

**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)	)	REQUEST FOR ALJ CERTIFICATION
Blue Marmot VII LLC (UM 1831)	)	FOR THE COMMISSION’S
Blue Marmot VIII LLC (UM 1832)	)	CONSIDERATION
Blue Marmot IX LLC (UM 1833)	)	
Complainants,	)	
	)	
v.	)	
	)	
Portland General Electric Company,	)	
Defendant.	)	

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**I. INTRODUCTION**

Pursuant to OAR 860-001-0110, 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”) respectfully request Oregon Public Utility Commission (the “Commission”) Administrative Law Judge (“ALJ”) Allan Arlow certify his March 22, 2018 Ruling (the “Ruling”) for the Commission’s consideration. The Ruling subjects the Blue Marmots to undue prejudice by requiring them to prepare responsive testimony without confirming whether significant portions of Portland General Electric Company’s (“PGE’s”) Response Testimony are in fact relevant. Additionally, good cause exists for certification because the Ruling concludes the jurisdictional arguments are premature, when jurisdiction should be determined early in legal proceedings, especially when raised by a party. The parties should have clarity regarding the relevance of the testimony and the Commission’s jurisdiction over PGE’s assertions before proceeding with the complaints. PGE’s transmission testimony is only relevant if the Commission has

jurisdiction over whether the Blue Marmots' purchase of transmission from PacifiCorp can deliver the net output to the edge of PGE's system. Thus, PGE's transmission testimony is irrelevant because the Commission lacks jurisdiction to address the transfer of electricity between two balancing authorities, and PGE's cost estimates do not make any fact that is of consequence to the ultimate determination any more or less probable.

## II. ARGUMENT

The Commission's rules allow parties to appeal an ALJ's ruling that "may result in ... undue prejudice to a party" or where "[g]ood cause exists for certification."<sup>1</sup> Here, both are met because the Ruling forces the Blue Marmots to prepare testimony responding to arguments that are irrelevant and beyond the Commission's jurisdiction.

The Blue Marmots filed a motion to strike portions of PGE's testimony addressing the System Impact Study performed by PGE—along with other related transmission claims—arguing this testimony is irrelevant because the Federal Power Act and Federal Energy Regulatory Commission ("FERC") regulations preempt the Commission from determining the veracity of PGE's factual allegations. The Blue Marmots' position is that their wheeling arrangements with PacifiCorp are sufficient to effectuate delivery to PGE's transmission system. From this Commission's perspective, PGE's standard contract presumes transmission occurs from the facility to a point of delivery on PGE's system, but does not direct how that occurs. The Commission should therefore either presume these arrangements are adequate as a matter of law or acknowledge that it is not the right body to determine where deliverability technically occurs. If PGE believes that delivery does not technically occur under the Blue Marmots'

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<sup>1</sup> OAR 860-01-0110(2). This rule also allows for certification of a ruling for additional reasons that are not applicable here.

wheeling arrangements, it should seek relief from FERC. Because FERC regulations and orders provide sufficient guidance for the Commission to resolve the material issues in the complaints without determining the veracity of PGE’s transmission claims, there is no reason to contest those facts here. The core issue in this case is whether PGE has the legal authority to refuse certain off-system deliveries, not the costs PGE believes are needed for it to accept delivery.

The Ruling denies the Blue Marmots’ motion, but does not explain why, which means that the Blue Marmots must extrapolate from the ALJ’s decision whether PGE’s allegations are relevant. The Ruling includes the legal standard for relevance, but does not explain why the ALJ believes PGE’s testimony is relevant. The Ruling instead notes that the Blue Marmots’ effectively seek a “judgment on the merits of the case in its totality.”<sup>2</sup> This is incorrect; the motion was not for summary judgment. The complaints ask the Commission to determine whether the Blue Marmots have established legally enforceable obligations, including all the terms in the executable power purchase agreements. This should be decided without litigating PGE’s challenge to the legitimacy of the Blue Marmots’ FERC-jurisdictional transmission arrangements, or whether and how much any transmission upgrades might cost.

The Ruling also refers to the Blue Marmots’ “jurisdictional-related argument” as “premature” and suggests that the Blue Marmots should argue the Commission’s jurisdiction “in the future”.<sup>3</sup> The jurisdictional issue must be resolved now. The Blue Marmots raised the issue of whether PGE’s testimony is irrelevant *because* the Commission lacks jurisdiction over PGE’s transmission claims. The Ruling suggests that

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<sup>2</sup> Ruling at 3

<sup>3</sup> Id.

the ALJ determined relevancy, but not jurisdiction. Preserving the Blue Marmots' right to re-raise its jurisdiction arguments later does nothing to protect them from the undue prejudice of having to respond to PGE's testimony now.

The Ruling's jurisdiction remarks are inconsistent with legal proceedings in general and the Commission's own practice.<sup>4</sup> Parties typically determine jurisdiction immediately to narrow the scope of the case and pleadings. In the PaTu<sup>5</sup> case so often cited in this proceeding, PGE filed a motion for summary judgment making the Blue Marmots' same jurisdiction arguments only one month after the complaints were filed.<sup>6</sup> The Commission did not suggest those arguments were premature. It instead granted that motion, dismissing PaTu's claims before any testimony or legal briefs were filed, and confirmed that although it "has jurisdiction to order PGE to purchase QF output" it "does not have any jurisdiction over the transmission of QF output to a utility."<sup>7</sup> Thus:

The Commission has neither the expertise nor the jurisdiction to evaluate the level of PGE's activity on the receiving end of a dynamic transfer. The Commission also does not have any indirect jurisdiction over any transmission function, and could not, therefore, direct PGE to participate in a dynamic transfer under the guise of the standard contract.<sup>8</sup>

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<sup>4</sup> Jurisdiction may be raised at any time, even on appeal, by a litigant or by the court. ORCP 21; Baty v. Slater, 161 Or. App. 653, 656 (1999) ("We must consider jurisdictional matters regardless of when they are presented."); Kontrick v. Ryan, 540 U.S. 443 (2004) (citing 1884 holding that "jurisdiction [challenges] may be made at any stage of the proceedings, and the court should raise the question *sua sponte*").

<sup>5</sup> PaTu Wind Farm, LLC v. PGE, Docket No. UM 1566.

<sup>6</sup> Docket No. UM 1566, PGE Motion at 3 (Jan. 31, 2012) and PGE Reply at 8 (Mar. 6, 2012) ("arrangements between two balancing authorities or transmission providers ... are a transmission function ... under the exclusive jurisdiction of FERC ... [t]he Commission lacks jurisdiction to order the relief PaTu seeks.").

<sup>7</sup> Docket No. UM 1566, Ruling at 7-8 (May 21, 2012) ("A transmission function, by definition, involves movement between two points, and a dynamic transfer between PaTu and PGE would put PGE on the receiving end of a transmission function over which the Commission has no jurisdiction.").

<sup>8</sup> Id. at 8.

Just as the Commission could not order PGE to allow qualifying facilities to dynamically transfer into its transmission system, it cannot order the Blue Marmots to wheel their power to any particular point of delivery on PGE's system or authorize PGE to reject FERC jurisdictional transmission delivered to its system. The Ruling in this case seems to come to the exact opposite conclusion, but does not provide any rationale for doing so. Thus, certification is warranted to explain why PGE's testimony is relevant, clarify the proper time to raise jurisdictional issues, and confirm whether the Blue Marmots' jurisdiction arguments are premature.

### III. CONCLUSION

For the foregoing reasons, the Blue Marmots respectfully request certification of the Ruling to the Commission for resolution.

Dated this 5th day of April 2018.

Respectfully submitted,



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Irion A. Sanger  
Sidney Villanueva  
Sanger Law, PC  
1117 SE 53rd Avenue  
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