**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

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

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| BLUE MARMOT V LLC (UM 1829) | ) |
| BLUE MARMOT VI LLC (UM 1830) | ) |
| 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. | ) |
| | ) |

# OPENING 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 Opening Brief in accordance with the Oregon Public Utility Commission (the "Commission" or "OPUC") Administrative Law Judge's January 23, 2019 Ruling.

This case considers complaints that were filed against Portland General Electric Company ("PGE") on behalf of the Blue Marmot projects, each of which is a separate solar electrical generation facility located in Lake County, Oregon. Each of the Blue Marmot projects has a 10 megawatt ("MW") alternating current nameplate capacity, and each is a "qualifying facility" (or "QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Each project has been self-certified with FERC as a small power production facility.[1]

Under PURPA, public utilities, including PGE, are obligated to purchase power from qualifying facilities that offer to sell their power to the utility. These sales take place at "avoided cost" rates established by the Commission. Each of the Blue Marmots signed standard power purchase agreements ("PPAs") with PGE pursuant to the Commission's implementation of PURPA. In accordance with the provisions in each of the Blue Marmots' PPAs, each of the projects has made the required arrangements for the transmission of its power to PGE, through executing transmission service agreements with PacifiCorp for delivery to PGE over PacifiCorp's system.

[1] Blue Marmot/100, Irvin/3.

The Blue Marmots' complaints were filed because PGE now refuses to purchase power from the Blue Marmots in accordance with the terms of the PPAs and requirements of PURPA. PGE instead seeks to either be discharged of its legally enforceable obligation to purchase the power, or to require that the Blue Marmots incur significant additional costs and obligations before PGE will purchase their power.

PGE's refusal stems from its determination, after sending executable PPAs to the Blue Marmots, and after receiving the executed PPAs from the Blue Marmots, that it has other competing uses for the transmission system interface across which the Blue Marmots' power was to be received by PGE under the PPAs. That transmission system interface is the only connection across which PGE receives power from PacifiCorp's service territory, and the parties have described it as the "PACW.PGE interface" or "PACW.PGE point of delivery" ("PACW.PGE POD"). PGE had previously reserved all of the available transfer capability ("ATC")[2] of that interface for its own use, and then proposed to FERC, *after* receiving the Blue Marmots' executed PPAs, that the capability would be used for PGE's participation in the Western Energy Imbalance Market ("EIM").[3]

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[2] ATC represents the amount of power that can be transferred over the transmission network above already committed uses.

[3] PGE/100, Greene-Moore/10-11; Blue Marmot/500, Irvin-Talbott/11. The EIM is a voluntary balancing energy market operated by the California Independent System Operation ("CAISO"). 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, by allowing each of the participating entities to make its resources and needs visible across their own boundaries, and available for use.

The Blue Marmots contend that PGE entered into a binding agreement to purchase the output of the Blue Marmots' power, in accordance with the rules and orders of the OPUC, which specify that a QF's signing of an executable PPA delivered to it by the utility creates a legally enforceable obligation. And the Blue Marmots contend that PGE has not offered a legally valid reason for failure to abide by its obligation.

As demonstrated by the length of this brief, there is a sizeable list of issues that have been raised in this case that the Commission may consider resolving in this proceeding. This includes issues which may prompt somewhat complex legal and factual questions. The Blue Marmots note, however, that the Commission need not address the vast majority of the disputed issues if it finds, as the Blue Marmots assert that it should, that PGE must accept and manage the Blue Marmots' net output because the Blue Marmots' have legally enforceable obligations with PGE and have purchased FERC-jurisdictional transmission from PacifiCorp to deliver their power to PGE's system. A Commission determination on these topics disposes of most or all of the issues in this proceeding. If the Commission elects to rule against the Blue Marmots on these fundamental issues, then there are additional questions that the Commission must resolve, including whether the Commission has jurisdiction to question FERC's determination of what is required in order to ensure that power is effectively delivered to a purchasing utility under FERC's Open Access Transmission Tariff, whether PGE demonstrated any actual impediment to receiving power at the PACW.PGE interface, and if it has adequately assessed its options for increasing available transfer capability there.

In this proceeding, PGE has offered views about its obligations to the Blue Marmots that differ from the Commission's precedent regarding those obligations, and which conflict with precedent from FERC and the courts. PGE now seeks to parse the relevant law in a new and

novel way, and argues that although the Blue Marmots signed the standard PPAs offered to them by PGE, none of the terms of the PPAs themselves are binding. Specifically, PGE seeks to distance itself from the rights of the Blue Marmots, under the PPAs and relevant FERC precedent, to deliver their power to the PACW.PGE interface for receipt by PGE. Contrary to PGE's view, however, the terms of the PPAs that PGE provided them, and which they executed, are binding and relevant to the Blue Marmots' legally enforceable obligations.

PGE seeks to require the Blue Marmots to pay for upgrades to its transmission system, or to purchase additional transmission services before it will purchase the Blue Marmots' power at its avoided cost rates. These conditions are unlawful under relevant FERC precedent and law, and do not excuse PGE of its obligation to purchase the Blue Marmots' output. Moreover, PGE's claims that it cannot receive the power at the PACW.PGE interface are incorrect from a factual standpoint, in any event, as established through this proceeding and admitted by PGE's witnesses. The record in this case shows that PGE can easily accept the Blue Marmots' output at the PACW.PGE interface, and that doing so will have only a minimal impact on the benefits that PGE hopes to obtain through its voluntary participation in the EIM.

In this case, PGE attempts to offer a variety of policy reasons for why the Commission should relieve it of its obligation to the Blue Marmots. None of these policy reasons overcome PGE's legal obligations, and none are compelling. Instead, each argument is founded on an incorrect assumption that PGE's customers will be significantly negatively affected by a reduction to PGE's benefits of participating in the EIM if PGE were to receive the Blue Marmots' power at the PACW.PGE interface. The record in this case demonstrates that PGE is able to continue to robustly participate in the EIM while accommodating the receipt of the Blue Marmots' power at the PACW.PGE interface.

PGE additionally asserts that the Blue Marmots' rights should be curtailed due to PGE's concerns about future QFs' actions in delivering power at the same interface. These concerns are based on a hypothetical scenario, and assume that such future QFs obtain the same status as the Blue Marmots, with legally enforceable obligations to deliver their power under the same terms as the Blue Marmots.

Even if PGE were entitled to insist that its receipt of the Blue Marmots' output was conditional upon upgrades to PGE's transmission system, FERC precedent establishes that the costs of those upgrades cannot be assigned directly to the Blue Marmots. Additionally, PGE has failed to adequately analyze the options available to it for receiving the power, and is thus not entitled to insist on the upgrades which it has demanded.

Finally, PGE discriminates against the Blue Marmots by refusing to accept their output at the PACW.PGE point of delivery, while acknowledging the rights of other similarly-situated QFs to do so.

## II. JURISDICTIONAL ISSUES

The Blue Marmots continue to take the position that the Commission does not have the jurisdiction to address certain of PGE's arguments regarding transmission issues in this case, and previously filed a motion to stay this case pending FERC's issuance of a declaratory order. These issues over which the Commission does not have jurisdiction include PGE's assertions that the Blue Marmots have not obtained the proper transmission to deliver their power to PGE, PGE's argument that the Blue Marmots can be made to pay for transmission system upgrades at the PACW.PGE interface, and what the cost of such upgrades, if required, would be.

In denying the Blue Marmots' separate motions to strike and stay the case, pending a FERC determination of these issues, Administrative Law Judge Arlow did not address the merits

of the Blue Marmots' motion, but denied the motion because it was "premature." Judge Arlow denied the motion for stay so that the Commission "will have before it a complete record which it may then choose to act upon or hold in abeyance as the Commissioners decide the circumstances require."[4] Therefore, the Blue Marmots understand that the Commission will, after reviewing the record in this case, decide whether it has jurisdiction over the transmission issues and whether it will stay the proceeding pending a declaratory order by FERC.

The Blue Marmots will not repeat all of their jurisdictional arguments herein, but instead primarily incorporate by reference the factual and legal arguments raised in their previously-filed motion to strike, request for certification, motion to stay, and pre-hearing brief.

In summary, the Commission does not have jurisdiction over the following issues:

- The reasonableness and feasibility of a QF's transmission arrangements that FERC has found reasonable and sufficient for QF power deliveries under PURPA. This means that the Commission cannot deny the Blue Marmots' right to sell PGE power under PURPA based on PGE's claims that the Blue Marmots' purchase of point-to-point transmission across PacifiCorp's system is somehow insufficient to reach PGE's system.

- The sufficiency, use of, and the calculation of available transfer capability, or whether a utility has accurately performed a system impact study associated with a transmission service request. This means that the Commission cannot deny the Blue Marmots' the right to sell power to PGE at the PACW.PGE interface based on PGE's system impact study, and that, if PGE wants the Blue Marmots to pay for costs associated with upgrades identified in PGE's transmission study, then PGE should raise those issues with FERC.

- The connection or interface between the PacifiCorp and PGE transmission systems. The Blue Marmots' interconnection is with PacifiCorp, and the Commission only has jurisdiction over interconnections between the purchasing utility and a QF that is directly interconnected to the purchasing utility.

- PGE's use of transmission facilities in connection with its participation in the EIM. This means that the Commission cannot conclude that PGE's

[4] Ruling at 3 (Dec. 3, 2018).

participation in the EIM supersedes or in any way prevents the Blue Marmots from selling their net output to PGE.

For purposes of resolving this case, the relevant factual issues within the Commission's jurisdiction that it must determine are whether: 1) the Blue Marmots have purchased FERC-jurisdictional transmission service from a transmission provider (here, PacifiCorp) that will deliver the power to the point of ownership change between PacifiCorp and PGE's system; 2) the Blue Marmots and PGE have formed a legally enforceable obligation to sell and purchase power; and 3) PGE has refused to comply with its obligations under PURPA to accept or otherwise manage the Blue Marmots' net output by failing to execute or otherwise honor the PPAs provided to the Blue Marmots by PGE for execution, and which were signed by the Blue Marmots.

The Blue Marmots' jurisdictional arguments are fully articulated in the Blue Marmots' Motion to Stay and Reply to PGE's Response to the Motion to Stay, as well as: 1) the Blue Marmots' Motion to Strike at 10-13 (field preemption summary), 14-15 (conflict preemption summary), and 19-21 (discussion of relevant FERC cases); 2) the Blue Marmots' Reply to PGE's Response to Blue Marmots' Motion to Strike at 6-12, 24-33 (limited Commission jurisdiction), 12-17, 22-24 (interconnection jurisdiction), and 18-22 (jurisdiction over the cost responsibility for managing QF power); and 3) Blue Marmots' Request for Certification at 1-5. The most relevant Commission case to review on the question of jurisdiction is its orders in *PaTu Wind Farm*, in which it concluded under remarkably similar circumstances that it did not have jurisdiction over what transmission arrangements Schedule 201 required.[5]

[5] *PáTu Wind Farm v. PGE*, Docket No. UM 1566, Order No. 14-287 (Aug. 13, 2014); *PáTu Wind Farm v. PGE*, Docket No. UM 1566, Order No. 12-316 (Aug. 21, 2012).

## III. ARGUMENT

### A. PGE Is Bound by Law, and this Commission's Orders, to Purchase the Blue Marmots' Output

Under PURPA, and Oregon statute and the Commission's rules implementing it, qualifying facilities 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. PURPA imposes an obligation on utilities to purchase "any energy and capacity which is made available from a qualifying facility" either directly, or indirectly by transmitting the power to a purchasing utility.[6]

The laws and rules establishing PURPA serve the important role of "encourage[ing] resource competition and the development of cogeneration and renewable energy technologies by non-utility power producers."[7] Although PURPA is a federal law, it relies, in certain respects, upon state regulatory commissions to implement it. FERC adopts regulations and policies governing utility purchases from QFs under PURPA,[8] and state regulatory agencies are required to implement them.[9]

As described above, each of the Blue Marmots are qualifying facilities, and each has agreed to sell power to PGE at its avoided cost rates. And each has gone through a negotiation

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6 18 CFR 292.303(a) (2018).

7 *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).

8 18 CFR 292.101-292.602; *FLS Energy Inc*., 157 FERC ¶ 61,211 at PP 23-25 (2016).

9 *See* 16 USC 824a-3(f); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 751 (1982). The Commission has the authority to establish, by rule, the terms and conditions for the purchase of energy, or energy and capacity, by a public utility from a QF. *See* ORS 758.535(2)(a). However, the Commission's policies and decisions are subject to review by FERC.

and contracting process with PGE, and ultimately executed a PPA with PGE, which spells out the terms and conditions each party is required to satisfy.[10]

### 1. The Commission Has Determined that a Legally Enforceable Obligation Comes About When a Qualifying Facility Executes a PPA Provided by a Utility to a Qualifying Facility for Execution

Whether and when a "legally enforceable obligation" (or "LEO") to sell and purchase power between a utility and a qualifying facility comes about is a topic that can generally be subject to dispute and contention. This Commission, therefore, determined the rules and policies that would apply to this question in Docket No. UM 1610, asking specifically, "When is there a legally enforceable obligation (LEO)?"[11]

After considering various positions of the parties, and the relevant policy and legal factors, the Commission found:

> A LEO will be considered 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. A LEO may be established earlier if a QF demonstrates delay or obstruction of progress towards a final draft of an executable contract, such as a failure by a utility to provide a QF with required information or documents on a timely basis. Through the complaint process, the Commission will resolve a dispute and determine the avoided cost price to apply on a case-by-case basis.[12]

Thus, under the Commission's order, a legally enforceable obligation to sell and purchase power between a qualifying facility and a public utility comes about no later than when a utility provides an executable PPA to a qualifying facility, and that facility signs the PPA and obligates itself to provide power or be subject to penalty for failing to deliver energy.[13]

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10 More detail regarding the Blue Marmots' contracting process is provided in the Blue Marmots' Prehearing Brief.

11 *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).

12 *Id.* (emphasis added).

13 *Id*. at 27.

The Commission's determination was made after multiple rounds of testimony and briefing by several parties, including PGE. As recounted in Order No. 16-174 from that docket, PGE advocated that a LEO should come about at the time when the utility is able to provide an executable contract: "PGE notes that the terms and conditions of a QF's commitment are not sufficiently known and clear until the utility provides a final executable draft PPA."[14] In other words, PGE argued that a LEO should come about once the terms of the delivery, and the nature of the qualifying facility's projects are clear, and the utility has offered an executable contract.

In its briefing in the UM 1610 docket, PGE explained further the logic behind its position, arguing that the provision of an executable contract by the utility marks the time by which the utility will have worked through the "commercial, safety, and resource planning" issues associated with the qualifying facility, and that by this time the utility is able to complete its "due diligence" regarding the project.[15] The Commission agreed in part with this position, noting also that a legally enforceable obligation can arise earlier, if the utility delays or obstructs the process.[16]

The Commission's determination of when a legally enforceable obligation arises comports with several cases at FERC and in the court system that have determined that it is *not* appropriate to require that a utility must *execute* a contract before a purchase and sale obligation

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14 *Id*. at 25.

15 *In Re Public Utility Commission of Oregon Investigation into Qualifying Facility Contracting and Pricing*, 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).

16 Docket No. UM 1610, Order No. 16-174 at 3.

is found to exist. In fact, the Commission recognized that its prior practice of requiring an agreement in writing between the utility and the qualifying facility was inconsistent with FERC's rules. Those rules provide each qualifying facility with the right to unilaterally create a legally enforceable obligation to sell its energy and capacity to a regulated public utility at avoided cost rates in effect on the date that the facility obligates itself to do so.[17] And, Oregon courts have also recognized that the "obligation to purchase power [under PURPA] is imposed by law on a utility; it is not voluntarily assumed [by the utility]."[18]

The Commission administers its oversight of the creation of legally enforceable obligations, in part, by requiring that the regulated utilities develop "standard contracts" for a defined class of qualifying facilities, whose output is under certain thresholds.[19] This group includes the Blue Marmots. The Commission uses the standard contract approach to establish "a standard set of rates, terms and conditions that govern a utility's purchase of electrical power from QFs at avoided cost."[20] The Commission also adopted a standard contracting process for entering into these standard contracts.[21] And as described above, under that process, a legally enforceable obligation is established no later than "once a QF signs the final draft of an executable contract provided by a utility to commit itself to sell power to the utility."[22]

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17 *Id*. at 27; 18 CFR 292.304(d)(2)(ii).
18 *Snow Mountain Pine Co. v. Maudlin*, 84 Or App 590, 599 (1987).
19 Docket No. UM 1129, Order No. 05-584 at 12.
20 *Id.*
21 Docket No. UM 1610, Order No. 16-174 at 24.
22 *Id.* at 3.

### 2. The Blue Marmot Projects Were Eligible for Standard Contracts, Negotiated and Worked with PGE to Fill Out All Required Terms, Received Executable PPAs from PGE, and Executed Them

There is no contention in this case that the Blue Marmots were somehow not eligible for standard contracts, or that they somehow failed to provide all information required by PGE or the Commission's process.[23] In fact, the Blue Marmots worked directly with PGE beginning in 2016,[24] and all projects (except one) received executable contracts from PGE that contained filled out exhibits and information regarding how their power deliveries would occur. Moreover, the last project, which was not provided an executable PPA by PGE despite requesting one, provided a similar executed PPA to PGE after PGE refused to honor the other projects' executed PPAs.[25] PGE has also agreed to honor the avoided cost prices provided to the fifth project, effectively admitting that this project formed a legally enforceable obligation.[26]

Under the Commission's rules, therefore, the Blue Marmots have all taken the necessary steps to create a legally enforceable obligation to sell power to PGE, and for PGE to purchase

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23 *See e.g.*, *Blue Marmot V, LLC v. PGE*, Docket No. UM 1829, Complaint at ¶ 17 ("The January 12, 2017 letter stated that PGE had determined that Blue Marmot V had provided sufficient information to allow PGE to prepare an executable standard PPA."); PGE's Answer at ¶ 17 (May 18, 2017) ("PGE admits the allegations in paragraph 17.").

24 Blue Marmot/200, Talbott/2.

25 All but one project received executable PPAs from PGE. Blue Marmot/200, Talbott/3, 4, 8. By the end of March 2017, all of the Blue Marmot projects that had received executable PPAs had signed them and returned them to PGE without alteration. *Id*. at 4-5. After hearing from PGE that PGE had concerns about executing the PPAs because of prior plans PGE had for use of the interface across which deliveries were to be made, the Blue Marmots expressed their concern with PGE regarding that position and its refusal to provide an executable PPA for the one Blue Marmot project that had not yet received one. *Id.* at 7. After PGE informed the Blue Marmots that it would not sign the executed PPAs, 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. *Id*. at 8.

26 Blue Marmot/200, Talbott/7.

that power. Each of them signed executable PPAs, provided by PGE after negotiations and the normal process used to fill out the required details.

### B. PGE Has Not Offered A Valid Reason for Its Refusal to Accept Power Under the Blue Marmots' Legally Enforceable Obligations and the Executable PPAs PGE Provided to Them

Despite the fact that the Blue Marmots and PGE have formed legally enforceable obligations under the Commission's rules, PGE makes several claims about why it should not be required to purchase power from the Blue Marmots projects under the terms of the PPA. Specifically, PGE seeks to avoid an obligation to purchase the Blue Marmots' power at the PACW.PGE interface because it has plans to use the entirety of the transmission capability at that interface for participation in the voluntary EIM. PGE refuses to abide by the PPA because it represents a commitment by PGE to accept deliveries at that interface. None of PGE's arguments for why it should be excused from purchasing the Blue Marmots' power as represented in the PPAs constitute a valid reason under law, or policy.

### C. PGE Personnel Have A Clearly Mistaken Understanding of the Commission's Rules Regarding Purchases Under PURPA

As described above, the Commission has determined that a legally enforceable obligation arises when the qualifying facility executes an executable contract, and the qualifying facility commits and legally obligates itself to provide power under the terms and conditions of the contract, or suffer penalties for failure to perform. In the Blue Marmots' case, PGE provided executable contracts, and even went so far as to include a cover letter for each contract that expressly stated that "[i]f Seller executes the enclosed agreement without alteration and returns the partially executed agreement to PGE for full execution, Seller will have established a legally

enforceable obligation."[27] Additionally, the cover letter for each executable PPA states that its individual terms are important, clarifying that "[i]f Seller seeks any changes, you will need to send PGE a written request for a new agreement."[28] Thus, both the Commission's rules, and the express terms used by PGE in transmitting the executable contracts establish that if the Blue Marmots signed the PPAs, they were committing to sell their power, and their actions created a binding arrangement between PGE and the Blue Marmots.

In this proceeding, PGE now takes a novel position, or more importantly, an incorrect position as to the significance of the Blue Marmots' commitment to the executable PPAs provided to them by PGE. Brett Greene, PGE's Director of Structuring, Origination and Strategic Analytics, who oversaw the contracts with the Blue Marmots, clarified PGE's view about the contracting process at the hearing.

Mr. Greene's statements expose the genesis of PGE's dispute with the Blue Marmots:

> Q. Is the QF obligating itself to anything when it signs that executable PPA?
>
> A. Absolutely not. With any contract, whether it be a Schedule 201 or bilateral contract, until it is fully executed by both parties that is a nonbinding contract.[29]

In other words, PGE's view in this case is that unless and until it counter-signs the Blue Marmots' PPAs, neither party undertook any obligation to deliver or purchase power under the terms of the PPA. PGE's witness confirmed the view by further elaborating:

> Q. Okay. So it's not PGE's view that the QF is obligating itself to meet a number of requirements like the minimum and maximum deliveries or COD and if they don't meet those requirements be subject to penalty?
>
> A. That is correct. Not until the contract is executed by both parties.[30]

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27 Blue Marmot/200, Talbott/5; Blue Marmot/201, Talbott/4.
28 *See, e.g.,* Blue Marmot/201, Talbott/3.
29 Hearing Transcript at 137 (Greene) (Dec. 12, 2018).
30 *Id.* at 137-138 (Greene).

This statement is extremely helpful because it reveals PGE's theory of this case. Specifically, PGE believes that because it did not counter-sign the PPAs it provided to the Blue Marmots, and which they executed, PGE is free to negotiate with, or dictate to the Blue Marmots new terms related to the delivery of the power. PGE's position extends to situations like this case where PGE's new terms differ from the PPA and go beyond the negotiations and standard contracting processes administered by PGE and the Commission.

PGE's view is obviously contrary to PURPA, and both FERC's and the Commission's rules, policies and administration of the statute. As described above, a legally enforceable obligation is broader than simply a contract between an electric utility and a QF, and may exist even without a contract.[31] Rather than being triggered by PGE's signature on the Blue Marmots' PPAs, the establishment of a legally enforceable obligation turns on the Blue Marmots' commitment to sell their net output to PGE,[32] and this rule applies even though PGE has refused to enter into a contract.[33]

It is well-established that the "obligation" that arises under a "legally enforceable obligation" for a sale under PURPA is a genuine and binding (even if non-contractual) obligation. In *Snow Mt. Pine Co. v. Mauldin*, the Court of Appeals explained:

> The 'obligation' referred to for this purpose is the *qualifying facility's* obligation to *provide* energy. That conclusion is supported by the fact that OAR 860-29-010 defines the 'time the obligation is incurred' as the date on which a binding obligation first exists to *deliver* energy. Thus, the regulations and administrative rules contemplate that a qualifying facility's

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31 *FLS Energy*, 157 FERC ¶ 61,211 at PP. 24, 26; *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P. 38 (2013).

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

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.

> self-imposed obligation to *deliver energy* triggers a utility's obligation to *purchase energy*.[34]

Although the Commission's administrative rules have been slightly modified since *Snow Mountain*, they continue to articulate that a legally enforceable obligation gives rise to a two-way commitment—an obligation for a qualifying facility to provide power, and the utility's obligation to purchase it.[35] Additionally, the Commission's recent order in UM 1610 confirmed its view that when a qualifying facility signs a final draft of an executable contract, it does so "to commit itself to sell power to the utility."[36]

By finding that PGE's understanding of what it takes to establish a legally enforceable obligation under PURPA, and what it signifies, is erroneous, the Commission can dispose of this case entirely. This is because all of PGE's reasons for asserting that it is excused from purchasing power from the Blue Marmots under the terms of the PPA (which reasons are addressed in more detail in the remainder of this brief) are founded upon PGE's erroneous view that the Blue Marmots' execution of the contract provided by PGE does not have any binding effect.

### D. Contrary to PGE's View, a Legally Enforceable Obligation Applies to the Terms of the PPA Regarding Delivery of the Power

PGE's position in this case with respect to the significance of a legally enforceable obligation is difficult to ascertain. On one hand, as described above, the PGE personnel administering its QF contracts assert that the purchase and sale obligations in the PPAs are not

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34 *Snow Mountain*, 84 Or App at 599 (emphases in original).

35 OAR 860-029-0010(37) provides that "'[t]ime the *obligation to purchase* the energy capacity or energy and capacity is incurred' means the earlier of: (a) The date on which a binding, written obligation is entered into between a qualifying facility and a public utility to *deliver* energy, capacity, or energy and capacity; or (b) The date determined by the Commission." (emphasis added).

36 Docket No. UM 1610, Order No. 16-174 at 3.

binding on either party until executed by both of them. On the other hand, in its Prehearing Brief, PGE tries to parse the law in a novel and new way, that would allow it to simultaneously hold the views that: 1) the Blue Marmots and PGE have a legally enforceable obligation to sell and purchase power that arose from the Blue Marmots' execution of the PPAs; and 2) none of the terms associated with that PPA, other than price, have been established or are binding.[37] From its Prehearing Brief and the testimony in this case, it is clear that PGE's advocacy for separating the terms of the PPA from its legally enforceable obligation is motivated by its desire to distance itself from the terms of the PPA regarding delivery of the power, which allow for the Blue Marmots to deliver their output to the PACW.PGE interface. On this topic, PGE seems to assert in its Prehearing Brief that the Blue Marmots are *bound* to sell power to PGE for a specific price because they have entered into a self-imposed obligation to sell the power by executing the PPAs, but that PGE is *not bound* to purchase the power under the terms of the PPA, unless the Blue Marmots incur significant additional costs to deliver the power, beyond those that are contained in the PPA that PGE provided to the Blue Marmots for execution.[38]

This construction of the law, which seeks to separate the PPA itself from the legally enforceable obligation is not sound, for many reasons.

### 1. PGE's Attempt to Separate the Terms of the PPA from the Legally Enforceable Obligation is Contrary to Law and the Commission's Precedent

PGE's view cannot be reconciled with the Commission's and FERC's Orders regarding when a legally enforceable obligation arises. First, in Order No. 16-174, the Commission

37 PGE Prehearing Brief at 39 (Nov.30, 2018).
38 PGE Prehearing Brief at 4.

expressly found that the terms of the PPA are tied with the legally enforceable obligation that comes about from signing the PPA. The Commission explained:

> We concur with Staff and the other parties that our existing LEO rule is inconsistent with FERC precedent and should be modified. We agree that there is no LEO until a utility and a QF have undertaken the contracting process, and negotiations have progressed beyond initial contact by a QF. We adopt Staff's proposal that a LEO exist when a QF signs a final draft of an executable standard contract *that includes a scheduled commercial on-line date and information regarding the QF's minimum and maximum annual deliveries, thereby obligating itself to provide power or be subject to penalty for failing to deliver energy on the scheduled commercial on-line date*.[39]

In light of the Commission's finding that a QF's agreement to *the terms of the PPA* create a legally enforceable obligation, and FERC's precedent confirming the same, PGE's position that the terms of the PPA have nothing to do with the legally enforceable obligation is baseless.

Second, PGE's view that the terms of the PPA are not included as part of the legally enforceable obligation is also contrary to the Commission's administration of PURPA through standard contracts. The Commission has explained its standard contract approach:

> The term, 'standard contract,' has been widely used by parties since passage of the federal PURPA law. The term is used to describe a standard set of *rates, terms and conditions* that govern a utility's purchase of electrical power from QFs at avoided cost.[40]

The Commission also elaborated further, clarifying that:

> [S]tandard contract rates, terms and conditions are intended to be used as a means to remove transaction costs associated with QF contract negotiation, when such costs act as a market barrier to QF development. Standard contracts are designed to *eliminate negotiations* . . . .[41]

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39 Docket No. UM 1610, Order No. 16-174 at 27 (emphasis added).

40 *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 12 (May 13, 2005) (emphasis added).

41 *Id.* at 16 (emphasis added).

In administering a standard contract approach to power purchases from small qualifying facilities, therefore, the Commission intended for the *terms* in the standard PPAs to be enforceable by a qualifying facility. And, PGE's view stands on its head the purpose of the standard contract approach by arguing that a legally enforceable obligation is not associated with the terms of the PPA, through which it was formed, and which the Commission intended to be a binding *substitute* for having to negotiate every term.

Third, the Court of Appeals, this Commission, and FERC have all found that under PURPA, a legally enforceable obligation represents an obligation by a qualifying facility to *sell* power, and that triggers a utility's corresponding obligation to *purchase* power.[42] Both of PGE's positions (that there is nothing binding between the parties until PGE counter-signs the agreement[43] or that PGE is able to add costs to the transaction before agreeing to purchase the power[44]) are inconsistent with the concept of a two-way obligation having been imposed. In contrast to a two-way obligation, PGE's position would result in a one-way obligation for the qualifying facility to sell the power, but PGE would be free to walk away from any obligation by asserting that some newly imposed condition could not be met.

Notably, PGE's view in this case that the terms of the PPA are not implicated in a legally enforceable obligation that arises from executing the PPA are contrary to PGE's own prior position. In UM 1610, when the Commission took up the question of when a legally enforceable obligation arises, PGE was a proponent, at least in part, of the rule adopted by the Commission. PGE argued expressly that a legally enforceable obligation should not be found to exist until the

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42 *See* Supra Section A.1.

43 Hearing Transcript at 137 (Greene) (Dec. 12, 2018).

44 PGE Prehearing Brief at 4.

terms of the power sale were clear, through the development of an executable PPA. PGE argued, for example:

> The contents and information required for a final executable draft contract should be the basis for determining that an unequivocal commitment by the QF has been made sufficient to establish a [legally enforceable obligation]. These required information and terms are readily set forth in PGE's Schedules 201, 202 and Commission-approved contracts, and are established through deadlines prescribed in the schedules. Using this approach, QFs would have an objective standard by which to achieve a LEO, short of execution of a contract.[45]

By that time, the utility has had a chance to complete its due diligence, and to determine, through the PPA process, the necessary facts that would allow it to do resource planning. PGE argued:

> 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.[46]

PGE thus specifically argued to the Commission that the terms of the PPA were not only *relevant* to the formation of a legally enforceable obligation—they were *necessary*. PGE's position now, that the terms of the PPA are not implicated in the formation of a legally enforceable obligation, is wildly different from its view on the Commission's rules when it was advocating for them.

At the very least, PGE's prior statements show that its current construction of the law is unreasonable and inconsistent with the Commission's findings. More appropriately, PGE's statements show that it should be precluded from asserting in this case that the Blue Marmots are not entitled to rely on the terms of the PPA. Courts and agencies are entitled to preclude

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45 Docket No. UM 1610, PGE/700, Macfarlane-Morton/11.

46 Docket No. UM 1610, PGE Prehearing Brief at 10 (internal citations omitted).

inconsistent assertions, under the doctrine of judicial estoppel, and the Commission should apply that doctrine here to resolve this complaint in the Blue Marmots' favor.[47]

### 2. PGE's View That the Terms of the PPA Are Not Connected with a Legally Enforceable Obligation Would Result in an Unworkable Approach to PURPA

In addition to being unlawful, and contrary to the Commission's and FERC's orders, PGE's view would result in a wholly unworkable construct for implementing PURPA. PGE's view ignores the fact that under the PPAs that they sign, qualifying facilities are *required* to take concrete actions, including meeting specific milestones and deliverability. And, to the extent the qualifying facility does not deliver, it is subject to paying damages to the public utility.[48] In the Blue Marmots' case, they are specifically required to secure transmission services to ensure deliverability of the power from the project.[49]

As Steve Irvin, Executive Vice President with EDP Renewables North America, testified at hearing, the Blue Marmots took very seriously their duties under the PPA upon signing it,

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47 *Jones v. Randle*, 278 Or App 39, 41 (2016). ("Judicial estoppel is a common law equitable doctrine that applies to prevent a litigant who has benefitted from a position taken in an earlier judicial proceeding from taking an inconsistent position in a later proceeding."). The Supreme Court has set out a three-pronged test for judicial estoppel: "benefit in the earlier proceeding [to the party to be estopped], different judicial proceedings, and inconsistent positions." *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 611 (1995). In this case, PGE presented its prior inconsistent in urging the Commission to adopt a position that it ultimately adopted at least in part, and now asserts a different position in the Blue Marmots' case, thus meeting the Supreme Court's criteria.

48 *See* Blue Marmot/202, Talbott/8 (example of executed Blue Marmot PPA, showing requirement to pay Lost Energy Value under section 3.1.10.4).

49 *See* Blue Marmot/202, Talbott/2 (example of executed Blue Marmot PPA, giving rights to PGE to require copy of executed Generation Interconnection and Transmission Agreements under section 1.5.6). *See also* Blue Marmots/201, Talbott/48 (PGE's Schedule 201, showing that a qualifying facility located outside of the Company's service territory is responsible for the transmission of power at its cost to PGE's service territory).

especially in light of PGE's own representations (consistent with this Commission's orders) that its signature created a legally enforceable obligation to deliver the power. Mr. Irvin testified:

> [W]e received that contract with the letter that said once we countersign this that we have a legally enforceable obligation to the contract that you had referenced earlier, that included terms that established requirements for the commercial operation date, . . . that we had to procure transmission from PacifiCorp . . . . So when I have a contract in front of me that I'm representing to my company to sign -- to sign, that has requirements that fill COD, which include getting transmission, you know, for the project -- which we had been pursuing . . . if I'm not able to get that [PacifiCorp] transmission, I could be in default under the agreement that you referenced earlier and be liable to PGE for damages. So we took that very seriously that, once we signed it, we had a legally enforceable obligation to uphold.[50]

In light of that obligation, and according to the requirements of the PPA, the Blue Marmots secured transmission service across PacifiCorp's transmission system.[51] And, under the agreements to secure that transmission, the Blue Marmots incurred certain costs related to required studies, and also could be liable for up to $8 million, depending on certain factors.[52]

PGE's apathetic approach to the formation of a legally enforceable obligation ignores these business realities that a qualifying facility faces upon signing an agreement that creates a legal obligation. Under PGE's view, a contracting qualifying facility, such as the Blue Marmots, would be expected to affirmatively commit to deliver power, and sign a document that imposes significant liabilities and obligations on them, yet PGE would be making no commitments at all.

PGE's proposed construct would also put QFs in a position of being completely unable to rationally approach the development of projects. Blue Marmot witnesses Steve

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50 Hearing Transcript at 15-16 (Irvin) (Dec. 12, 2018).
51 *Id*. at 38 (Irvin).
52 *Id*. at 39-40 (Irvin).

Irvin, Executive Vice President and William Talbott, Development Project Manager with EDPR NA, explained 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."[53] Mr. Irvin explained that, under PGE's proposed construct, a qualifying facility would have to commit to deliver power, but accept the risk that the utility counter-party would subsequently require additional costs that were unknown at the time of the qualifying facility's commitment. In the case of PGE and the Blue Marmots, PGE's requirements could even result in "negative rates"—i.e. the Blue Marmots incurring more costs to deliver the power than they would be compensated for through the avoided cost rates in the contract.[54]

Finally, PGE's view that a legally enforceable obligation has no binding effect, or that it accommodates PGE subsequently demanding items in contradiction to the PPA, would unjustifiably shift the risk of utility's negligence, or lack of due diligence to qualifying facilities. For example, a utility could inattentively interact with a qualifying facility throughout the entire contracting process, with little regard for the investment and due diligence being brought to bear by the qualifying facility, send the qualifying facility an executable PPA, and determine that it will only then do its own due diligence if the qualifying facility actually executes the PPA.

This risk is not only hypothetical, but played out in the case of the Blue Marmots. PGE clearly understood the location of the Blue Marmots projects, that they were in PacifiCorp's service territory,[55] that the Transmission Services procured by the Blue Marmots was across

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53 Blue Marmot/500, Irvin-Talbott/2.
54 Hearing Transcript at 19 (Irvin) (Dec. 12, 2018).
55 *Id*. at 78 (Greene).

PacifiCorp's system and not BPA's system,[56] and that the only point at which the power could be delivered from PacifiCorp was at the PACW.PGE interface.[57] The Blue Marmots exercised careful due diligence, even requesting additional clarifications from PGE about projects being delivered from the PacifiCorp service territory.[58] PGE refused to discuss this and other questions that the Blue Marmots had.[59] The Blue Marmots' witnesses also testified 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.[60] 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.[61]

After all this, including PGE providing an executable PPA to the Blue Marmots that specified that they are to purchase transmission across PacifiCorp's system, and receiving executed versions of those PPAs from the Blue Marmots, only then PGE did determine that, according to its view, it could not receive the power at the interface with PacifiCorp's system.[62] Although it is incorrect that PGE cannot receive the power at that interface, as addressed further

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56 *See* Blue Marmot/202, Talbott/39 (Executable PPA sent by PGE, showing that the sole Transmission Service required under the PPA was with PacifiCorp).

57 *See* Hearing Transcript at 241-42, 316 (Moore-Rodehorst) (Dec. 13, 2018) (explaining that there is only one interconnection across which energy can be delivered by a project to PGE from PacifiCorp's service territory).

58 Hearing Transcript at 78-79 (Greene) (Dec. 12, 2018); Blue Marmot/200, Talbott/9.

59 *Id.* at 80-82 (Greene).

60 Blue Marmot/500, Irvin-Talbott/9.

61 *Id.*

62 *See* Hearing Transcript at 144 (Greene) (Dec. 12, 2018) (PGE's counsel stating that "the [Schedule] 201 that was in place at the operative time for the Blue Marmots was in place prior to PGE even understanding that they had the constraint at the PACW-PGE interface."). *See also id.* ("Q . . . .Was your team, PGE's QF contracting team, aware of the constraint at the PACW.PGE interface at the time that you sent the final executable agreements to the Blue Marmots? A. No.").

below, PGE's actions show that its view of the legally enforceable obligation not applying to the terms of the PPA leads to an absurd result—a license for the utility to conduct its own due diligence only after the entire contracting process, and a unilateral right to erect barriers to performing under the PPA after a legally enforceable obligation has been deemed to exist. Such an approach is contrary to PGE's assertions to the Commission that a legally enforceable obligation should come about only after an executable contract is provided to a QF in order to allow a utility enough time to do its own resource planning and due diligence.[63]

### E. PGE Had Knowledge, and Agreed That the Power from the Blue Marmots Projects Would Be Delivered at the PACW.PGE Interface

In response to the above demonstration of why the terms of the PPA are tied with a legally enforceable obligation, PGE is likely to assert that the PPAs do not establish the point of delivery as the PACW.PGE interface, or to claim that it was unaware during the contracting process that the PACW.PGE interface was the intended point of delivery for the Blue Marmots' output. The Commission should disregard any such assertions for the reasons below.

As referenced earlier in this brief, there is only one point of delivery that can be used to provide power to PGE from PacifiCorp's service territory—the PACW.PGE interface.[64] And, PGE clearly understood the location of the Blue Marmots projects, and that their output would have to be delivered at that interface.[65] In light of these facts, PGE cannot deny that it was clear throughout the contracting process that the PACW.PGE interface was the point at which the Blue Marmots' power would be delivered.

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63 Docket No. UM 1610, PGE Prehearing Brief at 10.

64 *See* Hearing Transcript at 241-42, 316 (Dec. 13, 2018) (explaining that there is only one interconnection across which energy can be delivered by a project to PGE from PacifiCorp's service territory).

65 *See* above section, and cites demonstrating PGE's knowledge of the location and delivery path for the Blue Marmots projects.

It is also important to recognize that the PPA itself, delivered by PGE to the Blue Marmots for execution, specifies exactly what transmission arrangements were necessary to effectuate the delivery of power to PGE's system. Each of the PPAs includes an "Exhibit B" that lists "Required Facility Documents." As PGE acknowledges, PGE requires qualifying facilities to include in Exhibit B of the PPA *all* agreements required to effectuate the sale contemplated in the PPA.[66] And, in the case of the Blue Marmots' PPAs, this includes "Transmission Service Agreement with PacifiCorp", but no other transmission arrangements, such as transmission over BPA's system.[67]

Finally, PGE's refusal to counter-sign the PPAs belies PGE's position that it is unclear under the PPA where the power deliveries were to occur. If PGE legitimately believed that the PPAs prevented the Blue Marmots from delivering at PACW.PGE, then it could have counter-signed them without objection and relied upon those terms to refuse to accept delivery.

For all of these reasons, the Commission should disregard any assertion by PGE that it was unaware of the intended location for delivery of the Blue Marmots' output, or any assertion that PGE did not agree to that location during the contracting process.

### F. PGE's Arguments That Receipt of the Blue Marmots' Power at the PACW.PGE Interface Is Unfeasible Do Not Overcome Its Legal Obligations Under PURPA, and Do Not Withstand Scrutiny in Any Event

PGE's position is that it is excused from purchasing the Blue Marmots' power at the PACW.PGE interface because receiving power at that point is not feasible, or is too costly.

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

67 *Id*. at 88-89. Moreover, PGE admits that it never, during the contracting process, mentioned any requirement or inclination that transmission over BPA's system would be necessary. *Id.* at 107.

PGE is not entitled under PURPA to make its purchases of power from a qualifying facility subject to its own preference of where the power should be delivered. PURPA's obligations require that the utility purchase power from a qualifying facility that provides its power to the utility, at which point the power becomes the utility's, and it is responsible for managing the power as it does its other resources. PGE's inability, under law, to insist on preconditions to receiving the Blue Marmots' power or that the Blue Marmots move their power to a point of PGE's choosing is addressed first below. Following that analysis, this brief demonstrates why PGE's claim that it is unfeasible to receive the Blue Marmots power at the PACW.PGE interface is incorrect.

### 1. PGE Cannot Make its Obligation to Purchase Power from Qualifying Facilities Subject to Its Preference for the Delivery Point, and Cannot Require a Qualifying Facility to Pay for System Upgrades as a Condition to Receiving the Power

Under PURPA, a qualifying facility's responsibility is to deliver its power to the utility to whom it is offering to sell the power.[68] Beyond this point, it is the purchasing utility's responsibility to make the necessary arrangements to deliver that power to its load, or otherwise manage the power. Thus, a utility is not entitled to place other conditions on its purchase obligation, or to condition a qualifying facility's sale of power to it on actions other than providing for delivery to the utility's system.

Several FERC orders establish the straightforward nature of the utility's obligation, and demonstrate that utility conditions placed on its purchase obligation, such as those demanded by PGE, are not lawful. Those cases are discussed below.

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[68] 18 CFR 292.303(a).

In *Entergy Services, Inc*., FERC reviewed a utility's application for tariff provisions that would allow the utility to curtail (and thus not purchase) a qualifying facility's output if the facility failed to schedule the output.[69] FERC reasoned that PURPA provided no exceptions to the utility's obligation to purchase power that would allow such a tariff provision, and thus denied the utility's application.[70] FERC observed that once a qualifying facility's energy was delivered to the utility, "it is [the utility's] responsibility to deliver that energy to its load (or otherwise manage the energy)."[71] FERC went on to say that "general economic reasons" (economic loss) do not support the curtailment of QF power purchases.[72] This case demonstrates that a utility must purchase all power that a qualifying facility makes available to it, and cannot place other conditions on its obligation to do so, even where motivated by the utility's economic justifications.

Similarly, in *Exelon Wind 1, LLC et al.*, FERC concluded that a utility could not require qualifying facilities to fund transmission delivery upgrades to avoid curtailment.[73] In *Southwest Power Pool, Inc.*, FERC also rejected an application as "patently deficient" where a utility had proposed to curtail qualifying facilities in periods of congestion on its system.[74] These cases show that a utility cannot make its purchase obligation conditional on requiring transmission upgrades or a lack of congestion on their system.

In *Kootenai Electric Cooperative, Inc.*, FERC also made important findings that are relevant to PGE in this case, 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."[75] In *Kootenai*, a QF had argued that

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69 *Entergy Services, Inc.*, 137 FERC ¶ 61,199 at P.52 (2011).
70 *Id*. at PP. 53-54.
71 *Id*. at P. 52.
72 *Id*. at P.55.
73 *Exelon Wind 1, LLC, et al.*, 140 FERC ¶ 61,152, at P.50 (2012).
74 *Southwest Power Pool, Inc.*, 136 FERC ¶ 61,097 at P.1 (2011).
75 *Kootenai Electric Cooperative, Inc.*, 143 FERC ¶ 61,232 at P. 33 (2013).

Idaho Power had unlawfully refused to accept its power deliveries at the interface where Avista and Idaho Power's transmission systems connect, which allowed Kootenai to receive Oregon's higher avoided cost rates.[76] The Oregon Commission originally granted summary judgment for Idaho Power and against the QF.[77] The Oregon Commission had first looked to Idaho Power's Schedule 85 (the equivalent of PGE's Schedule 201) that required the QF to deliver their net output to Idaho Power's control area.[78] Reading Schedule 85, the Oregon Commission agreed with Idaho Power's interpretation on the limits of its control area, that the QF's FERC-jurisdictional transmission arrangements were ineffective in delivering the power to Oregon for purposes of the sale, and that the point of delivery for the power remained in Idaho despite Avista's connection to Idaho Power in Idaho.[79]

On review of the Oregon Commission's decision, FERC agreed with the QF and confirmed "[t]he QF has the discretion to choose to sell to a more distant utility (as it has here), and thus where to sell, as long as the QF can deliver its power to the utility."[80] FERC recognized that connections between utilities can take different forms, and "it is not uncommon for a [point of delivery or point of receipt] to represent multiple facilities or capacity between multiple transmission service providers, not just a single control area interface."[81] And FERC concluded that Avista's point of delivery with Idaho Power had been established by nondiscriminatory access "all the way across Avista's transmission system" and incorporated "the entirety of Avista's transmission assets" on the relevant transmission path, including those in Oregon.[82]

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76 *Id.*
77 *Id.* at P. 5.
78 *Id.*
79 *Id.* at P. 6.
80 *Id.* at P. 33 (citing 18 CFR 292.303(d)).
81 *Id.* at P. 5 (citing *Avista Corp.*, 140 FERC ¶ 61,165 at P. 21 (2012)).
82 *Id.* at P. 30.

Thus, the QF has the right to choose to sell its power "at that specific point – where ownership of the line changes."[83]

FERC also clarified that the point of change in ownership between Avista's and Idaho Power's transmission systems is "the only point at which Avista's transmission system directly connects with Idaho Power's transmission system," and confirmed that Kootenai had reserved capacity to deliver its output to that point.[84] FERC's finding confirmed 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."[85] FERC explained that the QF in *Kootenai* could not be found to have paid for its reservation and point-to-point transmission (and line losses) all the way to Idaho Power (in Oregon) under Avista's OATT only to then be denied the benefit of delivery to that location by terminating the transaction at Avista's substation in Idaho.[86] The Oregon Commission ultimately withdrew its order because it contravened FERC's finding regarding the point of delivery.[87] This case shows that a QF has the right to have a utility purchase its power if it can show delivery of the power to the point where the ownership of the line changes to the purchasing utility, and that a QF has the right to choose where the power is delivered, so long as it purchases transmission to deliver the power to that point.

In *PáTu Wind Farm LLC,* FERC confirmed that when qualifying facilities sell their power to utilities other than those they are directly interconnected with, the qualifying facility's obligation to

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83 *Kootenai Electric Cooperative, Inc.*, 145 FERC ¶ 61,229 at P.15 (2013).
84 *Id*. at P. 14.
85 *Id*. at P. 16.
86 *Id.*
87 *In Re Kootenai Electric Cooperative, Inc. v. Idaho Power,* Docket No. UM 1572, Order No. 14-103 (Jan. 9, 2014).

pay for transmission ends at the POD.[88] Importantly, FERC also reasoned that allowing PGE to impose restrictive scheduling requirements would permit utilities to "routinely escape their PURPA mandatory purchase obligations, and indeed the Standard Contract-imposed purchase obligation, by . . . failing to arrange the necessary transmission service to dispose of its purchase of the QF's entire net output once it has been delivered to the utility."[89] On rehearing, FERC reiterated that as an off-system resource, PáTu's transmission responsibility ends, and PGE's therefore began, at the delivery to PGE's system at the POD.[90] FERC explained:

> 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 . . . .[91]

FERC's decision in *PáTu* shows that it is a utility's obligation to purchase all energy delivered to it, and also to then manage the energy after it is made available to the utility at the edge of its system.

Another case, *Pioneer Wind Park I*, makes these rules clear as well. There FERC held:

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88 *PáTu Wind Farm, LLC*, 150 FERC ¶ 61,032 at P. 54 (2015).

89 *Id*. at P. 53 (emphasis added); *see also Entergy*, 137 FERC ¶ 61,199, at P. 52 (finding that once Entergy purchased QF energy, it was "Entergy's responsibility to deliver that energy to its load (or otherwise manage the energy)."); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004) ("In FERC's view, inefficiencies in the transmission grid and lingering opportunities for transmission owners to discriminate in their own favor remained obstacles to robust competition in the wholesale electricity market.").

90 *PáTu Wind Farm LLC*, 151 FERC ¶ 61,223 at n.102 (2015) (PáTu Rehearing Order)

91 *Id*.

> (1) [T]he QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility; (2) the QF is not required to obtain transmission service, either for itself or on behalf of the purchasing utility, in order to deliver its energy from the point of interconnection with the purchasing utility to the purchasing utility's load; and (3) the purchasing utility cannot curtail the QF's energy as if the QF were taking non-firm transmission service on the purchasing utility's system.[92]

Finally, in *Delta Montrose*, FERC found, and cited other references 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.[93] Instead, FERC was clear that the mandatory purchase obligation supersedes any such contractual provisions.[94] FERC noted that if contractual obligations were permitted to override the obligation to purchase from qualifying facilities, these contractual devices might be used to hinder the development of such facilities.[95] FERC 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.[96]

The above FERC cases establish several important rules that show PGE's conditions are not lawful. 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;

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92 *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215 at P. 38 (2013).

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

94 *Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative*, 83 FERC ¶ 61,224 at 61,998- 99, n.9 (1998) (implicitly amending the obligation in an all requirements contract between a cooperative and its supplying generation and transmission cooperative to accommodate QF sales).

95 FERC Order No. 69, FERC Stats. & Regs. ¶ 30,128 at p. 30,870-71 (1980).

96 *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).

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

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

- 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; 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.

Because PGE has entered into a legally enforceable obligation to purchase the output of the Blue Marmot projects, PGE also has a duty to manage that power beyond the point where it is delivered to PGE. PGE cannot, therefore, require the Blue Marmots to either upgrade its transmission system, purchase additional transmission, or build its own transmission line as a condition to PGE's purchase of the power. As described above, FERC has not authorized such conditions, and has found instead that utilities have a broad, statutorily-required duty to purchase power from qualifying facilities, and to take responsibility for that power at the point where it is made available to the utility. It is illegal for PGE to subject its obligations under PURPA to contractual or other commitments it makes with respect to its transmission system, including limiting its purchases of the Blue Marmots' output to its desire to maximize its participation in the voluntary EIM, especially when those commitments occurred *after* PGE refused to purchase the Blue Marmots net output.

### 2. PGE's Claim that the Blue Marmots Output Cannot Be Received at PACW.PGE Are Incorrect, in Any Event

PGE's claims that the Blue Marmots' power cannot be received at PACW.PGE are incorrect. In asserting that the Blue Marmots' power cannot be delivered at the PACW.PGE interface, PGE's incorrect positions are: 1) that the Blue Marmots have not made sufficient

arrangements to allow PGE to receive the power; 2) that it is not possible to receive the power at the PACW.PGE interface because the point is congested; and 3) that it would be bad policy to force PGE to accept the power at the PACW.PGE interface.

### i. The Blue Marmots Have Made All Necessary Arrangements for Delivery of the Power to PGE

PGE claims that Blue Marmots' arrangements for delivering power to PGE are somehow ineffective, or insufficient to complete the delivery. PGE's witnesses argued that "the Blue Marmots have arranged for transmission to the PACW.PGE POD *on PacifiCorp's system*, but . . . they will not be able to schedule delivery across the interface to the PACW.PGE POR on PGE's system."[97] PGE's efforts at hairsplitting, however, fall apart upon further scrutiny.

Importantly, the executable contract provided to the Blue Marmots contains exact specifications for what is required to deliver the power to PGE. Additionally, PGE's Schedule 201, FERC's rules, PGE's prior legal position, and PacifiCorp's and PGE's Open Access Transmission Tariff also all confirm the same answer—that the Blue Marmots were required to reserve transmission service across PacifiCorp's system to the point of connection to PGE's system.

The PPA specifies that "[s]eller shall sell to PGE the entire Net Output delivered from the Facility at the Point of Delivery."[98] "Point of Delivery" is then defined in the PPA as "the PGE system."[99] Thus, the plain reading of the PPA is that PGE shall purchase the output delivered to the PGE system.

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97 PGE/100, Greene-Moore/18 (emphasis in original).

98 *See* Blue Marmot/202, Talbott/9 (section 4.1 of the executed PPA).

99 *See* Blue Marmot/202, Talbott/4 (defining "Point of Delivery" at section 1.27 of the executed PPA).

PGE's Schedule 201 tariff also specifies that its purpose is to govern power sales "delivered by a Qualifying Facility (QF) *to* the Company . . ."[100] and that PGE will purchase any Energy which is "*made available* from the Seller."[101] For off-system PPAs, Schedule 201 specifies that qualifying facilities must make "the arrangements necessary for transmission of power *to the Company's system*."[102] Schedule 201 also specifies that "[i]f the QF is located outside the Company's service territory, the Seller is responsible for the transmission of power at its cost *to the Company's service territory*."[103] Thus, the plain reading of Schedule 201 is that it covers the purchase of power that is made available to PGE, and for which delivery to PGE's system is provided.

To the extent there is any ambiguity about what it takes to deliver power *from* one Company's system *to another* Company's system, that has been specifically addressed by FERC, and is covered in both PGE's and PacifiCorp's Open Access Transmission Tariffs ("OATTs"), which are consistent with FERC's requirements.

FERC's *pro forma* OATT explains that Point-to-Point Transmission Service "is *for the receipt of capacity and energy at designated Point(s) of Receipt* and the *transfer of such capacity and energy to designated Point(s) of Delivery*."[104] FERC's tariff then defines Point(s) of Receipt and Point(s) of Delivery, and that is also reflected in PGE's and PacifiCorp's OATTs, approved by FERC. For example, PacifiCorp's OATT defines "Point(s) of Delivery" as "Point(s) on the Transmission Provider's Transmission System where capacity and energy transmitted by

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100 *See* Blue Marmot/202, Talbott/221 (PGE's Schedule 201 Tariff) (emphasis added).
101 *See id.* (emphasis added).
102 *See id.* at 223 (emphasis added).
103 *See id.* at 240 (emphasis added).
104 *See* Section II, pmbl. of FERC *Pro Forma* Open Access Transmission Tariff, *available at* https://www.ferc.gov/industries/electric/indus-act/oatt-reform/pro-forma-OATT.pdf?csrt=9251080293897565778 (last accessed Feb. 6, 2019) (emphasis added).

[PacifiCorp] *will be made available* to the Receiving Party."[105] PGE's OATT defines "Point(s) of Receipt" as "[p]oint(s) of interconnection on [PGE's] System where capacity and energy will be made available to [PGE] by the Delivering Party."[106] These provisions, put in context, make clear what it takes to deliver power from PacifiCorp's service territory *to* PGE's service territory. That is done through making power available for receipt by PGE through the use of Point-to-Point transmission service across PacifiCorp's service territory, and designating the (only) point of connection to PGE's system as the Point of Delivery for PacifiCorp, and the Point of Receipt by PGE.

PGE itself, as well as the Commission have also confirmed that this is how it works with respect to the receipt of power from qualifying facilities that are not located on its system. In *PáTu Wind Farm LLC v. Portland General Elec. Co*., PGE explained to FERC that "Portland General's merchant function accepts delivery of PáTu's energy at the *border* of the Portland General transmission system and then *[PGE]* arranges for the necessary transmission service as the transmission customer on the Portland General system."[107] And, this Commission has also

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105 *See* Section 1.37 of PacifiCorp's Open Access Transmission Tariff, *available at* http://www.oasis.oati.com/woa/docs/PPW/PPWdocs/20180701_OATTMASTER.pdf (last accessed Feb. 6, 2019).

106 *See* Section 1.80 of PGE's Open Access Transmission Tariff, *available at* http://www.oasis.oati.com/woa/docs/PGE/PGEdocs/PGE-8_OATT.pdf (last accessed Feb. 6, 2019).

107 *PáTu Wind Farm LLC v. Portland General Elec. Co*., 150 FERC ¶ 61,032 at P. 31 (2015), *reh'g denied, PáTu Wind Farm, LLC v. Portland General Elec. Co.*, 151 FERC ¶ 61,223 (2015) (emphasis added). *See also id*. at P. 54 ("It is Portland General's merchant function's decision, once PáTu's net output is delivered to Portland General's Troutdale substation, to then choose how to subsequently deliver that net output to Portland General's load, whether through the use of dynamic scheduling or some other method. But, regardless of the transmission service that Portland General's merchant function uses to subsequently deliver the net output to Portland General's load, Portland General must take from PáTu its entire net output (all energy less onsite uses and losses) delivered and to do so at avoided cost rates.") (emphasis omitted).

recognized that qualifying facilities are required to get their power to a utility, at which point the remainder of the process of delivering the power to load rests with the utilities. In Order No. 14-058, the Commission noted "a QF cannot be required to obtain transmission to deliver its output from the point of delivery to load."[108]

In summary, as confirmed by the executable PPA that PGE provided to the Blue Marmots, PGE's Schedule 201, FERC's *pro forma* OATT, PGE's and PacifiCorp's OATT, Commission precedent, and PGE's own statements, the Blue Marmots have taken the necessary step (and the only step they could be required to take) in order to deliver power *to* PGE's system, and to make it *available* for purchase by PGE. That step was to provide for transmission service across PacifiCorp's system to the PGE system.[109]

#### ii. PGE Can Easily Accept the Blue Marmots' Power at the PACW.PGE Interface

PGE also claims that it is not feasible to receive the Blue Marmots' net output across the PACW.PGE interface because there is not sufficient Available Transfer Capability to do so.[110] PGE claims that all of the ATC is taken, and therefore the Blue Marmots have no ability to schedule their power to PGE—that the Blue Marmots' power is essentially stuck on the other side of a locked gate from PGE.[111]

PGE presents this issue as if it is a technical fact, when in reality, that is not the case. As Blue Marmots' witness Keegan Moyer explained, PGE's position essentially amounts to an argument that because PGE has made the discretionary decision not to accept the power

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108 Docket No. UM 1610, Order No. 14-058 at 22.
109 Hearing Transcript at 38 (Irvin) (Dec. 12, 2018).
110 PGE Prehearing Brief at 16.
111 *See* PGE/300, Afranji-Larson-Richard/15 (setting forth PGE's position that the pathway is constrained and that this prevents the power from being available for receipt by PGE).

delivered to the edge of its system, then the Blue Marmots have failed to provide for an adequate delivery of the power.[112] In short, the only reason the gate is locked is because PGE holds the key to the gate and has locked it.

### a. PGE's Merchant Function Has All It Needs to Receive the Power at PACW.PGE

Important to understanding PGE's position is the fact that when off-system qualifying facilities deliver their power to a utility, they do *not* make transmission reservations on the system of the utility to which they are selling the power.[113] Rather, they are required to deliver their power to the edge or border of the utility's system, as explained by PGE to FERC in the *PáTu* case.[114] From there, it is the responsibility of the utility's Merchant function, which manages the utility's generation resources, to arrange for the necessary transmission service from the utility's Transmission function[115] as the transmission customer on the utility's system.[116]

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112 *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.").

113 *Id.*

114 *Id*.

115 PGE's business operations are, pursuant to FERC's Standards of Conduct, split into two main functions: PGE's Merchant function, which is responsible for dispatching and scheduling PGE's generation assets and serving customer loads, and PGE's Transmission function, which operates the transmission function and provides access to the transmission system in accordance with FERC's open access requirements. PGE/300, Afranji-Larson-Richard/5.

116 *See PáTu Wind Farm LLC v. Portland General Elec. Co.*, 150 FERC ¶ 61,032 at P. 31 (2015), *reh'g denied, PáTu Wind Farm, LLC v. Portland General Elec. Co.*, 151 FERC ¶ 61,223 (2015) ("Portland General's merchant function accepts delivery of PáTu'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.") (emphasis added).

Thus, the real question in determining whether there is an impediment to PGE receiving the Blue Marmots' power is not whether the PACW.PGE interface has unused ATC that can be reserved by the Blue Marmots; the question is whether PGE's Merchant function can obtain ATC from its Transmission function on its own system sufficient to accept the Blue Marmots' power from the edge of its system to load.

It is undisputed in this case that PGE's Merchant function has access to ATC at the PACW.PGE interface. In fact, PGE's Merchant function has nearly *all* of the ATC at the interface.[117] PGE reserved 100 percent of the remaining ATC in 2015, which currently represents around 310 MW of transfer capability, out of a total of 320 MW. PGE did so with an expectation that it may use the ATC for what was at that time an undecided approach—either for what was then called the California ISO EIM or the Northwest Power Pool Initiative.[118] As described by PGE's witnesses, "[i]t was unclear at that time whether PGE would go one, both or neither routes."[119]

Since 2015, then, PGE's Merchant function has held or sought to hold all of the ATC available at the PACW.PGE interface. Importantly, there is nothing about PGE's reservation of the ATC itself that distinguishes it from the type of reserved ATC that the Company uses to receive power from other generators, including what it would use to accommodate the Blue Marmots' power. In other words, PGE's Merchant function holds a reservation for point-to-point transmission service across the PACW.PGE interface,[120] and that is the *very same capacity* that PGE's merchant function would use to accept the Blue Marmots' power.

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117 Blue Marmot/600, Moyer/10; Hearing Transcript at 242 (Moore-Rodehorst) (Dec. 13, 2018).

118 Hearing Transcript at 232 (Moore-Rodehorst) (Dec. 13, 2018).

119 *Id*.

120 *Id*.

Thus, the actual scenario regarding PGE's ability to receive the Blue Marmots' power at the PACW.PGE interface is this:

- In order to accept the Blue Marmots' power at the PACW.PGE interface, PGE's merchant function needs ATC sufficient to receive the output of the projects; and
- PGE's merchant function holds 310 MW of the ATC at the PACW.PGE interface.

Put simply, PGE has all that it needs in order to accept the Blue Marmots' power at the PACW.PGE interface, in accordance with the terms of the executable PPAs it sent them.

### b. PGE's Core Argument--That It Is Impossible to Receive the Blue Marmots' Power at PACW.PGE—Has Been Disproven

In addition to the above demonstration of why PGE's Merchant function is capable of receiving the Blue Marmots' power at the PACW.PGE interface, PGE's witnesses themselves eventually acknowledged it as well.

When the Blue Marmots filed their complaints with the Commission, it was because PGE refused to purchase the power that the Blue Marmots had agreed to make available to PGE, in accordance with the PPAs that they signed, and PGE's Schedule 201. In its Answer, PGE explained its view of why the complaint was not warranted:

> PGE is not required to, and cannot in good faith, execute a PPA with Blue Marmot when it knows the planned route for transmission of the power to the Company's system would be *impossible.*[121]

PGE has also asserted throughout this case that "impossibility of receipt" was the reason it would not counter-sign the PPAs it provided to the Blue Marmots for execution.[122]

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121 PGE's Answer at ¶ 71 (emphasis added).

122 *See* 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

After a fuller development of the record, however, and eventually at the hearing, PGE's witnesses finally agreed, somewhat reluctantly, that PGE can in fact receive the power using the ATC that its Merchant function has at the PACW.PGE interface:

> Q. . . . You would agree that PGE could use its existing reservation at the PACW.PGE interface to accept the Blue Marmots' power, but your point is that, if it did so, that would reduce its EIM participation; is that correct?
>
> A. I think, from the strictest technical sense, PGE could accept that.[123]

When pressed regarding what was meant by "the strictest technical sense," the witness clarified that PGE could in fact receive the power, but that PGE's position is that if it did, there would be a negative impact on the benefits it expects from its EIM participation.[124]

PGE witness Brett Greene also gave a similarly reluctant, but dispositive answer at the hearing. When asked whether PGE would be able to use the Merchant function's reserved ATC at the PACW.PGE interface to receive power from a qualifying facility, Mr. Greene finally responded: "So in a world of hypothetical and possibilities, PGE could use some of its EIM ATC."[125]

To be clear, the Blue Marmots understand that PGE continues to assert that the impact of receiving the Blue Marmots' power at the PACW.PGE interface is undesirable from its perspective, because of potential impacts to its benefits from EIM participation. However, PGE

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Point of Receipt (POR)."); *See also* Hearing Transcript at 84 (Greene) (Dec. 12, 2018) ("[W]hile Blue Marmots have satisfied delivery to the edge of the PAC system, there is no way to effectuate that delivery to the point of receipt. Because that is fully subscribed by PGE for EIM purposes."); *See also* PGE Prehearing Brief at 16 ("Because there is no ATC at the PACW-PGE interface, PGE currently cannot accept the Blue Marmots' output there. For that reason, PGE has appropriately declined to execute the Blue Marmots' PPAs . . . .").

123 Hearing Transcript at 261 (Moore-Rodehorst) (Dec. 13, 2018).

124 *Id.* at 261-62.

125 Hearing Transcript at 181 (Greene) (Dec. 12, 2018).

cannot continue to claim that the reason it will not counter-sign the Blue Marmots' PPAs, or agree to receive their power is because doing so would be impossible.[126]

### 3. PGE's Remaining Arguments for Not Accepting the Blue Marmots Power Are Based on Its Policy View, Not A Legal Framework

As described above, it is clear that PGE is asserting that it should be able to avoid purchasing the Blue Marmots' power at the PACW.PGE interface because its participation in the EIM should be elevated above its obligations to the Blue Marmots. In other words, absent PGE's participation in the EIM, it would be expected to have no reason to object to the purchase of the Blue Marmots' power at that location.

Yet, PGE has offered no theory for why its EIM participation is, as a *legal* matter, should be elevated above its obligations to the Blue Marmots under PURPA. For example, PGE sought authorization to participate in the EIM, came *after* the legally enforceable obligation with the Blue Marmots was created, and in fact even after the Blue Marmots filed their complaint in this case.[127] PGE would, therefore, have to argue that an after-the-fact action, which was voluntary, unwinds its previously established legal obligations under PURPA. And, PGE certainly made no representation to FERC that its EIM participation would preclude, or take precedence over any use of the PACW.PGE interface to deliver energy into its service territory or to use the interface to fulfill its purchases under PURPA. Thus, FERC definitely took no action when it approved

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126 The Blue Marmots note that PGE continues, even after the hearing, to assert in various forums that the PACW.PGE path is constrained. *See* Public Meeting Transmission Workshop, January 17, 2019, live stream at 3:42:20 through 3:42:50.

127 PGE filed a request for authority to participate in the EIM with FERC in June of 2017, which was granted in September of 2017. PGE began participating in the EIM on October 1, 2017. *Portland General Electric Co.*, 160 FERC ¶ 61,131 at P. 3 (2017). The Blue Marmots' complaints in this proceeding were filed in April of 2017.

PGE's participation in the EIM that could be construed as imposing a legal requirement that governs over PGE's implementation of PURPA.

To the contrary, PGE was explicit with FERC that any amounts of ATC at PACW.PGE that it planned to use for participating in the EIM were subject to existing contractual and reliability obligations.[128] Because the FERC filing came after PGE's legally enforceable obligation with the Blue Marmots arose, one would presume that FERC would agree that the Blue Marmots would be included within that category of uses to which PGE's EIM usage of PACW.PGE is expressly subject. To the point here, FERC has explained that a utility's "desire or lack thereof to purchase a QF's power in no way affects the QF's right to sell power."[129]

Finally, it is evident that PGE has no *legal* basis upon which to rest its argument by the very fact that the EIM is, by PGE's own unequivocal description, "voluntary."[130]

PGE's argument is best characterized as a policy position that it is asking the Commission to adopt, outside the bounds of the legal framework of PURPA.[131] That PURPA's legal obligations cannot be overcome by a utility's policy objections should be reason enough for the Commission to resolve this complaint in favor of the Blue Marmots.

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128 *See* PGE/200, Sims-Rodehorst-Sporborg /4 (explaining that "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."); Hearing Transcript at 239 (Moore-Rodehorst) (Dec. 13, 2018).

129 *Public Service Co. of New Hampshire*, 83 FERC ¶ 61,224 at p. 61,999.

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

131 PGE's witnesses do, in some instances, acknowledge that PGE's argument is one founded on policy. *See, e.g.,* PGE/100, Greene-Moore/16 (advocating that receiving the Blue Marmots power through the PACW.PGE interface, or allowing the Blue Marmots to not pay for upgrades to PGE's transmission system "is not good public policy").

#### 4. There is No Compelling Policy Reason to Discharge PGE Of Its Obligation to Purchase Power from The Blue Marmots at the PACW.PGE Interface

PGE asserts that it would be inappropriate to require PGE to receive the power from the Blue Marmots at the PACW.PGE interface because "PGE's customers should not be required to absorb" the costs of doing so.[132] The Company paints the picture that the dispute is between PGE's customers and the Blue Marmots, with significant financial harm on the line for customers.[133] However, PGE's receipt of power at the planned PACW.PGE interface imposes no incremental direct costs on PGE, and can be accomplished in conjunction with PGE's continued robust participation in the EIM.

##### i. PGE Will Not Incur Any Direct Costs in Accepting the Blue Marmots' Power at the PACW.PGE Interface

PGE claims that PGE's customers will be required to bear significant costs if PGE were to accept the Blue Marmots output under the terms of the PPAs. It is important to note, however, that PGE is not claiming that it will incur any actual direct costs in order to receive the Blue Marmots' power at the PACW.PGE interface.

In responding to an issue raised by Blue Marmots' witness Mr. Moyer, PGE's witnesses clarified this point:

> Mr. Moyer seems to be suggesting that PGE's customers pay for the cost PGE incurs when it reserves firm transmission for EIM transfers. However, that is not the case. Instead, because the transmission assets that are associated with the PACW-to-PGE path are used to serve PGE's customers, the costs associated with these assets are included in the Company's revenue

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132 PGE/100, Greene-Moore/4.

133 *See, e.g.,* PGE/100, Greene-Moore/5 (testifying that "the Company disagrees that it is required to sacrifice the transmission capability required for successful participation in the EIM, or to impose on its customers expensive upgrades or transmission service costs, in order to accommodate delivery of the Blue Marmots' output"); *See also* PGE/100, Greene-Moore/16 ("[E]very resolution of this dispute proposed by the Blue Marmots would shift significant costs from them to our customers.").

> requirement set in a general rate proceeding, *regardless of how the assets are used.*[134]

In other words, PGE's costs associated with the actual PACW.PGE interface are the same, and are fully included in PGE's customers' rates, whether or not PGE receives the Blue Marmots power at that point.

This fact is confirmed multiple times in this case by PGE's witnesses in their prefiled testimony:

> Regardless of whether that capacity is allocated for the EIM—as PGE argues it should be—or allocated for QF use—as the Blue Marmots argue it should be—it will be paid for by PGE Merchant to PGE Transmission. . . there is no incremental cost to PGE's customers associated with PGE Merchant's reservation of that capacity for the EIM.[135]

And, this point was also confirmed at the hearing:

> Q. So I think what you're stating there is that PGE's customers pay for the cost of the PACW.PGE path no matter how it is used; correct?
>
> A. Yes. So this was in response to testimony that I believe asserted that we weren't accounting for the costs associated with the EIM benefits, and what we wanted to make clear was that, in either circumstance, whether the PGE Merchant function was using its reserve transmission for the EIM or using its reserve transmission for a QF delivery, those costs related to the transmission were already something embedded, if you will, in customers' rates.[136]

It is important, therefore, to be clear that PGE does not incur any actual direct cost from receiving the Blue Marmots' power at the PACW.PGE interface. Rather, PGE calculates an alleged "harm" that is actually an "opportunity cost." Specifically, PGE's alleged harm is the difference between revenues it predicts it could achieve from the EIM if it were completely unfettered by any PURPA obligations to the Blue Marmots and the revenues it expects to

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134 PGE/500, Rodehorst/Moore/23 (emphasis added).
135 PGE/500, Rodehorst-Moore/23.
136 Hearing Transcript at 267 (Moore-Rodehorst) (Dec. 13, 2018).

achieve if it abides by its legally enforceable obligation through receiving the Blue Marmots' power at PACW.PGE.

This conclusion that the only "cost" associated with receipt of the Blue Marmots' power at the PACW.PGE interface is a change in EIM benefits otherwise obtainable was confirmed at the hearing:

> Q. Thank you. And in that respect, there's no incremental cost associated with receiving a qualifying facility's power across the PACW.PGE interface; correct?
>
> A. The incremental cost is the lost benefit from not being able to obtain the EIM administer [sic].[137]

#### ii. PGE's PURPA Obligations Are Not Unlike Any of the Other Various Obligations Placed on PGE That Limit Its Voluntary Participation in the EIM

PGE's efforts to equate an opportunity cost with a cost that is laid on PGE's customers by the Blue Marmots is inappropriate and misleading. PGE's ability to participate in the EIM is limited by numerous factors, most of which have nothing to do with PGE's legally enforceable obligation with the Blue Marmots, or even PGE's implementation of PURPA more generally. PGE's witnesses clarified that PGE's participation in the EIM is much more significantly impacted by various other obligations and restrictions.

For example, PGE's Merchant function first reserved 418 MW of firm point-to-point capacity on the PACW.PGE path, and had expected that it may use that entire amount for the participation in some type of energy imbalance market.[138] Then, 142 MW of that capacity was recalled by PGE's Transmission function in early 2016, after the path was re-studied and its

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137 *Id.* Undersigned counsel expects that "administer" likely should have been reported as "benefits" or "revenues."

138 PGE/100, Greene-Moore/20-21.

capabilities determined to be less than previously calculated.[139] When questioned about this change at the hearing, and whether PGE found the result to be an unacceptable limitation on its ability to participate in the EIM, PGE's witness explained that such restrictions on its participation in the EIM are somewhat inevitable and that they can come about from PGE's normal course of business, its open access transmission obligations, contractual obligations, and regulatory or reliability requirements.[140]

Certainly, PGE's participation in the EIM is impacted much more by these other items, and yet PGE repeatedly characterizes *any* effect on its EIM participation that may come about because of its obligations to a qualifying facility to be "unacceptable."[141] PGE has offered no reason for why limitations on EIM participation that come about from non-PURPA obligations or restriction are just 'facts of life,' but any restrictions that come about from PURPA are "unacceptable" and require the Commission to excuse PGE from its duties.

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139 *Id.* at 20.

140 Hearing Transcript at 247 (Moore-Rodehorst) (Dec. 13, 2018); *See also id.* at 251 ("Again, as I previously stated, there are circumstances around that that can cause things to happen beyond control or influence of PGE such as regulatory or reliability requirements that PGE Transmission witnesses have discussed.").

141 *See* 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 and could significantly undermine the EIM benefits received by PGE's customers.") (emphasis added); *See id.* at 24 ("Therefore, the effect of Mr. Moyer's suggestion would be to take PGE Merchant's transmission rights away from the EIM and devote them to the Blue Marmots. As we have explained, this is an *unacceptable* result that could affect the EIM benefits received by PGE's customers.") (emphasis added); *See id* at 24-25 ("Any solution that has the effect of allocating PGE's transfer capability reserved for EIM to the Blue Marmots would *unacceptably* compromise the Company's ability to participate in the EIM and could significantly undermine the EIM benefits received by PGE's customers.") (emphasis added).

### iii. To the Extent PGE's EIM Benefits Are Affected At All by the Blue Marmots' Power Deliveries at PACW.PGE, the Record Shows Those Effects to Be Minor

PGE asserts that any delivery of the Blue Marmots' power as envisioned under the PPAs would cause PGE's expected EIM benefits to be "seriously" or "severely eroded."[142] Yet, the record in this case shows this to be an unsupportable and wild exaggeration, even under PGE's own calculations.

Despite its claims of a severe erosion of EIM benefits, PGE did not initially attempt to quantify that alleged harm at all. 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.[143] Mr. Moyer then presented an analysis of the magnitude of the "harm" that PGE referred to in stating that accepting the Blue Marmots' power at the PACW.PGE interface would erode its EIM benefits. That analysis showed that 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.[144]

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 qualifying

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142 PGE/100, Greene-Moore/4, 21.

143 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.

144 Blue Marmot/600, Moyer/4-5.

facilities besides the Blue Marmots will seek to deliver 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.[145] Even under PGE's view, however, the annual detriment associated with the Blue Marmots' power being received at PACW.PGE would be only $89,790 under the current or recent level of EIM transfers.[146] PGE estimated that if EIM-transfers increased by 20% over current levels, that the "harm" from using the PACW.PGE interface to also receive the Blue Marmots power could increase, but that it would still only increase to $360,357.[147] At hearing, these outcomes were again verified with PGE's witnesses.[148]

#### iv. PGE Can Participate in the EIM and Receive the Blue Marmots' Power at PACW.PGE

What is evident from the above is that PGE can both honor its legally enforceable obligation to the Blue Marmots, and continue robust participation in the EIM. This conclusion makes sense in light of the limited impacts that one would expect from receiving the output of 50

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145 PGE/700, Rodehorst-Moore/4-5.

146 If PGE aggressively pursues this case through the Commission, FERC and into the courts, as it has with many other QF related disputes, PGE's litigation costs (including internal resources) will very likely exceed the additional "costs" associated with accepting the Blue Marmots net output.

147 PGE/700, Rodehorst-Moore/20. Probably because this number was so insignificant, PGE also calculated that its total EIM detriment could go up to $2.15 million, under the more aggressive assumptions of a 20% increase in EIM transfers *plus* an 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. *Id.*

148 Hearing Transcript at 306 (Moore-Rodehorst) (Dec. 13, 2018). Given the low magnitude of these dollars, it may not be that they even justify a rate change, if PGE went through the process to do so. And, if the rigor of a ratesetting process were applied to these amounts, PGE could likely justify no more than the $89,790, which represents its most recently established EIM activity.

MW of variable renewable solar plants into PGE's system, in an area that has historically experienced no congestion.[149]

As shown by the Blue Marmots' witness Mr. Moyer, and not disputed by PGE, 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, PGE would be able to use the unscheduled transmission to participate in the EIM.[150] He also demonstrated that, given the variable nature of the Blue Marmot projects, it would be rare for the Blue Marmots to require a full 50 MW of transfer capability, and that in most hours, they would require much less. Specifically, 50 MW of capacity would be used in only 13% of hours in the year; 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.[151]

Mr. Moyer showed that even under the methodologies that PGE uses today to participate in the EIM, and which it proposed to FERC in its request to participate in the EIM, PGE has enough transfer capability to accommodate the Blue Marmots' power at the PACW.PGE interface, and hold to its commitments to FERC. Mr. Moyer showed that 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)."[152] He explained that:

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149 *See Portland General Electric Co.*, 160 FERC ¶ 61,131 at P. 9 (Explaining FERC's findings in response to PGE's request to participate in the EIM that "Portland adds that an analysis of the congestion history of both the PACW to Portland and CAISO to Portland paths during the study period showed zero instances of congestion").

150 Blue Marmot/600, Moyer/20.

151 *Id.* PGE has not disputed this expected profile of the Blue Marmots' generation profile. *See* Hearing Transcript at 272 (Moore-Rodehorst) (Dec. 13, 2018).

152 Blue Marmot/600, Moyer/17.

> 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 [market-based rate 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.[153]

Moreover, even aside from PGE's ability to accommodate the Blue Marmots' output at PACW.PGE under the circumstances described above, PGE could have offered some amounts of additional ATC to the Blue Marmots that the Blue Marmots discovered became available after PGE entered into a legally enforceable obligation with the Blue Marmots. Instead of reserving those amounts for the Blue Marmots' output, PGE reserved that ATC for its own purposes 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.[154]

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 make the capability available to the EIM instead.[155] As described by the Blue Marmots' witness Mr. Moyer, 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

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153 *Id.* (emphasis in original).
154 Blue Marmot/300, Moyer/32.
155 PGE/100, Greene-Moore /15-16.

used to deliver power from QFs that have LEOs."[156] 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 power from qualifying facilities.[157]

In light of PGE's ability to continue to robustly participate in the EIM, and to do so even in accordance with the assertions it made to FERC *after* entering into a legally enforceable obligation with the Blue Marmots, PGE has produced no compelling policy basis upon which the Commission should find that it is excused of its obligations to the Blue Marmots.

### v. The Blue Marmots Are Supportive of PGE's Participation in the EIM

In pointing out 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 because of its participation in the EIM, the Blue Marmots are seeking to demonstrate that PGE has offered no valid reason to be excused from its obligations. The Blue Marmots do not, however, in any way contend that PGE should avoid participation in the EIM. In fact, the Blue Marmots are very

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156 Blue Marmot/300, Moyer/28.

157 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.

Blue Marmot/400, Moyer/6 (emphasis in original).

supportive of regional markets, and agree that participation in the EIM has benefits for PGE's customers and the integration of renewables.

The Blue Marmots also point out that they are in no way seeking to pit themselves against PGE's participation in the EIM, and that it would be inappropriate for PGE to characterize them as doing so in this proceeding. As PGE freely admits, PGE itself claims to have realized (after entering into a legally enforceable obligation with the Blue Marmots) that there could be some impact on PGE's EIM participation from accepting the Blue Marmots' power at the PACW.PGE interface. Certainly, then, PGE cannot seek to characterize the Blue Marmots' work with PGE to enter into a purchase and sale arrangement to have been somehow counter to PGE's interests in the EIM. Rather, the Blue Marmots are seeking to enforce a legally enforceable obligation that they developed in accordance with PGE's and the Commission's established procedures, rules, and law, and to which PGE now seeks to either walk away from, or make economically infeasible based on a recently discovered policy concern.

### G. The Blue Marmots Cannot Be Required to Shoulder the Costs of Upgrades to PGE's Transmission System, or to Build New Transmission

PGE has stated to the Blue Marmots that it will not purchase their power, unless they take one of two actions. PGE's position is that the Blue Marmots must either: 1) pay to upgrade PGE's transmission system at the PACW.PGE interface, or 2) purchase an additional leg of transmission across BPA's system, which is not called for in their PPA.[158] PGE then concluded that there are no feasible options to upgrade the transmission system to increase ATC across the PACW.PGE interface, so that the only feasible option to accept an additional 50 MW of power is

[158] Blue Marmot/200, Talbott/10.

to construct a 300-mile generation tie line from southeastern Oregon to its service territory around Salem, Oregon, at a cost of around $450 million.[159]

None of these actions are required on either a technical or legal basis, and there is no other basis to require these actions. The Blue Marmots' position is that PGE failed to properly conduct its FERC-jurisdictional transmission studies, failed to analyze all reasonable options to increase ATC at the PACW-PGE POD, and failed to account for the benefits associated with the construction of additional transmission. The Blue Marmots are confident that, if PGE's shareholders were responsible for the costs associated with any transmission upgrades, then PGE's studies would show that there is a more cost-effective solution. In addition, FERC's rules and policies recognize that the construction of these transmission upgrades would benefit, and should be paid by, all of PGE's transmission customers.

### 1. How Available Transfer Capability Is Increased and Why the Generation of the Blue Marmots Will Have a De Minimus Impact on Power Flows on PGE's System

A transmission provider like PGE must go through a FERC-approved process under its OATT for studying whether and at what cost transmission upgrades must be constructed when there is insufficient ATC at any location on its transmission system. These steps include the transmission customer requesting transmission service, and then the transmission provider determining the total transfer capability and the available transfer capability. The studies could

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159 PGE/100, Greene-Moore/4. The history of the issues of upgrades at the PACW.PGE point of delivery may lead to a confusing record regarding PGE's position. PGE has been consistent that its position is that the Blue Marmots are responsible for paying for upgrades at PACW.PGE (or pay for a second wheel of BPA transmission). After PGE responded to the Blue Marmots' complaint, PGE performed the System Impact Study under which PGE concluded that there are no feasible upgrades that could actually occur at the PACW.PGE point of delivery, and the Blue Marmots would instead need to deliver their power to that location by constructing a 300-mile generation tie line to PGE's system. As explained herein, the Blue Marmots disagree.

determine that there is sufficient ATC, and if so, then the ATC is offered to the transmission customer. The transmission customer may decline to take the ATC, and then it is posted on the transmission provider's OASIS and made available to any potential transmission customer (under established orders of priority). If the study determines that there is insufficient ATC, then the transmission customer has the option to pay for transmission upgrades to increase ATC to allow their deliveries.[160]

An important nuance in this proceeding is that QFs are not required to purchase transmission on, and do not become transmission customers of their purchasing utility's system.[161] When a QF enters into a power purchase agreement with a utility, the purchasing utility takes responsibility for and arranges for transmission on the purchasing utility's system.[162] In the case of QFs located in the balancing authority of another utility (called in Oregon "off-system QFs"), the QF (here, the Blue Marmots) purchases transmission on the system of the utility that it is directly interconnected with (here, PacifiCorp) but does not buy transmission or

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160 *See* Sections 13.5, 19.1, 19.3, 27 of PGE's Open Access Transmission Tariff, *available at* http://www.oasis.oati.com/woa/docs/PGE/PGEdocs/PGE-8_OATT.pdf (last accessed Feb. 6, 2019).

161 *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215 at P. 38 ("[T]he 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 . . . ."); Blue Marmot/300, Moyer/15 ("QFs, by nature, are not transmission customers on the purchasing utility's system . . . .").

162 PGE appears to agree that it is PGE's responsibility to make arrangements for the delivery of the Blue Marmot power, but the disagreement is whether PGE or the Blue Marmots should pay for any costs, if any, associated with receiving that power on PGE's system. PGE/100, Greene-Moore/12, 15-18 (PGE states that if an off-system QF seeks to deliver at the PACW.PGE POD, then PGE Merchant (and not the QF) will request a system impact study from PGE Transmission to determine if there are system upgrades to allow for delivery). In this case, because PGE had not made up its mind yet about whether PGE or the Blue Marmots were responsible for making the transmission request and to facilitate settlement, the SIS at issue was purchased and requested by the Blue Marmots.

become a transmission customer on the purchasing utility's system (here, PGE). Thus, the way to analyze whether there is sufficient ATC is that PGE Merchant (as the purchaser of the power) should make a request with PGE Transmission (the transmission provider) just the same way it would for its own on- or off-system generation resources.

PGE Transmission performs the transmission study and calculates total transfer capability ("TTC") and ATC pursuant to a FERC-approved methodology set forth in PGE's OATT.[163] Among the requirements in PGE's OATT are that PGE must "perform due diligence to expand or modify its transmission system to accommodate a transmission service request."[164] If the transmission customer disagrees with the transmission provider's transmission study results, then the transmission customer can request that FERC (and not a state commission) resolve the dispute.

A first step in the transmission study process is to determine the TTC, which is the best engineering estimate of the total amount of electric power in MWs that can be reliably transferred over a specific location (transmission path) over a specific period of time.[165] The TTC considers the facility ratings or capacity of all the transmission lines and the balance of load and generation.[166] There are a number of different FERC- and NERC-approved[167] methodologies to determine TTC, and PGE has made the choice to use the "Rated System Path

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163 PGE/300, Afranji-Larson-Richard/12, 16; Confidential PGE/301, Afranji-Larson-Richard/3-4.

164 Blue Marmot/600, Moyer/47 (citing PGE's OATT, Section 15.4 Obligation to Provide Transmission Service that Requires Expansion or Modification of the Transmission System, Redispatch or Conditional Curtailment).

165 PGE/300, Afranji-Larson-Richard/10-11.

166 PGE/300, Afranji-Larson-Richard/11.

167 NERC is the North American Electric Reliability Corporation.

Methodology," which is codified in NERC's Modeling, Data and Analysis ("MOD") 29 standard.[168]

Next, ATC is determined, which is the amount of transfer capability that is available and can be reserved over the specific location (transmission path) over a specific period of time.[169] "PGE calculates ATC pursuant to the FERC-approved methodology set forth in Attachment C of PGE's OATT."[170] At its most basic, ATC is determined by subtracting existing transmission commitments from the TTC to determine how much transfer capability is "available" for use.[171]

The determination of TTC and ATC is performed in a counter-intuitive manner based on "contract paths." The TTC of a contract path may not accurately reflect the full capabilities of the system, given how the electrons flow on the transmission system. Actual power flows at the PACW-PGE interface, for example, are *always* in the direction of going from PGE's system to PacifiCorp's system, and power system models cannot be forced to represent anything other than this.[172] Per NERC rules, in this scenario, this means that the TTC and the ATC for importing from PacifiCorp to PGE are actually set based on the maximum amount of power that can flow from PGE to PacifiCorp—the other direction.[173] This means that to estimate the amount of power that can be imported from PacifiCorp to PGE, the TTC and ATC actually calculate the flow in the opposite but prevailing direction (from PGE to PacifiCorp).[174] As Mr. Moyer

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168 Blue Marmot/400, Moyer/39 (The MOD-29 Rated System Path Methodology "was established by FERC and enforced by NERC, and is one of many available methods to evaluate the transfer capacity of FERC-jurisdictional transmission"); Confidential Blue Marmot/403, Moyer /11; PGE/300, Afranji -Larson-Richard/11.

169 PGE/300, Afranji -Larson-Richard/12.

170 PGE/300, Afranji -Larson-Richard/12.

171 PGE/300, Afranji -Larson-Richard/12.

172 Blue Marmot/400, Moyer/41-42.

173 *Id.*

174 *Id.*

explained, the studies performed in this case were "designed to increase flows *out of PGE's system* even though that is the opposite direction in which the system is contractually constrained and where new capacity is needed."[175]

Based on actual power flows and system stresses, very little of the Blue Marmot power "reaches" PGE's system and under no circumstances will it cause any system emergencies.[176] The transmission constraints at the PACW.PGE POD would likely not exist if PGE's ATC was calculated based on a flow-based methodology that managed transmission requests based on the physical effects of power transfers relative to the technical capabilities and reliability needs of the system.[177] The power flow analysis performed by Mr. Moyer:

> [S]uggests 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). Note that this power flow condition is the same regardless if the Blue Marmots deliver to PGE via the PACW-PGE interface or the BPA-PGE interface.[178]

Thus, the only real-world impact on PGE's system when the Blue Marmots generate power is that a very small amount of power (about 2 MWs) that would ordinarily flow from PGE to PacifiCorp will be displaced and thereby reduced. This impact is the same if the Blue Marmots contractually deliver at PACW.PGE or the BPA.PGE points of delivery.

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175 Blue Marmot/400, Moyer/42 (emphasis in original).
176 Blue Marmot/400, Moyer/38-39.
177 Blue Marmot/400, Moyer/42.
178 Blue Marmot/400, Moyer/40 (emphasis omitted) (note that the transmission study performed by PGE was based on 60 MW of generation while the Blue Marmots will put no more than 50 MWs of net output on the system).

The Commission should be mindful of the real-world power flows and reliability needs of the transmission system when deciding issues in this proceeding. The Blue Marmots do not advocate that the Commission require PGE to analyze its ATC using a different methodology (and the Commission could not order PGE to do so given that it has no jurisdiction over any aspect of the SIS).

Instead, the Blue Marmots raise the issue of real-world power flows for the Commission to understand the overall context in which this dispute is unfolding. The Commission should first recognize that PGE has made the choice to rely upon "a wasteful (and admittedly, confusing) planning approach where technical planning requirements and contract path approach to managing transmission have the potential to drive unneeded and potentially costly transmission investment."[179] As the Pacific Northwest transmission market matures and if PGE ever joins a Regional Transmission Organization, the issues associated with this proceeding (contract path "constraints" that a utility can use to favor its own generation resources that have nothing to do with power flows) will disappear overnight. The appropriate context for the technical debate regarding the veracity of the studies is that:

> [T]he limitations on PGE's system, as identified by the SIS and the TTC studies, are not traditional system reliability constraints that prevent PGE from importing additional power on the PACW-PGE interface because of thermal overloads or some other verifiable reliability issue. The limitations to import power on the PACW-PGE interface are actually methodological-constraints that are a product of the West's path-based approach to contracting and studying transmission (using FERC/NERC approved methodologies and procedures). This type of constraint would not happen in an organized market since transmission is, generally, used up to its reliability limit.[180]

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179 Blue Marmot/400, Moyer/42.

180 Blue Marmot/400, Moyer/32.

In the end, the disconnect between power flows and real reliability concerns on one hand, and contract path flow studies on the other hand means that it is even more critical for regulatory agencies to thoughtfully manage the transmission system and the limited legal rights to use that system. As to the core disputed issues in this case, Mr. Moyer explains: "[g]iven that there are no real-world reliability issues and very little of Blue Marmots' power actually reaches PGE's system because of real world power flows, a prudent and reasonable utility should not conclude that a 300-mile gen-tie line is the best way to accept power."[181]

### 2. PGE Has Not Adequately Analyzed Its Options, Even If It Were Able to Require the Blue Marmots to Pay for Unnecessary Upgrades

Even if transmission system upgrades *were* necessary in order to receive the Blue Marmots' power (which they are not), PGE did not adequately analyze all of the alternatives that could be used to produce the (unnecessary) outcome that PGE asserts should be paid for by the Blue Marmots. PGE's transmission study concluded that: 1) the TTC of the PACW-to-PGE path cannot be increased to accommodate the Blue Marmots' delivery; and 2) the Blue Marmots will need to "avoid the PACW-PGE interface entirely and could accomplish delivery directly by constructing a 300-mile generation lead line directly to PGE's system".[182] The evidence in this proceeding, however, demonstrates that PGE did not identify a sufficiently robust and technically accurate list of options to manage the Blue Marmots' power, and PGE inflated the costs of the options that it identified.[183] PGE also ignored potential benefits associated with transmission upgrades.[184]

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181 Blue Marmot/400, Moyer/43.
182 PGE/300, Afranji-Larson-Richard/4; Blue Marmot/400, Moyer/34.
183 Blue Marmot/400, Moyer/3.
184 Blue Marmot/600, Moyer/3, 6.

Mr. Moyer and his team at Energy Strategies[185] reviewed PGE's transmission study and identified three major concerns, which led to the conclusion that "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."[186] Mr. Moyer's primary concerns were that: 1) PGE did not consider a robust set of transmission alternatives to increase TTC; 2) PGE provided a misleading interpretation of certain study results; and 3) "the final solution offered by PGE is not realistic or reasonable."[187] PGE's analysis also included a number of errors, and used outdated information that could result in errors in the TTC calculations.[188]

PGE's transmission study looked at only one potential upgrade to the PACW-PGE interface, which was to add a second 230 kilovolt ("kV") transmission line between the existing Bethel and Parish Gap substations.[189] This alternative increased TTC by 18 MWs.[190] Mr. Moyer used the same models, methodologies and assumptions as PGE and identified a number of transmission alternatives in addition to the second line at Bethel to Parish Gap. The table below summarizes the alternatives:[191]

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185 Mr. Moyer and his team are highly qualified to independently review PGE's transmission studies. Prior to joining Energy Strategies, Mr. Moyer was the Manager of Transmission Expansion Planning at the Western Electricity Coordinating Council ("WECC").

186 Blue Marmot/400, Moyer/34.

187 *Id.*

188 *See generally* Confidential Blue Marmot/403; PGE/601, Edmonds-Larson-Richard/2.

189 Blue Marmot/400, Moyer/35; Confidential Blue Marmot/403, Moyer/5, 23-24.

190 Confidential PGE/301, Afranji-Larson-Richard/12; Confidential Blue Marmot/403, Moyer/23-24. PGE's analysis showed a 19 MW increase while Mr. Moyer's independent analysis showed 18 MW. The close number shows that their studies were properly calibrated and producing fundamentally the same results. Blue Marmot/400, Moyer/36, n. 44.

191 Blue Marmot/400, Moyer/36.

| Transmission Alternative (new facilities) | Maximum Reliable PGE-to-PACW Transfer (MW) | TTC Increase (MW) | Considered in PGE SIS Study? | Approximate Distance Between Substations (Miles) |
|---|---|---|---|---|
| Bethel – Parish Gap 230-kV circuit | 324 MWs | 18 MW | Yes | 10.6 |
| Marion – Bethel 500-kV circuit and 500/230 kV transformer at Bethel | 381 MWs | 75 MW | No | 15.3 |
| Ostrander – Bethel 500-kV circuit and 500/230 kV transformer at Bethel | 374 MWs | 68 MW | No | 39.9 |
| Santiam – Bethel 500-kV circuit and 500/230 kV transformer at Bethel | 341 MWs | 35 MW | No | 17.3 |

PGE failed to justify why it only considered one transmission upgrade alternative before rushing to the conclusion that the most viable option was the construction of a roughly $450 million 300-mile generation lead line "that would presumably need to be developed by the Blue Marmots, not PGE, to cross the Cascades mountain range and several federal National Forests."[192] PGE claimed that it was appropriate to only consider one transmission upgrade alternative because:

- PGE has 'sole discretion as to the scope, details and methods used to perform the study' due to the fact that the transmission study was conducted pursuant to the terms of PGE's FERC-jurisdictional OATT;
- PGE thought that the Blue Marmots 'wished it to analyze redispatch options and the potential for upgrades to the Bethel-Parish Gap 230 kV line', so the [sic] limited to [sic]the scope to a single transmission solution;
- [I]ncreasing the flow of power between Bethel and Parish Gap was the best option for increasing TTC that was most likely to be effective and constructible [based on PGE's engineering judgment]; and
- The proposed alternatives [identified by Mr. Moyer] are 'farther apart than Bethel and Parish Gap, and therefore it would be more expensive to construct a line between them'.[193]

192 Blue Marmot/400, Moyer/40.

193 Blue Marmot/400, Moyer/37; Blue Marmot/401, Moyer/6-11.

PGE's responses are remarkable in their lack of credibility. PGE asserting that it has sole discretion is inappropriate when PGE is party to this litigation and PGE is obligated under its OATT to identify transmission upgrades to accommodate the requested transmission service.[194] The Blue Marmots also did not request any limitations in the transmission study and any such assertions are false.[195] Finally, PGE's assertion that it was appropriate to refuse to consider other options that are not close or not constructible enough is simply illogical in comparison the PGE's proposed 'close' and easily 'constructible' 300-mile solution.[196]

After the Blue Marmots' filed their testimony, PGE had another opportunity to study Mr. Moyer's alternatives, but PGE again elected not to study them because they "would not be feasible or econom[ic]" as compared to a 300-mile generation tie line, and could result in PGE reexamining its TTC calculation methodology.[197] PGE agreed that it was likely that the new lines could yield the increased power flows identified by Mr. Moyer and assumed their accuracy.[198] Instead of studying whether the increased flows would actually increase TTC, PGE merely speculated that it might have to revisit its TTC methodology, which would be complex and potentially even result in a TTC reduction.[199]

The whole point of a transmission study is to study the potential impact of increased power flows on a transmission system and any upgrades necessary to accommodate those power flows. Obviously, if sound studies came up with the counter-intuitive conclusion that the construction of additional transmission somehow actually reduced TTC, then those options

194 Blue Marmot/400, Moyer/38; Blue Marmot/600, Moyer/47.
195 *Id*.
196 *Id.*
197 PGE/600, Edmonds-Larson-Richard/20.
198 *Id.*
199 PGE/600, Edmonds-Larson-Richard/21-22.

would not be pursued. There is nothing unique in terms of technical performance or constructability in Mr. Moyer's alternatives, and their costs (whatever they ended up being) would be significantly lower than PGE's preferred option.[200]

Finally, PGE failed to consider potential benefits associated with any transmission upgrades. PGE's refusal to conduct basic transmission analysis means "that there could be no or very minor costs associated with accepting the Blue Marmots' output and in certain circumstances, the incremental costs could be outweighed by benefits."[201] These benefits could include increased participation in the EIM, increased operational capabilities for PGE, or other unknown and unquantified benefits. In fact, PGE did not "provide any analysis regarding the potential benefits associated with any transmission upgrades."[202]

As summarized by Mr. Moyer:

> PGE did not perform a reasonable SIS for the Blue Marmots – expanding the transmission capacity was another option to accept the output. While new transmission may not be the most efficient means for PGE to manage the Blue Marmots' power, the option to do so was never truly on the table as PGE did not consider a reasonable slate of transmission alternatives, and the one it did focus on is 300-miles long and technically infeasible.[203]

### 3. FERC Policy Does Not Allow PGE To Charge the Blue Marmots for Upgrades to PGE's System in Order to Prevent Utilities from Discriminating Against Non-Utility Competitors and Because All Transmission Customers Benefit from Network Upgrades

As discussed above, the allocation of costs associated with the delivery of power across the interface between PAC and PGE is not subject to OPUC authority under 18 C.F.R. sec. 292.306. This is not an interconnection over which FERC regulations delegate authority to the

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200 Blue Marmot/600, Moyer/6, 45-46.
201 Blue Marmot/600, Moyer/2-3.
202 Blue Marmot/600, Moyer/6, 1. 13-14.
203 Blue Marmot/400, Moyer/44.

state commission. The Blue Marmots are interconnected with PacifiCorp, and the interface between PGE and PacifiCorp involves FERC-jurisdictional facilities and flow of power. To the extent the interface is conceived as a FERC-jurisdictional generator interconnection, FERC policy under Order No. 2003 is clear that the cost of upgrades associated with the flow of power from an interconnecting generator are to be rolled into system wide rates. Similarly. under FERC transmission policy, the cost of transmission upgrades called for by the delivery of power on behalf of transmission customers (as is PGE's merchant for purposes of its purchase of QF power), are appropriately rolled into system-wide rates, and are not assessed incrementally to transmission customers.

FERC's policies require all transmission customers to pay for network upgrades that are identified in transmission studies. FERC has adopted this policy to ensure that transmission providers do not discriminate against generation not owned or developed by the transmission provider's merchant function, and because network upgrades generally benefit all users of the transmission system. This is the situation that is occurring in this case in which PGE, as the transmission provider, has the power to, and appears to be discriminating against the Blue Marmots in favor of itself. To avoid these types of disputes, FERC simply removes the incentive and requires that the costs of transmission upgrades (including those related to generator interconnections) are generally rolled into the rates for all transmission customers.

FERC's long-standing policy has been that system-wide benefits associated with network transmission upgrades produce system-wide benefits and should be charged to all transmission customers.[204] The same policy applies to interconnections, and FERC adopted pricing policy in

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[204] *Old Dominion Elec. Coop, et al. v. Virginia Elec. and Power Co.*, 146 FERC ¶ 61,200 at P. 49 (2014) ("The Commission's policy is that the costs of transmission projects integrated with the transmission system that provide system-wide benefits should be

Order No. 2003[205] that, through application of the FERC's transmission rate crediting policy, ensures that interconnecting generators do not bear the economic cost of system upgrades associated with the interconnection. The crediting policy articulated in Order No. 2003 refunds the cost of system upgrades built to accommodate interconnecting generators through transferable transmission rate credits, or ultimate balloon payments. Explaining the rationale for holding generators harmless for the cost of upgrades associated with the delivery of power, FERC stated that:

> [T]he Commission remains concerned that, when the Transmission Provider is not independent and has an interest in frustrating rival generators, the implementation of participant funding, including the 'but for' pricing approach, creates opportunities for undue discrimination . . . . Therefore, the Commission

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rolled-in."); *Northeast Utils. Serv. Co.*, 58 FERC ¶ 61,070 at p. 61,206 (1992), *reh'g denied*, 59 FERC ¶ 61,042 (1992); *Pub. Serv. Co. of Colorado*, 59 FERC ¶ 61,311 at p. 62,150 (1992), *reh'g denied*, 62 FERC ¶ 61,013 (1993) (finding that where transmission facilities are fully integrated and support the entire transmission system, a utility will not be permitted to charge both an embedded cost rate and an incremental cost rate, and that a utility can charge the higher of embedded cost rates or incremental cost rates, but must demonstrate that incremental pricing is justified for a specific customer); *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act; Pricing Policy Statement, FERC Stats and Regs*. ¶ 31,005 at pp. 31,137-38 (1994) (Explaining that when a transmission provider must add transmission assets to provide new or expanded transmission service, the Commission has allowed the transmission provider to charge transmission customers the higher of either the rolled-in embedded cost for the system as expanded or the incremental expansion cost (i.e., "or" pricing), but not the sum of the two (i.e., "and" pricing)); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities: Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at p. 30,268 (1997) ("Under our transmission pricing policy, a utility is . . . permitted to charge the higher of incremental expansion costs 'or' a rolled-in embedded cost rate.").

[205] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146, at PP. 813-14 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007). *See also North Hartland, LLC*, 105 FERC ¶ 61,192 at P. 16 (2003); *Midwest Independent Transmission System Operator, Inc*., 138 FERC ¶ 61,204 (2012).

> continues in this Final Rule its current policy, as modified below, of requiring a Transmission Provider that is not an independent entity to provide transmission credits for the cost of Network Upgrades needed for a Generating Facility interconnection.[206]

FERC made clear that the policy effectively rolls into system-wide rates the cost of system upgrades called for to integrate new third-party generation, just as is the case for utility-owned generation. As FERC stated:

> The Transmission Provider has traditionally rolled into its transmission rates the cost of Network Upgrades required for its own interconnections, and the Commission's crediting policy ensures that Network Upgrades constructed for others are treated the same way.[207]

The implementation of the pricing policy articulated in Order No. 2003 was controversial in the utility community, leading many to argue that it would lead to inefficient siting decisions and impose costs on native load customers. Nonetheless, FERC determined that non-discrimination called for independent interconnecting generators to be treated the same as a utility's affiliated generators, and that the incremental cost of upgrades associated with the delivery of power should ultimately be rolled into system-wide rates.

FERC's overall pricing policy preference for rolling into system-wide rates the cost of transmission upgrades that are integrated into the grid presumes that all customers benefit from a more robust system. As FERC commented in Order No. 2003-A, in language directly applicable here:

> In response to the petitioners that want the cost of the Network Upgrades to be directly assigned to the Interconnection Customer, we note that the Commission has long held that the Transmission System is a cohesive, integrated network that operates as a single piece of equipment, and that network facilities are not 'sole use' facilities but facilities that benefit all Transmission Customers. The Commission has reasoned that, even if a customer can be said to have caused the addition of a grid facility, the addition represents a system expansion used by and

206 FERC Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P. 696 (2003).
207 *Id.* at P. 694.

> benefiting all users due to the integrated nature of the grid. For this reason, the Commission has consistently priced the transmission service of a non-independent Transmission Provider based on the cost of the grid as a whole, and has rejected proposals to directly assign the cost of Network Upgrades.[208]

The anti-discrimination provisions in PURPA and FERC's regulations[209] are consistent with, and indeed an expression of, this precedent and must be applied to assure interconnecting generators that they will not be treated adversely vis-à-vis the treatment enjoyed by affiliated utility generation. FERC's pricing policy determination that all customers are better off when the cost of integrated facilities are rolled into system-wide rates reflects the FERC's determination that existing customers will *not* be worse off by application of the pricing policy articulated in Order No. 2003.

#### 4. The Blue Marmots Are Not Required to Purchase an Unnecessary Additional Leg of Transmission

PGE has insisted that one way the Blue Marmots can qualify to sell their power to PGE is to purchase an additional leg of transmission service over the Bonneville Power Administration's transmission system, and deliver their output to PGE at a different location on its system. For all of the reasons described above, PGE can receive the power at the PACW.PGE interface, consistent with the PPAs, as is. Thus, PGE has no justification for requiring the Blue Marmots to take this action, even setting aside the legal prohibition against it doing so.

Additionally, the Blue Marmots point out that this additional leg of transmission would be expected to cost about $14 million. This far exceeds any opportunity cost that PGE has identified it could incur from lost EIM revenues, and is thus punitive at best. Such a requirement would mean that the Blue Marmots are required to shoulder a massive cost in order for PGE to

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208 Citing (at fn. 109), *Public Service Co. of Colorado*, 59 FERC ¶ 61,311 (1992), *reh'g denied*, 62 FERC ¶ 61,013 (1993).

209 18 CFR 292.304(a)(ii).

preserve a minimal benefit, despite the fact that PGE negotiated and entered into a legally enforceable obligation with the Blue Marmots, in accordance with its standard processes.

Somewhat ironically, PGE admits that if the Blue Marmots were to schedule power to their system over the BPA system, that this would only require point-to-point transmission to the edge of PGE's system.[210] This shows the lack of merit to PGE's contentions that when it comes to the PACW.PGE interface, the Blue Marmots are required to do something beyond provide for transmission service to the edge of PGE's system.

### H. PGE Cannot Change the Rate Applicable to the Blue Marmots to Recover Costs It Failed to Identify When Setting the Rates

It is undisputed in this case that the Blue Marmots have agreed to sell power to PGE at the appropriately-established avoided cost rates for PGE, in accordance with PURPA. And, it should be uncontroversial that PGE is not allowed to adjust those rates afterward. Yet, PGE seeks to effect such a result when it asks the Commission to require the Blue Marmots to take any of the costly and unnecessary options from which it has demanded the Blue Marmots choose.

FERC's PURPA regulations establish that QFs are entitled to sell their power at the avoided cost rates established at the time when the obligation is incurred, and that those rates continue to be valid and enforceable even when the utility's costs may change after the obligation was incurred.[211] FERC has explained that "[t]he import of [those regulations] is to

210 Hearing Transcript at 109 (Greene) (Dec. 12, 2018).
211 18 CFR 292.304(b)(5).

ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances."[212]

The Ninth Circuit's decision in *Independent Energy Producers Association, Inc.*, is also relevant here.[213] In that case, the California Public Utilities Commission ("CPUC") sought to re-price certain QFs' rates under the guise of regulating the QFs' operating characteristics to assure compliance with federal standards.[214] The Ninth Circuit Court of Appeals held that such a program was unlawful, because it deprived QFs of the full avoided cost rates, and that the CPUC was not entitled to regulate the rate to allow it to depart from the rate provided for under PURPA.[215] PGE's actions in seeking to impose costs on them after the legally enforceable obligations were incurred violates the "certainty of [their] arrangement" at the time they entered into the legally enforceable obligation, and changes the economic benefit of the obligations they undertook, contrary to the regulations under PURPA.[216]

PGE seeks to characterize its demands that the Blue Marmots incur significant (and unnecessary) costs before PGE will accept the power as something other than a departure from

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212 *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980).

213 *Independent Energy Producers Association Inc. v. California Public Utilities Commission*, 36 F.3d 848 (9th Cir. 1994).

214 *Id.* at 849.

215 *Id.* at 858 (citing 18 CFR § 292.304(d)(2)); *see also Wilson v. Harlow*, 860 P.2d 793, 799-800 (Okla. 1993) (holding that 18 CFR 292.304(b)(5) and (d)(2) provide QFs the "right to receive the benefits of the contract even if, due to changed circumstances, the contract price for the power at the time of delivery is unfavorable to the utility," and thus preempted contrary state law); *Smith Cogeneration Mgmt. Inc. v. Corp. Comm'n*, 863 P.2d 1227, 1240-41 (Okla.1993).

216 *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980).

its established rates. Instead, PGE seeks to characterize it as a Commission-established right under PURPA.[217]

As explained above, PGE's argument stands in stark contrast to the breadth of FERC cases that establish a utility's obligation to purchase power delivered to its system by a QF, and the inability of a utility to avoid that obligation through attaching conditions to it.[218] PGE's position is also contrary to the terms of the standard contract it provided to the Blue Marmots, which specifies their delivery obligations, which they have satisfied.[219]

### I. PGE Cannot Avoid Its Obligations to the Blue Marmots Out of Anxiety for the Future

PGE asserted throughout testimony, and at the hearing, that one of the reasons it should not be required to receive the Blue Marmots' power at the PACW.PGE interface, is because other qualifying facilities will then take advantage of that opportunity, degrading its ability to participate in the EIM.[220] It appears that PGE is seeking to use its refusal to purchase the Blue Marmots' net output as a "test case" that shields itself from purchasing power from other generators, who are not parties to this case.

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217 PGE Prehearing Brief at 18.

218 *See* Supra at Section F.1.

219 *See* Supra at Section E. In its Prehearing Brief, PGE cites *Water Power Co., Inc. v. PacifiCorp*, 99 Or App 125 (1989), for its finding that a utility "may insist on provisions that require . . . a particular point of delivery." PGE Prehearing Brief at 18. However, the question before the Court of Appeals in that case 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. *Water Power Co.*, 99 Or App at 130-132. 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. 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. And, for the reasons described earlier in this brief, PGE knew the location for the Blue Marmots output to be delivered. 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.

220 *See, e.g.*, PGE/100, Greene-Moore/21-22.

As a threshold matter, the Commission should reject this justification because it is irrelevant to the legal issues associated with whether the Blue Marmots are able to enforce *their* legally enforceable obligation and PPA with PGE. To the extent PGE believes the matter should be addressed prospectively, it is free to seek methods by which to do so. And, to the extent PGE is working with other qualifying facilities to renegotiate their rights, that also has no bearing on the Blue Marmots' rights.

Additionally, the record in this case is clear that PGE's statements on this topic are best characterized as generalized anxiety about the Commission's order ruling in the Blue Marmots' favor. PGE's witnesses admit that any impact of future events cannot be analyzed at this time, and would require technical, legal, and other analyses. At hearing, when asked to clarify PGE's statements that its participation in the EIM could be thwarted by other qualifying facilities, PGE's witnesses were asked:

> Q. Thank you. I just wanted to clarify that conclusion and the circumstances under which that would come about. And I believe you're saying it would take analysis to figure out whether or not such an outcome would occur in the instance that the commission ordered PGE to accept the Blue Marmots' power; is that correct? It would take further analysis in terms of legal review, identifying the existence of other contracts and things along that line?
>
> A. Yes. So to clarify my statement, I can't speculate to what decision the commission would make in this proceeding and how that would impact that. Now, pending that commission decision, yes, it would require a legal analysis, review of the qualifying facility contracts and, depending on what the commission stated, how that impacts that. So I cannot give you a specific number to address that question. I think that the statement stands for itself that it's as if the commission were to determine that, and I don't know what that determination is at this point in time.[221]

[221] Hearing Transcript at 291-292 (Moore-Rodehorst) (Dec. 13, 2018).

Finally, the evidence in this case shows that the Blue Marmots have a status different from future qualifying facilities. 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 qualifying facilities that come after the Blue Marmots do not need to be resolved in this case. Finally, to the extent there are other qualifying facilities 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 they are limited in number, and that some of those projects may not be coming on line in any event.[222]

Furthermore, even if all of those projects did demand to deliver power to the PACW.PGE interface, PGE would still have enough ATC at the interface to continue to participate robustly in the EIM. PGE's witnesses acknowledged that even if all of the QFs that have PPAs to deliver at the PACW.PGE interface, including the Blue Marmots, did so, PGE would still have at least 193 MW of ATC to use in the EIM, even at times when all of them were scheduling their full capacity.[223]

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222 *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." PGE also has been unable to contact the one of the qualifying facilities contracted to deliver at PACW.PGE. 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* Disposition: Motion to Compel Denied (Oct. 30, 2017). 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.

223 Hearing Transcript at 283 (Moore-Rodehorst) (Dec. 13, 2018).

### J. PGE Is Unlawfully Discriminating Against the Blue Marmots by Refusing to Accept the Power they Generate, But Accepting It from Other Qualifying Facilities at the Same Location and Under the Same Conditions

By failing to purchase power from the Blue Marmots, and requiring them to have engaged in this complaint process in order to enforce their legally enforceable obligation, PGE is unlawfully discriminating against the Blue Marmots.

It is well-established that PGE cannot unduly discriminate against any person, and that it must treat similarly-situated persons in the same manner.[224] This includes qualifying facilities taking service under Schedule 201. Yet, PGE admits that there are other qualifying facilities 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.[225] And, PGE has agreed to purchase power from those projects, while refusing to accept power from the Blue Marmots.[226]

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.[227] 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. Additionally, the record has established that there are no differences between the PPAs that PGE counter-signed, and the executable PPAs provided to the Blue Marmots on the topic of the delivery location. In other words, the Blue Marmots' PPAs are just as clear about the point of

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224 ORS 757.325.
225 Blue Marmot/400, Moyer/29; PGE/100, Greene-Moore/10, 13-14.
226 PGE/100, Greene-Moore/14.
227 *Id.*

delivery as are the other qualifying facilities' contracts that PGE characterizes as having contracted for delivery across the PACW.PGE interface.[228] 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.

Because there is no legally significant difference between the Blue Marmots and the other qualifying facilities with respect to their rights, or the terms of the PPA under which they created a legally enforceable obligation, the Commission should find that PGE is unlawfully discriminating against the Blue Marmots by refusing to purchase their output.

### K. If the Commission Were to Find That a PGE Counter-Signature is Required in Order to Enforce the Contracts, PGE Should be Directed to Sign the PPAs

Throughout the case, PGE has argued that it is legally significant that it did not counter-sign the Blue Marmots' PPAs. For the reasons described above, including the Commission's own express order, this is not a legally sound position. However, if the Commission were to find that there is a legal significance to PGE's counter-signature, or that doing so is a formality that will make the administration of the sale more straight-forward, it should direct PGE in this case to counter-sign the Blue Marmots' PPAs.

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228 *See* Hearing Transcript at 190 (Greene) (PGE witness explaining that other than the fact that the other contracts were counter-signed, ". . . I'm not aware of any other differences."). *See also* Blue Marmot/804 at 2-3 (Affidavit of John Morton, Originator, Power Operations at PGE, declaring that the Airport Solar PPA is the only off-system non-standard QF PPA that PGE has signed for deliveries to the PACW.PGE POD, and that "none of the terms of that agreement pertain to the constraint at the PACW.PGE POD"). The Blue Marmots sought the actual contract from PGE, but were not allowed to receive it pursuant to an ALJ Order issued on October 30, 2017 in this case.

### L. The Commission Should Adjust the Commercial Operation Date in the PPAs to Reflect the Delay Caused by the Need for These Complaints and Associated Litigation

In light of the litigation that has been required by the Blue Marmots 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.[229] In this case, the Blue Marmots request that the Commission modify the COD in their PPAs 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. For example, 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. Additionally, to the extent it is relevant in this proceeding, PGE has offered no compelling policy reason for why it should be discharged of its legally enforceable obligation to the Blue Marmots.

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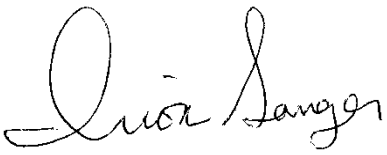
229 *See, e.g. West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) (declining to disturb state Commission findings that certain milestones of a QFs contract could be modified for litigation delay).

Respectfully submitted this 14th day of February, 2019.

Respectfully submitted,



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