

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

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

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

Complainants,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

COMPLAINANTS' MOTION FOR
STAY PENDING FERC
DETERMINATION

I. INTRODUCTION

Pursuant to OAR 860-001-0420, 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") hereby move the Oregon Public Utility Commission (the "OPUC"), for a stay of the schedule and the OPUC's determination in these matters pending resolution of key issues within the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").

This case involves interpretation of transmission issues more appropriately resolved by FERC, and the Blue Marmots request that the OPUC stay these proceedings until FERC issues a determination. The Blue Marmots filed a petition for declaratory order with FERC and expect FERC to resolve key issues in that proceeding on an

expedited basis.¹ Specifically, the Blue Marmots petitioned FERC to declare that: 1) transmission congestion on the purchasing utility's system will not relieve an electric utility of its obligation to purchase power from a qualifying facility ("QF") under the Public Utility Regulatory Policies Act ("PURPA") that has a legally enforceable obligation ("LEO"); and 2) a QF's obligation to pay interconnection costs extends only to the interconnection between the QF and the utility system to which it is directly interconnected, not to other aspects of transmission service over which FERC retains authority. Portland General Electric Company ("PGE") raised these issues in this proceeding, but they are more appropriately resolved by FERC and the OPUC should stay this case until FERC resolves them. If the OPUC does not stay these proceedings completely, then the Blue Marmots request that the OPUC issue a partial stay as to these two issues.

Pursuant to OAR 860-001-0420(3), the Blue Marmots conferred with PGE and understand that PGE opposes the Motion for Stay. In addition, the Blue Marmots respectfully request expedited consideration of this Motion because the hearing in this matter is currently scheduled for December 12 and 14, 2018 with pre-hearing briefs due November 30, 2018. Expedited consideration is warranted to prevent the OPUC and the parties from wasting resources if a stay is granted. PGE opposes expedited consideration.

¹ See Blue Marmots Petition for Declaratory Order and Request for Expedited Consideration at 2, November 7, 2018 (attached hereto as Attachment A).

II. BACKGROUND

The Blue Marmots are QFs under PURPA located off PGE's system and have purchased third-party transmission to wheel their net output to PGE. The third-party transmission arrangements are governed by the transmission provider's FERC-jurisdictional Open Access Transmission Tariff ("OATT"). In this case, the transmission provider is PacifiCorp.

Each of the Blue Marmots filed a complaint on April 28, 2017 with the OPUC alleging that they are entitled to a standard renewable off-system power purchase agreement ("PPA") with PGE because PGE provided or should have provided final executable standard PPAs and each Blue Marmot executed and tendered its PPA to PGE. PGE filed its answers on May 18, 2017, alleging that after providing final executable PPAs, PGE realized that the Blue Marmots' point of delivery ("POD") at PacifiCorp West-PGE ("PACW.PGE") would be "impossible" due to the lack of long-term firm available transfer capability ("ATC") at the PACW.PGE POD.²

On January 12, 2018, PGE filed testimony discussing these transmission issues, and in response, the Blue Marmots filed a motion to strike that testimony asserting, in part, that these transmission issues are within FERC's jurisdiction. After briefing on the motion to strike, administrative law judge ("ALJ") Allan J. Arlow denied the motion, but noted that "I do not reach [Blue] Marmots' premature contention that this Commission lacks jurisdiction," and that "inclusion of the portions of PGE's testimony subject to the

² See e.g. Blue Marmot V, LLC v. PGE, Docket No. UM 1829, PGE's Answer at ¶¶ 70-71, (May 18, 2017).

motion will not prejudice [Blue] Marmots' rights to make jurisdiction-related argument in the future."³ The Blue Marmots requested OPUC certification of the ALJ Ruling but that was denied.⁴ Since then, the parties continued to negotiate and follow the procedural schedule submitting testimony and other filings in these matters.

On November 7, 2018, the Blue Marmots filed a petition with FERC to resolve two issues raised by PGE, which are FERC jurisdictional. FERC's order will resolve many of the complex and irrelevant issues PGE raised, including those regarding the Energy Imbalance Market and transmission upgrades at the PACW.PGE POD.

First, the Blue Marmots requested that FERC re-affirm its precedent that the utility, and not the QF, is responsible for managing the net output of a QF with a LEO once it has arranged for delivery to the utility's system. A utility cannot refuse to purchase power from a QF because of alleged transmission congestion on its system. FERC's order on this issue will resolve PGE's claim that it does not need to purchase the Blue Marmots' power because of limited ATC at the PACW.PGE POD.

Second, the Blue Marmots requested that FERC re-affirm its precedent regarding the extent of state regulatory authority over interconnection costs under 18 CFR 292.306. A state commission like the OPUC only has the authority to assess the costs of direct physical interconnection between a QF and the electric utility on whose system the facility resides. FERC, however, retains jurisdiction over costs associated with the transmission of power across one utility's system to an existing inter-utility interface, and

³ ALJ Ruling at 3 (Mar. 22, 2018).

⁴ ALJ Ruling at 1 (Apr. 27, 2018).

over the delivery of power on the purchasing utility's system. FERC's order on this issue will clarify that FERC, rather than the OPUC, is the forum to address PGE's claims regarding cost responsibility for transmission upgrades.

Blue Marmots also requested that FERC make its declaration on an expedited basis so as to not unduly delay these proceedings.

III. LEGAL STANDARD

The decision to grant a motion for stay lies within the OPUC's discretion. The OPUC follows the Oregon Rules of Civil Procedure ("ORCP") unless they are inconsistent with the OPUC's own procedural rules.⁵ While the OPUC's procedural rules do not specifically provide for motions for a stay of the proceedings, they provide for general procedural motions such as motions to modify the schedule,⁶ and an ALJ may be delegated authority to decide such procedural matters.⁷ The ORCP also do not specifically provide for motions for a stay of the proceedings; however, generally, a trial court judge has discretion to stay proceedings,⁸ and an administrative agency's hearing officer has the discretion to stay proceedings that are within the agency's jurisdiction.⁹ In the case of the OPUC, the ALJ's discretion is still subject to the limitations imposed by

⁵ OAR 860-001-0000(1).

⁶ OAR 860-001-0390(2)(b).

⁷ OAR 860-001-0090(1)(g).

⁸ North Pac. Ins. Co. v. Wilson's Distrib. Serv., 138 Or App 166, 174 (1995) ("[A]s a general rule, the granting or denial of a motion to stay a judicial proceeding lies within the sound discretion of the trial court.").

⁹ See e.g. Bonneville Auto. Ins. Co. v. Insurance Div., Dept. of Commerce, 53 Or App 440, 447 (1981) (finding that the hearings officer has the discretion to stay proceedings that the Insurance Commissioner is authorized to conduct).

the OPUC and the OPUC's oversight.¹⁰ Therefore, the ALJ has discretion to grant or deny a motion for stay, with that conclusion subject to the OPUC's oversight.

IV. ARGUMENT

The OPUC should stay these proceedings because they present issues that will be resolved by FERC in its exclusive jurisdiction, or at the very least, are issues that the OPUC must rely upon in making its own decision and involve interpretation of federal law more appropriately interpreted by a federal agency. As such, these OPUC cases should be stayed pending the outcome of the FERC proceeding.

A. **A Stay of the Proceedings is Warranted Because FERC Will Resolve Issues Central to These Cases**

The OPUC should stay these proceedings because FERC will resolve issues central to this case and upon which the OPUC's decision must rely. Under PURPA, an electric utility has an obligation to purchase from QFs "any energy and capacity which is made available from a [QF]" regardless of whether that energy and capacity is made available directly to the utility or indirectly via transmission over another utility's lines.¹¹ If the energy and capacity is made available directly to the utility, the utility has an obligation to interconnect with the QF,¹² and may assess interconnection costs.¹³ However, if the energy and capacity is made available to the utility indirectly, the utility purchasing the QF's energy and capacity shall not charge the QF for the transmission,¹⁴

¹⁰ OAR 860-001-0090 (listing tasks the OPUC's ALJs are delegated authority over); OAR 860-001-0110 (describing process to certify an ALJ ruling to the OPUC).

¹¹ 18 CFR 292.303(a) (2018).

¹² 18 CFR 292.303(c).

¹³ 18 CFR 292.306.

¹⁴ 18 CFR 292.303(d).

but the utility transmitting the energy may charge the QF for the transmission service pursuant to its OATT. The off-system QF's transmission arrangements are not governed by the OPUC, but by FERC and the terms of the transmitting utility's OATT.

Two other Oregon cases, regarding QF matters with issues related to both the formation of a LEO and transmission illustrate the importance of awaiting a FERC decision before the OPUC decides a case. In both cases, a ruling from FERC provided necessary guidance and findings that needed to be considered in an OPUC ruling.

First, in Kootenai, an Idaho-based QF asked the OPUC to order Idaho Power Company ("Idaho Power") to accept the QF's power under a standard PPA at a POD in the State of Oregon where the ownership changes from the transmission provider (Avista) to Idaho Power.¹⁵ Idaho Power asserted that the QF's transmission arrangement was not sufficient to deliver the QF's net output to a point of delivery in Oregon but that it actually led to a point of delivery in Idaho where Idaho Power's control area began.¹⁶ FERC accepted the transmission agreement, finding that it provided transmission service all the way across Avista's transmission system.¹⁷ The OPUC then decided, based on an interpretation of Idaho Power's standard PPA, that the delivery occurred at the POD in Idaho, concluding that there was no obligation to purchase in Oregon.¹⁸

¹⁵ Kootenai Elec. Coop., Inc. v. Idaho Power Co., Docket No. UM 1572, Order No. 13-062 at 3 (Feb. 26, 2013).

¹⁶ Id. at 4-5.

¹⁷ Id. at n.3.

¹⁸ Id. at 5-6.

The QF then requested that FERC enforce its PURPA rights against the OPUC's implementation, and FERC found that the OPUC's order "misinterpreted" FERC's earlier order and clarified that the point of change in ownership in Oregon is the only point at which delivery can occur.¹⁹ As such, the OPUC withdrew its prior order and granted the QF's complaint.²⁰ Had FERC issued a more clear order the first time or had the OPUC accurately interpreted FERC's first order, the OPUC could have avoided needing to withdraw its order and could have resolved the case much more expeditiously. FERC's decision that the third-party transmission arrangements were sufficient to deliver power was a necessary precursor for the OPUC to accurately determine that Idaho Power was obligated to purchase the QF's power.

Second, in PáTu, an off-system QF with an already-executed PPA with PGE, argued that PGE had unlawfully refused to accept its power deliveries via a specific type of transmission service (dynamic transfer).²¹ The OPUC declined to review the QF's transmission-related claims stating that it "[does not] have the jurisdiction—nor possibly the expertise—to fully evaluate the impact of dynamic transfer."²² In a later FERC proceeding, FERC reviewed PGE's refusal to accept the QF's transmitted power in the context of its PURPA mandatory purchase obligation.²³ FERC noted that:

¹⁹ Kootenai Elec. Coop., Inc., 143 FERC ¶ 61,232 at PP. 27, 31 (2013).

²⁰ Kootenai Elec. Coop. Inc. v. Idaho Power Co., Docket No. UM 1572, Order No. 14-013 at 2 (Jan. 9, 2014).

²¹ PáTu Wind Farm, LLC v. PGE, Docket No. UM 1566, Order No. 12-316 at 9 (Aug. 21, 2012).

²² Id.

²³ PáTu Wind Farm, LLC, 150 FERC ¶ 61,032 at PP. 51-52 (2015).

“[I]f...[PGE] were permitted on this basis to refuse to accept [the QF’s] entire net output, [PGE] and other utilities could routinely escape their PURPA mandatory purchase obligation. . . by imposing overly restrictive or un-meetable scheduling requirements, or by the purchasing electric utility’s 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.”²⁴

Therefore, FERC found that PGE must take the QF’s entire net output,²⁵ and that it must take it via dynamic scheduling or some other method.²⁶

The Blue Marmots’ cases are very similar to PáTu in that they involve issues both within the OPUC’s jurisdiction (here, the formation of a LEO) and FERC-jurisdictional transmission issues, and this situation is nearly identical to Kootenai in that the OPUC will need to rely on a FERC transmission decision in order to determine the terms of that LEO. PGE’s main defenses are that it should not be required to execute the Blue Marmots’ PPAs due to transmission constraints and that, if it is required to execute these PPAs, then it should be able to require the Blue Marmots to pay for transmission upgrades. These are precisely the transmission issues the Blue Marmots have asked FERC to decide.

Once FERC decides whether the Blue Marmots’ transmission arrangements are sufficient to deliver their energy to PGE, then the OPUC can determine under what terms a LEO was formed. If the OPUC does not stay these matters pending FERC’s determination, then the OPUC would need to make its decision dependent upon a future FERC ruling. It is better to await FERC’s decision, so that the OPUC can have full

²⁴ Id. at P. 53.

²⁵ Id. at P. 54.

²⁶ PáTu Wind Farm, LLC, 154 FERC ¶ 61,167 at P. 36 (2016).

knowledge of the facts and law before hearing and deciding on the issues that are within the OPUC's jurisdiction.

B. The OPUC Does Not Have the Authority to Decide the Transmission Issues

As fully detailed in the Blue Marmots' Motion to Strike filed on February 12, 2018 and the Petition to FERC for Declaratory Order, the OPUC does not have the authority to relieve PGE of its PURPA mandatory purchase obligation or to require an off-system QF, such as the Blue Marmots, to pay interconnection or transmission costs. FERC has exclusive jurisdiction over these issues and the OPUC is preempted by federal law and/or regulations under the doctrines of field or conflict preemption.

First, Congress established a "bright-line rule" placing matters related to interstate transmission *exclusively* within FERC's jurisdiction.²⁷ The transmission of electric energy in interstate commerce refers to both the direct transmission of energy across state lines and the transmission of energy that is commingled with other energy in the stream of commerce.²⁸ Further, but for matters Congress has explicitly made subject to state regulation, FERC possesses exclusive authority to regulate transmission, along with wholesale power sales.²⁹ PURPA explicitly carved out a space for FERC to prescribe rules and the state regulatory authorities to implement such rules for QFs.³⁰ One such rule grants limited jurisdiction to the state regulatory authorities to assess interconnection

²⁷ See California ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 850 (9th Cir. 2004) opinion amended on denial of reh'g, 387 F.3d 966 (9th Cir. 2004).

²⁸ Fed. Power Comm'n v. Fla. Power and Light Co., 404 U.S. 453, 458, 463 (1972).

²⁹ Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) (citing Federal Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964)).

³⁰ PURPA, § 210(f)(1); 16 USC § 824a-3(f)(1) (2012).

costs on a QF.³¹ However, “when an electric utility interconnecting with a QF does not purchase all of the QF’s output and instead transmits the QF power in interstate commerce, [FERC] exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections.”³²

Second, FERC preempts state commissions in the regulation of transmission and wholesale energy sales under the doctrine of field preemption. Field preemption occurs where Congress adopts a comprehensive federal statutory scheme, and it can be inferred “that Congress left no room for supplementary regulation by the states.”³³ The Federal Power Act is one such scheme that applies to “the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.”³⁴ Importantly, the Federal Power Act delegates to FERC “*exclusive*

³¹ See 18 CFR 292.306 (“Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority . . . may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics.”).

³² Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at PP. 813-814 (2003), order on reh’g, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, order on reh’g, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), order on reh’g, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC, 475 F.3d 1277 (D.C. Cir. 2007). See also North Hartland, LLC, 105 FERC ¶61,192 P. 16 (Nov. 13, 2003); Midwest Independent Transmission System Operator, Inc., 138 FERC ¶61,204 (Mar. 20, 2012).

³³ Gadda v. Ashcroft, 363 F.3d 861, 869 (9th Cir. 2004).

³⁴ Federal Power Act, § 201(b)(1); 16 USC § 824(b)(1).

authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.”³⁵

Third, FERC preempts state commissions in the regulation of transmission and wholesale energy sales under the doctrine of conflict preemption. Conflict preemption typically occurs when “there is an actual conflict between federal and state law.”³⁶ But conflict preemption also arises when “it is impossible for a private party to comply with both state and federal law,” or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁷ Federal law includes federal regulations, which have no less preemptive effect than federal statutes.³⁸ And federal courts “give ‘great weight’ to any reasonable construction of a regulatory statute adopted by the agency charged with its enforcement.”³⁹

In these cases, the questions around transmission are precisely within FERC’s exclusive jurisdiction and any decision by the OPUC would be preempted under field or conflict preemption. PGE asks for relief from its obligation to execute the PPAs or alternatively to require the Blue Marmots to pay for transmission upgrades. The Blue Marmots’ Petition for Declaratory Order specifically asks FERC to declare that PGE cannot avoid its PURPA mandatory purchase obligation due to transmission constraints

³⁵ Transmission Agency of N. Cal. v. Sierra Pacific Power Co., 295 F.3d 918, 928 (9th Cir. 2002) (citing New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982) (emphasis added in Transmission Agency of N. Cal.).

³⁶ Gadda, 363 F.3d at 871.

³⁷ Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, at 372-73 (2000).

³⁸ See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) (citing Fidelity Fed. Sav. and Loan Ass’n v. De la Cuesta, 458 U.S. 141 (1982)).

³⁹ Bank of Am. v. City & County of S.F., 309 F.3d 551, 563 (9th Cir. 2002) (emphasis in original).

and to declare a state may not allow a utility to impose the costs of transmission upgrades over a QF to which it is not directly interconnected by claiming that they are state-jurisdictional interconnection costs. Therefore, to avoid potential inconsistency or preemption, the OPUC should stay these proceedings and await FERC's decision.

C. Even if the OPUC Had Concurrent Jurisdiction to Decide the Transmission Issues, It Would Still Be Prudent to Await a FERC Interpretation of Federal Statutes

When a state agency's decision will involve an interpretation of federal law, it is sometimes appropriate to stay the state-level proceeding to await an interpretation by a federal agency. As just discussed, transmission and wholesale power sales are within FERC's exclusive jurisdiction so it would be prudent to await FERC decision on those matters. However, even though the states have some authority to implement PURPA, FERC retains authority over a state's PURPA implementation obligation "as a rule enforceable under the Federal Power Act" and may therefore direct state utility commissions to comply with their PURPA requirements.⁴⁰

For example, the OPUC granted a motion to stay a telecommunication proceeding pending developments in a related Federal Communications Commission ("FCC") proceeding regarding the interpretation of a federal statute.⁴¹ In that case, the FCC held that it has exclusive authority and jurisdiction over the subject matter and that the states

⁴⁰ PURPA, § 210(h)(2)(A); 16 USC § 824a-3(h)(2)(A) (2012).

⁴¹ See Re Investigation into a Petition for Assignment of an Abbreviated Dialing Code, filed by INFODIAL INC., Docket No. UM 572, Order No. 97-261 (Jul. 9, 1997).

have no authority.⁴² As such, the OPUC dismissed the proceeding pending before it.⁴³ While this case is not directly on point, it does illustrate the importance of first receiving direction from a federal agency in the interpretation of federal statutes and regulations. If the OPUC had not awaited the FCC’s determination, then the OPUC’s final order would have been preempted and revisited.

Further, it may also be appropriate to get a FERC ruling in order to “remove uncertainty.”⁴⁴ In Pioneer Wind, a QF filed a petition for declaratory order over a transmission issue, and FERC exercised its discretion to “remove uncertainty” despite the facts that the parties had not yet executed a PPA and that the state commission procedures had not yet concluded.⁴⁵ Rather, when the parties have “an irreconcilable controversy” that “represents the last remaining issue to complete the negotiation of the PPA,” it is appropriate and within FERC’s discretion to address their policies under PURPA.⁴⁶

Here, it is also appropriate to await FERC’s interpretation of federal statutes and regulations to avoid potential preemption problems or simply to remove the uncertainty in this case around the transmission arrangements. The transmission issues are the last remaining issues and once resolved, will enable the Commission to determine the terms of the LEOs that were formed.

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Id.

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Id.

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See Pioneer Wind Park I, LLC, 145 FERC ¶ 61,215 at P.35 (2013).

45

Id.

46

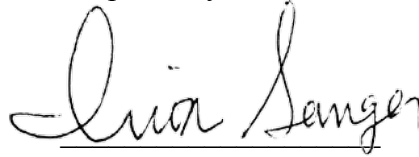
Id.

V. CONCLUSION

In sum, this proceeding should be stayed pending FERC's declaration that PGE cannot avoid its PURPA mandatory purchase obligation due to transmission constraints and that state-jurisdictional interconnection costs may not be assessed by a utility against a QF to which it is not directly interconnected. These transmission issues are exclusively within FERC's jurisdiction and any decision by the OPUC will be preempted under the doctrines of field or conflict preemption. However, even if the OPUC determines that it is not preempted, it would be prudent to await an interpretation of the federal law and statutes at issue by the appropriate federal agency because the OPUC will need to rely on those conclusions to make its decision. As such, the ALJ overseeing these matters and/or the OPUC should stay these proceedings pending the outcome of FERC's decision.

Dated this 7th day of November 2018.

Respectfully submitted,



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Attachment A

**Petition for Declaratory Order and Request for Expedited
Consideration**

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

FILED
SECRETARY OF THE
COMMISSION

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

Docket No. EL18-____

FEDERAL ENERGY
REGULATORY COMMISSION

**PETITION FOR DECLARATORY ORDER AND REQUEST FOR EXPEDITED
CONSIDERATION**

I. INTRODUCTION AND SUMMARY OF REQUEST

A. Background and Requested Declarations

Pursuant to Rule 207 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or the "Commission"),¹ 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" or "Petitioners") hereby submit this petition for declaratory order. The Petitioners are in the process of developing solar-powered qualifying facilities ("QFs") in Oregon that will interconnect with PacifiCorp, with the aim of selling this power to Portland General Electric Company ("PGE") under section 210 of the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA").² The declarations requested below are an expression of the purchase obligation and non-discrimination provisions mandated under federal law and controlling FERC precedent.

As described more fully below, the Blue Marmots have taken all steps necessary to commit PGE to a legally enforceable obligation under FERC regulations and those of the

¹ 18 C.F.R. § 385.207.

² 16 U.S.C. § 824a-3.

Oregon Public Utility Commission ("OPUC"). The Blue Marmots will be directly interconnected with the PacifiCorp system and power will be transmitted by the Blue Marmots under PacifiCorp's Open Access Transmission Tariff ("OATT") to the interface between the PacifiCorp and PGE systems. Despite the interconnection and transmission arrangements with PacifiCorp and the execution of the power purchase agreements by the Blue Marmots, PGE declined to countersign the power purchase agreements with the Blue Marmots, on the ground that PGE does not have available transmission capability ("ATC") to accept the Blue Marmots' power. Responding to PGE's decision rejecting the purchase of power, the Blue Marmots filed a series of complaints (subsequently consolidated) with the OPUC asking the Commission to direct PGE to enter into the power purchase agreements with the Blue Marmots.

Though the Blue Marmots' complaint remains pending before the OPUC, the crux of the current dispute is within FERC's authority and a matter on which FERC has opined clearly – whether an electric utility may decline to purchase power under PURPA on the ground that its transmission system is congested, where all other predicates for a legally enforceable obligation have been established. A declaratory order making it clear that transmission congestion does not mitigate the purchase obligation under PURPA and that transmission costs associated with the delivery of power on the PGE system are within FERC's authority will substantially simplify matters before the OPUC.

The declarations requested by the Blue Marmots are these:

1. Transmission congestion on the purchasing utility's system will not relieve the electric utility of its obligation to purchase power from a QF under PURPA,

where all other predicates to the creation of a legally enforceable obligation have been established; and

2. FERC's direction in 18 C.F.R. § 292.306 that QFs are obligated to pay such interconnection costs as are assessed by state regulatory authorities extends only to the physical interconnection between the QF and the utility system to which it is directly interconnected, not to other aspects of transmission service over which FERC retains authority.

B. Action by FERC at this time will settle an irreconcilable controversy most efficiently, consistent with controlling federal law.

Due to the irreconcilable positions of the parties and the need for a clear statement of federal law, the Blue Marmots ask the Commission to exercise its discretion at this time to resolve the instant dispute most efficiently. Section 554(c) of the Administrative Procedure Act and section 207(a)(2) of the Commission's Rules of Practice and Procedure provide the Commission with the authority to rule on this petition.³ Commission precedent makes it clear that FERC will exercise its discretion to opine on matters such as these when the resolution of a limited irreconcilable controversy will clear the path for the parties to enter into productive commercial relationships consistent with PURPA.⁴

In *Pioneer Wind*, the Commission said this:

Although Pioneer Wind and PacifiCorp have not executed a final PPA and the Wyoming Commission procedures have not concluded with respect to the PPA, these facts are not determinative of our ability to exercise our discretion to act on the Petition at this time and we, therefore, reject PacifiCorp arguments to this effect. Rather, the record demonstrates that Pioneer Wind and PacifiCorp have an irreconcilable controversy....⁵

³ See 5 U.S.C. § 554(e) (2012); 18 C.F.R. § 385.207(a)(2) (2013).

⁴ See, *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, at P 35 (2013) ("*Pioneer Wind*"), citing *Idaho Wind Partners I*, 143 FERC ¶ 61,248 at P 8; *US Gen New England, Inc.*, 118 FERC ¶ 61,172, at P 18 (2007).

⁵ *Pioneer Wind* at P 35.

Here, the parties are at an impasse with respect to matters on which FERC has opined clearly and relate directly to the purchase obligation under PURPA. The present circumstances call for FERC to exercise its discretion in issuing the requested declarations because a clear statement by FERC of controlling federal law will resolve significant aspects of the controversy before the OPUC. The Petitioners note that they are filing with the OPUC contemporaneously with this Petition a request to hold the OPUC proceedings in abeyance, pending FERC's issuance of an order in this docket.

II. SERVICE AND COMMUNICATIONS

All correspondence and communications regarding this Petition should be addressed to the following individuals, whose names should be entered on the official service list maintained by the Secretary in connection with these proceedings:⁶

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⁶ Petitioners request waiver of Rule 203(b)(3) of the Commission's Rules of Practice and Procedure 18 C.F.R. § 385.203(b)(3), to the extent necessary to permit more than two persons to be included on the official service list on their behalf in this proceeding.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Blue Marmots

The Blue Marmots are subsidiaries of EDP Renewables North America LLC (“EDPR NA”) and will each own a 10 MW nameplate solar generating facility to be located in Lake County, Oregon. Each is a “qualifying small power producer” within the meaning of PURPA section 201(h)(2)(B), having self-certified under FERC regulations.⁷ The five projects are similarly described in their respective FERC Form 556’s. The Blue Marmots will each be directly interconnected with the PacifiCorp system and have made arrangements for the transmission of the entire net output of their facilities across the PacifiCorp transmission network to the interface with PGE. FERC regulations permit QFs to interconnect with and transmit power across a directly interconnecting utility, for purchase by neighboring utilities, as is the case with PacifiCorp, the interconnecting and transmitting utility, and PGE.⁸

B. History of the Blue Marmots' Project Development with PGE

As explained in testimony presented to the OPUC by William Talbott, Project Manager with EDPR NA,⁹ the Blue Marmots began working with PGE in August, 2016 to put in place standard rate QF agreements under OPUC regulations. The Blue Marmots began that process by providing to PGE information and materials required for standard renewable off-system variable PPAs with PGE. Over the next several months, the Blue Marmots and PGE communicated regarding issues related to the sale of the net output of the

⁷ 18 C.F.R. § 292.207(a)

⁸ See 18 C.F.R. § 292.303(d)

⁹ Mr. Talbott's Revised Opening Testimony (December 20, 2017) is accessible here: <https://edocs.puc.state.or.us/cfdocs/HTB/um1829htb165237.pdf>

Blue Marmots to PGE, including but not limited to contract terms, required information, and project details. By March 2017 each of the five Blue Marmot projects had requested executable PPAs and PGE had provided executable PPAs for four of the five projects (Blue Marmot V, VI, VII and IX), along with the representation in the accompanying transmittal letters that the execution of each executable PPA would establish a legally enforceable obligation on PGE's part.¹⁰ PGE had also provided a final draft of the Blue Marmot VIII PPA on March 22, 2017. In March 2017, the Blue Marmots executed the four executable PPAs. These documents were subsequently amended with immaterial changes at PGE's request (to add the Form 556 and pagination corrections). The Blue Marmots approved these corrections on April 10, 2017.¹¹

Following the Blue Marmots' execution of the PPAs and delivery to PGE, PGE initiated a discussion with the Blue Marmots over the Point of Delivery ("POD") for the Blue Marmot projects. On April 19, 2017, PGE stated that the Blue Marmots' designated POD, the interface between PacifiCorp and PGE, was constrained. PGE subsequently refused to countersign the PPAs and to provide the executable PPA requested by Blue Marmot VIII, to which Blue Marmot VIII responded by executing the final draft PPA it had received and explicitly committing and obligating itself to sell power to PGE under the terms and conditions in the final draft PPA. On April 28, 2017 the Blue Marmots filed a complaint with the OPUC.

C. OPUC Complaint Proceedings

¹⁰ As Mr. Talbott testified in his Revised Opening OPUC Testimony (*id.*, p. 5), each of the letters received from PGE with respect to Blue Marmot V, VI, VII and IX included the representation that "[i]f Seller executes the enclosed agreement without alteration and returns the partially executed agreement to PGE for full execution, Seller will have established a legally enforceable obligation. Seller is entitled to receive PGE's [Standard Avoided Costs OR Renewable Avoided Costs] in effect at the time Seller executes the enclosed agreement without alteration."

¹¹ The Blue Marmots requested the final executable agreement (Blue Marmot VIII) on March 24, 2017, and obligated Blue Marmot VIII to sell power under the terms of the draft PPA on April 20, 2017.

The Blue Marmots filed complaints (subsequently consolidated) against PGE with the OPUC in lead Docket No. UM 1829 on April 28, 2017, aimed at PGE's refusal to honor its purchase obligation under PURPA. The Blue Marmots maintained, consistent with PURPA and FERC precedent discussed below, that the Blue Marmots' delivery of power over the PacifiCorp transmission system to the PacifiCorp-PGE interface triggered PGE's purchase obligation under PURPA.¹²

In answer to the complaints, PGE did not contest that the Blue Marmots had successfully arranged to bring power to the PacifiCorp-PGE POD, but nonetheless argued that transmission congestion on its system (insufficient ATC, largely resulting from PGE's reservation of transmission capacity to facilitate participation in the California Energy Imbalance Market ("EIM")), prevents it from accepting the Blue Marmots' power.¹³

The Blue Marmots filed responsive testimony arguing that transmission constraints do not mitigate PGE's purchase obligation under PURPA and that PGE's analysis of its transmission constraints is flawed. The Blue Marmots further pointed out that PGE can otherwise employ the Blue Marmot power in support of off-system sales, including participation in the EIM.¹⁴ And while, as discussed below, the economic cost to PGE will not relieve it of its PURPA purchase obligation, the Blue Marmots nonetheless calculated

¹² See: UM 1829, Blue Marmot V LLC, Complainant vs. Portland General Electric Company, Respondent, available at: <https://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAA&FileName=um1829haal65510.pdf&DocketID=20741&numSequence=1>

¹³ See PGE Answer to Complaint, p. 2, available at: <https://apps.puc.state.or.us/edockets/edocs.asp?FileType=HAC&FileName=um1829hac163953.pdf&DocketID=20741&numSequence=2>

¹⁴ June 18, 2018 Reply Testimony and Exhibits of Keegan Moyer, Steve Irvin and William Talbott, available at: <https://apps.puc.state.or.us/edockets/edocs.asp?FileType=HTB&FileName=um1829htb163214.pdf&DocketID=20741&numSequence=76>

that PGE's acceptance of the Blue Marmots' power would diminish PGE's economic benefit associated with EIM participation by no more than 2 to 4%.¹⁵ The Blue Marmots also pointed out that PGE had entered into PPAs with QFs situated similarly to the Blue Marmots, with one executed after the Blue Marmots had executed the PPAs PGE tendered to them.¹⁶

The Blue Marmots also filed a motion (later denied) with the OPUC Administrative Law Judge asking to strike PGE's testimony as it related to transmission congestion on its system, pointing out that controlling FERC precedent requires the purchase of QF power once it is delivered to an electric utility's system, notwithstanding existing transmission congestion.¹⁷

Responding to the Blue Marmots' Motion to Strike, PGE filed an answer that fairly frames the two issues that were presented to the OPUC Presiding Judge, subsequently to the Oregon PUC, and now to FERC for the requested declarations. As to the first issue presented, as PGE's counsel put it:

The case raises a straightforward but critically important question regarding the Public Utility Commission of Oregon's (Commission) implementation of the Public Utility Regulatory Policies Act (PURPA): Who is responsible for the costs required to facilitate the delivery of energy [on the PGE system] generated by an off-system qualifying facility (QF)?¹⁸

¹⁵ These figures equate to dollar values of between \$85,969 and \$191,390, even under assumptions provided by PGE. This impact is small due to relatively low utilization by PGE of the transmission capacity it has reserved; in other words, there are very few hours in the year when PGE is fully utilizing its reserved transmission capacity for EIM transfers and the Blue Marmot projects are simultaneously generating. See: October 30, 2018 Supplemental Testimony of Keegan Moyer (Blue Marmots), generally, and at pp. 1-5; 16, available at: <https://edocs.puc.state.or.us/efdocs/HTB/um1829htb16921.pdf>

¹⁶ Revised December 20, 2017 Opening Testimony of Blue Marmot witness Keegan Moyer, at p. 29. Available at: <https://edocs.puc.state.or.us/efdocs/HTB/um1829htb165237.pdf>

¹⁷ See Blue Marmot Motion to Strike at pp.3, 7-12, available at: <https://edocs.puc.state.or.us/efdocs/HAO/um1829hao155717.pdf>

¹⁸ See PGE Response to Blue Marmots' Motion to Strike, p. 1, available at: <https://edocs.puc.state.or.us/efdocs/HAC/um1829hac165241.pdf>

This is the very question on which the Blue Marmots ask FERC to opine here, and one on which FERC has already spoken clearly, holding that the cost of transmission on the purchasing utility's system is entirely such utility's responsibility and that the purchasing utility cannot refuse to purchase QF power in deference to the possible use of its own resources.

Closely related, PGE further presented to the OPUC its opinion that transmission costs associated with the delivery of power across the PacifiCorp-PGE interface involve an interconnection over which FERC has delegated jurisdiction to state regulatory authorities such as the OPUC under 18 C.F.R. § 292.306(a).

According to PGE:

PGE recognizes that the Commission [OPUC] has not previously been presented with the opportunity to categorize or assess costs like those presented in this case, which are required to allow an off-system QF to deliver to the purchasing utility. PGE believes that these costs fit well within FERC's definition of interconnection costs.¹⁹

On this matter, FERC has also spoken clearly, holding that FERC has delegated to state regulatory bodies only the authority to assess the costs of direct physical interconnection between a QF and the electric utility on whose system the facility resides. FERC retains jurisdiction over costs associated with the transmission of power across one utility's system to an existing inter-utility interface, and over the delivery of power on the purchasing utility's system.

It is to these matters that the declarations requested below are addressed.

IV. REQUESTED DECLARATIONS

D. Declaration 1: Transmission congestion on the purchasing utility's system will not relieve an electric utility of its obligation to purchase power from a QF under PURPA, where all other predicates for a legally enforceable obligation have been established.

¹⁹ *Id.*, p. 14.

The Blue Marmots ask the Commission to issue a declaratory order holding that transmission congestion on the purchasing utility's system will not relieve an electric utility of its obligation to purchase power from a QF under PURPA, where all other predicates for a legally enforceable obligation have been established. The Commission should further hold that under PURPA the responsibility for, and cost of, managing the Blue Marmots' net QF output, once it is delivered to the purchasing utility, belongs exclusively to the purchasing utility.

FERC has held repeatedly that a QF's sole transmission-related obligation is to deliver power to the purchasing utility. In *Pioneer Wind Park I*,²⁰ FERC held to be invalid a purchasing utility's protocol that would have enabled it to curtail QF purchases in favor of prior transmission commitments, including use of the transmission system for the utility's service to native load. The Commission held the curtailment provision to be discriminatory under PURPA²¹ and the Commission's associated regulations.²² Citing earlier decisions in *Entergy*²³ and *Exelon Wind 1*,²⁴ the Commission held as follows:

(1) [T]he QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility; (2) the QF is not required to obtain transmission service, either for itself or on behalf of the purchasing utility, in order to deliver its energy from the point of interconnection with the purchasing utility to the purchasing utility's load; and (3) the purchasing utility cannot curtail the QF's energy as if the QF were taking non-firm transmission service on the purchasing utility's system.²⁵

²⁰ *Pioneer Wind, id.* at P 38 (2013)

²¹ 16 U.S.C. 824a-3(b)(2) (rules shall provide that rates "for such purchase...shall not discriminate against qualifying cogenerators or qualifying small power producers.")

²² 18 C.F.R. §292.304(a)(1)(ii) ("rates for purchases shall...not discriminate against qualifying cogeneration and qualifying small power production facilities.")

²³ 137 FERC ¶ 61,199 at PP 54-57

²⁴ 140 FERC ¶ 61,152 at P 48

²⁵ *Pioneer Wind*, P 38. The Commission noted that in *Pioneer Wind*'s case "It is undisputed here that *Pioneer Wind* and *PacifiCorp* intend to enter into a long-term, fixed rate PPA based on avoided costs *calculated at the time the obligation is incurred.*" In the *Blue Marmots*' case, this is certainly true, and the evidence presented to the OPUC

In its earlier decision in *Entergy*, the Commission made plain that a utility program curtailing the purchase of QF power in order to accommodate transmission congestion on the utility's system violates PURPA's purchase obligation. The utility in that case argued that curtailment was appropriate where the QF had not reserved firm transmission service,²⁶ and that its curtailment protocol was needed "when necessary to relieve congestion."²⁷ Responding, FERC said this:

Except in certain limited circumstances, Entergy is obligated under federal law to purchase unscheduled QF energy. Once that energy is purchased, it is Entergy's responsibility to deliver that energy to its load (or otherwise manage the energy). Curtailing unscheduled QF energy output along with non-firm, secondary network service is inconsistent with Entergy's obligations under PURPA.²⁸

The Commission went on to say that "general economic reasons" (economic loss) do not support the curtailment of QF power purchases.²⁹ *A fortiori*, PGE's blanket refusal on economic grounds to accept its obligation to purchase the Blue Marmots' power is unlawful.

FERC recently reaffirmed this approach in *PáTu Wind Farm*,³⁰ reciting QF rights and utility obligations as detailed in *Pioneer Wind* and holding the utility to its purchase obligation specifically in the context of a QF that physically interconnected to a utility other than one to which the power would be sold, as is the case with the Blue Marmots.³¹ Similarly, in *Kootenai*

establishes that a legally enforceable obligation has already been created. See testimony of William Talbott before the OPUC, *id.*, at pp. 4-5.

²⁶ *Entergy* at p. 19

²⁷ *Id.* at P 30

²⁸ *Id.* at P 52

²⁹ *Id.* at p. 55.

³⁰ *PáTu Wind Farm LLC v. Portland General Elec. Co.*, 150 FERC ¶ 61,032 (2015), *reh'g denied*, *PáTu Wind Farm, LLC v. Portland General Elec. Co.*, 151 FERC 61,223, at n.102 (2015).

³¹ 151 FERC 61,223, at P 46 ("Portland General seeks to establish a distinction not previously recognized by the Commission; the Commission's regulations require that "any electric utility . . . shall purchase such energy or capacity [made available indirectly from the off-system QF] . . . as if the qualifying

Elec. Coop., FERC stated that “[a] utility is obligated under PURPA . . . to purchase the output of a QF, even a QF located in another state, as long as the QF can deliver its power to the utility.”³²

Taken together, these cases make it clear that the Blue Marmots' transmission-related obligations end with their delivery of power to the PacifiCorp-PGE interface. The QFs are not responsible for congestion, or the cost of resolving congestion, on the PGE system. As the Commission's decisions in *Pioneer Wind*, *Entergy*, *PáTu* and *Kootenai* make clear, a contrary decision would undermine the utility's purchase obligation under federal law and discriminate against QF power in favor of other uses of the transmission grid, including PGE's use of the grid to serve native load or to participate in the EIM. This is in direct violation of federal law and FERC's governing precedent, and there is no room for a different decision at the state level.

B. Declaration 2: FERC's direction in 18 C.F.R. 292.306 that QFs are obligated to pay such interconnection costs as are assessed by state regulatory authorities extends only to the physical interconnection between the QF and the utility system to which it is directly interconnected, not to other aspects of transmission service over which FERC retains authority.

FERC's delegation in 18 C.F.R. 292.306 to state regulatory bodies of authority over the assessment of interconnection costs extends only to costs associated with direct physical interconnection between a QF and the utility system to which it is directly interconnected. The contrary claim made by PGE in the OPUC litigation³³ is wrong.

18 C.F.R. §292.306(a) provides as follows:

facility were supplying energy or capacity directly to such electric utility.” The Commission’s finding in *Entergy* applies equally to the facts in this proceeding because the Commission’s regulations require the electric utility’s purchase obligation to be applied to both off-system as well as on-system QFs on a comparable basis. Portland General must treat *PáTu*, an off-system QF, as it would treat an on-system QF, and Portland General must purchase *PáTu*’s entire net output.”)

³² *Kootenai Elec. Coop. Inc.*, 143 FERC ¶ 61,232, at PP 1, 33 (2013).

³³ See above at p. 6.

Obligation to pay. 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.

To begin with, it bears emphasizing that FERC's definition of "interconnection costs" expressly refers to "the installation and maintenance of the *physical facilities* necessary to permit interconnected operations with the qualifying facility (emphasis added)."³⁴ The emphasis on direct physical interconnection makes sense in the context of regulations that were designed as an alternative offered to QFs in order to avoid difficult issues associated with applications to FERC for interconnection authority under section 210 of the Federal Power Act.³⁵ Section 210 expressly provides for applications by QFs for orders requiring "the physical connection of any cogeneration facility [or] small power production facility" to an electric utility's facilities.³⁶

Here, 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 have not applied for one. Instead, the Blue Marmot facilities will be directly interconnected with the PacifiCorp system. 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 is required.

Emphasizing the limited scope of 18 C.F.R. § 292.306 in *Niagara Mohawk Power Corp.*,³⁷ FERC asserted that "states, rather than the Commission, have the authority to determine

³⁴ 18 C.F.R. § 292.101((b)(7)

³⁵ See: FERC Order No. 69, 45 Fed. Reg. 12214, at 1229 – 30. [ADD FULL CITATION]

³⁶ 16 U.S.C. § 824i(a)(1)

³⁷ *Niagara Mohawk Power Corp.*, 77 FERC ¶ 61,224 (Nov. 27, 1996).

the obligation of a QF to pay for the costs of direct interconnections with the electric utility which purchases its power.³⁸ In this case, the Blue Marmots are directly interconnected with PacifiCorp, not to PGE, the purchasing utility.

Further, FERC has made it clear that interconnections that serve multiple purposes, including not only QF sales, but also the sale of power at wholesale are exclusively within FERC's authority and not subject to delegation to states under 18 C.F.R. § 292.306. As FERC held in *Western Massachusetts Electric Co.*, 61 FERC ¶ 61,182 at 61,661-62 (1992), *aff'd sub nom. Western Massachusetts Electric Co. v. FERC*, 165 F.3d 922, 926 (D.C. Cir. 1999), its "...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." *Id.* at p. 61,662. 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:

[W]hen an electric utility interconnecting with a QF does not purchase all of 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.³⁹

With respect to the interface between PacifiCorp and PGE over which the Blue Marmots' power will flow, of course, other FERC-jurisdictional transactions will take place, including

³⁸ *Id.* at 61,899 (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, *order on reh'g*, 65 FERC ¶61,081 (1993) to the same effect.

³⁹ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at P 813-814 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007). *See also North Hartland, LLC*, 105 FERC ¶61,192, P 16 (Nov. 13, 2003); *Midwest Independent Transmission System Operator, Inc.*, 138 FERC ¶61,204 (Mar. 20, 2012).

PGE's planned energy transactions component to its participation in the California EIM. Since the interconnection is clearly used to effectuate FERC-jurisdictional sales in interstate commerce, FERC, and not the OPUC, has exclusive rate authority over the interconnection.

V. REQUEST FOR EXPEDITED CONSIDERATION

As noted above, the request for these declarations comes in the midst of an ongoing proceeding before the OPUC. The Blue Marmots are optimistic that FERC's determinations herein will facilitate resolution of the OPUC proceeding. The OPUC proceeding has itself been underway for over 18 months, and commercial necessity is such that further delay of the Blue Marmot projects will at some point threaten their vitality. Accordingly, the Blue Marmots ask FERC to issue the requested declarations not later than the end of February, 2019.

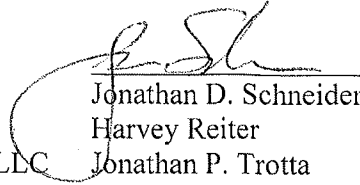
VI. CONCLUSION

For the reasons articulated above, the Blue Marmots ask for the declarations sought above on an expedited basis.

Respectfully submitted,

/s/

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Dated: November 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of November, 2018, caused a copy of the foregoing Request for Declaratory Order to be served via electronic mail or first class mail (postage prepaid) upon affected parties and on the affected state regulatory agency.

/s/
Jonathan D. Schneider