BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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

BLUE MARMOT V LLC (UM 1829)	)
BLUE MARMOT VI LLC (UM 1830)	)
BLUE MARMOT VII LLC (UM 1831)	)
BLUE MARMOT VIII LLC (UM 1832)	)
BLUE MARMOT IX LLC (UM 1833)	)
Complainants	)
vs.	)
PORTLAND GENERAL ELECTRIC	)
COMPANY	)
Defendant	)
Pursuant to ORS 756.500.	)
	)

REPLY BRIEF OF COMPLAINANTS BLUE MARMOTS

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I. INTRODUCTION

Complainants 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 "Complainants") hereby file this Reply Brief in accordance with the Oregon Public Utility Commission (the "Commission" or "OPUC") Administrative Law Judge's March 27, 2019 Ruling. This Brief replies to Portland General Electric Company's ("PGE's) Response Brief, filed on April 5, 2019.

Because many of PGE's arguments in its Response Brief were already addressed in the Blue Marmots' Opening Brief, not all of PGE's arguments are responded to in this brief. Instead, the Blue Marmots' case is as set forth in its Opening Brief, supplemented by this Reply Brief, and no argument should be considered waived or conceded simply because it is not addressed in this brief.

The Commission should find in this case that the Blue Marmots have taken all of the necessary steps to create a legally enforceable obligation under the Public Utility Regulatory Policies Act ("PURPA") to deliver their power to PGE. Because the Blue Marmots created a legally enforceable obligation by signing an executable standard contract, which was fully populated with relevant terms delivered to them by PGE, the Blue Marmots should be allowed to enforce that agreement with PGE, in accordance with this Commission's, the Federal Energy Regulatory Energy Commission's ("FERC's"), and relevant courts' precedent. By making this finding that the Blue Marmots are able to deliver power pursuant to the power purchase agreement ("PPA") that they executed, the Commission can dispose of this case, without the need to address many of the other issues raised in the case, including broad PURPA implementation issues.

None of PGE's arguments for why it should be excused from performance of its obligations to the Blue Marmots under the PPA represent cognizable legal theories for such an excusal. Instead, PGE's arguments are of the type that PURPA was meant to overcome.

PGE argues that it cannot receive the Blue Marmots' power because the Blue Marmots have not made adequate arrangements for its delivery to PGE. PGE's assertions on this topic have been demonstrated on the record in this case to be incorrect, and it has been shown that PGE has all of the resources and rights to allow receipt of the Blue Marmots' output. Further, PGE argues that its participation in the EIM excuses its performance, because PGE has determined that it should dedicate all of the PACW.PGE interface for participation in the voluntary Energy Imbalance Market ("EIM"). PGE's application to participate in the EIM, however, was subsequent to the formation of its legally enforceable obligation with the Blue Marmots, and PGE continues to hold transmission rights that allow it to receive the Blue Marmots' output at the PACW.PGE interface. PGE's advocacy on this topic amounts to a request that it be allowed to elevate a policy goal above its legal obligations under PURPA, and should be rejected under clear precedent.

PGE also argues that it should be allowed to allocate to the Blue Marmots the costs of necessary transmission upgrades or additional transmission required to get the Blue Marmots' power to PGE's system. But these arguments are inapposite because there are no upgrades or additional transmission arrangements necessary in order to get the Blue Marmots' power to PGE's system.

PGE argues that it does not need to purchase the Blue Marmots' power because the Blue Marmots have established no right to "usurp" PGE's transmission. PGE's contention on this point ignores the fundamental purpose of PURPA to require utilities to purchase a qualifying

facility's ("QF's") power, and overlooks that all PURPA sales require utilities to use their transmission and distribution systems to deliver power to their load.

PGE also seeks to be excused from performance under the Blue Marmots' contracts because of its view that a "customer indifference" standard prevents it from receiving the power. PGE's argument here inappropriately seeks to apply a generic concept to substantively limit a Commission-approved and well-established method for implementing PURPA. Specifically, PGE seeks to subject specific and well-defined Commission and FERC standard contracting and avoided costs rules and processes to a generic and vague standard. Moreover, PGE fails to argue for a faithful implementation of its own articulated customer indifference standard, by seeking to impose costs on the Blue Marmots well in excess of any impact their power sales could have on PGE's customers.

PGE also argues that its consent should be required before a purchase and sale arrangement with a QF can be implemented, but this flies in the face of PURPA's fundamental purpose of allowing QFs to create legally enforceable obligations without a utility's consent. PGE also argues for an artificial and illogical separation between the Blue Marmots' standard contract power purchase agreement ("PPA") and the legally enforceable obligation that was created between them and PGE. PGE's view is not supported by any case law, however, and is contrary to FERC's definition of a rate, which is inclusive of the associated power sales agreement.

Although PGE is obligated to enter into the PPA with the Blue Marmots, and can easily perform in accordance with it, to the extent the Commission finds that PGE's actions were unreasonable in entering in the obligation because it failed to perform its due diligence until after

entering into that obligation, the Commission should not allow that failure to excuse it from its obligations. Instead, PGE should be required to abide by its obligations.

Finally, the Commission should take appropriate actions to allow the Blue Marmot projects relief from the delay that has been caused by the need to litigate PGE's refusal to accept the Blue Marmots' power under the terms of the PPA that they executed. The Commission should grant the Blue Marmots' request that their Commercial Operation Date be extended to reflect the litigation delay.

II. ARGUMENT

A. PURPA Establishes a Mandatory Purchase and Sale Arrangement for Public Utilities and Qualifying Facilities, And Is Designed to Prevent Utilities from Delaying, Declining, or Otherwise Avoiding those Purchases

Congress passed the Public Utility Regulatory Policies Act of 1978 in order to accomplish several important purposes related to the nation's energy supply. Among these was giving small power producers of alternative energy access to stable pricing and a market for selling their power.[1] Congress recognized that "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities," and this reluctance was a barrier to the development of cogeneration and small power production facilities.[2] Thus, under PURPA, small power producers were given *rights* to put their power onto a utility's system, and PURPA established the rate construct (avoided costs) that must be paid for that power.

PURPA was a significant initiative and represented a major shift in the utility industry by modifying what had up to that time been a monopoly for utilities over electric generation.

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1 *In Re Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 6 (May 13, 2005).

2 *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

Because PURPA chipped away at the utilities' monopoly, and because utilities have a financial incentive to invest their own capital in electric generation, it was expected that PURPA implementation would be a point of significant contention with most utilities. Thus, the law surrounding PURPA, as implemented by FERC and state Commissions including Oregon, has recognized that qualifying facilities must be protected from efforts by the public utilities to avoid purchases from qualifying facilities.

This context is important and relevant in this case because the Commission should review PGE's arguments in this case to determine if PGE's objections to the purchase of the Blue Marmots' power, and the conditions it seeks to place on them violate PURPA's clear mandate, which was intended to overcome utilities' objections to purchasing power from qualifying facilities.

B. The Blue Marmots Have Met All of the Conditions of PURPA, and the Commission's Implementation of It, That Entitle Them to Sell Power to PGE Under the Executable Contracts that PGE Provided and that the Blue Marmots Executed

The Commission has been very clear about what is sufficient to trigger a utility's obligation to purchase power from a QF under PURPA— if a QF works with a utility, provides the necessary information to receive an "executable contract" from the utility, and then unequivocally commits to be bound by that contract by executing it, then a legally enforceable obligation has been formed.[3] Requiring any further codification of the utility's assent is not allowed under PURPA. For example, a Commission cannot require that a utility's counter-signature is required in order to establish the existence of a purchase and sale obligation.[4] Courts

[3] *In Re Public Utility Commission of Oregon Staff Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 3 (May 13, 2016).

[4] *Id.* at 23, 24, and 27 (Commission recognizing that its rules cannot require a counter-signature by the utility before a legally enforceable obligation arises); *Snow Mountain*

have observed that if such an action were required, then utilities could avoid their obligations under PURPA by simply refusing to counter-sign agreements.[5]

In the case of the Blue Marmots, the Blue Marmots negotiated diligently and worked in good faith with PGE, and requested executable contracts from PGE.[6] In that process, they specified all of the details of their projects, and how the power from those projects would be delivered to PGE,[7] and PGE prepared executable standard contracts and provided them to the Blue Marmots. The Blue Marmots indicated their unequivocal agreement by signing those agreements and returning them to PGE. Because the Blue Marmots fulfilled all of their obligations under PURPA and the Commission's precedent to establish a purchase and sale obligation with PGE, PGE should be required to implement that agreement. As described below, none of PGE's arguments in its Response Brief excuse PGE from its obligations, and the Commission need not address the majority of the issues raised by the parties in this case in order to find that the Blue Marmots are entitled to sell power in accordance with their PPAs.

C. PGE's Argument that Transmission Across the PACW.PGE Interface Is Fully Subscribed, Such That It Cannot Receive the Blue Marmots' Power, Is Demonstrably False

PGE continues to persist in arguing that the transmission path over which the Blue Marmots' power is to be delivered is "fully subscribed" and thus cannot be used to effectuate the

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Pine Co. v. Maudlin, 84 Or App 590, 599 (1987); *FLS Energy*, 157 FERC ¶ 61,211 at PP. 24, 26; *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P. 38 (2013).

5 *Snow Mountain*, 84 Or App at 599-600.

6 Blue Marmot/200, Talbott/3, 4, 8.

7 Blue Marmot/202, Talbott/39 (executable PPA sent by PGE, showing agreements under which power would be transmitted to PGE's system).

purchase and sale.[8] PGE asserts throughout its brief that it "cannot"[9] receive the power, or that the Blue Marmots are "unable"[10] to deliver the power, implying that the power sale contemplated in the PPAs is not possible. This continued assertion is surprising, because PGE's contention has already been disproven in this case.

As the Blue Marmots explained in their Opening Brief, PGE's witnesses admit that PGE can receive the Blue Marmots' power at the PACW.PGE interface, and that they already hold the transmission rights and capability that allow them to do so.[11] Thus, there should be no confusion about whether there is a technical impossibility of PGE receiving the power at the PACW.PGE interface. PGE's legal briefing regarding its inability to receive the Blue Marmots' power is incorrect.

It is also important to note that PGE's filing with FERC, to participate in the EIM and use its PACW.PGE interface for that purpose, came *after* the legally enforceable obligations with the Blue Marmots were created. Thus, any "impediment" that PGE argues arose after its commitment to FERC, would have been subsequent to PGE's obligations to the Blue Marmots.[12]

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8 *See, e.g.* PGE Response Brief at 61 ("[O]nce PGE became aware that the Blue Marmots were attempting to deliver to a constrained interface, it became clear that the Blue Marmots could *not* perform their delivery obligations with only the arrangements included in Exhibit B [of the PPA]."); *Id*. at 2, 8, 59 (other instances of PGE claiming that delivery cannot be achieved because the PACW.PGE interface is fully subscribed).

9 *See, e.g.* PGE Response Brief at 50.

10 *See, e.g. Id.* at 8.

11 Complainants' Opening Brief at 40-42 (recounting statements at the hearing, and development of the record that PGE is able to, as a technical matter, use its reserved transmission service at the PACW.PGE interface to effectuate the delivery of the Blue Marmots' power).

12 In its Response Brief, PGE seems to have misinterpreted the Blue Marmots' statements on this topic, and believe that the Blue Marmots were claiming that PGE reserved the ATC in 2015 for a purpose unrelated to a regional market. The point the Blue Marmots were actually making is that PGE did not know, in 2015, whether it would in fact participate in a regional market, or if it did, what it would be. And it was not until after the LEO with the Blue Marmots that PGE made its filings with FERC regarding the EIM.

Additionally, PGE continues to have, even after its decision to participate in the EIM, sufficient capabilities to receive the Blue Marmots' power.[13]

D. PGE's Arguments About Allocating Costs of Required Transmission Upgrades or Required Additional Transmission Are Inapposite

Throughout its Response Brief, PGE argues that the Commission and FERC have authorized the assignment of transmission system upgrade costs to QFs when the delivery from the QF necessitates such upgrades, or where the receipt of power from a QF necessitates the purchase of additional transmission.[14] Although the Blue Marmots disagree with PGE's assessment on this point, it is just as important to recognize that PGE's position has no application in this case at all.

As described above, and as is shown in the record of this case, there are no transmission upgrades needed in order for PGE to receive power from the Blue Marmots at the PACW.PGE interface. Additionally, there are no additional legs of transmission that need to be purchased in order for PGE to receive the power. The power can be received at the PACW.PGE interface, and there are *no* direct costs associated with doing so.[15] In other words, PGE is not be required to build anything, or purchase any additional transmission in order to receive the power. Thus, PGE has no costs that it can "pass on" or "allocate" to the Blue Marmots, even if PGE's advocacy surrounding the law were upheld.

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13 Hearing Transcript at 248 (Moore-Rodehorst) (Dec. 13, 2018).

14 *See, e.g.* PGE's Response Brief at 19 (arguing that the "Commission has already determined that QFs must bear the cost of third-party transmission or system upgrades necessitated by their decision to interconnect with and sell to the utility" and that the Blue Marmots must therefore be "responsible for paying the costs required to deliver their output to PGE at a location where it can be received").

15 Hearing Transcript at 267 (Moore-Rodehorst) (Dec. 13, 2018).

The only "cost" that PGE claims from receiving the Blue Marmots' power at the PACW.PGE interface (which, in the Blue Marmots' view is better characterized as an opportunity cost)[16] is a potential decrease in revenues it expects to achieve from participation in the EIM.[17] However, PGE does not seek, in this case, to allocate this opportunity cost to the Blue Marmots. Instead, PGE seeks to require the Blue Marmots to bear at least $14 million of expense by requiring them to reserve transmission on BPA's system, in order to deliver the Blue Marmots' power to another point on its system.[18] Because these are not costs that PGE will pay, and thus not costs that PGE can pass on to the Blue Marmots, PGE's assertions about cost allocations for transmission upgrades and required transmission are not applicable in this case, and PGE's argument should be rejected.

E. PGE Argues Against the Fundamental Purchase and Sale Obligation Created by PURPA

Although the fundamental tenet of PURPA is that qualifying facilities have the right to force utilities to purchase their power at avoided cost rates, PGE in this case has found a novel way to argue against this well-established obligation. PGE does this by essentially trying to turn the tables, such that PGE is not required to argue for why it should be *excused* from PURPA, but rather, PGE asserts, the Blue Marmots must make a case for why they are entitled to require PGE to purchase their power. Specifically, PGE does this by asserting that the Blue Marmots have failed to present a theory for why they can *take* PGE's transmission from it, or "commandeer" PGE's system.

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16 *Id*. (PGE witness explaining that the "cost" associated with receiving the Blue Marmots' power at PACW.PGE is the "lost benefit" from reduced EIM activities).

17 PGE Response Brief at 36-44 (explaining the harm that PGE forecasts from EIM participation being constrained by deliveries of the Blue Marmots' power at PACW.PGE).

18 *Id.* at 20.

In making this argument, PGE even implies bad motive on the part of the Blue Marmots, asserting that the Blue Marmots are seeking to "commandeer transmission" from PGE,[19] that they are trying to make PGE "surrender" its transmission.[20] PGE also asserts that the Blue Marmots are trying to "usurp"[21] or "appropriate" transmission from PGE.[22] PGE's efforts to change the narrative of PURPA should be disregarded. To be clear, PGE's claims are inconsistent with the implementation of PURPA, and contrary to fact as well. If PGE uses its transmission system to receive the Blue Marmots' power at the PACW.PGE interface, as the Blue Marmots contend it must, the Blue Marmots will have no ownership or rights to the transmission that is currently PGE's. Rather, PGE would simply be using its own transmission system and its own rights to receive that power.

In reality, the Blue Marmots are not seeking to acquire PGE transmission at all. Instead, what PGE argues is that it does not have an obligation to receive a qualifying facility's power onto its system, or use its transmission system to do so, despite the fact that under all PURPA contracts, utilities are required to use their transmission system to deliver the power to their customers.[23] On this point, there is nothing unique about the Blue Marmots' delivery of power to PGE through an interface with its system, or PGE's use of its transmission system and rights

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19 *Id.* at 29.

20 *Id.* at 2.

21 *Id.* at 30.

22 *Id.* at 31.

23 *See, e.g. PáTu Wind Farm LLC*, 151 FERC ¶ 61,223 at n.102 (2015) ("The Commission has specifically held that the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility, and it is the purchasing utility's obligation to obtain transmission service in order to, in turn, deliver the QF energy from the point of interconnection with the purchasing utility to the purchasing utility's load. In the case of PáTu, an off-system QF resource, PáTu's transmission responsibility ends, and [PGE's] transmission responsibility begins, with the delivery of PáTu's net output to the [PGE] system . . . .");

to accept that power, other than PGE's objection in this case to recognizing its obligation. The Commission should reject PGE's effort to shift the discussion from PGE's well-established PURPA obligations to a discussion about whether the Blue Marmots can "usurp" PGE's transmission system—a right the Blue Marmots do not even need or seek.

F. PGE's Argument for How to Apply a "Customer-Indifference Standard" Amounts to a Substitute Implementation of PURPA

In its Response Brief, PGE argues that the notion of "customer indifference" should be treated as a substantive limitation on its duties under PURPA,[24] regardless of what PGE's obligations would be under the Commission's normal implementation of PURPA through standard contracts and avoided cost pricing. PGE argues that under the "customer-indifference standard," "the Blue Marmots must either bear the cost of transmitting their output to the BPA-PGE interface or pay for any system upgrades that would allow them to deliver via the PACW-PGE interface."[25] PGE's argument fails for limiting its PPA obligations under a "customer indifference standard" fail for at least three reasons.

First, as described above, there are no "system upgrades" or additional transmission services needed in order to allow the Blue Marmots to deliver their output at the PACW.PGE interface. Thus, PGE's argument that the Blue Marmots must bear these costs in order to preserve customer indifference is inapt.

Second, PGE fails to support that there is a "customer-indifference" standard that legally eclipses other standards for the implementation of PURPA. PURPA's customer indifference standard is implemented *through* the application of "avoided cost rates" to the purchase and sale

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24 PGE Response Brief at 34.

25 *Id.* at 19.

of power, and through Commission-approved standard contracts.[26] PGE's argument appears to be that the more generic notion of customer indifference should be applied to the Blue Marmots' sale in a way that alters the Commission's standard contract, and disregards that the purchase and sale agreement relies on these established mechanisms. PGE provides no support for a generic principle, not even articulated in the law, from taking legal precedence over the Commission's policy that off-system QFs requires delivery to the purchasing utility's system at cost to the QF, and the provision of avoided cost rates to the QF for delivered power. Even if the customer-indifference standard were expressly articulated in PURPA as a substantive standard, which it is not, PGE's argument that it would trump the implementation of that standard through avoided cost rates and standard contract would be suspect. Courts have held, for example, that where generic statutory provisions exist along with more specific provisions on the topic, then "the more specific provision takes precedence over the general provision."[27] In this instance, PGE's "customer indifference" standard is not provided for by statute or even rule. Thus, while the Blue Marmots believe that the standard has been met in this case, if there is any inconsistency, then it must give way to the established implementation of PURPA through the administration of standard contracts and avoided cost pricing.

Finally, even if the Commission were to find that a generic "customer indifference standard" governs PGE's purchase of power under a standard contract at avoided cost rates, the record in this case shows that under no reasonable circumstances could the amount of "customer impact" associated with the Blue Marmots' power sales agreement be greater than between around $90k to $360k per year. Specifically, PGE testified that the annual detriment associated

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26 18 C.F.R. § 292.304(a); 18 C.F.R. § 292.101(b)(6).

27 *Takano v. Farmers Ins. Co.*, 184 Or App 479, 485 (2002).

with the Blue Marmots' power being received at PACW.PGE would be only $89,790 under the current or recent level of EIM transfers, and $360,357 if PGE assumed that EIM-transfers increased by 20% over current levels.[28] Thus, if the Commission were to find that a "customer indifference" standard applied, and somehow were to result in an amount chargeable to the Blue Marmots, then the amount must be within that range.[29]

Further, even if it were permissible to apply a generic "customer indifference" rule to judge a QF purchase and sale after an executable PPA has been provided, there would be no practical way to establish what the overall costs and benefits regarding the purchase and sale of the Blue Marmots' power, especially to the extent that PGE argues that "opportunity costs" should be factored into the analysis. Thus, the Commission may be unable to find that the small impact, if any, on PGE's participation in the EIM that resulted from the purchase and sale represents a net cost, as opposed to a benefit.

G. PGE Argues for a Result Completely At Odds With PURPA--That a Utility's Consent is Required in Order to Effectuate a Power Sale By a Qualifying Facility

In its Response Brief, PGE argues that its assent is required before a qualifying facility has the right to deliver power to the utility under a purchase and sale agreement, asserting that the Blue Marmots' PPA cannot be given effect unless and until PGE counter-signs it.[30] This position does not comport with the basic construct of PURPA.

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28 PGE/700, Rodehorst-Moore/20; Hearing Transcript at 306 (Moore-Rodehorst) (Dec. 13, 2018).

29 PGE calculated no number higher than this, without incorporating "costs" associated with other QFs besides from the Blue Marmots, *see* PGE Response Brief at 39, which costs would be even more inappropriate to allocate to the Blue Marmots.

30 PGE Response Brief at 62-65.

Oregon courts have recognized that the "obligation to purchase power [under PURPA] is imposed by law on a utility; it is not voluntarily assumed."[31] This recognizes that FERC's intention in adopting the concept of a legally enforceable obligation for a purchase and sale of power was explicit: "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility."[32] Thus, the concept of a LEO is that a power sale can be imposed, even where the utility refuses to execute an agreement that codifies the sale, and it violates PURPA to require that the purchase and sale obligation arise only when a utility and QF have executed a contract.[33]

In trying to make its case that a LEO can exist even though none of the other terms of delivery are fixed, PGE seeks to distance a LEO from the PPA associated with its creation, and argues that they are enforceable under different standards. The Blue Marmots addressed this argument comprehensively in their Opening Brief.[34] However, because PGE makes further nuanced arguments in its Response Brief, some of those are addressed here.

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31 *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 599 (1987).

32 *Small Power Prod. And Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, FERC Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980).

33 *Snow Mountain*, 84 Or App at 597-600; *FLS Energy*, 157 FERC ¶ 61,211 at P. 24; *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 at P. 24 (2012); *Grouse Creek*, 142 FERC ¶ 61,187 at P. 38.

34 Complainants' Opening Brief at 16-21. As explained in the Blue Marmots' Opening Brief, PGE's theory of the PPA being wholly separate from the LEO is contrary to the Commission's express finding that the signing of the PPA by the QF is significant because it fixes the terms of the sale, the Commission's determination to implement PURPA for small generators through a standard contract, and the Commission's and Courts' determination that a LEO represents a two-way obligation—both a purchase and sale of power—rather than a one-way agreement where the QF is bound to sell power but the utility remains free to impose additional conditions and terms.

PGE argues that the Commission and FERC have "clearly distinguished between a LEO and an executed contract."[35] PGE then refers to cases that confirm that prices are established by a LEO, and concludes that because FERC has held that a LEO establishes avoided cost rates, then it must *only* establish the price, leaving other requirements up for negotiation or later determination.[36] PGE offers no basis at all that FERC, the Commission, or any court intended price to be the *exclusive* component of a legally enforceable obligation that arises when a QF commits to sell power to a utility, other than its mere assertion.

PGE also argues that because FERC has recognized that LEOs can arise outside of a fully-executed contract, that this establishes that the contract is separate from the LEO, and thus subject to a different standard for determining enforceability.[37] FERC's establishment of a LEO outside of a contract is expressly intended to ensure that a purchase and sale obligation can be formed, even when a utility does not counter-sign an agreement (*i.e.* in the absence of a traditional contract).[38] Thus, it establishes that PGE's signature is *not* needed in order for the purchase and sale agreement to be binding, and argues strongly in favor of the conclusion that a LEO that arises in the absence of a signature by the utility is intended to have the same effect as if it had resulted from a signed contract.

PGE also argues that if the terms of the PPA were operative absent PGE's signature, then the Blue Marmots "could present a novel and costly situation not envisioned by the terms of a standard PPA, and customers would be helpless to account for the particular costs imposed by

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35 PGE Response Brief at 62.

36 *Id*. at 63-64.

37 *Id.*

38 *Snow Mountain*, 84 Or App at 597-600; *FLS Energy*, 157 FERC ¶ 61,211 at P. 24; *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 at P. 24 (2012); *Grouse Creek*, 142 FERC ¶ 61,187 at P. 38.

their projects."[39] If PGE's argument is that the Blue Marmots should pay for the interconnection and transmission costs, then they have already paid PacifiCorp for those costs. PGE's argument may be that a PPA cannot be operative without PGE's signature because the Blue Marmots would be able to insist on costly provisions in the PPA, and that PGE could do nothing about it. At least in this case, this overlooks the fact that PGE provided executable contracts approved by the Commission. Thus, no costly or non-standard provisions were included, and PGE expressly agreed that the contents of the agreement they provided were ready for execution by the Blue Marmots. In addition, PGE overlooks that there are always costs and benefits that accrue after contract execution, and the customer indifference standard applies at the time a legally enforceable obligation triggers not an after the fact review.

PGE even asserts, curiously, that the Blue Marmots have acknowledged that "mechanisms within the PPAs, such as Exhibit B, allow for the parties to account for the special costs imposed by a QF in order to protect customers," and thus argues that imposing the terms of an unexecuted PPA on PGE would be unfair.[40] This argument seems to be an assertion that PGE's signature is important in order to ensure that Exhibit B is populated correctly. Yet the Blue Marmots are willing to abide by the provisions of the Exhibit B that was included in the executable contract provided by PGE, and PGE acknowledges that PGE required the Blue Marmots to include in Exhibit B of the PPA *all* transmission agreements required to effectuate the sale contemplated in the PPA.[41] By tendering executable PPAs without questions or edits, PGE effectively approved and consented to those transmission arrangements as being sufficient

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39 PGE Response Brief at 64.

40 *Id*.

41 Hearing Transcript at 87-88 (Greene) (Dec. 12, 2018).

for delivery. Thus, it is PGE's insistence on layering additional costs and conditions onto the purchase and sale that is contrary to the terms of the PPA—not the Blue Marmots' position.

Finally, PGE argues that if the terms of the PPA were operative absent its signature, this would "render[] meaningless" a portion of PGE's standard contracts because PGE's PPA states that it is "effective upon execution by both Parties."[42] PGE argues that because the Commission approved this language, it must have intended that the terms of the PPA are of no effect unless PGE counter-signs. This is a non sequitur, as PGE is obligated under a *legally enforceable obligation*, rather than a *contractual obligation*. All this provision means is that the PPA itself is not effective and there is no contractual obligation. The Blue Marmots are not alleging that they have a traditional contract, but instead that they have a LEO, which is a non-contractual obligation for PGE to purchase power under the specific prices and specific terms and conditions. Such an attribution of significance to a commonplace contract provision, that both parties are to sign, would be contrary to PURPA for the many reasons discussed in this brief and the Blue Marmots' Opening Brief. PURPA does not depend upon the utility's agreement to the power sale. In fact, PURPA assumes that the utility may not agree to the power sale, and thus provides that the sale obligation can come about without the utility's assent. The Commission should also recognize that, as a practical matter, the language in the PPA requiring both parties to execute it would apply to price, just as it would the other terms of the agreement,[43] and that the Commission has already determined that it cannot require a utility counter-signature in order to

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42 PGE Response Brief at 65.

43 *See* Blue Marmot/202, Talbott/43 (PGE's Schedule 201, stating that "[p]rices and other terms and conditions in the PPA will not be final and binding until the Standard PPA has been executed by both parties.")

enforce a LEO. Thus, the language is most appropriately viewed as, at best, as a holdout from prior contract versions.

In short, if it is unlawful to require a utility to agree to the price of a power sale under PURPA, it is just as unlawful to allow a utility to indefinitely delay a power sale by refusing to sign a PPA. A right to sell power at a "price" is meaningless if the power sale cannot be accomplished, and thus it would make no sense that FERC or a state commission protects QFs by allowing them an ability to unilaterally commit themselves to sell at an established price, but puts them at the mercy of the utilities in order to effectuate any provisions of an actual sale.

PGE's theory that the terms of a power sale are completely separated from, and not implicated by a LEO is novel, and PGE cannot point to any case that includes such a finding. The Commission should reject PGE's invitation to create such a novel and damaging precedent for how PURPA is implemented in this case.

H. FERC's Definition of a Rate Confirms that A Legally Enforceable Obligation as to the Avoided Cost Rate Applies to the Terms of the Power Sale Also

PGE's argument that the terms of the purchase and sale agreement set out in the executable contract that the Blue Marmots signed is wholly separate from the LEO also is undermined by FERC's definition of what constitutes a "Rate." Under 18 CFR 292.101(5), FERC defines "Rate" as:

> any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification, and *any contract pertaining to the sale or purchase of electric energy or capacity*.[44]

[44] (emphasis added).

Thus, FERC has already recognized that under PURPA, a "rate" includes the terms of the purchase and sale. PGE's argument that rate includes the price, but not the terms, of the power sale is directly inconsistent with FERC's view that the rate also includes the terms of a contract.

In its Response Brief, PGE addresses FERC's definition, but argues that because FERC defined "rate" separately from "avoided costs," that the avoided costs that are fixed under a LEO are clearly separate from the contract terms that are expressly part of FERC's definition of a rate.[45] PGE's argument is superficial, and an actual review of FERC's case law shows this.

Both FERC cases as well as FERC's regulations establish that "avoided costs" and the "rates" under LEOs are often interchangeable, and always connected. For example, FERC's rules make it clear that avoided costs are a *type* of rate, clarifying that the "rates" for qualifying facilities that have established legally enforceable obligations "shall be based on the purchasing utility's avoided costs."[46] FERC cases describing "avoided cost rates" are numerous.[47] For example, FERC has explained that

> The Commission's regulations require that a utility purchase any energy and capacity made available by a QF. Under section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power 'as available' or at a forecasted *avoided cost rate* pursuant to a legally enforceable obligation.[48]

Or, substituting FERC's definition of rate for the word "rate" in the above quote:

> The Commission's regulations require that a utility purchase any energy and capacity made available by a QF. Under section 292.304(d) of the Commission's

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45 PGE Response Brief at 64.

46 18 CFR 292.304(d).

47 *See, e.g., Windham Solar LLC & Allco Fin. Ltd.,* 157 FERC 61,134, 61,475 (Nov. 22, 2016) (explaining that state regulatory authorities cannot preclude a QF from obtaining a "legally enforceable obligation with a forecasted avoided cost rate"); *West Penn Power Co.,* 77 FERC 61,223, 61,894 (Nov. 27, 1996) (explaining that "avoided cost rate" applies, even if market price later changes). This term "avoided cost rates" is also used throughout PGE's brief. *See, e.g.* PGE Response Brief at 4, 5, 6, 7, 18, and other pages.

48 *Hydrodynamics Inc.,* 146 FERC 61,193, 61,844 (March 20, 2014).

> regulations, a QF also has the unconditional right to choose whether to sell its power 'as available' or at a forecasted *avoided cost [price, rate, charge, or classification ... and any contract pertaining to the sale or purchase of electric energy or capacity]* pursuant to a legally enforceable obligation.[49]

FERC's definition of "rate" and its establishment of an avoided cost rate shows that FERC intended that avoided cost rates include all relevant terms required to accomplish a power sale, and not just the price.

I. PGE's Lack of Due Diligence Does Not Excuse It from Performing Under Its Legally Enforceable Obligation

In its Response Brief, PGE addresses the negotiations between the Blue Marmots and PGE, and asserts that it performed its due diligence in the manner that one would expect. PGE argues that both it and the Blue Marmots acted reasonably and in a careful manner, and implies that this justifies PGE's subsequent walking away from the executable contract it provided the Blue Marmots. PGE states:

> [B]oth parties have approached the execution of these PPAs with serious consideration. As the first party to execute, the Blue Marmots rightfully considered the duties that the PPAs would impose once they were fully executed. And as the second party to execute, PGE conducted a thorough final review before committing itself and its customers to the terms and conditions of the PPAs. Having established through this review that a serious deliverability issue existed, it would have been wholly irresponsible for PGE to proceed to execute the PPAs without first resolving the issue.[50]

Although the Blue Marmots do not intend to find fault with any individual that worked on the contract, it seems necessary, in light of PGE's statements, to point out that if it is "wholly irresponsible" for PGE to proceed to execute the PPAs in light of PGE's commitment to the EIM, that PGE should be found to have also acted irresponsibly when it waited until after the creation of a legally enforceable obligation to do its review on the contracts that it had provided

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49 *Id.*

50 PGE Response Brief at 68.

for execution. PGE's approach of waiting until the very end, or after its obligations were formed, to perform its due diligence would, under normal contracting processes, mean that PGE accepted the risks associated with its lack of investigation regarding the arrangement. The Blue Marmots do not assert that PGE's actions in accepting their power is irresponsible— to the contrary, as described throughout this brief, PGE is able to perform under the obligation easily, and has an obligation to do so. However, the Blue Marmots note that it is *PGE's position* that it would be imprudent to contract to purchase power from a qualifying facility in any way that impacts its participation in EIM. If indeed that is the case, then PGE should be required to perform its duties under the legally enforceable obligation formed under PURPA, and make its customers whole for any impacts associated with its actions that are deemed imprudent, because PGE accepted those consequences by not performing its due diligence until after a LEO was formed.

It is also relevant that in Docket No. UM 1610, when the Commission took up the question of when a legally enforceable obligation arises, PGE argued that a legally enforceable obligation should not occur until the utility provided an executable PPA. PGE justified its stance by arguing that the utility will have completed its due diligence regarding the project by the time it provides an executable PPA, and should not be expected to enter into a legally enforceable obligation before doing its due diligence.[51] It would be unjust for PGE to argue that a LEO can be formed only after it does its due diligence in the Commission's proceeding where the timing

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[51] Docket No. UM 1610, PGE Prehearing Brief at 10 (Sept. 2, 2015) ("The Commission should refrain from adopting any criteria that would require a utility to accept and pay for energy from a QF that the utility has little or no information about. As PacifiCorp points out, such a result would present *commercial, safety and resource planning* issues for the utility. It would also be *inconsistent with the due diligence that utilities exercise* when entering into non-QF contracts.") (internal citations omitted) (emphasis added).

for a LEO was established, but now be allowed to argue that a LEO was still not formed for the Blue Marmots because it failed to perform its due diligence until later.

J. Overarching PURPA Policy Supports the Blue Marmots' Rights to Sell Power Under the Terms of Their PPA, But the Commission Does Not Need to Rely on It In This Case In Order to Enforce the Blue Marmots' Rights

As addressed more fully in the Blue Marmots' Opening Brief, under PURPA and FERC precedent, utilities are not allowed to refuse power delivered from a qualifying facility by directing the QF to move the power to a point chosen by the utility, or by requiring the QF to make upgrades to the purchasing utility's transmission system.[52] Rather, a QF's obligation in order to effectuate a power sale is to deliver its power to the utility.[53] FERC precedent makes clear the unconditional nature of QFs' rights, through establishing several important rules about PURPA implementation. These include:

- Utilities cannot seek to impose restrictions, through tariffs, contracts, or otherwise that would limit their obligations to purchase all output delivered to them by a qualifying facility;[54]

- Qualifying facilities have an obligation to transmit their output to the edge of a utility's system, but the utility is responsible to manage the power beyond that point;[55]

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52 Complainants' Opening Brief at 27-33.

53 18 CFR 292.303(a).

54 *See, e.g. Entergy Services, Inc.*, 137 FERC ¶ 61,199 at P.52 (2011) (finding unlawful a utility's application for tariff provisions that would allow the utility to not purchase QF output if the facility failed to schedule the output); *Exelon Wind 1, LLC et al.*, 140 FERC ¶ 61,152, at P.50 (2012) (concluding that a utility could not require qualifying facilities to curtail on the same basis as non-firm transactions); *Delta-Montrose Electric Association*, 151 FERC ¶ 61,238 at P. 32 (2015) (finding that utilities "cannot lawfully bargain away any portion of the rights QFs enjoy under PURPA or [a utility's] statutory purchase obligation under PURPA, [FERC's] implementing regulations, or any rights QFs may subsequently have obtained in the context of … the open transmission access requirements of Order No. 888") (quoting *Public Service Co. of New Hampshire*, 83 FERC ¶ 61,224, at pp. 61,998-99 (1998)); *Id*. at PP. 52-54 (2015) (finding that no utility is able to overcome its obligations to purchase power from qualifying facilities through entering into contractual provisions with third-parties that would prohibit such a purchase).

55 *Entergy Services, Inc.*, 137 FERC ¶ 61,199 at P.52 (2011) (explaining that once a QF's

- Qualifying facilities can choose their point of delivery on the purchasing utility's system;[56]

- Upon delivering their power to a point where ownership of the transmission line changes to the purchasing utility, the QF's obligations to make the power available are fulfilled;[57] and

- Utilities cannot use claims of congestion, limitations on their system, or economic loss to overcome their obligation to purchase net output delivered to them.[58]

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energy was delivered to the utility, "it is [the utility's] responsibility to deliver that energy to its load (or otherwise manage the energy)"; *PáTu Wind Farm, LLC*, 150 FERC ¶ 61,032 at P. 54 (2015) (finding that when QF sells power to utilities other than those they are directly interconnected with, the qualifying facility's obligation to pay for transmission ends at the POD); *See also PáTu Wind Farm LLC*, 151 FERC ¶ 61,223 at n.102 (2015) (PáTu Rehearing Order) ("The Commission has specifically held that the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility, and it is the purchasing utility's obligation to obtain transmission service in order to, in turn, deliver the QF energy from the point of interconnection with the purchasing utility to the purchasing utility's load. In the case of PáTu, an off-system QF resource, PáTu's transmission responsibility ends, and [PGE's] transmission responsibility begins, with the delivery of PáTu's net output to the [PGE] system . . . ." (internal citations omitted)); *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215 at P. 38 (2013) (finding that "(1) the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility; (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" (internal citations omitted)).

56 *Kootenai Electric Cooperative, Inc.*, 143 FERC ¶ 61,232 at P. 33 (2013) (confirming that "[a] utility is obligated under PURPA to purchase the output of a QF as long as the QF can deliver its power to the utility," and approving power sale in Oregon where QF could show delivery to Idaho Power's system in Oregon, through purchasing transmission to that point).

57 *Kootenai Electric Cooperative, Inc.*, 145 FERC ¶ 61,229 at P.21 (2013) (confirming that a QF's actions are sufficient for a sale of its power if it contracts with a third-party transmission owner to "provide transmission service over its assets. . . to the point of the change in ownership").

58 *See, e.g. Entergy Services, Inc.*, 137 FERC ¶ 61,199 at P.55 (2011) (finding that "general economic reasons" do not support the curtailment of QF power purchases); *Southwest Power Pool, Inc.*, 136 FERC ¶ 61,097 at P.1 (2011) (rejecting utility application as "patently deficient" where a utility proposed to curtail qualifying facilities in periods of congestion on its system).

In its Response Brief, PGE spends much effort attempting to combat the above-described precedent about the unconditional nature of PURPA, and asserts that the Blue Marmots must prevail on this argument in order get the relief they request. Specifically, PGE states that a QF's right to deliver its output anywhere on a utility's system is "[f]undamental to the Blue Marmots' position" in the case.[59]

Although the Blue Marmots have correctly stated the law on this topic, and dispute PGE's attempts to rebut it, it is important to note that in this case, it is not necessary for the Commission to determine the Blue Marmots' ability to deliver under their contracts by relying on that law. Rather, under this Commission's approved construct for implementing PURPA, PGE and the Blue Marmots have formed a legally enforceable obligation through the Blue Marmots' execution of a fully populated standard power sales agreement that specifically identifies the transmission arrangements necessary for delivery. Thus, the Blue Marmots have rights, under these circumstances, to deliver their power in accordance with that agreement, regardless of PGE's subsequently-raised objections to purchasing the power.

The Blue Marmots do not concede that PGE can insist, with regard to other QFs that may approach it in the future, that deliveries to the PACW.PGE interface are prohibited based on its desire to dedicate that interface to EIM activities. The Commission should determine any such case based on the facts and operative law in those cases. Rather, the Blue Marmots only point out here that much of PGE's argument about broader PURPA policy and its objections need not be decided in this case order to grant the Blue Marmots the relief that they request, and to which they are entitled.

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[59] PGE Response Brief at 45-46.

K. In its Response Brief, PGE Fails to Distinguish or Accurately Characterize Relevant Case Law Supporting the Blue Marmots' Rights Under PURPA

Throughout its Response Brief, PGE contends that its view that it can impose additional costs and conditions on the Blue Marmots is supported by precedent from FERC and this Commission. PGE also disputes the numerous cases cited by the Blue Marmots that establish that PGE's view is in error.

In each of those instances, PGE either overstates the holding of the cases that they cite, disregards the relevant holding, or seeks to impute a finding where one does not exist. These cases are discussed below.

PGE repeatedly argues that the Commission has already found that costs incurred by a utility in receiving power from a QF should be assigned to the QF directly. It cites Order No. 14-058, in Docket No. UM 1610 for this proposition, quoting "that avoided cost rates should be adjusted for costs imposed on a utility by the particular circumstances of a QF," and that "any costs imposed on a utility that are above the utility's avoided costs must be assigned to the QF to comport with PURPA avoided cost principles."[60]

When read in its totality, however, it is clear that the Commission did not decide in Order No. 14-058 the issue that is presented in this case. For example, PGE overlooks the fact that the question before the Commission in Order No. 14-058 was whether a qualifying facility should be required to pay for *third-party transmission costs* that were *necessary* to get power to load within a utility's (PacifiCorp's) system. And, in that instance, PacifiCorp was moving power from one area within its service territory to another, and it claimed that it required use of a third-party's transmission system to do so. Any application of this language to the Blue Marmots' case

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60 *Id.* at 20-21.

presupposes something that has been disproven—it requires a finding that transmission upgrades or an additional leg of transmission is necessary in order to get the Blue Marmots' power to load, which it is not.

Also of note, in Order 14-058, the Commission expressly noted the Staff's view of the limited application of the language relied upon by PGE here. The Commission stated:

> Staff explains that the third-party transmission costs at issue in these proceedings should be understood as *incurred costs* instead of *costs to upgrade transmission facilities* or to back down more economic generation. Staff indicates that a utility and QF already have the option to negotiate an adjustment to nonstandard avoided costs rates to account for incremental costs or benefits associated with the QF's location, and the question presented in this docket is whether the Commission should authorize a means to recognize such costs or benefits in a standard contract.[61]

Thus, PGE's attempt to apply the Order to the facts here is an overreach, given that PGE is seeking to assign costs to the Blue Marmots that it has not "incurred" and which are not necessary to deliver the power to load within a utility's system.

PGE fails to note that the Commission declined, even in the instance of incurred third-party costs, to determine how such costs would be assigned. Certainly, the Order does not stand as precedent for what costs PGE can insist a qualifying facility incur, or that it can insist on a new delivery location.

Finally, such a policy would need to take effect on a going-forward basis and cannot be applied to the Blue Marmots' power sales. Even PGE admits that the Blue Marmots have a LEO as to price, and PGE cannot reduce their avoided cost rates. The Blue Marmots are not interconnecting to PGE, and these costs cannot be imposed upon the Blue Marmots in the

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[61] Docket No. UM 1610, Order No. 14-058 at 19 (Feb 24, 2014) (emphasis added).

interconnection process. Similarly, there is no provision of the executable standard contract that describes how any alleged costs would be imposed upon the Blue Marmots.

PGE also refers to FERC and other case law related to *interconnection costs* to argue that the Blue Marmots should be required to pay for costs associated with getting power to PGE's preferred point of delivery—presumably the costs of an additional leg of transmission over BPA's system.[62] These cases do not apply to the situation at hand, however, because the Blue Marmots are interconnected with PacifiCorp, and delivering power to PGE via PacifiCorp's transmission system. Thus, they do not rely on an interconnection with PGE, and have already paid for the cots associated with their interconnection to the transmission system. PGE's efforts to analogize the two go too far, as is addressed in this Reply Brief and the Blue Marmots' Opening Brief, where the sufficiency of delivery via Point-to-Point delivery over the bulk transmission system is discussed.[63]

PGE also points to a Utah Public Service Commission case, *Glen Canyon*, and argues that the Commission should follow that Commission's lead in assigning costs to QFs that impose them.[64] However, the Glen Canyon case is different than the Blue Marmots' case for several reasons. In *Glen Canyon,* the utility's system was constrained, and subject to use by a third-party,[65] and the service at issue was interconnection service. This proceeding, in contrast, involves transmission service, and PGE cannot point to any third-party whose rights would be infringed upon if it were to use its system to receive the Blue Marmots' power.

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62 PGE Response Brief at 26.

63 Complainants' Opening Brief at 34-38.

64 PGE Response at 27-28.

65 *Glen Canyon Solar A, LLC and Glen Canyon Solar R, LLC's Request for Agency Action to Adjudicate Rights and Obligations under PURPA, Schedule 38, and Power Purchase Agreements with Rocky Mountain Power* Docket No. 17-035-36, Consolidated Order at 18 (Utah Pub. Serv. Comm'n Dec. 22, 2017) (*"Glen Canyon* Order*"*).

In *Glen Canyon*, the record established that interconnection service was the responsibility of Glen Canyon Solar and the Utah Commission ruled that PacifiCorp was not required by PURPA to use its transmission rights to facilitate that interconnection service.[66] Finally, it is important to note that in the *Glen Canyon* case, the Utah Public Service Commission acknowledged that it was struggling with whether its decision was consistent with FERC's implementation of PURPA. The Commission stated:

> We recognize the policy underlying PURPA likely frowns upon allowing a utility to deter QF development by unreasonably refusing to employ existing resources so as to unnecessarily inflate interconnection costs. Conversely, we are not confident that policy requires utilities to devote every resource they possess, including transmission rights, to insulate QFs from costs arising out of their projects.[67]

The Utah Commission also struggled with whether it had jurisdiction, but concluded that because the costs at issue in that case were related to interconnection, that it would confine its review to those costs.[68]

The *Glen Canyon* case, therefore, represents an interesting case, but one which dealt with significantly different facts from those at issue here, and does not contain a clear finding that subjugating a QF's rights to deliver power to even a third-party's rights is consistent with PURPA.

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66 *Id.* at 14-15.

67 *Id.* at 15.

68 *Id.* at 3. ("The parameters of state and federal jurisdiction are not everywhere unambiguously defined under PURPA. For purposes of this docket, it should suffice to note that, in addition to establishing avoided cost pricing, state regulators have jurisdiction over and are responsible for assessing interconnection costs, which FERC regulations require QFs to pay.").

PGE also points to *Water Power Co., Inc. v. PacifiCorp*,[69] for its argument that a utility may insist on provisions that require a particular point of delivery.[70] However, PGE's insistence that this case is salient is undermined by a close reading of the case. In that case, the question before the Court of Appeals was whether jury instructions were erroneous when they instructed the jury that a utility could *enforce* a provision in a PPA that specified the delivery point.[71] In reviewing that question, the Court found that nothing in law was "contrary" to the notion that the parties to a purchase and sale agreement could specify a point of delivery. The Court noted the provision in the PPA specifying the point of delivery, and addressed the qualifying facility's claim that the *Snow Mt. Pine* decision precluded enforcement of the provision. The Court explained:

> Nothing in *Snow Mt. Pine* is to the *contrary*. . . . Accordingly, the power purchase agreement could provide for Cottage Grove as the point of delivery and a November 1, 1985, deadline for execution of the transmission agreement.[72]

In the case of the Blue Marmots, PGE cannot by any means assert that a location other than the PACW.PGE interface was designated by it in the PPA. Thus, the *Water Power Co.* case does not apply to this dispute by any means, since there is no provision in the PPA that PGE is trying to enforce.[73]

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69 99 Or App 125 (1989).

70 PGE Response Brief at 46-48.

71 99 Or App at 130-132.

72 99 Or App at 132.

73 Additionally, the case did not involve FERC-jurisdictional transmission arrangements, and instead involved a wheeling arrangement with a local utility. And, the case predate open access and the FERC precedent described in this case. Therefore, it is unlikely that any Commission requirement that a QF agree to a particular POD, similar to the Commission's prior rule that a LEO does not exist until the utility executes a PPA, would be found lawful by FERC.

Although the issue was not before the Court, in the *Water Power Co.* case, it does appear from that case that *prior* to the PPA being offered, the utility insisted on inserting the specific location for the point of delivery into the PPA, and that the Commissioner determined that such a provision could be inserted into the PPA by the utility.[74] However, the facts in this case differ significantly from those involved in the *Water Power Co.* case. First, PGE took no such action to specify a point of delivery in the Blue Marmots' PPA other than "PGE's System" and instead negotiated with the Blue Marmots, and offered them a contract (as it had for other qualifying facilities) that specified exactly what transmission arrangements were necessary to deliver the power. Those consisted of nothing more than transmission across PacifiCorp's system to PGE.

More fundamentally, to the extent that the Commission action referred to in the *Water Power Co.* case stood for the proposition that a utility can insist on a location for delivery of a qualifying facility's power, that insistence must be "reasonable."[75] In this case, PGE can point to no basis for insisting that the PACW.PGE interface is an unworkable location at which the Blue Marmots can deliver their power, in light of the fact that the power can be received by PGE there and delivered to load, and it will have only potentially minor effects on PGE's participation in the EIM. Moreover, such an insistence at this stage, *after* entering into a legally enforceable obligation is unreasonable and contrary to established law and the Commission's precedent.

In its Response Brief, PGE also addresses the Blue Marmots' argument that in *Delta Montrose*, FERC found that no utility is able to overcome its obligations to purchase power from qualifying facilities through entering into contractual provisions with third-parties that would prohibit such a purchase.[76] PGE argues that in that case, no actual conflict between the utility's

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74 99 Or App at 128.
75 *Id.* at 129.
76 PGE Response Brief at 32.

contracts and PURPA were found, and that the case is thus not relevant. However, PGE does not give enough weight to the fact that FERC did state in that case that, if contractual obligations were permitted to override the obligation to purchase from qualifying facilities, then these contractual devices might be used to hinder the development of such facilities.[77] FERC has clarified that utilities:

> [C]annot lawfully bargain away any portion of the rights QFs enjoy under PURPA or [a state's] statutory purchase obligation under PURPA, [FERC's] implementing regulations, or any rights QFs may subsequently have obtained in the context of … the open transmission access requirements of Order No. 888.[78]

The Blue Marmots' argument is that *Delta Montrose* is relevant because it establishes that PGE cannot elevate a policy determination, such as its desire to participate in the EIM, uninhibited by its PURPA obligations, above its obligations under the law to accept power. It is particularly relevant because in this case PGE had more than sufficient unused and unallocated transmission at the time the Blue Marmots executed their PPAs. When PGE made its application to join the EIM, could have and actually did reserve sufficient transmission to service its obligations to the Blue Marmots. Thus, the Commission not need reach the legal questions, and only need conclude that as a factual matter PGE can and should accept the Blue Marmots net output.

PGE also seeks to distinguish several cases that demonstrate limits on a utility's ability to curtail power from QFs.[79] PGE argues that these cases are not applicable because in each case, the QF had already established deliverability, whereas PGE contends that the Blue Marmots' power has not been arranged to be delivered to PGE.[80] This effort to distinguish these cases is

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77 *Delta-Montrose Electric Association*, 151 FERC ¶ 61,238 at PP. 52-54 (2015).

78 *Tri-State Generation and Transmission Association*, 155 FERC ¶ 61,269 at P. 18 (2016) (citing *Public Service Co. of New Hampshire*, 83 FERC ¶ 61,224, at pp. 61,998-99).

79 PGE Response Brief at 53-54.

80 *Id.* at 54-55.

strange because PGE seems to be implying that denying receipt of a QF's power altogether is somehow less violative of PURPA than curtailing purchases of a QF that is otherwise delivering power. This logic is unpersuasive. It would be easy to envision an alternative scenario for the Blue Marmots where PGE accepted delivery of the Blue Marmots' power, and then sought to curtail it in hours when that is "necessary" in order to participate in the EIM, and PGE seems to be conceding that this would be prohibited by FERC's precedent. Yet, PGE is asserting that it should be allowed to refuse *altogether* to receive the power. Such an illogical argument does not adequately address these cases.

L. Under the PPA, the Blue Marmots Have the Right to Sell Their Power At the PACW.PGE Interface

PGE argues in its Response Brief that the terms of the executable PPA that the Blue Marmots signed are not operative. However, as an apparent fallback position, PGE argues that even if the terms of the agreement are operative, that it is still allowed to assign costs to the Blue Marmots that are "necessary to facilitate the Blue Marmots' delivery" to PGE.[81] As a threshold matter, PGE's argument fails because PGE has not identified any necessary upgrades, and it is not necessary to obtain additional transmission in order to deliver the power to PGE's system, even at the PACW.PGE interface.

In making its contract interpretation argument, PGE points to Section 3.1.11 of the executed PPAs, and argues that it leaves the door open for assigning costs—presumably the costs of additional transmission over BPA's system, or the costs of any "necessary" upgrades. Read in full, however, Section 3.1.11 does not make any such provision. Rather, it simply states what the Blue Marmots and PGE have agreed to all along, and what is already provided for in FERC's

[81] *Id.* at 59.

regulations: a QF is required to pay the costs of delivering its energy to the receiving utility. Section 3.1.11 states:

> Seller will deliver from the Facility to PGE at the Point of Delivery Net Output not to exceed a maximum of 33,750,000 kWh of Net Output during each Contract Year ("Maximum Net Output"). The cost of delivering energy from the Facility to PGE is the sole responsibility of the Seller.[82]

The question of what constitutes "delivering energy" to PGE is answered by FERC precedent, discussed above, in addition to other terms of the contract. PGE's reliance on the language of Section 3.1.11 adds no new rationale to its argument that its preference to use the PACW.PGE interface, wholly unencumbered from its obligations to the Blue Marmots, allows it to require the Blue Marmots to provide for another delivery path than what is otherwise specified under the contract.

PGE further argues that the Blue Marmots' PPAs support its view that costs can be assigned to the Blue Marmots for BPA transmission or necessary upgrades because the PPAs do not spell out that the PACW.PGE interface is an acceptable point of delivery. PGE points out that "Point of Delivery" is not defined, other than to be "PGE's system."[83] This definition, however, supports the Blue Marmots' position, because their position is consistent with the contract, while PGE's is not.

When interpreting contracts, courts examine the text of a disputed provision "in the context of the document as a whole," and if the provision is clear, the analysis ends.[84] Oregon law provides that in construing a document, the court is "to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what

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82 *See, e.g.,* Blue Marmot/202, Talbott/8.
83 PGE Response Brief at 60.
84 *Yogman v. Parrott*, 325 Or 358, 361 (1997).

has been inserted."[85] Courts will generally not, absent ambiguity, allow a party to construe a contract more narrowly than what it allows for by its terms.[86] Thus, under the plain terms of the contract, the Blue Marmots are required to deliver their power to PGE's system, and are not required to deliver to a specific point of PGE's choosing. In order to reach such an interpretation, a court would have to "insert what has been omitted" by adding that the Point of Delivery is at PGE's system, "at a point determined by PGE" or other similar language.

The Blue Marmots' view of the contract as allowing them to deliver at the PACW.PGE interface is also bolstered by the fact that the contract, in Exhibit B, expressly describes what other agreements are required in order to effect the purchase and sale. Exhibit B specifies that transmission across PacifiCorp's system will be used, and lists no other transmission.[87]

PGE acknowledges that "it is true that Exhibit B to PGE's standard PPA normally incorporates the necessary transmission arrangements to allow a QF to deliver its output to PGE,"[88] but tries to distance itself from this fact by arguing that the parties "were not aware that such [additional] arrangements were required."[89] This response does not impose any obligation under the PPA. First, PGE has not shown that any additional arrangements are in fact "required" to deliver the power, and the record has established that they are in fact not required. Second, PGE's lack of knowledge about its preferred uses for the transmission system cannot translate into a contractual obligation of its counter-party to accommodate that preference, if it is not

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85 ORS 42.230.

86 *See, e.g. Johnson v. Campbell,* 259 Or 444, 447 (1971) (in context of real property restrictions, restriction of property "for residential use only" did not mean that the property was to be used only for *single-family* residences; that interpretation would add to and thus be inconsistent with the express terms of the covenant).

87 Hearing Transcript at 88-89 (Greene) (Dec. 12, 2018).

88 PGE Response Brief at 61.

89 *Id*.

contained in the contract. Third, the Blue Marmots communicated their intentions to deliver only using PacifiCorp transmission, and were aware (and continue to be aware) that no additional transmission is required.

Additionally, PGE's claim that the PPA, even if enforced, allows them to charge additional costs to the Blue Marmots, or to force them to move their power over BPA's system, is undermined by PGE's own refusal to sign the contracts. If PGE truly believed the contracts could be read the way it now asserts, one would think that PGE would have signed the contracts in the first instance, and sought to enforce its interpretation of the relevant provisions.

M. The Blue Marmots' Siting Decisions Are Not Relevant In This Case

Throughout its Response Brief, PGE argues that the Commission should not allow "inefficient" or "challenging"[90] siting decisions by the Blue Marmots to affect its customers. In some instances, PGE implies that issues may be caused by the fact that the Blue Marmots are "hundreds of miles" from PGE's service territory,[91] and in other instances argues that the Blue Marmots should not be allowed to "insulate themselves from the impacts of their own siting decisions" by interfering with PGE's plans for the EIM.[92] For whatever purpose, PGE's statements about inefficient or difficult siting decisions by the Blue Marmots should be disregarded.

PGE's assertions on this topic seem to be either geared toward confusing the issues, by implying that PGE's customers are somehow paying for transmission outside of PGE's system, or to simply paint the Blue Marmots projects as outsiders that should not have the rights to deliver power to PGE. Or, to the extent PGE argues that the projects were sited in a way that

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90 *See, e.g. Id.* at 27, 73.
91 *Id.* at 26.
92 *Id.* at 34.

interferes with PGE's EIM goals, it is clear that PGE did not even recognize its own position on this topic until the negotiations process had concluded, and PGE cannot impute any motives to the Blue Marmots on this topic. The Blue Marmots have paid for PacifiCorp transmission to the PACW.PGE POD, and the legal issues would be the same if the Blue Marmots were three miles or 300 miles from this particular POD.

The Blue Marmots have sited their facility in a location in Oregon that makes sense with respect to development of renewable power, and these projects are no differently situated than much of the generation that regional utilities purchase for their customers, which actually often comes from *out* of state. More relevant is the fact that the Blue Marmots pay for 100% of the costs of delivering their energy to PGE's service territory, and PGE's customers are not impacted at all by those costs, all in accordance with the PPA that they signed and FERC's rules under PURPA.

N. PGE Cannot Lawfully Discriminate Against the Blue Marmots

In its Response Brief, PGE argues against the Blue Marmots' assertions that PGE has acted in a discriminatory manner toward them. PGE asserts that it has not discriminated against the Blue Marmots because there is a meaningful distinction between the Blue Marmots and other projects that have fully-executed PPAs.[93] PGE also argues that it has yet to determine how to proceed with respect to other projects seeking to deliver their output to the PACW.PGE interface, and thus there is no factual basis for the discrimination claim.[94]

In addition to the arguments in their Opening Brief, the Blue Marmots point out that if there is found to be no legally cognizable difference between the rights of QFs with fully

93 *Id.* at 71.
94 *Id.*

executed contracts and those that have signed an executable contract (a conclusion that the Blue Marmots contend is established by law), then PGE is not free to discriminate between them and others on that basis. Further, to the extent PGE has not made any determinations about how to treat other projects, then the Blue Marmots' arguments on this topic should be applied to any future determinations by PGE.

O. PGE Failed to Fulfill Its Requirements to Analyze Other Transmission Alternatives

In its Response Brief, PGE argues that "[a]ssignment of cost responsibility for system upgrades is no longer a central issue in this case" because no party was able to identify "feasible upgrades" that would "enable delivery of the Blue Marmots' entire net output."[95] Although the Blue Marmots would agree that assignment of cost responsibility for system upgrades is no longer an issue, that is because PGE has acknowledged, and the record has established, that there are no system upgrades needed in order to deliver the Blue Marmots' power to PGE. PGE argues its point for a different reason, though, asserting that the Blue Marmots failed to demonstrate other viable alternatives aside from using BPA's transmission system to get their power to PGE. The Blue Marmots continue to view PGE's actions in studying its system as faulty, and those reasons are presented in their Opening Brief and the testimony in this case.

P. The Commission Should Reform the Contract's Commercial Operation Date

In its Response Brief, PGE argues that the Commission should reject the Blue Marmots' requested extension to the Commercial Operation Date specified in their contract. PGE argues that the relief should not be granted because "the Blue Marmots' complaints did not ask for an adjustment to their CODs," and because the remedy was "not raised in the Blue Marmots' filed

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95 *Id.* at 22.

testimony or at hearing."[96] PGE argues that, as a result, "PGE has been deprived of an opportunity to litigate such a proposal."[97]

PGE's objections to the Blue Marmots' request are suspect. Under ORCP 12, "[a]ll pleadings shall be liberally construed with a view of substantial justice between the parties," and "[t]he court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." Here, the Complaints ask that the Commission require PGE to purchase the net output of the Blue Marmots' solar facilities and "any other such relief as the Commission deems necessary."[98]

The evidence before the Commission is sufficient for the Commission to find that an extension of the COD is necessary to afford substantial justice and PGE's substantial rights are not affected. For example, Blue Marmot V executed its PPA on March 29, 2017 with a COD of November 30, 2019,[99] affording 32 months from execution to reach COD. PGE refused to sign that PPA and 10 days later, this litigation was commenced. As of the date this brief is filed, there are only approximately 7 months remaining to reach COD, and this number is decreasing every day. The Commission recently reconfirmed its policy that "[a] [QF] may specify a scheduled commercial on-line date . . . [a]nytime within three years *from the date of agreement execution*."[100] Because PGE has not yet executed the agreement, the QF is still permitted to select a commercial on-line date that is up to three years from the date PGE executes. Therefore, PGE's substantial rights are not affected and justice requires a modification of the COD.

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96 *Id.* at 77.
97 *Id.* at 77-78.
98 *See e.g.,* UM 1829 Complaint at 15 (Prayer for Relief ¶ 8).
99 *Id*. at Attachment A § 2.2.2 & P. A-1 (signature block).
100 OAR 860-029-120(4) (emphasis added); In Re Rulemaking Regarding Power Purchases by Public Utilities from Small Qualifying Facilities, Docket No. AR 593, Order No. 18-422 at 11 (Oct. 29, 2018).

Unless PGE could prove that the Blue Marmots' case was a sham or frivolous, which it is not, then there is no reason PGE should be inclined, or allowed, to use the litigation process as a method for harming the project's chances at viability. It is one thing if a QF files a sham or frivolous complaint under the sole pretense of pushing out the COD, but that is not the case here. A sham or frivolous pleading may be stricken pursuant to ORCP 21E. A sham plea is "good in form but false in fact; it is a pretense because it is not pleaded in good faith," and a frivolous plea is "true in its allegations but totally insufficient in substance."[101] Seeing that PGE has never asserted that the Blue Marmots claims are sham or frivolous, there is no reasonable basis to "punish" the QF by denying it the opportunity to select a COD that is within three years of the date PGE executes the agreement (at the conclusion of this litigation).

In other words, PGE seems to be insisting that there should be a "penalty" for litigating against the utility, because the project could be at risk of missing its COD if it does so. The Commission should not endorse this approach, but must instead exercise its authorities to regulate public utilities for the protection of their customers and the public generally from unjust and unreasonable practices[102] by ensuring that remedies can be sought without waiving the substantive rights that are specifically being sought to be preserved. To do otherwise, would reward PGE for refusing to sign a power purchase agreement—exactly the kind of behavior the LEO was designed to prevent.[103]

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101 *Andrysek v. Andrysek*, 280 Or 61, 69 n 8 (1977).

102 ORS 756.040.

103 FERC Order No. 69, 45 Fed. Reg. 12,214, 12,224 ("[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility.").

In response to PGE's specific argument that the Blue Marmots did not ask for such a specific remedy in their complaint, the Blue Marmots point out that at the time they filed their complaint, their injury was that PGE was refusing to counter-sign the executable PPA the Blue Marmots signed. It is this injury that was sought to be remedied through the complaint, not the harm that would come to the Blue Marmots from prolonged future litigation with PGE. That harm can be remedied through Commission orders addressing the harm that brought about the filing of the complaint.

PGE also argues that "the Blue Marmots have not met their burden of proving that this litigation has actually hindered their ability to achieve the CODs in the PPAs to which they claim they are entitled."[104] PGE describes that such relief does not seem necessary because "approximately 85 percent of EDPR's costs associated with these projects have been incurred since the date that PGE informed the Blue Marmots of the constraint at the PACW-PGE interface—suggesting that the projects have continued to proceed at a full pace."[105] PGE's assertions in this regard are absurd. PGE's "85 percent" number comes from comparing certain portions of numbers that totaled less than $1 million of preliminary expenses.[106] Although the Blue Marmots will not disclose here the total cost of their projects, no reasonable person could expect that the Blue Marmots projects are proceeding at "full pace" or that major capital expenditures are being incurred when the utility with which the projects hold a power sales agreement is litigating whether it actually has an obligation to receive the power under that agreement. PGE's request for additional time to do a factual investigation about whether the requested reasonable tolling of the Blue Marmots' COD appears to be nothing more than a tactic

104 PGE Response Brief at 77-78.
105 *Id.* at 78.
106 PGE's numbers are described in the Hearing Transcript at 27-28.

to continue to delay the proceeding or try to jeopardize the project further, and should be rejected.

On this topic, PGE finally argues against the Blue Marmots' request to extend their COD as unfair because "if the Blue Marmots were granted an extension for their projects' CODs, this would undermine the Blue Marmots' avoided cost prices, which were premised on a specific anticipated completion date."[107] This position would, like many of PGE's positions in this case, undermine the very foundation of PURPA, which gives qualifying facilities a right to create a power sale and purchase obligation without necessarily obtaining the utility's consent. If the Commission were to grant PGE's view that the COD should be maintained, even after litigating a complaint with the utility, then the result would be that utilities would be uninhibited in seeking to derail projects through litigating issues at the Commission, unless the prices required to be paid were acceptably low in the utility's view.

Further, it simply makes sense to update the COD following litigation and PGE's arguments to the contrary are unreasonable. For example, in *Kootenai Electric Cooperative v. Idaho Power Company*, after the Commission found that Kootenai had established a LEO, the parties executed a PPA with an updated COD.[108] In that case, the Commission did not specifically rule on this point because was not in dispute, likely because Idaho Power understood that in makes sense to update a COD based on the time a QF litigates the case. Given PGE's

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107 PGE Response Brief at 78.

108 *Compare* Kootenai Elec. Coop., Inc. v. PGE, Docket No. UM 1572, Complaint Exhibit 103 at 55 ("Seller has selected *May 1, 2012* as the estimated Schedule Operation Date") (Jan. 3, 2012) (emphasis added) *with* Idaho Power Co. – QF Contracts, Docket No. RE 141, OAR Compliance Filing Kootenai Elec. Coop., Inc. Oregon Standard Energy Sales Agreement at Appendix B, P. 36 ("Seller has selected *April 1, 2014* as the estimated Schedule Operation date") (Mar. 11, 2014) (emphasis added).

opposition in this case to the Blue Marmots' reasonable request for COD adjustment, the Commission should afford the necessary relief.

The Blue Marmots' opening brief provided legal support for the notion that the Commission has the authority to modify the COD in the contract to reflect litigation delay.[109] And, it is clear from this Commission's statutory authority that it has the right to remedy wrongs that it identifies in exercising its authority to regulate public utilities.[110]

III. CONCLUSION

For all the reasons described above, and as presented in the Blue Marmots' Opening Brief, the Commission should find that the Blue Marmots formed legally enforceable obligations to sell their power to PGE, and that PGE has not offered a legally cognizable excuse for why it is not required to purchase that power at those rates and under the terms of the standard PPAs that the Blue Marmots executed.

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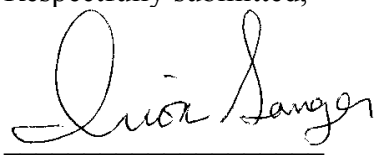
109 *See* Complainants' Opening Brief at 76 (citing *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) (upholding state Commission's modification to certain milestones of a QFs contract because of delay caused by litigation)).

110 *See, e.g. Dreyer v. Portland GE*, 341 Or 262, 286 (2006) (noting that "PUC is performing part of its regulatory functions" when it responds to Court remands and implements a remedy).

Respectfully submitted this 22nd day of April, 2019.

Respectfully submitted,



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