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VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
201 High Street SE, Suite 100
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1829 – In the Matter of Blue Marmot V LLC vs Portland General Electric Company

Attention Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company's Response to Blue Marmots' Motion for Stay.

Please contact this office with any questions.

Sincerely,

Alisha Till
Legal Assistant

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1829**

Blue Marmot V LLC
Blue Marmot VI LLC
Blue Marmot VII LLC
Blue Marmot VIII LLC
Blue Marmot IX LLC,
Complainants,

v.

Portland General Electric Company,
Defendant.

**PORTLAND GENERAL ELECTRIC
COMPANY'S RESPONSE TO THE
BLUE MARMOTS' MOTION FOR
STAY**

1 The Blue Marmots, five 10-MW qualifying facilities (QFs) planned for construction in
2 southern Oregon, filed this case with the Public Utility Commission of Oregon (Commission) in
3 April 2017. This case's central question is whether off-system QFs like the Blue Marmots must
4 bear all costs required to facilitate the delivery of their output to the purchasing utility, thereby
5 ensuring that utility customers pay no more than the utility's avoided costs. Answering this
6 question is squarely within the Commission's jurisdiction and authority to implement the Public
7 Utility Regulatory Policies Act (PURPA).

8 However, more than a year and a half after filing this case with the Commission, after seven
9 rounds of testimony, and just over one month before the scheduled evidentiary hearing, the Blue
10 Marmots now ask the Commission to stay this proceeding while they pursue a new petition for a
11 declaratory ruling filed with the Federal Energy Regulatory Commission (FERC).¹ The Blue
12 Marmots' blatant attempt at forum shopping should be rejected because the motion to stay is
13 untimely and prejudicial to Portland General Electric Company (PGE) and its customers. This
14 Commission should not await a FERC ruling that may not be issued and will not resolve the case;

¹ Blue Marmots' Motion for Stay at 1 (Nov. 7, 2018).

1 instead, this Commission should proceed toward a decision in this case, which presents issues
2 properly within the Commission’s jurisdiction and authority.

I. BACKGROUND

3 The Blue Marmots are five solar QF projects proposed for development by EDP Renewables
4 North America (EDPR) in PacifiCorp’s service territory near the southern Oregon border.² EDPR
5 plans to construct the facilities, interconnect to PacifiCorp’s transmission system, and wheel the
6 projects’ output to PGE—approximately 300 miles away—through the interface between
7 PacifiCorp and PGE’s systems (the PACW-PGE interface).³ However, PGE has reserved the
8 transmission capacity at that interface to participate in the EIM and there is therefore insufficient
9 available transfer capability (ATC) to enable delivery of the Blue Marmots’ output.⁴ Nonetheless,
10 the Blue Marmots claim that they are not responsible for any additional costs necessary to enable
11 delivery and that PGE’s customers must bear such costs instead.⁵ Based on this belief, on April
12 28, 2017, the Blue Marmots filed the complaints in this case with the Commission, alleging that
13 PGE violated its mandatory-purchase obligation under PURPA and asking the Commission to bar
14 PGE from either raising deliverability concerns or seeking to impose costs on the Blue Marmots.⁶

15 In the Blue Marmots’ opening testimony, filed on October 13, 2017, they argued that their
16 reservation of transmission service on PacifiCorp’s system is sufficient to constitute delivery of
17 their output to PGE.⁷ However, the Blue Marmots failed to provide any technical support for their
18 position that a mere reservation on PacifiCorp’s system would actually enable them to schedule
19 their output for delivery to PGE—a crucial issue given the lack of ATC at the PACW-PGE
20 interface.⁸ In response testimony, filed on January 12, 2018, PGE explained the lack of ATC at

² PGE/100, Greene-Moore/7.

³ PGE/100, Greene-Moore/8.

⁴ PGE/100, Greene-Moore/3.

⁵ PGE/400, Greene/1.

⁶ Blue Marmot V Complaint at 14-15 (Apr. 28, 2017).

⁷ See, e.g., Blue Marmots’ Motion to Strike at 3, 4 (Feb. 12, 2018); Blue Marmot/200, Talbott/11-13.

⁸ PGE/100, Greene-Moore/17.

1 the PACW-PGE interface and why, as a technical matter, the Blue Marmots cannot deliver their
2 output to PGE at that location.⁹

3 The Blue Marmots thereafter sought to strike portions of PGE’s testimony on February 12,
4 2018, on the basis that any technical transmission-related information regarding the lack of ATC
5 and their ability to deliver is within FERC’s exclusive jurisdiction and cannot be considered or
6 resolved by this Commission.¹⁰ More broadly, the Blue Marmots argued that any analysis of the
7 projects’ delivery options and the associated costs was similarly confined to FERC’s exclusive
8 review on the basis of both “field” and “conflict” preemption principles.¹¹

9 As PGE explained in its detailed response to the motion to strike, the transmission-related
10 issues that the Blue Marmots sought to remove from this case are fundamental to the Blue
11 Marmots’ claim that delivery has been or can be achieved at the PACW-PGE interface.¹² As a
12 result, Commission consideration of the lack of ATC and the costs necessary for the Blue Marmots
13 to actually achieve delivery is essential to a full and fair resolution of the Blue Marmots’ case.¹³
14 The presiding Administrative Law Judge (ALJ) agreed with PGE and, on March 22, 2018, denied
15 the Blue Marmots’ motion to strike, concluding that the Commission must be able to consider the
16 costs and feasibility of the Blue Marmots’ proposed means of delivering power.¹⁴ The Blue
17 Marmots’ subsequent request for certification of the ALJ’s decision to the Commission was also
18 denied on April 27, 2018.¹⁵

19 Now, approximately six months after the denial of the Blue Marmots’ jurisdiction-based
20 motion to strike—and more than a year and a half after they filed the complaints with the
21 Commission in this case—the Blue Marmots claim that the Commission is incapable of resolving
22 the dispute and must await FERC’s resolution of the request for declaratory ruling that the Blue

⁹ PGE/100, Greene-Moore/17.

¹⁰ Blue Marmots’ Motion to Strike at 2-3.

¹¹ Blue Marmots’ Motion to Strike at 2-3.

¹² PGE’s Response to Motion to Strike at 9-10 (Mar. 6, 2018).

¹³ PGE’s Response to Motion to Strike at 27-28.

¹⁴ Ruling Denying Blue Marmots’ Motion to Strike at 3 (Mar. 22, 2018).

¹⁵ Ruling Denying Request for ALJ Certification (Apr. 27, 2018).

1 Marmots filed simultaneous with their motion to stay.¹⁶ In that FERC petition, the Blue Marmots
2 ask FERC to declare that (1) transmission congestion does not relieve a utility of its mandatory-
3 purchase obligation under PURPA; and (2) a QF’s obligation to pay its interconnection costs “only
4 extends to the physical interconnection between the QF and the utility system to which it is directly
5 interconnected.”¹⁷ The Blue Marmots ask FERC to intervene in this dispute now “[d]ue to the
6 irreconcilable positions of the parties and the need for a clear statement of federal law.”¹⁸

II. DISCUSSION

7 This Commission has discretion to grant a motion to stay “when the interests of justice”
8 demand it.¹⁹ Generally, Oregon’s practice of granting stays appears to be consistent with the
9 federal standard,²⁰ under which the reviewing court balances (1) the interests of the parties,
10 (2) efficiency, and (3) the interests of nonlitigants and the public.²¹ A review of these factors
11 demonstrates that this Commission can—and should—proceed to resolve this case and should not
12 stay the case at this late hour to await resolution of the Blue Marmots’ FERC petition.

13 The Blue Marmots claim that the Commission should stay this proceeding because (1) FERC
14 will resolve issues central to the case, (2) the Commission lacks authority to resolve transmission-
15 related issues, and (3) it would be prudent to await FERC’s interpretation of federal statutes.²²
16 However, the Blue Marmots’ request for a stay is prejudicial to PGE and the public and offers no
17 efficiency value because (1) the motion to stay is untimely and would delay resolution of this long-

¹⁶ Blue Marmots’ Petition for Declaratory Order and Request for Expedited Consideration, (Attach. A of Blue Marmots’ Motion for Stay).

¹⁷ Blue Marmots’ Petition for Declaratory Order at 2-3.

¹⁸ Blue Marmots’ Petition for Declaratory Order at 3.

¹⁹ *Sawyer v. Real Estate Agency*, 268 Or App 42, 52 (2014). The Commission follows the procedural rules set forth in the ORCP where not specifically enumerated in the OAR; there are no specific administrative rules governing the standard for approving a motion to stay.

²⁰ *Seneca Sustainable Energy, LLC v. Dep’t of Revenue*, Or Tax Ct, TC 5323 (2018) (noting that “Oregon’s practice seems consistent with the federal courts’ general recognition that a ‘court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case’”) (quoting *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F2d 1458, 1465 (9th Cir 1983)). Note, while the tax court’s decision is plainly not binding, that tribunal receives motions to stay “relatively often,” yet noted that it had “not found an Oregon opinion listing specific factors to be considered in whether to place a case in abeyance,” and so relied on restated federal factors.

²¹ *Keating v. Office of Thrift Supervision*, 45 F3d 322, 325 (9th Cir 1995).

²² Blue Marmots’ Motion for Stay at 6-13.

1 running dispute; (2) awaiting a FERC ruling is neither prudent nor helpful because the Blue
2 Marmots' petition does not solicit useful guidance, nor would any such guidance be more than
3 advisory on the central issues in this case; and (3) the issues presented in this case are properly
4 within the Commission's jurisdiction and should be resolved by this Commission in the first
5 instance. For all these reasons, the Commission should deny the motion to stay.

A. The Blue Marmots' Motion is Untimely and Prejudicial.

6 Notably absent from the Blue Marmots' motion to stay is any explanation for their significant
7 delay in filing the motion and the accompanying FERC petition. As described above, the Blue
8 Marmots filed this case with the Commission in April 2017.²³ The Blue Marmots' complaints
9 included claims related to deliverability²⁴—an issue that the Blue Marmots now argue that the
10 Commission may not consider.²⁵ PGE disagrees that FERC has exclusive jurisdiction over this
11 case; however if the Blue Marmots believed that the issues presented by their complaints were
12 subject exclusively to FERC's review, then a FERC petition could have been filed at that time.

13 Even if the Blue Marmots were confused as to the scope of the issues presented by their
14 complaints, the transmission-related implications of their claims were made abundantly clear in
15 January 2018, after PGE filed its response testimony explaining that the Blue Marmots could not
16 deliver at their proposed point of delivery because the transmission capability at that interface is
17 fully subscribed. To the extent the Blue Marmots nevertheless believed that this central question
18 would be excluded from the Commission's review, they should have been disabused of this notion
19 in March 2018, when the ALJ denied the Blue Marmots' motion to strike transmission-related
20 portions of PGE's testimony²⁶—and again in April, when the ALJ denied the Blue Marmots'
21 request for certification of that ruling to the Commission.²⁷ Nonetheless, the Blue Marmots waited

²³ Blue Marmot V Complaint.

²⁴ See, e.g., Blue Marmot/100, Irvin/2.

²⁵ Blue Marmots' Motion for Stay at 4-5.

²⁶ Ruling Denying Motion to Strike at 3 (Mar. 22, 2018).

²⁷ Ruling Denying Request for ALJ Certification (Apr. 27, 2018).

1 *an additional 6 months*—until a mere one month before the Commission hearing—to file a
2 petition with FERC and request a stay in this proceeding.

3 Any claim that the Blue Marmots’ FERC petition is motivated by perceived efficiency gains
4 is wholly undermined by their lengthy and unexplained delay. Critically, this delay has entailed
5 substantial costs in both time and resources, as the parties have—just since April—filed four
6 additional rounds of detailed testimony, entailing extensive new and time-intensive analysis.²⁸
7 The Blue Marmots were well aware of the resources that were required to prepare additional
8 analyses and testimony, because it was one of the bases for their motion to strike.²⁹ Nonetheless,
9 the Blue Marmots allowed this case to proceed for six more months before seeking a stay on the
10 eve of the hearing—an inexcusable and inexplicable delay that is harmful to both PGE and its
11 customers. Indeed, further delays will only increase the prejudice to PGE and its customers; the
12 Blue Marmots’ avoided cost rates, established in spring 2017,³⁰ are growing increasingly stale.

13 In sum, since the Blue Marmots filed this case more than a year and a half ago, PGE has
14 expended substantial personnel and financial resources on developing several pieces of detailed
15 testimony to clarify the issues central to this case, and preparing for the impending hearing, which
16 will enable the Commission to resolve this case in a timely manner. The hearing is now mere
17 weeks away, and hearing preparation is well underway. In the interests of both fairness and
18 efficiency, the Blue Marmots’ motion to stay should be denied.

B. Staying this Case to Await FERC’s Guidance Would Be Neither Prudent nor Helpful.

19 The Blue Marmots assert that this Commission should stay this proceeding and await
20 FERC’s resolution of issues central to the case.³¹ However, staying this case pending resolution
21 of the Blue Marmots’ petition is imprudent because (1) FERC may decline to take up the Blue
22 Marmots’ petition; (2) any FERC decision is unlikely to be issued quickly; and (3) the Blue

²⁸ See Blue Marmot/400-500; PGE/400-600; Blue Marmot/600; and PGE/700.

²⁹ Blue Marmots’ Motion to Strike at 28.

³⁰ PGE/100, Greene-Moore/8, 15.

³¹ Blue Marmots’ Motion for Stay at 13.

1 Marmots’ petition does not invite guidance that would be either relevant to or dispositive of this
2 case. Therefore, the Commission should deny the requested stay.

3 First, while the Blue Marmots have petitioned FERC for a declaratory ruling, FERC has no
4 obligation either to take up the case or to issue such a ruling. FERC may simply decline to act,
5 leaving parties in an indefinite period of uncertainty.³² This Commission should not stay this case
6 on the eve of hearing to await a FERC order that may never materialize.

7 Second, while the Blue Marmots have requested expedited consideration of their FERC
8 petition, there is no reason to believe that this request will yield a swift result. The broad
9 declarations requested by the Blue Marmots are likely to invite interest from many other parties
10 who may seek to weigh in at FERC regarding the petition. And even if FERC decides to take up
11 the Blue Marmots’ petition, and further determines to opine on the questions presented, there is no
12 guarantee that FERC would choose to do so in the expedited time frame requested by the Blue
13 Marmots.³³ The parties have already spent many months and expended substantial resources
14 attempting to resolve the issues presented by this case and, in contrast to the Blue Marmots’
15 proposed new approach at FERC, an opportunity for clear and full resolution by this Commission
16 is impending.

17 Third, the Blue Marmots’ requested declarations would not fully resolve the case, even if
18 they were issued. The Blue Marmots first ask FERC to declare that a utility is not absolved of its
19 mandatory purchase obligation by transmission constraints.³⁴ Crucially, however, ***PGE has not***
20 ***requested to be relieved of its mandatory-purchase obligation.*** On the contrary, PGE understands
21 that it will have an obligation to purchase the Blue Marmots’ output at the avoided cost prices in
22 effect when they established their legally enforceable obligations—as soon as the Blue Marmots
23 agree both to feasible delivery arrangements that can actually make their output available to PGE

³² See 18 CFR § 385.207 (providing no mandatory timeline for resolution of a petition seeking a declaratory order).

³³ See, e.g., *ANR Storage*, 141 FERC ¶ 61099 (2012) (waiting approximately six months to act on a petition for declaratory ruling and then opting to hold a fact-finding hearing).

³⁴ Blue Marmots’ Petition for Declaratory Order at 2-3.

1 and to bear the costs of the necessary arrangements. Therefore, the declaration that the Blue
2 Marmots seek, even if granted, would do nothing to resolve the actual dispute in this case.

3 The Blue Marmots' second requested declaration is similarly unhelpful; they ask FERC to
4 declare that interconnection costs assessed by state regulatory authorities extend only to the
5 physical interconnection between the QF and the directly interconnected utility.³⁵ Such a
6 declaration from FERC would not resolve this case because this Commission has made clear that
7 "any costs imposed on a utility that are above the utility's avoided costs must be assigned to the
8 QF in order to comport with PURPA avoided cost principles," and noted that such costs can be
9 accounted for "by lowering avoided cost rates, separately in interconnection costs assessments,
10 through an addendum . . . or by some other means."³⁶ Therefore, even if FERC were to declare
11 that the costs imposed by the Blue Marmots do not fall within FERC's definition of interconnection
12 costs, this declaration would not alter the fact that such costs clearly must be paid by the Blue
13 Marmots to comport with avoided-cost and customer-indifference principles, and that assessing
14 such costs is within this Commission's jurisdiction.

C. The Commission Has Jurisdiction to Fully Resolve This Case.

15 The Blue Marmots claim that the Commission should stay this proceeding because PGE
16 "raised issues" that "are more appropriately resolved by FERC" and are within FERC's "exclusive
17 jurisdiction."³⁷ Here, the Blue Marmots simply reprise the arguments made in their unsuccessful
18 motion to strike PGE's testimony.³⁸ Once again, the Blue Marmots argue generally that FERC
19 has "exclusive" jurisdiction over deliverability issues and interconnection costs under "field or
20 conflict preemption."³⁹ As PGE already explained in its thorough and detailed response to the
21 earlier motion to strike,⁴⁰ FERC's exclusive jurisdiction over interstate transmission matters does

³⁵ Blue Marmots' Petition for Declaratory Order at 3.

³⁶ *In the Matter of Pub. Util. Comm'n of Or. Staff Investigation Into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 14-058 at 22 (Feb. 24, 2014).

³⁷ Blue Marmots' Motion for Stay at 1-2.

³⁸ Blue Marmots' Motion to Strike at 7.

³⁹ Blue Marmots' Motion for Stay at 10.

⁴⁰ PGE hereby incorporates and relies upon its Response to the Blue Marmots' Motion to Strike (Mar. 6, 2018).

1 not extend broadly to the transmission-related issues in this case under either field or conflict
2 preemption.⁴¹

3 By way of brief background, state law can be preempted either expressly or implicitly, and
4 courts ascertain whether a federal law preempts state law by examining legislative intent.⁴² If a
5 federal law expressly preempts state authority, courts “need not go beyond that language to
6 determine whether Congress intended” preemption.⁴³ “In the absence of explicit statutory
7 language signaling an intent to pre-empt,” courts will “infer such intent where” the state law is
8 either “field” or “conflict” preempted by federal law.⁴⁴ Here, neither field nor conflict preemption
9 applies.

1. Field preemption does not apply.

10 Field preemption occurs where “Congress has legislated comprehensively to occupy an
11 entire field of regulation, leaving no room for the States to supplement federal law.”⁴⁵ In support
12 of their field preemption claim, the Blue Marmots offer the unremarkable proposition that “FERC
13 preempts state commissions in the regulation of transmission and wholesale energy sales.”⁴⁶
14 However, the Blue Marmots attempt to extend this jurisdictional boundary to any “questions
15 around transmission”⁴⁷—which would require any case involving a transmission-related issue to
16 be reserved for FERC’s sole review. The Blue Marmots’ effort to redraw the jurisdictional
17 boundaries is unsupportable, as this Commission has clearly been granted authority to determine
18 avoided cost rates and assess interconnection costs, both of which intersect with transmission-
19 related issues.⁴⁸ Moreover, FERC has emphasized “the need for heightened cooperation between

⁴¹ PGE’s Response to Blue Marmots’ Motion to Strike at 3.

⁴² *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 509 (1989).

⁴³ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996).

⁴⁴ *Northwest Cent. Pipeline*, 489 U.S. at 509; *Talen Energy Mktg.*, 136 S.Ct. at 1297.

⁴⁵ *Northwest Cent. Pipeline*, 489 U.S. at 509.

⁴⁶ Blue Marmots’ Motion for Stay at 12.

⁴⁷ Blue Marmots’ Motion for Stay at 12.

⁴⁸ PURPA requires utilities to purchase energy from QFs and delegates to state regulatory authorities, such as the Commission, the authority to implement this requirement and FERC’s associated regulations. 16 U.S.C. § 824a-3(a); 16 USC § 824a-3(f); 18 C.F.R. § 292.303(1). “[S]tates are allowed a wide degree of latitude in establishing an implementation plan” under PURPA, as long as the plan is consistent with FERC’s regulations. *Cal. Pub. Utils. Comm’n, et al.*, 133 FERC ¶ 61,059, P 24 (2010) (internal citations omitted). The Commission has broad authority

1 federal and state regulators in areas where there are overlapping federal and state policy
2 concerns,”⁴⁹ and the fact that FERC and state jurisdiction intersect and overlap demonstrates that
3 FERC has not occupied the field of—and retained exclusive authority over—all transmission-
4 related issues. In sum, Congress and FERC delegated to the Commission broad authority to
5 implement and enforce PURPA, and the Commission’s authority is not implicitly preempted
6 because PURPA or FERC’s regulations occupy the field.⁵⁰

2. Conflict preemption does not apply.

7 Conflict preemption occurs “where the state law at issue conflicts with federal law, either
8 because it is impossible to comply with both, or because the state law stands as an obstacle to the
9 accomplishment and execution of congressional objectives.”⁵¹ There is a presumption against
10 finding conflict preemption because doing so tends to interfere with the historic powers of the
11 states.⁵²

12 Other than reciting the legal standard, the Blue Marmots have not explained how conflict
13 preemption is implicated in this case.⁵³ PGE assumes that the Blue Marmots are simply re-arguing

to implement PURPA and the responsibility to protect customers from QF-related costs in excess of avoided costs. 16 U.S.C. § 824a-3(b); 18 CFR § 292.304; *see also* ORS 758.505(1) (defining “avoided cost”); *So. Cal. Edison Co.* at 62,079-80 (stating that in adopting PURPA, “Congress was not asking utilities and utility ratepayers to pay more than they otherwise would have paid for power. . . PURPA requires an electric utility to purchase power from a QF, but only if the QF sells at a price no higher than the cost the utility would have incurred for the power if it had not purchased the QF’s energy and/or capacity, i.e. would have generated itself or purchased from another source. The intention was to make ratepayers indifferent as to whether the utility used more traditional sources of power or the newly-encouraged alternatives.”); *Pioneer Wind Park I, LLC* at P 38 n.73 (stating that FERC’s regulations permit a state to account for “transmission or distribution costs directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations” in the determination of avoided costs if such costs are not assessed as interconnection costs). While FERC’s regulations provide state commissions with guidelines of the factors to take into account in setting avoided cost, 18 C.F.R. § 292.304(e), FERC is generally “reluctant to second guess the state commission’s determination.” *Cal. Pub. Utils. Comm’n*, 133 FERC ¶ 61,059, P 24. Moreover, under FERC’s regulations, the Commission is also 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.” 18 C.F.R. § 292.306.

⁴⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, 115 FERC ¶ 61,211, P 61.

⁵⁰ More detailed discussion of these issues is provided in PGE’s Response to the Blue Marmots’ Motion to Strike at 18-26.

⁵¹ *Nw. Cent. Pipeline*, 489 U.S. at 509 (internal citations omitted).

⁵² *New York v. FERC*, 535 U.S. at 17-18 (noting that a “presumption against pre-emption” applies when evaluating “whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority”).

⁵³ Blue Marmots’ Motion for Stay at 12-13.

1 their position from their earlier motion to strike, which claimed that any Commission order
2 resolving this case would inevitably conflict with FERC orders⁵⁴—including, potentially, the
3 declaratory order recently requested by the Blue Marmots. As PGE explained in response to the
4 motion to strike, such FERC orders cannot serve as the basis for a finding of conflict preemption
5 because they are non-binding, declaratory orders, and therefore FERC’s statements about
6 PURPA’s requirements in them are not mandatory.⁵⁵ The D.C. Circuit Court of Appeals has
7 repeatedly noted that FERC’s orders on PURPA issues “contain language that appears mandatory,”
8 but the orders are nonetheless “declaratory.”⁵⁶ And both FERC and the courts acknowledge that
9 FERC’s pronouncements on PURPA issues in these contexts remain merely advisory,⁵⁷ and
10 therefore in no way can conflict with state commissions’ authority to implement PURPA. Thus,
11 the Commission can fully resolve the issues raised by this case without creating a conflict with
12 FERC precedent.

⁵⁴ Blue Marmots’ Motion to Strike at 14.

⁵⁵ *Public Service Co. of New Hampshire v. New Hampshire Elec. Coop., Inc.*, 83 FERC ¶ 61,224 (May 29, 1998) (declining to initiate PURPA enforcement action); *Kootenai Electric Cooperative, Inc.*, 143 FERC ¶ 61,232 (declining to initiate PURPA enforcement action); *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61215, P41 (“We note that it is the state’s responsibility in the first instance to determine an avoided-cost rate consistent with the Commission’s PURPA regulations. Therefore, if Pioneer Wind has concerns regarding the ultimate avoided-cost rates for its QF output, it should first pursue such concerns at the Wyoming Commission, which will review and make a determination concerning those avoided-cost rates. After the Wyoming Commission has made its determination and if Pioneer Wind is dissatisfied with that determination, Pioneer Wind may exercise its rights to file a petition pursuant to sections 210(g) and/or 210(h)(2)(B) of PURPA.”); *PáTu Wind Farm, LLC*, 150 FERC ¶ 61,032 (issuing pronouncement that, upon appeal, FERC insisted was non-binding, *see PGE v. FERC*, 854 F.3d at 701).

⁵⁶ *PGE v. FERC*, 854 F.3d at 701; *see also Midland Power Coop. v. FERC*, 774 F.3d 1, 7-8 (D.C. Cir. 2014); *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997) (“An order that does no more than announce the Commission’s interpretation of the PURPA or one of the agency’s implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA.”); *New York State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473, 1477 (D.C. Cir. 1997) (“[FERC] did nothing more than state why in its opinion the challenged rates comply with the PURPA [We lack jurisdiction] to review a non-binding declaratory order.”).

⁵⁷ *See PGE v. FERC*, 854 F.3d at 702 (“FERC could avoid a great deal of confusion and waste of judicial resources by not using words like ‘shall’ and ‘must,’ and by making clear in its orders—as opposed to later in this court—that its discussions of PURPA-related issues are advisory only.”).

D. Even If the Commission and FERC Have Overlapping Jurisdiction, the Commission Should Proceed to Resolve this Case.

1 The Blue Marmots also argue that, even if the Commission has jurisdiction to decide the
2 issues in this case, it should nonetheless let FERC rule on this case first.⁵⁸ To this end, the Blue
3 Marmots point to two prior QF cases that were addressed by both this Commission and FERC to
4 warn of the potential complications of the two tribunals reaching separate conclusions.⁵⁹ As an
5 initial matter, PGE has already explained in its response to the motion to strike that each of these
6 cases is factually distinguishable from the present case, and neither case dictates the outcome in
7 this dispute.⁶⁰ Moreover, the Blue Marmots fail to recognize that any FERC “discussions of
8 PURPA-related issues” would be “advisory only,”⁶¹ and would not absolve this Commission of
9 its obligation to implement PURPA in this case.

10 Here, the Commission must consider whether to require customers to bear substantial
11 additional costs necessary for QFs to achieve delivery, or whether to allocate these costs to the
12 QFs. This question bears on the Commission’s central responsibility to protect ratepayers and to
13 ensure that they remain indifferent to the purchase of QF generation “by having utilities pay no
14 more than their avoided costs.”⁶² Thus, there is no need to await further guidance from FERC,
15 and the Commission should exercise its “broad authority to prevent customer harm” and proceed
16 to an efficient resolution of this case.⁶³

III. CONCLUSION

17 The Blue Marmots urge the Commission to stay this proceeding, claiming that the central
18 questions in this case are matters of exclusive FERC jurisdiction and that it would be “prudent” to
19 await FERC’s resolution. However, the Blue Marmots’ belated attempt to stay this long-running

⁵⁸ Blue Marmots’ Motion for Stay at 7-9, 13.

⁵⁹ Blue Marmots’ Motion for Stay at 7-9.

⁶⁰ PGE’s Response to Motion to Strike at 26-27.

⁶¹ *PGE v. FERC*, 854 F.3d at 702.

⁶² *In the Matter of Pub. Util. Comm’n of Or. Staff’s Investigation Relating to Elec. Util. Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 1, 11 (May 13, 2005).

⁶³ *In the Matter of PacifiCorp, dba Pacific Power, Application to Update Schedule 37 Qualifying Facility Info.*, Docket No. UM 1729, Order No. 18-289 at 8 (Aug. 9, 2018).

1 case mere weeks before hearing is inexplicable and prejudicial. It is not clear that FERC will
2 choose to issue a declaratory ruling in response to the Blue Marmots' petition nor that such a ruling
3 would be relevant to—much less dispositive of—this case. And because the issues in this case fall
4 squarely within the Commission's jurisdiction and competence, the Commission should not stay
5 the case pending a FERC ruling. Instead, consistent with both the Commission's clear jurisdiction
6 and the interests of justice, PGE respectfully requests that the Commission deny this motion to
7 stay and proceed to timely resolve this case.

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