BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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

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

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 in opposition to Portland General Electric Company's ("PGE's") Motion requesting that Oregon Public Utility Commission (the "Commission") Administrative Law Judge ("ALJ") strike portions of Blue Marmot's Opening Testimony ("PGE's Motion"). PGE's Motion should be denied because the Blue Marmots' testimony is consistent with the Commission's rules and policies. As a fact-finding administrative agency, the Commission is not bound and does not follow strict rules of evidence. The Commission has historically allowed testimony that discusses legal and policy matters into the record to assist in its decision-making and then provides appropriate weight to the evidence as presented.

The primary purpose of the Blue Marmots' testimony is not to provide a legal opinion but to identify the witnesses' understanding of the law and policy, which is

critical to lay the foundation for the factual evidence presented. To the extent that it addresses legal issues, it does so in the same manner as other testimony submitted in Commission administrative proceedings, including testimony filed by PGE as well as other testimony regarding the Public Utility Regulatory Policies Act ("PURPA") that was reviewed and approved by PGE's outside counsel in this case.

Finally, if the ALJ is inclined to depart from common practice and conclude that witnesses should not be allowed to summarize their understanding of the law and policy, then such a decision should not be made in a contested case proceeding in which the Blue Marmots have relied upon past Commission practice in preparing their testimony. Instead, the Commission should open a generic investigation or rulemaking regarding the appropriate scope of testimony rather than strike any testimony in this proceeding. The Blue Marmots should not be penalized for their reliance upon the Commission's past practices regarding the admission of testimony discussing legal and policy matters.

II. BACKGROUND

The Blue Marmots filed five separate Complaints alleging that PGE failed to meet its PURPA mandatory purchase obligations, including the Commission's implementation of those standards, and requesting the Commission find that PGE had a legally enforceable obligation to purchase the net output from the Blue Marmots' projects. PGE appears to admit that, because it had sent the Blue Marmots executable power purchase agreements, the Blue Marmots would normally have a legally enforceable obligation. However, PGE appears to be arguing in this case that the Blue Marmots are not able to deliver their power to PGE at their requested point of delivery ("POD") without

additional transmission upgrades and therefore have not formed a legally enforceable obligation.

The Blue Marmots have executed transmission agreements to deliver their net output to PGE's system. However, PGE appears to be arguing that it is not able to accept the Blue Marmots' power at the Blue Marmots' chosen POD because PGE has made the decision to contractually constrain the POD for other non-PURPA purposes. This means that PGE is refusing to take responsibility for accepting the Blue Marmots' power after it is delivered to PGE's system. Instead of fulfilling its statutory duty to accept and manage the power, PGE is proposing that the Blue Marmots pay for transmission upgrades or deliver their power to another POD of PGE's unilateral choosing. This is despite PGE having numerous options to accept the power at Blue Marmots' chosen POD.

The Blue Marmots filed their Opening Testimony establishing the underlying facts of this case and describing their understanding of PURPA and the Commission rules governing whether or not PGE has a legally enforceable obligation to purchase the Blue Marmots' net output. There is no way to coherently describe many of these facts, or understand why certain facts are important, without discussing the regulatory context. The Blue Marmots relied upon an expert witness with experience and specialized knowledge of PURPA's requirements. The primary purpose of the Blue Marmots' witnesses is not to testify to the truth of any legal requirements under PURPA but to explain their understanding of the law to lay the foundation for the testimony and why their facts are relevant to the issues in this proceeding. In addition, to the extent that the Blue Marmots witnesses are testifying as to PURPA law and policy, it is no different than is generally done in Commission administrative proceedings.

PGE's Motion concedes "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 and context for the factual matters presented."[1] Still, PGE claims that because parts of the Blue Marmots' testimony is "legal in nature" PGE is (for some reason) required to perform discovery on the legal opinions offered by Blue Marmot and offer its own expert legal testimony, which "would constitute an awkward and expensive approach to addressing the important legal issues in this case."[2] PGE does not address the apparent contradiction between the fact that this kind of background evidence is relatively common and "sometimes" appropriate in OPUC proceedings, and PGE's claims that the testimony in question in this case is irrelevant.

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.[3] According 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.[4] The ORCP rules include provisions governing discovery, pleadings, and certain trial procedures for both bench and jury trials, but do not provide much with respect to the admissibility of relevant evidence.[5]

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1 PGE's Motion at 4.
2 PGE's Motion at 7, 8.
3 OAR 860-01-0000.
4 Id.
5 ORCP 23, 36, and 58.

By way of comparison, Oregon's Evidence Code, which is provided by statute and similar to the Federal Rules of Evidence, applies to all of Oregon's court proceedings unless there is an express statutory exception.[6] Although the Commission is not required to follow these rules, they may assist the Commission in determining admissibility. For example, Rule 702 expressly allows expert witnesses to provide opinion testimony to assist the trier of fact to understand the evidence.[7] Similarly, Rule 703 confirms that experts may rely upon inadmissible evidence to base their own opinions, so long as it is the type of support reasonably relied upon by experts in the field.[8] Rule 705 allows experts to provide their opinions without disclosing the underlying information, unless the court requires otherwise.[9]

The Commission's rules provide guidance regarding the admissibility of relevant evidence, which means other evidence rules are not necessary.[10] The Commission's rules of evidence confirm that written testimony is subject to the rules of admissibility,[11] that

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6 ORS 40.015.

7 ORS 40.410 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.").

8 ORS 40.415 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.").

9 ORS 40.425 ("An expert may 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. The expert may in any event be required to disclose the underlying facts or data on cross-examination.").

10 See Bonneville Auto. Ins. Co. v. Ins. Div., Dep't of Commerce, 53 Or. App. 440, 449 (1981) (finding that administrative hearings officers have discretion regarding admissibility of evidence, but are not confined to all of the statutory rules of evidence required for admission of the same document in court).

11 OAR 860-01-0480(10).

evidence is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs,[12] and that evidence is relevant if it tends to make any fact in the proceeding more or less probable than it would be without the evidence.[13] Additionally, the Commission's rules provide than an ALJ may allow evidence to be presented, after an objection has been made regarding admissibility, and reserve ruling on that objection until a later time.[14]

IV. RESPONSE

PGE suggests that because the Blue Marmots' testimony is "legal in nature" it is irrelevant and inadmissible under the Commission's rules.[15] PGE's Motion conflates the more stringent rules of evidence that apply to courts and jury trials with those that apply to the Commission and administrative proceedings. However, even the Oregon Evidence Code (and the Federal Rules of Evidence) permit experts with specialized knowledge that will assist the trier of fact to understand the evidence to offer opinion testimony. Moreover, this kind of testimony is routinely admitted in Commission proceedings, and is the kind that is commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. Finally, PGE's argument that it must respond with expert legal opinion is unconvincing and does not warrant potentially providing the Commission with an incomplete and confusing record.

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12 OAR 860-01-0450(1)(b).
13 OAR 860-01-0450(1)(a).
14 OAR 860-01-0450(3).
15 PGE's Motion at 7.

A. Blue Marmot's Testimony is Admissible and Can Assist the Commission's Decision Making

As PGE's Motion acknowledges, both state and federal PURPA regulations are relevant to the issues presented in this case.[16] The Blue Marmots' testimony on how the facts relate to those regulations is admissible evidence in this proceeding. The witnesses' summaries of their understanding of PURPA and Commission policy will assist the Commission in understanding the factual evidence that they are providing. PGE's insistence that the Blue Marmots' testimony is irrelevant is undercut by its arguments that the testimony involves "key legal issues" in the case.[17]

PGE's Motion fails to recognize that administrative procedures are different than jury trials. In jury trials, the jury is responsible for determining the facts while the judge is to provide the jury instructions as to the applicable law. As such, courts generally do not allow experts to give legal conclusions to avoid confusion on the part of the jury.[18] Such legal conclusions would encroach on the court's authority to instruct the jury on the applicable law. Here there is no jury, and there is no potential for confusion.

Oregon's courts have routinely confirmed that administrative hearings have a relaxed evidentiary standard. For example, hearsay evidence is admissible in agency

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16 See PGE's Motion at 2-3 (describing what PGE considers several key legal questions in the case). The Blue Marmots disagree with PGE's characterization of the issues in this proceeding, but both PGE and Blue Marmots agree that PURPA's obligations and the Commission's policies are relevant to the outcome of this case.

17 PGE's Motion at 5.

18 See Hygh v. Jacobs, 961 F.2d 359, 364 (2d Cir. 1992) ("Whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing the jury."); United States v. Milton, 555 F.2d 1198, 1203 (5th Cir. 1977) ("an expert witness may not substitute the court in charging the jury regarding the applicable law.").

proceedings whereas it is generally excluded from judicial proceedings.[19] In fact, hearsay evidence alone can provide substantial evidence to justify the ultimate decision.[20] That is because nothing in the Oregon Administrative Procedures Act requires agencies to weigh some classes of evidence more heavily than other classes of evidence.[21] The Commission is a fact-finding, administrative agency and is capable of appropriately weighing the different kinds of evidence presented in the Blue Marmots' testimony. The Blue Marmots' background information on PURPA primarily explains the context for the fact presented by the Blue Marmots' witnesses and need not be relied upon as evidence of PURPA's requirements. In addition, all the decision makers in this case (the ALJs, the Commission legal counsel, the Commission Utility Program Director and the Commissioners) are trained as lawyers, and PGE should be confident that they are more than capable of reviewing the testimony without confusion.

PGE's Motion has not cited any examples, and the Blue Marmots are not aware of any instances where the Commission has stricken testimony solely because a witness included legal conclusions or simply explained his or her understanding of the law. In a 2005 decision, an ALJ suggested that a motion to strike portions of PGE's testimony on

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19 ORS 183.450; see also ORS 183.315(6) providing certain sections of the Administrative Procedures Act that do not apply to the Commission.

20 Cole v. Driver and Motor Vehicle Servs. Branch, 336 Or. 565, 587, 87 P.3d 1120 (2004) (holding that "the hearsay evidence in this case was sufficiently reliable and probative for the agency to employ it as a basis for its findings of fact" in license suspension proceeding).

21 Reguero v. Teacher Standards & Practices Comm'n, 312 Or. 402, 417, 822 P.2d 1171 (1991) ("ORS 183.482(8)(c) provides that 'substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.' That statute makes no provision for weighing some classes of evidence in the record more heavily as classes than other classes of evidence in the record – for example, weighing exhibits more heavily than testimony, or non-hearsay testimony more heavily than hearsay – as a matter of law.").

this basis *might* be appropriate to resolve an objection to PGE's presentation of "future facts" during a hearing.[22] The ALJ also cautioned that the term "future facts" would need to be fully and precisely defined in any such motion. The motion was filed, and the Commission found it generally "inadequate" and therefore dismissed it.[23] Simply suggesting a motion to strike could be an appropriate resolution is far from setting a legal standard to strike legal conclusions from witness testimony.

To that end, PGE relies upon Olson v. Coates, 78 Or. App. 368, 370, 717 P.2d 176 (1986) for the broad proposition that "a witness may not testify regarding a legal conclusion."[24] As a threshold matter, Coates involved a jury trial, which alone suggests it is not applicable here. Furthermore, in Coates, the Court of Appeals considered whether the judge erred in allowing a witness to testify, over the plaintiff's timely objection, because the question called for a legal conclusion. The Court determined that the judge should have instructed the jury as to the law and the jury should have determined the facts from the evidence and then draw its own legal conclusions. Because the Commission's contested case proceedings do not involve juries, these kinds of protections are not needed.

Interestingly, PGE omitted from its motion that Coates has since been distinguished by United States National Bank v. Zellner, 101 Or. App. 98, 102 789 P.2d 670 (1990). In that case, the Oregon Court of Appeals determined it was not an error to

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22 Re Application of PGE for an Investigation into Least Cost Plan Plant Retirements, Docket Nos. DR 10/UE 88/UM 989, Post-Hearing Memorandum and Ruling at 2 (Sept. 1, 2005) ("With regard to the testimony of PGE, URP may also move to strike the testimony on the basis that the testimony sets forth legal conclusions.").

23 Re Application of PGE for an Investigation into Least Cost Plan Plant Retirements, Docket Nos. DR 10/UE 88/UM 989, Ruling at 6 (Sept. 19, 2005).

24 PGE's Motion at 7, n.21.

allow a witness to answer a similar line of questioning during a jury trial. The Court distinguished Coates, where counsel asked a witness whether specific facts satisfied the legal standard, from Zellner, where counsel asked a witness factual information about his understanding of the parties' legal obligations. Thus, even during a jury trial witness testimony that is "legal in nature" can be admissible.

In some circumstances, witness testimony that is legal in nature has been deemed admissible to assist the jury in understanding the issues. These cases rely upon the model rules of evidence briefly discussed above. For example, in United States v. Van Dyke, 14 F.3d 415, 422 (8th Cir. 1994), the court found the failure to allow expert testimony "that would clearly have assisted the jury in understanding the regulation" combined with excessive intervention in the examination of the expert was a reversible error. Additionally, in Peckham v. Continental Casualty Insurance, Co., 895 F.2d 830, 837 (1st Cir. 1990), attorneys were allowed to testify about their understanding of insurance law to generally "shed some light in a shadowy domain." Finally, in Spectra Novae, Ltd. v. Waker Associates, Inc., 140 Or. App. 54, 62, 914 P.2d 693 (1996), the dissenting judge determined "Although [the non-lawyer witness] used the word 'liable' … I would hold that the affidavit can reasonably be viewed as stating a factual, rather than a legal, assertion." Cases like these demonstrate that even the question of admissibility in judicial proceedings, with more stringent evidence rules, is a nuanced one. The Blue Marmots' testimony should be admitted to "shed some light in a shadowy domain" of PURPA policies.

Finally, expert opinion testimony involving the facts of this case may help the Commission better understand the legal issues presented.[25] Admissibility is generally favored when, as here, the expert's opinion does not amount to the ultimate conclusion that the tribunal must reach to dispose of the case but is primarily relevant to the factual framework underlying the theory of the case, or a complex, collateral issue.[26] PURPA is a complicated regulatory scheme that includes both state and federal regulations. Reasonably prudent people seek experts with specialized experience to help them understand their serious affairs.[27] Determining whether or not PGE and the Blue Marmots have met their respective PURPA obligations raises mixed questions of law and fact and may not be obvious from a chronological presentation of just the facts. The Blue Marmots' expert witness can help the Commission understand how these issues interact within the complex state and federal schemes.

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25 See Re MidAmerican Energy Holdings Company Application for Authorization to Acquire Pacific Power & Light, dba PacifiCorp, Docket No. UM 1209, Ruling Issues List Established at 1 (Nov. 1, 2005) (requesting additional testimony because "[d]evelopment of the factual record is essential in light of the legal obligation that the Commission establish a rational relationship between findings of fact and legal conclusions").

26 See e.g., United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991) (allowing testimony that did not invade the court's authority to instruct jury on law); AMFAC Foods, Inc. v. Int'l Sys. & Controls Corp., 294 Or. 94, 116 (1982) (allowing testimony on the meaning of specialized industry terms); United States v. Vogel, 37 F.3d 1497, 1994 US. App. Lexis 28293 at *25 (4th Cir. 1994) ("Expert testimony on bankruptcy law was essential for the jury to intelligently evaluate Vogel's financial situation and his motive to commit the arson-for-profit charged in the indictment.").

27 See Oregon Electric Utility Company, LLC, et al., Application for Authorization to Acquire Portland General Electric Company, Docket No. UM 1121, Ruling (Oct. 18, 2004).

B. Even PGE Acknowledges that The Commission Routinely Allows This Kind of Testimony in Contested Case Proceedings

As PGE concedes, this kind of background information is relatively common and "sometimes appropriate" in Commission proceedings.[28] PGE does not explain why answers that are legal in nature are sometimes appropriate and sometimes inappropriate. While not entirely clear, PGE seems to suggest that the Commission's ordinary processes that allow testimony discussing legal issues violate the Commission's rules and evidentiary standards. However, the Commission has declared that when a complaint is filed, "parties shall be free to present and argue the totality of the case and the factual and legal burdens shall not be altered by the subject matter of the proceeding."[29] There is nothing unusual about this complaint proceeding that would warrant evidentiary scrutiny beyond that which is required by the Commission's rules.

PGE again relies upon cases that are not applicable. First, PGE cites a 2004 Ruling denying a motion to strike a bankruptcy lawyer's expert opinion testimony and seems to suggest that this "expert opinion testimony" was permissible because the expert opinion came from a lawyer rather than a non-lawyer.[30] As the cases cited above demonstrate, lawyers' expert opinion about complex bankruptcy statutes are routinely allowed. PGE also mischaracterizes why that motion to strike was denied. To begin with, the ALJ stated that the expert's testimony meets the standard that is commonly relied upon by reasonably prudent people. The ALJ also notes that it would not be fair to strike the response testimony because it "arguably responds to an issue previously raised" by

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28 PGE's Motion at 4.

29 Re Investigation into the Use of Virtual NPA/NXX Calling Patterns, Docket No. UM 1058, Order No 04-704 at 3 (Dec. 08, 2004).

30 See PGE's Motion at 7, n.21.

the moving party's own witness.[31] Then the ALJ determined that "the testimony does not impinge on the Commission's authority to make its own legal interpretations." The Ruling never mentions that the expert is a lawyer, let alone suggests that the expert's status as a lawyer was at all relevant to the ALJ's overall determination. If anything what this Ruling does suggest, is how prevalent it is to see admissible expert testimony on legal issues in Commission proceedings.

Next, PGE points out that the Commission has stated that legal argument "belongs in briefs and not in the testimony of non-lawyers."[32] PGE does not, however, provide any context for that statement. Even a cursory review of the Commission's order reveals that the Commission was addressing what it deemed a "collateral attack" upon a previous rulemaking rather than expert testimony on a question of mixed law and fact. In UE 177, PacifiCorp filed a Motion in Limine arguing that much of the testimony in question was beyond the scope of the proceeding and did not relate to the facts at issue.[33] In Order No. 08- 176, which PGE cites, the Commission determined that portions of the testimony were not appropriate because the purpose of the docket was to determine whether the utility's filing complied with the new rule while the evidence demonstrated infirmities with the rule's expression of the intent of the legislature. The Commission suggested the evidence would have been "properly offered in support of a petition to

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31 Docket No. UM 1121, Ruling (Oct. 18, 2004) ("ICNU 'opened the door' by having its own witness … offer legal opinions regarding bankruptcy issues").

32 PGE's Motion at 4 (citing Re Oregon Public Utility Commission Staff Requesting the Commission Direct PacifiCorp to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408, Docket No. UE 177, Order No. 08-176 at 3 (Mar. 20, 2008)).

33 Order 08-176 at 3.

amend the existing rule in a separate rulemaking proceeding" instead.[34] Here, PGE has already conceded that the Blue Marmots' testimony addresses key relevant issues.

PGE fails to address that the decision to strike the testimony in Order No. 08-176 was challenged and that the Commission ultimately modified that order to allow the "legal argument" testimony as part of the official record.[35] PGE neglected to explain that this case that forms the key foundation of its arguments was not good law. The Commission not only allowed the previously-stricken testimony but also allowed the utility's rebuttal testimony, which addressed those portions, noting that the rebuttal testimony "consists of legal arguments and does not address any disputed fact. . . ."[36] The Commission concluded that allowing both sets of legal argument testimony was necessary to fully consider and address the issues raised.

Finally, PGE cites American Can Company v. Lobdell, 55 Or. App. 451, 466, 638 P.2d 1152 (1982) as upholding the Commission's decision to exclude irrelevant evidence. Although the Commission certainly has the authority to exclude irrelevant evidence, this case has nothing to do with a motion to strike, questions of mixed law and fact, or legal opinions in testimony. This case is so unrelated that it is not even clear why PGE is relying upon it. In Lodbell, the court was reviewing a challenge to the Commission's authority to adopt a long run investment cost ("LRIC") standard rather than a cost of service standard to determine the rate spread for customer classes during a rate case. The Court determined the Commission had broad statutory authority, the decision was within

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34 Id.

35 Re Oregon Public Utility Commission Staff Requesting the Commission Direct PacifiCorp to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408, Docket No. UE 177, 09-177 at 3 (May 20, 2009).

36 Id.

its discretion, and there was substantial evidence in the record supporting the LRIC standard. Additionally, the Court held that because appellants had expressly acquiesced in the Commissioner's use of the LRIC standard (which is based on future costs), other evidence (namely historic costs of service) would have been irrelevant to a rate spread based on LRIC. Thus, the Commissioner properly refused to consider that evidence. PGE appears to concede that the issues addressed by the Blue Marmots are relevant but seeks to limit the admissibility of expert opinion testimony provided by the Blue Marmots.

C. The Blue Marmots' Testimony Is Consistent with Testimony Commonly Admitted in Commission Proceedings

Parties to Commission proceedings, including PGE and companies represented by PGE's attorneys in this proceeding (McDowell Rackner and Gibson), routinely include this kind of information in testimony. PGE and its lawyers should not be provided a double standard in which they can present testimony regarding legal matters in the cases of their choosing, but prevent other parties from doing the same. While examples abound, most recently in UM 1811, PGE filed testimony that includes examples of legal opinion. Beginning at PGE/200, Milano-Goodspeed/2, PGE's non-attorney witness testified over several pages that its pilot programs were crafted to meet the overall legislative intent of SB 1547 and the Commission's Transportation Electrification Rules, OAR Division 87, and were consistent with those requirements. Commission Staff testified in a similar manner in the same case. Beginning at Staff/400 Klotz/14, Staff's witness in UM 1811 states that Staff will address legal arguments in its brief, but then testifies about the

meaning of SB 1547 and spends several pages responding to what he considers mischaracterizations of SB 1547 from other parties.[37]

It is extremely common for witnesses to testify regarding their understanding of the law and policy in PURPA proceedings, given the complexity of the issues and unique mixture of law, policy, and facts. For example, in this proceeding the Blue Marmots'

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[37] There are numerous other examples of utilities sponsoring detailed testimony on legal issues. In one such example in which McDowell Rackner and Gibson represented PacifiCorp in Docket No. UE 246, PacifiCorp's witness Cathy Wolloms testified regarding the Environmental Protection Agency's regional haze rules, what actions states had taken to comply with the rules, what actions PacifiCorp could have taken under the rules, and why PacifiCorp's actions were consistent with the law. PAC/1400, Wolloms/3-4 ("I discuss the key regulatory and compliance requirements that drive the Company's decision to invest in emissions controls at its coal-fueled generating facilities, including the relevant federal and state regulatory requirements and the need to continue to provide safe, adequate, and reliable service at the least cost, adjusted for risk, to the Company's customers."), Wolloms/8 ("Q. Please explain the Regional Haze Rules that are the basis for the emission reduction projects."), Wolloms/9 ("Q. What actions did Wyoming undertake to meet EPA's SIP submittal requirements?"), Wolloms/12 ("The regulations require, and EPA has taken the position, that once the state has made its BART determinations, the BART controls must be installed as expeditiously as practicable, but no later than five years after the date EPA approves the Regional Haze SIP."), Wolloms/13 ("Q. Does the requirement that the state program be 'better than BART' mean that the Company's facilities have made more emission reductions than otherwise required?" A. [explanation of how PacifiCorp followed the law]), Wolloms/14 ("Q. Does the backstop trading program mean that sources under the program do not have to do anything unless the trading program cap is exceeded? A. No. The SIPs are currently enforceable by the states and, based on the proposed approval of the Section 309 SO_2 SIPs by the EPA, will be federally enforceable once EPA finalizes its proposed action."), Wolloms/18 ("Q. Are there other environmental requirements that would require installation of the controls subject to review in this case? A. Yes. [explanation of the legal requirements without citations to the law or regulations]"), Wolloms/20-21 ("Is there overlap between the regional haze, NAAQS, and MATS requirements? Yes. [followed by an explanation of the law]") Wolloms/17-21. Similarly, PacifiCorp witness Chad Teply testified regarding PacifiCorp's legal obligations. PAC/1500, Teply/3 ("Q. Is the Company obligated to install the emissions controls required by state permits, regardless of whether final U.S. Environmental Protection Agency ("EPA") review and approval of the respective Regional Haze SIPs remain pending? A. Yes. [explanation of the law]).

witness William Talbott testified about his understanding of a Commission order regarding legally enforceable obligations and the specific actions that the Blue Marmots have taken that are consistent with the Commission's order. In the underlying PURPA proceeding that adopted the legally enforceable obligation standard that Mr. Talbott referenced, both PGE and Idaho Power (which was represented by McDowell Rackner and Gibson) sponsored testimony that provided far more detailed legal opinions.

PGE testified that a LEO should be created at the time an executable PPA is provided. PGE testified that "PGE recommends that the Commission set criteria for establishing a legally enforceable obligation using the final executable draft contract as the basis for potential commitment by the QF."[38] PGE then cited to Commission guidelines and orders to support its conclusion about when a legal obligation should start (i.e., at the point an executable PPA is provided), and what PGE was required to do under the law. There are numerous other examples in UM 1610 of PGE testifying about what the law is and why its actions or proposals were consistent with the law.[39]

PGE's outside counsel has approved PURPA witness testimony that included even more clear "legal opinion" in its own Commission filings. In the same proceeding, Idaho Power witness Randy Allphin first conditioned his testimony on the grounds that

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38 Re Commission Staff Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PGE/500, MacFarlane-Morton/12.

39 E.g., Re Commission Staff Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, PGE/700, MacFarlane-Morton/8-9 ("PGE supports the use of the methodology established in Order No. 07-360, adjusting avoided costs for QF specific characteristics consistent with the seven factors outlined in18 CFR 292.304(e)(2) …. The [Commission approved methodology that PGE uses is] consistent with the seven factors outlined in 18 CFR 292.304(e)(2), ensures that the utility pays QFs prices that truly reflect its avoided costs and thus does not burden its customers with superfluous costs.")

he was not a lawyer, but then recommended what standard the Commission should use to determine a legally enforceable obligation stating that its proposal was legal.

> This is the process established and long recognized by the Idaho Public Utilities Commission for establishment of a legally enforceable obligation under PURPA. Idaho Power and the Idaho Public Utilities Commission have participated in numerous proceedings at the Federal Energy Regulatory Commission ('FERC'), the Idaho Supreme Court, and federal district court over the issue of legally enforceable obligation and this rule has been upheld as a lawful implementation of PURPA by the state commission that comports with both state and federal law. To properly implement PURPA, the State must make provision for purchases not only through a signed contract but also by means of a legally enforceable obligation, absent a contract.[40]

Mr. Allphin does not provide any citations to the conclusions of the Idaho Supreme Court, and federal district court to support his legal opinion that Idaho Power's proposed "rule has been upheld as a lawful implementation" or was otherwise consistent with PURPA.

Mr. Allphin then spent four pages interpreting the legal requirements in Idaho Power's rate schedule, FERC and OPUC statutes, rules and orders, the reasons FERC and the OPUC adopted their rules and policies and why his interpretation of a LEO was consistent with these laws (e.g., "What is FERC's rationale for the existence of its rule regarding a LEO?", "Does the Commission currently have any rules relating to the issue of a Legally Enforceable Obligation ('LEO')?", "Is Idaho Power's recommendation to this Commission consistent with FERC's direction regarding a LEO?"). The main difference between Mr. Allphin's testimony in UM 1610 and Mr. Talbott's in this proceeding is that Mr. Allphin's citations and summaries were far more detailed and expansive than Mr. Talbott's extremely limited reference to a Commission order.

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[40] Re Commission Staff Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Idaho Power/900, Allphin/9-10.

Mr. Allphin also directly explained what sort of fact situations would or would not constitute a LEO ("Does this mean that a QF could simply ask for a draft contract or sign a draft contract and send it to the utility, and by doing so create a 'Legally Enforceable Obligation' and bind the utility to a certain rate or certain terms and conditions that may be in effect?"). Thus, Mr. Allphin essentially provided legal advice regarding what types of specific fact situations would or would not meet the legal requirements for forming a legally enforceable obligation. PGE's outside counsel apparently were fine when their witness provided "legal advice" but not when Blue Marmot's witness provides far more limited "legal advice".

Similar testimony was submitted by PacifiCorp, Staff and QF advocates. PGE and its lawyers in UM 1610 were able to file responsive testimony, without needing to conduct discovery on the underlying basis for the PURPA legal opinions of any of the witnesses in UM 1610. None of the testimony was stricken, it was all admitted into the record, and (presumably) it was relied upon by the Commission in reaching its conclusions.

In disputes about PURPA requirements regarding legally enforceable obligations and transmission disputes for individual projects, witnesses have provided even more detailed testimony applying the specific facts to the law in a manner that would not be permitted in jury trial. In another PURPA contract dispute proceeding, PacifiCorp's testimony notably includes a description of a qualifying facility's legal rights, without any citation to orders, statutes or rules. Beginning at PAC/100, Griswold/10, PacifiCorp witness Bruce Griswold explained that "PacifiCorp does not believe that a QF is entitled to lock in rates under a standard PPA if a QF is not willing or able to agree to the terms of

that PPA." Mr. Griswold described the factual circumstances of that case, and then concluded that "they preclude any conclusion that Surprise Valley had a LEO…."[41]

Mr. Griswold also provided extensive testimony regarding PURPA's and PacifiCorp's tariff requirements to obtain transmission to effectuate a QF's sale to an Oregon utility, which is an issue in this case as well. Mr. Griswold testified:

> Q. What is PacifiCorp ESM's obligation to purchase power from QFs under PURPA?
> A. PURPA generally requires a utility such as PacifiCorp to purchase the net output of the generation that is produced by a QF and is made available to the utility.
> …
> Q. What is your understanding of a QF's delivery obligations under PURPA?
> A. Both federal and Oregon law require a QF to arrange for delivery of its power to a utility's system before that utility is obligated to purchase QF power.
> …
> Q. Is evidence of QF power delivery arrangements a prerequisite to entering into a Commission-approved off-system PPA?
> A. Yes.[42]

Mr. Griswold then cited to a PUC and a FERC order and explains the PURPA obligations for an off-system PPA:

> Q. How is QF power delivery accomplished?
> A. QFs are required to deliver their power to PacifiCorp through one of two methods: (1) physical delivery of the power from the QF to PacifiCorp's system through a direct interconnection with PacifiCorp's system; or (2) delivery of the power from the QF to PacifiCorp's system through a commercially acceptable wheeling arrangement.
> Q. Are these methods consistent with PURPA regulations?
> A. Yes.
> Q. Are these methods recognized by the Commission?

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41 In re Surprise Valley Electrification Corp. against PacifiCorp, dba Pacific Power, Docket No. UM 1742, PAC/100, Griswold/10-11 (discussing "PURPA Obligations").

42 In re Surprise Valley Electrification Corp. against PacifiCorp, dba Pacific Power, Docket No. UM 1742, PAC/100, Griswold/12-13.

A. Yes. These methods are explicitly recognized by the QF delivery requirements in PacifiCorp's standard, Commission-approved QF PPAs.

Mr. Griswold went on to explain the "QF's Delivery Obligations" under PacifiCorp's PPAs.[43] Finally, Mr. Griswold addressed "Legal Construct in Surprise Valley's Complaint" and states that the QF "relies on two theories for its entitlement to a QF PPA in its complaint" before explaining why those legal theories are incorrect.[44] The QF's witnesses submitted similar testimony, and when their expertise was not sufficient, testified regarding their understanding of the law and policy and relying upon advice of counsel.[45]

In another PURPA litigated case, Idaho Power also responded to a motion to strike, based on the presence of legal conclusions, where the testimony explained certain elements required by FERC's OATT with respect to points of delivery and why they were important in PURPA sales.[46]

PGE itself has submitted testimony that is just as "legal" in nature as the Blue Marmots' testimony, which can be seen from comparing Mr. Moyer's testimony in this case to PGE testimony in a different case. For example, Mr. Moyer testifies about his understanding of how Oregon sets avoided cost rates.[47] The basic purpose of Mr. Moyer's testimony is to explain that if PGE is able to impose additional transmission

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43 In re Surprise Valley Electrification Corp. against PacifiCorp, dba Pacific Power, Docket No. UM 1742, PAC/100, Griswold/13-28.

44 In re Surprise Valley Electrification Corp. against PacifiCorp, dba Pacific Power, Docket No. UM 1742, PAC/100, Griswold/51-55.

45 In re Surprise Valley Electrification Corp. against PacifiCorp, dba Pacific Power, Docket No. UM 1742, SVEC/300 Saleba-Tabone/28 (Mar. 15, 2016) (testimony relying on advice of counsel).

46 Re Kootenai Electric Cooperative, Inc. v. Idaho Power Company, Docket No. UM 1572, Idaho Power's Response to Motion to Strike (May 29, 2012).

47 PGE Exhibit A at 44-45 (Blue Marmot/300, Moyer/26-27).

costs on the Blue Marmots, it will result in an effective reduction in the Blue Marmots' avoided cost rates. PGE, however, proposes to strike this portion of the testimony, essentially the punch line or main point, which states that as a matter of fact PGE's proposal "is a de facto transmission charge which ultimately lowers the avoided cost rate paid to the Blue Marmots."[48]

The testimony PGE proposes to strike is remarkably similar to testimony that PGE *itself* submitted in a PURPA dispute between a QF and PGE about the necessary "transmission arrangements" that another off-system QF was required to obtain. In that proceeding, PGE argued that the QF's proposed transmission arrangements would result in the QF being overcompensated and paid more than the relevant avoided cost rates. When discussing Oregon PUC "policy" PGE's witness cited a Commission order and explained why the QF's proposal would be inconsistent with it. PGE's witness testified:

> Q. PaTu proposes that PGE pay the avoided cost prices for energy delivered that exceed Net Output. Would this approach reflect good regulatory policy?
>
> A. No. In UM 1129, the Public Utility Commission of Oregon (Commission) recognized that avoided cost rates should be paid on the Net Output of a qualifying facility (QF). Order No. 05-584 at 52. *PaTu's position is inconsistent with Commission policy and would result, all other things being equal, in customers paying QF prices for energy that is not sourced from a QF*.[49]

PGE's witness then explains why PGE's proposal for paying a QF is consistent with Commission precedent and the underlying purpose behind the Commission's PURPA policies. Finally, PGE's witness makes a recommendation in that case:

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48 PGE Exhibit A at 45 (Blue Marmot/300, Moyer/27).

49 Re PaTu Wind Farm, LLC v. PGE, Docket No. UM 1566, PGE/100, Bettis-Macfarlane-True/17 (emphasis added).

> Q. What is your recommendation regarding decisions in this docket?
> A. *We recommend the Commission affirm the decision made in docket UM 1129 that avoided cost rates be paid only on the Net Output from a QF and deem that PGE's payments to PaTu achieve that objective and are reasonable*.[50]

Thus, PGE's witness is citing a Commission order, reviewing the specific facts of the contested case, and then arguing that the QF's proposal was inconsistent with that Commission order. PGE does not provide a basis for distinguishing the type of testimony that it is moving to strike from the Blue Marmots' filing from the highly similar type of testimony that PGE itself has submitted in the past.

In the end, the Blue Marmots have simply followed extensive precedent of witnesses in Commission proceedings testifying regarding their understanding of the law and policy to lay a foundation for their factual assertions. Especially regarding PGE's proposed stricken version of Keegan Moyer's testimony, it is extremely difficult to present factual evidence regarding what the Blue Marmots have done to comply with their understanding of PURPA, without explaining their understanding of PURPA requirements and how the Commission has interpreted those requirements.

D. PGE is Not Required to Conduct Discovery on Legal Opinions or Provide Legal Opinions in its Reply Testimony

PGE's Motion sets up a straw man, that effectively argues that if the ALJ refuses to strike the portions of the testimony that PGE objects to, then PGE will be required to perform discovery on the basis for the Blue Marmots' witnesses' opinions and will be required to submit expert opinion testimony in its response testimony.[51] This is simply not true. There is nothing compelling PGE to respond to what it sees as irrelevant

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[50] Re PaTu Wind Farm, LLC v. PGE, Docket No. UM 1566, PGE/100, Bettis-Macfarlane-True/24 (emphasis added).

[51] PGE's Motion at 8.

evidence. On the contrary, the Commission's rules favor just, speedy, and inexpensive resolution of the issues presented. If anything, the mere fact that PGE believes these portions of evidence are irrelevant suggests there would be little harm in not responding to those portions of the Blue Marmots' testimony. PGE's primary purpose appears to be that it does not want to spend the time and effort to explain its own witnesses' understanding of PURPA policy, or conduct its own research to rebut the Blue Marmots' understanding.

Ultimately, the Commission need not make an admissibility determination now. As mentioned above, the Commission's rules permit an ALJ to allow evidence to be presented, after an objection has been made regarding admissibility, and reserve ruling on that objection until a later time.[52] This would allow the Commission to build a more complete administrative record and consider the weight of the parties' evidence later. This is akin to the approach taken by the Commission in UM 1572, where the Commission issued its order resolving the PURPA complaint, concluding that an outstanding motion to strike was moot and noting "[w]e resolve the disputed issues in the parties' motions [for summary judgment] without relying on the challenged paragraphs . . . ."[53] Given the early stages of this case, the Commission could simply defer PGE's Motion if it believes that any of the testimony might need to be stricken.

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52 OAR 860-01-0450(3).

53 Re Kootenai Electric Cooperative, Inc. v. Idaho Power Company, Docket No. 1572, Order No. 13-062 at 3 (Feb. 26, 2013) ("Kootenai argues that the affidavits … offers legal conclusions, which should only be made in briefs and oral arguments of attorneys, rather than affidavits of lay witnesses.").

E. Granting PGE's Motion Is Overly Broad and Would Unduly Prejudice the Blue Marmots

The Blue Marmots expect that PGE may argue that just because the Commission routinely allows similar testimony to be included in the record, that does not mean that it is appropriate to do so (and will be essentially arguing that the Commission should depart from common practice). However, the fact that witnesses commonly explain their understanding of the law is sufficient grounds to allow the testimony in this proceeding. Any change in policy should be forward looking and allow other non-parties to opine because it will result in far reaching consequences to the regulatory practice before the Commission.

The Blue Marmots will have detrimentally relied upon Commission past practices and will be harmed if their testimony is stricken. PGE has witnesses who have testified in numerous PURPA proceedings, negotiated numerous PURPA contracts, and are experts in transmission policy. By contrast, the Blue Marmots do not have this internal expertise and retained outside consultants to assist them with the preparation of their testimony. If the Blue Marmots had known that they would not be able to present the same type of testimony that PGE, Idaho Power, PacifiCorp and Commission Staff have done in the past, then they would not have incurred this additional expense.

As a preliminary matter, the Blue Marmots attempted to make it clear that they are testifying about their understanding of the requirements under PURPA, the Commission's rules, and FERC. They are not providing legal opinions as lawyers. Mr. Talbott states that "While I am not a lawyer, I will explain my understanding of legally

enforceable obligations."[54] Similarly, Mr. Moyer often states that part of his understanding is based on information provided from legal counsel,[55] and that he is not an attorney testifying about the law.[56] In the beginning of Mr. Moyer's testimony he states that: "While I am not a lawyer, I will explain my understanding of a QF's obligations under PURPA, and then explain why the Blue Marmots have met these obligations."[57] Thus all of Messrs. Talbott's and Moyer's statements about PURPA should be taken with the understanding that they are not lawyers and are only explaining their understanding to lay the groundwork for their factual opinions. While some of Mr. Moyer's statements regarding PURPA start with the preface that they are based on his "understanding," for the sake of brevity, Mr. Moyer did not repeat that caveat every time he testified about PURPA and its requirements. If necessary and to avoid undue confusion, the Blue Marmots would be willing to stipulate that all of Messrs. Talbott's and Moyer's statements about PURPA law and policies should be limited by this caveat, but none of their testimony should be stricken.

Even if information should be stricken, PGE's Motion is overly broad. For example, Mr. Talbott cites the Commission's most recent order enunciating its policy on legally enforceable obligations and then paraphrases it.[58] PGE did not seek to strike the citation to the order but does seek to strike Mr. Talbott's summary of the Commission order. It appears that, according to PGE, if the Blue Marmots had just quoted the text of the order, then the testimony would not need to be stricken. PGE then moves to strike Mr.

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54 Blue Marmot/200, Talbott/13.
55 Blue Marmot/300, Moyer/27-29.
56 Blue Marmot/300, Moyer/4, 27.
57 Blue Marmot/300, Moyer/4.
58 Blue Marmot/200, Talbott/14-15.

Talbott's basic and relatively innocuous statement that "a QF can require a utility to purchase its power even if the utility has refused to enter into a contract."

PGE's efforts to strike Mr. Moyer's testimony are similarly overly broad, even if the ALJ agrees that the rules of evidence designed to protect juries applies in this proceeding. One example is PGE's attempt to strike Mr. Moyer's summary of a proposal that PacifiCorp made regarding changing its FERC jurisdictional network operating agreement to accommodate QF power. The point of Mr. Moyer's testimony regarding PacifiCorp is not to say that PGE is obligated to take any actions similar to PacifiCorp but merely to point out that PacifiCorp has taken a different position than PGE and to summarize PacifiCorp's network operating agreement, that was accepted by FERC.

PGE, however, seeks to strike Mr. Moyer's statement characterizing his understanding of the reasons why PacifiCorp made its filing. Specifically, Mr. Moyer testified that:

> While the details are complex, PacifiCorp recognized that it, as the purchasing utility, was ultimately responsible for managing any QF power made available to it, which could include paying for and constructing additional transmission. PacifiCorp also recognized that it was to its customers' benefit to identify creative solutions to integrate the QF output while also avoiding transmission upgrades. In contrast, PGE is refusing to accept the Blue Marmots' net output as a network resource because of insufficient ATC and is refusing to take responsibility for the Blue Marmots' net output. Given that PGE Merchant holds significant transmission rights between the PACW and PGE transmission footprints, PGE's situation seems easier to manage because there are more options to solve the alleged "problem."[59]

The vast majority of this statement does not include any legal opinions. First, Mr. Moyer explains his understanding of *why* PacifiCorp filed a change to its network operating agreement. If PGE wants to dispute this factual allegation, PGE can submit its

[59] PGE Exhibit A, at 39 (Blue Marmot/300, Moyer/21)

own responsive testimony. Then Mr. Moyer states that PGE is refusing to purchase the Blue Marmots' net output because of insufficient ATC, something PGE admitted in its Answers to the Blue Marmots' complaints. Next, Mr. Moyer says that PGE has significant transmission rights (again a factual statement) and that PGE's transmission constraints are easier to manage (another factual statement). While PGE seeks to strike the above quoted text, PGE does not strike the majority of Mr. Moyer's testimony on PacifiCorp's proposal to change its network operating agreement.[60]

PGE's Motion should also be denied because PGE inconsistently decides what should be stricken. For example, PGE moves to strike Mr. Talbott's testimony stating that he believes that the Blue Marmots have done everything required to form a legally enforceable obligation, but then PGE decides not to strike Mr. Talbott's testimony stating that the Blue Marmots have exceeded the Commission's administratively determined standard.[61] PGE seeks to strike Mr. Talbott's conclusions that the Blue Marmots have obtained a legally enforceable obligation, but not Mr. Irvin's or Mr. Moyer's.[62] PGE seeks to strike Mr. Moyer's statements about what he believes PURPA requires, but then elects not to strike Mr. Moyer's testimony about what the exceptions are to PGE's PURPA obligations.[63] PGE's Motion should be denied simply because it has not clearly explained why certain pieces of testimony should be stricken and not others. Neither the Blue Marmots or the ALJ should be required to guess as to why PGE elected to strike

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60 PGE Exhibit A, at 40-41 (Blue Marmot/300, Moyer/22-23).

61 PGE Exhibit A, at 16 (compare Blue Marmot/200, Talbott/15, lines 12-13 with Blue Marmot/200, Talbott/15, lines 14-16).

62 PGE Exhibit A at 16 (compare Blue Marmot/200, Talbott/15 with Blue Marmot/100, Irvin/7 and Blue Marmot 300, Moyer/12).

63 PGE Exhibit A at 24-25, 28 (compare Blue Marmot/300, Moyer/6-7 with Blue Marmot/300, Moyer/10).

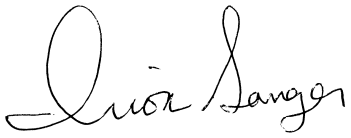
some but not other similar testimony, which means that none of the testimony should be stricken.

V. CONCLUSION

For the reasons discussed above, Blue Marmot respectfully requests the ALJ either deny PGE's Motion or reserve ruling on PGE's objection to determine whether the testimony might assist the Commission with its decision-making.

Dated this 6th day of November, 2017.

Respectfully submitted,



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