

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1829, UM 1830, UM 1831, UM 1832, UM 1833 – PHASE II

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

Complainants,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

RESPONSE TO PGE’S MOTION FOR
EXTENSION OF TIME TO FILE
RESPONSE TESTIMONY

I. INTRODUCTION

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”) file this response to Portland General Electric Company’s (“PGE’s”) motion for an indefinite extension of time to file response testimony (“PGE’s Motion”). The Blue Marmots oppose PGE’s Motion because the extension is inappropriate, unnecessary, harmful, and overall lacks good cause.

The Blue Marmots were served with an “Amendment to its Motion for Extension of Time to File Response Testimony” at 9:54 am today. PGE did not confer with the Blue Marmots regarding this filing. PGE also served the Blue Marmots with an additional multi-party data request yesterday afternoon requesting a response by April 3, 2020 related to PGE’s Data Request 8. The Blue Marmots have not had an opportunity to review the data response in detail, but note that they have provided responses to all of PGE’s data requests upon their due dates,

including those in which PGE has asked for expedited response times. PGE requests that the date for its testimony be delayed until April 8, 2020, and does not ask for any changes to the Blue Marmots' testimony due date, which is currently scheduled for filing on April 21, 2020.

The Blue Marmots continue to oppose PGE's request for additional time, and if the Administrative Law Judge grants an extension, then the Blue Marmots request that it be set no later than two business days or April 1, 2020, and that the Blue Marmots be provided an extension of time equal to whatever PGE is allowed. As explained below, the Blue Marmots believe that PGE can file its testimony by March 30, 2020, and that PGE did not need the information in response to DR 8 to file its testimony on profitability. PGE has *all* the specific information it originally asked for, and does not need the extremely small amount of backup materials to warrant a week and half extension of time. The Blue Marmots decline to specifically address PGE's characterization of the dispute and colorful accusations regarding the Blue Marmots, but note that the Blue Marmots disagree with them.

II. RESPONSE

A. PGE's Motion Should Be Denied Because a Week and Half Extension Is Inappropriate

Either an indefinite or even a week and half extension of time inappropriate in light of the parties' prior agreement to the schedule.¹ PGE and the Blue Marmots agreed to a schedule with full awareness that a discovery dispute was ongoing, and was made *specifically* in light of PGE's Motion to Compel. PGE understood that a resolution of the discovery dispute may require time and that the production and review of data may require time. PGE did not condition its agreement upon receiving the data by a date certain, and did not state that it would later ask for an indefinite extension of time.

¹ PGE Motion for Extension of Time to File Response Testimony (Mar. 24, 2020).

On December 16, 2019, PGE and the Blue Marmots agreed to a full schedule for this Phase II, including that PGE's Response Testimony would be due March 27, 2020, and the Blue Marmots' Reply Testimony would be due April 20, 2020.² On February 28, 2020, PGE and the Blue Marmots agreed to amend the schedule so that PGE's Response Testimony would be due on March 30, 2020 and the Blue Marmots' Reply Testimony would be due April 21, 2020 at noon.³ This agreement already reflects a three-day extension on PGE's Response Testimony, and a half-day extension on the Blue Marmots' Reply Testimony.

It was and remains important to the Blue Marmots that the schedule not be significantly altered and maintain the hearing date of May 13, 2020, and the final reply brief on June 29, 2020. Given the limited issues in Phase II, the Blue Marmots assumption was that the Commission could quickly turn around an order with acceptable commercial operation dates that would allow the Blue Marmots to timely commence construction to reach commercial operation in September through December 2023. It is critical to achieve those dates because the Blue Marmots will lose the full 30% Investment Tax Credit at the end of 2023. Thus, there is no more time to push out the commercial operation dates without causing significant and irreparable harm to the Blue Marmots. If the Blue Marmots actual commercial operation dates are pushed past 2023, then the Blue Marmots will need to seek relief for this diminished asset value.

PGE knew when it agreed to the schedule that the data it sought were voluminous. Since at least February 6, 2020, the Blue Marmots have been telling PGE that the responses to PGE's data requests ("DRs") 1, 4, and 12 would be voluminous.⁴ The Blue Marmots' original

² Prehearing Conference Memorandum at 1 (Dec. 20, 2019).

³ ALJ Ruling at 3 (Mar. 2, 2020) (adopting the parties' agreed-upon deadlines).

⁴ The Blue Marmots agree that the data are voluminous but do not necessarily accept PGE's count of emails. PGE has previously counted email chains, which can contain

responses stated that data production would be burdensome and that the DRs were overly broad.⁵ PGE previously stated that review of the material “is a task that can be accomplished in a few hours,”⁶ but now PGE wants to a week and half of additional time over what it characterized as a few hours of review.

Notwithstanding these objections, the Blue Marmots voluntarily provided PGE all the information that the Blue Marmots believed was relevant.⁷ PGE has now had seven weeks to review the relevant data. The Blue Marmots asked PGE to provide narrower DRs, if PGE thought additional data were necessary.⁸ This would have been less burdensome for the Blue Marmots, may have avoided the need for a discovery dispute, and reduced the quantity of data that PGE now seeks additional time to review. PGE never narrowed its discovery requests, and instead chose to obtain a larger amount of data.

Discovery disputes are common in litigation; parties often need to make filings in an expedited manner after discovery disputes are resolved. In fact, during Phase I of this proceeding, the Blue Marmots and PGE had a discovery dispute that was not resolved until after

numerous emails, and the Blue Marmots do not believe that this is an appropriate approach. *See, e.g.*, PGE’s Reply on the Motion to Compel.

⁵ PGE’s Motion to Compel at 12 (Feb. 21, 2020).

⁶ *See* PGE’s Reply in Support of First Motion to Compel at 14 (Mar. 6, 2020) (noting that the Blue Marmots’ estimate of over 300 emails is not persuasive because “in PGE’s experience, reviewing 300 emails . . . is a task that can be accomplished in a few hours”).

⁷ *E.g., id.* at 8 (quoting the Blue Marmots’ response to DR 1 as providing all requested correspondence to the extent it addresses “permitting timing and schedule”).

⁸ The Blue Marmots disagree with PGE’s characterization in PGE’s Motion to Compel that the Blue Marmots failed to request more specific DRs. PGE’s Motion to Compel at 15 (Feb. 21, 2020). Any objection to a DR as being overbroad and unduly burdensome is necessarily a request for narrower and more specific DRs.

testimony was due.⁹ PGE knew there was a risk that it would have limited time to file its testimony after the dispute was resolved. PGE agreed to the schedule anyway.

In short, PGE has gotten exactly what it should have expected when it agreed to the current schedule. If PGE had thought more time was necessary than the extension it already agreed to, then it should have raised this earlier and asked for more time or conditioned its agreement on receiving the data by a date certain. It did neither, and it would be inappropriate to amend the parties' agreement at this late stage.

B. PGE's Motion Should Be Denied

PGE's review of DRs 1, 4, 8, and 12 does not warrant a week and half extension of time. Neither PGE nor the Administrative Law Judge ("ALJ") asked the Blue Marmots to produce compelled data by a certain date,¹⁰ yet the Blue Marmots have produced the overwhelming majority of data in an extremely expedited fashion. The Blue Marmots produced a substantial portion of the data within only two days of the ALJ's ruling.¹¹ The Blue Marmots and their counsel worked evenings and a weekend, changed schedules, and rearranged work responsibilities in order to produce data as quickly as possible. While the documents were voluminous, much of the preparation time was to locate, gather and prepare the information,

⁹ Compare Blue Marmots' Opening Testimony (Oct. 13, 2017), with ALJ Ruling (Oct. 30, 2017) (addressing a discovery dispute relevant to the Blue Marmots' Opening Testimony).

¹⁰ See generally PGE's Motion to Compel (Feb. 21, 2020); ALJ Ruling (Feb. 24, 2020) (adopting expedited schedule for motion to compel); ALJ Ruling (Mar. 2, 2020) (amending the schedule); PGE's Reply in Support of First Motion to Compel (Mar. 6, 2020); ALJ Ruling (Mar. 18, 2020). At most, PGE requested a "prompt" response and the Blue Marmots have more than complied.

¹¹ The Blue Marmots have provided a single additional item for DR 1 since March 20, 2020 because a single item was inadvertently missed from the response provided on March 20, 2020.

including a review to remove any documents for privilege and relevancy.¹² The Blue Marmots responded promptly and endeavored to avoid unnecessary delays to a proceeding, which is specifically about the harm the Blue Marmots have suffered from litigation delays.

Further, PGE has had more than sufficient time to review all of the data produced for DRs 1, 4, and 12. The data are unlikely to have any effect on PGE's Response Testimony. DRs 1 and 4 request information about permitting, and the Blue Marmots produced all relevant data regarding permitting timing and scheduling on February 6, 2020. Similarly, DR 12 requested information regarding the Blue Marmots' interconnection (or transmission) arrangements with PacifiCorp Transmission, and the Blue Marmots produced all relevant data regarding interconnection and transmission timing and scheduling on February 6, 2020 (or shortly thereafter in response to other DRs). Neither permitting nor interconnection nor transmission arrangements have caused delays to the Blue Marmots' development; the delays have been caused only by Phase I of this proceeding.

DR 8 will also *not* require days to review. Since PGE filed its motion for an extension, the Blue Marmots have produced the remaining data for DR 8. DR 8 asks for specific numbers for each year that the projects would have been operational: specifically the annual expected profits of the Blue Marmots if PGE had not failed to counter-sign the PPAs and the Blue Marmots had had viable PPAs upon which they could rely to achieve their original CODs as they always planned.¹³

¹² As in the case of discovery matters of this sort, the parties generally provide more information than is responsive to legal counsel to ensure that no documents are missed, and then legal counsel conducts an independent review to remove any documents not related to the discovery request or that are privileged.

¹³ PGE's Motion to Compel, Attachment A at 1 (PGE's First Set of Data Requests (Jan. 23, 2020)) (stating DR as "Assuming the Blue Marmots were able to achieve their original

PGE claims, without any support, that this data would require a significant amount of time to review. The Blue Marmots never objected that this data would be voluminous, as PGE seems to suggest. While the Blue Marmots needed more time to produce the data for DR 8 than for DRs 1, 4, and 12, that was because the data did not exist and was not readily available. Even so, they successfully produced data responsive to DR 8 in fewer than five business days following the ALJ's ruling.

PGE did not need these data to prepare or even make this argument. PGE has claimed that it plans to argue that the Blue Marmots should not have delayed development because (in PGE's view) the projects would have been "profitable" even with a second transmission wheel.¹⁴ This is despite the fact that the Blue Marmots did not have viable contracts and would not have constructed the projects regardless of their potential profitability, if there was uncertainty regarding securing viable contracts. Nevertheless, PGE should have already drafted this section of its testimony, and could have filed its testimony on this point by making its own profitability estimates based upon the expected revenues and industry standard solar costs. Inputting some specific numbers to support this argument should not be difficult.

PGE originally alleged that an indefinite extension is needed in case PGE needs to file additional DRs, and now asks for a week and half of additional time.¹⁵ PGE has no grounds for believing the Blue Marmots will fail to respond in a rapid manner. The Blue Marmots have provided timely discovery responses, even those that PGE asked the Blue Marmots a week before the Blue Marmots' testimony was due. PGE also has outstanding data requests that have

¹⁴ CODs, please provide the total expected profit, by year, not adjusted for present value or inflation, expected over the term of the Power Purchase Agreements (PPA)."). PGE's Motion to Compel at 3 (Feb. 21, 2020) ("PGE believes that the Blue Marmots' projects were likely profitable even if the Blue Marmots had to pay to deliver their output to BPAT.PGE POD") (emphasis omitted).

¹⁵ PGE's Motion for Extension of Time to File Response Testimony at 1-2 (Mar. 24, 2020).

asked the Blue Marmots to respond on a shorter time frame than the fourteen-day period agreed to, and the Blue Marmots are voluntarily responding to these data requests on expedited basis.

The ALJ should be aware that PGE has already propounded an excessive amount of discovery. Considering the extremely limited scope of this Phase II, the Blue Marmots are surprised that PGE has already asked 48 DRs, 19 of which have multiple subparts. The scope of this Phase II is limited to only *two* unresolved issues that were parts of Phase I.¹⁶ In contrast, in Phase I, the Blue Marmots addressed far more significant and complex issues, and PGE sought to suspend all discovery when the Blue Marmots had more than 100 DRs.¹⁷ Based on PGE's own arguments in Phase I, the Blue Marmots would be justified in asking to simply prevent further discovery.¹⁸ The Blue Marmots have not yet done so, but the Blue Marmots are extremely concerned about PGE's last-minute request to change the schedule.

C. PGE's Motion Should Be Denied Because an Extension Is Harmful

PGE's Motion to amend the schedule must be weighed against the harm that a last-minute schedule change would impose. The entire focus of this Phase of the proceeding is about the harm the Blue Marmots suffered from delays in litigation. As the ALJ has previously stated, it is "incumbent upon the parties and the Commission to keep further delays due to litigation to a minimum."¹⁹ An indefinite suspension of the schedule would have simply perpetuate the harm from Phase I in this Phase II, and a week and half extension could do the same given the upcoming testimony and hearing dates.

¹⁶ See Order No. 19-322 at 19 (Sept. 30, 2019); see Joint Issues List at 1 (Jan. 2, 2020).

¹⁷ See generally PGE's Response to Blue Marmots' Motion to Compel Discovery (Sept. 5, 2017).

¹⁸ *E.g., id.* at 14 ("PGE respectfully requests that the Commission deny Blue Marmot's Motion to Compel, prohibit Blue Marmot from issuing additional data requests until after PGE files its Response Testimony, and require PGE to respond only to the first 101 data requests served by Blue Marmot in this matter for the time being.").

¹⁹ ALJ Ruling at 2 (Feb. 24, 2020); see also ALJ Ruling at 2 (Mar. 4, 2020).

The Blue Marmots note that although PGE's request asks for an extension only to PGE's Response Testimony, it necessarily follows that any extension threatens the entirety of the schedule. The schedule already provides the Blue Marmots with an extremely short period of time to file their Reply Testimony: fifteen and half business days to file their Reply Testimony. The Blue Marmots agreed to this expedited reply period because it helped ensure that the original schedule could proceed and this Phase II could conclude on the originally planned schedule, including maintaining the May 11, 2020 hearing date and a timely final order to allow the projects to be constructed prior to the end of 2023.²⁰

If the ALJ believes that some extension is warranted, then the Blue Marmots ask that, at minimum, it not be indefinite or even a week and half. The ALJ should consider the schedule as a whole, grant no more than two business day extension to PGE, and (whatever additional time is provided to PGE) grant an equal amount of time to the Blue Marmots for their Reply Testimony.

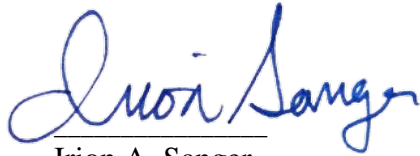
III. CONCLUSION

For the foregoing reasons, the Blue Marmots respectfully request that the Commission provide expedited consideration to this response and deny PGE's Motion for an e extension. Alternatively, the Blue Marmots request that the Commission approve an extension more than two business days. Further, if any extension is granted, the Blue Marmots request that reply period be maintained by providing an equal amount of time to the Blue Marmots.

Dated this 27th day of March 2020.

²⁰ See Prehearing Conference Memorandum at 1 (Dec. 20, 2019).

Respectfully submitted,



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