

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

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

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|------------------------------------|---|----------------------------|
| Blue Marmot V LLC (UM 1829) |) | |
| Blue Marmot VI LLC (UM 1830) |) | REPLY TO PGE’S RESPONSE TO |
| Blue Marmot VII LLC (UM 1831) |) | MOTION TO COMPEL DISCOVERY |
| Blue Marmot VIII LLC (UM 1832) |) | |
| Blue Marmot IX LLC (UM 1833), |) | |
| Complainants, |) | |
| |) | |
| v. |) | |
| |) | |
| Portland General Electric Company, |) | |
| Defendant. |) | |

I. INTRODUCTION

Blue Marmot V, LLC, Blue Marmot VI, LLC, Blue Marmot VII, LLC, Blue Marmot VIII, LLC, and Blue Marmot IX, LLC (collectively “Blue Marmot”) file this reply to Portland General Electric Company (“PGE’s”) response to Blue Marmot’s motion to compel discovery (“Blue Marmot’s Motion”) requesting that Oregon Public Utility Commission (the “Commission” or “OPUC”) Administrative Law Judge (“ALJ”) Allan Arlow require PGE to provide a full and complete answer to Blue Marmot’s Data Request No. 22.

PGE’s response (“PGE’s Response”) to Blue Marmot’s Motion argues: 1) PGE has substantially responded to Blue Marmot’s data requests; 2) searching PGE’s own communications is unduly burdensome; 3) the Airport Solar power purchase agreement (“PPA”) is too commercially sensitive to provide; and 4) Blue Marmot should be prohibited from additional data requests. This reply addresses PGE’s first three arguments pursuant to OAR 860-001-0500(7) whereas Blue Marmot intends to respond

to PGE's motion for limitations on discovery in a separate response filing pursuant to the agreed upon schedule adopted by ALJ Arlow.

In reality, PGE has not substantially responded to Blue Marmot's discovery requests and the limited information that PGE has provided and offered to provide does not adequately address the issues in dispute in this case. PGE has claimed that at some point in April it simply changed its process and has treated all similarly situated QFs the same. Blue Marmot has the right to determine whether the facts support PGE's claims.

PGE's justification for withholding relevant information does not provide a legitimate basis for its objections.¹ In regards to proving when PGE knew about the alleged constraint and communicated that information, PGE should not be permitted to claim that searching its own emails is too burdensome, given the limited amount of off-system PPAs at issue here. Although PGE has not yet confirmed the total number of off-system contracts, it has confirmed that since 2015 PGE has entered into about 30 contracts. Finding the date that PGE learned about the point of delivery ("POD") and communicated those facts for each of these 30 or so contracts should not be unduly burdensome.

Similarly, PGE should not be able to withhold relevant information under the guise that it is confidential. Confidentiality is not a legitimate discovery objection, and is contrary to routine Commission practice. There is already a protective order in place in this case, and PGE has not evoked the Commission's separate process to deal with any allegedly highly confidential information. PGE's offer to provide excerpts or summaries

¹ Blue Marmot notes that PGE has not disputed that the information is relevant, but only that it should be allowed not to provide complete information.

of only the provisions of the PPA that it wants Blue Marmot to review are not an adequate replacement.

Blue Marmot is seeking this information for the purpose of determining whether or not PGE is unlawfully discriminating against Blue Marmot, which cannot be determined without knowing when PGE provided notice to other similarly situated QFs of its alleged concerns regarding the PACW.PGE point of delivery POD, and whether PGE has entered into contract terms that may address its alleged concerns. Specifically, if PGE knew about the alleged constraint at the PACW.PGE POD prior to its execution of other off-system PPAs, and then executed PPAs with those QFs but not Blue Marmot, then PGE will have unlawfully discriminated against Blue Marmot. Given that PGE executed one off-system PPA only two weeks before refusing to execute off-system PPAs with Blue Marmot, the exact dates and contract terms are necessary to determine if PGE has in fact discriminated against Blue Marmot.

The opposite is also true: If PGE is not requiring other off-system QFs to deliver at different PODs or pay for transmission upgrades, then it would be unlawful discrimination for PGE to treat Blue Marmot differently. Therefore, if the Airport Solar and other off-system PPAs allow those QFs to deliver at the PGE.PACW POD, then PGE should immediately execute Blue Marmot's partially executed PPAs, and allow Blue Marmot to make deliveries at the POD of their choosing, including the PGE.PACW POD.

II. BACKGROUND

PGE claims that it has had insufficient capacity to accept deliveries at the PACW.PGE POD since it acquired the long-term firm transmission capability PGE felt

was necessary to participate in the Energy Imbalance Market (“EIM”) back in 2015. PGE claims that, because this information was posted on its OASIS cite, Blue Marmot should have been aware of the insufficient available transfer capability (“ATC”) when Blue Marmot submitted its requests to enter into Schedule 201 PPAs with PGE.² Despite arguing Blue Marmot should have been aware of this alleged transmission limitation, PGE also claims that it was not even aware of the ATC limitation until sometime between April 3, 2017 (when PGE executed the Airport Solar PPA) and April 17, 2017 (when PGE requested Blue Marmot identify its POD).

PGE has elected not to provide Blue Marmot with documentary support for when PGE learned of the alleged constraint and when it was communicated to other off-system QFs. PGE’s statements about when it “generally” began asking QFs about their PODs is not the same as understanding exactly what information PGE knew when it executed the Airport Solar PPA and other off-system QFs, and why it did not execute the Blue Marmot PPAs.³ Moreover, PGE has confirmed that other similarly situated QFs were not asked about their PODs until June and July, months after PGE informed Blue Marmot.⁴

Blue Marmot has tried to work with PGE to limit the amount of discovery needed, but those efforts have not yielded sufficient information. For example, Blue Marmot originally asked PGE to provide certain information for all of its off-system PPAs, which PGE refused to provide.⁵ Blue Marmot took PGE on its word that its request was burdensome and limited its request to identify less information and only for PPAs

² PGE’s Answer at 2.

³ PGE’s Response at 4.

⁴ Id. at Attachment A (PGE’s Response to Blue Marmot’s Data Request No. 41).

⁵ Blue Marmot’s Motion at Attachment A (PGE’s Response to Blue Marmot’s Data Request No. 22).

executed in 2015, 2016, and 2017, and PGE responded.⁶ That response indicated that PGE has only entered into about 30 off-system PPAs since PGE acquired the additional transmission capability for the EIM and (in PGE's view) the PACW.PGE POD became constrained. Due to: 1) the limited number of off-system PPAs PGE has executed; 2) how critical this issue is to Blue Marmot's case; and 3) the value of the limited amount of information otherwise being provided by PGE, Blue Marmot reiterated its initial request to provide the remaining information requested in Data Request No. 22.

To date, PGE has offered to provide some additional information to resolve this dispute, but refuses to search its own records for communications about what could be little more than 30 contracts and refuses to provide the one and only relevant negotiated contract that is not publicly available on the Commission's website. Blue Marmot also expressed a willingness to work with PGE to review a redacted version of the Airport Solar PPA, if there are provisions that Blue Marmot agrees are not relevant;⁷ however, Blue Marmot has not agreed to allow PGE to unilaterally decide which provisions Blue Marmot can review because even nuanced language changes can have significant impacts on even apparently unrelated terms and conditions.

III. ARGUMENT

Blue Marmot is seeking to establish whether PGE has treated some QFs differently than others, and specifically whether Blue Marmot has been treated differently than other similarly situated QFs. Blue Marmot has the burden of proof in these complaints, and cannot establish its case if PGE refuses to provide even basic facts about

⁶ Id. (PGE's Response to Blue Marmot's Data Request No. 40).

⁷ PGE's Response did not mention Blue Marmot's full attempts to work out a compromise with PGE.

the relevant issues. PGE's Response provides some of the key facts that Blue Marmot has been trying to establish, but are only unsupported assertions by legal counsel that also raise new questions. PGE has repeatedly refused to provide information that is likely to either prove or disprove whether PGE has treated similarly situated QFs the same. And the alternative information that PGE is offering is simply inadequate.

A. Why the POD Request Dates May Be Critical to Blue Marmot's Case

Blue Marmot requested that PGE identify when PGE requested other QFs, which executed off-system PPAs, identify their PODs to prove the accuracy of PGE's claims that it is treating all similarly situated QFs the same. The timing of these requests is relevant to establishing why PGE decided that it must evaluate how to handle some PPAs whereas it has decided that it cannot accept delivery for other PPAs.⁸ Requiring different things from different QFs at or around the same time may be discriminatory, and PGE should provide the information and documentation necessary to prove that it was not.

PGE has stated, "[a]ll QFs that have requested PPAs from PGE and that have requested to deliver at PACW.PGE will be given the same options as Blue Marmot."⁹ This may not be the case, however, because PGE executed a PPA with Airport Solar less than a week after Blue Marmot sent its partially executed executable PPAs for Blue Marmot V, VI, VIII, and IX. Because PGE executed a contract with Airport Solar, but did not execute contracts with Blue Marmot, PGE does not appear to be treating at least these QFs the same. In addition, if PGE learned or should have learned of the ATC limitation further back in time, PGE may be more favorably treating even more QFs.

⁸ PGE's Response at Attachment A (PGE's Response to Blue Marmot's Data Request No. 28); PGE's Answer at 7.

⁹ Blue Marmot's Motion at Attachment A (PGE's Response to Blue Marmot's Data Request No. 23).

Blue Marmot has asked PGE for additional information about this discrepancy from a variety of angles, but PGE has not been forthcoming. In fact, PGE’s Response is the first time that PGE has clarified in writing several key facts, and those answers raise new questions. For example, PGE’s Response states, “Blue Marmot was one of the first—if *not the first*—QF that PGE informed about the constraint and asked about its POD prior to executing a PPA.”¹⁰ This statement appears to confirm that PGE has not treated all similarly situated QFs the same.¹¹ Moreover, if Blue Marmot were the very first QF that PGE informed about the constraint at the PACW.PGE POD, then PGE should be able to provide information with greater specificity than “PGE generally began requesting that QFs identify PODs on or about April 18, 2017.”¹² As noted above, PGE asked EDPR to identify its POD on April 17, 2017, which suggests that PGE learned about this issue prior to April 17, 2017. Moreover, PGE asked other QFs to identify their PODs in June and July, which suggests that the request dates may be quite varied.

PGE’s Response goes on to explain, “[b]efore learning of the constraint at the PACW.PGE POD in mid-April 2017, PGE asked QFs to identify their PODs upon execution” whereas “[a]fter learning of the constraint at the PACW.PGE POD in mid-April of 2017, PGE contacted the QF developers in the queue to whom it had sent PPAs to inquire about their planned PODs.”¹³ PGE’s position appears to be that it did not know about the constraint when it executed the Airport Solar PPA, but did know about it

¹⁰ PGE’s Response at 8-9 (emphasis added).

¹¹ See also id. at 9 (“PGE has explained that it offered other similarly situated QFs the same options it offered Blue Marmot”).

¹² Blue Marmot’s Motion at Attachment A (PGE’s Response to Blue Marmot’s Data Request No. 22).

¹³ PGE’s Response at 7-8.

when it was reviewing the partially executed PPAs from Blue Marmot. PGE refuses to provide documentary support for these claims. This is part of the information Blue Marmot has been pursuing through Data Request No. 22, and something which PGE has refused to provide detailed information about.

PGE's Response also states that "the Airport Solar contract was executed before PGE's QF personnel had knowledge of the constraints at [the] PACW.PGE POD" and Blue Marmot only received this information by pushing for a full and complete answer to Data Request No. 22.¹⁴ Again, Blue Marmot simply asks that PGE provide contemporaneous documents for these good faith, but ultimately unsupported, assertions made by counsel.

PGE's responses regarding the POD-request dates are also not adequate because they merely suggest that PGE changed its internal policy sometime "on or around April 18, 2017" and neither prove nor disprove when PGE actually changed its policy, and whether PGE has actually treated similarly situated QFs the same. For PGE to claim that it is unable to provide dates that it requested POD information for certain (older) PPAs, PGE must first take a look at their own records and then provide the information that it has available. Blue Marmot should not be forced to assume that POD information was not requested for any PPA executed before April 18 based on one statement from PGE that does not appear to be fully supported by Blue Marmot's own dealings with PGE.

B. Why the Airport Solar PPA May Be Important to Establishing the Veracity of PGE's Claims

Blue Marmot requested complete and non-redacted copies of all off-system QF contracts, which are not available on the OPUC's website, to establish whether PGE is

¹⁴ Id. at 10.

treating similarly situated QFs the same. PGE's Response also confirms for the first time that the Airport Solar PPA is the *only* executed Schedule 202 contract planning to deliver at the PACW.PGE POD.¹⁵ This is yet another key fact that PGE's vague and incomplete responses have failed to confirm to date.¹⁶ Ultimately, there could be relevant information in the contract provisions of the Airport Solar PPA, which is why it is so important for Blue Marmot to review the full contract.

PGE's Response suggests a summary of the PPA or an affidavit from PGE confirming that there is nothing special about the Airport Solar PPA's transmission arrangements should be sufficient. But these negotiated PPAs are complex, hard to understand, and could have any myriad of provisions that would compensate PGE for what it deems to be insufficient transmission at the POD. Excerpts and summaries are therefore insufficient to prove the veracity of PGE's claims that it has treated Airport Solar and Blue Marmot the same. Blue Marmot should not be forced to simply take PGE on its word. If PGE negotiated certain unique provisions in the PPA with Airport Solar to accommodate for what PGE believes is a problem with a particular POD about the same time it rejected Blue Marmot's standard PPAs, that is a fact that Blue Marmot has a right to know.

Conversely, if the transmission arrangements in the Airport Solar PPA are identical, Blue Marmot should receive the same treatment. In other words, if PGE is not requiring other off-system QFs to deliver at different PODs or construct transmission upgrades, then Blue Marmot should receive the same treatment, or else PGE is

¹⁵ Id. at 9.

¹⁶ Blue Marmot's Motion at Attachment A (PGE's Response to Blue Marmot's Data Request No. 22).

discriminating against Blue Marmot by requiring it to obtain transmission service or pay for upgrades that are not being required of other QFs.

PGE's Response also argues that the information is simply too confidential to provide, even under the Commission's protective order in place in this proceeding, but this is not a relevant objection. If PGE believes that additional protection is warranted, the Commission has a procedure for handling highly confidential material that PGE should be required to use, rather than unilaterally decide not to provide relevant information.

PGE's concerns about confidentiality are not consistent with past Commission practice. As PGE's Response admits, PacifiCorp was compelled to provide all of its PPAs (including those negotiated with large QFs) in the Surprise Valley case, and PacifiCorp did not raise any confidentiality concerns before providing dozens of executed PPAs under the Commission's standard protective order.¹⁷ These included non-standard contracts with unique provisions that PacifiCorp considers as confidential. These kind of PPAs are also routinely reviewed in the utilities' general rate cases. PGE itself even filed a complaint against another QF involving a Schedule 202 PPA.¹⁸

PGE also raises concerns about Blue Marmot's counsel reviewing documents that are based on the assumption that counsel will violate the terms of any protective agreement in this proceeding. Blue Marmot's counsel has routinely reviewed or been provided even more confidential PPAs and energy market information, including the extremely confidential names and bid scores for bidders in PGE's last request for

¹⁷ PGE's Response at 11.

¹⁸ Re PGE v. Covanta, Docket No. UM 1887, available at <http://apps.puc.state.or.us/edockets/docket.asp?DocketID=20985>.

proposal, all the while representing both industrial customers and QFs that had or were planning to negotiate with PGE.¹⁹

PGE's concerns about Blue Marmot's counsel appear to be a tactical move to punish Blue Marmot for selecting the counsel of its choice.²⁰ PGE does not appear to have any concerns sharing with information with the law firm representing it in this case (McDowell Rackner and Gibson), which represents: 1) Idaho Power and PacifiCorp, two utilities that may negotiate complex and confidential power sales agreements with PGE; and 2) at least one QF that may wish to sell power to PGE in the future. Blue Marmot and its counsel have the highest respect for the professionalism of PGE's counsel, and have no doubt that they will take actions that go above and beyond the rules of professional conduct. Absent contrary evidence (and there is none), Blue Marmot's counsel should be provided the similar benefit of the doubt and assumption that they will follow the letter and spirit of the rules. If McDowell Rackner and Gibson can represent PGE's competitors that may wish to or are already selling power to PGE, then counsel for Blue Marmot should be able to review the same documents under cover of an appropriate protective order. Thus, confidentiality is routinely protected in Commission matters and should not provide a basis for withholding such relevant information.

¹⁹ See e.g., Re PGE Partial Waiver of Competitive Bidding Guidelines, Approval of RFP Schedule, Docket No. UM 1773, available at <http://apps.puc.state.or.us/edockets/docket.asp?DocketID=20149>.

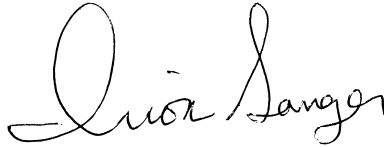
²⁰ PGE's arguments to restrict access to information to counsel which does not represent other QFs that could sell power to PGE would effectively prevent Blue Marmot from selecting *any* counsel knowledgeable about Oregon PURPA policy. Of the very few Oregon PURPA attorneys, all them have, are, or are likely to negotiate with PGE.

IV. CONCLUSION

For the reasons discussed in Blue Marmot's Motion and above, Blue Marmot respectfully requests ALJ Arlow require PGE to provide complete responses to Blue Marmot Data Request No. 22. Specifically, PGE must provide the date when it requested each off-system QF identify its POD, and provide a copy of the non-standard PPA executed with Airport Solar.

Dated this 8th day of September, 2017.

Respectfully submitted,



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