCorp that its Notice of Termination during the pendency of the dispute resolution procedures was invalid and done in bad faith.

89. In its Mediation Brief filed on July 31, 2015, Blue Mountain asserted that (i) the actions by Ellis-Hall caused by PacifiCorp (and recently validated by the Utah Supreme Court) and the FERC Action constitute Force Majeure Events under the PPA, (ii) the Force Majeure events allow for an extension of the “Scheduled Commercial Operation Date” among others under

the PPA for at least 14 months considering both the delay at the Utah Supreme Court and pendency of resolution of the FERC complaint that was filed by Ellis-Hall in February 2015, (iii) PacifiCorp, by its actions in the conversation with Bruce Griswold in July of 2014 and in its failure to timely respond to Blue Mountain's Force Majeure letter of May 2014 until February 2015 had agreed with Blue Mountain's position that the Ellis-Hall actions constituted an event of Force Majeure, or, at a minimum, is estopped to deny Blue Mountain's Force Majeure position; (iv) by stating in February of 2015 that an event of Force Majeure had not occurred, PacifiCorp breached its obligations under the PPA and is in default under the PPA due to such actions; (v) PacifiCorp intends to attempt to cause the termination of the PPA for economic reasons, avoidance of potential PSC disallowance of reimbursement of PacifiCorp costs from mismanagement of its PPA administration responsibilities, and the avoidance of further claims and issues with Ellis-Hall and in furtherance of those desires, has acted in bad faith to attempt to drag out Blue Mountain's ability to complete the Blue Mountain project before the PTC deadline of December 31, 2016, and (vi) Blue Mountain is entitled to significant damages due to PacifiCorp's breach of the PPA and bad faith and intentional actions.

90. Judge Cassell held a mediation conference between Blue Mountain and PacifiCorp on August 11, 2015.

91. The parties were unable to resolve the dispute during the mediation conference. Therefore, as agreed upon beforehand by the parties, Judge Cassell prepared a "Proposed Resolution of Dispute" following the hearing which is dated August 18, 2015. Judge Cassell prepared his Proposed Resolution after considering the arguments submitted by both sides both in their briefs and during the mediation conference and PacifiCorp's Notice of Termination of the

PPA and the basis for the termination asserted by PacifiCorp. Judge Cassell agreed with Blue Mountain's position, found that a Force Majeure event had occurred because of the delays caused to the Project by Ellis-Hall's various challenges to the validity of Blue Mountain's PPA based on allegations of misconduct by PacifiCorp, and urged PacifiCorp to push back the deadline. He determined that "[i]n light of the litigation risk (and the cost of litigation), PacifiCorp should pay \$4,400,00 to Blue Mountain on or before October 20, 2015."

92. Judge Cassell set the payment at \$4.4 Million based on his review of the facts and the PPA, as the price, in effect, PacifiCorp was required to pay to purchase the PPA from Blue Mountain.

93. PacifiCorp rejected Judge Cassell's recommendations and refused to have any further dealings with Blue Mountain. Indeed, on August 18, 2015 – the same day that Judge Cassell issued his recommendations – PacifiCorp sent a letter to Blue Mountain formally affirming PacifiCorp's termination of the PPA.

94. The course of events in January and February of 2015 severely damaged Blue Mountain and its shareholders. Rather than being able to continue the development of the project and move toward securing turbines and complete the project prior to the expiration of the PTC, which is essential to the viability of the Project, the actions of PacifiCorp have effectively killed any ability of Blue Mountain to have serious talks of any kind with turbine vendors, contractors or other equity partners or potential project builders. The Project is not viable without qualifying for the PTC and no one will contract with, provide equipment to or partner in a project where the off-taker of the primary project assets is asserting that the deadline for completion (which is now impossible to meet) is not subject to adjustment.

95. PacifiCorp's decision to wait until January/February of 2015 to spring this on Blue Mountain smacks of bad faith. Had PacifiCorp objected to the Force Majeure claim in May of 2014, Blue Mountain would have had time to have the matter decided in court and could have then proceeded with its project to be completed before the PTC deadline for completion of construction (which has now been extended). However, Blue Mountain understands that PacifiCorp, instead, intentionally misled Blue Mountain, allowing Blue Mountain to believe that PacifiCorp agreed that the Force Majeure clause applied and the new deadline for completion was extended – only to reverse course on Blue Mountain in January of 2015 and claim that no Force Majeure had occurred, knowing that it would effectively shut down any turbine supply, construction or potential third party partner efforts Blue Mountain had underway.

96. Furthermore, PacifiCorp's April 8<sup>th</sup> and April 22<sup>nd</sup>, 2015 Notices of Termination, which were based on its claim that Blue Mountain had failed to post security within the 30-day deadline of approval of the PPA by the PSC, were improper because they failed to account for continuing and ongoing challenges to the PPA (including the LGIA entered into thereunder) and the fact that Blue Mountain had provided a notice of dispute resolution.

97. Blue Mountain would have obtained the financing for the Project, including the Security Deposit, shortly after the PSC had initially approved the PPA had Ellis-Hall not continued to challenge its validity both before the PSC and Utah Supreme Court (and then later before FERC). As PacifiCorp was fully aware, the delays caused by Ellis-Hall's challenges to the PPA pushed the timing of the Project so far back that Blue Mountain no longer had the ability to obtain the purchase of the wind farm turbines in time to meet the PTC deadline.

98. Blue Mountain was diligent in working towards completing the Project. It invested nearly \$6 million into the Project, including the completion of a substantial portion of the construction required on the Project. However, when Ellis-Hall refused to stop pursuit of its challenge to the validity and enforceability of Blue Mountain's (and Latigo's) PPA based on allegations of misconduct by PacifiCorp and initiated proceedings before the Utah Supreme Court attacking, among other things, the PSC's approval of the PPA, Blue Mountain reasonably determined that completion on the Project would not happen while the validity of its PPA was under challenge. In addition, Ellis-Hall's continued challenge to the validity of Blue Mountain's PPA resulted in Blue Mountain being unable to complete construction of Project including the purchase of the turbines to be used at the wind farm.

99. The delays caused by Ellis-Hall's repeated challenges to the validity of Blue Mountain's PPA are precisely the type of delay that Blue Mountain and PacifiCorp intended would be covered as an event of Force Majeure under the PPA when they agreed to the broad Force Majeure language contained in the PPA. When Ellis-Hall's challenges to the validity of the PPA are analyzed applying each of the four elements required to trigger a Force Majeure event under Section 14.1 of the PPA, it is clear that these challenges qualify as an event of Force Majeure for purposes of the PPA.

### **Summary of PacifiCorp's Wrongful Conduct**

100. The actions taken by PacifiCorp beginning in January of 2015 evidence an intentional pattern of attempting to prevent Blue Mountain from performing the PPA and to cause the termination of the PPA in bad faith for PacifiCorp's own financial benefit. PacifiCorp's clearly had a financial motive to cause the termination of the PPA. For example, the price of power for

contracts similar to Blue Mountain's PPA dropped from about \$61 per MWh to down around \$48 per MWh under the updated pricing methodologies established by PacifiCorp (and approved by the PSC) from when the PSC originally approved the PPA and January of 2015. Thus, a termination by PacifiCorp of the PPA (notwithstanding the fact that Blue Mountain had, based on the existence of the PPA, invested nearly approximately \$6 million in the Project) would reduce PacifiCorp's payments by an estimated \$60 million to \$70 million NPV thereby giving PacifiCorp commercial advantages in future rate cases. In addition, a termination of Blue Mountain's PPA would assist PacifiCorp avoid scrutiny of its administrative actions involving Blue Mountain altogether and assist it in deflecting the accusations and criticisms Ellis-Hall had continued to level at PacifiCorp and its officers and employees.

101. PacifiCorp's bad faith and intentional efforts to cause the termination of the PPA is evidenced in several facts. First, PacifiCorp waited until January 2015 to object to the Force Majeure claim. This virtually assured that it would be too late for Blue Mountain to find the necessary turbines, contractor and partner to construct its project. If PacifiCorp had actually objected to or disagreed with the Force Majeure claim, it would have done so in May of 2014 when it received Blue Mountain's letter or during its subsequent July 2014 telephone conversation when the Force Majeure issue was specifically discussed. However, PacifiCorp intentionally waited until its rejection of the Force Majeure claim would do the most damage to Blue Mountain and the Project and make it most likely that the project could not proceed. It is also important to note that PacifiCorp took no action to communicate that it had changed its position regarding the Force Majeure issue until Blue Mountain contacted it in January 2015 to make a legitimate and reasonable request to extend the dates of the PPA. By remaining silent, PacifiCorp gained every

advantage and leverage over Blue Mountain as PacifiCorp was able to learn that extension of the PPA dates was commercially important and likely critical for the Project to succeed.

102. Second, PacifiCorp's unjustified denial of the claim for Force Majeure, is in and of itself, an act of bad faith. There was no basis for denying the requested confirmation of the extension of the Scheduled Commercial Operation Date beyond November 30, 2015. Notwithstanding this lack of basis, PacifiCorp was well aware of the fact that a mere denial of the claim of Force Majeure, let alone its termination of the PPA, would cause third party suppliers, partners, and turbine vendors not to deal with Blue Mountain on this Project.

103. Third, PacifiCorp's acquisition of confidential information under the highly misleading and fraudulent guise of negotiations for the purchase of Blue Mountain based on its representation that it wished to make the purchase is further evidence of bad faith by PacifiCorp.

104. PacifiCorp clearly made known to Blue Mountain that the sole purpose of its claimed intention to purchase the Project was to terminate the PPA.

105. Fourth, PacifiCorp's demands for a Security Deposit (after its change of position regarding Force Majeure) and its Notice of Termination of the PPA, after Blue Mountain provided formal notice to PacifiCorp in January 2015 to extend the dates in the PPA to account for the events of Force Majeure (and before any security was due under the terms of the PPA), and during the pendency of the dispute resolution process required under the PPA constitutes an egregious act of bad faith and denied Blue Mountain its rights under the PPA.

106. All of the foregoing acts resulted in Blue Mountain being prevented from completing the Project on time or alternatively, partnering with a third party creditworthy entity qualified to meet the Credit Requirements of the PPA.

107. As the foregoing makes clear, PacifiCorp executed a strategy of delay in a bad faith attempt to sabotage the Project so that it could manufacturer bogus grounds to cancel the PPA.

108. Under such circumstances, Blue Mountain's notice to extend the dates of the PPA based on Force Majeure events leading to formal approval of the PPA not occurring until December 2014 (which notice Blue Mountain provided to PacifiCorp in January 2015 before any security was due under the PPA), the existence of a second Force Majeure event ongoing at FERC at the time PacifiCorp terminated the PPA (for which Blue Mountain provided notice to PacifiCorp on February 24, 2015 (Force Majeure No. 2)), and due to PacifiCorp's actions, Blue Mountain was not required to post cash security and meet the requirements of Section 8.1, Project Development Security, thereby making the Notice of Default and Notice of Termination null and void.

### **RELIEF REQUESTED**

#### **COUNT I – DECLARATORY RELIEF**

109. PacifiCorp, acting in extreme bad faith and in its own self-interest, without basis terminated Blue Mountain's PPA after changing its position that an event of Force Majeure had occurred that met the requirements set forth in PPA for Force Majeure resulting from repeated challenges to the validity of the PPA, which delayed final approval.

110. PacifiCorp's refusal to comply with the terms of the PPA regarding Force Majeure, its change in position regarding the existence of an event of Force Majeure, its misleading intent to buy the Project and PPA from Blue Mountain itself causing further delay, and its termination of the PPA after submitting an untimely demand for a Security Deposit while Blue Mountain was exercising its dispute resolution rights under the PPA, are not in the public interest.

111. Blue Mountain is entitled to a PSC order declaring that:

- a. The approval of the PPA by the PSC became final on November 21, 2014 when the Utah Supreme Court wrote its final opinion on Ellis-Hall's petition challenging the PPA;
- b. PacifiCorp failed to comply with the terms of the PPA when it denied a legitimate claim for an event of Force Majeure resulting from Ellis-Hall's repeated challenges to the PPA;
- c. PacifiCorp further delayed Blue Mountain's performance under the PPA to complete the Project by the deadlines set forth therein by representing to Blue Mountain that it wished to purchase the Project;
- d. Because of the Force Majeure event and PacifiCorp's representation that it desired to purchase the Project, PacifiCorp's demand for a Security Deposit from Blue Mountain in April 2015 was not timely and was unreasonable given the delays in the Project caused by the actions of PacifiCorp;
- e. PacifiCorp prevented Blue Mountain from exercising its rights relating to dispute resolution under the PPA by making its untimely request for a Security Deposit;
- f. PacifiCorp's termination of the PPA due to Blue Mountain's failure to provide the Security Deposit at the time requested by PacifiCorp was improper and violated the terms of the PPA and required the approval of the PSC.

## **COUNT II – INJUNCTIVE RELIEF**

112. Because of PacifiCorp's violations of the PPA, a power purchase agreement approved by the PSC, its actions relating to Ellis-Hall which resulted in a substantial delay in the

acquisition of final approval of the PPA, PacifiCorp's demand to buy the PPA and Project, and an event of Force Majeure under the terms of the PPA, and PacifiCorp's unlawful termination of the PPA, Blue Mountain was unable to complete the Project by the deadline set forth in the PPA and lost its entire investment in the Project of approximately \$6 million and a further \$19 million of shareholder losses.

113. Blue Mountain should be provided an opportunity to complete the Project under the same time frame (i.e. number of months) as set forth in the PPA with the dates being amended to account for all the delays caused by PacifiCorp's wrongful actions, including its unlawful termination of the PPA, and provide for an extension of all deadlines of the PPA such that the deadlines shall be set as though the PPA was entered into as of the date the PSC enters an order in this matter. A pricing adjustment to account for economic losses caused by PacifiCorp should also be incorporated in the PPA.

114. PacifiCorp shall be required to purchase power from Blue Mountain in accordance with the avoided cost methodology set forth in the PPA, with an increase in price to cover the increased costs caused by PacifiCorp.

115. In the alternative, the PSC should compel PacifiCorp, by exercising its injunctive powers, to purchase the PPA from Blue Mountain for the original stated amount of \$25 Million and thereby benefit Utah ratepayers by retiring the PPA or from the costs of a legal action in the courts, which would include claims for monetary, punitive and exemplary damages exceeding the total amount of the PPA.

DATED this 23<sup>rd</sup> day of November, 2016.

GREENBRIAR CAPITAL CORP. d/b/a  
BLUE MOUNTAIN POWER PARTNERS,  
LLC

By: /s/ Jeff Ciachurski  
Jeff Ciachurski, Chief Executive Officer

**CERTIFICATE OF SERVICE**

I certify that I have served on the following persons a true and correct copy of the foregoing COMPLAINT AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF AND REQUEST FOR AGENCY ACTION by E-Mail this 23<sup>rd</sup> day of November, 2016.

Public Service Commission: [psc@utah.gov](mailto:psc@utah.gov) (via E-mail)

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*/s/ Jeff Ciachurski*