

**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))	PREHEARING BRIEF OF
BLUE MARMOT VIII LLC (UM 1832))	COMPLAINANTS
BLUE MARMOT IX LLC (UM 1833))	
Complainants)	
vs.)	
PORTLAND GENERAL ELECTRIC)	
COMPANY)	
Defendant)	
Pursuant to ORS 756.500.)	
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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 prehearing brief in accordance with the Oregon Public Utility Commission (the “Commission” or “OPUC”) Administrative Law Judge’s October 1, 2018 Memorandum and Ruling. This prehearing brief is intended to present a high-level overview of the case to aid in the Commissioners’ and Administrative Law Judge’s participation in the hearing, and Complainants reserve their rights to supplement or modify their arguments in the post-hearing briefing, after the evidentiary phase of the proceeding is concluded.

While the factual and legal issues that Portland General Electric Company’s (“PGE’s”) witnesses have raised in this proceeding are complex, the fundamental legal issue is simple and the Commission need not address the myriad of arguments that PGE has raised. The Blue Marmots have legally enforceable obligations to sell their net output to PGE and have purchased

firm Federal Energy Regulatory Commission (“FERC”)-jurisdictional transmission service from a third-party utility (PacifiCorp) that is sufficient to deliver the power to PGE’s system. This Commission only needs to direct PGE to accept responsibility for managing the power, and PGE (not the Blue Marmots or the Commission) should then determine the least-cost and least-risk method of fulfilling its other responsibilities.

With this simple direction, there is no need for the Commission to resolve or even address any of PGE’s complex issues (many of which are FERC-jurisdictional transmission issues) related to points of delivery (“POD”), available transfer capability (“ATC”), participation in the Western Energy Imbalance Market (“EIM”), and the deliverability of power under Open Access Transmission Tariffs (“OATTs”). Finally, the Commission also does not need to be concerned with prospective precedential impacts of this case, as PGE argues, because the applicability of the Commission’s decision in this case is limited, at most, to a discrete and limited group of qualifying facilities (“QFs”) that PGE admits have obtained legally enforceable obligations.

II. BACKGROUND

Under the Public Utility Regulatory Policies Act of 1978 (“PURPA”) and Oregon statute and the Commission’s rules implementing it, QFs are able to enter into agreements with public utilities, such as PGE, to sell them power at the utility’s Commission-approved avoided cost rates.

This case comes about because of PGE’s refusal to accept power from the Blue Marmots’ solar projects after the Blue Marmots obtained legally enforceable agreements with PGE that obligate them to sell power to PGE, and correspondingly obligate PGE to purchase their net output. PGE claims that it is not obligated to take the power unless the Blue Marmots deliver the

power to a different location of PGE's choosing, or pay for unnecessary transmission upgrades. PGE's position comes about because PGE realized, after the Blue Marmots' commitment to sell their net output to PGE, that PGE has constraints at the point of delivery for that power, due to PGE's voluntary commitment to reserve remaining amounts of ATC for use in the EIM.¹

PGE cannot exempt itself from its obligation to purchase and manage the power from the Blue Marmots by voluntarily reserving capacity for other reasons, refusing to properly investigate the options to accept the power, electing not to sell the net output off-system, arguing that its established avoided cost rates do not adequately account for transmission constraints, exaggerating the cost implications of accepting the Blue Marmot output, or with the other justifications it offers. Additionally, PGE, by refusing to accept the power, discriminates against the Blue Marmots compared to other similarly-situated QFs that entered into legally enforceable obligations before PGE made its determination that it would deny power deliveries under PURPA. Finally, aside from its legal obligations to purchase the power, PGE has not demonstrated that it is unable to accommodate the power, that it will incur any significant cost from doing so, or that it has even adequately investigated all the potential options to accept the Blue Marmots' net output.

A. The Blue Marmots Projects

The Blue Marmot projects are each separate solar electrical generation facilities, located in Lake County, Oregon. Each project has a 10 megawatt ("MW") alternating current nameplate

¹ See PGE/100, Greene-Moore/10-11 (explaining that on April 5, 2017, through discussions among PGE personnel, there was a realization that PGE had been negotiating for QF power deliveries that would be delivered via the PACW.PGE interface, and that PGE had reserved all remaining ATC on the pathway for participation in the EIM). See also Blue Marmot/500, Irvin-Talbott/11 ("Even by PGE's own account, it was a lack of internal coordination at PGE that caused PGE to change its position after providing executable contracts.").

capacity, and each Blue Marmot project qualifies as, and has been self-certified with FERC as a small power production facility under PURPA.² Each of the Blue Marmots has made arrangements for the transmission of its power to PGE, through executing transmission service agreements with PacifiCorp for delivery to PGE over PacifiCorp’s system, and each of the Blue Marmots signed standard power purchase agreements (“PPAs”) with PGE, obligating themselves to deliver power to PGE at its Commission-approved avoided cost rates in effect at the time the Blue Marmots executed the PPAs.

B. Blue Marmots’ Negotiations with PGE, and PGE’s Actions

The Blue Marmots have been working with PGE since early 2016, when they requested information about how to enter into PPAs with PGE.³ Although some of the projects proceeded on slightly different timelines from each other, the Blue Marmots continued to work with PGE and provided materials required to move toward PPAs, including informing PGE that the projects would be delivered over PacifiCorp’s transmission system to the “PACW.PGE” interface,⁴ which constitutes several points of physical interconnection between the PacifiCorp and PGE systems.⁵ Eventually, all but one project received executable PPAs from PGE.⁶

These PPAs were accompanied by cover letters, which stated that if the project “executes the enclosed agreement without alteration and returns the partially executed agreement to PGE for full execution, Seller will have established a legally enforceable obligation.”⁷ By the end of

² Blue Marmot/100, Irvin/3.

³ Blue Marmot/200, Talbott/2.

⁴ *Id.* at 9.

⁵ *Id.* at 7, n.6.

⁶ *Id.* at 3, 4, 8.

⁷ *Id.* at 3-4.

March 2017, all of the Blue Marmot projects that had received executable PPAs had signed them and returned them to PGE without alteration.⁸

On April 5, 2017, the Blue Marmots reached out to PGE, and asked when PGE would return the executed PPAs with PGE's signature.⁹ PGE informed the Blue Marmots that the process normally takes a couple of weeks.¹⁰ PGE then contacted the Blue Marmots on April 17, 2017, and asked about the POD for the output from the projects on PGE's transmission system.¹¹ Although PGE already knew this information, the next day the Blue Marmots confirmed for PGE that it was the "PACW.PGE" interface.¹²

On April 19, 2017, PGE responded to the Blue Marmots that it was concerned that this POD was constrained, and may not be feasible.¹³ In response, the Blue Marmots expressed their concern with PGE's refusal to counter-sign the PPAs, and its refusal to provide an executable PPA for the one Blue Marmot project that had not yet received one.¹⁴ PGE responded back that it would not sign the PPAs.¹⁵ The last remaining Blue Marmot Project (Blue Marmot VIII) communicated to PGE on April 20, 2017 that it was committing and obligating itself to sell power to PGE under the standard terms and conditions contained in the Final Draft PPA it had received from PGE, and followed up with an executed version of that PPA.¹⁶

On May 18, 2017, PGE communicated to the Blue Marmots that it could not accept delivery from the Blue Marmot projects because of transmission constraints at the PACW.PGE

⁸ *Id.* at 4-5.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 7.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 8.

interface that had arisen from PGE reserving transmission rights to participate in the Western EIM.¹⁷ PGE's justification was that it had reserved all remaining Available Transfer Capability¹⁸ related to its decision to participate in the EIM. PGE's view was that its reservation of ATC had left it without the ability to receive the Blue Marmot's power at the PACW.PGE interface.

PGE informed the Blue Marmots that they had two options if they wanted PGE to purchase their output under PURPA; they could either: 1) pay for upgrades at the PACW.PGE interface themselves; or 2) purchase a second leg of transmission service to move their output over both PacifiCorp and Bonneville Power Administration's ("BPA's") systems to deliver to the interface between the PGE and BPA systems, the BPAT.PGE POD.¹⁹ Eventually, PGE offered a third option, which was for the Blue Marmots to build a 300-mile transmission line from the projects to PGE's system, at the Blue Marmots' expense.²⁰

PGE admits that the Blue Marmots and PGE formed legally enforceable obligations for the projects to sell power to PGE at PGE's avoided cost, but PGE asserts that the obligations only apply with respect to price.²¹ PGE contends that the legally enforceable obligations do not apply to all of the terms of the PPAs, and are contingent upon delivery to the BPAT.PGE POD or other upgrades that must be paid for by the Blue Marmots.²² These requirements are not authorized by law to be imposed upon QFs, PGE had never previously insisted on them for other

¹⁷ *Id.* at 10.

¹⁸ ATC represents the "amount, in megawatts ("MW"), of transfer capability that is available to be reserved on a given transmission path over a given increment in time." Blue Marmot/400, Moyer/5 n.3.

¹⁹ *Id.*

²⁰ PGE/100, Greene-Moore/4.

²¹ PGE/100, Greene-Moore/14-15; PGE/400, Greene/24.

²² PGE/100, Greene-Moore/23.

QFs,²³ and PGE's Schedule 201 tariff, which sets forth the requirements for delivering power from QFs, does not contain such provisions.

The Blue Marmots filed these complaints on April 27, 2017. Subsequent to the filing of these complaints, PGE took several actions that are relevant to this case. First, on June 16, 2017, PGE filed a request at FERC to join the EIM.²⁴ FERC granted PGE's request on September 28, 2017, and PGE joined the EIM on October 1, 2017.²⁵ Notably, PGE's participation in the EIM was structured around its existing obligations at the time,²⁶ but PGE argues that this does not include its obligation to purchase and accept the Blue Marmots' power.

Second, more ATC became available to PGE after PGE had already informed the Blue Marmots that PGE would not purchase their net output due to the lack of ATC. Rather than committing this ATC to facilitate the use of the Blue Marmots' power, however, PGE elected to reserve this capacity for itself to increase its point-to-point transmission capacity for EIM transfers.²⁷

Finally, after the filing of the Blue Marmots' complaints, PGE agreed to look further into transmission options, and subsequently reiterated its view that it would be impossible to upgrade the facilities and transfer capacity at the PACW.PGE interface to accommodate the Blue Marmots' output, and the only other way to deliver the Blue Marmots' output (aside from requiring the Blue Marmots to move it, at significant cost, to a different POD), was for the Blue Marmots to build a 300-mile transmission line directly to PGE's system, at their own expense.²⁸

²³ PGE/100, Greene-Moore/11-12.

²⁴ *Portland General Electric Co.*, 160 FERC ¶ 61,131 P. 1 (2017).

²⁵ PGE/200, Sims-Rodehorst-Sporborg/5.

²⁶ Blue Marmot/701, Moyer/9.

²⁷ Blue Marmot/300, Moyer/32.

²⁸ PGE/100, Greene-Moore/4; Blue Marmot/400, Moyer/5-8, 33-35.

III. ARGUMENT

A. A Central Issue in this Case Should be Resolved by FERC

A central issue in this case is whether it is consistent with PURPA for a purchasing utility to refuse QF power delivered to its system, impose additional costs upon a QF related to upgrades of the purchasing utility's transmission system, or to require that the QF find alternative paths in the event that the purchasing utility determines it has other uses for transmission capacity that could otherwise accommodate the QF output. This issue should be resolved by FERC, which has jurisdiction over such transmission matters. As such, the Blue Marmots filed a petition for declaratory order with FERC on November 7, 2018.

Because FERC's determination of these issues could be dispositive of the Commission's determination of the remainder of the issues in the Blue Marmots' complaints, or perhaps dispose of the dispute altogether, the Blue Marmots filed a motion to stay these proceedings with the Commission, in this docket, on the same day.²⁹ Given that the Blue Marmots motion for stay lays out in detail the reasons why the Commission should stay this proceeding, those arguments are not repeated in detail here. However, in summary, the Blue Marmots point out that:

- The OPUC does not have authority to inquire into the reasonableness of a QF's transmission arrangements that FERC has found reasonable and sufficient for QF power deliveries under PURPA;
- FERC has jurisdiction over factual disputes regarding the sufficiency and use of ATC and a utility's ability to perform transmission system upgrades;
- FERC has jurisdiction over PGE's participation in the EIM with respect to transmission facilities;

²⁹ Complainants' Motion for Stay Pending FERC Determination (Nov. 7, 2018).

- The disputes at hand do not concern interconnection of the QF to the transmission system; rather, they involve the arrangements for transmission of the power to PGE over a FERC-jurisdictional transmission provider (PacifiCorp); and
- Under FERC policy, PGE's Merchant entity is the entity that is required to request transmission services related to QF power after it is delivered to PGE's system.

All of these points lead to the conclusion that this proceeding is best stayed until FERC makes its determination on the above and other issues discussed in the Blue Marmots' Petition for a Declaratory Order.

If this Commission decides to not stay the case and instead to determine whether a QF is required to pay for costs other than delivering power to the purchasing utility's system, it should find that a QF is not required to do so. QFs are not responsible for running the purchasing utility's system, or determining how power delivered to a purchasing utility will be used within that utility's system. These decisions and obligations clearly rest with the utility, and it would be wholly unworkable to place these obligations on a QF under PURPA. Instead, PURPA creates a system where QFs can sell power *to* the utility, making the power the utility's responsibility upon purchase.

PURPA imposes obligations on QFs to pay interconnection costs. Here the Blue Marmots' interconnections are with PacifiCorp, and because the Blue Marmots have already made arrangements to interconnect with PacifiCorp (and incur those associated interconnection costs) and transmit their power to PGE (and incur those associated transmission costs), the Blue Marmots are entitled to rely on the connections between PacifiCorp's and PGE's transmission systems to ensure that the power is delivered to PGE's system.

Moreover, the Commission should look to FERC's policy that transmission system upgrades generally benefit all transmission customers, and thus the associated costs are rolled

into the transmission provider's rates.³⁰ Should the Commission take up this issue, it should follow FERC's policy to find that it would be unreasonable for PGE to require a QF developer to incur the costs of upgrading PGE's transmission system in order to be able to exercise their rights under PURPA to sell power to a utility at its avoided costs established by the Commission, because these are not the types of costs that are borne by a single entity—let alone a QF that is selling its power to the utility under PURPA. And, the inequities associated with such an approach would be even more pronounced where, as here, there are more cost-effective options available that would avoid the need for the upgrades altogether.

If the Commission finds in this case that QFs are not required to incur additional transmission-related costs after delivering power to a utility's system, then this case must be resolved in favor of the Blue Marmots, because such a finding would dispose of all of PGE's objections in this proceeding.

B. Under PURPA and the Commission's Rules, the Formation of a "Legally Enforceable Obligation" Determines When a Utility is Obligated to Purchase a QF's Power, Not When the Utility Countersigns a PPA

PGE argues throughout its testimony that the fact that it has not counter-signed the Blue Marmots' PPAs is a fact that has significance, and that its obligations to the Blue Marmots are therefore tentative in nature.³¹ This view, however, is incorrect under the Commission's and FERC's implementation of PURPA, which establishes that it is the QF's commitment to deliver

³⁰ See Blue Marmot/300, Moyer/18 (describing FERC's policy of rolling in transmission system upgrades into general transmission rates); see also Blue Marmot/600, Moyer/47 (explaining that "FERC has a policy of requiring all users of the transmission system to pay for Network Upgrades since FERC has determined that they benefit the system as a whole. FERC makes this bright line determination regarding cost responsibility of Network Upgrades to ensure that transmission providers do not discriminate against generation not owned or developed by the transmission provider's affiliate merchant function.").

³¹ See PGE/100, Greene-Moore/15; see also PGE/400, Greene/21-24.

power under the terms of the PPA that creates a legally enforceable obligation, rather than the utility's counter-signature.

FERC has adopted regulations and policies governing utility purchases from QFs under PURPA,³² and state regulatory agencies are required to implement them.³³ FERC's rules provide each QF with the right to unilaterally create a "legally enforceable obligation," or "LEO," to sell its energy and capacity to a regulated public utility at projected avoided cost rates in effect on the date that the QF obligates itself to sell energy and capacity.³⁴ Thus, importantly, the "obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed."³⁵ And, once a LEO is formed, the associated avoided cost rate is fixed, regardless of whether the utility's costs go down, or up, or whether the utility's circumstances change.

Although PURPA is a federal law, it relies, in certain respects, upon state regulatory commissions to implement it. And, Oregon law itself also provides that a QF has the right to legally obligate itself to sell its net output at a time prior to the actual delivery of its net output.³⁶ Under rules established by the Commission, a legally enforceable obligation is established "once a QF signs the final draft of an executable contract provided by a utility to commit itself to sell power to the utility."³⁷

³² 18 CFR 292.101-292.602 (2018); *FLS Energy Inc.*, 157 FERC ¶ 61,211 at PP. 23-25 (2016).

³³ See 16 USC 824a-3(f) (2012); *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

³⁴ 18 CFR 292.304(d)(2)(ii).

³⁵ *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 599 (1987).

³⁶ Specifically, ORS 758.525(2)(b) provides: "[a]t the option of the qualifying facility, exercised before beginning delivery of the energy or energy and capacity, such prices may be based on . . . [t]he projected avoided costs calculated at the time the legal obligation to purchase the energy or energy and capacity is incurred."

³⁷ *In Re Commission Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 3 (May 13, 2016).

Thus, rather than being triggered by PGE’s signature on the Blue Marmots’ PPAs, the establishment of legally enforceable obligations turns on the Blue Marmots’ commitment to sell their net output to PGE,³⁸ and this rule applies even though PGE has refused to enter into contracts.³⁹

C. PGE Admits that the Blue Marmots Established Legally Enforceable Obligations, But Argue They Apply Only to Price

PGE’s witnesses agree that the Blue Marmots established legally enforceable obligations.⁴⁰ However, they urge the Commission to find that the legally enforceable obligations are different in nature than normal legally enforceable obligations. Specifically, PGE’s witnesses assert that the obligations only relate to price, not location or other terms and conditions, and that PGE’s obligation to purchase the power is conditional upon the Blue Marmots taking actions to either upgrade PGE’s system, or add additional transmission to a delivery point of PGE’s choosing.⁴¹

Blue Marmot witnesses Steve Irvin, Executive Vice President with EDP Renewables North America (“EDPR NA”) and William Talbott, Development Project Manager with EDPR NA, explained the impracticality of this position from a business perspective, stating that “[a] contract or other legal obligation to a price, without the corresponding terms and provisions, is worthless to a business because the economic value of a contract is based on the totality of all terms and conditions—not just the price.”⁴² They explained the Blue Marmots’ convictions,

³⁸ *FLS Energy*, 157 FERC ¶ 61,211 at P. 24; *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P. 25 (2009).

³⁹ *Snow Mountain*, 84 Or App 590, 598-99; *FLS Energy*, 157 FERC ¶ 61,211 at P24; *Murphy Flat Power LLC*, 141 FERC ¶ 61,145 at P. 24 (2012); *Grouse Creek Wind Park LLC*, 142 FERC ¶ 61,187 at P. 38 (2013).

⁴⁰ PGE/100, Greene-Moore/14-15.

⁴¹ *Id.* at 19-20, 22-23.

⁴² Blue Marmot/500, Irvin-Talbott/2.

based on their negotiations with PGE and their clear intent in signing the standard PPAs, that by entering into legally enforceable obligations with PGE, “the Blue Marmots were entitled to both the prices *and* the contract terms and conditions in place when the LEO was established.”⁴³

They also explained that based on their negotiations with PGE, they believe that PGE understood and was agreeable that the Blue Marmots would deliver their power to the PACW.PGE POD, using PacifiCorp transmission.⁴⁴ They explained that this understanding was based on PGE’s communications during the course of the negotiations, along with their reading of the Commission-approved PPAs and PGE’s Schedule 201, the tariff that governs sales to PGE from small power producers such as the Blue Marmots.⁴⁵ Further, as is evidenced by the PPAs themselves,⁴⁶ each of the power purchase agreements that were prepared by PGE and sent to the Blue Marmots for execution include an “Exhibit B” that lists “Required Facility Documents,” which include “Transmission Service Agreement with PacifiCorp”, but no other transmission arrangements.⁴⁷

There is no factual basis for PGE’s assertions that the Blue Marmots’ legally enforceable obligations are of a different nature than is normally the case, or that the Blue Marmots have anything less than a comprehensive, binding agreement with all of the relevant terms and conditions. However, PGE asserts that because it realized, after receiving the signed executable PPAs from the Blue Marmots, that its Merchant function had reserved ATC for its voluntary EIM participation, the Blue Marmots’ legally enforceable obligations apply only to price.

⁴³ Blue Marmot/500, Irvin-Talbott/9.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See, e.g.*, Blue Marmot/201, Talbott/6-22.

⁴⁷ *Id.* at 26.

This novel view is not supported by the facts, and is also completely counter to the Commission's and FERC's precedent. In Oregon, the Commission has established a standard contract approach to small generator QF power sales, and a standard contracting process for entering into these contracts.⁴⁸ And, the Commission has clarified that under that process, a legally enforceable obligation is established "once a QF signs the final draft of an executable contract provided by a utility to commit itself to sell power to the utility."⁴⁹ Therefore, when a QF is eligible for an Oregon standard contract, the commitment by the QF to be bound by the contract forms a legally enforceable obligation, and this obligation includes the rate and all the terms and conditions contained in that final draft of an executable standard contract. Further, it is important to recognize that a legally enforceable obligation, like any other contract, represents a two-way obligation. PGE's view of a legally enforceable obligation as to price only would, therefore, produce an illogical result, where the Blue Marmots would be obligated to deliver power to PGE at a set price, but PGE would be free to determine the location and other important terms that would significantly affect the overall cost to the Blue Marmots.

If the Commission finds that a LEO exists with respect to the terms in the standard contract, including Exhibit B listing the only transmission arrangements necessary for delivery to PGE's system, then this case should be resolved in favor of the Complainants. PGE should be required to purchase the output of the Blue Marmots projects under those terms, and manage the Blue Marmot net output appropriately. The Commission need not address any other issues.

⁴⁸ *In Re Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 12, 16-17 (May 13, 2005).

⁴⁹ *In Re Commission Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 3 (May 13, 2016).

D. Blue Marmots Have Provided for the Effective Delivery of Their Power to PGE

Under PURPA, QF projects, like the Blue Marmots, are required to make arrangements to deliver their power to the purchasing utility. Where directly interconnecting to the purchasing utility, this involves making the necessary interconnection arrangements and associated upgrades. Where the power is purchased by a utility other than the one to which interconnection is made, effective delivery involves both the interconnection to the first utility and also arranging for transmission service to the purchasing utility by “wheeling” power across the transmission system of the utility to which the QF is interconnected.⁵⁰ Under these circumstances, the “wheeling” is pursuant to the interconnecting utility’s FERC-approved Open Access Transmission Tariff (“OATT”), and accomplishes the delivery of the power to the purchasing utility.⁵¹

FERC regulations provide for this arrangement of wheeling QF power to a purchasing utility and confirm that the utility to which the power is wheeled must then purchase the output as if the QF was supplying the net output directly into its system.⁵² FERC’s regulations also state that the rate for purchase by the utility “shall not include any charges for transmission.”⁵³

In this case, PGE raises numerous objections, many of which are related to PGE’s view that it has other uses for its transmission system (or specifically, the PACW.PGE interface), or that its transmission system is not able to accommodate the receipt of the Blue Marmots’ power.

⁵⁰ Blue Marmot/300, Moyer/6.

⁵¹ A utility’s OATT is required by FERC to provide certain services, and is intended to ensure that utilities provide open access to their transmission systems on a comparable and non-discriminatory basis. *See generally* FERC Order No. 888, 75 FERC ¶ 61,080 (1996).

⁵² 18 CFR 292.303(d).

⁵³ *Id.*

In light of PGE’s arguments, the Blue Marmots retained an expert witness, Keegan Moyer, to analyze PGE’s positions and provide testimony in this proceeding on their behalf. Mr. Moyer is a Principal in the firm Energy Strategies LLC, has a degree in engineering and management, and specializes in transmission system analysis and strategy. Mr. Moyer has experience in assessing transmission plans and capabilities, and previously worked as the Manager of Transmission at the Western Electricity Coordinating Council (“WECC”). At WECC, he advised senior management on FERC energy and planning policies.⁵⁴ Mr. Moyer has extensive technical experience designing and conducting production cost models and power flow simulation studies, and his firm employs transmission planning engineers and maintains the same power flow modeling software that is used by PGE to perform its transmission studies.⁵⁵

As Mr. Moyer testified, in this case, the Blue Marmots met their requirements to deliver their power to PGE by arranging and paying for interconnection to PacifiCorp’s system and securing transmission rights across PacifiCorp’s system to PGE’s system.⁵⁶ This enables the power from the Blue Marmots to be received directly by PGE, through its connection to PacifiCorp’s system, the PACW.PGE interface, which is the only point where PGE can receive power from PacifiCorp’s system.⁵⁷ As Mr. Moyer explains, QFs, such as the Blue Marmots, do not and cannot make transmission reservations on the system of the utility to which they are selling.⁵⁸ Instead, their obligation is to deliver to the edge of the system of the purchasing utility.⁵⁹ In the case of the Blue Marmots, the edge of PGE’s system is the PACW.PGE interface.

⁵⁴ Blue Marmot/300, Moyer/2.

⁵⁵ Blue Marmot/400, Moyer/35.

⁵⁶ Blue Marmot/300, Moyer/8.

⁵⁷ *Id.*

⁵⁸ Blue Marmot/600, Moyer/10.

⁵⁹ *Id.*

The sufficiency of the Blue Marmots' arrangements is not only established by FERC precedent but also confirmed by PGE's Schedule 201. Schedule 201 applies to "power purchased from small power production or cogeneration facilities that are QFs . . . that meet the eligibility requirements described herein and where the energy is delivered *to the Company's system* and made available for Company purchase pursuant to a Standard PPA."⁶⁰ It also states that "the Company will purchase any Energy in excess of station service (power necessary to produce generation) and amounts attributable to conversion losses, which are *made available* from the Seller."⁶¹ Finally, on the topic of transmission of the power specifically, it states: "[a] Seller with a facility that interconnects with an electric system other than the Company's electric system may enter into a PPA with the Company after following the applicable Standard or Negotiated PPA guidelines and making the arrangements necessary for *transmission of power to the Company's system*,"⁶² and that the QF is "responsible for the transmission of power at its cost *to the Company's service territory*."⁶³ Nowhere does Schedule 201 allow PGE to add additional and substantial costs to a QF beyond delivering the power to PGE's system, or to refuse power from a QF that is delivered to PGE's system.

PGE's assertion, therefore, that the Blue Marmots are obligated to deliver their power to a specific point of PGE's choosing, or to pay for costly PGE system upgrades is not supported by law, rule, or tariff. And, PGE admits that this was not required even by any established PGE business practice.⁶⁴ PGE's witnesses acknowledge that prior to the Blue Marmots projects, PGE

⁶⁰ Blue Marmot/201, Talbott/29, *Schedule 201, Qualifying Facility 10 MW or Less Avoided Cost Power Purchase Information* at 1 (emphasis added).

⁶¹ *Id.* at 1 (emphasis added).

⁶² *Id.* at 3 (emphasis added).

⁶³ *Id.* at 20 (emphasis added).

⁶⁴ *See* PGE/100, Greene-Moore/11-12.

had never required QFs to specify where their power would be delivered, and that it only required delivery of the power to PGE's system.⁶⁵ Moreover, it is contradictory to PGE's prior statements to FERC that QFs only need to reach the border of the PGE system in order to make the power available, and that it is PGE's merchant function that then arranges for transmission within PGE's system.⁶⁶

In the absence of a supporting law, rule, tariff or even business practice for its newly created requirements, PGE's witnesses argue for a new definitional interpretation of why PGE is not required to purchase the Blue Marmots' power. They argue that in order for the Blue Marmots to deliver power to PGE, the power must be both: 1) made available by the Blue Marmots, at a point of delivery; and 2) be received by PGE, at a point of receipt.⁶⁷ Whether PGE accepts the power that the Blue Marmots make available is completely outside the control of the Blue Marmots and completely within PGE's discretion.

As Blue Marmots' witness Mr. Moyer explained, PGE's position essentially amounts to an argument that, because PGE refuses to accept the power delivered to the edge of its system, the Blue Marmots have failed to provide for an adequate delivery of the power.⁶⁸ This new interpretation is circular, and it also flies in the face of FERC precedent and PGE's own tariff

⁶⁵

Id.

⁶⁶

PaTu Wind Farm LLC v. Portland General Elec. Co., 150 FERC ¶ 61,032 at P. 31 (2015), *reh'g denied*, *PaTu Wind Farm, LLC v. Portland General Elec. Co.*, 151 FERC 61,223 (2015) (recapping PGE's arguments that "Portland General's merchant function accepts delivery of PaTu's energy at the border of the Portland General transmission system and then it arranges for the necessary transmission service as the transmission customer on the Portland General system.").

⁶⁷

See id. at 9.

⁶⁸

See Blue Marmot/600, Moyer/10 ("Regardless, PGE has argued that the Blue Marmots will not be able to schedule their output, and I contend that the only reason the Blue Marmots would not be able to do so is because PGE has decided not to arrange transmission service on its system to accept the Blue Marmots' output at the PACW-PGE interface.").

language, which requires that the power be transmitted to the utility's system and "made available" for sale by the QF.⁶⁹ Significantly, PGE never modified its tariff to reflect its new view of the requirements, and has in fact still not even requested that the Commission do so. The Blue Marmots were entitled to rely on PGE's tariff, as all parties are entitled to do unless and until the tariffs are lawfully modified.⁷⁰

If the Commission finds that the Blue Marmots met the requirements of PGE's tariff to deliver the power to PGE's system, then this case should be resolved in the Blue Marmots' favor, because such a determination will dispose of all of PGE's defenses its witnesses have outlined for rejecting the Blue Marmots' power. The Commission need not address any other issues.

E. PGE Has Not Fully Analyzed Its Options for Purchasing and Utilizing Blue Marmot Power

As described above, it is PGE's obligation to purchase power from the Blue Marmots in these circumstances, where legally enforceable obligations were formed. And, there is no requirement on the Blue Marmots to figure out how PGE should operate its system in order to use that power. Rather, this is PGE's role.

Despite the fact that it is not a requirement that the Blue Marmots determine how PGE uses the power they sell to it, because PGE has claimed that purchase of the power is impractical, not good policy, or excused for legal reasons, it may be relevant to the Commission that PGE has not fully analyzed all of its options for receiving and using the power in any event. As testified by Mr. Moyer, PGE has not seriously analyzed several options, including at least the following ones:

⁶⁹ Blue Marmot/201, Talbott/29 (emphasis added).

⁷⁰ *See In re Utility Reform Project, et al. v. Portland General Elec. Co.*, Docket No UCB 13, Order No. 03-629 (2003) (describing filed rate doctrine and its application in Oregon regulation).

- Using a small portion of the transmission rights currently used for EIM to accommodate both EIM transfers and the Blue Marmots’ output;⁷¹
- Allowing QFs to schedule in 15-minute increments;⁷²
- Selling the power to a third-party;⁷³
- Completing transmission upgrades that increase ATC and allow for PGE to accept output at the PACW.PGE POD by obtaining new transmission rights;⁷⁴ or
- Obtaining transmission service from a third-party transmission provider to wheel the power from the PACW.PGE POD to another location.⁷⁵

Significantly, after discovering that its transmission system was constrained by EIM-related reservations by PGE Merchant, PGE did not even take the first formal step that would normally be associated with considering these alternatives. That step would be to have PGE’s Merchant function request transmission service from PGE’s Transmission function related to the Blue Marmots’ power.⁷⁶ Instead, when the individuals at PGE learned of the constraints on the PACW.PGE delivery point, they almost immediately informed the Blue Marmots that PGE could not honor its commitment to purchase the Blue Marmots’ power.⁷⁷ Eventually, PGE gave the Blue Marmots the choice of either moving their power on a second expensive transmission path, or paying for upgrades to PGE’s system.⁷⁸ Yet, at that time, PGE could not have known all of its available options, and had not explored them.

71 Blue Marmot/600, Moyer/9.
72 Blue Marmot/600, Moyer/29.
73 Blue Marmot/400, Moyer/7.
74 Blue Marmot/300, Moyer/16.
75 Blue Marmot/300, Moyer/16-17.
76 Blue Marmot/300, Moyer/19.
77 Blue Marmot/200, Talbott/8.
78 Blue Marmot/200, Talbott/10.

Additionally, as Mr. Moyer testified, PGE has failed to take steps to perform the types of analysis of its transmission system that would demonstrate a genuine consideration of its options to accommodate the Blue Marmot output. While PGE did perform a transmission System Impact Study (“SIS”) at the Blue Marmots’ request, Mr. Moyer testifies that it did not look at all feasible options, and that the option that PGE Transmission recommended was not feasible or realistic.⁷⁹ Continuing its lack of proactive analysis to seek a solution, PGE failed to update the SIS to analyze the ability to increase ATC of the PACW.PGE interface after Mr. Moyer proposed several reasonable transmission alternatives in his testimony and an accompanying report. Given that SIS reports are commonly updated when new information is identified, the Blue Marmots expected, at a minimum, that PGE would seriously consider the proposed alternatives.⁸⁰ Instead, PGE rejected these alternatives, through its testimony in this case, for reasons that represent only the common challenges that a transmission provider faces any time it deals with a new transmission need on its system and routinely works through. Additionally, PGE failed to seek to quantify the impacts of accommodating the Blue Marmots’ power on its EIM benefits, until the Blue Marmots undertook that effort in the first instance.

PGE and the Blue Marmot testimony on these issues are complex. However, it is important to keep the big picture in mind. PGE’s transmission “study” “somehow concluded that a new 300-mile line was the best and most efficient solution for a 16 MW capacity shortfall.”⁸¹ This is despite the fact that, as Mr. Moyer explained, a power flow analysis shows that only 3% of that net output actually reaches the PACW.PGE interface.⁸² In addressing the

⁷⁹ See generally Blue Marmot/400, Moyer/33-42.

⁸⁰ Blue Marmot/600, Moyer/45.

⁸¹ Blue Marmot/400, Moyer/35; Blue Marmot/500, Irvin-Talbott/4-5.

⁸² Blue Marmot/400, Moyer/39-40.

weaknesses and inadequacies in PGE’s transmission study, Mr. Moyer explained that PGE: 1) did not consider a robust set of transmission alternatives in and around the PACW.PGE interface when evaluating options to increase ATC; 2) misleadingly interpreted certain study results; and 3) “the final solution offered by PGE is not realistic or reasonable. In the end, PGE’s studies are flawed and PGE has not demonstrated that there are no other alternatives to accept the Blue Marmots’ net output at the PACW-PGE interface.”⁸³ As explained by Messrs. Irvin and Talbott:

His basic conclusion is that, under no circumstance is the best and most efficient solution for the Blue Marmots (or PGE) to build a 300 mile gen-tie line to address a small contractual capacity deficit that has no implications from a reliability and powerflow perspective. We are confident that PGE will implement a more cost effective solution that could impose little to no additional costs on PGE or its customers, if the Commission concludes that PGE must be responsible for accepting the Blue Marmots’ net output at the PACW.PGE POD.⁸⁴

If the Commission finds that PGE has not fully analyzed its options for receiving the Blue Marmots’ power, then this is further work that PGE should be required to do, but the Commission should find that the Blue Marmots’ rights are still enforceable in any event.

F. PGE’s Voluntary Participation in the Western Energy Imbalance Market Does Not Excuse It from Its Obligations to Purchase the Blue Marmots’ Power Under PURPA

From the testimony filed in this proceeding, it appears that PGE will advance, through briefing, several other justifications for why the Blue Marmots’ power should not be purchased by PGE. Each of these in some way relates to PGE’s voluntary participation in the Western Energy Imbalance Market, or EIM.

⁸³ Blue Marmot/400, Moyer/34. Mr. Moyer’s transmission analysis is explained at Blue Marmot/400, Moyer/31-43, and Mr. Moyer’s alternative transmission study in the record at Confidential Blue Marmot/403.

⁸⁴ Blue Marmot/500, Irvin-Talbott/4-5.

The EIM is a voluntary balancing energy market operated by the California Independent System Operation (“CAISO”).⁸⁵ The purpose of the EIM is to optimize the dispatch of generation and flows of power within and between Balancing Authority Areas (“BAAs”). These BAAs, including PGE, are responsible for maintaining the electricity balance within their areas by controlling the generation and transmission of electricity within those areas, and between neighboring BAAs. Absent participation in the EIM, each individual BAA ensures that they independently meet energy balancing requirements from their own resources or arrangements. The goal of the EIM is to help take advantage of the diversity among BAAs to more efficiently integrate variable renewable energy resources, and resolve energy imbalances in the least-cost way possible, by allowing each of the participating entities to make its resources and needs visible across their own boundaries, and available for use.

PGE determined that it would participate in the EIM, and filed a request with FERC to do so, which was granted in September of 2017. PGE began participating in the EIM on October 1, 2017.⁸⁶

Some of PGE’s EIM-related justifications for refusing to purchase the Blue Marmots’ power at the PACW.PGE interface appear to be based on policy grounds, and some preview legal assertions that the Company may plan to make. Each of PGE’s assertions are outlined below, with a brief response.

1. PGE First Claimed that it Was Not Possible to Receive the Power Because of Its EIM Participation

Early in the dispute between PGE and the Blue Marmots, PGE claimed that it could not accomplish the purchase of the Blue Marmot power because doing so would be impossible given

⁸⁵ PGE/200, Sims-Rodehorst-Sporborg/3.

⁸⁶ *Portland General Electric Co.*, 160 FERC ¶ 61,131 P.3 (2017).

the constraints on the PACW.PGE interface.⁸⁷ The logic here appeared to be that PGE viewed its obligations to purchase power from the Blue Marmots as subordinate to PGE’s reservation of rights to voluntarily participate in the EIM. PGE eventually modified, or clarified its view to be that it *could* accept the power at the PACW.PGE interface, but that doing so would be *unacceptable* from its point of view.⁸⁸

⁸⁷ PGE/100, Greene-Moore/3 (explaining that PGE personnel determined that due to PGE’s merchant reserving the remaining ATC, PGE could not accommodate deliveries from the Blue Marmot projects). *See also id.* at 17 (“However, because there is no ATC on the PACW-to-PGE path, the generation cannot travel from the PACW.PGE POD on PacifiCorp’s side of the interface to PGE’s side of the interface, which is technically the Point of Receipt (POR).”). *See also* Blue Marmot/200, Talbott/10 (“PGE has stated that there is ‘insufficient long-term firm available transmission capacity (ATC) at this POD’ and that, ‘Given the lack of long-term firm ATC as the PACW.PGE POD, PGE cannot agree to accept delivery of Blue Marmot’s output at this POD.’”).

⁸⁸ *See, e.g.*, PGE/200, Sims-Rodehorst-Sporborg/24 (asserting that any arrangement to receive the Blue Marmots’ power at the PACW.PGE interface would reduce EIM benefits, and be unacceptable to PGE). PGE also raised arguments that indicated there could be a reliability problem on its system if it were to accept power from the Blue Marmots. Blue Marmots regard this as being resolved if PGE is required to purchase the power, because it would take the appropriate steps to accommodate the power without creating a reliability issue. Also, Mr. Moyer responded to PGE’s statements regarding reliability. He explained:

I understand that PGE cannot accept schedules across its transmission system that are greater than a path’s [Total Transfer Capability] – doing so would go against important operational and planning protocols that protect the reliability of the system. However, if we set these contract path-based issues aside and focus on the actual flow of power and actual stress on the system, very little of the Blue Marmot power actually reaches PGE’s system and it does not cause system emergencies. Our power flow analysis suggests that when 60 MW is injected at the Blue Marmots’ point-of-interconnection on the PacifiCorp system, only 3% of that injection actually reaches the PACW-PGE interface. This is because flows on the PACW-PGE path only change by 2 MW for every 60 MW of Blue Marmot power that is injected. From this perspective, the Blue Marmots’ physical power flow has negligible negative impacts on PGE’s transmission reliability because most of the physical power does not physically *reach* PGE’s system and for that small amount of power that does (3%), it actually pushes back against the flow from PGE-to-PACW (reducing exports), so there is no increased reliability risk from a physical flow perspective (and since flows actually go down, you can argue that reliability is *enhanced*).

2. PGE Admits that It Can Receive the Power at the PACW.PGE Interface, but Asserts that It Would be Bad Policy to Do So

PGE witnesses testify that it would be poor public policy to require PGE to receive the Blue Marmots' power at the PACW.PGE interface. Specifically, they assert that "every resolution of this dispute proposed by the Blue Marmots would shift significant costs from them to our customers. PGE believes that this result is not good public policy."⁸⁹ PGE's witnesses base this conclusion on their view that using ATC at the PACW.PGE interface to deal with the Blue Marmots' power would reduce the amount of ATC available for participation in the EIM. They assert that any delivery of the Blue Marmots' power as envisioned would cause PGE's expected EIM benefits to be "seriously" or "severely eroded."⁹⁰

These statements may preview PGE's position in this case that the Commission should decide, on *policy* grounds, whether PGE should be allowed to subordinate its obligations under PURPA to its voluntary participation in the EIM. The Blue Marmots view the question of whether PGE's QF obligations are subordinate to its EIM participation as a legal question, which is discussed more below, but also assert that it is good public policy to require PGE to fulfill its obligations to purchase QF power, and deliver that power over company-owned resources, while making use of the EIM to the greatest extent practicable.

If the Commission agrees with the Blue Marmots' view from even a policy perspective, then the Commission should resolve the case in favor of the Blue Marmots, and require PGE to honor the Blue Marmots' commitment to sell their power to PGE.

Blue Marmot/400, Moyer/39-40.

⁸⁹ PGE/100, Greene-Moore/16.

⁹⁰ PGE/100, Greene-Moore/21; *id.* at 4.

3. PGE’s Voluntary Participation in EIM, and Its Reservation of Transmission for That Purpose Cannot Legally Shield PGE From Its Obligations Under PURPA

As described above, PGE’s unwillingness to receive the Blue Marmots’ power at the PACW.PGE interface is based on the fact that PGE’s Merchant function reserved all of the available transfer capability at the interface in order to facilitate PGE’s participation in the EIM. PGE takes the position that its voluntary use of the PACW.PGE interface for EIM participation takes precedence over its obligation to purchase the Blue Marmots’ power at that location.

PGE’s position overlooks the fundamental point that its participation in the EIM is voluntary, while its obligations under PURPA to purchase a QF’s power are mandatory.⁹¹ This fact alone should resolve the case because it makes clear, from a legal perspective, what the prioritization should be for the competing uses of PGE’s transmission system.

Throughout their testimony, PGE’s witnesses admit that PGE’s participation in the EIM is voluntary.⁹² And, they recognize, at least in some instances, that PGE’s ability to use its transmission system to participate in the EIM is secondary to meeting its obligations.⁹³ Curiously, however, PGE’s position is that PURPA is subordinated to all of those other obligations, and also its voluntary EIM commitments.

In order to provide context for PGE’s and the Blue Marmots’ positions in this case, witnesses for both PGE and the Blue Marmots detailed the method through which PGE chose to

⁹¹ 16 USC 824a-3(a)-(b) (2012).

⁹² *See, e.g.* PGE/200, Sims-Rodehorst-Sporborg/3.

⁹³ *See, e.g.* PGE/200, Sims-Rodehorst-Sporborg /4 (explaining that “PGE Merchant has committed to make 200 MW of its firm transmission rights on the path between PacifiCorp and PGE (the PACW-to-PGE path) available exclusively for EIM transfers. PGE Merchant also committed to make its remaining firm rights available to the EIM, subject to usage for reliability or for servicing existing contractual arrangements.”). (emphasis omitted).

participate in the EIM. PGE could have participated in the EIM through two basic methodologies—the Available Transfer Capability Methodology (“ATC Methodology”) or the Interchange Rights Holder Methodology. The ATC approach is more common, and under this approach, the utility would treat any unscheduled transmission capability as available for EIM transfers; *i.e.* PGE would use transmission for the EIM on an “as available” basis.⁹⁴ Under the Interchange Rights Holder methodology, the utility offers its reserved firm transmission rights as capacity for EIM transfers.⁹⁵ PGE decided to structure at least part of its EIM participation under the Interchange Rights Holder Approach, and dedicated 200 MW of firm transmission rights to the EIM. It then also reserved the remainder of its firm transmission rights (around 76 MW) to be available to the EIM, subject to PGE’s other contractual obligations.

In asserting that its EIM participation takes precedence over its obligations to purchase the Blue Marmots’ power at the PACW.PGE interface, PGE asserts that *none* of its ATC at the interface is available for the Blue Marmots’ power. With respect to the 200 MW it committed to the EIM, PGE argues that this ATC is unavailable because it is solely for EIM use. This is problematic because it represents PGE seeking to have a voluntary commitment take precedence over a mandatory one, and does so in a way that would represent a method for PGE to avoid its PURPA obligations altogether.⁹⁶ PGE also asserts that the 76 MW of transmission capability above its firm commitment is also unavailable to facilitate purchase of the Blue Marmots’ power.

⁹⁴ Blue Marmot/300, Moyer/24; PGE/200, Sims-Rodehorst-Sporborg/11-12.

⁹⁵ PGE/200, Sims-Rodehorst-Sporborg/11-12.

⁹⁶ PGE’s witnesses testified that PGE’s Merchant function first reserved 418 MW of firm point-to-point capacity on the PACW-to-PGE path in order to participate in the EIM. Then 142 MW of that capacity was recalled by PGE’s Transmission function in early 2016, after the path was re-studied and the its capabilities determined to be less. The Company then later reserved an additional 34 MW in two separate transactions, bringing its total to 310. PGE/100, Greene-Moore/20-21. In essence, PGE’s Merchant function reserved as much capability as possible on this path, on a firm basis, in order to dedicate

Mr. Moyer also addressed PGE's argument that even the "as available" ATC is unavailable. Mr. Moyer noted that PGE stated to FERC that it would commit an additional 76 MW of firm reservations on the PACW-PGE path to the EIM, subject to usage reliability purposes or existing contracts.⁹⁷ He testified, however, that PGE's pledging of the 76 MWs was not actually relied upon by FERC in its authorization that PGE participate in the EIM. As he explained, "FERC did not require the 76 MW of additional capacity as a prerequisite for PGE obtaining [Market-Based Rate] authority and that use of a portion of that 76 MW for the Blue Marmots does not constitute a change in the amount of firm transmission on the PACW-PGE path committed to the EIM . . ." ⁹⁸ For this reason, at a minimum, PGE should be required to purchase the Blue Marmots' power at least through using this 76 MW of ATC that goes beyond the 200 MW that PGE committed on a firm basis to the EIM.

it to the EIM. PGE's witnesses even testified that if additional capacity were to become available, they would desire to acquire that and dedicate it to the EIM as well. PGE/100, Greene-Moore/16. This approach to PGE's EIM participation seeks to lock up PGE's transmission system in a way that would prevent PGE from receiving QF power, and instead allow it to dedicate any remaining capability to the EIM, subject to PGE's other requirements. Blue Marmot witness Keegan Moyer described this approach, explaining:

What I am voicing, more generally, is concern with the practice of unnecessarily reserving transmission solely for use in the EIM and preventing that transmission capacity from being used for any other purpose. PGE does this by utilizing the Interchange Rights Holder Methodology for EIM transfers over the PACW-to-PGE path. The other method that is available to PGE puts unused transmission into the EIM "as-available . . ." By reserving transmission solely for use in the EIM using the Interchange Rights Holder Methodology, the transmission is "locked up" so PGE (and its resources) and other EIM entities (and their resources) can use the transmission in combination with the EIM real-time dispatch to economically serve loads. However, anyone seeking longer-term use of that transmission, such as the Blue Marmots, are locked out.

Blue Marmot/400, Moyer/11 (internal citations omitted).

⁹⁷ Blue Marmot/600, Moyer/39.

⁹⁸ Blue Marmot/600, Moyer/40.

Additionally, with respect to this 76 MW of ATC, Mr. Moyer also clarified that this commitment, which was expressly made subject to PGE's other existing obligations, was made in June of 2017.⁹⁹ Thus, this commitment came after PGE's provision of executable PPAs to the Blue Marmots, and even after the Blue Marmots filed their complaints.¹⁰⁰ Because the Blue Marmots had legally enforceable obligations prior to the time of PGE's committed use of the 76 MWs, the receipt of the Blue Marmots' power should be deemed an appropriate use of this 76 MW of reservations on the PACW.PGE path, according to PGE's own statements. Despite these facts, however, PGE takes the position that this transmission capability is also unavailable to use for receiving the Blue Marmots' power, and that PGE's EIM activities will come first.¹⁰¹

Finally, the Blue Marmots discovered that additional ATC became available at the PACW.PGE interface *after* PGE's obligations with respect to the Blue Marmots arose, but PGE reserved that ATC for itself too. As Mr. Moyer explained:

Additional ATC became available after PGE informed the Blue Marmots that PGE would not purchase their net output due to limited ATC. PGE could have reserved or obtained this to accept at least a portion of the Blue Marmots' net output or otherwise meet its PURPA obligations, but PGE elected to reserve this for itself as point-to-point transmission. PGE also could have informed the Blue Marmots that this ATC had become available. Instead PGE appeared to act as if it had no knowledge of its obligations to accept the Blue Marmots' output on that same transmission path.¹⁰²

On this point, PGE's witnesses responded that other QFs may have been entitled to the newly available capability ahead of the Blue Marmots, but that in any event, PGE wishes to

⁹⁹ Blue Marmot/701, Moyer/3.

¹⁰⁰ Blue Marmot/600, Moyer/39-40.

¹⁰¹ *Id.*; see also PGE/200, Sims-Rodehorst-Sporborg/4 (“The Blue Marmots’ suggestions of ways PGE could accommodate their delivery all boil down to taking transmission away from the EIM and giving it to the Blue Marmots, which would unacceptably compromise the Company’s ability to participate in the EIM . . .”).

¹⁰² Blue Marmot/300, Moyer/32.

make the capability available to the EIM instead.¹⁰³ PGE’s actions are “troubling because PGE appears to be procuring transmission solely for its own purposes when it should be seeking to arrange for transmission service to be used to deliver power from QFs that have LEOs.”¹⁰⁴

PGE’s approach is problematic from a legal perspective because it represents an attempt to bootstrap a voluntary commitment into a mandatory one, and to do it in a way that subverts PGE’s obligations to purchase QF power. And PGE’s actions are problematic because they indicate a lack of commitment to meeting its legal obligations.¹⁰⁵

Importantly, the Blue Marmots also demonstrate in this case that PGE can, in any event, meet both its commitments made to FERC with respect to its participation in the EIM and its obligation to purchase power from the Blue Marmots at the PACW.PGE interface. Mr. Moyer’s testimony establishes that in hours when the Blue Marmots schedule less than their total capacity, which would be expected in most hours given that they are solar generation projects, then PGE would be able to use the unscheduled transmission to participate in the EIM.¹⁰⁶ He

¹⁰³ PGE/100, Greene-Moore /15-16.

¹⁰⁴ Blue Marmot/300, Moyer/28.

¹⁰⁵ As Mr. Moyer explains,

PGE’s view appears to be that as additional transmission on its own system becomes available, it will purchase and use the transmission for whatever purpose it desires, except to accept the Blue Marmots’ output. This is concerning not only for the Blue Marmots and other QFs, but for the long-term efficient use of the PGE transmission system. This concern regarding PGE’s use of its existing and future transmission rights on its own system is amplified by the analysis I present . . . , which shows that the transmission that PGE *already has* in the EIM is not frequently used.

¹⁰⁶ Blue Marmot/400, Moyer/6.

Blue Marmot/600, Moyer/20. (explaining that:

[B]ased on the expected solar generation profile, the Blue Marmots will submit hourly schedules that are:

- Less than 40 MW in 79% of all hours;
- Less than 20 MW in 68% of all hours; and
- Less than 10 MW in 61% of all hours.

testified that in light of this fact, PGE could participate in the EIM using both the ATC and Interchange Rights Holder methods, as it currently does today, “with ‘firm participation’ in the EIM under the Interchange Right Holder . . . Methodology for 260 MW for EIM-only use, and on an ‘as-available’ basis using the ATC Methodology for the remaining 60 MW (of summer capacity).”¹⁰⁷ He explained that,

Of these 60 MW, 50 MW should be prioritized for Blue Marmot output, but in any hour the 50 MW is not fully utilized by Blue Marmot output, the unused portion will be available for EIM transfers. The 260 MW of EIM-dedicated transmission will allow PGE to far exceed its commitments to FERC regarding MBR Authority and there will be many hours in which the EIM transfer limit for the PACW-to-PGE import path will be greater than 260 MW. Using *both* the ATC and IRH Methodologies would *not* be a deviation from PGE’s current practices and this is the type of participation I recommend.¹⁰⁸

Therefore, Mr. Moyer’s analysis shows, and his recommendation is that PGE can participate in the EIM in a way that does not change its participation approach, and accommodate the Blue Marmots’ output at the PACW.PGE interface, if PGE only approaches it flexibly enough to modify the quantity of transmission used under the two various participation methodologies.¹⁰⁹

In pointing out PGE’s actions with respect to the EIM, and the unreasonableness of PGE’s position that it should not be required to purchase any of the Blue Marmots’ power at the PACW.PGE interface, the Blue Marmots do not contend that PGE should avoid participation in the EIM. In fact, the Blue Marmots are very supportive of regional markets, and agree that participation in the EIM has benefits for PGE’s customers and the integration of renewables. To

In fact, the full 50 MW of transmission will only be used in 13% of hours in the year. This means most of the 50 MW of capacity will be available in most hours for EIM transfers.).

¹⁰⁷ *Id.* at 16-17.

¹⁰⁸ *Id.* at 16-17.

¹⁰⁹ Blue Marmot/600, Moyer/17.

be clear, the Blue Marmots' point is that PGE's participation in the EIM does not form a priority action, from a legal perspective, that can take precedence over PGE's already established legal obligations as a regulated utility to purchase QF power, and that it should therefore view the EIM in this context, while also taking advantage of ways to actually achieve both ends.

Finally, the Commission does not need to address PGE's broader arguments regarding potential impacts on the EIM by QFs that do not (and may not be able to) establish legally enforceable obligations. Instead, the Commission only needs to conclude that PGE must accommodate the Blue Marmots, to which PGE provided executable contracts before PGE submitted its request to FERC for EIM participation, explicitly recognizing that its use of the EIM would accommodate existing contractual arrangements. The Blue Marmots are one of those existing contractual arrangements that must be served prior to EIM participation.

4. PGE's Alleged Financial Harm from Accepting the Power at the PACW.PGE Interface Will Be Minor

Although PGE's witnesses asserted that receipt of the Blue Marmots' power would financially harm PGE by "seriously eroding" EIM benefits,¹¹⁰ PGE did not attempt to quantify that alleged harm. Instead, the Blue Marmots' witness Mr. Moyer conducted a utilization analysis to determine how much PGE's participation in the EIM would actually be affected if it were to use its transmission at the PACW.PGE interface to facilitate receipt of the Blue Marmots' power. That analysis showed that PGE could still accommodate the Blue Marmots' power without diminishing the 200 MW of firm transmission capability PGE had voluntarily committed to FERC that it would maintain at the PACW.PGE interface for EIM participation.¹¹¹

¹¹⁰ PGE/100, Greene-Moore/21.

¹¹¹ PGE committed to FERC that it would maintain 200 MW of firm capability for EIM purposes. Mr. Moyer's analysis is described at Blue Marmot/400, Moyer/25-27.

Subsequently, in his Sur-rebuttal testimony, Mr. Moyer then presented an analysis of the “cost” that PGE referred to in stating that accepting the Blue Marmots’ power would erode its EIM benefits. According to Mr. Moyer’s original testimony on this topic, he estimated that PGE’s EIM benefits would be reduced by around \$25,000 to \$63,000 annually, or less than half of one percent of PGE’s EIM-related benefits, if it were to accept the Blue Marmots’ power at the PACW.PGE interface.¹¹² Note, Mr. Moyer assumed that the only way in which PGE would accept the Blue Marmots’ net output is by using transmission that would have been reserved for EIM purposes. PGE could elect to use the power in other ways, which would reduce or eliminate any loss of EIM benefits.

PGE’s witnesses responded to this analysis, arguing that EIM benefits in the future will not match what PGE experienced in the past, and that it should be assumed that other QFs beside the Blue Marmots will seek to place power at the same interface. PGE’s witnesses also argued that Mr. Moyer’s analysis contained unreasonable rounding assumptions, did not incorporate available September transfer data, and that he should have added lost transfers from the winter season to his analysis.¹¹³ Under PGE’s view, the detriment associated with the Blue Marmots’ power being received at PACW.PGE would more likely be \$89,790 under the current or recent level of EIM transfers, or \$360,357 annually under PGE’s assumption of a 20% increase in EIM transfers in the future.¹¹⁴ PGE also calculated that its total EIM detriment could go up to \$2.15 million, under more aggressive assumptions of a 20% increase in EIM transfers plus an

¹¹² Blue Marmot/600, Moyer/4-5.

¹¹³ PGE/700, Rodehorst-Moore/3-4.

¹¹⁴ PGE/700, Rodehorst-Moore/20.

assumption that many more QFs would use the interface such that QF deliveries at the interface became more than six times what the Blue Marmots' power requires.¹¹⁵

In testimony responding to PGE, Mr. Moyer explained that PGE's analysis confirms the overall reasonableness of his analysis, and makes clear that "PGE can accept the Blue Marmot output at the PACW-PGE interface and continue to retain almost all of its EIM benefits, even with increased EIM transfers on the path."¹¹⁶ He demonstrated that even accounting for PGE's reasonable adjustments to his study, his updated analysis would project only an \$85,969 detriment to PGE's EIM benefits from the receipt of the Blue Marmots' power, or less than a two percent decrease.¹¹⁷ Putting this potential lost opportunity cost for PGE in terms of dollars per MWh of Blue Marmots' power, Mr. Moyer showed it would be equivalent to only \$0.67/MWh of Blue Marmot generation.¹¹⁸ Mr. Moyer's testimony also showed that under even much more aggressive assumptions, like those made by PGE, PGE may forego EIM benefits from the Blue Marmots projects that only total to less than four percent of the company's projected EIM benefits.¹¹⁹

PGE responded that Mr. Moyer's analysis is premature because there is not yet enough information to know what the ultimate foregone EIM benefits will be. Yet, as Mr. Moyer testified, "PGE cannot have it both ways by recommending that the Commission make a decision based on unsubstantiated claims of significant harm, while simultaneously arguing that it is

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Id.

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Blue Marmot/700, Moyer/4.

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Blue Marmot/700, Moyer/16.

118

Blue Marmot/700, Moyer/5.

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Id.

inappropriate to quantify the alleged harm or lost opportunity cost associated with using a portion of its EIM transmission to accept the power from the Blue Marmots.”¹²⁰

Even considering the full spectrum of testimony in the record at this point, it is evident that PGE grossly overreacted when it made a policy determination that it could not accept the Blue Marmots’ power in light of its EIM participation. And, as significantly, it errs with respect to the applicable law as well.

5. PGE’s Argument That the Blue Marmots and Other QFs Will Further Erode EIM Benefits is Not Well-Founded

In urging the Commission to allow it to reject the Blue Marmots’ power, PGE’s witnesses assert that if the Blue Marmots are allowed to sell their power to PGE at the PACW.PGE interface, then other QFs will surely do the same, and further deteriorate PGE’s benefits from participation in the EIM.¹²¹ Essentially, PGE argues that granting the Blue Marmots’ complaint would be a ‘slippery slope,’ with unintended consequences from future QFs.

First, the Blue Marmots point out that the Commission does not need to (and should not) resolve in this case questions about what other QFs may seek to do in the future regarding PGE’s new views. The Blue Marmots’ rights are determined by the facts in this proceeding, and there are not other QFs making the same claims as the Blue Marmots. Second, evidence in this case shows that the Blue Marmots have a status different from future QFs. The Blue Marmots fully committed to deliver power to PGE *prior* to PGE’s determination that it should place constraints on its receipt of power at the PACW.PGE interface. The validity of any potential arguments from QFs that come after the Blue Marmots do not need to be resolved in this case. Finally, to

¹²⁰ Blue Marmot/700, Moyer/2.

¹²¹ PGE/100, Greene-Moore/21-22.

the extent there are other QFs that are similarly situated to the Blue Marmots (*i.e.*, they have a legally enforceable obligation to deliver at the PACW.PGE interface) that have not brought complaints, evidence in this case suggests that most of those projects may not be coming on line in any event.¹²²

If the Commission determines that the Blue Marmots are in a class of QFs that is different from other QFs, because they had legally enforceable obligations before PGE's new direction on the PACW.PGE interface, then the Commission should resolve this case in favor of the Blue Marmots, and order PGE to purchase their power at the avoided costs rates agreed to by PGE.

6. PGE's "Customer Indifference" Rule Is an Inappropriate Attempt to Skirt Its Obligations Under PURPA

In its testimony, PGE seeks to legitimize its refusal to purchase the Blue Marmots' power by urging the Commission to adopt a rule of "customer indifference."¹²³ PGE claims that if it purchases power from the Blue Marmots, then this will reduce EIM benefits, and thereby affect customers, violating PGE's "customer indifference" test.¹²⁴

PGE presumably is seeking to create this rule as an extension of the pricing scheme established through PURPA, which requires that purchases be at utilities' avoided costs. But, PGE's argument has no basis in law. Under PURPA, QFs are entitled to have their power

¹²² See Blue Marmot/700, Moyer/10 ("One of the QFs, the Obsidian Lakeview 10 MW project, has a commercial operation date of May 30, 2018 and to my knowledge the project has not met this target. Additionally, PGE has been unable to contact one of the contracted QFs, OM Power."). The final project of which the Blue Marmots are aware is the "Airport PPA," and the Blue Marmots were prevented from reviewing that contract by PGE's objections and the ALJ's ruling denying discovery of that contract. See October 30, 2017 Ruling. For this reason, it should not be deemed relevant to this proceeding because such a finding was already argued by PGE and agreed to by the ALJ.

¹²³ PGE/400, Greene/5.

¹²⁴ *Id.* at 5-7.

purchased at the avoided rates established by the Commission. In this case, there is no dispute that those are the rates at which the Blue Marmots are requesting power.

PGE may be arguing in this case that it thinks those rates are wrong, because they should incorporate some additional cost of service associated with PGE accepting the power at the PACW.PGE interface. But, to the extent PGE is asserting this argument, PGE overlooks the fact that once the rates are set, QFs are entitled to those rates unless and until lawfully changed.¹²⁵ It is always the case that established rates deviate from actual costs soon after they are set, but this does not create a right for a party to charge or pay a different rate. Instead, if PGE seeks to establish new avoided cost rates, it must do so through the appropriate processes.

If the Commission rejects PGE's "customer indifference" rule as not applicable to the federal scheme of PURPA, then it should resolve this case in favor of the Blue Marmots, and order PGE to purchase the power at PGE's avoided cost rates.

7. PGE's Late Discovery of Limited ATC Due to its Voluntary EIM Plans Does Not Excuse It from Its Obligations to the Blue Marmots

As described above, PGE seeks to escape its obligations to purchase power from the Blue Marmots because it determined, after the Blue Marmots committed to sell their net output to PGE, that it has limited ATC at the point where the Blue Marmots' power is to be delivered. PGE admits that when it sent final PPAs to the Blue Marmots, it did not know about the EIM-caused constraints at the PACW.PGE interface, that it had never made a practice of requiring QFs to specify the points of delivery, and that it never provided any indication that its

¹²⁵ See *In re Utility Reform Project, et al. v. Portland General Elec. Co*, Docket No UCB 13, Order No. 03-629 (2003) (describing filed rate doctrine).

willingness to purchase power from the Blue Marmots or other QFs was conditioned upon specific levels of ATC at designated locations.¹²⁶

Rather than justifying a legal escape for PGE, these facts, if anything, establish that PGE made a unilateral mistake. Although the existence of a requirement by PGE to purchase power from QFs is administratively and legally determined (as opposed to being a purely contractual matter), there are elements of basic contract law that should guide the Commission’s review of PGE’s arguments, and which reveal what the consequences of PGE’s actions should be. Specifically, PGE’s failure to recognize the fact that ATC was limited, and its *post hoc* assertion that it would have negotiated differently with the Blue Marmots if it had known about the constraints, amounts to a basic unilateral mistake by PGE. PGE knew, or should have known that the delivery point for the Blue Marmots’ power was PACW.PGE.¹²⁷ And, PGE knew (as an institution), and should have known (as individuals), what the status of ATC was at the interface. Thus, the facts in this case are that one party knew, or through its own fault did not know, a ‘material fact,’¹²⁸ yet committed to perform a certain action—offering to purchase power from the Blue Marmots with legally enforceable PPAs. In such circumstances, the mistaken party is not relieved of its obligations to perform.

¹²⁶ See PGE/100, Greene-Moore/11 (“Up until the QF personnel became aware of the constraint at the PACW-PGE interface, PGE did not ask off-system QFs executing Standard Contracts where they wished to deliver their output until after the PPA had been signed.”) (emphasis omitted).

¹²⁷ Blue Marmot/200, Talbott/9; PGE/400, Greene/23.

¹²⁸ The Blue Marmots do not assert that the level of ATC was a material fact that would excuse PGE’s performance even if known, but recognize that PGE certainly regards the fact as material (and in fact a total impediment to performance). More accurately, it seems that PGE may have actually experienced a mistake of corporate policy (or a *post hoc* creation of a new policy), in that it sent an executable PPA to a party and then later determined that for other corporate reasons, it wished that it had not done so.

Another relevant piece of contract law is that when an agreement does not expressly spell out a relevant term, the agreement among the parties is determined by looking to outside information that is consistent with the agreement, and looking to things such as trade usage, course of dealing, and course of performance. In this case, it is evident that PGE routinely, and consistently entered into power purchase obligations without requiring conditions on location of delivery,¹²⁹ that it knew or should have known that the delivery point for the project was the PACW.PGE interface,¹³⁰ and that it would have executed the PPAs with the same level of detail and information provided by the Blue Marmots prior to this dispute. In these circumstances, the Commission should not allow PGE to escape its obligations to the Blue Marmots because the Blue Marmots' rights to deliver power to the PACW.PGE interface are established by normal contract interpretation principles (in addition to the PURPA-specific law described above).

A final basic element of contract law that should be applied in this case is that one cannot add a material term to the contract after the obligation to perform has been incurred, unless there is additional consideration. Yet here, PGE insists that it should be allowed to add a significant new "provision" to its legally enforceable obligation to purchase the Blue Marmots' power, by requiring them to deliver their power to a specific, and costly, point on PGE's system,¹³¹ or pay for significant upgrades.

¹²⁹ See PGE/100, Greene-Moore/11 ("Up until the QF personnel became aware of the constraint at the PACW-PGE interface, PGE did not ask off-system QFs executing Standard Contracts where they wished to deliver their output until after the PPA had been signed.") (emphasis omitted).

¹³⁰ Blue Marmot/500, Irvin-Talbott/9-10.

¹³¹ See Blue Marmot/300, Moyer/14 (explaining that it would cost the Blue Marmots around \$14 million if they had to "double wheel" their power across PacifiCorp's system, and then across BPA's system to a new point of delivery).

If the Commission finds that PGE is barred from asserting it is excused from its PURPA obligations because of its actions in failing to recognize transmission constraints, or that it assumed the risk of the transmission constraints, then it should decide the case in the Blue Marmots' favor, and order PGE to purchase the power at its avoided cost rates.

G. PGE's Treatment of the Blue Marmots Amounts to Unlawful Discrimination

It is well-established that PGE cannot unduly discriminate against any person, and that it must treat similarly-situated persons in the same manner.¹³² This includes QFs taking service under Schedule 201. Yet, PGE admits that there are other QFs that had enforceable rights to prospectively sell power at the PACW.PGE interface at the time PGE determined that this path was constrained due to voluntary EIM participation.¹³³ And, PGE has agreed to purchase power from those projects, while refusing to accept power from the Blue Marmots.¹³⁴

PGE's witnesses try to establish that the Blue Marmots are not similarly situated because PGE had not already counter-signed the Blue Marmots' PPAs, whereas it has signed the others' agreements.¹³⁵ As described above, however, this is not a meaningful distinction because it does not take PGE's signature to create a legally enforceable obligation. Rather, that occurred when the Blue Marmots signed the final executable PPA or otherwise committed to sell power to PGE. The real question in this case, then, is whether it is unduly discriminatory to treat one QF with a legally enforceable obligation differently from other QFs that have a legally enforceable obligation, when both were, after the fact, found to have arranged for delivery at the PACW.PGE interface that PGE argues is constrained.

¹³² ORS 757.325.

¹³³ Blue Marmot/400, Moyer/29; PGE/100, Greene-Moore/10, 13-14.

¹³⁴ PGE/100, Greene-Moore/14.

¹³⁵ *Id.*

If the Commission finds that PGE's refusal to purchase power from the Blue Marmots constitutes undue discrimination, then it must decide this case in the Blue Marmots' favor, and find that PGE is obligated to purchase the power at the established avoided cost rates.

H. The Commission Should Reform the Contract to Update the COD, Given the Delays in Enforcing the Contract.

In light of the litigation that has been required by Complainants in order to enforce their rights under PURPA to sell their power to PGE, the Complainants request that the Commission exercise its authorities to modify the Commercial Operation Date ("COD") required under the PPAs that the Blue Marmots signed. FERC has recognized state commissions' ability to do so under circumstances such as this, where delay from litigation makes specific milestones in the PPA impractical.¹³⁶ In this case, the Blue Marmots request that the Commission modify the COD in their PPAs to on a day for day basis from the date upon which PGE refused to execute the power purchase agreements to the day of the final order in this proceeding. Therefore, if the Commission's final order is issued a year and a half after PGE refused to execute the contracts, then the Blue Marmots' CODs should be extended by a year and a half.

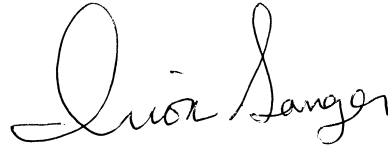
IV. CONCLUSION

For all the reasons described above, 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.

¹³⁶ See, e.g. *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) (declining to disturb state Commission findings that certain milestones of a QF's contract could be modified for litigation delay).

Respectfully submitted this 30th day of November, 2018.

Respectfully submitted,

A handwritten signature in black ink that reads "Irion Sanger". The signature is written in a cursive style with a large initial "I" and a long, sweeping underline.

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