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March 6, 2020

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, Phase II – In the Matter of Blue Marmots, 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 First Motion to Compel.

Please contact this office with any questions.

Sincerely,

Wendy McIndoo
Office Manager

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1829 – PHASE II

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 FIRST MOTION TO COMPEL**

Pursuant to the Administrative Law Judge's (ALJ) Rulings of February 24, 2020, and March 2, 2020, Portland General Electric Company (PGE or Company) submits this Reply in support of its Motion to Compel. The above-captioned Blue Marmot LLCs (collectively, Blue Marmots) have failed to establish good cause for the Public Utility Commission of Oregon (Commission) to limit or prevent disclosure of the information requested in PGE's Data Requests 1, 4, 8, and 12. The Blue Marmots' ongoing refusal to provide complete responses to reasonable discovery requests has severely impeded PGE's preparation of its case. PGE's Response Testimony—its only round of testimony currently scheduled in Phase II of this case—is now just three weeks away, and PGE still has not received key information that it requested on several important issues. Therefore, PGE respectfully requests that the Commission require the Blue Marmots to promptly provide full responses to Data Requests 1, 4, 8, and 12.

I. INTRODUCTION

In this Phase II, the Blue Marmots request that the Commission extend the commercial operations dates (CODs) in the power purchase agreements (PPAs) for their qualifying facility (QF) projects by ***approximately four years*** from the dates they originally committed to when they

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established their legally enforceable obligations (LEOs). If their request is granted, by the time the Blue Marmots become operational, they will be receiving avoided cost prices that were set approximately seven years earlier—prices that are significantly higher than those paid to other projects coming on line at that same point in time. The Blue Marmots argue that these lengthy extensions are appropriate because the litigation in Phase I caused delays in their project development. However, given certain publicly available information discovered by PGE and confirmed by the Blue Marmots' Opening Testimony, PGE believes that factors other than the litigation were either wholly or significantly responsible for the delays at issue. In particular, PGE believes that certain critical and unreasonable decisions made by the Blue Marmots in their siting and interconnection processes—decisions that were not caused by the litigation—may have been the primary, if not sole, causes of their claimed need for a four-year extension. This view is consistent with and bolstered by PGE's belief that the Blue Marmots' expected profits may be so substantial that even the worst-case scenario presented by the Phase I litigation would not have caused a reasonable developer to slow down their projects to the degree that they would be unable to meet the CODs to which they had committed.

PGE has sought to explore the true causes for the delays in the Blue Marmots' project development by requesting information concerning (1) project decisions and challenges relating to siting and permitting; (2) project decisions and challenges relating to interconnection; and (3) the projects' anticipated profitability. All three categories of information would factor into a commercially reasonable developer's decision-making process and might independently have impacted the projects' development timelines. Unfortunately the Blue Marmots have repeatedly stymied PGE's efforts to evaluate the relevant facts and develop its theory of the case by raising meritless objections, which are based on a misunderstanding of the applicable legal standards, an artificially narrow interpretation of the issues in this case, unsupported claims of burdensomeness, faulty allegations of unavoidable harm, and baseless new claims that the Commission lacks authority to apply its own procedural rules to a QF complainant.

First, the requested communications between the Blue Marmots and two governmental permitting authorities—the Oregon Department of Energy/Energy Facility Siting Council (collectively, EFSC) and the Lake County Planning Department (Lake County)—are clearly discoverable, bearing directly on the causes for delays in the Blue Marmots' permitting process. While the Blue Marmots' fear that the requested information may be prejudicial could hypothetically support an argument that the information is *inadmissible*, it is not a proper objection to discovery. Moreover, the Blue Marmots' claim that the production of these communications is unduly burdensome does not withstand scrutiny. The Blue Marmots have ample resources and presumably have already compiled and reviewed the responsive communications in order to produce those that the Blue Marmots concede *are* relevant.

Second, the requested interconnection-related communications relate directly to the causes for delays in the interconnection process, and the Blue Marmots' assertion that they have already provided *some* communications in other data responses does not remove their obligation to provide *all* communications, as requested. Further, the Blue Marmots utterly fail to carry their burden of proving that this request is burdensome—making no effort to quantify the number of responsive documents or the time required to respond. In reality, PGE expects that compiling, reviewing, and producing the remaining documents—none of which could possibly be privileged—will be straightforward.

Third, PGE's requested data regarding the Blue Marmots' anticipated profits is necessary to understand whether it was commercially reasonable for the Blue Marmots to have delayed development pending litigation in which the worst-case outcome would have required them to pay an additional $14 million to deliver their output. The Blue Marmots had already committed to CODs when they established their LEOs, and having done so, they could reasonably have been expected to weigh expected profits of the projects against the potential outcomes of the litigation when determining whether to proceed with development. Therefore, the Blue Marmots' expected profits are directly relevant to a determination of whether the litigation actually did cause delays

in the project development schedule and if so, whether the delay was commercially reasonable. The Blue Marmots' claims to the contrary are therefore without basis. Moreover, the Blue Marmots' remaining objections to providing information regarding their expected profits misapply the discovery standard (which does not require a showing of need), overlook available procedural protections (which could prevent harmful dissemination of sensitive information), and dramatically misstate the Commission's jurisdiction (which includes the power to fairly and equitably resolve complaints). The Commission should compel disclosure of the requested information consistent with the clear dictates of its own rules and the Oregon Rules of Civil Procedure (ORCP).

II. BACKGROUND

A. Phase I Litigation

PGE identified a constraint at the PACW.PGE point of delivery (POD) after the Blue Marmots had executed PPAs.[1] PGE promptly notified the Blue Marmots by email that it would honor the Blue Marmots' avoided cost prices even if prices changed while the parties were resolving the delivery issue.[2] However, PGE did not countersign the PPAs,[3] and the Blue Marmots filed their complaints in April 2017.[4] In its Answer, PGE again confirmed its view that the Blue Marmots had established LEOs, thereby locking in their avoided cost prices.[5]

In their Phase I Opening Testimony, the Blue Marmots identified the cost of delivering their output to the alternate delivery point of BPAT.PGE as $14 million for the five projects over the life of the PPAs.[6] The parties also identified various upgrades that could be made to the PACW.PGE POD, but all were significantly more expensive than the Bonneville Power

[1] Phase I, PGE/100, Greene-Moore/8-9.
[2] Phase I, PGE/100, Greene-Moore/23.
[3] Phase I, PGE/100, Greene-Moore/8-9.
[4] Phase I, Blue Marmots' Complaints (Apr. 27, 2017).
[5] Phase I, PGE's Answer at 1.
[6] Phase I, Blue Marmot/100, Irvin/6; Blue Marmot/200, Talbott/11; Blue Marmot/300, Moyer/14.

Administration (BPA) delivery option.[7] The Commission resolved Phase I by granting four of the five Blue Marmots the right to deliver at the PACW.PGE POD.[8]

B. Phase II Issues

The Blue Marmots first requested COD extensions in their Prehearing Brief in Phase I, filed on November 30, 2018.[9] In its Order resolving Phase I, the Commission briefly addressed the Blue Marmots' belated request, stating:

> We conclude that there is insufficient evidence on the record to demonstrate that achievement of the Blue Marmots' stated CODs is not possible due to litigation, and accordingly we decline to order an extension. The Blue Marmots may assert such a claim following this order, and PGE will be entitled, as it requests in its reply brief, to a full evidentiary proceeding with discovery as we consider this question.[10]

Phase II commenced, and at the ALJ's request,[11] the parties jointly filed two issues for the Commission to consider in Phase II:

1. "Whether litigation caused commercially reasonable delays in the Blue Marmots' scheduled commercial operation dates listed in their partially executed PPAs?" and

2. "Should the Blue Marmots' scheduled commercial operation dates be extended and if so, what new dates should be included in the final executable PPAs that PGE must offer consistent with the final resolution of all issues in Phase II of UM 1829 or other subsequent proceedings?"[12]

C. Phase II Discovery

PGE served its first round of data requests on the Blue Marmots on January 23, 2020,[13] which, as the Blue Marmots note, was prior to the Blue Marmots' testimony due date.[14] PGE served initial discovery requests at that time because PGE expected that it would need to conduct several rounds of discovery to fully understand the facts surrounding the Blue Marmots'

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[7] *See, e.g.*, Phase I, PGE/100, Greene-Moore/20.
[8] Phase I, Order No. 19-322 at 15-16 (Sept. 30, 2019).
[9] Phase I, Blue Marmots' Prehearing Brief at 41 (Nov. 30, 2018).
[10] Order No. 19-322 at 20.
[11] Administrative Specialist's email correspondence to UM 1829 Parties re: Request for Joint Issues List (Dec. 30, 2019).
[12] Phase II, Joint Issues List at 1 (Jan. 2, 2020).
[13] Attachment A to Motion to Compel, PGE's First Set of Data Requests (Jan. 23, 2020).
[14] Blue Marmots' Response to PGE's First Motion to Compel at 6 (Mar. 2, 2020).

development, permitting, interconnection, and transmission-related issues. PGE was cognizant that it had limited time in which to conduct discovery and prepare testimony—and that PGE had just one round of testimony in which to fully present its case. However, PGE recognized that serving discovery at this time could pose challenges for the Blue Marmots, and when the parties conferred on January 27, counsel for the Blue Marmots expressed concern about the Blue Marmots' ability to respond to the data requests while finalizing their testimony. PGE's counsel responded that PGE understood and would agree to an extension if the Blue Marmots needed one. The Blue Marmots did not request an extension.

Four requests from PGE's first set of data requests remain at issue in this Motion to Compel:

- **PGE Data Request 1** Please provide all communications between EDPR/ Blue Marmots and Oregon Department of Energy (ODOE)/ Energy Facility Siting Council (EFSC).

- **PGE Data Request 4** Please provide all communications between EDPR/ Blue Marmots and Lake County Planning Department.

- **PGE Data Request 8** Assuming the Blue Marmots were able to achieve their original CODs, please provide the total expected profit, by year, not adjusted for present value or inflation, expected over the term of the Power Purchase Agreements (PPA).

- **PGE Data Request 12** Please provide all communications between EDPR and PacifiCorp Transmission regarding the Blue Marmots' interconnection process, including but not limited to executed study agreements, questions and responses, etc.

On January 27, counsel for PGE and the Blue Marmots conferred regarding Data Request 8.[15] Counsel for the Blue Marmots also noted at that time that some of PGE's requests for "all communications" could be burdensome but that the Blue Marmots had not yet evaluated how much material was responsive to each request. However, the Blue Marmots ultimately did not confer regarding objections to Data Requests 1, 4 or 12 prior to providing their initial responses on February 6. Following two letters from PGE regarding the inadequacy of the responses and

[15] And Data Requests 7 and 18, which are not at issue in this Motion to Compel.

objections (sent on February 7 and 11[16]) and a follow-up phone call (on February 14), the Blue Marmots supplemented their objections to Data Requests 1 and 4 and their response to Data Request 12 on February 19.[17] The Blue Marmots continued to refuse to provide any response to Data Request 8.

In sum, the Blue Marmots have provided the following responses to the data requests at issue in this Motion:

- **PGE Data Request 1**: Nine emails between EDPR and EFSC that "focus[] on permitting timing and schedule."
- **PGE Data Request 4**: Seven emails between EDPR and Lake County that "focus[] on permitting timing and schedule."
- **PGE Data Request 8**: No response provided.
- **PGE Data Request 12**: One email from PacifiCorp regarding deferral of EDPR's transmission service request and a screenshot depicting EDPR's transmission service reservations.

III. LEGAL STANDARDS

The scope of discovery extends to any matter, not privileged, that is relevant to a claim or defense of either party and also information "reasonably calculated to lead to the discovery of admissible evidence," even if the specific evidence sought in discovery will be inadmissible.[18] Thus, an argument that evidence is inadmissible alone is not a sufficient basis for refusing to respond to discovery. Evidence is relevant if it "tend[s] to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence."[19]

[16] *See* Attachment C to PGE's Motion to Compel, Letter to Mr. Sanger (Feb. 7, 2020); Attachment D to PGE's Motion to Compel, Letter to Mr. Sanger (Feb. 11, 2020).
[17] The Blue Marmots also supplemented the responses and objections to other data requests that are not at issue in this Motion.
[18] ORCP 36(B)(1). The ORCPs apply in Commission proceedings unless they are inconsistent with Commission rules, a Commission order, or an ALJ's ruling. OAR 860-001-0000(1).
[19] OAR 860-001-450(1)(a); see also ORS 40.150 (Oregon Evidence Code 401).

The Commission's rules also provide that discovery that is "unreasonably cumulative, duplicative, burdensome, or overly broad is not allowed[.]"[20] In evaluating discovery requests against a claim that the request is burdensome or overly broad, the Commission will consider the needs of the case, the resources available to the parties, and the importance of the issues to which the discovery relates.[21] Importantly, the party seeking to limit its responses to discovery bears the burden of showing good cause for the limitation.[22]

Under the Commission's rules, "Parties must make every effort to engage in cooperative informal discovery and to resolve disputes themselves. If a party receives a data request that is likely to lead to a discovery dispute, then that party must inform the requesting party of the dispute as soon as practicable and attempt to resolve it informally."[23]

IV. DISCUSSION

A. The Commission should compel production of all communications with permitting agencies (Data Requests 1 and 4).

PGE sought all communications between EDPR and EFSC (Data Request 1) and between EDPR and Lake County (Data Request 4).[24] Although PGE requested *all* correspondence, the Blue Marmots stated that they would provide only those emails that they judged to be relevant to "permitting timing and scheduling,"[25] and as a result provided just nine emails to or from EFSC and seven emails to or from Lake County.

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[20] OAR 860-001-0500(2).
[21] OAR 860-001-0500(1); *Columbia Basin Elec. Coop. v. Umatilla Elec. Coop. Re Wheatridge Wind Project*, Docket UM 1823, Ruling at 3-4 (June 16, 2017).
[22] *See Lindell v. Kalugin*, 353 Or 338, 349-50 (2013) ("Ordinarily, the party seeking relief bears the burden of persuasion. . . . Consistently with that ordinary allocation of the burden of persuasion, the [ORCP] provide that any party who wishes to impose conditions on discovery may do so by means of a motion for a protective order under ORCP 36. That rule . . . provides that the party seeking an order 'that discovery may be had only on specified terms and conditions' must establish 'good cause' for those conditions. ORCP 36 C.").
[23] OAR 860-001-0500(5).
[24] Attachment A to Motion to Compel at 1.
[25] Attachment B to Motion to Compel at 1-2, Blue Marmots' Responses to PGE's First Set of Data Requests (Feb. 6, 2020).

1. The information PGE seeks to discover is directly relevant to this case.

The Blue Marmots object that "all communications" with EFSC and Lake County are not relevant,[26] claiming instead that only "evidence of the permitting timing and schedule is relevant."[27] The Blue Marmots' relevance objection is based on their incorrect belief that any delays in their projects' development caused by factors other than the litigation—for example, siting, permitting, or interconnection challenges—are "completely outside the scope of the very limited issues in Phase II."[28] It seems the Blue Marmots believe that they can satisfy their burden of proof and receive COD extensions simply by *claiming* that the litigation caused delays—essentially limiting the evidence in this proceeding to two facts: (1) the parties engaged in litigation, and (2) the Blue Marmots' development was delayed. The Blue Marmots argue that PGE has no need or right to inquire further into other possible reasons for delay.[29]

On the contrary, whether other factors caused or contributed to delay is plainly within the scope of information necessary to understand both whether *litigation* caused delay and whether the Blue Marmots' CODs should be extended.[30] When causation is at issue in a case, a party is entitled to conduct discovery that is reasonably calculated to uncover evidence supporting alternative theories of causation.[31] For example, in a medical malpractice case in which the parties disputed whether side effects from the defendant's medical treatment caused the plaintiff's emotional distress, the Court of Appeals held that the defendant was entitled to discover the plaintiff's psychological records so that he could investigate whether there were other factors that could have independently caused or contributed to the plaintiff's emotional distress.[32]

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[26] Response at 12.
[27] Response at 11.
[28] Response at 11.
[29] Response at 11.
[30] Joint Issues List at 1.
[31] *See Baker v. English*, 134 Or App 43, 45-46 (1995), *vac'd on other grounds*, 324 Or 585 (1997).
[32] *Id.* at 45-47.

Similarly here, to evaluate causation, it is necessary for PGE and the Commission to understand whether there were other factors that caused the delays—such as siting, permitting, or interconnection challenges. However, without discovery regarding other potential causes, it is impossible to determine whether the litigation was the actual cause, and PGE is entirely within its rights to probe the accuracy of the Blue Marmots' statement that it was the litigation that caused the delay. Importantly, even accepting for the sake of argument that the Phase I litigation caused some degree of delay, it is nevertheless important to understand if other factors significantly contributed to or extended the delay, particularly in view of the fact that the Blue Marmots are seeking to extend their CODs for a period longer than the length of the litigation. If, for example, the Blue Marmots' construction permits would have been delayed 18 months even in the absence of litigation due to the presence of endangered species in the area of their projects, then that information would be relevant to assessing whether litigation caused delays.

The Blue Marmots assert that PGE should not be allowed to litigate about "hypothetical" issues that could have resulted in the Blue Marmots not meeting their CODs.[33] PGE has no wish to argue about hypotheticals, which is why PGE is reasonably requesting that the Blue Marmots provide information to help PGE understand their permitting and siting process to date.

Ironically, even if the Blue Marmots were entitled to disclose only a limited subset of correspondence, the Blue Marmots have not actually provided the subset they define as relevant—namely, "*all* correspondence regarding permitting timing and scheduling."[34] For instance, Mr. Talbott testified that, "[i]n November 2018[,] the Blue Marmots conveyed to [the Oregon Department of Energy] staff that they would be placing on hold their work with EFSC, and

[33] Response at 12. The Blue Marmots also suggest, without explanation, that "the Commission has no interest in (or jurisdiction over) the litigation of" factors that could have affected their ability to achieve their CODs. *Id.* Given that the CODs are a term of the Public Utilities Regulatory Policies Act (PURPA) PPAs and that the Commission has ordered a "full evidentiary proceeding" to evaluate the Blue Marmots' request to extend their CODs, PGE does not agree with this assertion.

[34] Response at 12 (emphasis original).

suspending the [Notice of Intent] submitted [in] January 2018."[35] However, the Blue Marmots did not provide *any* communications between the Blue Marmots and EFSC between May 2018 and November 2019. Thus, the Blue Marmots have failed to provide even those communications referenced in their testimony—communications that are plainly relevant.

This concerning example emphasizes the difficult position PGE would be placed in if the Blue Marmots were permitted to select a limited subset of requested information to produce. PGE would be forced to simply accept the Blue Marmots' judgment regarding what is or is not relevant and would have no way of knowing whether additional information that could be helpful to PGE's case exists in the 300 or more emails that the Blue Marmots are refusing to produce.[36] Such an approach to discovery would be fundamentally unfair, depriving PGE of an opportunity to explore the key issue of causation in this case. Consistent with ORCP 36, the information PGE requests is relevant or reasonably calculated to lead to the discovery of admissible evidence, and the Blue Marmots should be required to respond.

2. The possibility that the probative value of evidence may be outweighed by the risk of confusion or prejudice is not a valid basis for refusing to provide discovery.

Even if the additional correspondence PGE seeks might lead to admissible evidence, the Blue Marmots oppose production "on the grounds it could confuse the issues in a way that is prejudicial to the Blue Marmots."[37] The Blue Marmots assert that the probative value of any additional admissible evidence is "substantially outweighed by the risk that the evidence produced could be misleading, unfairly construed and prejudicial to the Blue Marmots."[38] As an initial matter, PGE notes that the Blue Marmots' argument that the information is "prejudicial"[39] and "potentially harmful"[40] appears to amount to a concession that (1) the Blue Marmots have already

[35] Blue Marmot/900, Talbott/24.
[36] *See* Response at 13.
[37] Response at 13.
[38] Response at 13.
[39] Response at 13.
[40] Response at 11.

obtained and reviewed the correspondence—calling into question their burdensomeness claim, and (2) the information they wish to shield from discovery is relevant and damaging to the Blue Marmots' case.

The Blue Marmots correctly note that relevant evidence may be excluded from admission into evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.[41] However, the Blue Marmots incorrectly seek to apply this *admissibility* standard as a shield in the *discovery* process. In the medical malpractice case discussed above, the trial court had denied the defendant's motion to compel, stating that the psychological records sought "may be relevant [but] would be highly prejudicial to the plaintiff and such prejudice would outweigh the probative value of the evidence."[42] The Court of Appeals reversed, finding that the trial court erred by denying discovery based on its assessment that the material would not be admissible.[43] Here, it would similarly be premature to deny PGE's requested discovery based on a finding that the evidence might not be admissible.[44] PGE is absolutely entitled to obtain and review the Blue Marmots' correspondence with EFSC and Lake County to determine whether it supports PGE's theory of the case. In the event that PGE decides to include any such evidence in its testimony, then the ALJ can determine at that time whether the evidence should be admitted.

3. The requested information is not overly broad or unduly burdensome to produce.

The Blue Marmots also argue that PGE's Data Requests 1 and 4 are overly broad because PGE "provided no limitations in terms of time frame or subject matter."[45] Notably, the Blue Marmots did not confer with PGE regarding an alternative proposal that would be more limited or

[41] Response at 8 (quoting OAR 860-001-0450(1)).
[42] *Baker*, 134 Or App at 46.
[43] *Id.* at 47.
[44] ORCP 36 (B)(1) ("It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").
[45] Response at 12-13.

less burdensome.[46] The Oregon Court of Appeals has recognized that a "request for discovery must often be couched in broad terms, because the significance of the material cannot always be determined until it has been inspected."[47] Absent additional information from the Blue Marmots regarding the nature of their communications with EFSC and Lake County, PGE believes that any correspondence with these permitting authorities could be relevant to understanding timing and actual or potential delays—even correspondence that is not specific to the schedule. Moreover, PGE assumes that it would be easier for the Blue Marmots to simply turn over all responsive emails rather than review them to isolate a specific subset.

The Blue Marmots also assert that production of the information requested in Data Requests 1 and 4 would be unduly burdensome because "the Blue Marmots could be forced to review at least over 300 emails" and also to "[a]scertain[] whether there are additional communications[.]"[48] As an initial matter, the Blue Marmots present the incorrect legal standard. The Blue Marmots claim that "PGE has failed to show that it is 'unable without undue hardship to obtain the substantial equivalent of the materials by other means.'"[49] This standard applies specifically when a party seeks to discover materials "prepared in anticipation of litigation or for trial."[50] It does not apply to discovery in general,[51] and PGE may obtain discovery into "any matter, not privileged, that is relevant" or "reasonably calculated to lead to the discovery of admissible evidence" unless the Blue Marmots establish good cause for limiting discovery.[52]

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[46] *See* OAR 860-001-0500(5) ("If a party receives a data request that is likely to lead to a discovery dispute, then that party must inform the requesting party of the dispute as soon as practicable and attempt to resolve it informally.").
[47] *Vaughan v. Taylor*, 79 Or App 359, 365 (1986) (citing 8 Wright & Miller, *Federal Practice and Procedure* § 2001 (1970)).
[48] Response at 12-13.
[49] Response at 13 (quoting ORCP 36B(3)(a)).
[50] ORCP 36B(3)(a).
[51] *See* ORCP 36B(1).
[52] *Id.*; *see also Lindell*, 353 Or at 350 ("Ordinarily, the party seeking relief bears the burden of persuasion. . . . Consistently with that ordinary allocation of the burden of persuasion, the [ORCP] provide that any party who

In evaluating a discovery request against a burdensomeness claim, the Commission will consider the needs of the case, the resources available to the parties, and the importance of the issues to which the discovery relates.[53] Here, the requested information relates to one of the key issues in this case—what caused delays in the Blue Marmots' development. The communications PGE seeks are readily available to the Blue Marmots, whereas PGE would need to submit multiple public records requests to obtain them, which would inevitably delay this case.[54] It would be inefficient and incompatible with the needs of this case to require PGE to file public records requests to receive discoverable information, and the Blue Marmots' suggestion is inconsistent with their claim that they "welcome the speedy resolution of this dispute."[55]

The Blue Marmots complain that it would be burdensome for them to review and produce 300 emails.[56] First, in PGE's experience, reviewing 300 emails for production is a task that can be accomplished in a few hours—especially when, as here, the emails have been exchanged externally with a public agency and therefore do not need to be reviewed for privilege. Second, the Blue Marmots' claims that that it would be burdensome to obtain and review all responsive

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wishes to impose conditions on discovery may do so by means of a motion for a protective order under ORCP 36. That rule . . . provides that the party seeking an order 'that discovery may be had only on specified terms and conditions' must establish 'good cause' for those conditions. ORCP 36 C.").

[53] OAR 860-001-0500(1); Docket UM 1823, Ruling at 3-4 (June 16, 2017).

[54] Although Oregon's Public Records Law requires public bodies to respond to records requests within 15 business days, *see* ORS 192.329(5) (providing deadline of ten business days after the date the public body is required to acknowledge receipt of the records request), the public bodies can simply inform the requester that they will not complete processing the request by that deadline. In actuality, responses to public records requests take far longer. According to one study, the average response time for Oregon public bodies is 148 days. Katie Shepherd, *Oregon Ranks Worst For Public Records Response Times, According to Nationwide Analysis*, WILLAMETTE WEEK (Mar. 24, 2019) (available at https://www.wweek.com/news/state/2019/03/24/oregon-ranks-worst-for-public-records-response-times-according-to-nationwide-analysis/). PGE's testimony is due in 24 calendar days, and therefore PGE would not receive a response to a public records request in time for PGE to review the correspondence before filing testimony.

[55] Response at 5.

[56] Response at 13. Note, the Blue Marmots claim that there could be more such correspondence involving additional EDPR employees. However, the Blue Marmots have not provided any reason to believe that a large number of employees communicated with EFSC and Lake County. Vague statements that there could be many more emails do not establish good cause for limiting discovery.

emails is contradicted by their assertion that they have already produced all relevant emails.[57] If the Blue Marmots already have pulled all email correspondence between themselves and EFSC and Lake County and reviewed the emails in order to produce the subset they deem relevant (those related to permitting timing and schedule), then it should require no additional effort for them to turn over the remainder of the emails to PGE. And third, the Blue Marmots are part of a large, multinational corporation and certainly have the resources necessary to participate in the discovery process in a case they themselves filed.

B. The Commission should compel production of all communications between the Blue Marmots and PacifiCorp related to the Blue Marmots' interconnection process (Data Request 12).

Data Request 12 sought "all communications between EDPR and PacifiCorp Transmission regarding the Blue Marmots' ***interconnection*** process . . ."[58] The Blue Marmots responded by providing one email with PacifiCorp that they characterized as materially impacting ***transmission*** timing and schedule.[59] They then supplemented the response with a screen shot regarding ***transmission*** service. The Blue Marmots did not provide any interconnection-related information in response to this request.

1. Data Request 12 clearly seeks information about interconnection.

The Blue Marmots explain at great length why they understood PGE's request to relate to transmission service and why transmission information is not relevant.[60] However, the plain text of the data request is clear—"all communications . . . regarding the . . . interconnection process"—and cannot be reconciled with the Blue Marmots' interpretation that it relates to transmission service. To the extent that the request was at all unclear, the Blue Marmots could have conferred

[57] *See* Response at 12 ("Because the Blue Marmots have provided *all* correspondence regarding permitting timing and scheduling with both EFSC and Lake County, . . . [t]here is no further relevant permitting correspondence to share.").
[58] Attachment A to Motion to Compel at 2 (emphasis added).
[59] *See* Attachment B to Motion to Compel at 4.
[60] Response at 26-30.

with PGE at any point to clarify. The Blue Marmots inexplicably did not request clarification upon initially receiving the request, upon receiving a request to supplement their initial response, or upon receiving a Motion to Compel related to the response. Had the Blue Marmots conferred as required,[61] their confusion could have been resolved quickly.

The Blue Marmots devote substantial briefing to their claim that they provided a response "based on the reasonable, good-faith assumption that PGE sought information regarding the Blue Marmots' transmission arrangements."[62] However, neither the reasonableness of the Blue Marmots' misunderstanding nor the good faith nature of their actions is relevant to this Motion to Compel. PGE is not seeking penalties or sanctions. PGE is simply seeking the requested information—which the Blue Marmots continue to refuse to provide.

2. While some of the requested communications have been provided in response to other data requests, it appears that the Blue Marmots have not fully responded to Data Request 12.

The Blue Marmots claim this request is duplicative.[63] It is not clear from the Blue Marmots' Response whether they are claiming that they have already provided *all* information responsive to Data Request 12 in response to other data requests addressing interconnection.[64] PGE is not asking the Blue Marmots to produce the same information twice. If the Blue Marmots have provided all responsive information already in response to other data requests, they can quickly resolve this dispute by simply stating this and pointing to the other requests. Thus far, they have made no such representation.

However, PGE doubts that all information responsive to Data Request 12 has already been produced, given that Data Request 12's request for "all communications" is plainly broader than the information designated in other requests PGE submitted regarding specific aspects of the

[61] OAR 860-001-0500(5).
[62] Response at 26.
[63] Response at 27.
[64] *See* Response at 30 (stating Data Request 12 "would be duplicative of the evidence already provided in response to Data Requests 9, 10, 11, 13, 14, 15, and 16.").

interconnection process.[65] If the Blue Marmots have not already produced *all* responsive information, then their claim that *some* of the requested information is duplicative is irrelevant and does not excuse their obligation to fully respond to the request.

3. Producing the requested information is not unduly burdensome.

The Blue Marmots assert that reviewing all communications with PacifiCorp over a four year period would be unduly burdensome.[66] But the Blue Marmots—who have the burden of showing good cause for limiting their response to discovery[67]—have not explained how many communications are responsive to Data Request 12, nor have they provided an estimate of the time necessary to review and produce these documents. Notably, a thorough review of responsive documents prior to production is not required because none of the Blue Marmots' communications with PacifiCorp would be protected by any privilege. Therefore, PGE assumes that production would simply require conducting an appropriate email search, which could be accomplished relatively quickly. And, given that some interconnection-related communications with PacifiCorp have already been produced in response to other data requests, PGE assumes that email searches have already occurred.

The Blue Marmots also claim, without support, that the requested information "would provide at best only marginal value," characterizing the information sought as "valueless evidence."[68] These bare, unsupported assertions fall far short of establishing good cause to limit the requested discovery. Further, there is no discovery exception for evidence that is marginally relevant, and even evidence that is not directly relevant is discoverable so long as it is "reasonably

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[65] *See* Attachment A to Motion to Compel at 1-2.
[66] Response at 31.
[67] *See Lindell*, 353 Or at 350 ("Ordinarily, the party seeking relief bears the burden of persuasion. . . . Consistently with that ordinary allocation of the burden of persuasion, the [ORCP] provide that any party who wishes to impose conditions on discovery may do so by means of a motion for a protective order under ORCP 36. That rule . . . provides that the party seeking an order 'that discovery may be had only on specified terms and conditions' must establish 'good cause' for those conditions. ORCP 36C.").
[68] Response at 31.

calculated to lead to the discovery of admissible evidence."[69] Here, communications between the Blue Marmots and PacifiCorp will help PGE understand the potential and reasons for any interconnection delays—which are highly relevant. The Blue Marmots should be required to produce all communications with PacifiCorp regarding their interconnection process.

C. The Commission should compel disclosure of the Blue Marmots' expected profits (Data Request 8).

PGE requested information concerning the Blue Marmots' expected profitability in order to determine whether it was reasonable for the projects to delay development in light of the limited litigation risks. The Blue Marmots oppose PGE's request, offering five reasons why the Commission should not and cannot require the Blue Marmots to disclose such evidence. Specifically, the Blue Marmots argue that the Commission *should not* compel disclosure of the projects' profit estimates because such evidence (1) is irrelevant, (2) is unnecessary, and (3) would irreparably harm the Blue Marmots. In addition, the Blue Marmots claim that the Commission *cannot* compel the Blue Marmots to disclose information regarding the projects' economics because (4) the Commission lacks authority[70] to compel the Blue Marmots to reveal non-safety-related data; and (5) requiring disclosure of profit-related information would violate state and federal law by destroying the Blue Marmots' competitive advantage. These arguments rest on circular logic, misunderstandings of the Commission's procedural rules, and astonishingly strained interpretations of the Commission's enabling statutes.

- ***First,*** the projects' expected profits are plainly relevant to whether it was commercially reasonable for the Blue Marmots to delay development solely because, in a worst-case scenario, they might be required to incur an additional $14 million. Indeed, the Blue

[69] ORCP 36B(1).

[70] The Blue Marmots appear to use "authority" interchangeably with "jurisdiction." *See* Response at 22 ("[T]he Commission does not have authority to 'supervise and regulate' QFs, nor does it has [sic] the power to compel information from them.") and 31 ("PGE's Motion . . . seeks to have the Commission act beyond its jurisdiction[.]"). Both concepts are addressed below.

Marmots themselves have acknowledged that "[e]xpected profit" is one of a number of reasons for potentially delaying a project's development.[71]

- ***Second,*** whether information about expected profits is "necessary" is immaterial to whether such information is discoverable. The requirement to show "substantial need" applies only to the discovery of materials "prepared in anticipation of litigation or for trial[.]"[72] Regardless, the fact that PGE could estimate the Blue Marmots' likely profitability does not mean that PGE is precluded from receiving the Blue Marmots' estimates.
- ***Third,*** any sensitive information disclosed during discovery can be effectively shielded through a modified protective order—a mechanism that could limit disclosure to PGE's legal counsel and an independent expert. Indeed, the Commission's rules obligated the Blue Marmots to promptly pursue such a protective order rather than simply refusing to comply with the discovery request.[73]
- ***Fourth,*** the Commission's jurisdiction, far from the "limited authority" described by the Blue Marmots,[74] includes the power "to do all things necessary and convenient in the exercise of [its] power and jurisdiction."[75] This power and jurisdiction includes the power to resolve complaints.[76] Resolving complaints fairly requires the Commission to apply this state's and the Commission's own civil procedure and evidentiary rules.[77] The Blue Marmots' suggestion that the Commission apply its procedural rules to utilities but not to QFs that have filed complaints is both irrational and impracticable.

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[71] Response at 14.
[72] ORCP 36B(3)(a).
[73] OAR 860-001-0500(8).
[74] Response at 3.
[75] ORS 756.040(2).
[76] ORS 756.500.
[77] OAR 860-001-0500 ("Discovery in Contested Case Proceedings"); ORCP 36 ("General Provisions Governing Discovery").

- ***Fifth,*** applying uniform rules of evidence and civil procedure to the Blue Marmots does not constitute "undue or unreasonable prejudice or disadvantage[.]"[78] The statute precluding a utility from engaging in discrimination does not require the Commission to grant the Blue Marmots preferential procedural treatment.[79]

Each of the Blue Marmots' claims is addressed in more detail below.

1. The requested profitability data is plainly relevant to determining whether it was commercially reasonable to delay development.

As PGE explained in its Motion to Compel, PGE seeks to understand whether it was commercially reasonable for the Blue Marmots to have delayed development in light of the projects' limited litigation-related risks.[80] In Phase I of this proceeding, the worst-case outcome for the Blue Marmots was to be required to pay an additional $14 million to deliver their output at the BPAT.PGE POD.[81] In order to understand the implications of this potential additional cost, PGE must also understand the projects' estimated profit margins. A commercially reasonable developer would certainly weigh the projects' likely profits against the possibility of increased costs to determine whether to proceed with a project's development.[82] In this case, the Blue Marmots had already committed to specific CODs and their Complaint had not asked the Commission to modify this deadline. Thus, a commercially reasonable developer in the Blue Marmots' position might have decided to proceed with developing the projects if the cost risk associated with litigation was outweighed by the projects' expected profits.

Curiously, the Blue Marmots respond by acknowledging that "[e]xpected profit" would be a relevant factor for a developer to determine whether to proceed with construction of a project—

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[78] ORS 757.325(1).
[79] *Id.* ("No public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.").
[80] PGE's Motion to Compel at 9.
[81] PGE's Motion to Compel at 10.
[82] "A rational investor in an economic venture seeks to maximize profit and minimize loss and risk." Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. R. 193, 197 (2007).

in addition to other available investments and project risks (presumably such as siting concerns).[83] Thus, the Blue Marmots seem to have conceded the central point: that the projects' likely profits are relevant to whether a commercially reasonable developer would delay or proceed with development. Relevant, non-privileged evidence must be disclosed in discovery.[84]

Nonetheless, the Blue Marmots proceed to argue that the profitability of the projects is irrelevant because the litigation risks were too open-ended.[85] In the Blue Marmots' words, "[i]f a level of risk is too high, the expected profits are irrelevant."[86] Because the risks were so substantial, the Blue Marmots reason, "the only facts that need to be determined are what the risks were."[87] These claims are baseless. The very nature of a profit/risk assessment entails a rational consideration of likely risks. Risk may discount, but does not erase, the possibility for substantial profit. The fact that some risk of cost increases existed did not render the entire project wholly unpredictable and valueless.

Here, the Blue Marmots are free to argue that the risks were so significant that even more than fifty million dollars in potential profits would not have moved EDPR to safeguard its investment. Similarly, PGE should be free to present and support the argument that the Blue Marmots' potential profits were so significant, and the likely risks so manageable, that a commercially reasonable developer could have and would have proceeded to develop the projects despite the pending litigation. Whether such a decision would have been reasonable depends on the scale of the Blue Marmots' expected profits when the projects were in litigation.[88]

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[83] Response at 14.
[84] ORCP 36B(1).
[85] Response at 19.
[86] Response at 20.
[87] Response at 20.
[88] Indeed, if the Blue Marmots believed that no profit forecast could truly be performed in the fact of such uncertainty, then there would be no such forecast to be disclosed. Given the Blue Marmots' vociferous objection to disclosing such information, such a forecast clearly exists.

Moreover, the Blue Marmots' claims that the risks erased any potential profit forecasts dramatically overstates the actual risks associated with litigation. The Blue Marmots claim that litigation presented risks well beyond a $14 million increase because (1) the Commission could have ordered the Blue Marmots to pay to upgrade the PACW.PGE POD at a cost of $450 million;[89] (2) the cost of delivering to the BPAT.PGE POD might have increased;[90] (3) PGE might have changed its position and challenged the projects' avoided cost prices or other contract terms later in the litigation;[91] and (4) "the Commission could have resolved issues in a variety of manners[.]"[92] Yet none of these concerns were actual, substantial risks that would have impacted a commercially reasonable decisionmaker.

First, as PGE explained in the Phase I proceeding, the fact that other, more expensive options existed to deliver the Blue Marmots' power in no way meant that the Blue Marmots would be obligated to pursue them.[93] No party was arguing for such an extreme outcome. While the Commission was not bound by the positions of the parties, the reasonable risks associated with the litigation did not exceed $14 million—the lowest estimated cost if the Blue Marmots had lost the dispute concerning all five projects' PODs.

Second, while the estimated cost of BPA transmission was not fixed, PGE is not aware of any reason to believe that these costs might substantially increase or that the transmission capacity might evaporate entirely. If such risks impacted the Blue Marmots' assessment, then the projects are certainly free to argue that the potential for more than one hundred and sixty million dollars in

[89] Response at 16.
[90] Response at 16.
[91] Response at 16-18.
[92] Response at 19.
[93] Phase I, PGE's Response Brief at 60-61 (Apr. 5, 2019) ("[T]he BPA-PGE interface is the only practical—and by far the least expensive—means of reaching PGE's system[.]").

revenue[94] was nullified by the potential that BPA might run out of transmission capacity. Whether such a judgment would have been commercially reasonable remains questionable.

Third, PGE had repeatedly confirmed—on the record—that the Blue Marmots had achieved LEOs locking in the projects' avoided cost prices, and that the Blue Marmots should not be required to needlessly pay $450 million to upgrade a POD when there was a $14 million alternative.[95] Even if the Blue Marmots truly believed that PGE would abandon clear and consistent statements made to the Commission, such private beliefs are beside the point. The question here is what a commercially reasonable developer would have done, and how a commercially reasonable developer would have perceived the apparent risks. In light of the narrow scope of the parties' deliverability dispute and PGE's on-the-record statements, it was not realistic to infer that PGE would suddenly challenge the projects' avoided cost prices—let alone that such a challenge would have yielded a wholly different result for the Blue Marmots.

Fourth, while it is true that the Commission is not bound by parties' consensus positions in a contested case, party alignment may reasonably make a range of given outcomes more likely. Here, no party contested the projects' other PPA terms; no party challenged the projects' fixed avoided cost prices; and no party claimed that a $450 million delivery solution was preferable over the $14 million delivery solution. Thus, the fact that the Commission *could in theory* have unilaterally ordered a different and more costly solution to the parties' dispute does not change the fact that such an outcome was vanishingly unlikely. By extension, a commercially reasonable

[94] *See* Phase I, PGE/100, Greene-Moore/25 ("PGE estimates that the Blue Marmots' total revenues under the PPAs could exceed $160 million.").

[95] *See., e.g.*, Phase I, PGE's Answer at 1 (May 18, 2017) (stating that "PGE does not dispute that the Company would have a legally enforceable obligation to purchase Blue Marmot's output at the avoided cost prices in effect at the time Blue Marmot signed the executable PPA" once the Blue Marmot's deliverability was established); Phase I, PGE/100, Greene-Moore/14-15 (Jan. 12, 2018) ("PGE acknowledges that the Blue Marmots have a [LEO]—which PGE agrees locks in their right to the avoided cost rate in place at the time the LEO arises[.]"); Phase I, PGE's Prehearing Brief at 4 (Nov. 30, 2018) ("PGE takes its obligations under PURPA seriously and is fully prepared to execute PPAs to purchase the Blue Marmots' output at the avoided cost rates in effect at the time they established their LEOs[.]").

person, facing a reasonable assessment of the litigation's relatively low-cost risks, may have chosen to proceed with developing a series of highly lucrative projects rather than risk missing the projects' established CODs.

Despite these reasonable assessments of the attendant risks, the Blue Marmots will remain free to explain why, in their opinion, even extraordinarily lucrative projects could not be advanced until after litigation had resolved. However, none of the Blue Marmots' arguments alleviates their responsibility to provide the requested information in the discovery process.

Separately, the Blue Marmots assert that the Commission has already "commented on the irrelevance of QF profitability data to its decision-making process" in a 1984 decision in Docket UM 11 (*Snow Mountain Pine*).[96] There are at least two problems with the Blue Marmots' reliance on this decision: (1) it is irrelevant, as it concerned the appropriate calculation of avoided cost prices, which are properly based on the utility's avoided costs rather than the QF's profitability;[97] and (2) it was overturned by the Court of Appeals.[98] The referenced proceeding did not concern the details of a particular QF's profit-related decision making, but rather what "rate paid by the utility is fair, just, and reasonable"—a question that the Commission concluded "is not dependent upon the [QF's] profit or loss[.]"[99] The fact that a utility's avoided cost rates must be calculated based on the utility's avoided costs rather than the QF's desired profits does not mean that a QF's profits are irrelevant in every instance.

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[96] Response at 23. Note, the Blue Marmots quote the Commission as emphasizing the word "profit" in the Commission's original order. This is incorrect. The emphasis is the Blue Marmots'. *Snow Mt. Pine Co. v. CP Nat'l Corp.*, Docket UM 11, Order No. 84-895 at 4 (Nov. 13, 1984).

[97] Order No. 84-895 at 4 (rejecting the QF's argument that a lower rate "would make the project infeasible" because "the Commissioner cannot require a utility to pay an amount greater than its true avoided cost").

[98] *Snow Mt. Pine Co. v. Mauldin*, 84 Or App 590, 601 (1987) ("[T]he commissioner's order is reversed and remanded for a determination of CP National's actual 'avoided costs[.]'").

[99] Order No. 84-895 at 4.

2. The substantial need standard does not apply to PGE's data requests because the requests do not concern trial preparation materials.

Having admitted the relevance of the Blue Marmots' profitability, the Blue Marmots next attempt to revise the discovery standard by claiming that PGE must nonetheless establish a "need" for the evidence.[100] The Blue Marmots are incorrect. During discovery, "parties may inquire regarding ***any matter, not privileged, that is relevant*** to the claim or defense of the party seeking discovery or to the claim or defense of any other party."[101] Once again, the Blue Marmots appear to have misapplied the standard for a party seeking disclosure of an opposing party's trial preparation materials under ORCP 36B(3)(a)—which does require the requesting party to show that it has "substantial need of the materials[.]"[102]

Moreover, the Blue Marmots' argument that PGE "has no need of a definitive estimate" is self-defeating. The Blue Marmots claim that PGE could simply "create" evidence regarding the projects' expected profitability or rely on previous estimates of the projects' overall revenues.[103] This "solution" is the worst of both worlds—and would have PGE presenting a factual argument without making use of available factual support. Moreover, the Blue Marmots have already made plain their intent to oppose any such argument on the basis that inferred profitability is speculative and inadmissible.[104] Finally, PGE attempted to estimate the Blue Marmots' likely revenues—but these revenues do not mean that PGE is able to accurately estimate the Blue Marmots' likely *profits* (i.e., revenues netted against costs). Even if PGE were in possession of publicly available information to establish an estimate of the projects' profitability, this would not mean that PGE lacks a right to actual evidence of the Blue Marmots' profit margins.

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[100] Response at 21.
[101] ORCP 36B(1).
[102] ORCP 36B(3) ("Trial preparation materials"); ORCP 36B(3)(a) ("Materials subject to a showing of substantial need").
[103] Response at 21.
[104] Response at 21 ("assuming the evidence is deemed admissible").

3. Any harm to the Blue Marmots can be avoided by implementing a modified protective order.

PGE has acknowledged that the information it is requesting may be commercially sensitive, and has stated its willingness to "consider implementing any appropriate protections that the Blue Marmots suggest."[105] PGE's offer recognizes that, under the Commission's rules, a claim of confidentiality "may not be used to delay the discovery process[.]"[106] On the contrary, the Commission's rules specifically *require* the Blue Marmots to promptly seek a protective order in order to facilitate disclosure of the confidential information, as follows:

> If an answering party believes that a response to a discovery request involves confidential information that is inadequately *protected* by the safeguards existing in the docket, ***the answering party must notify the requesting party of this belief as soon as practicable and***, if appropriate, ***promptly move for an appropriate protective order***.[107]

Despite this clear direction from the Commission, the Blue Marmots claim that a protective order would be insufficient because such an order would not prevent disclosure to PGE.[108] The Blue Marmots' claim ignores the possibility of implementing a *modified* protective order to provide enhanced protections. For instance, the Commission has previously limited disclosure of highly confidential materials to a certain number of legal counsel and experts[109] and has required highly sensitive information to be viewed only in a safe room.[110] As it has previously stated, PGE

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[105] Attachment C to PGE's Motion to Compel at 1.
[106] OAR 860-001-0500(8).
[107] OAR 860-001-0500(8) (emphasis added).
[108] Response at 24.
[109] *In the Matter of Covad Comms. Co. Request for Comm'n Approval of Non-Impairment Wire Center List*, Docket UM 1251, Order No. 06-141 (Mar. 24, 2006).
[110] *In the Matters of Pac. Power & Light dba PacifiCorp, Portland Gen. Elec. Co., Nw. Nat. Gas Co., and Avista Utils. filing of tariffs establishing automatic adjustment clauses under the terms of SB 408*, Dockets UE 177, UE 178, UG 170, and UG 171, Order No. 06-033 at 4 (Jan. 25, 2006) ("Given the significant harm that might occur from the disclosure of the tax information . . . we have no choice but to adopt a safe-room discovery mechanism to govern the use of highly confidential information in these dockets.").

is willing to agree to appropriate enhanced protections, but notes that it is the Blue Marmots' responsibility to seek a protective order to facilitate prompt disclosure of confidential materials.[111]

4. The Commission has authority to compel the Blue Marmots to disclose profitability data because the Commission has the power to fairly adjudicate disputes.

The Blue Marmots contend that the Commission lacks "the power to compel information" from QFs.[112] Instead, the Blue Marmots claim that "[t]he Commission's power over QFs begins and ends with safety requirements[.]"[113] Based on this cramped interpretation of the Commission's authority, the Blue Marmots argue that the Commission's "involvement" in this proceeding must be limited to "supervising" PGE—with the apparent implication that the Commission's discovery and other procedural rules are inapplicable to QFs.[114]

The absurdity of the Blue Marmots' position speaks for itself. Seemingly, the Blue Marmots would be excused from all discovery obligations, deadlines, and the full panoply of this Commission's administrative rules, with a limited exception for "safety requirements."[115] As a practical matter, the Blue Marmots' world view would render the Commission's authority ineffectual at best, and wholly slanted at worst. The Commission would be tasked with adjudicating complaints between utilities and other parties without the power to enforce its rules against both sides. PGE is unaware of a single administrative agency tasked with carrying out its adjudicative function under such lopsided and irrational constraints.

The statutes cited by the Blue Marmots—ORS 756.040, 756.105, 757.005, 758.555, and 758.535—do not support a narrow characterization of the Commission's authority. ORS 756.040

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[111] OAR 860-001-0500(8). The Blue Marmots also note without argument that PGE has previously opposed disclosing commercially sensitive information relating to other QF contracts in this proceeding. Response at 24. However, the information requested by the Blue Marmots in that instance was not merely commercially sensitive, but concerned a non-party QF and went well beyond the relevance of the proceeding. *See* ALJ Ruling at 3 (Oct. 30, 2017).

[112] Response at 22.

[113] Response at 22.

[114] Response at 22.

[115] Response at 22 (citing ORS 758.535(3)).

is the Commission's general powers statute. As the Blue Marmots recognize, the Commission has the authority to "supervise and regulate every public utility and telecommunications utility in this state." However, the Blue Marmots conveniently (and silently) truncate the full legislative delegation of authority,[116] which reads:

> The [C]omission is vested with power and *jurisdiction* to supervise and regulate every public *utility* and telecommunications utility in this state, and ***to do all things necessary and convenient in the exercise of such power and jurisdiction***.

Clearly, the Commission's authority to adjudicate complaints must necessarily extend to the ability to apply the appropriate rules of evidence and civil procedure.

Utility Obligation to Provide Information to Commission: ORS 756.105 addresses a utility's duty to furnish the Commission with information as part of a Commission investigation.[117] The Blue Marmots claim that they cannot be required to disclose information because this statute applies only to public utilities.[118] Yet the information in this case is not sought under the Commission's investigatory powers, but rather under the Commission's authority to adjudicate complaints,[119] because the Blue Marmots filed a complaint with the Commission.

Definition of Utility: ORS 757.005 and 758.555 confirm that the Blue Marmots are not a public utility—a fact that PGE does not dispute. Nonetheless, the Blue Marmots are parties to this proceeding, and the Commission's discovery rules apply to the parties in a proceeding.[120] The Blue Marmots have previously accepted that they are "parties" to this proceeding for purposes of seeking Commission certification under OAR 860-001-0110.[121] The fact that the Blue Marmots are not a public utility is irrelevant.

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[116] Response at 22.
[117] ORS 756.070 *et seq*. ("Investigatory Powers"); ORS 756.105 ("Duty to furnish information to commission").
[118] Response at 22.
[119] ORS 756.500.
[120] OAR 860-001-0500
[121] Phase I, Blue Marmots' Request for ALJ Certification for the Commission's Consideration (Apr. 5, 2018).

Terms of QF Sales: ORS 758.535 directs the Commission to establish terms and conditions for the sale of energy from small QFs by rule, and provides that such rules must also ensure the safety and operating requirements of QFs.[122] The fact that the Commission is specifically directed to regulate the sale of power from QFs does not, as a matter of logic, mean that the Commission is precluded from applying its procedural rules to QFs involved in litigation before the Commission.

Aside from clear logic, there is recent and readily available precedent to support this Commission's ability to compel QFs to produce documents in discovery. Indeed, the Blue Marmots appear to have overlooked relevant precedent from this very case. In Phase I of this proceeding, PGE filed a Motion to Compel against the Blue Marmots, accompanied by a Motion to Strike certain testimony concerning the Blue Marmots' legal opinions.[123] The ALJ granted PGE's motions in part, ruling that, if the Blue Marmots chose to retain certain portions of its testimony concerning the legal opinions of counsel, then PGE's motion to compel the related communications was granted to the same extent.[124]

To the extent that the Blue Marmots are challenging the Commission's jurisdiction over the Blue Marmots themselves, the Commission has recently clarified the breadth of its jurisdiction over QFs involved in PPA-related disputes. In 2018, the Commission rejected a similar argument made by the Blue Marmots' counsel that QFs are immune from the Commission's jurisdiction because QFs are "private, non-regulated compan[ies]."[125] As the Commission explained, it has personal jurisdiction over QFs involved in PPA disputes both "under [its] complaint statutes" and

[122] ORS 758.535(2)-(3).
[123] Phase I, PGE's Motion to Compel (Nov. 9, 2017).
[124] Phase I, ALJ's Ruling at 5 (Dec. 13, 2017).
[125] *Portland Gen. Elec. Co. v. Pacific Northwest Solar, LLC*, Docket UM 1894, Order No. 18-025 at 2 (Jan. 25, 2018) (describing the QF's argument against the Commission's exercise of jurisdiction).

because such PPAs "impact the utility's revenues and expenses, which, in turn, have an impact on recovery of costs through rates charged to customers[.]"[126]

In sum, the Commission clearly has authority to compel discovery from the Blue Marmots as an extension of the Commission's authority to adjudicate complaints under ORS 756.500.

5. The Commission can compel discovery by fairly and consistently applying its procedural rules to the parties in this proceeding.

Lastly, the Blue Marmots argue that the Commission cannot require them to disclose information concerning their projects' expected profitability because doing so would "unfairly disadvantage[]" the Blue Marmots, in violation of ORS 757.325(1).[127] Moreover, the Blue Marmots claim that such disclosure would disadvantage not merely the Blue Marmots but "Oregon's entire competitive marketplace."[128]

Again, the Blue Marmots misconstrue the nature of the referenced statute. ORS 757.325 is an anti-discrimination statute, not a shield for QFs against unfavorable outcomes.[129] Indeed, there is nothing discriminatory about consistently applying the Commission's procedural rules to parties in a contested case. On the contrary, uniformly applying such rules is both fair and balanced.

Nor is there any support for the Blue Marmots' doomsday predictions about impacts on all other QFs "or potential QFs."[130] Under the Blue Marmots' logic, QFs would be equally "chill[ed]" were they to seek relief from a court, thereby invoking that tribunal's application of the Oregon Rules of Civil Procedure.[131] QFs seeking relief from the Commission are not prejudiced or unfairly disadvantaged by the uniform application of the rules of civil procedure.

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[126] Order No. 18-025 at 4-5.
[127] Response at 25.
[128] Response at 26.
[129] ORS 757.325 ("Undue preferences and prejudices"); *see also Amer. Can Co. v. Davis*, 28 Or App 207, 227 (1977) (explaining that "[u]njust discrimination in rates is expressly forbidden by statute" and citing ORS 757.320 and 757.325).
[130] Response at 26.
[131] Response at 26.

V. CONCLUSION

Because PGE's discovery requests seek information that is relevant or reasonably calculated to lead to the discovery of admissible evidence and because the Blue Marmots have failed to establish good cause for limiting discovery or reinterpreting the Commission's authority, the Commission should grant PGE's Motion to Compel and order the Blue Marmots to promptly respond to Data Requests 1, 4, 8, and 12.

Dated March 6, 2020

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