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March 3, 2020

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, Phase II – In the Matter of Blue Marmots, LLC vs Portland
General Electric Company**

Attention Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company's Second Motion to Compel, expedited consideration requested.

Please contact this office with any questions.

Sincerely,

Alisha Till
Paralegal

Attachment

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1829 – PHASE II

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 SECOND MOTION TO
COMPEL**

*EXPEDITED CONSIDERATION
REQUESTED*

1 Pursuant to OAR 860-001-0420 and OAR 860-001-0500(7), Portland General Electric
2 Company (PGE or Company) moves the Public Utility Commission of Oregon (Commission) for
3 an order compelling the above-captioned Blue Marmot LLCs (collectively, the Blue Marmots) to
4 produce a complete response to PGE’s data request (DR) 25. PGE notes that it filed an initial
5 motion to compel on February 21, 2020, (First Motion to Compel) which is currently pending.
6 Given the overlap between the legal and factual issues raised by both motions, PGE has attempted
7 to avoid repetition and therefore asks that, in deciding this Second Motion to Compel, the
8 Commission consider the background and arguments raised in the First Motion to Compel.

9 PGE certifies that the parties have conferred, as required by OAR 860-001-0500(7), but
10 have been unable to resolve this dispute. Given its fast-approaching testimony deadline, PGE
11 respectfully requests expedited consideration.

I. INTRODUCTION

12 In this Phase II, the Blue Marmots have asked the Commission to extend the Commercial
13 Operation Dates (CODs) in their power purchase agreements (PPAs) with PGE—arguing that the
14 litigation in Phase I caused commercially reasonable delays in the development of their projects,

1 and that the extension of their CODs is appropriate.¹ Through its discovery requests, PGE has
2 attempted to explore the Blue Marmots' claim that it was the litigation that caused the delays in
3 their projects, and to that end has sought information about certain decisions that the Blue Marmots
4 made in their siting and interconnection processes. In particular, PGE has sought to understand
5 the Blue Marmots' decision in 2017 to terminate their siting efforts through Lake County, and
6 instead pursue siting through the Energy Facility Siting Council (EFSC), as well as the Blue
7 Marmots' decision in 2018 to ask PacifiCorp to restudy its interconnection request as one 50 MW
8 facility instead of five separate 10 MW facilities. As explained in PGE's First Motion to Compel,
9 the Blue Marmots have refused to provide full documentation of their communications with Lake
10 County and EFSC—communications that may shed light on the Blue Marmots' decision-making
11 on these issues. And now, in their responses to PGE's Second Set of Data Requests, the Blue
12 Marmots refuse to fully explain in a narrative manner the facts and circumstances that gave rise to
13 their decision to site their facilities through EFSC.

14 The information sought by PGE in DR 25 will help to provide a full picture of the facts
15 and circumstances driving the Blue Marmots' decisions to alter the processing of their siting
16 requests—decisions that may be related to the delays in their projects' development. Without a
17 full understanding of these issues, PGE cannot evaluate the Blue Marmots' testimony that
18 *litigation* caused commercially reasonable delays in their development or begin preparing its own
19 responsive testimony. The information sought is highly relevant to the key issues in this case, and
20 therefore the Commission should promptly grant PGE's Second Motion to Compel.

II. BACKGROUND

21 In his Direct Testimony, the Blue Marmots' witness William Talbott provides an overview
22 of the projects' siting and interconnection processes, in support of the Blue Marmots' claim that

¹ Blue Marmot/900, Talbott/4-6.

1 the litigation in Phase I caused delays in their project development.² In explaining both the siting
2 and the interconnection processes, Mr. Talbott describes two key changes that caused—or had the
3 potential to cause—delays in the development of the Blue Marmots. The first of these changes
4 took place in 2017, when the Blue Marmots decided to terminate their efforts to site their projects
5 through the Lake County Conditional Use Permit (CUP) process,³ and the second change was
6 made in 2018, when the Blue Marmots asked PacifiCorp to restudy their proposed interconnection
7 in the configuration of one consolidated 50 MW project, instead of the five separate 10 MW
8 projects originally studied.⁴

9 Specifically, regarding the siting process, Mr. Talbott explains that the Blue Marmots
10 initially planned to apply for siting authority through the Lake County CUP process.⁵ However,
11 Mr. Talbott states that “[i]n the course of preparing CUP application materials for Lake County
12 and evaluating options for permitting the projects individually or collectively . . . it was determined
13 that the projects would be more appropriately permitted collectively through EFSC rather than
14 through a Lake County CUP process.”⁶ Mr. Talbott indicates that the reason for this decision was
15 that “based on the shared interconnection facilities and ownership of the projects, they could be
16 considered a single facility from the perspective of EFSC jurisdiction and in [the] aggregate would
17 impact more than the 320 acre threshold for EFSC jurisdiction in effect at the time this decision
18 was made.”⁷

19 In its first round of data responses, PGE sought to better understand the Blue Marmots’
20 decisions regarding both siting and interconnection. In particular, DRs 1, 4, and 12⁸ requested that
21 the Blue Marmots provide all of their correspondence with EFSC, Lake County, and PacifiCorp

² Blue Marmot/900, Talbott/9.

³ Blue Marmot/900, Talbott/22.

⁴ Blue Marmot/900, Talbott/17.

⁵ Blue Marmot/900, Talbott/13-14.

⁶ Blue Marmot/900, Talbott/22.

⁷ Blue Marmot/900, Talbott/22.

⁸ Attachment F to PGE's First Motion to Compel at 1-4, 6 (Feb. 21, 2020).

1 to aid PGE in understanding the basis for these decisions and to what extent these decisions—and
2 not the litigation with PGE—were responsible for the Blue Marmots’ inability to reach commercial
3 operations until 2022 or 2023, as claimed by Mr. Talbott.⁹ However, as explained in PGE’s First
4 Motion to Compel, the Blue Marmots refused to provide complete responses to these DRs.¹⁰

5 In its Second Set of DRs, PGE continued its efforts to understand the reasons for and timing
6 of the Blue Marmots’ decision to switch siting authorities, including whether the Blue Marmots
7 believed that the EFSC jurisdiction was mandatory or simply available. To explore these issues,
8 PGE served the following DR 25 on the Blue Marmots, on February 12, 2020:

9 **PGE Data Request 25** Please refer to Blue Marmot/900, Talbott/22.

- 10 a. Please provide the date on which the Blue Marmots determined that their
11 projects fell under Energy Facility Siting Council (EFSC) jurisdiction.
12
13 b. Please explain how the Blue Marmots determined that their projects fell
14 under EFSC jurisdiction.
15
16 c. If the Blue Marmots proceed as five 10-MW projects, are the Blue Marmots
17 required to permit their projects with EFSC, or do the Blue Marmots have
18 the option to permit with Lake County?
19
20 d. If the Blue Marmots proceed as one 50-MW project, are the Blue Marmots
21 required to permit their projects with EFSC, or do the Blue Marmots have
22 the option to permit with Lake County?

23 On February 26, the Blue Marmots served PGE with the following response:

24 **Response to PGE Data Request 25.**

- 25 a. This determination was made during the months of May and June 2017 but there
26 was no single date on which this happened.
27
28 b. The Blue Marmots object to this data request on the grounds of relevancy
29 and to the extent that production of the requested data would reveal
30 information protected by the attorney-client privilege, the work product
31 doctrine, or any other privilege.
32

⁹ Blue Marmot/900, Talbott/3-4.

¹⁰ PGE’s First Motion to Compel at 7 (Feb. 21, 2020).

1 Notwithstanding this objection the Blue Marmots provide the following
2 privilege log.

3
4 4/25/2017: discussion between EDPR NA and Stoel Rives
5 4/26/2017: materials provided by Stoel Rives to EDPR NA
6 6/2/2017: discussion between EDPR NA and Stoel Rives

- 7
8 c. The Blue Marmots object to this data request to the extent that it requests a
9 legal opinion.

10
11 Notwithstanding this objection, the Blue Marmots provide the following
12 citation to the relevant Oregon Revised Statutes regarding EFSC
13 jurisdiction: ORS 469.470 and 469.300(11)(a)(D).

- 14
15 d. See DR 25(c).¹¹

16 On February 27, PGE sent a letter to counsel for the Blue Marmots to confer regarding the
17 Blue Marmots' responses to subsections b, c, and d.¹² PGE explained the relevance of the
18 information it was seeking, and requested that the Blue Marmots reconsider their decision not to
19 provide the requested information. PGE also assured the Blue Marmots that it was not asking
20 them to reveal communications with their counsel. To date, the Blue Marmots have not responded
21 to PGE's attempt to confer.

22 **III. ARGUMENT**

23 There are only two fundamental issues presented in this case. The first is whether the Blue
24 Marmots' litigation with PGE in Phase II caused commercially reasonable delays in the Blue
25 Marmots' scheduled commercial operation dates listed in their partially executed PPAs.¹³ This
26 question asks whether the litigation in Phase I (a) actually caused the Blue Marmots to delay
27 project development resulting in the need to delay the CODs in their PPAs; and (b) whether the
28 Blue Marmots' decision to delay project development was commercially reasonable. The second
issue is whether "the Blue Marmots' scheduled commercial operation dates [should] be extended

¹¹ Attachment A, PGE Data Request 25 and Blue Marmots' Response.

¹² Attachment B.

¹³ UM 1829 Phase II, Joint Issues List at 1 (Jan. 2, 2020).

1 and if so, what new dates should be included in the final executable PPAs that PGE must offer
2 consistent with the final resolution of all issues in Phase II of UM 1829 or other subsequent
3 proceedings?”¹⁴ This question asks the Commission to consider, in view of all of the above,
4 whether it is appropriate to extend the Blue Marmots’ CODs. DR 25 seeks information that is
5 directly relevant to both of these issues.

6 **A. The Blue Marmots should provide a full explanation of all of the reasons underlying**
7 **their determination that their projects fell under EFSC jurisdiction.**

8 In DR 25(b), PGE asked the Blue Marmots to explain how they determined that their
9 projects fell under EFSC jurisdiction.¹⁵ PGE acknowledges that the wording of this DR is
10 ambiguous, but has clarified in conferring with the Blue Marmots that it seeks an explanation of
11 the reasons for this determination, and is not seeking communications with counsel.¹⁶

12 One of the key issues in Phase II is the reason or reasons for the delay in the Blue Marmots’
13 project development. Accordingly, PGE is entitled to understand the precise reasons why the Blue
14 Marmots chose to site their projects with EFSC—a process that is typically lengthier and more
15 involved than the CUP route. In addition, PGE would like to understand whether potential delays
16 or challenges in the CUP process led to the decision to pursue siting through EFSC. All of these
17 factors will help PGE to understand the reasons for the delay in the Blue Marmots’ project
18 development, and the requested information should be provided.

19 **B. The Blue Marmots should clarify whether it was optional for them to site their**
20 **projects through EFSC.**

21 In DR 25(c) and (d), PGE asked the Blue Marmots to explain whether they had concluded
22 that EFSC jurisdiction was required or optional under either the one 50 MW project scenario, or

¹⁴ UM 1829 Phase II, Joint Issues List at 1 (Jan. 2, 2020).

¹⁵ Attachment A at 1.

¹⁶ Attachment B at 1 (“To be clear, PGE is not asking the Blue Marmots to reveal communications with their counsel.”).

1 the five separate 10 MW projects scenario.¹⁷ In asking these questions, PGE sought to explore
2 whether the Blue Marmots had considered their decision to site through the EFSC process to be
3 mandatory—and whether the answer to that question hinges on the Blue Marmots’ project
4 configuration.

5 The Blue Marmots objected to the extent that DR 25(c) and (d) called for attorney-client
6 privileged communications, but pointed PGE to the statutes governing EFSC jurisdiction.
7 However, the Blue Marmots are missing the point. First, as noted above, PGE is not requesting
8 that the Blue Marmots reveal attorney-client information.¹⁸ However, PGE is entitled to
9 understand how and why the Blue Marmots chose what is generally a much more time-intensive
10 siting process through EFSC, instead of the typically more streamlined CUP process through Lake
11 County. PGE is also entitled to understand whether the Blue Marmots’ choice of EFSC
12 jurisdiction was impacted by a potential decision to consolidate the five 10 MW projects into one
13 50 MW project. Importantly, the answers to these questions are not apparent from a review of the
14 statutes that the Blue Marmots cite in their data response.

IV. CONCLUSION

15 The Blue Marmots’ ongoing refusal to provide PGE with adequate responses to reasonable
16 discovery requests is depriving PGE of the “full evidentiary proceeding” that the Commission
17 ordered and severely hampering PGE’s ability to timely prepare its case. Therefore, PGE
18 respectfully requests that the Commission grant this Second Motion to Compel on an expedited
19 basis.

¹⁷ Attachment A at 1.

¹⁸ Attachment B at 1 (“To be clear, PGE is not asking the Blue Marmots to reveal communications with their counsel.”).

Dated March 3, 2020

MCDOWELL RACKNER GIBSON PC



for Jordan Schoonover

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Attorneys for Portland General Electric Company

UM 1829, Phase II

Attachment A

To

Portland General Electric Company's

Second Motion to Compel

Blue Marmots' Response to PGE Data Request 25

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
February 26, 2020
Blue Marmots' Response to PGE Data Request 25

PGE Data Request 25

Please refer to Blue Marmot/900, Talbott/22.

- a. Please provide the date on which the Blue Marmots determined that their projects fell under Energy Facility Siting Council (EFSC) jurisdiction.
- b. Please explain how the Blue Marmots determined that their projects fell under EFSC jurisdiction.
- c. If the Blue Marmots proceed as five 10-MW projects, are the Blue Marmots required to permit their projects with EFSC, or do the Blue Marmots have the option to permit with Lake County?
- d. If the Blue Marmots proceed as one 50-MW project, are the Blue Marmots required to permit their projects with EFSC, or do the Blue Marmots have the option to permit with Lake County?

Response to PGE Data Request 25

- a. This determination was made during the months of May and June 2017 but there was no single date on which this happened.
- b. The Blue Marmots object to this data request on the grounds of relevancy and to the extent that production of the requested data would reveal information protected by the attorney-client privilege, the work product doctrine, or any other privilege.

Notwithstanding this objection, the Blue Marmots provide the following privilege log:

4/25/2017: discussion between EDPR NA and Stoel Rives
4/26/2017: materials provided by Stoel Rives to EDPR NA
6/2/2017: discussion between EDPR NA and Stoel Rives

- c. The Blue Marmots object to this data request to the extent that it requests a legal opinion.

Notwithstanding this objection, the Blue Marmots provide the following citation to the relevant Oregon Revised Statutes regarding EFSC jurisdiction: ORS 469.470 and 469.300(11)(a)(D).

- d. See DR 25c.

UM 1829, Phase II

Attachment B

To

Portland General Electric Company's

Second Motion to Compel

February 27, 2020 Letter to Mr. Sanger



LISA RACKNER
Direct (503) 595-3925
lisa@mrg-law.com

February 27, 2020

VIA EMAIL

Irion A. Sanger
Sanger Law PC
1041 SE 58th Place
Portland, OR 97215

Re: Docket UM 1829 - Blue Marmot's Response to Data Request 25

Dear Mr. Sanger

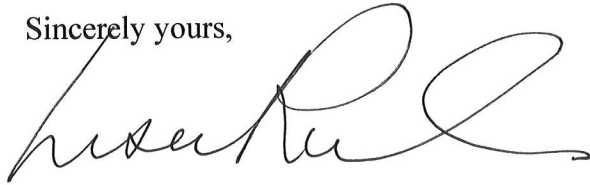
I am writing to confer regarding Blue Marmots' response to DR 25. In that request, PGE is seeking to understand the basis for the Blue Marmots' decision to abandon their efforts to site their projects through Lake County, and instead to pursue siting through EFSC. The Blue Marmots have stated that they did so because they determined that their projects fell under EFSC's jurisdiction, but have refused to (a) provide the basis for that determination, or (b) to clarify whether they determined that they had the option to pursue siting under **either** the County or EFSC processes, or rather they determined that they were **required** to pursue siting through EFSC. If they determined that they were required to pursue siting through EFSC, PGE would like to understand whether the initial decision to pursue siting through the County was in error, or whether the project changed in such a way that later brought it under EFSC's jurisdiction. To be clear, PGE is not asking the Blue Marmots to reveal communications with their counsel.

PGE believes all of these matters are relevant to delays in the permitting and interconnection processes—and whether those delays were caused by the litigation or some other factors. PGE is also seeking to understand these matters through its requests for correspondence between Blue Marmots and Lake County and EFSC—but the Blue Marmots have refused to fully respond to those DRs as well. In short, the Blue Marmots' refusals to respond to reasonable requests for discovery are hampering PGE's ability to understand the Blue Marmots' position and to develop its own testimony in this case.

Irion A. Sanger
February 27, 2020
Page 2

PGE requests that the Blue Marmots reconsider their refusal to provide full responses to DR 25, and provide PGE with its decision on this matter immediately. In the event the Blue Marmots do not provide full responses to DR 25, PGE will file a second Motion to Compel.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Lisa Rackner". The signature is fluid and cursive, with a large loop at the end.

Lisa Rackner