

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1829, UM 1830, UM 1831, UM 1832, UM 1833**

BLUE MARMOT V LLC (UM 1829),  
BLUE MARMOT VI LLC (UM 1830),  
BLUE MARMOT VII LLC (UM 1831),  
BLUE MARMOT VIII LLC (UM 1832),  
and  
BLUE MARMOT IX LLC (UM 1833),

Complainants,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Defendant.

RESPONSE TO PGE’S MOTION  
TO OPEN A NEW DOCKET FOR  
FURTHER PROCEEDINGS

**I. INTRODUCTION**

Blue Marmot V, LLC, Blue Marmot VI, LLC, Blue Marmot VII, LLC, Blue Marmot VIII, LLC, and Blue Marmot IX, LLC (collectively the “Blue Marmots”) file this response in opposition to Portland General Electric Company’s (“PGE’s”) Motion requesting that the Oregon Public Utility Commission (the “Commission”) require that further proceedings occur in a new docket rather than in Phase II of Docket UM 1829 et al., which is what the Blue Marmots requested. PGE’s Motion should be denied because opening a new docket would be inconsistent with Commission practice and would risk unnecessary expense and delay. Furthermore, opening a new docket is not necessary to ensure that the scope of further proceedings is appropriately limited.

## II. BACKGROUND

On September 30, 2019, the Commission issued an order granting in part and denying in part the Blue Marmots' requested relief. In briefing, the Blue Marmots requested that the Commission direct PGE to execute the revised power purchase agreements with new commercial operation dates ("CODs") to reflect the delay caused by the litigation in these proceedings. Blue Marmot V and VI power purchase agreements have a November 30, 2019 COD, and Blue Marmot VII, VIII and IX power purchase agreements have a March 31, 2020 COD. The Commission denied the Blue Marmots' request; however, the Commission afforded the Blue Marmots an opportunity to submit evidence in support of new CODs. Specifically, the Commission stated that:

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.<sup>1</sup>

In accordance with Order No. 19-322, the Blue Marmots asserted a claim on November 26, 2019, and requested that the administrative law judge ("ALJ") set a prehearing conference to set a schedule for a Phase II of the proceeding. PGE agreed to the setting of a prehearing conference but disagreed that a Phase II approach should be taken. At the prehearing conference, the ALJ asked both parties to submit briefings on

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<sup>1</sup> *Blue Marmots V, LLC, et al. v. PGE*, Docket No. UM 1829 et al., Order No. 19-322 at 20 (Sept. 30, 2019).

this issue. PGE filed its Motion to Open New Docket for Further Proceedings on December 17, 2019. The Blue Marmots hereby respond.

### III. LEGAL STANDARD

The Commission has established rules to govern its practice and procedure, which are to be liberally construed to ensure just, speedy, and inexpensive resolution of the issues presented.<sup>2</sup> No Commission rule appears to govern whether further proceedings must occur in a Phase II or in a new docket.

According to the Commission’s rules, the Oregon Rules of Civil Procedure (“ORCP”) also generally apply in contested case proceedings, unless they are inconsistent with the Commission’s rules, orders, or an ALJ ruling.<sup>3</sup> The ORCP rules similarly are silent on the question of whether further proceedings should occur in a Phase II or a new docket.

The Commission has established a practice of continuing proceedings in Phase II.<sup>4</sup> Further, this practice is consistent with the Commission’s and ORCP’s rules on

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<sup>2</sup> OAR 860-01-0000.

<sup>3</sup> *Id.*

<sup>4</sup> For example, following is a partial list of contested case proceedings that have had at least one secondary phase: *Idaho Power Company Request for General Rate Revision*, Docket No. UE 233 (Phase II), Order No. 13-416 (Nov. 12, 2013); *Avista Utilities Annual Tax Filing under ORS 757.268*, Docket No. UG 171(4), Order No. 11-119 (Apr. 11, 2011); *NW Natural Request for a General Rate Revision*, Docket No. UG 344 (Phase II), Order No. 19-105 (Mar. 25, 2019); and *NW Natural Mechanism for Recovery of Environmental Remediation Costs*, UM 1635 (Phase II), Order No. 15-276 (Sept. 11, 2015). This list is not exhaustive and is intended only to illustrate the Commission’s practice. Despite this practice, the Blue Marmots are not aware of any Commission precedent in which holding further proceedings in a secondary phase was challenged, nor does PGE cite to any such guiding precedents.

consolidation of proceedings. The Commission’s Rule grants the Commission or ALJ discretion to consolidate proceedings for hearing.<sup>5</sup> ORCP 53A allows orders on consolidation which “may tend to avoid unnecessary costs or delay.”<sup>6</sup>

The Commission appears to have discretion to determine whether proceeding in Phase II or in a new docket would best avoid unnecessary costs or delay and thereby uphold the public interest.

#### **IV. RESPONSE**

PGE’s Motion requests a new docket that would risk causing unnecessary costs and delay. Further, it would not provide any benefit to counterbalance that risk, as it would not ensure the scope of proceedings is limited any better than can be achieved in a Phase II.

##### **A. Proceeding in Phase II Would Ensure Relevant Evidence is Available in a Timely and Least Cost Manner**

Opening a new docket could hinder access to relevant evidence and cause unnecessary expenses and delays. Both PGE and the Blue Marmots devoted significant resources to introducing evidence into the record of Docket No. UM 1829, at times over the strenuous objections of PGE.<sup>7</sup> PGE notes that the Blue Marmots could offer evidence from UM 1829 into a new docket or that the Blue Marmots could request that the

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<sup>5</sup> OAR 860-001-0600.

<sup>6</sup> ORCP 53A.

<sup>7</sup> *See, e.g.*, ALJ Ruling at 4-5 (Dec. 13, 2017); ALJ Ruling at 3 (Mar. 22, 2018).

Commission take official notice of evidence from UM 1829.<sup>8</sup> Both options exist but neither offers certainty.<sup>9</sup>

Neither option for admitting evidence from these dockets into a new docket ensures that the process will avoid delays or unnecessary expenses. Under either option, PGE could object to any evidence it deems irrelevant to the scope of a new docket. In fact, PGE has objected to the taking of official notice in the past.<sup>10</sup> In UM 1805, PGE argued against taking notice of the documents the Complainants in that case requested notice of, arguing that:

OAR 860-001-0460 anticipates the Commission will provide the parties with notice of the specific fact or document the Commission takes official notice of, when the Commission takes official notice *during the hearing, in an ALJ ruling, or in a Commission order*. By providing OAR 860-001-0460(2) notice in the hearing, order or ruling that actually relies on the noticed fact, the Commission or ALJ allows the parties to a proceeding to understand exactly what document or fact is relied upon by the Commission or ALJ in a specific order or ruling, why the fact or document is relied upon, and to what effect. The parties then have 15 days to object to and explain or rebut the noticed fact with the knowledge of how the Commission or ALJ is using or relying on the fact in the context of an actual decision being made by the Commission or ALJ.<sup>11</sup>

In PGE's interpretation, the Commission's order relying upon any officially noticed fact will need to specifically identify and explain which facts it officially notices, and then

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<sup>8</sup> PGE's Motion to Open a New Docket for Further Proceedings at 2; *see* OAR 860-001-0460(1)(d) and OAR 860-001-0490.

<sup>9</sup> The Commission recently took official notice per OAR 860-001-0460(1)(d) in *Pacific Power 2016 Transition Adjustment Mechanism*, Docket No. UE 296, Order No. 19-406 at 5-7 (Nov. 25, 2019).

<sup>10</sup> *E.g., Northwest and Intermountain Power Producers Coalition; Community Renewable Energy Association and Renewable Energy Coalition v. Portland General Elec. Co.*, Docket No. UM 1805, PGE's Response to Complainants' Motion for Official Notice (June 14, 2017).

<sup>11</sup> *Id.* at 2.

provide the parties two weeks to object to and explain or rebut the noticed fact after understanding how the Commission will use those facts. Thus, according to PGE, the Commission will need to carefully consider which facts it wishes to take official notice of, identify them in its order, and then provide both parties time to respond and object.

This is exactly the type of additional and cumbersome process for both the Commission and the parties that the Blue Marmots are seeking to avoid by keeping this case in a Phase II rather than a new proceeding. If the Commission keeps the case in a Phase II, then all PGE and the Blue Marmots need to do is cite to evidence already in the record and then the Commission can rely upon those facts, without having to specifically identify in its order which ones it is taking official notice of nor does the Commission then need to allow parties an opportunity to respond to any officially noticed facts.

Further, the taking of official notice is discretionary by the Commission.

Finally, the Blue Marmots wish they shared PGE's "confiden[ce] that the parties will be able to work cooperatively"<sup>12</sup> to place all relevant evidence into the record of a new docket. The Blue Marmots agree that both PGE and the Blue Marmots will attempt to work cooperatively; however, reaching agreement has proven difficult in the past.<sup>13</sup>

The Blue Marmots are not interested in re-litigating the relevance of evidence already in the record of Docket No. UM 1829 merely for the convenience of having a separate docket number. The Blue Marmots disagree with PGE's statement that

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<sup>12</sup> PGE's Motion to Open a New Docket for Further Proceedings at 2.

<sup>13</sup> *See, e.g.*, Docket No. UM 1805, Parties' Joint Statement (Mar. 10, 2017) (listing the undisputed and disputed facts that remained following efforts to reach agreement).

“evidentiary concerns do not provide a valid reason for proceeding as Phase II.”<sup>14</sup> On the contrary, the possibility of saving time and money for both the parties and the Commission is, in the Blue Marmots’ view, a perfectly reasonable justification for proceeding as Phase II. Proceeding in a Phase II approach would avoid the risk of unnecessarily repeating arguments as to the admissibility of some portions of the UM 1829 record.

**B. PGE’s Concerns that the Scope of a Phase II Approach Would Be Overly Broad Are Unfounded**

PGE suggests that opening a new docket would “best ensure” that the scope of proceedings remains limited.<sup>15</sup> In fact, the Blue Marmots and PGE do not disagree over what the scope of the proceedings should be. The Commission has already stated the scope. Specifically, in Order No. 19-322, the Commission stated that:

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.<sup>16</sup>

The Blue Marmots understand this order to envision a Phase II of the docket to resolve a single unresolved question.<sup>17</sup>

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<sup>14</sup> PGE’s Motion to Open a New Docket for Further Proceedings at 2.

<sup>15</sup> *Id.*

<sup>16</sup> Docket No. UM 1829 et al., Order No. 19-322 at 20 (Sept. 30, 2019).

<sup>17</sup> The Commission may decide, at its discretion, that separate issues should be consolidated in Phase II. Blue Marmots noted in their Application for Reconsideration that there is an additional issue related to Blue Marmot VIII’s ability to deliver that could be considered in a Phase II, if the Commission finds

PGE is suggesting that the Blue Marmots seek to re-litigate issues outside the scope of the extension of CODs. This is incorrect. The Blue Marmots are not seeking to re-litigate in Phase II issues that were resolved by Order No. 19-322. As the Blue Marmots stated in their Motion for a Pre-Hearing Conference on Phase II, the Blue Marmots believe the purpose and scope of Phase II is limited to the issue of the CODs.<sup>18</sup> If PGE still has any concerns regarding the scope of the proceeding, then the Blue Marmots are willing to agree that the Commission could issue an order specifically identifying the scope of the proceeding and that it would be inappropriate to re-litigate any issues.

The Commission has previously resolved ongoing questions in other dockets through the use of a secondary phase, as noted above. In the Blue Marmots' opinion, this approach has worked well in the past, has minimized costs and avoided delays, and would be appropriate in this case.

**C. PGE's Concerns Regarding What Constitutes a Final Order Are Irrelevant**

PGE's claim that launching a new docket will avoid confusion over what constitutes a final order is irrelevant to the procedural question of what form the further proceedings should take. PGE suggests that the Blue Marmots are confused about what constitutes a final order. The Blue Marmots provide the following solely to explain PGE's claim. PGE asked, without explaining the relevance of the question, whether the Blue Marmots considered Order No. 19-322 to be final. PGE is correct that the Blue

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additional briefing on that issue to be useful. Blue Marmot VIII's Application for Reconsideration at 3 (Nov. 27, 2019).

<sup>18</sup> Blue Marmots' Motion for Pre-Hearing Conference at 1 (Nov. 26, 2019).



Marmots indicated to PGE that they may not view Order No. 19-322 as a final order. As PGE acknowledged, the order is currently the subject of a limited reconsideration request by the Blue Marmots.<sup>19</sup>

The Blue Marmots' Application for Reconsideration requests clarification of the Commission's order. It does not seek to resolve the COD question on which the Commission invited further proceedings. The Blue Marmots do not view the reconsideration request as relevant to the current question of what form further proceedings on COD should take.

The Commission should decide the question of how the parties ought to proceed on an issue the Commission chose to defer to further proceedings based on what form of proceedings is likely to "tend to avoid unnecessary costs or delay" and not based on irrelevant factors.

**D. Granting PGE's Motion Could Cause Additional Delay and Could Unduly Prejudice the Blue Marmots**

The Blue Marmots are concerned that additional delay could arise if, in the event the Commission opens a new docket, PGE were to argue in that docket that the claim filed by Blue Marmots is somehow precluded by this docket. The Blue Marmots do not believe their claim would be precluded. Nor do the Blue Marmots believe that it would be the intent of the Commission for the form of additional proceedings to preclude the claim that Order No. 19-322 invited the Blue Marmots to assert.<sup>20</sup>

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<sup>19</sup> PGE's Motion to Open a New Docket for Further Proceedings at 2.

<sup>20</sup> Docket No. UM 1829 et al., Order No. 19-322 at 20.

Proceeding in Phase II would minimize any possible distraction by issues of preclusion. Doing so would avoid the risk of delay and avoid the risk, if preclusion were somehow found to exist, of the Blue Marmots being unduly prejudiced by the unintended consequence of the Commission approving PGE's procedural preference for additional proceedings.

## V. CONCLUSION

For the reasons discussed above, the Blue Marmots respectfully request the Commission deny PGE's Motion and allow the process to continue in Phase II, as the Blue Marmots requested.

Dated this 20th day of December, 2019.

Respectfully submitted,



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