

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

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

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

Complainants,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Defendant.

RESPONSE TO PGE’S SECOND  
MOTION TO COMPEL

**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 the Blue Marmots to produce data that PGE already has or could obtain (“PGE’s Motion”).

PGE seeks to compel answers to three questions from its Data Request (“DR 25”): 1) how the Blue Marmots determined that their five projects fell under Energy Facility Siting Council (“EFSC”) jurisdiction; 2) whether the Blue Marmots have the option to permit their projects with the local county (“Lake County”) instead of EFSC; and 3) whether permitting through EFSC or Lake County depends on how the Blue Marmots’ projects are configured. Specifically, PGE inquired about the possible configuration of five separate facilities (“5 x 10

MW”) versus the configuration of this same capacity co-located at a single location (“1 x 50 MW”). The answer to the first question of “how” the Blue Marmots made their determination is simple: it was done by conferring with legal counsel. The second and third questions ask for legal interpretations that PGE is capable of making on its own. The Blue Marmots have fully answered DR 25.

What PGE is trying to do is to compel answers to a question that DR 25 did not ask. This question asks why—not how—the Blue Marmots decided to pursue permitting through EFSC instead of Lake County. After receiving the Blue Marmots’ complete response to DR 25, PGE sent a letter demanding an answer to this new question of why (“PGE’s Demand Letter”). Shortly thereafter, PGE filed this Motion. Since then, two things have occurred. First, PGE—perhaps realizing its procedural error—asked its new question of why as a separate DR. Second, in an effort to respond to what PGE meant to (but did not actually) ask for in DR 25, the Blue Marmots have answered this new question of why (“Response Letter”). Nevertheless, PGE seeks to compel this answer. PGE has failed to demonstrate that any more data regarding DR 25 is required. PGE is free to (and has already done so) ask additional follow up questions and form its own legal opinions.

Finally, PGE asserts that its Motion is related to PGE’s First Motion to Compel. The Blue Marmots view PGE’s first and second motions to compel as independent; however, to the extent that they are related, this Response should be understood as responding to both.

## II. BACKGROUND

### A. The Narrow Scope of this Phase II

The Blue Marmots provided a brief summary of Phase I as it relates to the discovery process for this Phase II in the Blue Marmots' Response to PGE's First Motion to Compel.<sup>1</sup> For the sake of brevity, the Blue Marmots do not repeat the full summary here. In short, this Phase II is concerned with determining the appropriate CODs for the Blue Marmots, given the delays caused by this litigation.<sup>2</sup> The Blue Marmots are seeking new CODs, as without them, the Commission's favorable ruling in Phase I<sup>3</sup> provides no relief to the Blue Marmots.

### B. The Context of this Discovery Dispute

On February 12, 2020, PGE provided the Blue Marmots with PGE's Second Set of Data Requests.<sup>4</sup> Fourteen days later, the Blue Marmots timely provided responses to all of PGE's Data Requests, including DR 25.<sup>5</sup> The Blue Marmots objected to the extent that DR 25 sought privileged attorney-client data and provided a privilege log; the Blue Marmots also objected to the extent that DR 25 requested legal interpretations rather than factual information.<sup>6</sup> PGE does not challenge the Blue Marmots' objections,<sup>7</sup> which pursuant to the Commission's rules act as a full and complete response.<sup>8</sup> Confusingly, PGE nevertheless claims that the Blue Marmots are

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<sup>1</sup> Blue Marmots Response to PGE Motion to Compel at 4-6 (Mar. 2, 2020).

<sup>2</sup> See PGE and Blue Marmots Joint Issues List at 1 (Jan. 2, 2020); see also ALJ Ruling at 4 (Jan. 31, 2020) (adopting parties' Joint Issues List).

<sup>3</sup> See generally Order No. 19-322 (Sept. 30, 2019).

<sup>4</sup> Blue Marmots Response to PGE Motion to Compel at Attachment B at 1 (Mar. 2, 2020) (PGE Second Set of Data Requests to Blue Marmots).

<sup>5</sup> See PGE Second Motion to Compel at Attachment A at 1 (Blue Marmots Response to PGE Data Request 25).

<sup>6</sup> *Id.*

<sup>7</sup> PGE Second Motion to Compel at 6-7.

<sup>8</sup> OAR 860-001-0540(1), (4); see also ORCP 39D(3); ORCP 43.

withholding non-privileged information.<sup>9</sup> The Blue Marmots fully responded to DR 25, as the question was actually asked.

PGE then realized that it did not clearly ask the questions that it meant to ask, which predictably lead to PGE not getting the information that it wanted. On February 27th, the Blue Marmots received PGE's Demand Letter requesting further information, supposedly on DR 25.<sup>10</sup> PGE demanded that the Blue Marmots provide an immediate answer and threatened to file a second Motion to Compel.<sup>11</sup> PGE did not call, and the parties did not converse. Only three business days later, on March 3rd, the Blue Marmots were preparing a response to PGE, when PGE filed this Motion.<sup>12</sup>

PGE filed its Motion to correct a problem of PGE's own making—failing to ask clear questions. PGE claims that the Blue Marmots misunderstood DR 25, even though PGE simultaneously “acknowledges that the wording of this DR is ambiguous.”<sup>13</sup> PGE uses its Motion to ask that the Blue Marmots respond not to DR 25 but to the question that PGE *meant* to ask in DR 25. In fact, PGE has since stated this question as a separate DR, the answer to which is due March 18.<sup>14</sup> The Blue Marmots should have the opportunity to respond to PGE's new DR

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<sup>9</sup> PGE Second Motion to Compel at 4. Possibly PGE was confused by the Blue Marmots' objection on the grounds of relevancy. The Blue Marmots objected, because PGE's DR 25(b) asks the Blue Marmots how they made a legal decision. The Blue Marmots' internal business processes for consulting attorneys or evaluating privileged information are irrelevant to this proceeding, as those processes do not tend to make any fact at issue more or less probable.

<sup>10</sup> PGE Second Motion to Compel at Attachment B at 1-2 (PGE's Demand Letter).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> PGE Second Motion to Compel.

<sup>13</sup> *Id.* at 6-7.

<sup>14</sup> On March 4, PGE provided the Blue Marmots with PGE's Fourth Set of DRs. *See* Attachment A (PGE's Fourth Set of DRs). DR 38 effectively asks the question which PGE currently claims it asked in DR 25. *See* Attachment A at 2 (PGE's Fourth Set of DRs).

in accordance with the adopted procedural schedule.<sup>15</sup> Instead, PGE has sought to compel information without waiting for the Blue Marmots to respond to PGE’s Demand Letter or subsequent data requests. PGE’s Motion is not yet ripe.

On March 6th, the Blue Marmots sent their Response Letter to PGE providing answers to the questions PGE meant to ask and also confirming their willingness to supplement their response to DR 25.<sup>16</sup> PGE’s Motion is moot because the Blue Marmots have already provided PGE with the information that it wants; however, PGE claims the Blue Marmots response remains insufficient and has refused to withdraw this Motion. If PGE had not rushed to file its Motion, then PGE could have had the information earlier and not wasted the Blue Marmots’ time responding to both PGE’s Demand Letter and this Motion.

PGE has stated that its Motion does not seek privileged information.<sup>17</sup> In addition, PGE’s Motion appears to request further responses only to DR 25(b), (c), and (d) and not to DR 25(a).<sup>18</sup>

### 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.<sup>19</sup> Three provisions are relevant here. First, any party seeking to obtain discovery must make “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

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<sup>15</sup> ALJ Ruling at 2 (Dec. 20, 2019) (providing parties fourteen days to respond to discovery requests).

<sup>16</sup> Attachment B (Response Letter).

<sup>17</sup> PGE Second Motion to Compel at 5-7.

<sup>18</sup> *Id.* at 6-7.

<sup>19</sup> OAR 860-001-0000; *see also* ALJ Ruling at 4 (Jan. 31, 2020) (acknowledging and adopting in this proceeding the Commission’s rules applicable to the introduction, admission, and consideration of evidence related to contested cases).

the materials by other means.”<sup>20</sup> Second, discovery must not be unreasonably cumulative or duplicative.<sup>21</sup> Third, evidence sought in discovery must be relevant, which means that it “tend[s] to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence.”<sup>22</sup>

#### IV. RESPONSE

##### A. The Blue Marmots Should Not Be Compelled to Produce Data to a Brand-New DR.

On procedural grounds, the Blue Marmots disagree with PGE’s filing of this Motion. There is no adopted schedule for providing supplemental responses, but traditionally parties provide more than three business days from the request for further information, especially when the party failed to ask clear questions. PGE did not wait nor call, but ran to the Commission and demanded the Commission fix a problem of PGE’s own making.

PGE seeks to reinterpret DR 25 to ask different questions, which it has effectively asked in its new DR 38. The original DR 25 asked how the Blue Marmots made a legal determination and asked the Blue Marmots to make new legal interpretations about different project configurations.<sup>23</sup> PGE now re-interprets DR 25 to ask why the Blue Marmots made the determination that they did and whether one reason was the two different project configurations.<sup>24</sup> Similarly, DR 38 asks whether the Blue Marmots made the determination that

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<sup>20</sup> Oregon Rule of Civil Procedure 36B; *see also* OAR 860-001-0000.

<sup>21</sup> OAR 860-001-0500(2).

<sup>22</sup> OAR 860-001-0450(1).

<sup>23</sup> *See* PGE Second Motion to Compel at Attachment A at 1 (Blue Marmots Response to PGE DR 25).

<sup>24</sup> *Compare id.*, with PGE Second Motion to Compel at Attachment B at 1 (PGE’s Demand Letter) and PGE Second Motion to Compel at 5-7.

they did based on either of those two project configurations.<sup>25</sup> The Blue Marmots do not owe PGE a response to DR 38 until March 18, yet PGE seeks to compel answers now.

**B. The Blue Marmots Should Not Be Compelled to Produce Duplicative Data Already Provided to PGE and Which PGE has Failed to Demonstrate a Need For**

In DR 25(b), PGE asks the Blue Marmots to “explain how the Blue Marmots determined that their projects fell under EFSC jurisdiction.”<sup>26</sup> The Blue Marmots understood the word *how* to have its common English understanding of what manner or way or by what means is something done. Thus, the Blue Marmots fully answered this question by objecting that PGE was seeking attorney client privileged information because *how* the Blue Marmots made their decision was working with legal counsel.<sup>27</sup>

In its Demand Letter and its Motion, PGE demands the Blue Marmots “provide the basis for that determination,”<sup>28</sup> essentially reframing the request from asking *how* to asking *why*. Nevertheless, the Blue Marmots have provided the basis in both their original testimony and further elaboration in their Response Letter. PGE has had more than a month to review the Blue Marmots’ testimony.<sup>29</sup>

DR 25 refers to Blue Marmot/900, Talbott/22.<sup>30</sup> Blue Marmot/900, Talbott/22 provides:

After extensive internal discussions, as well as preliminary consultations with ODOE, it was determined that the projects would be more appropriately permitted collectively through EFSC

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<sup>25</sup> See Attachment A at 2 (PGE’s Fourth Set of Data Requests). DR 38(a) and (b) ask whether the Blue Marmots’ determination was for the 5 x 10 MW configuration or the 1 x 50 MW configuration. The Blue Marmots reserve their right to object to DR 38(c) and (d).

<sup>26</sup> PGE Second Motion to Compel at Attachment A at 1 (Blue Marmots Response to PGE DR 25).

<sup>27</sup> *Id.*

<sup>28</sup> PGE Second Motion to Compel at Attachment B at 1 (PGE’s Demand Letter); see PGE Second Motion to Compel at 6.

<sup>29</sup> The Blue Marmots provided their Direct Testimony to PGE on January 31, 2020.

<sup>30</sup> PGE Second Motion to Compel at Attachment A at 1 (Blue Marmots Response to PGE DR 25).

rather than through a Lake County CUP process. The reason was that based on the shared interconnection facilities and ownership of the projects, they could be considered a single facility from the perspective of EFSC jurisdiction and in aggregate would impact more than the 320 acre threshold for EFSC jurisdiction in effect at the time this decision was made.<sup>31</sup>

As the Blue Marmots have told PGE in correspondence, the second sentence is the basis for permitting through EFSC.<sup>32</sup> The Blue Marmots decided to pursue permitting through EFSC because there was a risk that the projects “could be considered” a single facility due to the shared interconnection facilities and shared ownership. As PGE knows, the Blue Marmots are all owned by EDP Renewable North America (“EDPR NA”). Obtaining permits from Lake County would have been a futile exercise if a challenge was made that the Blue Marmots fell under EFSC jurisdiction. Thus, the decision to pursue permitting through EFSC sought to mitigate against this risk of challenge and the delays to development that would result from such a challenge.

In addition to an explanation of “why” the Blue Marmots determined their projects fell under EFSC jurisdiction, PGE appears to ask whether one reason was the project configurations (5 x 10 MW or 1 x 50 MW). The answer is no. The Blue Marmots provided this answer in their testimony and the Response Letter as well as indicated this in the discussion above. The decision to pursue permitting through EFSC was made on the basis that the five projects “could be considered” a single facility. The Blue Marmots pursued permitting through EFSC because it provided the least-risk option for permitting, regardless of project configuration. PGE’s new interpretation of its DR is fully answered by the very testimony to which PGE refers. PGE has not claimed this testimony is vague or unclear. PGE merely asks the Blue Marmots to state it as

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<sup>31</sup> Blue Marmot/900, Talbott/22.

<sup>32</sup> Attachment B (Response Letter).



fact. The Blue Marmots have now done so four times (testimony, data response, Response Letter and this Response). The Blue Marmots are not sure what else is left to say on this topic.

**C. The Blue Marmots Should Not Be Compelled to Provide Legal Interpretations**

In DR 25(c) and 25(d), PGE specifically asks the Blue Marmots to explain whether they are “required to permit their projects with the EFSC, or do [they] have the option to permit with Lake County,” depending on whether the configuration is five 10-MW projects or one 50-MW project.<sup>33</sup> The Blue Marmots objected on the grounds that this DR asks for legal interpretations about whether the law requires them to do something or not.<sup>34</sup> This legal interpretation by the Blue Marmots would not “make the existence of any *fact* at issue in the proceedings more or less probable.”<sup>35</sup> If PGE believes the Blue Marmots have pursued permitting in error, they are free to argue that in their testimony and legal briefing. They neither need assistance from Blue Marmots, nor are they entitled to ask for legal interpretations from the Blue Marmots.

Notwithstanding the Blue Marmots’ objection, the Blue Marmots provided a supplemental response in their Response Letter to PGE.<sup>36</sup> First, they explained why PGE’s answer necessarily requested a legal interpretation. Next, the Blue Marmots pointed out that PGE’s questions make baseline assumptions that assume bright jurisdictional lines that may not necessarily exist. Thus, PGE is asking about whether the law requires a specific action, when the law may be unclear. At this time, the Blue Marmots have not taken (and they may never need to take) a public legal position about whether the law requires the Blue Marmots to permit their projects with EFSC, or whether they have the option to permit with Lake County.

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<sup>33</sup> PGE Second Motion to Compel at Attachment A at 1 (Blue Marmots Response to PGE DR 25).

<sup>34</sup> *Id.*

<sup>35</sup> OAR 860-001-0450(1) (emphasis added).

<sup>36</sup> Attachment B (Response Letter).

If PGE wishes to review the law governing EFSC jurisdiction, it is free to do so. PGE is free to present arguments that the Blue Marmots pursued EFSC permitting in error (although such a question is likely to be irrelevant to the issues in the case). However, PGE is only entitled to ask the Blue Marmots for facts, not legal arguments. The Blue Marmots have explained what actions they took and no further answer to DR 25 is needed.

## V. CONCLUSION

PGE seeks to compel the Blue Marmots to answer a brand-new DR, to provide data already in PGE's possession, and to provide PGE with legal interpretations, not facts. PGE's Motion is inconsistent with the Commission's rules and practice. Thus, for the reasons discussed above, the Blue Marmots respectfully request the ALJ deny PGE's Motion.

Dated this 9th day of March 2020.

Respectfully submitted,



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Irion A. Sanger  
Joni L. Sliger  
Sanger Law, PC  
1041 SE 58th Place  
Portland, OR 97215  
Telephone: 503-756-7533  
Fax: 503-334-2235  
irion@sanger-law.com

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**

**UM 1829, Phase II**

**Portland General Electric Company's  
Fourth Set of Data Requests (Mar. 4, 2020)**



**Portland General Electric Company**  
121 SW Salmon Street • Portland, Oregon 97204

March 4, 2020

**TO:** EDP Renewables (EDPR), the Blue Marmot LLCs, and their attorney  
Irion Sanger

**FROM:** Portland General Electric Company and its attorney Lisa Rackner

**RE: UM 1829 Portland General Electric Company's Fourth Set of Data Requests to Blue Marmots regarding the Commercial Operation Date (COD) Litigation**

Please provide responses to the following requests for data by **March 18, 2020**. Please note that all responses must be posted to the Public Utility Commission Huddle account. Contact the undersigned before the response due date noted above if the request is unclear or if you need more time. In the event any of the responses to the requests below include spreadsheets, the spreadsheets should be in electronic form with cell formulae intact. For the purposes of responding to these requests, references to "Blue Marmot" or "Blue Marmots" should be interpreted to refer to the Blue Marmot projects individually *and* collectively.

36. Please see Blue Marmot/900, Talbott/12, stating "Indeed, EDPR NA was tendered those TSAs as anticipated and signed them on March 15, 2017," and Blue Marmot/900, Talbott/20, stating, "In May 2017, EDPR NA signed TSAs for this remaining capacity..."

a. Should the date contained in the testimony on page 12 be May 15, 2017?

37. Please see Blue Marmot/900, Talbott/26, stating "there is very little commercial opportunity in the current market for a geographically disparate cluster of 10 MW projects, as this project capacity is too large to benefit from standard rate QF contracts and too small to capture economies of scale required to price favorably for competitive energy procurement solicitations."

a. Please confirm whether the Blue Marmots are suggesting that a 50 MW project could benefit from economies of scale that are not available to five single 10 MW projects.

If the answer to (a) is yes, please provide a detailed explanation of the types of economies of scale that are available to a 50 MW project that would not be available to a 10 MW project.

If the answer to (a) is no, please explain what size of project can benefit from economies of scale, and please provide a detailed explanation of the types of economies of scale that would be available to that project.

38. Please see Blue Marmot/900, Talbott/22, stating “The reason was that based on the shared interconnection facilities and ownership of the projects, they could be considered a single facility from the perspective of EFSC jurisdiction and in aggregate would impact more than the 320 acres threshold for EFSC jurisdiction in effect at the time the decision was made.”
- a. At the time the Blue Marmots made the decision to permit through EFSC, was the statement quoted above applicable to the 5 x 10 MW configuration?
  - b. At the time the Blue Marmots made the decision to permit through EFSC, was the statement quoted above applicable to the 1 x 50 MW configuration?
  - c. Is the statement quoted above currently applicable for the 5 x 10 MW configuration, given the 2019 changes to the acre thresholds for EFSC jurisdiction?
  - d. Is the statement quoted above currently applicable for the 1 x 50 MW configuration, given the 2019 changes to the acre thresholds for EFSC jurisdiction?
39. Please see Blue Marmot/900, Talbott/16, stating “the projects began indicating to PacifiCorp that they would likely seek to revise the COD contemplated in their SGIAs to a later date.”
- a. To the extent not previously provided in data responses, please provide all communications to PacifiCorp in which EDPR provided the indication referenced in this testimony and all responses from PacifiCorp.
  - b. If it is not evident from the communications provided in response to part (a), please provide the dates on which each communication occurred.
40. Please see Blue Marmot/900, Talbott/17, stating “However, the Blue Marmots also continued to advance negotiations with PacifiCorp in the months after being tendered their draft SGIAs to pursue resolution on several technical points where EDPR NA sought clarifications or adjustments to certain provisions of the SGIAs.”
- a. To the extent not previously provided in data responses, please provide all communications to and from PacifiCorp regarding the negotiation of the draft SGIAs referenced in this testimony.
  - b. If it is not evident from the communications provided in response to part (a), please provide the dates on which each communication occurred.
  - c. Please provide the date on which the referenced negotiations began and the date on which negotiations ended.

41. Please see Blue Marmot/900, Talbott/18 stating that Blue Marmots negotiated with PacifiCorp to delay the start of engineering under the five consolidated SGIAs until May 2020, despite executing the SGIAs in September 2019.
  - a. To the extent not previously provided in data responses, please provide all communications to and from PacifiCorp regarding the negotiation referenced in this testimony.
  - b. If it is not evident from the communications provided in response to part (a), please provide the dates on which each communication occurred.
42. Please see Blue Marmot/900, Talbott/24, stating "In November 2018 the Blue Marmots conveyed to ODOE staff that they would be placing on hold their work with EFSC, and suspending the NOI submitted [in] January 2018."
  - a. To the extent not previously provided in data responses, please provide all communications to and from EFSC regarding the hold and/or suspension referenced in this testimony.
  - b. If it is not evident from the communications provided in response to part (a), please provide the dates on which each communication occurred.
43. Please see the April 16, 2018 email from Kellen Tardaewether (ODOE) to Mr. Talbott, provided in response to PGE Data Request No. 1, which references an "upcoming meeting regarding a Goal 3 exception."
  - a. Were the Blue Marmots seeking a Goal 3 exception?
  - b. If so:
    - i. Please specify which of the Blue Marmot project(s), if any, were affected by Goal 3.
    - ii. Please explain how the need for a Goal 3 exception affects the Blue Marmots' eligibility to permit through EFSC.
    - iii. Please explain how the need for a Goal 3 exception affects the Blue Marmots' requirement to permit through EFSC.
    - iv. Please explain how the need for a Goal 3 exception is expected to affect the timing of receiving a site certificate.
    - v. Are the Blue Marmots still seeking a Goal 3 exception?
  - c. If not: please explain why Blue Marmots were meeting with ODOE "regarding a Goal 3 exception."

44. Please see Blue Marmot/900, Talbott/24, stating “In November 2018 the Blue Marmots conveyed to ODOE staff that they would be placing on hold their work with EFSC, and suspending the NOI submitted [in] January 2018,” and the Blue Marmots’ response to PGE Data Request No. 27, stating “The Blue Marmots placed a hold on their work with EFSC to control permitting expenditure and maximize credibility with permitting authorities, given the revenue contract uncertainty and the configuration uncertainty.”
  - a. Please explain why the Blue Marmots did not resume permitting in the 5 x 10 MW configuration in September 2018.
  - b. Please explain what “revenue contract uncertainty” means.
  - c. Please explain why the Blue Marmot projects experienced “configuration uncertainty” in November 2018.
  
45. Please see Blue Marmot/900, Talbott/26, stating “To bring the Blue Marmot projects online under the original 5 x 10 MW configuration contemplated in the January 29, 2018 SGAs tendered by PacifiCorp, it would be necessary to coordinate with PacifiCorp to revert the SGAs back to the plan of service that PacifiCorp had designed in the originally tendered SGAs.”
  - a. Is it the Blue Marmots’ understanding or belief that re-studies will be necessary to “revert the SGAs”?
  - b. Other than the cost of any required re-studies, is there any cost or fee required to “revert the SGAs”? If so, please explain with specificity the nature and amount.
  
46. Please see Blue Marmot/900, Talbott/31, stating “The Blue Marmots are actively evaluating the possibility of conducting some of these studies ‘at risk’ to try to bring as much flexibility as possible to the schedules for these projects.”
  - a. Please provide all documents and communications related to the referenced evaluation.
  - b. Have the Blue Marmots decided to begin conducting any studies?
  - c. If not, please supplement this data response if the Blue Marmots do decide to begin conducting studies.

DIRECT QUESTIONS TO:

Lisa Rackner and Jordan Schoonover  
McDowell Rackner Gibson PC  
Attorneys for Portland General Electric Company  
Telephone Nos: (503) 595-3925 and (503) 290-3633  
Emails: [lisa@mrg-law.com](mailto:lisa@mrg-law.com) and [jordan@mrg-law.com](mailto:jordan@mrg-law.com)

**Attachment B**

**UM 1829, Phase II**

**March 6, 2020 Letter to Lisa Rackner**



## Via Electronic Mail

March 6, 2020

Via Email

Lisa Rackner  
McDowell Rackner Gibson PC  
419 SW 11th Ave, Suite 400  
Portland, OR 97205

**Re: Blue Marmot Data Response 25  
Docket Nos. UM 1829 et al.**

Dear Ms. Rackner:

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”) are responding to your February 27, 2020 letter regarding the Blue Marmots’ response to Portland General Electric Company’s (“PGE”) Data Request (“DR”) 25 (“PGE’s Letter”). This letter is to provide additional information to PGE regarding permitting decisions made by the Blue Marmots. The Blue Marmots hope this letter response will resolve PGE’s concerns regarding DR 25 and PGE will agree to withdraw its Second Motion to Compel (“Motion to Compel”). If PGE withdraws the Motion to Compel, then the Blue Marmots can supplement DR 25 and/or provide a response to other PGE DRs so that PGE can include this information in the record.

As stated in testimony, EDPR NA determined that the Blue Marmot projects would be more appropriately permitted through Energy Facility Siting Council (“EFSC”) than through the Lake County Conditional Use Permit (“CUP”) process based upon privileged advice from counsel. However, this letter is intended to provide additional information to PGE regarding this decision.

Regarding point (a) in PGE’s Letter stating that the Blue Marmots have refused to “provide the basis for that determination”, please refer to Blue Marmot/900, Talbott 22, which states, “After extensive internal discussions, as well as preliminary consultations with ODOE, it was determined that the projects would be more appropriately permitted collectively through EFSC rather than through a Lake County CUP process. The reason was that based on the shared interconnection facilities and ownership of the projects, they

could be considered a single facility from the perspective of EFSC jurisdiction and in aggregate would impact more than the 320 acre threshold for EFSC jurisdiction in effect at the time this decision was made.” The last sentence of this quote is the basis for permitting through EFSC.

Regarding point (b) in PGE’s Letter, the Blue Marmots disagree with the premise that the projects were either: 1) required to permit through EFSC; or 2) had an option to pursue permitting under either the County or EFSC processes. The Blue Marmots also disagree with the premise that either 1) the initial decision to pursue permitting through Lake County was made in error, or 2) the configurations changed in a manner that brought the projects under EFSC jurisdiction. This framing implies bright jurisdictional lines that may not necessarily exist. The question that PGE is asking relates to a legal interpretation rather than a factual matter. As explained in the Blue Marmots Response to PGE DR 25(d), PGE is free to review the relevant statutes to reach its own legal interpretation.

The determination to pursue permitting through EFSC was independent of considerations around project configuration(s) and was appropriate regardless of whether EDPR NA planned for the 5x10 MW disaggregated configuration, the 50 MW co-located configuration, or permitting for both configurations (as the NOI ultimately submitted by the Blue Marmots did).

As explained above, the treatment of the 5x10 MW projects as a single facility for purposes of permitting, driven in part by shared interconnection facilities and common ownership, was the basis for the decision to pursue EFSC permitting, not factors related to project configurations. The Blue Marmots decided to pursue permitting through EFSC because there was a risk that, had the projects pursued permitting through Lake County, a party could have argued that the shared interconnection facilities and ownership of the 5x10 MW projects made them in effect a single facility impacting a footprint that would trigger EFSC jurisdiction based on acreage thresholds. This could have resulted in a party challenging the projects’ permitting via Lake County. The 50 MW co-located configuration would have triggered the same acreage thresholds. A project description encompassing both configurations to allow for flexibility between them triggered the same acreage thresholds. The decision to pursue permitting through EFSC sought to mitigate against this risk of legal challenge and the delays to development that would result from such a challenge.

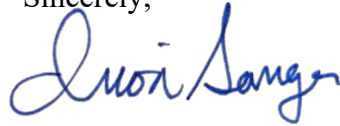
Blue Marmot Data Response 25

March 6, 2020

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Please provide a response by March 9, 2020 at noon regarding whether PGE will withdraw its Motion to Compel.

Sincerely,



Irion A. Sanger

cc: Steve Irvin  
Meredith Chambers  
Will Talbott