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**VIA ELECTRONIC FILING**

PUC Filing Center  
Public Utility Commission of Oregon  
PO Box 1088  
Salem, OR 97308-1088

**Re: UM 1829 - Portland General Electric Company's Reply to Motion to Compel**

Attention Filing Center:

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

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 COMPEL**

*EXPEDITED CONSIDERATION  
REQUESTED*

1           On October 13, 2017, the above-captioned Blue Marmot LLCs (collectively, Blue  
2 Marmots) filed the testimony of engineer Keegan Moyer—the majority of which consists of Mr.  
3 Moyer's assertions about the law applicable to this case, including his conclusions on key legal  
4 issues in dispute. When Portland General Electric Company (PGE) sought to discover the bases  
5 of these statements, the Blue Marmots objected, taking the position that the information sought is  
6 covered by the attorney-client privilege. Because PGE must understand the bases of Mr.  
7 Moyer's statements to respond effectively, PGE filed this Motion to Compel, pointing out that to  
8 the extent Mr. Moyer's testimony is offered as his own opinion, it is not privileged, and if it is  
9 based on communications with counsel, then any privilege has been waived.

10           The Blue Marmots have responded with a hodge-podge of contradictory arguments—  
11 reasserting that the bases of Mr. Moyer's statements are shielded by the attorney-client privilege  
12 (but also maintaining that Mr. Moyer's testimony is not based on the advice of counsel), and  
13 implying that Mr. Moyer is testifying as an expert witness regarding PURPA (but acknowledging  
14 that Mr. Moyer has no expertise in the law). However, in the end, the Blue Marmots have not  
15 met their burden of showing that the information sought is shielded from disclosure by the

1 attorney-client privilege; nor have they provided any convincing arguments to support their view  
2 that they did not waive any privilege by voluntarily disclosing the content of communications  
3 with counsel in their testimony. None of the Blue Marmots’ other arguments against disclosure  
4 are persuasive, and PGE respectfully requests that the Commission grant its Motion to Compel.<sup>1</sup>  
5 In addition, PGE notes that its Response Testimony is due on December 22 and therefore  
6 requests expedited consideration of its Motion.

**I. REPLY**

**A. The attorney-client privilege does not protect the information PGE seeks.**

8 The Blue Marmots have asserted that the bases for Mr. Moyer’s legal statements are  
9 protected by the attorney-client privilege, stating, “Mr. Moyer’s understanding is based on his  
10 experience in the energy industry and communications with counsel.”<sup>2</sup> Perplexingly, in their  
11 Response to PGE’s Motion to Compel (Response), the Blue Marmots also assert that Mr.  
12 Moyer’s reference to advice of counsel “was not intended to intimate that Mr. Moyer had  
13 *himself* received legal advice from the Blue Marmots’ counsel.”<sup>3</sup> These objections do not  
14 amount to a legitimate claim of privilege. Mr. Moyer is not an attorney, and if his legal  
15 statements are not based on legal advice he received from an attorney, then *the attorney-client*  
16 *privilege—by definition—does not apply*. Thus, if the Blue Marmots are taken at their word, the  
17 privilege analysis can end there, and PGE’s Motion to Compel should be granted.

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<sup>1</sup> As explained in PGE’s Motion to Compel, PGE’s Motion is related to its Motion to Strike—PGE seeks to strike the legal argument from the Blue Marmots’ testimony, or, in the alternative, to compel production of its bases. Therefore, if the Motion to Strike is granted, the Commission need not decide this Motion to Compel.

<sup>2</sup> Attachment A, Blue Marmots’ Responses to PGE Data Requests 10(a), 11, 12, 14, 15, 16 & 17.

<sup>3</sup> Blue Marmots’ Response to Motion to Compel at 10 (emphasis added).

1 **B. To the extent the requested information was ever privileged, the privilege has been**  
2 **waived.**

3 As the party asserting the attorney-client privilege, the Blue Marmots bear the burden of  
4 proving that the privilege applies and that it has not been waived.<sup>4</sup> The Blue Marmots have not  
5 carried their burden here.

6 The Blue Marmots argue that Mr. Moyer’s use of phrases such as “on advice of counsel”  
7 was not intended to waive the attorney-client privilege, but rather to “delineat[e] between areas  
8 where he has expertise (i.e., with respect to technical facts) and areas where he does not have any  
9 particular expertise (i.e., with respect to the law).”<sup>5</sup> However, when considering whether a  
10 waiver of the attorney-client privilege has occurred, the relevant question is whether the  
11 *disclosure* of the attorney-client communication was intended; the intent to waive may be  
12 inferred from the intent to disclose, despite later protestations to the contrary.<sup>6</sup> Some courts are  
13 reluctant to find that waiver has occurred where a privileged document was disclosed  
14 inadvertently or against a party’s will.<sup>7</sup> But here, the Blue Marmots’ disclosure of the substance  
15 of confidential attorney-client communications was voluntary and intentional, and, by doing so,  
16 the Blue Marmots have waived the privilege.

17 The Blue Marmots’ Response argues that the instant case does not present one of the  
18 “limited situations where relying ‘on advice of counsel’ constitutes an implied waiver of the  
19 attorney-client privilege.”<sup>8</sup> However, the Blue Marmots appear to have misinterpreted PGE’s  
20 primary argument. PGE’s position is that the Blue Marmots waived the attorney-client privilege  
21 directly by disclosing the content of confidential communications with counsel, not impliedly by

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<sup>4</sup> *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23 (9th Cir. 1981).

<sup>5</sup> Blue Marmots’ Response to Motion to Compel at 10.

<sup>6</sup> *Goldsborough v. Eagle Crest Partners, Ltd.*, 105 Or App 499, 503 (1991).

<sup>7</sup> *See, e.g., Tinn v. EMM Labs, Inc.*, 556 F. Supp. 2d 1191, 1198 (D. Or. 2008).

<sup>8</sup> Blue Marmots’ Response to Motion to Compel at 10-12.

1 putting the advice of counsel at issue in the case. The Blue Marmots' Response discusses  
2 several cases addressing implied waiver of the attorney-client privilege, of the type that occurs  
3 when a party brings a malpractice suit or asserts an advice-of-counsel defense, thereby placing  
4 the content of their attorney's advice squarely at issue in the case. In such cases, the attorney-  
5 client privilege is deemed waived, even though the content of the attorney-client communication  
6 itself has not been disclosed. Here, in contrast, the Blue Marmots disclosed and described the  
7 contents of their attorneys' advice in their testimony. By doing so, the Blue Marmots have  
8 waived any claim that the content of the communications described, and any other  
9 communications on the same subject, are protected by the attorney-client privilege.<sup>9</sup>

10 **C. The Blue Marmots' other arguments against finding a waiver are unpersuasive.**

11 The Blue Marmots make several other arguments about why Mr. Moyer's disclosures do  
12 not constitute a waiver and why PGE's Motion to Compel is inappropriate and unnecessary.  
13 However, none of these side arguments are relevant to the waiver analysis. In addition, these  
14 arguments are inaccurate and unpersuasive.

15 *1. Mr. Moyer's testimony consists mostly of legal argument and contains few facts,*  
16 *and his legal statements are not necessary to provide context for factual*  
17 *testimony.*

18 The Blue Marmots assert that their testimony was filed "to establish the underlying facts  
19 of this case, [and] also described their witnesses' understanding of some of the disputed  
20 issues."<sup>10</sup> They also state that "the contested testimony was not offered as legal opinion, it  
21 simply explains the witnesses' understanding and provides necessary context for the  
22 Commission to understand the significance of the facts presented by the witnesses."<sup>11</sup> However,

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<sup>9</sup> See ORS 40.225 (Oregon Evidence Code 503).

<sup>10</sup> Blue Marmots' Response to Motion to Compel at 3.

<sup>11</sup> Blue Marmots' Response to Motion to Compel at 7.

1 the reason for which the Blue Marmots disclosed the substance of attorney-client  
2 communications has no bearing on whether the disclosure waived the privilege, so this entire line  
3 of argument is incorrect as a matter of law.

4 In addition to the legal deficiencies of the Blue Marmots' argument, the Blue Marmots'  
5 assertion that the legal argument in their testimony is necessary to provide context cannot be  
6 squared with the testimony itself. Mr. Moyer's testimony is almost entirely legal in nature and  
7 there is little factual material in his testimony for which to provide context. The majority of Mr.  
8 Moyer's testimony—21 pages—is a section entitled "PURPA Obligations," in which Mr. Moyer  
9 discusses the parties' respective legal obligations under PURPA and exceptions thereto.<sup>12</sup> Only  
10 a few pages in this section address the facts of this case—he describes the parties' actions to date  
11 and the impacts of losing the case on the Blue Marmots.<sup>13</sup> This section also contains Mr.  
12 Moyer's argument about what actions PGE can and should take to resolve this case, and this  
13 argument is intertwined with his assertions of PGE's legal obligations.<sup>14</sup> The next section of Mr.  
14 Moyer's testimony, entitled "Avoided Cost Rates," contains Mr. Moyer's argument about how  
15 PGE is violating the law by attempting to adjust the Blue Marmots' avoided cost rate.<sup>15</sup> Finally,  
16 the last section of Mr. Moyer's testimony, entitled "Discrimination," argues that PGE is  
17 discriminating against the Blue Marmots and offers his opinions about the actions PGE should  
18 have taken to accommodate the Blue Marmots.<sup>16</sup> In sum, Mr. Moyer's testimony does very little  
19 to establish the facts of the case, and is almost entirely focused on conveying Mr. Moyer's  
20 interpretations of the law, and arguments about the ways in which PGE has violated the law.  
21 Therefore, the Blue Marmots' assertion that Mr. Moyer's legal statements are necessary to

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<sup>12</sup> Blue Marmot/300, Moyer/4-25.

<sup>13</sup> Blue Marmot/300, Moyer/7:21-8:7; 13:12-15:22.

<sup>14</sup> Blue Marmot/300, Moyer/16:17-18:9; 18:20-19:3; 19:6-20:5; 22:13-24:13.

<sup>15</sup> Blue Marmot/300, Moyer/25:19-28:12.

<sup>16</sup> Blue Marmot/300, Moyer/28:13-32:15.

1 provide context for his factual testimony reflects a mischaracterization of Mr. Moyer's  
2 testimony.

3 A closer look at just one example demonstrates that Mr. Moyer's conclusions about  
4 disputed issues of law are not necessary for context. Stating his legal opinion on one of the key  
5 issues of this case, Mr. Moyer concludes: "Blue Marmots have the choice to sell their power to  
6 PGE at the specific point *of their choosing* where ownership of the transmission between  
7 PacifiCorp and PGE changes."<sup>17</sup> The Blue Marmots' Response states that Mr. Moyer's  
8 statement is not a legal opinion and "was necessary to lay the foundation for the factual  
9 testimony regarding the relevance of the fact that PGE has offered to accept the Blue Marmots'  
10 net output at PGE's point of connection with BPA's system but will not accept it at PGE's  
11 connection with PacifiCorp's system."<sup>18</sup> However, one need only re-read the statement to  
12 determine that (1) Mr. Moyer is asserting his opinion as to the Blue Marmots' legal rights and  
13 PGE's legal obligations—as if it were blackletter law, and (2) the statement was not necessary to  
14 present the underlying facts clearly. Mr. Moyer could simply have stated that the Blue Marmots  
15 seek to deliver at the PacifiCorp point of interconnection, but PGE will accept their delivery only  
16 at the BPA point of interconnection. Then, in their legal briefing, the Blue Marmots could have  
17 argued—with appropriate citations—that PGE's refusal violates the law, and PGE could have  
18 responded in kind. Instead, the Blue Marmots chose to include their legal argument in their  
19 testimony, and, as a result, the basis for the argument is not now shielded from discovery,  
20 regardless of the reason for its inclusion.

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<sup>17</sup> Blue Marmot/300, Moyer/8.

<sup>18</sup> Blue Marmots' Response to Motion to Compel at 17 (emphasis added).

1           **2. PGE cannot obtain the requested information in other ways.**

2           In their Response, the Blue Marmots purport to explain how PGE can obtain the  
3 information it requests elsewhere.<sup>19</sup> The Blue Marmots argue that PGE can understand the basis  
4 of Mr. Moyer’s testimony by looking to the Blue Marmots’ Complaint.<sup>20</sup> PGE is perplexed why,  
5 if the sole basis for Mr. Moyer’s statements is the Blue Marmots’ Complaint or the caselaw cited  
6 therein, the Blue Marmots did not just say so in response to PGE’s data requests. The fact that  
7 the Blue Marmots have resisted responding to PGE’s data requests on the basis of attorney-client  
8 privilege suggests that Mr. Moyer did more than simply read the Complaint to prepare the legal  
9 portions of his testimony.

10           Moreover, the Blue Marmots’ position is inherently contradictory—they maintain that the  
11 bases of Mr. Moyer’s statements are privileged but they also assert that he is simply providing  
12 context, not offering a legal opinion, and that PGE could have discovered the statements’ bases  
13 from the Complaint. The Blue Marmots have included unsupported legal argument in their  
14 testimony and then attempted to shield it from discovery using contradictory claims that  
15 undermine each other. None of the Blue Marmots’ claims provide a valid reason for refusing to  
16 disclose the bases of Mr. Moyer’s legal arguments, and PGE cannot obtain the requested  
17 information any other way.

18           **3. Mr. Moyer’s testimony is not comparable to PGE’s testimony in UM 1892.**

19           The Blue Marmots point to testimony filed by PGE in an unrelated case—Docket No.  
20 UM 1892—in an attempt to demonstrate how their own testimony is consistent with Commission  
21 practice and with testimony PGE and its counsel have filed in the past.<sup>21</sup> However, this attempt

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<sup>19</sup> Blue Marmots’ Response to Motion to Compel at 15-19.

<sup>20</sup> Blue Marmots’ Response to Motion to Compel at 16-17.

<sup>21</sup> Blue Marmots’ Response to Motion to Compel at 8.



1 backfires because the testimony the Blue Marmots point to is a perfect example of an acceptable  
2 statement of Commission policy used to provide context for factual testimony, and in this way, it  
3 is fundamentally different from what the Blue Marmots have attempted in Mr. Moyer’s  
4 testimony. Specifically, in PGE witness Jay Tinker’s testimony in support of PGE’s Application  
5 for a Waiver of the Competitive Bidding Guidelines, Mr. Tinker sets forth the criteria that  
6 Commission Staff has proposed for evaluating a waiver request, and then goes on to provide the  
7 facts that support PGE’s position that its Application meets each criterion.<sup>22</sup> Mr. Tinker includes  
8 citations to Staff’s criteria—which are not in controversy and which are policy statements, not  
9 conclusions about statutory requirements—and then provides the relevant facts. Importantly,  
10 Mr. Tinker does not use his testimony to make arguments as to disputed issues of law.

11 **D. Mr. Moyer is not a PURPA expert, and even if he were, the bases of his assertions**  
12 **would not be exempt from disclosure.**

13 The Blue Marmots argue that the rules of evidence permit experts to testify to their  
14 opinions or inferences “without prior disclosure of the underlying facts or data, unless the court  
15 requires otherwise,”<sup>23</sup> which, in their view, “undermines PGE’s argument that the Blue  
16 Marmots’ expert witness intended to disclose confidential communications.”<sup>24</sup> Because the  
17 confidential communications at issue in PGE’s Motion to Compel relate to the parties’ legal  
18 obligations, it is apparently the Blue Marmots’ position that Mr. Moyer is an expert on these  
19 issues. Confusingly, however, the Blue Marmots also argue that Mr. Moyer’s use of phrases  
20 such as “on advice of counsel” was not intended to waive the attorney-client privilege, but rather  
21 to “delineat[e] between areas where he has expertise (i.e., with respect to technical facts) and

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<sup>22</sup> *In the Matter of Portland General Electric Company, Application for a Waiver of the Competitive Bidding Guidelines*, Docket No. UM 1892, PGE/100, Tinker/8-11 (Aug. 25, 2017).

<sup>23</sup> Blue Marmots’ Response to Motion to Compel at 12 (quoting ORS 40.425 (OEC 705)).

<sup>24</sup> Blue Marmots’ Response to Motion to Compel at 12.

1 *areas where he does not have any particular expertise (i.e., with respect to the law).*<sup>25</sup> It is  
2 unclear how Mr. Moyer can simultaneously be an expert on PURPA’s legal requirements but  
3 also lack expertise in the law.

4 Although the Blue Marmots’ position as to Mr. Moyer’s expertise is unclear, their  
5 arguments based on the rules of evidence fail, regardless of their position. As an initial matter,  
6 Mr. Moyer clearly is not an expert on PURPA law. Mr. Moyer, who is an engineer by training  
7 and has a background in transmission policy, is not a lawyer and does not have any particular  
8 expertise in the law.<sup>26</sup> Even if Mr. Moyer were an expert, Oregon Evidence Code (OEC) 705  
9 would not protect the bases of his opinions from disclosure, as the Blue Marmots argue.<sup>27</sup> OEC  
10 705 permits an expert “to testify in terms of opinion or inference without *prior* disclosure of the  
11 underlying facts or data.”<sup>28</sup> The rule does not even begin to suggest that the opposing party  
12 cannot discover the basis for the expert’s opinion after the expert has testified, and in fact,  
13 expressly permits disclosure during cross-examination.<sup>29</sup> The Blue Marmots cannot avoid  
14 discovery into the bases for Mr. Moyer’s opinion by incorrectly labeling Mr. Moyer as an expert  
15 witness.

16 **E. The information PGE seeks is not immune from disclosure under the work product**  
17 **doctrine.**

18 The Blue Marmots argue that they have not waived the work product protection and that  
19 PGE has not demonstrated a substantial need for the information.<sup>30</sup> As explained in PGE’s  
20 Motion to Compel, the Blue Marmots have waived any claim of work product protection by

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<sup>25</sup> Blue Marmots’ Response to Motion to Compel at 10 (emphasis added).

<sup>26</sup> Blue Marmot/300, Moyer/2, 4 & 29; Blue Marmots’ Response to Motion to Compel at 10.

<sup>27</sup> Blue Marmots’ Response to Motion to Compel at 12.

<sup>28</sup> ORS 40.425 (OEC 705) (emphasis added).

<sup>29</sup> ORS 40.425 (OEC 705).

<sup>30</sup> Blue Marmots’ Response to Motion to Compel at 12-13.

1 disclosing the information in their testimony.<sup>31</sup> However, even if the work product protection  
2 has not been waived, the Blue Marmots can respond to PGE's data requests without producing  
3 their work product. It is possible to provide the bases for Mr. Moyer's statements without  
4 describing counsel's mental impressions or legal memoranda. PGE continues to request that the  
5 Commission compel the Blue Marmots to respond to PGE's data requests.

6 **F. The Commission can and should decide the Motion to Compel after ruling on PGE's**  
7 **Motion to Strike.**

8 The Blue Marmots speculate that PGE's Motion to Compel may not be ripe because the  
9 Commission has not yet ruled on PGE's related Motion to Strike.<sup>32</sup> However, as PGE explained  
10 in its Motion to Compel, the schedule in this case did not allow sufficient time for PGE to await  
11 a ruling on the pending Motion to Strike before filing a Motion to Compel. Even if PGE  
12 received a ruling on its fully briefed Motion to Strike today, PGE would not have time to file,  
13 fully brief, and receive a ruling on its Motion to Compel before its Response Testimony is due on  
14 December 22. As it is, PGE must file its Response Testimony in less than three weeks. PGE  
15 continues to request that the Commission rule on the Motion to Strike expeditiously and then, if  
16 necessary, decide this Motion to Compel.

II. CONCLUSION

17 The Blue Marmots chose to include in their testimony a significant amount of legal  
18 argument about key, disputed issues in this case, and they have opposed PGE's request to strike  
19 the information. PGE's data requests simply sought to understand the bases for the Blue  
20 Marmots' legal argument in order to respond effectively, a request the Blue Marmots also have  
21 opposed. The information PGE seeks in its requests, and now in its Motion to Compel, is not

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<sup>31</sup> PGE's Motion to Compel at 6, 10.

<sup>32</sup> Blue Marmots' Response to Motion to Compel at 2, 7 & 20; *see* PGE's Motion to Strike (Oct. 25, 2017).

1 protected by the attorney-client privilege or the work product protection, and the Blue Marmots  
2 waived any applicable privilege by disclosing the information in their testimony. In addition,  
3 Mr. Moyer is not qualified as a legal expert, and the rules of evidence regarding expert testimony  
4 do not shield the bases of his statements from disclosure. For these reasons, PGE respectfully  
5 requests that the Commission compel the Blue Marmots to provide full and complete responses  
6 to PGE Data Requests 10(a), 11, 12, 14, 15, 16, and 17.

Dated December 4, 2017

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