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VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1829 – In the Matter of Blue Marmot V, LLC vs Portland General Electric Company

Attention Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company's Reply in Support of Motion to Open New Docket for Further Proceedings.

Please contact this office with any questions.

Sincerely,

Wendy McIndoo
Office Manager

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1829

Blue Marmot V LLC
Blue Marmot VI LLC
Blue Marmot VII LLC
Blue Marmot VIII LLC
Blue Marmot IX LLC,
Complainants,

v.

Portland General Electric Company,
Defendant.

PORTLAND GENERAL ELECTRIC
COMPANY'S REPLY IN SUPPORT OF
MOTION TO OPEN NEW DOCKET FOR
FURTHER PROCEEDINGS

1 In its Motion to Open New Docket for Further Proceedings, Portland General Electric
2 Company (PGE) requested that the Public Utility Commission of Oregon (Commission) open a
3 new docket to consider the above-captioned Blue Marmot LLCs' (Blue Marmots) request for an
4 extension of the commercial operation date (COD) for each of their projects.¹ In response, the
5 Blue Marmots argue that opening a new docket (1) would make it more time-consuming or costly
6 for them to introduce evidence, (2) would not help limit the scope of the proceeding, which they
7 agree is narrow, and (3) could allow PGE to argue that their COD-extension claim is precluded.²
8 While the parties appear to be in agreement regarding the narrow scope of further proceedings, the
9 Blue Marmots' evidentiary and claim-preclusion concerns are unfounded and do not support
10 litigating their COD-extension request in Phase II of UM 1829. Instead, opening a new docket
11 remains the best way to ensure an efficient and orderly resolution of the COD issue.

¹ Portland General Electric Company's Motion to Open New Docket for Further Proceedings at 1 (Dec. 17, 2019).

² Blue Marmots' Response to PGE's Motion to Open a New Docket for Further Proceedings (hereinafter, "Response") at 4-10 (Dec. 20, 2019).

1 **A. Requiring evidence to be submitted into a new docket would not cause unnecessary**
2 **cost or delay, and instead would benefit the parties and the Commission by presenting**
3 **a clear and concise record.**

4 The Blue Marmots' primary concerns about opening a new docket appear to be that PGE
5 might (a) object to the introduction of evidence it believes is irrelevant, or (b) insist that proper
6 procedures be observed in the taking of official notice, as it did in UM 1805.³ The Blue Marmots
7 appear to believe that they can avoid any evidentiary objections by proceeding in Phase II, during
8 which they may simply cite to any evidence within the existing UM 1829 record—without needing
9 to provide PGE with notice or demonstrate that the evidence is relevant to the narrow, COD-
10 extension issue.⁴ They suggest that, only by proceeding as Phase II, will they have “certainty”
11 that evidence from the existing UM 1829 record will be admitted.⁵ On the contrary, however,
12 proceeding as Phase II would not relieve the Blue Marmots of their obligation to designate the
13 evidence on which they rely—during the evidentiary phase of the COD proceeding—so that PGE
14 is placed on notice, can evaluate the relevance of the offered evidence, and has an opportunity to
15 offer its own evidence in response. Therefore, opening a new docket would not cause any
16 increased cost or delay due to evidentiary matters, as compared to proceeding as Phase II.

17 First, the Blue Marmots cannot avoid PGE's right to insist on the relevance of the evidence
18 offered simply by litigating the COD issue in Phase II. Indeed, it makes no sense for the Blue
19 Marmots to agree that Phase II should be limited to the narrow issue of their request to extend their
20 CODs,⁶ while suggesting that they may offer any evidence from the record below, relevant or not.⁷
21 The Commission's rules require that evidence be relevant and that an objection to the introduction
22 of evidence “must state the grounds for the objection at the time the evidence is offered.”⁸ Because

³ See Blue Marmots' Response at 5.

⁴ Blue Marmots' Response at 6 (“If the Commission keeps the case in a Phase II, then all PGE and the Blue Marmots need to do is cite to evidence already in the record...”) and (“The Blue Marmots are not interested in re-litigating the relevance of evidence already in the record of Docket No. UM 1829...”).

⁵ See Blue Marmots' Response at 5.

⁶ Blue Marmots' Response at 8.

⁷ See Blue Marmots' Response at 6.

⁸ OAR 860-001-0450.

1 the Blue Marmots did not request COD extensions until after the UM 1829 record had been
2 closed,⁹ PGE was unable to evaluate evidence offered in UM 1829 for relevance to the COD-
3 extension request—much less object to admissibility on this ground. Therefore, even if the
4 Commission were to require the parties to proceed as Phase II, the Blue Marmots would need to
5 specifically identify the evidence from the UM 1829 Phase I record that they seek to rely upon,
6 and PGE would need an opportunity to respond.

7 Second, in UM 1805, PGE responded to a request for official notice of 70 documents from
8 other dockets, which was made after the briefing had concluded and would have deprived PGE of
9 an opportunity to respond to the noticed materials with its own evidence.¹⁰ In response, PGE
10 simply requested that the Commission provide PGE with notice and an opportunity to respond—
11 if and when the Commission decided to rely upon any of the offered documents—rather than
12 requiring PGE to review and respond to each of the 70 offered documents at the outset.¹¹ PGE’s
13 position in UM 1805 was entirely reasonable and consistent with the Commission’s rule regarding
14 official notice, which provides important procedural protections that are necessary to due
15 process.¹² Here, the Blue Marmots cannot avoid PGE’s right to understand and respond to the
16 evidence on which the Blue Marmots rely simply by proceeding in Phase II and incorporating the
17 entire UM 1829 record. And proceeding in Phase II would not eliminate any possibility of
18 evidentiary disputes, as the Blue Marmots suggest.¹³

19 Importantly, proceeding as Phase II and relying upon the entire UM 1829 record also will
20 not save time or expense in developing the COD-extension record, because there is unlikely to be
21 significant material relevant to the COD issue in the existing UM 1829 record, and both parties

⁹ See Hearing Transcript, Vol. II at 318 (Dec. 13, 2018) (“ALJ ARLOW: Any other matters that you wish to submit to the evidentiary record before we close it? . . . Then I guess we can close the evidentiary record[.]”); Blue Marmots’ Opening Brief at 76 (Feb. 14, 2019) (requesting COD extension).

¹⁰ See *Northwest and Intermountain Power Producers Coalition et al. v. Portland General Electric Company*, Docket UM 1805, Motion for Official Notice (May 30, 2017) and PGE’s Response to Motion for Official Notice (June 14, 2017).

¹¹ Docket UM 1805, PGE’s Response to Motion for Official Notice at 3.

¹² See OAR 860-001-0460.

¹³ See Blue Marmots’ Response at 6.

1 presumably will choose to submit new evidence to support their positions. The Blue Marmots did
2 not request COD extensions until they filed their post-hearing Opening Brief,¹⁴ after the record
3 had been closed.¹⁵ Therefore, neither party submitted evidence into the record specifically
4 regarding the COD-extension request, and the Commission concluded that “there is insufficient
5 evidence on the record to demonstrate that achievement of the Blue Marmots’ stated CODs is not
6 possible due to litigation.”¹⁶ To the extent there *is* relevant evidence in the existing record, it is
7 not voluminous, and therefore it would not be burdensome for the parties to re-submit such
8 evidence into the record in a new docket.

9 Moreover, opening a new docket would benefit both parties and the Commission by
10 presenting the evidence related to the COD-extension request in a clean and concise format—
11 separate from the lengthy UM 1829 record, which addresses numerous complex issues. The
12 parties filed 14 separate pieces of testimony in UM 1829, along with many exhibits, and
13 participated in a two-day evidentiary hearing.¹⁷ The evidence in the UM 1829 record addresses
14 contracting issues, Energy Imbalance Market issues, and transmission issues, and it would be
15 burdensome to require the Commission and parties to wade through this voluminous evidence to
16 review the limited portions that may be relevant to resolving the COD-extension issue. In contrast,
17 opening a new docket would present the Commission and parties with a clearer and more concise
18 record, thus conserving resources.

19 **B. PGE will not argue that the Blue Marmots’ COD-extension claim is precluded simply**
20 **because it is presented in a new docket.**

21 The Blue Marmots also argue that opening a new docket could enable PGE to assert claim
22 preclusion and bar the Blue Marmots from requesting COD extensions at all.¹⁸ This concern is

¹⁴ Blue Marmots’ Opening Brief at 76 (Feb. 14, 2019).

¹⁵ Hearing Transcript, Vol. II at 318 (Dec. 13, 2018) (“ALJ ARLOW: Any other matters that you wish to submit to the evidentiary record before we close it? . . . Then I guess we can close the evidentiary record[.]”).

¹⁶ Order No. 19-322 at 20 (Sept. 30, 2019).

¹⁷ *See* Parties’ Joint Motion to Admit Pre-Filed Testimony and Exhibits (Dec. 11, 2018); Hearing Transcript (Dec. 12-13, 2018).

¹⁸ Blue Marmots’ Response at 9-10.

1 unfounded, as PGE has never considered making such an argument—much less suggested to the
2 Blue Marmots that it might do so. Nor could PGE assert claim preclusion in good faith, given that
3 the Commission expressly provided the Blue Marmots with an opportunity to litigate their
4 CODs.¹⁹ The Blue Marmots’ claim preclusion fears do not support proceeding in Phase II.

5 **C. The Commission should clarify the narrow scope of the further proceedings.**

6 PGE’s initial concerns underlying its Motion to Open New Docket were the potential that
7 the scope of additional proceedings could be expanded or the finality of the Commission’s order
8 compromised. These concern were fueled by the Blue Marmots’ suggestion that additional issues
9 raised on reconsideration could also be addressed in Phase II,²⁰ and by their failure to acknowledge
10 that the Commission issued a final order in UM 1829.²¹ The Blue Marmots’ Response now
11 clarifies that they agree the additional proceedings will be focused upon “a single unresolved
12 question,”²² and that they do not seek to re-litigate resolved issues.²³ PGE appreciates this
13 clarification and requests that the Commission reflect the narrow scope of the additional
14 proceedings and the finality of Order No. 19-322 in the order resolving this Motion.²⁴

15 **D. Conclusion.**

16 The Blue Marmots have not articulated any persuasive reason why further proceedings
17 must occur in Phase II, and opening a new docket to address the Blue Marmots’ COD-extension

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¹⁹ Order No. 19-322 at 20.

²⁰ Blue Marmots’ Application for Reconsideration at 3 (Nov. 27, 2019).

²¹ See Order No. 19-322 at 24 (“A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.”); ORS 183.480 (referring to judicial review of an agency’s “final order”).

²² Blue Marmots’ Response at 7.

²³ Blue Marmots’ Response at 8.

²⁴ In their Response at 8, the Blue Marmots state that they “are willing to agree that the Commission could issue an order specifically identifying the scope of the proceeding and that it would be inappropriate to re-litigate any issues.”

- 1 request is the best way to efficiently resolve the remaining narrow dispute. For these reasons, PGE
- 2 respectfully requests that the Commission grant its Motion.

Dated December 27, 2019

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