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November 9, 2017

VIA ELECTRONIC FILING

PUC Filing Center
Public Utility Commission of Oregon
PO Box 1088
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Re: UM 1829 - Portland General Electric Company's Reply to Motion to Strike

Attention Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company's Reply to the Motion to Strike.

Please contact this office with any questions.

Very truly yours,

Alisha Till
Administrative Assistant

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 TO MOTION
TO STRIKE**

1 In response to Portland General Electric Company’s (PGE) Motion to Strike, the above-
2 captioned Blue Marmots LLCs (collectively, Blue Marmots) argue that the Commission should
3 deny PGE’s Motion because (a) expert legal testimony is permitted in practice before the Public
4 Utility Commission of Oregon (Commission); (b) PGE and its outside counsel have filed similar
5 testimony in the past; and (c) PGE is not required to file expert legal testimony of its own in
6 response. None of these arguments excuses what the Blue Marmots have attempted in their
7 testimony—including legal argument and conclusions about disputed issues that are key to the
8 resolution of the case in non-lawyers’ testimony—and PGE respectfully requests that the
9 Commission grant PGE’s Motion to Strike.

10 As PGE has acknowledged and the Blue Marmots’ numerous examples helpfully confirm,
11 it is common practice before the Commission for a non-lawyer’s testimony to lay out the relevant
12 blackletter law and then apply that settled law to the facts of the case. The Commission also has
13 accepted expert legal testimony provided by lawyers who specialize in specific areas of the law
14 not commonly addressed by the Commission, such as bankruptcy law or the Clean Air Act.
15 However, the legal argument contained in the Blue Marmots’ testimony is fundamentally different,

1 because the Blue Marmots have offered the opinions of non-lawyers about the very questions of
2 law that this Commission must resolve in this case. Moreover, they have presented their legal
3 arguments as if they were statements of well-settled law—when in fact, they are not; and they have
4 provided virtually no citations to precedent, making it particularly difficult for PGE to respond.

5 The Blue Marmots contend that the legal argument is offered simply to provide necessary
6 background for their factual testimony, and that there is therefore no reason for PGE to feel that it
7 must respond. This assertion is unconvincing. If the Blue Marmots are permitted to place legal
8 argument about key issues in their testimony, phrased in a way that makes it appear to be well-
9 established law, the Commission reasonably would expect PGE to respond, and PGE would feel
10 the need to do so. It is for this reason that PGE served data requests on the Blue Marmots asking
11 them to provide the bases for their legal conclusions—to allow PGE to provide thoughtful and
12 thorough responses if this Motion to Strike is not granted.

13 PGE did not take filing this Motion lightly. The Company understands that the
14 Commission liberally construes the rules of evidence and generally allows proffered testimony,
15 according it the weight it deserves. In fact, prior to filing this Motion, PGE carefully considered
16 whether and how it might appropriately respond to the Blue Marmots’ testimony as it was filed.
17 However, in light of the quantity and nature of the legal argument in the Blue Marmots’ testimony,
18 and their refusal to provide the bases for their assertions in discovery,¹ PGE concluded that it
19 cannot provide the Commission with helpful and thorough responsive testimony to legal
20 arguments made by non-lawyers—particularly when they provide few clues as to the bases of their
21 opinions. For these reasons, PGE’s Motion to Strike should be granted.

I. BACKGROUND

22 As PGE explained in greater depth in its Motion to Strike, this dispute between PGE and
23 the Blue Marmots raises several important legal issues that are key to the ultimate resolution of

¹ See PGE’s Motion to Compel (Nov. 9, 2017).

1 the case. The Blue Marmots have alleged that PGE has a legal obligation to accept their output at
2 the point of delivery (POD) of their choice, and that they have no obligation to pay for upgrades,
3 despite the fact that there is no available transmission capability (ATC) at this POD (i.e., there is
4 no ability for PGE to accept the Blue Marmots' electricity onto its system). PGE's QF contracting
5 team became aware of the POD concerns only after many of the Blue Marmots had been sent
6 executable power purchase agreements (PPAs), and the Blue Marmots argue that they incurred a
7 legally enforceable obligation (LEO) to the terms and conditions in the PPAs.² The Blue Marmots
8 believe that PGE is required by law to accept their net output at the POD of their choosing—even
9 if doing so would require system upgrades (the cost of which the Blue Marmots refuse to pay), or
10 the displacement of ATC reserved by PGE to participate in the Western Energy Imbalance Market
11 (EIM).³ Determining the applicable legal and policy requirements and the parties' respective
12 obligations in this situation will be critical to the resolution of this case.

II. DISCUSSION

13 **A. The Blue Marmots' non-lawyer witnesses are not legal experts on PURPA's** 14 **requirements.**

15 PGE seeks to strike portions of Blue Marmots' witnesses William Talbott and Keegan
16 Moyer's opening testimony. Neither witness is a lawyer, and neither is qualified to interpret what
17 the law requires. Therefore, their testimony is not only irrelevant, as PGE explained in its Motion
18 to Strike, it also will not assist the Commission's decision making, as the Blue Marmots contend.⁴

19 For example, Mr. Moyer testifies:

20 A QF cannot be given the choice between funding transmission upgrades or being
21 unable to deliver its net output when there is transmission congestion or limited
22 ATC. Even when there is no ATC on the purchasing utility's system to deliver the
23 net output to load, the purchasing utility must accept and manage the power at the
24 POD.⁵

² See, e.g., UM 1829 Complaint at 10-11.

³ See, e.g., UM 1829 Complaint at 13-14; Blue Marmot/300, Moyer/12:20-22, 19:10-11.

⁴ Blue Marmots' Response to PGE's Motion to Strike at 7.

⁵ Blue Marmot/300, Moyer/13:2-7.

1 These statements represent the Blue Marmots’ position on what may prove to be an important legal
2 question in this case. The fact that these—and other—assertions in the Blue Marmots’ testimony
3 constitute legal conclusions is proven by the Blue Marmots’ discovery responses, which state that
4 their legal testimony is based upon discussions with counsel.⁶ However, Mr. Moyer simply offers
5 statements such as these in his testimony, without citation, as if they were well-established and
6 undisputed fact. PGE obviously disagrees with Mr. Moyer’s characterization of the Blue
7 Marmots’ obligations under PURPA—if the parties were in agreement, there would be no need to
8 litigate this case. And Mr. Moyer’s testimony is not the proper location for the Blue Marmots’
9 legal arguments.

10 The Blue Marmots’ testimony is rife with similar statements, and these are the portions of
11 the testimony that PGE seeks to strike. The parties will file legal briefs with citations to assist the
12 Commission with evaluating competing arguments about what the law requires and how it should
13 be applied in this case. In addition, the Commission has its own attorneys to advise it about what
14 the law requires. The Blue Marmots’ witnesses’ unsupported assertions and conclusions about the
15 legal requirements applicable to this case are irrelevant and will not provide the Commission with
16 helpful information.

17 **B. The Commission has not allowed this type of testimony before, and it will not harm**
18 **the Blue Marmots if the Commission declines to do so now.**

19 The Blue Marmots have provided numerous examples of testimony previously filed in
20 Commission proceedings that the Blue Marmots believe is comparable to their own.⁷ Overall the
21 excerpts offered by the Blue Marmots are distinguishable in key respects from the testimony PGE
22 moves to strike in this case.

⁶ See PGE’s Motion to Compel (Nov. 9, 2017).

⁷ Blue Marmots’ Response to PGE’s Motion to Strike at 15-23.

1 First, one of the examples provided by the Blue Marmots is the testimony of an
2 environmental lawyer with over 20 years of experience in environmental compliance, who
3 testified about federal and state implementation of the Clean Air Act’s Regional Haze Program—
4 an area of the law that was, at the time, unfamiliar to the Commission.⁸ There was no question as
5 to the witness’s qualifications to provide that testimony.⁹ By contrast, the testimony offered by
6 the Blue Marmots is offered by non-lawyers, and the subject matter of the Blue Marmots’ legal
7 testimony is PURPA implementation—an area of the law the Commission routinely interprets and
8 applies and about which there is no need for expert testimony, even from lawyers.¹⁰

9 Second, the Blue Marmots have offered excerpts of testimony wherein witnesses have
10 provided statements of settled law and applied that law to the facts of the case.¹¹ By contrast, the
11 testimony PGE seeks to strike consists of arguments about the disputed legal issues in this case
12 and assertions about how the Blue Marmots’ interpretation of the law applies here—stated without
13 citation, as if they were incontrovertible facts.¹²

14 Third, the Blue Marmots have provided excerpts of testimony from witnesses in a generic
15 policymaking docket offering their recommendations about what the Commission’s policies
16 should be, which is perfectly appropriate testimony from a policy witness.¹³ Neither the
17 circumstances of that case, nor the testimony itself is comparable to the present case and the
18 testimony PGE is seeking to strike.¹⁴

⁸ Blue Marmots’ Response to PGE’s Motion to Strike at 16 n.37 (quoting the Reply Testimony of attorney Cathy Woollums in Docket No. UE 246); *In the Matter of PacifiCorp, dba Pacific Power’s Request for a General Rate Revision*, Docket No. UE 246, PAC/1400, Woollums/1-2, 8-11 (July 19, 2012).

⁹ See Docket No. UE 246.

¹⁰ See Blue Marmot/200; Blue Marmot/300.

¹¹ Blue Marmots’ Response to PGE’s Motion to Strike at 19-23.

¹² See Exhibit A to PGE’s Motion to Strike.

¹³ Blue Marmots’ Response to PGE’s Motion to Strike at 17-19, 23 (discussing witness testimony in Docket No. UM 1610).

¹⁴ See Exhibit A to PGE’s Motion to Strike. The Blue Marmots also offered an example of a PGE witness testifying about the intent behind a recently passed statute. Blue Marmots’ Response to PGE’s Motion to Strike at 15-16. However, characterizing the legislative intent behind a statute is not the same as making substantive legal argument and conclusions about the legal obligations imposed on the parties by a statute.

1 Finally, regardless of whether the Blue Marmots can find any isolated instances where
2 parties have filed testimony similar to their own, the existence of such testimony does not dictate
3 the legally correct ruling in this case. In none of the instances the Blue Marmots cite did the
4 Commission review and approve statements containing legal argument and conclusions as
5 admissible. Accordingly, the Blue Marmots' examples are equivocal, at best, and unpersuasive.
6 Here, PGE objects to the Blue Marmots' testimony, and the Commission should apply the law and
7 its rules to determine whether the testimony presented *in this case* is admissible.

8 The Blue Marmots assert that if the Commission departs from what is—in their view—
9 common practice and grants PGE's Motion, the Blue Marmots will be prejudiced because they
10 relied on the Commission's past practice.¹⁵ This argument is misplaced because the Blue Marmots
11 will have ample opportunity to present their legal argument and conclusions in this proceeding.
12 Through their briefing and at oral argument, if held, the Blue Marmots will be able to inform the
13 Commission of their positions on the legal issues and pull together their factual and legal
14 arguments. Moreover, their testimony will retain its basic structure and context, even if the marked
15 portions are stricken. Nevertheless, to the extent the Commission finds it appropriate, PGE does
16 not object to statements of blackletter law remaining in the Blue Marmots' testimony. PGE also
17 would not object if the offending testimony were stricken and the Blue Marmots sought to revise
18 their testimony to ensure it remained clearly readable, provided that PGE had sufficient time to
19 respond. PGE continues to request that the unsupported legal argument and conclusions in the
20 Blue Marmots' testimony be stricken.

21 **C. The testimony should be stricken now to avoid burdening the record.**

22 The Blue Marmots assert that PGE is not required to conduct discovery regarding the bases
23 for their legal assertions or to provide legal testimony of its own in response, and they argue that

¹⁵ Blue Marmots' Response to PGE's Motion to Strike at 25.

1 the Commission should refrain from ruling on PGE’s Motion to Strike now and determine what
2 weight to give the material later.¹⁶ PGE strongly disagrees. It would be improper for the
3 Commission to give *any* weight to the legal opinions of non-lawyer witnesses. Delaying a ruling
4 on the Motion to Strike will not alter the inadmissible nature of the Blue Marmots’ testimony and
5 will result in a confusing and burdensome record in which the underlying facts and the parties’
6 legal arguments are intermingled. Even though PGE believes the testimony is irrelevant and
7 inadmissible, if it is not stricken, PGE will be required to respond with its own legal argument.
8 This not only puts PGE’s witnesses in a difficult position, it also will lead to a longer-than-
9 necessary record that burdens the parties and the Commission. The Commission should not
10 postpone ruling on the Motion to Strike.

III. CONCLUSION

11 The legal argument and conclusions of the Blue Marmots’ non-lawyer witnesses are
12 irrelevant, unhelpful, and inadmissible, and their admission would burden the record. In addition,
13 the Blue Marmots’ testimony is inconsistent with the Commission’s rules and with generally
14 accepted practice before the Commission.

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¹⁶ Blue Marmots’ Response to PGE’s Motion to Strike at 23-24.

1 PGE respectfully requests that the Commission strike the portions of the Blue Marmots'
2 testimony marked in Exhibit A to PGE's Motion to Strike.

Dated November 9, 2017

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