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), Blue Marmot IX LLC (UM 1833), Complainants, v. Portland General Electric Company, Defendant.	)))))))))))	REPLY IN SUPPORT OF MOTION TO STRIKE

I. INTRODUCTION

In its Response, Portland General Electric Company ("PGE") claims that 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") suffer from an overly simplistic, factually incorrect, and legally flawed perspective.[1] Despite this hyperbole, PGE and the Blue Marmots actually appear to be in agreement regarding the core legal issue for the Oregon Public Utility Commission (the "Commission" or "OPUC") to resolve: Does PGE need to take responsibility for the Blue Marmots' net output after the Blue Marmots have executed third-party transmission arrangements to deliver their power to PGE's system?

PGE argues that it does not need to manage the Blue Marmots' net output, and supports its position with testimony alleging that certain transmission studies (the "Transmission Study") show that the Blue Marmots' net output will not reach PGE's

[1] PGE's Response at 9.

system and provide estimates of the costs needed to upgrade PGE's transmission system to allow delivery. The testimony that the Blue Marmots seek to strike addresses alleged transmission upgrades that Federal Energy Regulatory Commission ("FERC") controlling precedent conclusively holds are not the qualifying facility's ("QF") responsibility. Accordingly, PGE's testimony addressing such upgrades and costs is irrelevant to the issues legitimately before the Commission, and should be stricken to prevent PGE from confusing the otherwise simple issues present in this proceeding.

Even if it were relevant, the Transmission Study testimony should be stricken because the Commission does not have jurisdiction to adjudicate PGE's concerns about whether the transmission that the Blue Marmots have purchased from PacifiCorp can deliver their net output. FERC is the only entity that can answer that question, and the Blue Marmots' transmission arrangements are sufficient for the Commission to determine that they have made their power available to PGE at the edge of PGE's transmission system.

II. SUMMARY

A. PGE and the Blue Marmots Agree About the Substantive Issue for the Commission to Resolve

While each party characterizes the core issue differently, both PGE and the Blue Marmots believe that this "case raises a straightforward but critically important question" and that "the law is clear."[2] PGE asks the question as: "Who is responsible for the costs required to facilitate delivery of energy generated by an off-system qualifying facility (QF)?"[3] PGE answers "the QF" and, at least under the facts of this case, PGE believes

---

2 Id. at 1.

3 Id.

this means that it can dictate the Blue Marmots' delivery options as being either wheeling their power to a new point of delivery ("POD") of PGE's choosing or requiring the Blue Marmots to pay for upgrades at the PACW.PGE POD.

The Blue Marmots agree that an off-system QF is responsible for the costs to get its power to the purchasing utility's system, but frame the question as: Who is responsible for managing a QF's net output *after* the QF has arranged to wheel its net output to the purchasing utility's system?[4] Or under the facts of this case, can PGE refuse to accept and manage the Blue Marmots' net output despite the Blue Marmots' purchasing FERC jurisdictional transmission from PacifiCorp to deliver their power to PGE at the PACW.PGE POD? The Blue Marmots have pointed out that there are numerous options available to PGE, only one of which could require transmission system upgrades at the PACW.PGE POD.[5] However, it is not the Blue Marmots' responsibility to dictate how PGE should manage any QF's net output after they have purchased transmission to reach PGE's system.

FERC has repeatedly decided that the purchasing utility is ultimately responsible for managing any QF power made available to it at the border of its transmission system. There is no support for PGE's view that that the Blue Marmots are responsible for moving power across an "interface" short of PGE's system and beyond the end of PacifiCorp's system. The Blue Marmots' net output has been delivered to the PGE system with the purchase of PacifiCorp transmission, period.

---

[4] The Blue Marmots' Complaint also raised the issue of the applicable rate the PGE would pay the Blue Marmots once they delivered their power. PGE has agreed to pay the Blue Marmots the applicable Schedule 201 rate, but minus the costs of any transmission to wheel the power from the PACW.PGE POD to PGE's load.

[5] Blue Marmot/100, Irvin/8; Blue Marmot/300, Moyer/18-19.

B. PGE's Transmission Study is Irrelevant to Determining Whether PGE Must Purchase the Blue Marmots' Net Output at the PACW.PGE POD

The central issue in this case is whether PGE has an obligation to purchase the Blue Marmots' power once delivered to its system. The PGE transmission study and related testimony supports PGE's claim that it cannot accept delivery of the power offered by the Blue Marmots, or move that power to its load without substantial investment. Yet, controlling FERC precedent holds that PGE must manage a QF's power as its own, and deliver it to its load once the QF makes its power available to the purchasing utility. Accordingly, the PGE study and related testimony are not relevant to issues before the OPUC.

PGE is simply refusing to accept delivery via the transmission the Blue Marmots have purchased from PacifiCorp under that utility's FERC-jurisdictional tariff, and is seeking to litigate whether the Blue Marmots' chosen and commonly accepted form of delivery is sufficient to reach PGE's system. PGE wants to focus this proceeding on alleged transmission "problems" at the PACW.PGE POD, and PGE's proposed "solutions" to those problems. For example, PGE claims that PacifiCorp transmission can only deliver the Blue Marmots' power to the edge of PGE and PacifiCorp's system, but PacifiCorp cannot get the power over to PGE's system.[6]

---

[6] PGE's Response at 10; PGE/100, Greene-Moore/17. Notwithstanding PGE's arguments in this proceeding, PGE has previously agreed that "an off system QF . . . is responsible for arranging and paying for the transmission required to *deliver its off-system QF energy to the Portland General border*." PáTu Wind Farm, LLC, 151 FERC ¶ 61,223 at n.52 (citing PGE General Request for Rehearing at 9, n.24) (emphasis added). PGE's position that a QF need not reach PGE's load, but only needed to reach PGE's border, was not a stray comment, but repeated multiple times in the rehearing and other pleadings. See e.g., PáTu v. PGE, FERC Docket No. EL15-6-001, PGE Motion for Leave to Answer and Answer at 2 (Mar. 10, 2015) ("the central issue is whether PGE has fulfilled its

PGE argues that the Blue Marmots' purchase of transmission from PacifiCorp "assumes that their reservation currently enables them to deliver their output" and submits this as a "crucial fact that PGE disputes."[7] PGE is correct the Blue Marmots assume that the purchase of FERC jurisdictional transmission to the PACW.PGE POD enables them to deliver to PGE's system. This Commission has previously determined that PGE's standard contracts presume that the QF has made arrangements to reach PGE's system.[8] It is not for this Commission to decide whether or how PacifiCorp's transmission tariff delivers the Blue Marmots' net output, and any arguments regarding PGE's inability to receive the Blue Marmots' power and cost estimates for transmission upgrades to its system are not relevant here.

To be clear, contrary to PGE's claims in its Response, the Blue Marmots are not arguing that PGE will *always* be responsible for these kinds of upgrades or that they are responsible for them "no matter what" they may cost. Instead, the Blue Marmots' arguments are under the specific facts of this case. First, PGE has provided the Blue Marmots executable standard off-system PPAs premised on the Blue Marmots' delivery at the PACW.PGE POD and the presumption that the QF is responsible for arrangements necessary to deliver their power to PGE's system. If PGE believes that those transmission arrangements are inadequate, then PGE should seek assistance from the entity that has jurisdiction over those arrangements (FERC) and make its case there.

PURPA obligation to purchase PáTu's *output delivered to the PGE electrical border* at the contractually specified, Public Utility Commission of Oregon-("OPUC") approved avoided-cost rate"); see also id. at n.5 ("While the parties' pleadings focus on dynamic scheduling, the issue in this proceeding is whether Portland General is fulfilling its obligation under PURPA and the Commission's regulations, as implemented by the [OPUC].").

7 PGE's Response at 9-10.

8 PáTu v. PGE, Docket No. UM 1566, Order No. 12-316 at 8 (Aug. 21, 2012).

Second, the Blue Marmots have the right to sell their net output under the terms of the Commission's approved standard contract and rates without alteration by PGE.[9] If PGE believes that its standard contracts or avoided cost rates are insufficient, then it needs to seek to revise those on a prospective basis, not unilaterally lower the rates by imposing transmission costs or inserting provisions that prevent the QF from delivering at its chosen POD.

C. PGE Does Not Identify Any Jurisdictional Basis to Adjudicate Its Concerns About PGE's Ability to Accept, or PacifiCorp Transmission's Ability to Deliver, the Blue Marmots' Net Output

PGE appears to assert that this Commission has jurisdiction because the state has broad authority over the Public Utility Regulatory Policies Act ("PURPA") to ensure that utilities pay no more than the utility's avoided costs.[10] PGE points to a number of instances in which the Commission has considered certain transmission issues,[11] but as far as the Blue Marmots can discern identifies three main jurisdictional hooks to litigate its concerns regarding potential upgrades at the PACW.PGE POD: 1) as a separate charge "for system upgrades required to permit interconnected operations"; 2) as part of the utility's avoided costs rate;[12] or under 3) the Commission's inherent authority to

---

9 Re OPUC Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 14-058 at 7 (Feb. 24, 2014) ("As we have noted in previous orders addressing this issue, because standard contracts have pre-established rates, terms, and conditions that an eligible QF can elect without any negotiations with the purchasing utility, 'standard contract rates, terms and conditions are intended to be used as a means to remove transaction costs associated with QF contract negotiation, when such costs act as a market barrier to QF development.").

10 PGE's Response at 12-13.

11 Id. at 24-25.

12 Id. at 13.

address PURPA matters, which presumably include ensuring customer indifference and determining whether a legally enforceable obligation has been established.[13]

It is important to note that the Blue Marmots do not argue that the Commission cannot address any transmission issues. In terms of the key substantive issue in this proceeding (whether PGE must accept responsibility for the power delivered to PGE's system or border), the Commission's role is to simply implement federal law, as interpreted by FERC and the courts. The Commission cannot second guess or dispute whether any FERC-jurisdictional transmission arrangements are in fact sufficient.

PGE appears to admit that changing the Blue Marmots' avoided cost rate is not available because PGE provided the Blue Marmots an executable power purchase agreement at the then-current avoided cost rates.[14]

Contrary to PGE's assertions, the Commission does not have the authority delegated by FERC to assess the costs of PGE's transmission upgrades to the Blue Marmots simply because they involve an "interconnection." Under PURPA's form of cooperative federalism,[15] the state has limited jurisdiction to have the first opportunity to

---

13 Id. at 14 (conceding "the Commission has not previously been presented with the opportunity to categorize or assess costs like those presented in this case" and noting PGE *believes* they "fit well within FERC's definition of interconnection costs" or "to facilitate delivery") (emphasis added).

14 Id. at 8 ("none of these system upgrades are reflected in the avoided cost rates included in the Blue Marmots' PPAs"); id at 12-13 ("FERC has recognized that 'transmission or distribution costs directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations' may be accounted for in 'the determination of avoided costs if they have not been separately assessed as interconnection costs."); id at 25 ("PGE's standard avoided cost rates for off-system QFs include transmission costs, and the Commission necessarily must evaluate the appropriateness of those calculations.") (citations omitted).

15 Cooperative federalism works in that both the federal and state governments have concurrent jurisdiction over certain areas, but the state is allowed the first

set avoided cost rates, determine the date of a legally enforceable obligation, and regulate interconnections by a QF selling its entire net output to its directly connected utility.[16] In other areas, the Federal Power Act and PURPA have provided FERC with exclusive jurisdiction, including over transmission, and interconnections—except in the limited circumstance where the interconnection is between a QF and a utility that the QF is directly connected and selling their entire net output to.

Because there is no jurisdictional "hook" for the Commission to address PGE's disputed facts, PGE's Transmission Study and testimony should be stricken.

III. ARGUMENT

A. FERC Has Authority Over These Issues

In its Response, PGE either misunderstands or mischaracterizes the Blue Marmots' position on the Commission's authority. It is not that the Commission is entirely prohibited from considering transmission issues, but rather that it must confine its consideration to the limits of its jurisdiction over those transmission issues. In this case, FERC has provided sufficient guidance to resolve the relevant transmission issues in dispute, which means this Commission is confined to implementing FERC's guidance.

FERC has concluded that in order to trigger PGE's purchase obligation as an off-system QF, the Blue Marmots' responsibility is to effectuate delivery of energy to PGE's system by obtaining transmission to the point of change of ownership between the purchasing and transmitting utilities. Despite PGE's suggestion to the contrary, the

---

opportunity to implement the law in manner consistent with federal law. FERC v. Mississippi, 456 US 742 (1982) (holding PURPA does not infringe upon the state sovereignty or compel the exercise of the state's sovereign powers, but simply establishes conditions on continued state regulation in an area subject to complete federal preemption under the Commerce Clause).

[16] Docket No. UM 1610, Order No. 14-058 at 3-4 (summarizing the Commission's implementation of FERC's avoided cost and interconnection regulations).

Commission has not been granted the legal authority to disregard that FERC precedent as merely "advisory", to issue an order that conflicts with FERC's rules or past orders, or adjudicate issues within FERC's jurisdiction, including whether transmission purchased by the Blue Marmots is sufficient to reach PGE's system.

While PGE is correct that "[s]tate-based adjudication serves as the mainstay for enforcing PURPA rights" its explanation of the bounds of Commission and FERC jurisdiction are incorrect.[17] The Commission does not have unfettered discretion to implement PURPA, especially on matters outside of its jurisdiction. PGE cites to the DC Circuit court's discussion comparing FERC's "enforcement authority" to opinions the court considered "advisory only" and mistakenly concludes that "issues related to a utility's purchase obligation under PURPA are entirely subject to the Commission's jurisdiction."[18] The court's use of term "advisory" applies to the discretion federal court should provide to FERC, not the weight that FERC orders have over state commissions.[19]

PGE ignores that, if FERC determines that a state commission's PURPA implementation is inconsistent with its own rules or guidance, FERC has enforcement authority over states, and the Commission must therefore follow FERC's rules. Unlike the Idaho Public Utilities Commission,[20] this Commission has always attempted to

---

17 See PGE's Response at 23 (citing PGE v. FERC, 854 F.3d at 695, 698, 700-702 (D.C. Cir. 2017)).

18 Id.

19 PGE v. FERC, 854 F.3d 692 at 701-02.

20 FERC v. Idaho Public Utilities Commission, U.S. D. Idaho Case No. 1:13-cv-00141-ELJ-REB (Dec. 2, 2013) ("Plaintiff, the Federal Energy Regulatory Commission ("FERC"), brings this civil action to enforce a federal statute – the Public Utility Regulatory Policies Act of 1978 ("PURPA") – and FERC's regulations implementing PURPA."); Murphy Flat Power, LLC, 141 FERC ¶ 61,145 at P.1. (2012) ("we conclude that the Idaho Public Utilities Commission's (Idaho Commission's) June 8, 2011 order rejecting Petitioners' three Firm Energy

faithfully abide by FERC's decisions, even those that it disagreed with.[21] As the same D.C. Circuit opinion PGE relies upon points out, "where a state, contrary to section 210(f), fails to implement FERC's PURPA rules, … subsection (h)(2) gives FERC authority to direct the state utility commission to comply, which the Commission accomplishes by treating PURPA's implementation obligation 'as a rule enforceable under the Federal Power Act.'"[22] Thus, where FERC has provided PURPA rules or guidance, the Commission must implement those rules or guidance.

This is consistent with the string of PáTu orders and decisions where the Commission, FERC, and the DC Circuit court have a limited view of the Commission's authority as opposed to the more expansive view suggested by PGE. By way of refresher in PáTu, this Commission determined it did not have jurisdiction over the kind of transmission required by PGE's standard contract and declined to address the dynamic scheduling issues in PáTu's complaint. In declining jurisdiction, the Commission noted,

> We agree that FERC is the proper authority to resolve transmission disputes between PáTu and PGE. Should FERC make determinations about dynamic transfer issues that implicate the implementation of the parties' PPA, PáTu is free to file a new complaint.[23]

This is also consistent with the Commission's own actions in the various Kootenai orders. There, this Commission initially concluded that the QF was not eligible to sell its output to Idaho Power Company ("Idaho Power") under the utility's (higher) Oregon

---

Sales Agreements is inconsistent with the requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA) and our regulations implementing PURPA. In this order, we also give notice that we will initiate an enforcement action pursuant to section 210(h) of PURPA").

21 Kootenai Electric Cooperative v. Idaho Power Company, Docket No. UM 1572, Order No. 14-013 at 2 (Jan. 9, 2014).

22 PGE v. FERC, 854 F.3d 692 at 14 (D.C. Cir. 2017) (quoting PURPA § 210(h)(2)(A), 16 USC 824a-3(h)(2)).

23 PáTu v. PGE, Docket No. UM 1566, Order No. 14-425 at 3 (Dec. 8, 2014).

avoided cost rate after accepting the utility's claims that the QF's output would only be transferred as far as Idaho Power's Lolo Substation in Idaho rather than making it to Idaho Power's more distant substation in Oregon.[24] Kootenai requested FERC enforce its rights to sell in Oregon. FERC issued an order expressly declining to initiate an enforcement action, but declared that this Commission's order misinterpreted a previous FERC order and was inconsistent with PURPA.[25] FERC confirmed that "the QF has the discretion to choose to sell to a more distant utility (as it has here), and thus where to sell, as long as the QF can deliver its power to the utility."[26] FERC also explained,

> We agree with Kootenai that the practical effect of the Oregon Order, if it were to be upheld, is that Kootenai would be paying for its reservation for point-to-point transmission (and line losses) all the way to Imnaha, Oregon under Avista's Commission-jurisdictional OATT and at Commission-jurisdictional transmission rates, but at the same time Kootenai would be denied the benefit of delivery to Imnaha by terminating the transaction at the Lolo Substation in Idaho.[27]

This Commission then withdrew its order and granted the QF's complaint, explaining "[a]fter reviewing FERC's Declaratory Order and Order Denying Request for Reconsideration, we conclude that our Order No. 13-062 contravenes FERC's finding regarding the point of delivery of Kootenai's proposed transactions. Accordingly, we withdraw Order 13-062 and grant Kootenai's complaint."[28]

Thus, the Commission has jurisdiction to resolve the issues presented in the Blue Marmots' Complaints—namely whether the Blue Marmots have established a legally enforceable obligation and whether PGE must manage and accept the Blue Marmots'

---

24 Kootenai Electric Cooperative v. Idaho Power Company, Docket No. UM 1572, Order No. 13-062 (Feb. 26, 2013).

25 Kootenai Elec. Coop., Inc., 143 FERC ¶61,232 at P.25 (2013).

26 Id. at P.33.

27 Id. at P.32.

28 Docket No. UM 1572, Order No. 14-013 at 2.

power. The Commission does not have the jurisdiction, however, to determine the adequacy of the Blue Marmots' FERC-jurisdictional transmission arrangements with PacifiCorp to effectuate power deliveries under PGE's PPA at the PACW.PGE POD.

As applied to this case, as PGE has characterized the core legal dispute, the Commission has limited jurisdiction to simply implement federal law and FERC orders regarding "who" is responsible for facilitating the delivery of an off-system QF's net output. FERC has already decided that all the QF needs to do is purchase transmission to the point of change in ownership and that the QF need not take responsibility for delivering that power from PGE's border to (or toward) PGE's load. If PGE does not like the Blue Marmots' transmission arrangements, then FERC should adjudicate (as it did in PáTu and Kootenai) what specific transmission arrangements or costs are appropriate.

For these reasons, the portions of PGE's testimony explaining what transmission upgrades may or may not be needed for PGE to feel it is able to accept the power made available at the PACW.PGE POD are wholly irrelevant.

B. This is Not an Interconnection Issue

PGE's core argument in favor of Commission jurisdiction is that a state has jurisdiction over the interconnection between a utility and the QF selling its net output.[29] While the Commission has limited jurisdiction over an interconnection between a QF and the utility it is directly connected with, FERC has provided significant guidance to conclude that the *connection* between PGE and PacifiCorp is *not* part of the Blue Marmots' *interconnection* with PacifiCorp. A generator can only obtain interconnection

[29] PGE's Response at 3 ("the Commission is regularly called upon to address transmission costs, including system upgrades, that are required for QF interconnection and the delivery of QF sales.").

service once, and the Blue Marmots' interconnection service with PacifiCorp is under FERC's exclusive jurisdiction.

1. The Connection Between PacifiCorp and PGE is Not an Interconnection Over Which the OPUC has Authority Under 18 CFR 292.306

In its Response, PGE asserts "the Commission is…delegated authority over the interconnection costs between a QF and a purchasing utility, including the responsibility to assess interconnection costs against a QF on a nondiscriminatory basis and to 'determine the manner for payments of interconnection costs.'"[30] This generic statement is true as far as it goes, but misleading for two reasons. The first is that the delivery of power to PGE from the PacifiCorp system does not require a new interconnection between the two utility systems, and the Blue Marmots cannot apply for one. Instead, the Blue Marmots' facilities will be directly interconnected with the PacifiCorp system following their application for interconnection. Once the Blue Marmots' obligation to deliver power to the PacifiCorp-PGE interface is completed, PGE may move that power to load on its system across the existing interface, or it may use the power elsewhere. In either event, no new interconnection with PGE is required.

Second, contrary to PGE's claim, the connection between the PacifiCorp and PGE systems is not subject to a delegation of rate authority by FERC to the OPUC under 18 CFR 292.306(a). While the regulation nominally states that each QF "shall be obligated to pay any interconnection costs which the State regulatory authority … may assess … on a nondiscriminatory basis …" FERC has made it clear repeatedly that not all interconnections associated with the delivery of QF power are subject to FERC-delegated

[30] PGE's Response at 21 (citing 18 CFR 292.306).

state ratemaking authority.[31] Rather, the interconnections over which states are granted rate authority must be a direct interconnection with the QF, and those through which the QF sells all of its power to the host utility. 18 CFR 292.306 does not apply to the existing transmission connection between two existing systems that is a transmission wheel away from a direct QF interconnection serving multiple FERC-jurisdictional purposes, including wholesale sales and purchases by PGE and other generators.

Explaining the scope of 18 CFR 292.306 FERC has concluded that "states, rather than the Commission, have the authority to determine the obligation of a QF to pay for the costs of *direct interconnections* with the electric utility which purchases its power."[32] These decisions are consistent with the interconnection authority granted FERC in section 210 of the Federal Power Act, which specifies that upon application of a cogenerator or qualifying small power producer, FERC may order "the *physical connection* of any cogeneration facilities, any small power production facility, or the transmission facilities of any electric utility . . . ."[33] This precedent clearly eschews any intent on FERC's part to delegate authority over rates or costs associated with subsequent connections between intermediary utilities delivering QF power.

Further, FERC has made it clear that interconnections which serve multiple purposes—including not only the facilitation of QF sales, but also the sale of power at wholesale subject to FERC's authority—are exclusively within FERC's authority and not subject to delegation to states under 18 CFR 292.306. FERC has explained that its

---

31 18 CFR 292.306

32 Niagara Mohawk Power Corp., 77 FERC ¶ 61,224 at p. 61,899 (1996) (emphasis added). The decision relies on Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶61,139 at p. 61,991 to the same effect.

33 16 USC 824i (emphasis added).

"exclusive jurisdiction over the charges assessed in conjunction with the provision of interstate transmission service necessitates [the] exercise of jurisdiction over the related interconnection costs."[34]

Specifically addressing the situation in which an interconnection serves both the purpose of facilitating FERC-jurisdictional sales as well as sales under PURPA, FERC held as follows in Order No. 2003:

> But when an electric utility interconnecting with a QF does not purchase all the QF's output and instead transmits the QF power in interstate commerce, the Commission exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections.[35]

This means that the Blue Marmots' interconnection with PacifiCorp is under FERC's exclusive jurisdiction.

With respect to what PGE describes as the interface between PacifiCorp and PGE over which the Blue Marmot power will flow, of course, other FERC-jurisdictional transactions will take place, including PGE's planned purchase and sales to and from the California Energy Imbalance Market ("EIM"). Since this connection is used to effectuate FERC-jurisdictional sales in interstate commerce, FERC, and not this Commission, appear to have exclusive rate authority over that connection as well.

---

[34] Western Massachusetts Electric Co., 61 FERC ¶ 61,182 at p. 61,662 (1992).

[35] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P.813 (2003) [hereinafter FERC Order No. 2003]; Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277 (D.C. Cir. 2007) (upholding FERC Order No. 2003); see also North Hartland, LLC, 105 FERC ¶61,192 at P.16 (2003); Midwest Independent Transmission System Operator, Inc., 138 FERC ¶61,204 at p. 61,926 (2012) (confirming FERC jurisdiction "over interconnections that permit third-party sales … even if the QF or the utility customer does not actually take transmission service as soon as the line enters the grid").

2. Even if the OPUC Had Rate Authority Over the Connection Between PacifiCorp and PGE under 18 CFR 292.306, the Regulation Does Not Permit the Assessment to Interconnecting Generators of Upgrades Associated with Delivery of the Power

Assuming, for the sake of argument, that the Commission has delegated rate authority over the PacifiCorp-PGE interface under 18 CFR 292.306, PGE is not permitted to assess the cost of transmission upgrades associated with delivery of the power to load to the Blue Marmots. Section (a) of the regulation specifies that:

> Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility *on a nondiscriminatory basis* with respect to other customers with similar load characteristics.[36]

To the extent the regulation applies in this setting, the specification that interconnection costs can only be assessed on a non-discriminatory basis is a critical limiting factor binding the Commission's determination. As that term was understood and applied by FERC in Order No. 2003 with respect to generation interconnections over which it has retained authority, FERC has implemented a crediting policy for the cost of transmission upgrades ensuring that generators outside regional transmission authorities ultimately do not bear the cost of system upgrades associated with the delivery of power. According to FERC:

> the Commission remains concerned that, when the Transmission Provider is not independent and has an interest in frustrating rival generators, the implementation of participant funding, including the "but for" pricing approach, creates opportunities for undue discrimination . . . . [t]herefore, the Commission continues in this Final Rule its current policy, as modified below, of requiring a Transmission Provider that is not an independent entity to provide transmission credits for the cost of Network Upgrades needed for a Generating Facility interconnection.[37]

---

[36] 18 CFR 292.306(a) (emphasis added).

[37] FERC Order No. 2003 at P.696.

As further explained in Order No. 2003-A, FERC's crediting policy – ensuring that the cost of system upgrades is ultimately refunded to interconnecting generators – is an application of its "higher of" pricing policy, providing that transmission customers can be asked to pay the higher of the cost of incremental upgrades or generally applicable transmission rates, but not both.[38] Putting this policy in the context of FERC's obligation to prohibit discrimination, FERC said this:

> we believe that our interconnection pricing policy is reasonable because it provides efficient incentives for new generation and transmission expansion, while our "higher of" ratemaking standard prevents subsidization of merchant generation and prevents undue discrimination by native load or other Transmission Customers.[39]

With this as background, 18 CFR 292.306 cannot be read to permit this Commission to do what FERC cannot – to assess the cost of system upgrades associated with the delivery of power on a utility's system to interconnecting generators. 18 CFR 292.306 is a limited grant of authority to state commissions. The qualifying condition of the grant – that it be exercised in a non-discriminatory way, as FERC understands that term – cannot be read out of the regulation.

3. Contrary to PGE's Contention, FERC Precedent is Clear That Investments Associated with Managing the Delivery of QF Power Are the Purchasing Utility's Obligation

PGE is right that none of the cases the Blue Marmots cited address deliverability or the costs required to deliver a QF's output to the purchasing utility. This is because up

---

38 Id. at n.111.

39 FERC Order No. 2003-A at P.590; see also id. ("The policy ensures that all Transmission Customers (including the Interconnection Customer when it takes transmission delivery service) will bear a fair share of the cost of the Transmission System, reflecting the fact that all customers benefit from having a Transmission System that provides reliable service and supports new, competitive generation options.").

until now there appears to have been no debate that third-party wheeling was sufficient to deliver a QF's output to a purchasing utility and those wheeling costs, which are the QF's responsibility, are easily discernable. Instead of providing any applicable examples where FERC has addressed or sanctioned PGE's deliverability claims, however, PGE merely points to FERC's definition for interconnection costs to support its position. The plain language of that definition does not apply to the kind of upgrades PGE claims are needed in this case.

FERC defines interconnection costs as "the reasonable costs of connection … incurred by the electric utility directly related to the installation … of the physical facilities necessary to permit interconnected operations with a QF . . . ."[40] This definition refers to one utility and one QF. The definition goes on to address costs "which *the* electric utility would have incurred if *it* had not engaged in interconnected operations."[41] PGE is not engaging in interconnected operations with the Blue Marmots. FERC's definition most naturally refers to the Blue Marmots' interconnection with PacifiCorp and does not apply to PacifiCorp's connection with PGE. This is also consistent with FERC's view of interconnection costs.[42] Again, PGE has not offered anything more than this definition to suggest that subsequent purchasing (or wheeling) utilities could or should be included in a generator's interconnection with a utility.

---

40 18 CFR 292.101(b)(7).

41 Id.

42 See Nevada Power Co., 113 FERC. ¶ 61,007 at PP.6&19 (2005) ("The network begins at the point where the interconnection facilities connect to the transmission system, not somewhere beyond that point." "[D]ue to the integrated nature of the transmission grid, upgrades at or beyond the point where a customer connects to the grid benefit all users of that grid. Thus, we have rejected the direct assignment of grid facilities [costs] at or beyond the point where a customer connects to the grid").

What the FERC precedent does overwhelmingly establish is that on-system QFs (i.e., those selling to the utility they are interconnected with) are responsible for their own interconnection costs whereas off-system QFs (i.e., those wheeling to a different utility and selling to a utility they are not connected with) are responsible for their interconnection costs with their host utility and any third-party transmission costs that may be necessary to reach the purchasing utility's transmission system. This is addressed in more detail below, but the clarity on this subject underscores how little there is left for the Commission to ponder here.

PGE is also correct that Pioneer Wind dealt with an on-system QF, but this distinction does not mean it is inapplicable with respect to the PURPA obligations of the QF and purchasing utility.[43] In Pioneer Wind, PacifiCorp took the position that it did not have to accept the QF's net output because there was no firm transmission service available to deliver that output to PacifiCorp's load.[44] The QF claimed that PacifiCorp required it to choose between two options: 1) either pay for any system upgrades needed to secure firm transmission service; or 2) agree to be curtailed as if it were a non-firm transmission customer.[45] PacifiCorp denied that it had refused to enter into a PPA, and claimed that it was simply offering the QF a non-standard contract.[46] FERC ultimately agreed that PacifiCorp's offer was in direct violation of PURPA regulations.[47]

According to PGE's Response, "PGE understands that once the Blue Marmots have achieved delivery of their output, PGE is responsible for transmitting their output to

---

43 PGE's Response at 15.
44 Pioneer Wind Park I, LLC, 145 FERC ¶ 61,215 at PP.11-13 (2013).
45 Id, at P.6.
46 Id. at P.13.
47 Id. at P.39.

load."[48] PGE suggests, however, that its position is (somehow) consistent with FERC's holding because it is not trying to curtail the Blue Marmots and is instead just flatly refusing to accept their delivery, if the Blue Marmots do not agree to pay for PGE's system upgrades. PGE misses the forest from the trees here. Pioneer Wind is controlling because it confirms that the QF's responsibility ends at the point of interconnection, and not because it confirms long-standing precedent that QFs cannot be curtailed by utilities. Specifically, it makes clear that utilities must accept all power made available to them at the change of ownership and must manage that power as their own. FERC's statements on this issue bind the OPUC and makes PGE's technical claims about transmission service across the PACW-PGE transmission interface irrelevant.

FERC extended the Pioneer Wind holding in PáTu, confirming that just as an on-system QF's responsibility ended at the point of interconnection, so does the off-system QF's responsibility end at the point of delivery.[49] FERC stated:

> The Commission has specifically held that the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility, and it is the purchasing utility's obligation to obtain transmission service in order to, in turn, deliver the QF energy from the point of interconnection with the purchasing utility to the purchasing utility's load. **In the case of PáTu, an off-system QF resource, PáTu's transmission responsibility ends, and**

---

48 PGE's Response at 15.

49 PáTu Wind Farm, LLC, 151 ¶ 61,223 at n.102 (2015); see also PáTu Wind Farm, LLC, 150 FERC ¶61,032 at P.53-54 (2015) (noting that allowing PGE to refuse to accept PáTu's entire net output would permit utilities to "routinely escape their PURPA mandatory purchase obligation, by … *failing to arrange the necessary transmission service to dispose of its purchase of the QF's entire net output once it has been delivered to the utility*.") (emphasis added). FERC also confirmed that QFs have the discretion to choose to sell to a more distant utility, and thus where to sell, so long as the QF can deliver its power to the desired utility. Kootenai Electric Cooperative, Inc., 143 FERC ¶ 61,232 at P.33 (2013).

> **[PGE's] transmission responsibility begins, with the delivery of PáTu's net output to the [PGE] system**.[50]

On rehearing, PGE argued that off-system QFs were responsible for delivering their energy to PGE's border, which appears to be inconsistent with its current position.[51] Thus, PGE's suggestion that Pioneer Wind is not applicable because it dealt with an on-system QF is incorrect, especially given FERC's subsequent PáTu decision. On the contrary, Pioneer Wind and PáTu confirm that the Commission only needs to determine that the Blue Marmots have purchased FERC jurisdictional transmission service to wheel their power to the POD.

PGE also cites to a footnote in Pioneer Wind to remind the Commission about FERC's rule requiring QFs "to pay interconnection costs to account for transmission directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations."[52] PGE uses this note to suggest, "PGE's position in this case is consistent with FERC's holding in *Pioneer Wind Park*."[53] Unfortunately for PGE, the distinction between an on-system and off-system QF is a distinguishing factor here. As explained above, FERC has never said that transmission on PGE's system could be included in the Blue Marmots' interconnection with PacifiCorp. The Blue Marmots have (or will) incur the necessary costs to permit interconnection operations. Those costs will be paid to PacifiCorp.

---

50 PáTu, 151 FERC ¶ 61,223 at n.102 (emphasis added).
51 Id. at n.52.
52 PGE's Response at 15 (citing Pioneer Wind Park I, LLC. at P 38, n.73).
53 Id.

4. Oregon Law Also Does Not Provide Jurisdiction Over FERC Jurisdiction Interconnections

Oregon defines an interconnection as the point at which an interconnection customer's facilities connect with a utility's facilities. The Commission's small generator interconnection rules "govern the interconnection of a small generator facility . . . to a public utility's transmission or distribution system."[54] Those rules specifically "do not apply if the interconnection . . . is subject to the jurisdiction of the [FERC]."[55] Additionally, the Commission's large generator interconnection procedures apply to requests from an interconnection customer to interconnect to a utility's transmission system.[56] The plain language of these rules does not apply to the connection between a transmission provider and an Oregon utility's transmission or distribution system.

5. PGE's Technical Arguments Are Transmission Not Interconnection Related

PGE's technical arguments illustrate that PGE is raising transmission concerns outside of the Commission's jurisdiction. As explained in the Blue Marmots' Motion to Strike, PGE claims that it is impossible to construct any transmission upgrades at the PACW.PGE POD to allow PGE to accept the Blue Marmots' net output, which requires the resolution of numerous issues within FERC's exclusive jurisdiction.[57]

---

54 OAR 860-082-0005(1); Re Rulemaking to Adopt Rules Related to Small Generator Interconnection, Docket No. AR 521, Order No. 09-196 at 1 (Jun. 8, 2009).

55 OAR 860-082-0005(1).

56 Re Investigation into Interconnection of PURPA Qualifying Facilities With Nameplate Capacity Larger Than 20 Megawatts to a Public Utility's Transmission or Distribution System, Docket No. UM 1401, Order No. 10-132 at appendix A at 9, 13, 14 (Apr. 7, 2010).

57 Motion to Strike at 15-28 (Feb. 12, 2018).

PGE's response makes it even more clear that it is raising FERC-jurisdictional arguments. PGE argues that the Blue Marmots cannot schedule deliveries to the PACW.PGE POD.[58] Whether or not the Blue Marmots are able to schedule deliveries would require the adjudication of a host of FERC-jurisdictional issues.[59] Even PGE concedes that scheduling is done pursuant to its FERC-approved tariff and the North American Electric Reliability Corporation and North American Energy Standards Board Wholesale Electric Quadrant standards rather than OPUC rules or policy.[60]

Similarly, the specific delivery costs that PGE refers to in its Transmission Testimony reflect the costs to move the Blue Marmots' power from the point of delivery to PGE's load, not to deliver the Blue Marmots' power to PGE's system.[61] As such, these are not QF-related interconnection costs, they would be costs related to PGE's transmission system's ability to manage the power delivered from PacifiCorp.

---

58 PGE's Response at 2-3 ("From a technical standpoint, given the current constraint at the PACW-PGE interface, the Blue Marmots cannot schedule deliveries to PGE at that location, and under required processes and procedures, any attempt to schedule deliveries will necessarily be rejected.").

59 A non-exclusive list of PGE's scheduling requirements includes: NAESB standards (providing detailed documents on how scheduling works and the practices for complying with FERC orders and NERC standard), NERC Interchange Standards (how transactions between balancing authorities occur), WECC Criterion (in support of NERC Standards), OATT provisions (including FERC requirements for scheduling firm point-to-point transmission service), OASIS (originally conceived with the Energy Policy Act of 1993 and formalized in FERC Order Nos. 888 and 889), as well as various other FERC Orders (FERC Order No. 764 requires transmission providers to offer intra-hour transmission scheduling). None of PGE's scheduling requirements appear to be subject to OPUC jurisdiction.

60 Attachment A (PGE Response to Blue Marmot Discovery Request No. 135) (This transmission information is posted to PGE's OASIS website).

61 PGE's Response at 6 ("even though the Blue Marmots have reserved transfer capability on PacifiCorp's system to *PacifiCorp's side of the interface*, they will be unable to schedule the delivery of their output to PGE") (citations omitted).

Worth noting, PGE's discovery response, which is provided as Attachment A, indicates that PGE's determination to accommodate a reservation request continues even after transmission service has been reserved by the transmission customer.[62] Here, the transmission customer would be PGE rather than the Blue Marmots. These scheduling issues underscore the simple fact that PGE's concerns center on its ability to manage its own transmission system via OASIS, which is also under FERC's exclusive jurisdiction.

C. FERC Is the Appropriate Forum to Adjudicate Whether the Blue Marmots' Power Can Reach PGE or Whether the Blue Marmots Can Schedule Deliveries at the PACW.PGE POD

Contrary to PGE's claims, the Blue Marmots do not "suggest that state commissions are entirely prohibited from considering transmission-related issues."[63] Instead, the Blue Marmots argue that the Commission must follow the jurisdictional lines in the Federal Power Act and PURPA. PGE's examples of the Commission addressing transmission issues fall within two categories that the Commission is permitted to adjudicate: either interconnections and avoided cost price setting, where the Commission is merely implementing and deferring to FERC's regulations and decisions, or areas in which FERC does not have exclusive jurisdiction. Neither of those situations matches the instant case.

---

62 Attachment A (PGE Response to Blue Marmot Discovery Request No. 135) ("*PGE* cannot allow *customers* to reserve transmission service where there is insufficient ATC to accommodate the reservation request, similar conditions apply to the scheduling of transmission service after it has been reserved."); but see PacifiCorp, 151 FERC ¶ 61,170 at P. 28 (2015) (allowing PacifiCorp to grant transmission requests from its own transmission service provider when there is zero ATC to enable delivery from QFs that avoid making costly transmission upgrades).

63 PGE's Response at 22.

1. The Commission's Authority Over Standard Contract Terms Does Not Provide Jurisdiction Over Off-System Transmission Costs

PGE argues "the Commission regularly considers transmission-related costs in crafting and approving standard contract terms and conditions and setting avoided costs."[64] The Commission's adoption of policies consistent with federal law and FERC regulations and orders does not mean that the Commission has the jurisdiction to resolve wholesale sales and transmission disputes that are within FERC's exclusive jurisdiction.

The Commission has the authority to approve standard contract provisions that a QF may elect to use, which naturally reflect that some QFs will deliver their net output to a utility they are not directly interconnected with. As PGE points out, the Commission approved off-system standard contract contains terms addressing transmission service, including curtailments.[65] Obviously, if the Commission is going to adopt standard contract provisions, then it must also adopt provisions that reflect the fact that off-system QFs have the right to sell their net output and that their power might be curtailed.

PGE's citation to Section 9 of the Blue Marmots' power purchase agreement, which relates to transmission curtailments, merely proves the point that the Commission is implementing rather than setting FERC policy. Section 9 simply states that if there is a transmission curtailment, then the QF will pay PGE for the replacement power costs.[66] FERC's pro forma open access transmission tariff sets out a mechanism to facilitate any

---

64 Id. at 25.

65 PGE's Response at 25.

66 See e.g., Blue Marmot V Complaint at Attachment A (providing Blue Marmots' PPAs).

necessary expansion, which also includes curtailment and redispatch provisions.[67] This does not provide the Commission with the jurisdiction to adjudicate a dispute about whether PacifiCorp properly curtailed any transmission customer under its tariff.

PGE also points to the generic Commission PURPA investigation dockets, including how to address the situation in which a utility must move power out of a load pocket.[68] The Commission recently relied upon Pioneer Wind to extend its interconnection policies to include any third-party transmission PacifiCorp claimed would be needed to get power from a directly interconnected QF located in a remote and constrained area to its load.[69] The Commission has determined that any such charges should be passed along to a QF.[70] Because the Blue Marmots interconnect with PacifiCorp, rather than PGE, these policies are neither controlling nor informative.

2. The Commission's Authority Over Avoided Cost Rates Only Applies Prospectively and Does Not Provide Jurisdiction in This Case

PGE also argues that the Commission's jurisdiction over PGE's avoided cost rates provides it the authority to adjudicate whether any upgrades are needed on its system and, what the costs of certain transmission upgrades would be at the PACW.PGE POD.[71] PGE ignores that it cannot adjust the avoided cost rate for off-system QFs, like the Blue Marmots, or otherwise charge off-system QFs transmission costs to access its system because those QFs already pay transmission in the form of wheeling arrangements. This

---

67 FERC Pro Forma OATT at Section 15.4 (detailing Obligation to Provide Transmission Service that Requires Expansion or Modification of the Transmission System, Redispatch or Conditional Curtailment).

68 PGE's Response at 25.

69 Docket No. UM 1610, Order No. 14-058 at 22.

70 Id. at 21.

71 PGE's Response at 25 ("PGE's standard avoided cost rates for off-system QFs include transmission costs, and the Commission necessarily must evaluate the appropriateness of those calculations.")

means that PGE cannot charge the Blue Marmots transmission charges, because the Blue Marmots already pay transmission charges to PacifiCorp, which are subject to FERC's jurisdiction.

Even if PGE could charge off-system QFs additional transmission costs via the avoided cost rate, that would be inappropriate in this context because avoided cost rates are set prospectively and this is not a proceeding to set rates, but to determine if PGE is obligated to purchase power delivered to at least the border of its system. PGE's avoided cost rates, which are paid to QFs, match the deferred costs of PGE next planned generation resource needed to serve its load, minus the costs of network transmission to wheel that transmission from the planned generation asset across PGE's transmission system to its load.[72] For PGE (but not PacifiCorp), these costs include the costs of third-party transmission.[73] As such, PGE's standard avoided cost rates include transmission costs for off-system QFs.[74] This means that, if it is appropriate to account for these costs, i.e., additional transmission upgrades for PGE to accommodate off-system sales, then it should be done in setting PGE's future avoided cost rates. PGE itself acknowledges "that

---

72 Docket No. UM 1401, Order No. 10- 132 at 2-3.

73 Docket No. UM 1610, Order No. 14-058 at 15-17 ("We affirm the existing policy that if the proxy resource used to calculate a utility's avoided costs is an off-system resource, the costs of third-party transmission are avoided, and are therefore included in the calculation of avoided cost prices. This is the situation for PGE, and it was not contested in these proceedings.").

74 PGE's Response at 13; PGE/100, Greene-Moore/23-24; Docket No. UM 1401, Order No. 10-132 at 2 (PGE, along with the other utilities, "claim that the costs of network upgrades are generally built into the avoided cost rates"); Re OPUC Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PGE's Prehearing Memorandum at 8 (May 20, 2013) ("PGE includes the costs and benefits of third-party transmission in the calculation of avoided cost prices and recommends continuing this policy"); Re OPUC Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 6-8 (confirming PGE still includes avoided transmission costs in its avoided cost prices for off-system proxy resources that incur transmission costs).

the costs of network upgrades are generally built into the avoided cost rates."[75] Yet, PGE has not acknowledged this opportunity to recover the costs it is seeking to impose on the Blue Marmots.

Since the Blue Marmots have established legally enforceable obligations with the contract prices in their partially executed power purchase agreements, neither PGE nor the Commission can adjust the Blue Marmots' avoided cost rate now, after the fact.[76]

---

[75] Docket No. UM 1401, Order No. 10-132 at 2-3; Re OPUC Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PGE's Prehearing Memorandum at 8 (May 20, 2013) ("PGE includes the costs and benefits of third-party transmission in the calculation of avoided cost prices and recommends continuing this policy…"); Docket No. UM 1610, Order No. 16-174 at 6-8 (confirming PGE still includes avoided transmission costs in its avoided cost prices for off-system proxy resources that incur transmission costs).

[76] Idaho Wind Partners 1, LLC, 140 FERC ¶ 61,219 at P.41 (2012) (prohibiting a state commission or utility from unilaterally adjusting rates in fixed price contract, or otherwise adjusting the compensation paid to the QF under the contract); N.Y. State Elec. & Gas Corp., 7l FERC ¶ 61,027 at 61,118*, reconsid. denied*, 72 FERC ¶ 61,067 (1995), appeal dismissed sub nom. N.Y. State Elec. & Gas Corp. v. FERC, 117 F.3d 1473 (D.C. Cir. 1997) ("If we were to ... allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered"); Oregon Trail Electric Consumers Co-op, Inc. v. Co-Gen Co., 168 Or App 466, 482 (2000) (PURPA prohibits regulators from exercising any kind "of post-contractual, utility-type price modification authority"); Freehold Cogeneration v. Bd. Reg. Comm'rs of N.J., 44 F.3d 1178, 1192 (3d Cir), cert den 516 U.S. 815, (1995) ("Congress intended to exempt [QFs] from state and federal utility rate regulations); Smith Cogeneration Mgt. v. Corp. Comm'n, 863 P.2d 1227, 1240 (Okla. 1993) ("[r]econsideration of long-term contracts established estimated avoided costs imposes utility-type regulation over QFs. PURPA and FERC regulations seek to preventreconsideration of such contracts); American Paper Inst. v. American Elec. Power, 461 U.S. 402, 414 (1981) ("legislative history [of PURPA] confirms . . . that Congress did not intend to impose traditional ratemaking concepts on sales by [QFs] to utilities); Afton Energy, Inc. v. Idaho Power Co., 107 Idaho 781, 693 P.2d 427, 433 (1984) (subjecting PPA prices to later modification based on regulatory determination that they are contrary to the public interest results in utility-type regulation, which Congress rejected in enacting PURPA); see also Indep. Energy Producers Ass'n v. Cal. Pub. Util. Comm'n, 36 F.3d 848, 855 (FERC exclusive authority to determine or revoke QF status).

Thus, to the extent that this remedy is available, it could only be used on future off-system QFs and not the Blue Marmots.

3. Prior Decisions Regarding Off-System QFs Are Inapplicable

PGE's Response claims that the Commission has previously determined that a QF can be required to deliver to an alternative POD, and cites two old Oregon wheeling cases that do little more here than underscore the Commission's justifications for establishing QF contracts—by demonstrating the long and difficult history QFs have endured trying to negotiate PPAs with utilities, especially when their avoided cost prices are dropping.

a. Water Power is Not Applicable

The first case PGE relies upon, Water Power, is a 30-year old court case, ultimately decided by a jury, where a QF was required to abide by unfavorable contract terms that it had agreed to. In Water Power, PacifiCorp, was preparing to lower its avoided cost rates and was requiring an off-system QF to produce an executed wheeling agreement before it would execute a PPA. While the facts and procedural history of the case are intricate, the QF ultimately agreed to certain wheeling requirements in exchange for higher avoided cost rates.

The QF challenged the validity of its wheeling requirement, which required it to obtain the agreement of three other parties (the purchasing utility, and two different transmitting utilities) to change from the POD specified by the Commission in its executed contract. Ultimately, an Oregon jury found for the utility. The court order noted that because PURPA allows parties to make contract provisions beyond those covered in FERC's regulations, i.e., to negotiate their own contracts, and the QF had

originally agreed to that provision, there was nothing invalid per se about a PPA that specified a particular POD.

PGE fails to acknowledge several distinguishing factors. First and most important, Water Power was not decided under FERC jurisdictional transmission, but rather between BPA and Douglas Electric Cooperative. FERC did not have jurisdiction to adjudicate the existence or validity of any transmission wheeling arrangements, which means that there was no conflict with the Supremacy Clause. Second, the QF signed the unfavorable PPA that contained a POD that it did not want to deliver to. PGE's standard PPAs do not specify any specific POD and the Blue Marmots have not agreed to make any concessions with respect to the POD. The Commission has confirmed that QFs have the right to insist on every provision of the standard PPA.[77] Third, the Blue Marmots are entitled to PGE's avoided cost rates in effect when they established their legally enforceable obligations, and PGE cannot impose additional charges upon them. Finally, Water Power was decided prior to the recent string of FERC cases cited above that clarify the responsibilities between utilities and off-system QFs. Thus, PGE is incorrect that Water Power stands for the proposition that PGE can require the Blue Marmots to deliver to a delivery point of its choosing.[78]

---

[77] See e.g., Re OPUC Investigation into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Staff Response to PacifiCorp's Motion to Close Docket at 6 (Mar. 30, 2017) (noting the Commission had not yet adopted PacifiCorp's proposal to assign third-party transmission costs to QFs seeking standard contracts with an addendum to its standard contract and questioning PacifiCorp's authority to do so); see also supra note 10.

[78] PGE's Response at 11 ("The Commission, affirmed by the Oregon Court of Appeals, has made clear that a QF does not have absolute discretion to choose its delivery point and that a utility can require a QF to deliver to a reasonable delivery point.").

b. Oregon Energy Co. Is Not Applicable

PGE also relies upon PGE v. OEC for the proposition that the Commission has previously "considered whether an off-system QF had made sufficient transmission arrangements to interconnect with PGE and trigger PGE's mandatory purchase obligation."[79] This woefully mischaracterizes the holding and the ongoing applicability of this old Commission decision.

In PGE v. OEC, a QF sent a partially executed PPA to PGE attempting to establish a legally enforceable obligation before another impending avoided cost rate decrease. The QF believed it took the same exact actions that were found by the Court of Appeals to trigger a legally enforceable obligation in the Snow Mountain Pine case.[80] The Commission disagreed, and determined the QF had not done enough to establish its legally enforceable obligation because, as on off-system QF, it "did not have a binding obligation to wheel [its] power" to PGE.[81] The QF had not made any transmission arrangements, but argued that it could compel a utility not regulated by this Commission or FERC to wheel its power. The Commission reasoned that "[w]ithout wheeling, the power is not available, and the obligation to purchase does not arise."[82] Critically, this opinion again involved third-party transmission that was not under FERC jurisdiction, so there was nothing that FERC could adjudicate.

The central holding in PGE v. OEC supports the Blue Marmots' position that the Commission has the authority to determine whether the Blue Marmots have established a

---

79 PGE's Response at 24 (citing PGE. v. OEC, Docket No. UC 315, Order No. 98-238, 1998 Or PUC LEXIS 204 at *19 (June 12, 1998)).

80 PGE v. Oregon Energy Co., Docket No. UC 315, Order No. 98-055 at 1 (Feb. 17, 1998).

81 Id. at 10.

82 Id.

legally enforceable obligation under Oregon's policy. PGE characterizes the decision as the Commission having "considered whether an off-system QF had made sufficient transmission arrangements to interconnect with PGE and trigger PGE's mandatory purchase obligation."[83] Here, PGE has already agreed that the Blue Marmots have formed legally enforceable obligations and triggered a mandatory purchase obligation.

PGE ignores, however, how unusual this order was and that off-system QFs are not required to *actually* purchase their transmission before executing a PPA. Such a requirement is not part of Oregon's current legally enforceable obligation policy. If this case stands for the proposition that PGE cites it for, then it has been overruled because FERC has subsequently issued several orders clarifying that any such requirement from a state commission would be inconsistent with its PURPA regulations.[84]

PGE also posits that because "the Commission concluded that the QF did not have the necessary transmission arrangements in place to trigger PGE's obligation to purchase the QF's power" pursuant to 18 CFR 292.303(d), the Commission "plainly acted within its jurisdiction … analyzing whether the QF had made the transmission arrangements necessary to deliver its output."[85] But, the Commission did not really analyze whether OEC's transmission arrangements would deliver its power. Simply put, OEC did not have *any* transmission arrangements to analyze. Moreover, the sufficiency of the Blue Marmots' transmission arrangements have been deemed adequate by FERC

---

83 PGE's Response at 24.

84 FLS Energy, Inc., 157 FERC ¶ 61,211 at P.23 (2016) ("just as requiring a QF to have a utility-executed contract, such as a PPA, in order to have a legally enforceable obligation is inconsistent with PURPA and our regulations, requiring a QF to tender an executed interconnection agreement is equally inconsistent with PURPA and our regulations."); Cedar Creek Wind, LLC, 137 FERC ¶ 61,006 at P.36 (2011); JD Wind 1, LLC, 129 FERC ¶ 61,148 at P.25 (2009).

85 PGE's Response at 25.

in its previous orders, which means there is no longer any technical transmission issues for the Commission to consider.

In fact, the exact same transmission arrangements have been deemed adequate by PGE itself in its previously executed contracts with Airport Solar and OM Power.[86] Thus, the Commission can determine whether any transmission arrangements exist, but it cannot determine whether PGE's Transmission Testimony is accurate, because those transmission arrangements are under FERC's exclusive jurisdiction.

IV. CONCLUSION

For the reasons discussed above, the Blue Marmots reiterate that all the Commission need decide in this case is that PGE is responsible for managing their net output after they have purchased transmission to wheel the power to PGE's border. Thus, the portions of PGE's testimony that refer to its Transmission Study should be stricken.

//

//

//

//

//

//

//

//

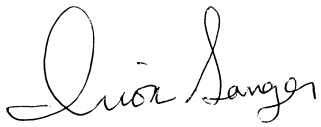
//

//

[86] ALJ Ruling (Oct. 30, 2017) (directing PGE to provide an affidavit that none of the terms of the Airport Solar PPA pertain to the constraint at the PACW.PGE POD).

Dated this 20th day of March 2018.

Respectfully submitted,



Irion A. Sanger
Sidney Villanueva
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

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

Complainants' Data Requests and PGE Responses

February 9, 2018

TO: Irion Sanger
Leslie Freiman
Will Talbott

FROM: Robert Macfarlane
Interim Manager, Pricing and Tariffs

PORTLAND GENERAL ELECTRIC
UM 1829
PGE Response to Blue Marmot Data Request No. 135
Dated January 26, 2018

Request:

135. On GREEN-MOORE/9: 22-23, PGE asserts that "energy cannot be scheduled for delivery unless there is sufficient ATC for it to be received." Please provide factual documentation, including references to NERC Standards, NERC Glossary of Terms, FERC Orders, NAESB Business Practices, PGE Business Practices and/or other references, that support this position. Additionally, please provide a summary as to how this determination is made by PGE.

Response:

In order to schedule transmission of power, transmission capability must be reserved and available on all contractual paths over which the power must flow. Please see PGE/300, Afranji-Larson-Richard/13-14.

PGE determines ATC as described in Attachment C to its FERC-approved OATT and its Available Transfer Capability Implementation Document (ATCID), which is posted on PGE's OASIS. Pursuant to Sections 4.1, 17.5, and 32 of PGE's OATT, PGE may not grant a reservation unless sufficient capability exists. *See also* the NERC INT (Interchange) Standards, available at nerc.com.

While the discussion in the paragraph above makes clear that PGE cannot allow customers to reserve transmission service where there is insufficient ATC to accommodate the reservation request, similar considerations apply to the scheduling of transmission service after it has been reserved. Specific scheduling and tagging requirements are set forth in the NAESB WEQ Standards, which are protected under the United States Copyright laws. As such, PGE is unable to reproduce those standards or transfer them to third parties. Information regarding access to the NAESB Standards is available at www.naesb.org.