

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

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

Blue Marmot V, LLC (UM 1829))	
Blue Marmot VI, LLC (UM 1830))	RESPONSE TO PGE’S MOTION TO
Blue Marmot VII, LLC (UM 1831))	COMPEL
Blue Marmot VIII, LLC (UM 1832))	
Blue Marmot IX, LLC (UM 1833),)	
Complainants,)	
)	
v.)	
)	
Portland General Electric Company,)	
Defendant.)	

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 requesting that the Oregon Public Utility Commission (the “Commission”) Administrative Law Judge (“ALJ”) compel certain privileged and confidential communications and documents (“PGE’s Motion”). PGE’s Motion is inconsistent with the Commission’s rules and practice, Oregon and federal law regarding the attorney-client and work product privileges, and should be denied.

PGE seeks to compel all attorney-client communications and legal memoranda prepared to develop the strategy for and predict the outcome of the current litigation. PGE suggests that the mere presence of the term, “on advice from counsel” in the Blue Marmots’ testimony constitutes a total waiver of all of the witness’s communications with counsel, and any supporting legal documents prepared in anticipation of the Blue Marmots’ need to litigate these

issues. PGE's arguments for such a severe compulsion are not well supported, and are unconvincing.

Importantly, PGE fails to identify even a *single* example where the Commission (or court) has determined this kind of language or even a remotely similar circumstance constituted a waiver of either the attorney-client privilege or the work product doctrine. Given the paucity of any supporting case law or analysis, the Blue Marmots reserve the right to file a sur-response if PGE elects to include information in its reply that should have been included in its Motion to Compel.

PGE also omits from its Motion that some of underlying "legal" arguments and references to laws, cases, rules, and administrative orders can be found in the Blue Marmots' complaint. As part of their preparation for their testimony, the Blue Marmots' witnesses reviewed the Blue Marmots' complaints filed in this proceeding. PGE also can review the Blue Marmots' complaints to understand the "legal" basis for much of the Blue Marmots' testimony, without the extreme remedy of compelling attorney client and work product privileged material.

Finally, it is not clear whether PGE's Motion is even ripe because the Commission has not yet ruled upon PGE's Motion to Strike. PGE acknowledges "if the Motion to Strike is granted, this Motion to Compel will be moot" without acknowledging how procedurally awkward the timing of its two motions is.¹ Given the unprecedented nature of PGE's request, and the severity of the information PGE is seeking to compel, it seems that the Commission ought to rule on PGE's Motion to Strike (including any certifications or appeals) before addressing PGE's Motion to Compel.

¹ PGE's Motion at 8.

II. BACKGROUND

The Blue Marmots filed their Opening Testimony to establish the underlying facts of this case, which also described their witnesses' understanding of some of the disputed issues. Shortly thereafter, PGE filed a Motion to Strike requesting the ALJ strike certain portions of the Blue Marmots' testimony, which PGE identified as legal argument offered by non-lawyer witnesses.² Although PGE conceded that providing legal argument as context in testimony was somewhat commonplace in Commission proceedings, it argued the portions PGE identified were irrelevant and inadmissible.³ PGE also argued that, if the contested testimony was not stricken, PGE would be forced to respond with legal argument. To that end, PGE had already issued several discovery requests for the legal basis behind the contested testimony, including privileged attorney-client and work product communications and legal memoranda.

The Blue Marmots responded to PGE's Motion to Strike by demonstrating that the Blue Marmots' testimony was consistent with the Commission's rules and normal practice as well as PGE's own and other utilities' testimony in numerous proceedings, and should not be stricken. Because the purpose of the contested testimony was not to provide a legal opinion, but simply to identify the witnesses' understanding of the law and policy to provide context for the factual evidence presented, the Commission should simply provide the appropriate weight to the evidence as presented.

Before awaiting resolution of its Motion to Strike, PGE filed a subsequent motion seeking to compel all of the Blue Marmots' privileged communications and documents in case

² PGE's Motion to Strike at 1.

³ Id. at 4 (PGE acknowledges that "contested cases brought before this Commission frequently present interrelated legal and factual matters, and that therefore it is sometimes appropriate for witnesses to reference statutes, regulations, and legal decisions to provide background or context for the factual matters presented.").

the contested testimony was not stricken.⁴ PGE correctly states that the Blue Marmots have refused to respond fully to PGE’s data requests, because the information PGE seeks is protected by the attorney-client privilege and the work product doctrine. PGE claims, however, that the Blue Marmots have waived these privileges by disclosure in their Opening Testimony. More specifically, PGE suggests that the Blue Marmots have waived *all* privileges, which means that *all* of their communications with counsel, and *all* documents prepared in advance of litigation in this proceeding are discoverable. PGE uses only full three paragraphs to make such a bold legal claim that would undermine centuries of precedent, and points to zero Commission orders supporting its position and no remotely similar court cases.⁵

III. LEGAL STANDARD

The Commission has established rules to govern its practice and procedure, which are to be liberally construed to ensure just, speedy, and inexpensive resolution of the issues presented.⁶ The Commission’s rules provide both broad and specific guidance with respect to discovery in contested case proceedings. For example, pursuant to OAR 860-001-0500(1), “[d]iscovery must be commensurate with the needs of the case, the resources available to the parties, and the importance of the issues to which the discovery relates.”

The Oregon Evidence Code (the “OEC”), which is provided by statute and is similar to the Federal Rules of Evidence, applies to all of Oregon’s court proceedings unless there is an express statutory exception.⁷ The OEC Rules generally do not apply to Commission proceedings, but the Commission’s rules do make one reference the OEC rules that is relevant

⁴ PGE’s Motion acknowledges that “if the Motion to Strike is granted, the Motion to Compel will be moot.” PGE’s Motion at 8.

⁵ The lack of any on point or even similar cases demonstrates the novelty of PGE’s creative and unusual effort to obtain privileged information.

⁶ OAR 860-001-0000.

⁷ OEC Rule 101; ORS 40.015.

here. OAR 860-001-0500(3) provides, “privileged material is not discoverable except as provided under the Oregon Rules of Evidence.” Pursuant to the OEC, attorney-client communications are only discoverable if the attorney-client privilege is waived.

Communications between a lawyer and client are considered privileged if the communications are confidential,⁸ for the purpose of seeking legal advice, and between the parties described in the rule.⁹ The attorney-client privilege can be waived by voluntary disclosure or consent to disclose.¹⁰

According to the U.S. Supreme Court, “[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.”¹¹ The Court goes on to declare that it serves the “public interests in the observance of law and administration of justice.”¹² Although the privilege belongs to the client, the attorney-client privilege is an indispensable part of the lawyer’s function as an advocate because an attorney can only prepare a case if the client is able to freely disclose all aspects of the situation.¹³ Without full disclosure, protected by confidentiality, a lawyer cannot properly advise a client. The Court rejected certain restrictions to the privilege explaining,

if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be

⁸ OEC Rule 503; ORS 40.225. Rule 503 defines “confidential” as “a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”

⁹ E.g., the lawyer and the lawyer’s team and client, including representatives of the client. There are a handful of specific exclusions to the privilege in Rule 503, which are not relevant here.

¹⁰ OEC Rule 511; ORS 40.280.

¹¹ Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)).

¹² Id.

¹³ Id.

certain but results in widely varying applications by the courts, is little better than no privilege at all.¹⁴

Pursuant to the Commission's rules, the Oregon Rules of Civil Procedure ("ORCP") also generally apply in contested case proceedings, unless they are inconsistent with the Commission's rules, orders, or an ALJ ruling.¹⁵ The ORCP Rules include general provisions governing discovery, limitations on discovery (including privileged matters), and attorney work product.¹⁶ Non-privileged documents are often protected during discovery by the work product doctrine. The term "attorney work product" is used to describe documents crafted by attorneys in anticipation of litigation, which contain the thoughts and mental impressions of the lawyer, and are therefore generally not discoverable. Pursuant to Rule 36, attorney work product is only discoverable if the party seeking discovery has a substantial need of the materials and is unable without undue hardship to obtain the substantial equivalent of the material by other means.¹⁷

IV. RESPONSE

PGE's Motion requests unprecedented access into the privileged communications between the Blue Marmots, their technical experts, and legal counsel. Worse still, PGE is seeking legal memoranda and other written documents specifically prepared by the Blue Marmots' counsel in anticipation of this litigation. To support such an unprecedented extension of the Commission's discovery rules, PGE offers little legal backing and unimpressive argument. To begin with, as the Blue Marmots pointed out in their Response to PGE's Motion to Strike, PGE still has not offered any support for its position that "[t]he presence of such extensive legal

¹⁴ Id. at 393 (rejecting the test used by a lower court because it restricted the availability of the privilege and suggested unpredictability in its application).

¹⁵ OAR 860-001-0000.

¹⁶ See ORCP 36, 43, and 46.

¹⁷ Under ORCP 36 "trial preparation materials" is defined as materials prepared in anticipation of litigation or for trial. We refer to "trial preparation materials" as "attorney work product" for simplicity.

argument in the Blue Marmots' testimony requires a response."¹⁸ It does not. PGE is simply stretching to find any rule, or opportunity, to allow it to claim a tactical advantage over the Blue Marmots. The Commission should reject PGE's attempt to undermine client privileges that are central to the Commission's contested case proceedings. The Commission may also dismiss PGE's Motion because it is not yet ripe.

A. The Commission Should Neither Strike the Contested Testimony Nor Compel the Discovery Materials Requested

PGE mischaracterizes the Blue Marmots' position by suggesting that the information must either be stricken (if irrelevant) or compelled (if relevant).¹⁹ In fact, the Blue Marmots opposed PGE's discovery on a number of bases, and primarily because "production of the requested data would reveal information protected by the attorney-client privilege, and/or the work product doctrine"²⁰ The contested testimony was not offered as legal opinion, it simply explains the witnesses' understanding and provides necessary context for the Commission to understand the significance of the facts presented by the witnesses.²¹ The facts in this case are very technical, and difficult to explain without understanding what the relevant issues are. By framing the argument as a simple either-or option, PGE ignores the obvious: just because the communications are relevant does not mean that they are discoverable. In short, PGE's argument here misses the mark: the Blue Marmots' primary position is that the information is not discoverable because it is privileged.

¹⁸ PGE's Motion at 7.

¹⁹ See PGE's Motion at 7 ("The Blue Marmots seek to have it both ways by refusing to produce the basis for their legal statements in discovery, on the grounds that PGE has sought to strike the information, while simultaneously opposing PGE's Motion to Strike.").

²⁰ Id. at Attachment A (Blue Marmots' Response to PGE's Data Requests).

²¹ PGE's Motion to Strike seeks to strike testimony from two witnesses whereas PGE's Motion to Compel seeks to compel more complete responses from only one witness.

It is important to note that PGE's efforts to seek privileged information would require nearly all parties to reveal confidential attorney-client and work product privileged information in nearly all Commission proceedings. For example, McDowell, Rackner and Gibson recently filed PGE's request to waive the Commission's competitive bidding guidelines.²² PGE's witness Jay Tinker explained the Commission precedent regarding waivers, and then applied his understanding of the law and Commission's standards to PGE's specific facts.²³ Mr. Tinker's summary and explanation of his understanding of the law is only partial and does not include all relevant laws or Commission precedent. However, that does not allow other parties the ability to conduct discovery on the communications between counsel and Mr. Tinker or to obtain any legal analysis or memoranda that Mr. Tinker reviewed in preparation of his testimony.

In addition, it would be irresponsible and malpractice for lawyers in contested case proceedings not to assist their witnesses in the preparation of their testimony. Therefore, the communications and documents prepared during the litigation process should be broadly protected to ensure that parties are free to communicate without fear that opposing counsel may obtain them.

B. The Attorney-Client Privilege Has Not Been Waived

PGE claims that the Blue Marmots' attorney-client communications are not privileged because they have been voluntarily disclosed in the Blue Marmots' testimony. In support of this claim, PGE contends that a partial disclosure is effectively the same as a full disclosure, and constitutes a total waiver.²⁴ Pursuant to Oregon statute, protection under the attorney-client privilege is far reaching, and extends to communications between a party's attorney and its

²² Re PGE Application for Waiver of Competitive Bidding Guidelines, Docket No. UM 1892, Application (Aug. 25, 2017).

²³ Re PGE Application for Waiver of Competitive Bidding Guidelines, Docket No. UM 1892, PGE/100, Tinker/7-11 (Aug. 25, 2017).

²⁴ PGE's Motion at 9 (citing to commentary to OEC Rule 503).

experts or representatives.²⁵ For example, even facts collected at counsel's request for later use in providing legal advice can be protected under the attorney-client privilege.²⁶ PGE appears to concede that, to the extent that the Blue Marmots' witness's statements are based on communications with an attorney, those communications would be protected by the attorney-client privilege.²⁷

PGE claims, however, that the Blue Marmots have waived that privilege by their voluntary disclosure. Specifically, PGE suggests that when the Blue Marmots' witness acknowledged in testimony that his understanding was based upon advice of counsel, that the Blue Marmots voluntarily waived the attorney-client privilege.²⁸ PGE's rationale hinges on the statutory definition of "confidential" provided in the OEC, which states that confidential communications are not intended to be disclosed.²⁹

PGE's position that the Blue Marmots waived the attorney-client privilege is misguided. The Blue Marmots' witness had no intention of disclosing the contents of the Blue Marmots' privileged communications. Mr. Moyer was simply delineating between areas where he has expertise (i.e., with respect to technical facts) and areas where he does not have any particular

²⁵ OEC Rule 503; ORS 40.225(2)(b) (stating that the attorney-client privilege applies to communications between a lawyer and the lawyer's representative).

²⁶ See e.g., Fed. Trade Comm'n v. Boehringer Ingelheim Pharm., Inc., 180 F.Supp.3d 1, 33-34 (D.D.C. 2016).

²⁷ See PGE's Motion at 8.

²⁸ Compare Goldsborough v. Eagle Crest Partners, Ltd., 105 Or. App. 499 (1991) (holding that defendant had voluntarily waived the attorney-client privilege by including an otherwise privileged letter along with unprivileged discovery materials) with Tinn v. EMM Labs, Inc., 556 F. Supp.2d 1191, 1197-1198 (D. Or. 2008) (deciding that, under Oregon law, unintentional production of a privileged email did not result in voluntary waiver); see also Transamerica Computer Co. v. IBM Corp., 573 F.2d 646, 650-653 (9th Cir. 1978) (holding there was no waiver because substantial efforts were made to screen voluminous production); United States v. De La Jara, 973 F.2d 746, 749-750 (9th Cir. 1992) (holding defendant attorney-client privilege was not waived because defendant was compelled to produce privileged documents in an earlier case).

²⁹ PGE's Motion at 8.

expertise (i.e., with respect to the law). The inclusion of clauses like “on advice of counsel” was not intended to intimate that Mr. Moyer had himself received legal advice from the Blue Marmots’ counsel. As is customary in Commission proceedings, witnesses work with counsel to ensure that their testimony is consistent with all relevant legal and regulatory requirements. The phrases were simply intended to alert PGE and the Commission that the witness did not intend to fully support or explain the legal bases for his understandings, and signal that those explanations would occur later in legal briefing.

As both PGE and the Blue Marmots have acknowledged, providing legal context in written testimony is somewhat commonplace in Commission proceedings.³⁰ The natural extension of PGE’s arguments would suggest that nearly all parties waive these privileges in cases before the Commission. This would be a fundamental change Commission policy and prevent witnesses from providing contextual testimony that is legal in nature. Yet PGE has not cited any examples, and the Blue Marmots are not aware of any instances where this issue has ever been addressed before the Commission.

There are limited situations where relying “on advice of counsel” constitutes an implied waiver of the attorney-client privilege. This, however, is not one of them. For example, in an “advice-of-counsel” defense, courts have recognized an implied waiver of the attorney-client privilege. If a party asserts a defense by stating that he or she relied on the advice of counsel, then it is usually deemed an implied voluntary waiver of the attorney-client privilege and opens

³⁰ PGE’s Reply to Motion to Strike at page 5 (grouping examples of legal argument that was allowed in testimony into three groups: 1) where there was “no question as to the witness’ qualifications to provide that testimony”; 2) “where witnesses have provided statements of settled law and applied that law to the facts of the case”; and 3) “testimony from witnesses in a generic policymaking docket offering their recommendations about what the Commission’s policies should be, which is perfectly appropriate testimony from a policy witness.”)

the door to those communications.³¹ Usually this defense is asserted to negate an intent element, i.e., by claiming that he or she could not have intended the wrongdoing because their lawyer told them what they were doing was legal. The salient issue is that the client must affirmatively place their attorney's advice as the core issue in the case. The Blue Marmots' witness was not asserting a legal defense associated with any actions the Blue Marmots had taken; he was merely explaining his understanding of facts and issues relevant to the litigation at hand. As explained in the Blue Marmots' response to PGE's Motion to Strike, this is very common in Commission proceedings and occurs before courts and other agencies in highly technical matters. Thus, the Blue Marmots' witness was not putting the Blue Marmots' attorneys' advice in issue.

Similarly, a client who asserts ineffective assistance of counsel or malpractice generally waives the attorney-client privilege, because the client is placing the legal advice in issue.³² In determining whether the claim of ineffective assistance of counsel or malpractice has occurred, the specific nature of that legal counsel is the critical issue. In nearly all other circumstances, the quality of the legal advice is evaluated through the legal briefing and not discovery of the underlying privileged communications between counsel and client.

On the other hand, where a client's state of mind is put in issue in a case, i.e., whether the client had knowledge of a particular fact at a particular time, the attorney-client privilege is not implicitly waived.³³ The Third Circuit has explained,

Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where

³¹ See Chevron v. Penziol, 974 F.2d 1156 (9th Cir. 1992) (discussing the "advice-of-counsel" defense).

³² Petersen v. Palmateer, 172 Or. App. 537, 542-43 (2001) (ineffective assistance of counsel); Pappas v. Holloway, 787 P.2d 30, 34 (Wash 1990) (malpractice).

³³ See Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994) (comparing the "advice-of-counsel" defense).

the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.³⁴

Additionally, the OEC expressly permits experts to “testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise.”³⁵ Because experts are not uniformly required to provide the bases for their opinions, Rule 705 undermines PGE’s argument that the Blue Marmots’ expert witness intended to disclose confidential communications.

Finally, requiring disclosure of attorney-client communications would chill the Blue Marmots’ communications between its attorneys and experts, which would hamper its ability to obtain legal advice from counsel, expert advice from its representatives, and would drastically undermine the Commission’s contested case process. The attorney-client privilege is essential to public justice, because communications between parties, attorneys, and experts discussing the laws and facts of a particular case are necessary to ensure sound legal advice. The attorney-client privilege is therefore essential to provide judicial review itself, including the enforcement of administrative rules. If the Commission were to determine the Blue Marmots waived their privileges here, it would be among its most radical rulings, and could create precedent that would ultimately thwart the Commission’s ability to develop a complete record.

C. Protection Under the Work Product Doctrine Has Not Been Waived

PGE also mischaracterizes the Blue Marmots’ position on the work product doctrine by suggesting “the Blue Marmots’ objections to disclosure of the requested information primarily are based on the attorney-client privilege.”³⁶ In fact, as mentioned above, the Blue Marmots opposed PGE’s discovery on a number of bases, including because “production of the requested

³⁴ Id. (emphasis added).

³⁵ OEC Rule 705; ORS 40.425.

³⁶ PGE’s Motion at 10.

data would reveal information protected by the attorney-client privilege, *and/or the work product doctrine . . .*”³⁷

Nevertheless, PGE claims that the work product doctrine only protects work product from falling into the hands of an adversary.³⁸ PGE suggests that because the Blue Marmots have disclosed its work product directly to its adversary, the work product is no longer protected. In the one and only paragraph PGE spends addressing the work product doctrine, PGE does not indicate whether a partial disclosure would constitute a full disclosure. In addition, PGE has not pointed to any actual documents that the Blue Marmots have disclosed, but instead to statements by the Blue Marmots’ witness expressing that his understanding of the law is limited and that he was specifically not testifying about legal matters that would be addressed in later legal briefing.

The thoughts and mental impressions of a lawyer crafted in anticipation of litigation and memorialized in notes or other documents are generally not discoverable by an adversary under the work product doctrine.³⁹ In Oregon, documents protected by the work product doctrine are only discoverable when the opposing party has a substantial need for a document and there is no alternative source for the information.⁴⁰ In cases where the requisite showing has been made,

³⁷ Id. at Attachment A (Blue Marmots’ Response to PGE’s Data Requests) (emphasis added).

³⁸ Id. at 10 (citing, Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1428 (3d Cir 1991)).

³⁹ Compare City of Portland v. Nudelman, 45 Or. App. 425 (1980) (finding evidence “was not made to aid the preparation or conduct of litigation and was not part of the work product of plaintiff’s attorney”) with Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir.) (finding work product admissible “when mental impressions are at issue in a case and the need for the material is compelling”).

⁴⁰ ORCP 36 (“a party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party’s case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of

and discovery of trial preparation materials is ordered, ORCP 36 still requires courts to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”⁴¹ PGE appears to concede that the materials PGE is seeking to obtain would normally be covered under the work product doctrine and has not claimed any substantial need for these materials.

With respect to waiver, PGE has not offered any applicable rules, laws, or cases in Oregon for its proposition that the Blue Marmots have waived the protections offered under the work product doctrine. Likewise, PGE has not explained how its motion is consistent with OAR 860-001-0000, which requires that the Commission’s rules be liberally construed to ensure just, speedy, and inexpensive resolution of the issues presented. PGE’s motions are unnecessarily burdening the resolution of this case. Additionally, OAR 860-001-0500, which requires that discovery be commensurate with the needs of the case and the importance of the issues, would suggest that the rules for waiver should not be expanded unnecessarily.

In short, simply acknowledging that testimony is based in part on discussions with counsel does not constitute waiver of the attorney work product doctrine. It is important to note that the ORCP and OEC distinguish between privileges (like the attorney-client privilege) and work product protection. As such, waiver of the attorney-client privilege does not necessarily constitute waiver of work product protections. Because PGE has failed to establish a reasonable

such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”); see also In re Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1232 (3d Cir. 1979) (finding substantial need for memorandum containing information from an interview with a deceased individual).

⁴¹ ORCP 36B(3); see also United States v. Chatham City Corp., 72 F.R.D. 640, 644 (S.D. Ga. 1976) (“The claim of necessity for the intrusion into the investigative file appears to be little more substantial than a desire to learn what kind of a case the Government has.”).

basis to compel discovery of documents protected by the attorney work product doctrine, the documents protected by the work product doctrine should not be compelled.

D. PGE’s Data Requests Sought Protected Information

PGE’s Motion listed the seven data requests that PGE is seeking to compel, but failed to provide context for each portion of contested testimony.⁴² The Blue Marmots provide that context in turn below. Generally, PGE Data Requests fall into two buckets here. In the first, PGE Data Requests 10-12 and 14, PGE seeks “the full basis for Mr. Moyer’s understanding, including any relevant statutes, rules, regulations, orders, rulings, or other documents that support Mr. Moyer’s statement.”⁴³ The breadth of this request would be challenging for anyone to respond to accurately, and requiring the Blue Marmots to fully respond would result in parties in Commission proceedings refusing to communicate with legal counsel because of a fear of being required to produce privileged material, or allowing parties to routinely obtain privilege material. However, PGE can review the Blue Marmots complaints to understand some of the basis for Mr. Moyer’s testimony, without needing to compel attorney client and work product privileged material. In the second bucket, PGE Data Requests 15-17, PGE seeks “the date of the communications with counsel, the identity of counsel, and [for the Blue Marmots to] describe the complete content of the communication with counsel, including any reference made by counsel to the statutes, rules, regulations, orders, ruling, or other documents.”⁴⁴ PGE should be able to provide responsive testimony on these points or conduct its own research without gaining access to the Blue Marmots’ attorney-client and work product privilege materials.

PGE Data Request 10 refers to a statement made by Mr. Moyer distinguishing between on-system and off-system projects. Mr. Moyer states that this distinction is relevant because

⁴² PGE’s Motion at 4.

⁴³ Id. DR 14 has slightly different language, but is effectively the same request.

⁴⁴ Id. at 4-5.

“PGE Merchant must purchase a QF’s net output, whether the power is delivered within or wheeled to the PGE system.”⁴⁵ If PGE wants to understand the basis of this statement, PGE can start its research with a similar statement in the Blue Marmots’ complaints, which states: “As FERC has stated, these ‘regulations require the electric utility’s [PURPA] purchase obligation to be applied to both off-system as well as on-system QFs on a comparable basis.’ PáTu Wind Farm, LLC v. Portland General Electric Co., 151 20 FERC ¶ 61,223 at P 46 (2015).”⁴⁶

PGE characterizes this as legal opinion, but Mr. Moyer (who is not a lawyer) has made no apparent claim that this is either his or counsel’s legal opinion. This testimony is necessary to lay the foundation for the factual testimony because PGE is refusing to accept the Blue Marmots’ net output at the point of delivery connecting PGE’s and PacifiCorp’s systems. Mr. Moyer is simply expressing his view that utilities must purchase QF power whether it is interconnected directly with that utility or wheeled from another utility. This testimony should be uncontroversial, and understood by anyone familiar with PURPA.

PGE Data Request 11 also refers to the Blue Marmots’ ability to choose the specific point of delivery where ownership changes between PGE and PacifiCorp. Mr. Moyer said “Blue Marmots have the choice to sell their power to PGE at the specific point of their choosing where ownership of the transmission between PacifiCorp and PGE changes.”⁴⁷ If PGE wants to understand the basis of this statement, PGE can start with a similar statement in the Blue Marmots’ complaints to perform its own research, which states: “The QF has the discretion to

⁴⁵ Id. at 4.

⁴⁶ Blue Marmot V Complaint, ¶ 55.

⁴⁷ PGE’s Motion at 4.

choose to sell to a more distant utility that it is not interconnected with ‘as long as the QF can deliver its power to the utility.’”⁴⁸

Again, Mr. Moyer does not assert that this is a legal opinion, but PGE has characterized it as such. This was necessary to lay the foundation for the factual testimony regarding the relevance of the fact that PGE has offered to accept the Blue Marmots’ net output at PGE’s point of connection with BPA’s system, but will not accept it at PGE’s connection with PacifiCorp’s system. Mr. Moyer simply identifies the relevance to this case of PGE’s decision to accept the power at one point of delivery, but not another.

PGE Data Request 12 refers to PURPA’s mandatory purchase obligation. Mr. Moyer said “my understanding is that a utility’s PURPA obligations supersede any contractual obligations that a utility might claim would prohibit its ability to purchase a QF’s net output.”⁴⁹ Again, Mr. Moyer has not presented this as a legal opinion, but he is explaining his understanding to lay the foundation for the factual testimony. Specifically, Mr. Moyer testifies regarding PGE’s claims that PGE has insufficient transmission available to move the Blue Marmots’ power away from the point of delivery connecting PGE’s and PacifiCorp’s systems. It is PGE which claims that it cannot accept the Blue Marmots net output because of PGE’s own contractual commitments made to participate in the Western Energy Imbalance Market. Mr. Moyer cannot describe or refute one of the fundamental grounds for PGE’s decision to refuse to accept the Blue Marmots’ net output without providing a basic summary of his understanding regarding PURPA’s obligations.

PGE Data Request 14 refers to the costs of transmission upgrades to PGE’s system. Mr. Moyer said a “QF cannot be given a choice between paying for upgrades or being unable to

⁴⁸ Blue Marmot V Complaint, ¶ 56.

⁴⁹ PGE’s Motion at 4.

deliver its power when there is transmission congestion or limited ATC. Even when there is no ATC on the purchasing utility's system to deliver the net output to load, the purchasing utility must accept and manage the power at the POD"⁵⁰ Again, Mr. Moyer does not state this is a legal opinion. Instead, this testimony is necessary to lay the foundation for the factual testimony regarding why the Blue Marmots have rejected PGE's demand that they either: 1) deliver to another point of delivery or 2) pay for transmission upgrades on PGE's system. If Mr. Moyer did not believe that PGE, rather than the Blue Marmots, is responsible for managing and accepting power delivered at the point of delivery of a QF's choosing, then his testimony would not make sense.

PGE Data Request 15 refers to the timing of avoided cost rate adjustments in cases dealing with legally enforceable obligations. Mr. Moyer said "No, my understanding based on communications with counsel is that under existing OPUC and FERC policy, any adjustments to avoided cost rates must be made prospectively and prior to establishing a LEO. . . ."⁵¹ If PGE wants to understand the basis of this statement, PGE can start with a similar statement in the Blue Marmots' complaint to perform its own research, which states: "FERC's rules provide each QF with the right to unilaterally create a legally enforceable obligation to sell its energy and capacity at projected avoided cost rates in effect on the date that the QF obligates itself to sell energy and capacity. 18 CFR 292.304(d)(2)(ii); FLS Energy Inc., 157 FERC ¶ 61,211 at PP 23-25 (2016)."⁵²

This involves a complicated web of law and policy, which Mr. Moyer acknowledges he is not a complete expert in. The testimony is necessary, however, to lay the foundation for the

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Id.

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Id.

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Blue Marmot V Complaint, ¶ 5.

factual testimony that avoided cost rates are generally permitted to include certain aspects of transmission costs, and that PGE is attempting to force the Blue Marmots to negotiate the avoided cost rate applicable after a legally enforceable obligation has been established.

PGE Data Request 16 refers to federal preemption under PURPA. Mr. Moyer said “I have been informed by counsel that PGE or the OPUC cannot unilaterally adjust rates in a fixed price contract, or otherwise adjust the compensation paid to the QF under the contract because PURPA prohibits utilities and regulators from exercising any kind of post-contractual price modifications.”⁵³ Similarly, PGE Data Request 17 refers to PGE’s position that the Blue Marmots must either select a different point of delivery or pay for additional transmission upgrades to PGE’s system. Mr. Moyer said “I have been informed by counsel that, once PGE issues executable PPAs, it is required to honor those PPAs, and is barred from raising any new concerns”⁵⁴ These two responses were necessary to lay the foundation for the factual testimony that the Blue Marmots are entitled to the avoided cost rate in place at the time the legally enforceable obligation was established, and to explain the practical impact of PGE’s proposal: PGE is requiring the Blue Marmots to change their avoided cost rate after they have formed a legally enforceable obligation. Simply because counsel informed him about a principle of law that Mr. Moyer relied upon to prepare his testimony does not mean that all communications regarding this matter can now be viewed by PGE’s counsel.

V. CONCLUSION

PGE seeks to compel privileged and protected information where no privileges or protections have been waived. Thus, for the reasons discussed above, the Blue Marmots respectfully request the ALJ deny PGE’s Motion. The Commission could also clarify whether

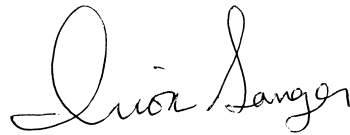
⁵³ Id. at 5.

⁵⁴ Id.

PGE's Motion is ripe, because PGE's Motion to Strike is still pending, and if granted, would moot this motion.

Dated this 27th day of November, 2017.

Respectfully submitted,

A handwritten signature in black ink, reading "Irion Sanger". The signature is written in a cursive style with a horizontal line above the name.

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Of Attorneys for Blue Marmot V, LLC, Blue Marmot VI, LLC, Blue Marmot VII, LLC, Blue Marmot VIII, LLC, and Blue Marmot IX, LLC

Attachment A

Blue Marmot Data Request and PGE Response

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October 31, 2017

Via Huddle

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Re: In the Matter of the Complaint of BLUE MARMOT V LLC, BLUE MARMOT VI LLC,
BLUE MARMOT VII LLC, BLUE MARMOT VIII LLC, BLUE MARMOT IX LLC,
against PORTLAND GENERAL ELECTRIC COMPANY
Docket Nos. UM 1829, UM 1830, UM 1831, UM 1832, UM 1833

Dear Ms. Rackner:

Please find responses from Blue Marmot V, VI, VII, VIII, and IX (the “Blue Marmots”) to Portland General Electric Company’s (“PGE’s”) first set of data requests. Please do not hesitate to contact me with any questions.

Sincerely,

/s/ Irion A. Sanger

Irion A. Sanger

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

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

BLUE MARMOT V LLC (UM 1829))	
BLUE MARMOT VI LLC (UM 1830))	
BLUE MARMOT VII LLC (UM 1831))	
BLUE MARMOT VIII LLC (UM 1832))	BLUE MARMOT V LLC
BLUE MARMOT IX LLC (UM 1833))	BLUE MARMOT VI LLC
Complainants)	BLUE MARMOT VII LLC
)	BLUE MARMOT VIII LLC
vs.)	BLUE MARMOT IX LLC'S
)	RESPONSES TO PGE'S FIRST SET OF
PORTLAND GENERAL ELECTRIC)	DATA REQUESTS DATA REQUESTS
COMPANY)	
Defendant)	
<u>Pursuant to ORS 756.500.</u>)	

Dated: October 31, 2017

Blue Marmot V, VI, VII, VIII, and IX (the "Blue Marmots") hereby respond to PGE's Data Request Nos. 1 through 17 as follows. Subject to the objections below, the Blue Marmots will provide documents responsive to PGE's First Set of Data Requests.

GENERAL OBJECTIONS

1. The Blue Marmots object to the instructions set forth in PGE's Data Requests to the extent that these instructions impose obligations on Blue Marmots that exceed, are unauthorized by or are inconsistent with the discovery rules, including OAR § 860-014-0070.
2. The Blue Marmots object to the request to the extent that the data requested is not relevant to the issues identified in this proceeding.
3. The Blue Marmots object to the request to the extent that production of the data requested would be unduly burdensome and that the request is overly broad.

4. The Blue Marmots object to the request to the extent that production of the requested data would reveal information protected by the attorney-client privilege, and/or the work product doctrine, and/or any other privilege.

5. The Blue Marmots object to the request to the extent that production of the requested data would reveal information that is highly commercially sensitive.

6. Each of the preceding general objections is incorporated by reference in the specific response below.

Oregon Public Utility Commission
OPUC Dockets UM 1829, UM 1830, UM 1831, UM 1832, UM 1833
October 31, 2017
Blue Marmots' Response to PGE Data Request 12

PGE Data Request 12

Regarding Mr. Moyer's statement: "My understanding is that a utility's PURPA obligations supersede any contractual obligations that a utility might claim would prohibit its ability to purchase a QF's net output" (Blue Marmot/300, Moyer 12), please state the full basis for Mr. Moyer's understanding, including any relevant statutes, rules, regulations, orders, rulings, or other documents that support Mr. Moyer's statement.

Response to PGE Data Request 12

The Blue Marmots object to this data request to the extent that production of the requested data would reveal information protected by the attorney-client privilege, the work product doctrine, or any other privilege. In addition, the Blue Marmots object on the grounds that PGE does not believe the information is relevant and PGE has sought to strike this testimony.

Notwithstanding these objections, the Blue Marmots provide the following:

Mr. Moyer's understanding is based on his experience in the energy industry and communications with counsel. Mr. Moyer is not required to provide references to specific statutes, rules, regulations, orders, rulings, or other documents to explain his understanding of the requirements under the Public Utility Regulatory Policies Act ("PURPA"). Mr. Moyer's testimony was not intended to testify to the legal requirements under PURPA, but only his understanding to lay the foundation for his testimony regarding the relevant facts in this proceeding.