

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1829, UM 1830, UM 1831, UM 1832, UM 1833 – PHASE II

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
COMPEL

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 to Portland General Electric Company’s (“PGE’s”) motion requesting that the Oregon Public Utility Commission (the “Commission”) Administrative Law Judge (“ALJ”) compel the Blue Marmots to produce excess data that are unnecessary, irrelevant, commercially sensitive, and duplicative to this proceeding (“PGE’s Motion”). PGE’s Motion is inconsistent with the Commission’s rules and practice and seeks to have the Commission act beyond its jurisdiction. The Blue Marmots respectfully request that PGE’s Motion be denied.

The Blue Marmots have endeavored to cooperate with PGE and provide data in spite of disagreements with PGE as to its need for the data. Nevertheless, PGE now seeks to compel the Blue Marmots to produce: 1) irrelevant permitting communications; 2) commercially sensitive

profitability data that PGE has no valid need for; and 3) duplicative interconnection communications.¹ The requested data production would require the Blue Marmots to waste significant time and resources as well as to suffer irreparable harm.

Instead of limiting discovery to the agreed-upon issues, PGE seeks copious correspondence regarding the Blue Marmots' permitting processes. The Blue Marmots have shared all permitting correspondence relating to the permitting timeline and deviations from that timeline, whether past or expected. This information is relevant to the issue in this case regarding what new Commercial Operation Dates ("CODs") should be included in the final executable PPAs, and Blue Marmots have no further relevant permitting correspondence to share. Further, the irrelevant evidence PGE seeks would confuse the issues and could be prejudicial to the Blue Marmots.

PGE's request for information related to permitting makes it clear that PGE wants to expand the scope of this proceeding far broader than what the Commission intended or the Blue Marmots expected. PGE does not simply want to litigate whether there were any commercially reasonable delays associated with the litigation and what new CODs the Blue Marmots are entitled to. Instead, PGE wants the Commission to adjudicate a counterfactual alternative history and make a determination about whether or not the Blue Marmot projects would have been built, if PGE had countersigned the PPAs in April 2017. The Blue Marmots are confident that each of the projects would have progressed successfully towards commercial operations but for the litigation; however, nothing is ever certain. The Blue Marmots did not focus their testimony on speculation about what might have occurred, but on what actually happened. The Blue Marmots

¹ PGE Motion to Compel at 19 (Feb. 21, 2020) (requesting the Commission compel the Blue Marmots to respond to Data Requests 1, 4, 8, 12, and 15(c)). Note that Data Request 15(c) is no longer at issue, as PGE and the Blue Marmots have resolved that aspect of this discovery dispute.

strongly object to allowing PGE to expand the scope of this proceeding to address whether there may have been unrelated challenges in the construction of the facilities. Even if there were other challenges (and all projects face challenges), they are irrelevant to the question both parties have agreed to litigate: Whether a commercially reasonable business would either: 1) delay the projects in light of the litigation in Phase I; or 2) move forward and risk tens of millions of dollars without viable, fully executed contracts.

PGE seeks commercially sensitive information regarding the Blue Marmots' expected profitability in PGE's alternative-history universe in which the Blue Marmots moved forward to construct the projects without viable contracts. PGE has failed to show that these data are necessary to its case, nor has PGE shown that these data are even remotely relevant. The Blue Marmots want to emphasize that the data regarding profitability is highly commercially sensitive. Disclosure would permanently distort the competitive relationship between the Blue Marmots and PGE (which is both a competitor and customer), causing irreparable harm to the Blue Marmots and their parent company EDP Renewables North America ("EDPR"). The Blue Marmots are not aware of the Commission ever requiring qualifying facilities ("QFs") to disclose their profits, which is consistent with the Commission's limited authority under federal and state law. Allowing PGE to do so here would undermine the confidence of all QFs that the Commission will protect their commercial secrets from PGE's eyes. The Blue Marmots ask that the Commission act to foster competitiveness, not to destroy it.

Finally, PGE seeks correspondence between the Blue Marmots and PacifiCorp, regarding interconnection, or transmission, or both. PGE has not clarified what topic(s) of correspondence it is interested in, and appears to be taking the position that everything that the Blue Marmots and PacifiCorp have discussed over the past four years is crucially important to this proceeding. The

Blue Marmots have already provided PGE with substantial evidence regarding both potential topics, including study results and draft and executed agreements which are far more definitive than any correspondence. The Blue Marmots ask not to be burdened with duplicating evidence already provided to PGE.

II. BACKGROUND

A. The Narrow Scope of this Phase II

Phase I of this proceeding addressed two issues: 1) whether PGE was required to execute standard power purchase agreements (“PPAs”) with the Blue Marmots; and 2) if so, what delivery terms those PPAs should have. The dispute arose over a single contractual term—the agreed-upon point of delivery (“POD”) that PGE belatedly characterized as oversubscribed—but, as is typical in litigation, the dispute soon expanded to other essential contractual terms, including the financial terms of the contracts. For example, PGE initially argued that any additional costs for delivery should be fully allocated to the Blue Marmots (even when the costs were unknown).² Later on, PGE argued that if PGE were required to make alternative delivery plans, then the associated costs should nevertheless be allocated to the Blue Marmots through a reduction in the contract price. The Commission rejected PGE’s arguments, holding that PGE had to execute standard PPAs with the Blue Marmots that had terms almost identical to those negotiated prior to the litigation.³ However, prior to this order the Blue Marmots had no

² PGE offered two options for power delivery: upgrade the POD or transmit to a different POD. The Blue Marmots and PGE agree that transmission to the next closest POD had estimated incremental costs of \$14 million. However, at the start of litigation, the parties did not know how much upgrades to the POD might potentially cost, and, despite the Blue Marmots’ evidence to the contrary, PGE never backed down from its position that the only possible way for the Blue Marmots to deliver their power to the POD in the executable PPAs provided by PGE was a 300 mile generation tie line. Blue Marmots Opening Brief at 53-54 n.159; PGE Response Brief at 22-25.

³ Order No. 19-322 (Sept. 30, 2019).

certainty regarding what the Commission’s final order would be or if the Commission would hold that the Blue Marmots were entitled to the avoided cost prices in their partially executed PPAs.

The Commission also held that further evidence was needed to determine whether the scheduled CODs in the new PPAs should be identical to the ones negotiated in early 2017 or whether new CODs should be adopted to reflect delays to the Blue Marmots’ development caused by the litigation. The determination of this one contractual term is the complete, narrow scope of this proceeding. The parties restated these issues as:

- Whether litigation caused commercially reasonable delays in the Blue Marmots’ scheduled commercial operation dates listed in their partially executed PPAs?
- 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?⁴

In short, this Phase II is concerned with determining the appropriate CODs for the Blue Marmots.

The Blue Marmots welcome the speedy resolution of this dispute. Instead of the typical two weeks’ turnaround for PGE to counter-sign an executable PPA,⁵ one-hundred-and-fifty-two weeks have passed without the mutual execution of these PPAs, as of the date of this filing. This loss of time has been and continues to be harmful to the Blue Marmots. The original COD for two Blue Marmots has already passed, and the original COD for the other three Blue Marmots will pass soon. Due to the Phase I litigation, the Blue Marmots will not be able to achieve the

⁴ PGE and Blue Marmots Joint Issues List at 1 (Jan. 2, 2020); *see also* ALJ Ruling at 4 (Jan. 31, 2020) (adopting parties’ Joint Issues List).

⁵ *See, e.g.*, Docket No. UM 1833, Complaint at ¶ 23 (“On April 5, 2017, PGE informed Blue Marmot IX that PGE usually takes a couple of weeks from the date the QF executes the executable final PPA for PGE to execute the partially executed final PPA.”).

original CODs. New CODs are necessary. Without them, the Commission’s favorable ruling in Phase I provides no relief to the Blue Marmots.

B. The Context of this Discovery Dispute

PGE spends the first part of its Motion to Compel complaining about when the Blue Marmots provided data responses and the time it took to provide supplemental responses; however, PGE omits that the Blue Marmots timely provided Data Responses⁶ to all of PGE’s Data Requests. This is despite PGE taking the highly unusual step of submitting the Data Requests one week prior to the scheduled filing date for the Blue Marmots’ Direct Testimony. Providing timely responses was burdensome for the Blue Marmots as they also sought to finalize their Direct Testimony.⁷ In fact, the Blue Marmots believe that its Direct Testimony and associated exhibits readily answered at least seven of PGE’s Data Requests,⁸ making several of PGE’s requests unripe, unnecessary, burdensome, and wasteful.

PGE raised no concerns with about half of the twenty Data Responses⁹ but did raise concerns regarding the remaining ones.¹⁰ On these remaining Data Responses, the Blue

⁶ See PGE Motion to Compel at Attachment B (Feb. 21, 2020) (Blue Marmots’ Responses to PGE’s First Set of Data Requests (Feb. 6, 2020)). The Blue Marmots stated various objections in writing, which constitute responses under the Commission’s rules. See OAR 860-001-0540 (“Each data request must be answered fully and separately in writing or by production of documents, *or objected to in writing.*” (emphasis added)).

⁷ While an unrelated disagreement prevented the Blue Marmots from filing their Direct Testimony as scheduled, they provided a copy of their Direct Testimony to PGE on the original due date and were prepared to file it, but PGE objected. This dispute, however, added further burdens on the Blue Marmots’ ability to timely respond to PGE’s data requests.

⁸ Specifically, Data Requests 2, 3, 5, 6, 9, 10, 15(a) and (b), and 16. See PGE Motion to Compel at Attachment A (Feb. 21, 2020) (PGE’s First Set of Data Requests (Jan. 23, 2020)).

⁹ Specifically, Data Requests 3, 9, 10, 13, 14, 15(a) and (b), 16, 17, 19, and 20. See PGE Motion to Compel at Attachment A (Feb. 21, 2020) (PGE’s First Set of Data Requests (Jan. 23, 2020)).

Marmots provided Supplemental Responses within five business days,¹¹ while continuing to work to formally file their Direct Testimony, which meant that they needed to resolve PGE’s objections to that testimony referencing settlement discussions. Some of PGE’s concerns were trivial, such as requesting that the Blue Marmots restate rather than cite the Blue Marmots’ as-yet-unfiled Direct Testimony, which PGE had a copy of.¹² Others were substantive, asking for data that the Blue Marmots had objected to as irrelevant, among other grounds. Despite their objections and view that the data was unneeded and production was wasteful, the Blue Marmots sought to avoid unnecessary disagreements by providing this data. In this way, the Blue Marmots have appeased PGE as to an additional six of the Data Requests.¹³ In addition, since the filing of PGE’s Motion to Compel, the Blue Marmots and PGE have resolved the dispute as to Data Request 15(c). Based on this resolution, the Blue Marmots do not provide a response on the merits regarding Data Request 15(c) in this filing.

¹⁰ Specifically, Data Requests 1, 2, 4, 5, 6, 7, 8, 11, 12, 15(c), and 18. *See* PGE Motion to Compel at Attachment A (Feb. 21, 2020) (PGE’s First Set of Data Requests (Jan. 23, 2020)).

¹¹ PGE’s Motion to Compel incorrectly states that the Blue Marmots promised to provide supplemental responses earlier. PGE Motion to Compel at 6-7 (Feb. 21, 2020). In fact, the Blue Marmots responded the very next day after receiving PGE’s February 11 letter that they would respond by “close of business Wednesday,” meaning the next Wednesday, February 19. PGE Motion to Compel at Attachment E (Feb. 12, 2020 Email from Mr. Sanger re Blue Marmot Discovery). Had Mr. Sanger meant Wednesday, February 12, as PGE argues, then he would have simply said that a response would be provided by “close of business today.” Since the email was sent late in the day and it would have been impossible to provide supplemental responses in such a short period of time, it was unreasonable for PGE to assume the email referred to the same day.

¹² In fact, PGE has already sent a Second Set of Data Requests to the Blue Marmots with citations to the unfiled testimony in the same manner that they earlier claimed was inappropriate. *Compare* PGE Motion to Compel at Attachment D (Feb. 21, 2020) (February 11, 2020 Letter to Mr. Sanger), *with* Attachment A (PGE’s Second Set of Data Requests). This suggests that the earlier requests served prior to the Blue Marmots completing their draft testimony accomplished nothing but the waste of time and resources.

¹³ Specifically, Data Requests 2, 5, 6, 7, 11, and 18. *See* PGE Motion to Compel at Attachment A (Feb. 21, 2020) (PGE’s First Set of Data Requests (Jan. 23, 2020)).

Now, PGE raises concerns with only four Data Responses, fewer than half of those that PGE originally disputed, on three topics: 1) permitting communications (Data Requests 1 and 4); 2) commercially sensitive profitability estimates (Data Request 8); and 3) transmission and/or interconnection communications (Data Request 12).¹⁴

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.¹⁵ The Commission’s rules provide both broad and specific guidance with respect to discovery in contested case proceedings. For example, “[d]iscovery must be commensurate with the needs of the case, the resources available to the parties, and the importance of the issues to which the discovery relates.”¹⁶ Furthermore, the evidence sought in discovery must be relevant, which means that 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.”¹⁷

Discovery is not unlimited. For example, discovery must not be “unreasonably cumulative, duplicative, burdensome, or overly broad.”¹⁸ Further, relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.”¹⁹

¹⁴ See PGE Motion to Compel at 19 and Attachment A (Feb. 21, 2020) (PGE’s First Set of Data Requests (Jan. 23, 2020)).

¹⁵ OAR 860-001-0000; *see also* ALJ Ruling at 4 (Jan. 31, 2020) (acknowledging and adopting in this proceeding the Commission’s rules applicable to the introduction, admission, and consideration of evidence related to contested cases).

¹⁶ OAR 860-001-0500(1).

¹⁷ OAR 860-001-0450(1).

¹⁸ OAR 860-001-0500(2).

¹⁹ OAR 860-001-0450(1).

The Commission has adopted specific rules governing discovery requests. For instance, data requests, like depositions, must “be reasonably calculated to lead to the discovery of relevant evidence.”²⁰ A party may object to a data request in writing.²¹ Further, data requests are subject to the discovery rules in the Oregon Rules of Civil Procedure (“ORCP”).²²

The ORCPs include general provisions governing discovery, including limitations on discovery.²³ For example, ORCP 36B limits the scope of discovery to “any matter, not privileged, that is relevant.”²⁴ Furthermore, any party seeking to obtain discovery must make “a showing that the party seeking discovery has substantial need of the materials in the preparation of such party’s case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”²⁵ A responding party, under ORCP 39D, may decline to respond to a discovery request so as to “to preserve a privilege or constitutional or statutory right.”²⁶ A responding party so objecting is relieved of its duty to respond to the extent of the objection.²⁷

One statutory right of relevance here is every person’s right not to be subject to “any undue or unreasonable prejudice or disadvantage in any respect” by a public utility, such as PGE.²⁸ That right extends to any action by a public utility and must logically extend to any action by the Commission, which is charged with “supervis[ing] and regulat[ing]” every public

²⁰ OAR 860-001-0540(4); OAR 860-001-0520(4).

²¹ OAR 860-001-0540(1), (4).

²² OAR 860-001-0540(1); *see also* OAR 860-001-0000 (providing that the ORCP generally apply in contested case proceedings unless inconsistent with Commission rules, orders, or an ALJ ruling).

²³ *See* ORCP 36 and 43.

²⁴ ORCP 36B.

²⁵ *Id.*

²⁶ ORCP 39D(3).

²⁷ ORCP 43.

²⁸ ORS 757.325.

utility.²⁹ The Commission’s authority extends to ensuring every public utility’s compliance with the Constitution and laws of this state. The Commission has no authority to issue an order, whether on a motion to compel or any other pleading, that would have the practical effect of *requiring* a public utility to violate statutory law.

In addition, the Commission is bound by its adopted policies as well as those of the Oregon State Legislature. Relevant here is the State of Oregon’s official policy to “[i]ncrease the marketability of electric energy produced by qualifying facilities” and to “[c]reate a settled and uniform institutional climate for the qualifying facilities.”³⁰ In pursuit of this policy, the Commission has stated “[O]ur intent with regard to implementation of PURPA remains the same as first articulated in 1981. We seek to provide *maximum incentives* for the development of QFs of all sizes, while ensuring that ratepayers remain indifferent to QF power by having utilities pay no more than their avoided costs.”³¹ This Oregon statute should guide the Commission in all of its decision making, including resolving procedural and discovery disputes.

IV. RESPONSE

A. **The Blue Marmots Should Not Be Compelled to Engage in the Unduly Burdensome Production of Permitting Communications That Are Irrelevant and May Be Prejudicial**

In Data Requests 1 and 4, PGE seeks to obtain “all communications” between the Blue Marmots and the Oregon Department of Energy’s Energy Facilities Siting Council (“EFSC”) and the Lake County Planning Department (“Lake County”).³² The Blue Marmots have provided all

²⁹ ORS 756.040(2).

³⁰ ORS 758.515.

³¹ *Re Investigation Relating to Electric Utility Purchases from QFs*, Docket No. UM 1129, Order No. 05-584 at 11 (May 13, 2005) (emphasis added).

³² PGE Motion to Compel at Attachment A (Feb. 21, 2020) (PGE’s First Set of Data Requests (Jan. 23, 2020)).

relevant and potentially relevant correspondence to both entities,³³ and any additional production would be wasteful and potentially harmful.

1. The Blue Marmots Provided All Relevant Permitting Communications

The Blue Marmots recognize that evidence of the permitting timing and schedule is relevant to the proceeding. Specifically, once the Blue Marmots prove that litigation caused commercially reasonable delays to the development (Issue 1), then this proceeding will determine the new CODs that are appropriate for the Blue Marmots' PPAs (Issue 2). To determine the appropriate CODs to adopt, it is necessary to understand the remaining steps, including permitting, that the Blue Marmots must undertake to achieve their CODs. Therefore, the permitting timing and schedule are relevant. Respecting this, the Blue Marmots have provided *all* correspondence regarding permitting timing and scheduling with both EFSC and Lake County.

PGE believes that "it is likely that the delays in developing the Blue Marmots' projects were not caused by the litigation, but rather by unrelated challenges in the siting, permitting and interconnection processes."³⁴ PGE's argument is completely outside the scope of the very limited issues in Phase II. PGE is seeking to expand the first issue in Phase II which is: "Whether litigation caused commercially reasonable delays in the Blue Marmots' scheduled commercial operation dates listed in their partially executed PPAs."³⁵ Whether or not there may have been other challenges associated with the projects' development related to permitting, financing, construction, weather, U.S trade policy, U.S. tax law, or a myriad of other factors is irrelevant. This is not a proceeding about the strategies, plans, risks and solutions that would

³³ See PGE Motion to Compel at Attachment B (Feb. 21, 2020) (Blue Marmots' Responses to PGE's First Set of Data Requests (Feb. 6, 2020).

³⁴ PGE Motion to Compel at 3 (Feb. 21, 2020).

³⁵ *Id.* at 8.

have been involved to date in the development of the Blue Marmots had PGE countersigned the PPAs. PGE should not be permitted to litigate—and we expect that the Commission has no interest in (or jurisdiction over) the litigation of—a hypothetical issue about all of the various factors that could potentially have resulted in the Blue Marmots meeting or not meeting their original scheduled CODs.

Even accepting PGE’s view of what is relevant, what PGE seeks has already been provided. PGE requests evidence of a delay to permitting. Because the Blue Marmots have provided *all* correspondence regarding permitting timing and scheduling with both EFSC and Lake County, that correspondence necessarily included any correspondence regarding permitting delays. There is no further relevant permitting correspondence to share.

2. PGE Seeks Irrelevant Communications that Are Burdensome

PGE asserts that the Blue Marmots have failed to provide an adequate response because they have not provided “all communications” with either permitting agency. The Blue Marmots stated in writing their objections for withholding data, specifically that the request asks for evidence that is not relevant, that the scope of the request is overly broad, and that the production would be unduly burdensome.³⁶ PGE dismissed these objections and asked the Blue Marmots to supplement their responses. At that time, the Blue Marmots explained why the remaining data are not relevant and reiterated that a request covering irrelevant evidence is both overly broad and unduly burdensome.³⁷

PGE refuses to acknowledge that production is burdensome. PGE has provided no limitations in terms of time frame or subject matter, thus the Blue Marmots could be forced to

³⁶ PGE Motion to Compel at Attachment B (Feb. 21, 2020) (Blue Marmots’ Responses to PGE’s First Set of Data Requests (Feb. 6, 2020).

³⁷ PGE Motion to Compel at Attachment F, Blue Marmots’ Supplemental Responses to PGE’s First Set of Data Requests (Feb. 19, 2020).

review at least over 300 emails with EFSC and Lake County on one employee's computer. Ascertaining whether there are additional communications and engaging in the total production—including review—of these documents would be burdensome.

That burdensome production is also unnecessary. PGE could readily obtain further information on the permitting processes, including information about the Blue Marmots specifically, through a simple public records request to EFSC or Lake County. In this respect, PGE has failed to show that it is “unable without undue hardship to obtain the substantial equivalent of the materials by other means.”³⁸ If PGE wishes to waste money and resources examining irrelevant evidence, it should do so on its own dime and not burden the Blue Marmots.

3. PGE Seeks Irrelevant Communications that It Intends to Use in an Inappropriate and Prejudicial Manner

To the extent any additional permitting correspondence might *potentially* lead to admissible evidence, the Blue Marmots ask not to produce it on the grounds it could confuse the issues in a way that is prejudicial to the Blue Marmots. All projects must pass through a long permitting process, and this proceeding is not a referendum on the merits of the development of the Blue Marmots. Any potential permitting challenges, if any, raised in reference to the Blue Marmots are outside of the limited scope of this Phase II. Given that any additional correspondence would be irrelevant or, at most, marginally likely to lead to admissible evidence, and thereby provide minimal probative value, that value is substantially outweighed by the risk that the evidence produced could be misleading, unfairly construed and prejudicial to the Blue Marmots.

³⁸ ORCP 36B.

For the above reasons, PGE’s Motion to Compel supplemental responses to Data Requests 1 and 4 should be denied.

B. The Blue Marmots Cannot Be Compelled to Produce Irrelevant and Commercially Sensitive Data Regarding Speculative Profits

PGE’s Data Request 8 states, “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).”³⁹ PGE requests speculative facts unnecessary to PGE’s testimony and asks the Blue Marmots to reveal commercially sensitive data. In and of itself, any information regarding expected “profit” is irrelevant because it does not provide the Commission any information regarding risk and therefore whether delays in development were commercially reasonable. Expected profit is only one aspect of a developer’s decision making, including other investment opportunities and the risks associated with the project. Even if there were very high potential profits, a commercially reasonable business like EDPR simply would not begin construction and make major investments in the Blue Marmots without the certainty provided by viable, fully executed PPAs.

The Blue Marmots cannot stress how strongly they believe PGE’s request is highly inappropriate. The Blue Marmots are concerned that being compelled to produce data would be an illegal dereliction of the Commission’s duties to foster a competitive market and to supervise PGE in its compliance with the law. Essentially, PGE is seeking to force EDPR to provide EDPR’s most sensitive information to PGE, an entity that is both a competitor and customer, and asks EDPR to forfeit its rights as a competitive entity, in violation of Oregon state law, in

³⁹ PGE Motion to Compel at Attachment A (Feb. 21, 2020) (PGE’s First Set of Data Requests (Jan. 23, 2020)).

exchange for EDPR's right simply to obtain CODs that will provide these projects with a reasonable chance of being constructed.

1. Evidence of Profitability Is Irrelevant

The Blue Marmots' expected profits are irrelevant to the issue of what CODs should apply. PGE asks the Blue Marmots to report their expected profits, given the PPA terms announced by the Commission only a few months ago. However, this proceeding is not about what the Blue Marmots ought to do now, but what the Blue Marmots already did. The fact at issue in this proceeding is whether the Blue Marmots' actions in delaying development were commercially reasonable. This fact depends upon the information they had at the time. Any information they did not have and could not possibly have obtained—such as how the Commission would rule—has no bearing on the reasonableness of their decision-making.

If PGE is inquiring about the Blue Marmots' expected profits at the time PGE refused to counter-sign the PPAs, that information is still irrelevant. Whether the Blue Marmots acted reasonably depends on what they knew, and they did *not* know if PGE would ever execute PPAs, if the new PPAs' terms would be the same as the old ones, or what the Commission's final order would be.

PGE argues that the Blue Marmots “were likely profitable even if the Blue Marmots had to pay to deliver their output to BPAT.PGE POD,”⁴⁰ but this was not the only “if” at issue. PGE assumes that the only question was whether the Blue Marmots would be required to pay to deliver to BPAT.PGE POD, and that this was the only aspect of project economics that was unknown. PGE's views are summarized as claiming that “the worst-case scenario for the Blue Marmots in this litigation would have decreased EDPR's expected profits by \$14 million.”⁴¹

⁴⁰ PGE Motion to Compel at 3 (Feb. 21, 2020).

⁴¹ PGE Motion to Compel at 10 (Feb. 21, 2020).

PGE's argument is flawed for at least four reasons. First, it ignores that upgrading the original PACW.PGE POD was an alternative option to buying transmission to the BPAT.PGE POD. The costs of upgrading PACW.PGE POD were uncertain but likely in excess of \$450 million,⁴² a number substantially greater than \$14 million. The Commission could have ordered PGE or the Blue Marmots to pay for the upgrade, which at over \$450 million would have made the projects uneconomic.

Second, PGE assumes that paying \$14 million for BPA transmission was a fixed option. However, the relevant remaining transmission capacity on BPA's network could have been secured by a different entity at any time. Thus the transmission was not guaranteed to be available for sale and even if it were available at the end of litigation, the costs could have changed.

Third, PGE's argument rests on an untenable position that PGE could be counted on not to change its position in the litigation (which was that the avoided cost prices in the partially executed PPAs were locked in), and not to argue that the Commission ought to change the prices to be paid to the Blue Marmots, or that other non-price terms that would impact the overall value of the project should be changed. The context of PGE's stated commitment to honor the prices is significant. The Blue Marmots and the Commission are aware that PGE has received more than 50 Commission complaints, one Federal Energy Regulatory Commission ("FERC") complaint, one FERC request for declaratory ruling, and two state and federal district court complaints regarding QF

⁴² Blue Marmot/400, Moyer/40-41.

contracting.⁴³ This included a wide variety of creative circumstances in which PGE sought to avoid its obligation to purchase the net output from QFs.⁴⁴

PGE also has taken aggressive efforts at the Commission to change regulatory policy in a way that is harmful to QFs. For example, PGE might have argued that the Blue Marmot projects were no longer eligible for the QF rates with standard contracts due to the capacity threshold for standard rate contracts dropping from 10 MWs to 3 MWs. This was not just a hypothetical concern. During this proceeding, PGE made two proposals to lower its avoided cost prices⁴⁵ and another to lower the size threshold from 10 MWs to 3 MWs and impose a permanent lifetime cap on any one developer from accessing standard prices.⁴⁶ There were other projects that had been negotiating PPAs with PGE for months and to which PGE had promised to provide executable PPAs, but were suddenly told by PGE that they were no longer eligible for standard contracts because they had no

⁴³ *Re PGE Request to Update its Schedule 201 and Standard Power Purchase Agreements*, Docket No. UM 1987, PGE Application at 3 (Dec. 7, 2018) (information current as of December 2018—additional complaints have since been filed).

⁴⁴ *See e.g., Re PGE Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar QFs*, Docket No. UM 1854, Northwest and Intermountain Power Producers Coalition, Community Renewable Energy Association and Renewable Energy Coalition Joint Response to PGE Motion for Interim Relief at 36-39 (July 27, 2017) (list of examples of PGE contracting abuses).

⁴⁵ *PGE's Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728 at 1 (May 1, 2017)(PGE requested a May 17, 2017 effective date, which was at least one month prior to the normal effective date). In addition, on August 4, 2017, PGE announced in its 2016 IRP that PGE will ask the Commission to change its current avoided cost rate process (which re-sets avoided cost rates only after approval of a new rate filing that is made 30 days after the IRP acknowledgment) to instead ensure that the avoided cost prices paid to QFs that enter into contracts or achieve a legally enforceable obligation after the Commission's acknowledgement will no longer to be eligible for the current rates. *Re PGE 2016 Integrated Resource Plan*, Docket No. LC 66, PGE Response to Staff Report at 7-8 (Aug. 4, 2017).

⁴⁶ *Re PGE Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar QFs*, Docket No. UM 1854, PGE Application at 1 (June 30, 2017) (PGE sought to lower from 10 MWs to 3 MWs the eligibility cap for solar QFs to obtain standard cost prices and a cap on a solar QF project with capacity above 100 kilowatts from being eligible for a standard contract or standard prices from PGE if any owner of the solar QF project has requested or obtained standard prices from PGE for more than 10 MW of solar QF capacity).

executed PPAs.⁴⁷ If PGE had been truthful with these projects, then they could have timely executed PPAs.

The Blue Marmots themselves had a reasonable lack of confidence in PGE's ability to honor its commitments. From the Blue Marmots' perspective, PGE had already agreed to accept power at the PACW.PGE POD and committed to execute PPAs with that delivery point. The Blue Marmots believed that PGE had failed to "live up to its promises" and that PGE "was not acting as a good faith business partner."⁴⁸ This was not a business context in which the Blue Marmots could make multi-million dollar investment decisions based on the hope that PGE would not change its position.

In fact, in this proceeding PGE argued that none of the contract terms were final and, if PGE were required to accept the power at the PACW.PGE POD, then the costs associated with transmission upgrades should nevertheless be allocated to the Blue Marmots through a reduction in the contract price.⁴⁹ PGE also stated in this proceeding that it had not decided whether to honor the contracts that it had with Airport Solar, Lakeview and OM Power, but wanted to use this proceeding as a test case.⁵⁰ PGE's view was that, if the Commission adopted all of PGE's arguments, then PGE was reserving the right to require these QFs with fully executed PPAs to purchase a second wheel of transmission across Bonneville Power Administration, despite PGE's prior written contractual commitment to accept their power at the PacifiCorp POD.

While PGE sought to impose other costs on the Blue Marmots, including through indirect impacts to prices, ultimately PGE did not propose any direct changes to the avoided cost prices

⁴⁷ Tickle Creek Solar was a particularly informative example. PGE provided an executable PPA to Tickle Creek Solar, which Tickle Creek executed and returned to PGE. PGE initially refused to execute the PPAs so because PGE made a filing to change the size threshold availability. PGE could have done the same to the Blue Marmots. *Re Tickle Creek Solar, LLC v. PGE*, Docket No. UM 1862, Complaint at ¶¶ 41-54 (Aug. 7, 2017).

⁴⁸ Blue Marmot/100, Irvin/7.

⁴⁹ PGE Response Brief at 22-28, 40-41.

⁵⁰ Blue Marmots' Opening Brief at 71.

in the partially executed PPAs. However, it would have been foolhardy for the Blue Marmots to count on this outcome, especially during the 2017-2019 time period during the height of PGE's unpredictable and creative contracting maneuvers and regulatory filings.

The fourth major reason why the worst case scenario was not an additional \$14 million in costs is that, regardless of PGE's statements, the Commission could have resolved issues in a variety of manners and was not bound to simply adopt either PGE's or the Blue Marmots' positions. In fact, the Commission's ultimate order agreed with PGE on certain issues and the Blue Marmots on others. No one knew what the Commission would decide until the order was released. The Commission could have ordered either or both parties to instead pay some different cost to upgrade the original POD, or even found that the Blue Marmots were not entitled to the avoided cost prices in their partially executed PPAs. For example, the Commission's legally enforceable obligation standard explicitly adds uncertainty by stating that in a complaint, "the Commission will resolve a dispute and determine the avoided cost price to apply on a case-by-case basis."⁵¹ While the Blue Marmots are appreciative of the Commission's primary holding in Phase I, the fact remains that the Order's conclusion that the original CODs might not be changed when it was impossible to meet them was surprising.

At no point in this litigation (including today) can the Blue Marmots rely on old PPA terms in their financial decision-making. Any expectations of profits based on the old PPA terms fails to make the fact at issue—the reasonableness of the Blue Marmots' financial decision-making—more or less probable because it would at best provide an inaccurate and incomplete picture of the Blue Marmots' financial decision-making. PGE asks the Blue Marmots to make major financial decisions based on certain PPA terms, when the Blue Marmots did not have valid

⁵¹ *Re Commission Investigation into QF Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 3 (May 13, 2016).

and enforceable PPAs with PGE. They simply could not make financial decisions based on non-existent PPAs.

Further, the view of expected profitability requested by Data Request 8 would be incomplete as it would lack an understanding of other investment opportunities and risks. For a financier, including one using internal capital, the opportunity cost is as relevant as the expected profits. Even if a project is *known* to be profitable, that knowledge is meaningless without some awareness of what profits a financier must forego by locking funds into a specific project. Given that financing decisions are based on comparisons, financiers also care about the level of risk involved in achieving any expected profits. If a level of risk is too high, the expected profits are irrelevant.

That is the situation here. For the Blue Marmots, the uncertainty of litigation created financial risks that were too great to justify the investments needed for project development. This was not a high-risk, high-reward situation; it was a high-risk, *unknown*-reward situation. The Blue Marmots could not have acted based on expected profits from PPA terms that were under dispute and up to the Commission to decide upon. No amount of data production now will change what was unknown then.

To determine whether the Blue Marmots' financial decision-making was commercially reasonable, the only facts that need to be determined are what the risks were. It is sufficient to recognize the fact that the reward was unknown. Data Request 8 asks what the previously-unknown reward is, given new information, but any answer would be irrelevant. The crucial determination for this proceeding is what the risks were, and whether they justified delays to the extent that the Blue Marmots deserve new CODs. The Blue Marmots should not be forced to produce irrelevant data that is unnecessary and misleading.

2. PGE Has Failed to Make a Showing that Such Speculative Evidence is Necessary

PGE has already admitted that it has formed an estimate of the Blue Marmots' likely revenue if PGE had not failed to counter-sign the PPAs back in 2017.⁵² PGE is free to use that estimate in drafting its Direct Testimony. If it wishes to make a more accurate estimate, it is free to do so by using any of the publicly available evidence regarding the likely costs of the Blue Marmots and similarly situated projects, such as interconnection costs which are available on OASIS.

PGE may freely assert in its testimony that based on the available evidence, PGE believes that the Blue Marmots' likely profits—in the *non-existent* universe in which PGE had not failed to counter-sign the PPAs—justified development regardless of the litigation.⁵³ PGE has no need of a definitive estimate to make that argument.

As a matter of legal procedure, the Blue Marmots have the burden to state their claim, which necessarily includes rebutting PGE's arguments. The Blue Marmots have the right to choose how best to make a rebuttal through the evidence they choose to introduce. Thus, if the Blue Marmots do not respond to PGE's own calculations regarding project profits, then that is their choice (assuming the evidence is deemed admissible). While there is no circumstance in which the Blue Marmots will voluntarily reveal this information to PGE, in theory they could choose to create and introduce evidence regarding the projects' expected profitability at any moment in time—after executing the PPAs, after PGE refused to counter-sign, after the complaints were filed. PGE should not be allowed to dictate the Blue Marmots' legal strategy by

⁵² PGE Motion to Compel at 2 (Feb. 21, 2020) (“The expected revenue from these projects is \$160 million over the life of the contracts.”).

⁵³ PGE Motion to Compel at 3 (Feb. 21, 2020).

forcing them to produce evidence, especially when that evidence is unnecessary, misleading, irrelevant, and harmful.

3. The Commission Lacks Authority to Compel the Blue Marmots to Reveal Profitability Data

As a matter of Oregon state law, the Commission has the authority and duty to “supervise and regulate every public utility and telecommunications utility in this state.”⁵⁴ Further, the Commission has the power to demand information from any “public utility” in the state.⁵⁵ As a public utility, PGE is subject to the Commission’s jurisdiction and must provide information at the Commission’s request.

However, QFs are not “public utilities.” They are specifically excluded from the definition of “public utility.”⁵⁶ Therefore, the Commission does not have the authority to “supervise and regulate” QFs, nor does it have the power to compel information from them. The Commission’s power over QFs begins and ends with safety requirements, intended to ensure that QF operations do not threaten utility facilities.⁵⁷ Otherwise, the Commission’s involvement with QFs is limited to supervising a “public utility” in its behavior towards QFs.

This understanding of the Commission’s authority under Oregon state law is consistent with federal laws governing QFs. Under the Public Utility Regulatory Policies Act (“PURPA”),

⁵⁴ ORS 756.040(2).

⁵⁵ ORS 756.105 (“Every public utility or telecommunications utility shall furnish to the Public Utility Commission all information required by the commission to carry into effect the provisions of ORS chapters 756, 757, 758 and 759 and shall make specific answers to all questions submitted by the commission.”).

⁵⁶ ORS 757.005(1)(b)(D); *see also* ORS 758.555.

⁵⁷ ORS 758.535(3) (“The rules or policies adopted [by the Commission] shall: Establish safety and operating requirements necessary to adequately protect all systems, facilities and equipment of the electric utility and qualifying facility; Be consistent with applicable standards required by the Public Utility Regulatory Policies Act of 1978 (P.L. 95-617); and Be made available to the public at the commission’s office.”).

QFs are exempt from state utility rate regulation.⁵⁸ The U.S. Supreme Court has concluded, “Congress did not intend to impose traditional ratemaking concepts on sales by [QFs] to utilities.”⁵⁹ Whereas the Commission may fairly inquire about the profitability of a public utility like PGE as necessary for ratemaking,⁶⁰ the Commission is specifically precluded from subjecting QFs to the same treatment.

The Commission itself has previously commented on the irrelevance of QF profitability data to its decision-making process. In addressing a contested case where a QF claimed its financial feasibility was at risk, the Commission stated:

A [QF] is not required to supply cost information. The commissioner must consider the effect of the contract rate on the utility, its customers, and the benefits to the utility power supply system which may be realized through the development of [QFs]. Whether the rate paid by the utility is fair, just, and reasonable is not dependent upon the *profit* or loss realized by the [QF] at any given time. The commissioner’s duty is to encourage [QF generation] by requiring the utility to pay its avoided cost.⁶¹

This ruling by the Commission is as true today as it was then. A QF is *not* required to supply data about its profits. If this Commission requires the Blue Marmots to report profitability data, it will be acting outside of its scope of authority in violation of Oregon and federal law.

4. Providing Unnecessary Evidence to PGE Would Constitute an Irreparable Harm to the Blue Marmots.

If the Commission acts beyond its authority and grants PGE’s unprecedented request, the Blue Marmots will suffer irreparable harm. To require the Blue Marmots and by necessary extension EDPR to reveal commercially sensitive information about the projects’ profitability would effectively require them to make a fatal choice between dropping this dispute—denying

⁵⁸ 18 CFR § 292.602(c); *see also* 16 USC § 824a—3(e).

⁵⁹ *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 414 (1983).

⁶⁰ *E.g.*, ORS 756.040(1).

⁶¹ *Snow Mountain Pine Co. v. CP Nat’l Corp. and Idaho Power Co.*, Docket No. UM 11, Order No. 84-895, 64 P.U.R.4th 166, 169 (Nov. 13, 1984) (emphasis in original).

them all relief from PGE’s illegal actions—or undermining their ability to pursue future development opportunities.

The Commission has recognized that disclosure of commercially sensitive information can cause irreparable harm. PGE does not contest that the information is commercially sensitive, but they have incorrectly claimed that a protective order would remedy the issue.⁶²

PGE misstates the Blue Marmots’ concern. The Blue Marmots agree that a protective order would protect any commercially sensitive information from disclosure to *non-parties*, but the Blue Marmots are specifically concerned about disclosure *to PGE*.

PGE has previously argued against disclosing information it considers commercially sensitive, including arguing against disclosure specifically to the Blue Marmots.⁶³ PGE feared that disclosure of commercially sensitive information would “distort the competitive nature” of utility-QF interactions.⁶⁴ PGE therefore argued—and won⁶⁵—that it would be prejudicial for the information to be disclosed.

The Commission has previously recognized the necessity and the value of preventing utilities and independent developers from accessing each other’s commercially sensitive information in the context of a request for proposals (“RFP”).⁶⁶ Under an RFP, a utility may bid against independent developers for the right to construct a necessary resource.⁶⁷ However, utilities separate and screen any utility individuals involved in the self-bidding from any utility

⁶² See PGE Motion to Compel at Attachment C (Feb. 21, 2020) (February 7, 2020 Letter to Mr. Sanger) (“PGE understands that the requested information may be sensitive and would certainly consider implementing any appropriate protections”); see also PGE Motion to Compel at 5.

⁶³ PGE Response to Blue Marmots Motion to Compel at 10-11 (Sept. 5, 2017).

⁶⁴ *Id.* at 11.

⁶⁵ ALJ Ruling at 3 (Oct. 30, 2017).

⁶⁶ See generally OAR 860-089.

⁶⁷ OAR 860-089-300(1).

individuals involved in running the RFP and reviewing the competitors' bids.⁶⁸ This separation alone, however, is not sufficient. The utility must also hire an independent evaluator ("IE") to ensure that the bidding process and evaluation have occurred in accordance with the rules.⁶⁹ EDPR could desire to bid into PGE's future RFPs, but being forced to disclose cost information regarding the Blue Marmots would put it at a substantial competitive disadvantage.

PGE has no right to any data regarding the Blue Marmots' profitability or EDPR's financial decisions. Disclosing any such information to PGE would constitute a significant and irreparable harm to the Blue Marmots, as the disclosure would forever have the effect of causing them to be unfairly disadvantaged in any future development negotiations with PGE, including any bids they might make in response to PGE issuing RFPs (which it has already announced it plans to do as an action under its pending Integrated Resource Plan).

5. Both PGE and the Commission Would Be Violating State Law by Forcibly Removing the Blue Marmots' Competitive Advantage

PGE has a statutory obligation not to cause any person to be unfairly disadvantaged,⁷⁰ yet it seeks information from EDPR that would disadvantage EDPR in a way unheard-of in the competitive electricity marketplace. The Commission has the obligation and the duty to supervise and regulate public utilities like PGE, which includes preventing them from violating federal and state law. PGE seeks to violate its statutory duty.

⁶⁸ OAR 860-089-300(1) ("Any individual who participates in the development of the RFP or the evaluation or scoring of bids on behalf of the electric company may not participate in the preparation of an electric company or affiliate bid and must be screened from that process").

⁶⁹ OAR 860-089-0200(1); *see also* OAR 860-089-0450 (listing the IE's duties, such as "check[ing] whether the electric company's scoring of the bids and selection of the initial and final shortlists are reasonable").

⁷⁰ ORS 757.325(1) ("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.").

The Blue Marmots ask this Commission not to abandon their post at this critical juncture. Subjecting QFs to burdensome discovery that harms their competitive market position or allows utilities to peer into the private business plans of QFs will reduce the ability of QFs to market their electricity and send a chilling message to the market that, if a QF seeks to enforce its legal rights before the Commission, then the electric utility can gain access to even the most commercially sensitive information. Subjecting even one QF to such a choice would discourage all QFs or potential QFs from pursuing development or from pursuing relief from a public utility's bad behavior. Effectively limiting a QF's ability to obtain relief by requiring the QF to forfeit its commercially sensitive cost information would harm not only the Blue Marmots but Oregon's entire competitive marketplace. PGE's Motion to Compel commercially sensitive information must be denied.

C. The Blue Marmots Should Not Be Compelled to Engage in the Unduly Burdensome Production of Communications That Are Either Irrelevant or Duplicative

In Data Request 12, PGE seeks "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."⁷¹ The Blue Marmots have fully answered many other data requests regarding the interconnection process.⁷² The Blue Marmots nonetheless provided a response based on the reasonable, good-faith assumption that PGE sought information regarding the Blue Marmots' transmission arrangements. PGE has still not clarified whether it seeks information regarding transmission or interconnection in Data Request 12. If PGE is seeking information about the Blue Marmots' transmission agreements, then the Blue Marmots maintain that transmission is generally irrelevant to this Phase II and the information

⁷¹ PGE Motion to Compel at Attachment A at 2 (Feb. 21, 2020) (PGE's First Set of Data Requests (Jan. 23, 2020)).

⁷² In this Phase II, these include, at minimum, Data Requests 9, 10, 11, 13, 14, 15, and 16.

provided to date is more than sufficient. If PGE is seeking information about the Blue Marmots' interconnection agreements, then that information has been largely provided in response to other data requests. In either case, providing any additional data regarding transmission or interconnection would be unduly burdensome.

1. The Blue Marmots' Good-Faith Reading that PGE Sought and Is Seeking Transmission Data, Not Interconnection Data, Was Reasonable

The Blue Marmots understood that PGE sought transmission evidence in Data Request 12 based on PGE's specificity of PacifiCorp *Transmission* rather than PacifiCorp as a whole and based on the duplicative nature of PGE's questions on interconnection. PGE's Data Requests 9, 10, 11, and 12 all include the words "interconnection" and "PacifiCorp."⁷³ Data Request 12 was the *only one* to specify PacifiCorp *Transmission*. The Blue Marmots understood this to mean that PGE was seeking information of a different nature than the requests in Data Requests 9, 10, and 11, and was requesting information regarding the Blue Marmots transmission arrangements. Much, if not all, of what PGE would be requesting, if it intended to seek information regarding the Blue Marmots' *interconnection* process, would be unreasonably duplicative not only of the responses to Data Requests 9, 10, and 11 but also of the responses to Data Requests 13, 14, 15, and 16.⁷⁴

⁷³ See PGE Motion to Compel at Attachment A at 1-2 (Feb. 21, 2020) (PGE's First Set of Data Requests (Jan. 23, 2020)) (PGE Data Request 9 ("Please provide all versions of interconnection studies—both draft and final—conducted by PacifiCorp for EDPR/ Blue Marmots."); PGE Data Request 10 ("Please provide all versions of the Blue Marmots' Interconnection Agreement (IA) and final executed IA with PacifiCorp."); PGE Data Request 11 ("Please provide all feedback EDPR/ Blue Marmots provided to PacifiCorp regarding their interconnection studies and IA."); 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.") (emphasis added)).

⁷⁴ Each of these four Data Responses ask questions regarding various interconnection studies and study agreements. See *Id.* (PGE Data Request 13 ("Was the System Impact Study (SIS) restudy required or requested by EDPR/ Blue Marmots? Please explain the

For this reason, the Blue Marmots' initial response provided the only relevant information regarding the Blue Marmots' transmission arrangements. PGE responded via letter but did not clarify Data Response 12. In fact, PGE's letter solidified the Blue Marmots' understanding. PGE's letter responded jointly to both Data Request 11 and 12, requesting further information about communications with PacifiCorp (Data Request 11) and with PacifiCorp *Transmission* (Data Request 12).⁷⁵ PGE's joint response made it even more difficult to understand specifically what PGE sought in Data Request 11 and what in Data Request 12. The Blue Marmots understood PGE to be seeking more data on interconnection (Data Request 11) as well as on transmission (Data Request 12). The Blue Marmots endeavored to provide further information on both subjects. It is worth noting that PGE is not seeking any additional interconnection data in response to Data Requests 9, 10, 11, 13, 14, 15, or 16.⁷⁶

In a Supplemental Response to Data Request 12, the Blue Marmots explained why communications regarding *transmission* are generally irrelevant. In addition, the Blue Marmots provided an OASIS report⁷⁷ in the hopes that would eliminate any confusion or uncertainty that PGE might have had regarding the Blue Marmots' transmission arrangements.

reason(s) why a re-study was either required or requested.”); PGE Data Request 14 (“Was the Facilities Study restudy required or requested by EDPR/ Blue Marmots? Please explain the reason(s) why a re-study was either required or requested.”); Data Request 15 (“Was one of the reasons the Blue Marmots sought restudies (of either or both the SIS and Facilities Study) Blue Marmots’ desire to be studied for interconnection as an aggregated project? . . .”); PGE Data Request 16 (“Please explain the reason for the difference between the interconnection COD contained in the IA and the interconnection COD contained in the Feasibility Study.”)).

⁷⁵ PGE Motion to Compel at Attachment D at 2 (Feb. 21, 2020) (February 11, 2020 Letter to Mr. Sanger).

⁷⁶ As noted previously, PGE and the Blue Marmots have resolved the dispute regarding Data Request 15(c) but the additional information that was requested was at most only tangentially related to interconnection arrangements with PacifiCorp.

⁷⁷ Motion to Compel at Attachment F at 6 (Feb. 21, 2020) (Blue Marmots Supplemental Response to PGE Data Request 12).

PGE's Motion to Compel remains unclear, and the Blue Marmots do not know whether PGE is arguing the relevance of transmission communications or seeking unreasonably duplicative interconnection communications, or potentially both.⁷⁸ Due to this uncertainty, the Blue Marmots address both potential requests below.

2. Additional Transmission Evidence Would Be Irrelevant

Transmission arrangements are not at issue in this Phase II and are entirely irrelevant, except to the extent that they might impact schedule. However, they will not. As explained in the Blue Marmots' testimony and supplemental response to PGE regarding Data Request 12, the Blue Marmots have already secured the necessary PacifiCorp transmission service arrangements and did so for service start dates aligned with the original COD's for the projects.⁷⁹ Notably, no network upgrades are required prior to the start of service to the Blue Marmots under these transmission service agreements and the transmission service agreements are fully executed.. Therefore, transmission would not have delayed the Blue Marmots' development in the event PGE had not forced them into this litigation, nor will transmission affect the Blue Marmots' development in the future after this Phase II is resolved.

The Blue Marmots have provided the only relevant evidence, that is, proof that the necessary transmission arrangements were made for service beginning prior to the original CODs and proof that those arrangements are sufficient for any new CODs determined in this Phase II. PGE has not stated any concerns that those transmission arrangements are in any way deficient. The Blue Marmots found it odd that PGE sought further information on transmission, given the evidence provided. In an apparently fruitless effort to avoid unnecessary dispute, the Blue

⁷⁸ Compare PGE Motion to Compel at 16 (disagreeing with the Blue Marmots regarding the relevance of transmission data), with PGE Motion to Compel at 17 (seeking correspondence indicating or regarding "obstacles in the *interconnection* process, if any exist" (emphasis added)).

⁷⁹ Blue Marmots/900, Talbott/20.

Marmots provided an OASIS report to leave no doubt that the Blue Marmots' transmission arrangements are complete and final.

The Blue Marmots have provided a response, providing all relevant or potentially relevant transmission-related communications with PacifiCorp. The Blue Marmots should not be compelled to produce additional communications that are irrelevant and are not likely to lead to any admissible evidence in this case.

3. Additional Evidence Regarding Interconnection Would Be Duplicative

If PGE is actually seeking "all communications between EDPR and PacifiCorp [. . .] regarding the Blue Marmots' interconnection process," that request would be duplicative of the evidence already provided in response to Data Requests 9, 10, 11, 13, 14, 15, and 16. Notably, PGE is not seeking any additional interconnection data from these seven Data Requests.⁸⁰

PGE's Motion explains that PGE seeks correspondence indicating or regarding "obstacles in the interconnection process, if any exist."⁸¹ The Blue Marmots have already provided all interconnection studies, which show the work necessary to complete interconnection, and all interconnection agreements, which estimate the time necessary to complete that work.⁸² Further, the Blue Marmots have provided all of their feedback to PacifiCorp regarding the interconnection studies and interconnection agreements,⁸³ and the Blue Marmots have answered all of PGE's questions regarding these studies.⁸⁴

⁸⁰ As discussed separately below, PGE seeks additional information regarding Data Request 15(c), but the additional information requested is at most only tangentially related to interconnection arrangements with PacifiCorp.

⁸¹ PGE Motion to Compel at 17 (Feb. 21, 2020).

⁸² See PGE Motion to Compel at Attachment A at 1-2 (Feb. 21, 2020) (Data Requests 9 and 10).

⁸³ See *id.* at 2 (Data Request 11).

⁸⁴ See *id.* at 2 (Data Requests 13, 14, 15, and 16).

The Blue Marmots believe that providing additional correspondence would provide minimal additional evidence beyond that in the record. If PGE has additional questions regarding the evidence provided, PGE is free to submit a new data request and confirm that there is no additional evidence. However, merely producing the duplicative evidence would be wasteful.

4. Producing Irrelevant or Duplicative Data Would Be Unduly Burdensome

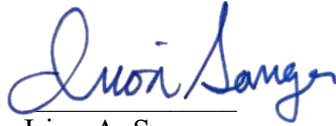
The Blue Marmots have been in more or less constant contact with PacifiCorp for four years regarding either interconnection or transmission service. Reviewing all of these communications and producing them would be burdensome to the Blue Marmots. Given the irrelevant nature of transmission-related emails and the duplicative nature of interconnection-related emails, these communications would provide at best only marginal value to this proceeding. The Blue Marmots should not be forced to engage in the unduly burdensome production of valueless evidence.

V. CONCLUSION

PGE seeks to compel the Blue Marmots to engage in the unduly burdensome production of certain excess, irrelevant, and confidential communications and documents. PGE's Motion is inconsistent with the Commission's rules and practice and seeks to have the Commission act beyond its jurisdiction in compelling the Blue Marmots to reveal statutorily protected information. Thus, for the reasons discussed above, the Blue Marmots respectfully request the ALJ deny PGE's Motion.

Dated this 2nd day of March 2020.

Respectfully submitted,



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Of Attorneys for Blue Marmot V, LLC, Blue Marmot VI,
LLC, Blue Marmot VII, LLC, Blue Marmot VIII, LLC, and
Blue Marmot IX, LLC

Attachment A

**UM 1829 Blue Marmots' Responses
to PGE's 1st Set of DRs re COD Litigation**

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
February 6, 2020
Blue Marmots' Response to PGE Data Request 2

PGE Data Request 2

Please explain why the Blue Marmots have not yet submitted an EFSC Application.

Response to PGE Data Request 2

See Blue Marmot/900, Talbott/22-24.

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
February 6, 2020
Blue Marmots' Response to PGE Data Request 3

PGE Data Request 3

Please explain why the Blue Marmots have delayed their Notice of Intent (NOI).

Response to PGE Data Request 3

See Blue Marmot/900, Talbott/22-24.

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
February 6, 2020
Blue Marmots' Response to PGE Data Request 5

PGE Data Request 5

Please explain why the Blue Marmots elected to pursue site certification through EFSC rather than through the Lake County conditional use process.

Response to PGE Data Request 5

See Blue Marmot/900, Talbott/22.

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
February 6, 2020
Blue Marmots' Response to PGE Data Request 6

PGE Data Request 6

Please describe the current status of the Blue Marmots' development permits (e.g. site certificate, conditional use permit, etc.).

Response to PGE Data Request 6

See Blue Marmot/900, Talbott/24-25.

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
February 6, 2020
Blue Marmots' Response to PGE Data Request 13

PGE Data Request 13

Was the System Impact Study (SIS) restudy required or requested by EDPR/ Blue Marmots?
Please explain the reason(s) why a re-study was either required or requested.

Response to PGE Data Request 13

Requested by EDPR / Blue Marmots. See DR 15.

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
February 6, 2020
Blue Marmots' Response to PGE Data Request 14

PGE Data Request 14

Was the Facilities Study restudy required or requested by EDPR/ Blue Marmots? Please explain the reason(s) why a re-study was either required or requested.

Response to PGE Data Request 14

Requested by EDPR / Blue Marmots. See DR 15.

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
February 6, 2020
Blue Marmots' Response to PGE Data Request 16

PGE Data Request 16

Please explain the reason for the difference between the interconnection COD contained in the IA and the interconnection COD contained in the Feasibility Study.

Response to PGE Data Request 16

See Blue Marmot/900, Talbott/9-11, 16-20.

Attachment B

**UM 1829 PGE 2nd Set of Data Requests
to Blue Marmots re COD Litigation**



Portland General Electric Company
121 SW Salmon Street • Portland, Oregon 97204

February 12, 2020

TO: EDP Renewables (EDPR), the Blue Marmot LLCs, and their attorney
Irion Sanger

FROM: Portland General Electric Company and its attorney Lisa Rackner

RE: UM 1829 Portland General Electric Company's Second Set of Data Requests to Blue Marmots regarding the Commercial Operation Date (COD) Litigation

Please provide responses to the following requests for data by **February 26, 2020**. Please note that all responses must be posted to the Public Utility Commission Huddle account. Contact the undersigned before the response due date noted above if the request is unclear or if you need more time. In the event any of the responses to the requests below include spreadsheets, the spreadsheets should be in electronic form with cell formulae intact. For the purposes of responding to these requests, references to "Blue Marmot" or "Blue Marmots" should be interpreted to refer to the Blue Marmot projects individually *and* collectively.

21. Please refer to Blue Marmot/900, Talbott/6, which states that there is "no assurance that the projects would ultimately secure viable PPAs with PGE" and Blue Marmot/900, Talbott/19, which states, "the Blue Marmots projects would never be built without viable PPAs in place to generate a predictable stream of revenue."
 - a. Please explain what Mr. Talbott means by "viable" in this context.
 - b. Is it the Blue Marmots' position that the PPAs the Blue Marmots executed in 2017 would not be "viable" if the Blue Marmots had to secure BPA transmission to deliver via the BPA-PGE interface? If so, please explain why.
22. Please refer to Blue Marmot/900, Talbott/5, in which Mr. Talbott states that "to start construction without any visibility into revenue contracts for the projects and simply hope for a favorable solution to this proceeding has always been out of the question."
 - a. Please explain the meaning of "without any visibility into revenue contracts."
 - b. Please see the Blue Marmots' Complaint at 8 ¶ 33 and PGE's Answer to the Complaint at 1 & 5 ¶ 33. Please confirm that PGE agreed on April 19, 2017, that the Blue Marmots were entitled to the standard avoided cost prices in effect at that time even if the delivery concerns were not resolved before PGE's avoided cost prices changed.
 - c. Please confirm that the Blue Marmots estimated the cost of BPA transmission for

the five projects to be approximately \$14 million over the life of the PPAs. *See* Blue Marmot/300, Moyer/14.

- d. Given that the avoided cost prices were fixed and the cost of BPA transmission was known, please explain with specificity what aspects of revenue under the partially executed PPAs were unknown during the UM 1829 Phase 1 litigation.
23. Please refer to Blue Marmot/900, Talbott/16. Please explain the cause of the referenced "schedule slippage" between the Facilities Study results and the finalized small generator interconnection agreements.
 24. Please refer to Blue Marmot/900, Talbott/20. Please provide the date on which the Blue Marmots first asked the Commission for an extension of the commercial operation dates in the PPAs the Blue Marmots had executed.
 25. Please refer to Blue Marmot/900, Talbott/22.
 - a. Please provide the date on which the Blue Marmots determined that their projects fell under Energy Facility Siting Council (EFSC) jurisdiction.
 - b. Please explain how the Blue Marmots determined that their projects fell under EFSC jurisdiction.
 - c. If the Blue Marmots proceed as five 10-MW projects, are the Blue Marmots required to permit their projects with EFSC, or do the Blue Marmots have the option to permit with Lake County?
 - d. If the Blue Marmots proceed as one 50-MW project, are the Blue Marmots required to permit their projects with EFSC, or do the Blue Marmots have the option to permit with Lake County?
 26. Please refer to Blue Marmot/900, Talbott/24. Please explain specifically what "commercially agreed upon configuration" the Blue Marmots focused their permitting efforts on.
 27. Please refer to Blue Marmot/900, Talbott/24. Please explain why the Blue Marmots placed a hold on their work with the EFSC in November 2018.
 28. Please refer to Blue Marmot/900, Talbott/25, stating, "the Blue Marmots now expect that an 18-month timeline for completing permitting through EFSC represents a relatively aggressive schedule to target for securing a site certificate from the point of resuming work." Please provide support for this statement.
 29. Please refer to Blue Marmot/900, Talbott/24, 26. Please explain why the Blue Marmots did not "coordinate with PacifiCorp to revert the SGIAs" back to the original 5 x 10 MW configuration after September 2018.

PGE's Second Set of Data Requests to Blue Marmot re COD Litigation

February 12, 2020

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