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April 19, 2018

VIA ELECTRONIC MAIL

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: Blue Marmot LLC vs Portland General Electric Company

Attention Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company's Response to the Blue Marmot LLCs' Request for ALJ Certification.

Please contact this office with any questions.

Sincerely,

A handwritten signature in blue ink that reads "Alisha Till".

Alisha Till
Legal 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 RESPONSE TO THE
BLUE MARMOTS' REQUEST FOR
ALJ CERTIFICATION**

1 The above-captioned Blue Marmot LLCs (Blue Marmots) are five qualifying facilities
2 (QFs) that will be constructed in southern Oregon and seek to deliver their output to Portland
3 General Electric Company (PGE or Company), via PacifiCorp's transmission system, at the
4 interface between PacifiCorp and PGE (the PACW-PGE interface). PGE maintains that the Blue
5 Marmots' existing transmission arrangements are insufficient to enable delivery via this
6 constrained interface, and that, under the Public Utility Regulatory Policies Act (PURPA), the
7 Blue Marmots are responsible for the cost of upgrades or alternative arrangements that would be
8 necessary to enable the Company to accept delivery. In support of its positions, PGE filed
9 testimony (Transmission Testimony) detailing the constraint at the PACW-PGE interface, the
10 cost of delivery to an alternate interface, and the results of the System Impact Study (SIS) PGE
11 conducted at the Blue Marmots' request, which found that: (1) given the current constraint, the
12 Blue Marmots are unable to deliver their output via the PACW-PGE interface; and (2) any
13 system upgrades that might allow delivery—if feasible—would be extraordinarily costly.

14 The Blue Marmots moved to strike the Transmission Testimony, arguing that it is
15 irrelevant and raises issues within the exclusive jurisdiction of the Federal Energy Regulatory
16 Commission (FERC). After reviewing the parties' extensive briefing, the ALJ denied the Motion

1 to Strike, and the Blue Marmots now request certification of the ALJ’s Ruling to the Public
2 Utility Commission of Oregon (Commission).

3 The ALJ’s Ruling should be upheld and certification denied, because good cause does not
4 exist for certification, and the Blue Marmots will not be unduly prejudiced by the Ruling.¹ The
5 ALJ correctly found that the Motion to Strike inappropriately seeks resolution of the case on the
6 merits by excluding the testimony PGE requires to prove its case, and concluded that the Blue
7 Marmots’ jurisdictional and relevance arguments cannot be resolved at this point in the case—
8 before they offer factual support for their position. Moreover, the ALJ reached the correct result
9 because PGE’s testimony is relevant and within the Commission’s jurisdiction, as explained in
10 depth in PGE’s March 6, 2018 Response to the Motion to Strike (March 6 Response).

A. The ALJ correctly recognized that the Blue Marmots’ Motion to Strike does not present a full and adequate record upon which to resolve this case.

11 The Blue Marmots filed a Motion to Strike that sought to effectively decide the case in
12 their favor by removing from the record PGE’s testimony rebutting their contention that they
13 have arranged for transmission sufficient to deliver their output to PGE. Crucially, however, the
14 Blue Marmots did not provide any evidence to support their contention or to rebut PGE’s
15 testimony regarding their inability to deliver.² In other words, the Blue Marmots ask the
16 Commission to take their word for it that their transmission arrangements are sufficient and to
17 find that PGE must accept their output, without considering the constraint at their chosen
18 interface, the costs imposed by such delivery, or the impact on PGE’s customers. Because the
19 ALJ correctly declined to make such a drastic finding in the context of a Motion to Strike, and
20 properly deferred resolution of the jurisdictional and relevance issues until later in the
21 proceeding, the Blue Marmots cannot establish that good cause exists for certification.

22 The Blue Marmots claim that, because they did not seek summary judgment, the ALJ erred
23 in finding that granting their Motion to Strike would essentially render “a judgment on the merits

¹ See OAR 860-001-0110 (ALJ must certify if good cause exists or if the Ruling may result in undue prejudice).

² PGE stands behind its SIS and the transmission information conveyed in its testimony and does not believe that the Blue Marmots will be able to show that they are able to deliver their output via the PACW-PGE interface.

1 of the case in its totality.”³ This argument ignores the obvious implications of their Motion,
2 which would deprive PGE of the ability to establish its case—resulting in an unjust victory for
3 the Blue Marmots.

4 The Blue Marmots also argue that the ALJ erred by characterizing their challenge to the
5 Commission’s jurisdiction as “premature,” because jurisdiction may be raised at any time in a
6 proceeding and should be resolved early.⁴ However, the ALJ properly recognized that in this
7 particular proceeding there currently is an insufficient record upon which to make a jurisdictional
8 determination. Specifically, because the Blue Marmots have not yet articulated the basis for their
9 hypothetical challenge to the SIS—or provided any evidence to support a challenge—the
10 Commission cannot determine whether any dispute is within its jurisdiction or competency to
11 decide. More broadly, finding that the Commission lacks jurisdiction over a portion of a PURPA
12 dispute—when “[s]tate-based adjudication serves as the mainstay for enforcing PURPA
13 rights”⁵—is not a decision to be made lightly and with inadequate information. As the ALJ
14 found, this is especially true where, as here, the *complainant* argues that the forum in which it
15 sought relief lacks jurisdiction to adjudicate key issues raised by the defendant in response.⁶

B. The ALJ reached the correct result because PGE’s testimony is relevant, and the Commission has jurisdiction over the transmission issues raised in this case.

16 Because PGE’s testimony is relevant and presents issues within the Commission’s
17 jurisdiction, the ALJ correctly denied the Motion to Strike. In support of this argument, PGE
18 relies on the detailed analysis in its March 6 Response, which explained that PGE’s testimony is
19 highly relevant because:

³ Blue Marmots’ Request for ALJ Certification at 3 (Apr. 5, 2018) (Blue Marmots’ Request); ALJ Ruling Denying Motion to Strike at 3 (Mar. 22, 2018) (ALJ Ruling).

⁴ Blue Marmots’ Request at 3-4; ALJ Ruling at 3.

⁵ *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 698 (D.C. Cir. 2017).

⁶ The Blue Marmots rely on *PaTu*, but as explained in PGE’s March 6 Response, the issue in *PaTu* was not *whether* delivery was possible but *how* it should be achieved. The Commission ruled it could not require PGE’s Transmission Function to offer a particular delivery service to a QF; the Commission did not suggest that it lacked jurisdiction to assess whether delivery could occur, and implied that its analysis would be different if PaTu asserted that delivery was impossible. See *PaTu v. PGE*, Docket No. UM 1566, Order No. 12-316 at 8 (Aug. 12, 2012) & Order No. 14-287 at 14 (Aug. 13, 2014). Moreover, the U.S. Court of Appeals confirmed that the Commission—not FERC—has jurisdiction over a QF’s delivery to a purchasing utility. See *PGE v. FERC*, 854 F.3d at 702.

- 1 • The Commission must recognize the constraint at the PACW-PGE interface and the
2 reason for, nature of, and amount of costs required to facilitate delivery in order to
3 resolve this case in compliance with PURPA.⁷
- 4 • The substantial costs imposed are not reflected in PGE’s avoided cost prices, and
5 therefore must be borne by QFs to uphold PURPA’s customer-indifference standard.
- 6 • The Court of Appeals has held that a QF does not have unfettered discretion to select an
7 infeasible delivery point,⁸ and PGE’s testimony demonstrates why the Blue Marmots’
8 preferred delivery point is not feasible and would impose significant costs on customers.⁹

9 In addition, the March 6 Response explained that PGE’s testimony does not present issues within
10 FERC’s exclusive jurisdiction because the Commission:

- 11 • Has broad authority under PURPA to set the terms and conditions of QF purchases and
12 responsibility to protect customers from costs beyond the utility’s avoided cost; and
- 13 • Regularly considers transmission issues related to QF interconnection and delivery,
14 developing standard contract terms and conditions, and calculating avoided costs.

C. The Blue Marmots will not suffer undue prejudice from the ALJ’s decision.

15 Certification should be denied because the ALJ’s Ruling will not result in undue prejudice
16 to the Blue Marmots, whereas granting the Motion to Strike would prejudice PGE and its
17 customers. The Blue Marmots argue they will be prejudiced if they must respond to PGE’s
18 testimony without a determination that it is relevant,¹⁰ but testimony should not be stricken to
19 relieve the opposing party of the need to respond, and preparing responsive testimony will not be

⁷ The Blue Marmots state the “core issue” in the case is “whether PGE has the legal authority to refuse certain off-system deliveries.” Blue Marmots’ Request at 3. Under their framing of the case, PGE’s testimony is relevant.

⁸ See *Water Power Co., Inc. v. PacifiCorp*, 99 Or App 125, 127-130, 134 (1989).

⁹ The Blue Marmots claim PGE’s transmission testimony is not relevant because their complaints simply ask the Commission to determine that they have established legally enforceable obligations (LEOs). Blue Marmots’ Request at 3. If the sole issue in this case were whether the Blue Marmots incurred LEOs when they signed the PPAs, then this case would be moot, because PGE has acknowledged from the outset that the Blue Marmots established LEOs to the avoided cost prices and terms in the PPAs they executed. However, PGE believes these LEOs are contingent upon the Blue Marmots being able to deliver their output—which they currently cannot do via the PACW-PGE interface—and PGE’s testimony is key to understanding why.

¹⁰ Blue Marmots’ Request at 1.

1 unduly prejudicial. The Blue Marmots will have ample time to fully examine the issues, conduct
2 discovery and any necessary analyses, and prepare responsive testimony—they have already had
3 PGE’s testimony for more than three months, they have conducted extensive discovery, and PGE
4 has agreed to a schedule that allows them additional time to file reply testimony once the Motion
5 to Strike is resolved. Moreover, the Blue Marmots have adequate resources to retain a consultant
6 to review PGE’s transmission studies, and appear from discovery requests to have done so
7 already.¹¹ Although denial of the Motion to Strike will not unduly prejudice the Blue Marmots,
8 granting the Motion and striking substantial portions of PGE’s testimony would unduly prejudice
9 PGE and its customers because it would leave the Commission without a complete
10 understanding of the costs the Blue Marmots seek to impose on PGE and would effectively
11 resolve the case against PGE, without a full evidentiary record.

D. Conclusion

12 For the reasons explained herein, PGE respectfully requests that the ALJ deny the Request
13 for Certification. If the ALJ grants certification, PGE requests that the Commission confirm the
14 ALJ’s Ruling denying the Motion to Strike, for the reasons explained in depth herein and in
15 PGE’s March 6 Response to the Motion to Strike.

Dated: April 19, 2018.

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¹¹ See Blue Marmot Data Request No. 119. In addition, PGE already obtained an independent, third-party review of one transmission study and attached the report to its testimony. PGE/300, Afranji-Larson-Richard/19-20; PGE/302.