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October 25, 2017

**VIA ELECTRONIC FILING**

PUC Filing Center  
Public Utility Commission of Oregon  
PO Box 1088  
Salem, OR 97308-1088

**Re: UM 1829 - Portland General Electric Company's Motion to Strike**

Attention Filing Center:

Attached for filing in the above-captioned docket is Portland General Electric Company's Motion to Strike.

Please contact this office with any questions.

Very truly yours,

Alisha Till  
Administrative Assistant

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

UM 1829

Blue Marmot V LLC  
Blue Marmot VI LLC  
Blue Marmot VII LLC  
Blue Marmot VIII LLC  
Blue Marmot IX LLC,  
Complainants,

v.

Portland General Electric Company,  
Defendant.

**PORTLAND GENERAL ELECTRIC  
COMPANY’S MOTION TO STRIKE**

**EXPEDITED CONSIDERATION  
REQUESTED**

1 Pursuant to OAR 860-001-0420, Portland General Electric Company (PGE or Company)  
2 moves the Public Utility Commission of Oregon (Commission) for an order striking portions of  
3 witness testimony offered on behalf of the above-captioned Blue Marmot LLCs (collectively, Blue  
4 Marmots) by William Talbott and Keegan Moyer as irrelevant and therefore inadmissible. As  
5 discussed below, the portions of the testimony marked in the attached Exhibit A constitute  
6 improper legal argument offered by non-lawyer witnesses, and therefore should be stricken from  
7 the record.

8 PGE requests expedited consideration of this Motion so that it can receive a ruling with  
9 sufficient time to prepare its response testimony accordingly. PGE and Blue Marmot are working  
10 to agree upon an expedited briefing schedule and will provide an update as soon as they do, or if  
11 they are unable to reach an agreement.

**I. BACKGROUND AND INTRODUCTION**

12 This case concerns a dispute between PGE and the Blue Marmots—five off-system  
13 qualifying facilities (QFs), planned for development by EDP Renewables North America (EDPR).

1 EDPR proposes to construct the Blue Marmots in PacifiCorp’s service territory and to sell their  
2 output to PGE. In April of this year, PGE already had sent final executable power purchase  
3 agreements (PPAs) to four of the Blue Marmots when the Company’s personnel responsible for  
4 QF contracting discovered that the point of delivery (POD) between the PacifiCorp and PGE  
5 systems (PACW.PGE POD) lacked sufficient available transfer capability (ATC) to accept  
6 delivery of the Blue Marmots’ generation. After considering its options, PGE informed the Blue  
7 Marmots that they could either make arrangements to deliver their output to another POD, or  
8 request a study and pay for any upgrades required for delivery. In response, the Blue Marmots  
9 filed these complaints, alleging PGE has a legal obligation to accept their output at the PACW.PGE  
10 POD, and that the Blue Marmots have no obligation to pay for upgrades. The Blue Marmots argue  
11 that their only obligation is to arrange for transmission on PacifiCorp’s system to the PACW.PGE  
12 POD, after which PGE is required to accept such deliveries—even if doing so would require  
13 system upgrades, or the displacement of ATC reserved by PGE to participate in the Western  
14 Energy Imbalance Market (EIM).<sup>1</sup> The Blue Marmots also argue that they incurred a legally  
15 enforceable obligation (LEO) to the terms and conditions in the PPAs.<sup>2</sup>

16 Thus, the outcome of this case hinges on the resolution of a several legal questions, key  
17 among them:

- 18 1. Does an off-system QF have the right to transmit its generation to the purchasing utility  
19 at the POD of its own choosing, regardless of ATC?  
20
- 21 2. If an off-system QF opts to transmit its generation to a POD with insufficient ATC,  
22 may the QF be required to pay for interconnection costs, including system upgrades,  
23 required to deliver its generation to the purchasing utility?  
24
- 25 3. Is a utility required to give up ATC obtained to participate in the EIM to accommodate  
26 QF deliveries?  
27

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<sup>1</sup> See, e.g., UM 1829 Complaint at 13-14; Blue Marmot/300, Moyer/12:20-22, 19:10-11.

<sup>2</sup> See, e.g., UM 1829 Complaint at 10-11.

1           4. Does the fact that a QF may have a LEO entitle a QF to transmit its generation to a  
2           POD of its choosing, without incurring additional interconnection costs?

3           These legal issues can and should be addressed in depth in the parties’ pre-hearing and  
4 post-hearing briefing, and at oral argument if scheduled by the Commission. It is not appropriate,  
5 however, for the parties to present their legal arguments and conclusions through witness  
6 testimony. Unfortunately, this is precisely what the Blue Marmots are seeking to do.

7           Mr. Moyer, who is an engineer by training,<sup>3</sup> offers extensive testimony on a range of legal  
8 issues, including whether the Blue Marmots have the right to deliver to any POD they prefer,<sup>4</sup>  
9 whether PGE can require the Blue Marmots to pay for system upgrades required to facilitate  
10 delivery,<sup>5</sup> and whether PGE’s obligations to contract with QFs “supersede” its commitments to  
11 participate in the EIM.<sup>6</sup> Mr. Talbott, who has degrees in economics and business and works for  
12 EDPR developing solar projects,<sup>7</sup> discusses the Commission’s orders on the formation of a LEO  
13 under PURPA, and draws conclusions on the proper application of that law to this case.<sup>8</sup>  
14 Importantly, these witnesses provide virtually no support for their legal opinions—other than Mr.  
15 Moyer’s references to communications with counsel.<sup>9</sup>

16           By placing legal argument in testimony, the Blue Marmots improperly present their  
17 witnesses’ argument and opinions as to key legal matters in this case as if they were factual  
18 evidence. However, as discussed below, legal argument does not constitute admissible evidence  
19 under the Commission’s rules and therefore is not the proper subject of testimony—particularly  
20 when offered by non-lawyers. Moreover, the presence of such extensive legal argument in witness

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<sup>3</sup> Blue Marmot/300, Moyer/2:14.

<sup>4</sup> Blue Marmot/300, Moyer/7:18-20, 8:18-19, 9:4-5.

<sup>5</sup> Blue Marmot/300, Moyer/16:10-12.

<sup>6</sup> Blue Marmot/300, Moyer/12:18-22.

<sup>7</sup> Blue Marmot/200, Talbott/1:7-15.

<sup>8</sup> Blue Marmot/200, Talbott/13:14-15:20.

<sup>9</sup> Blue Marmot/300, Moyer/27:23, 28:5, 29:18.

1 testimony would require PGE to respond through its own testimony. This approach to presenting  
2 legal argument is awkward and inefficient and should be avoided.

3 PGE acknowledges that contested cases brought before this Commission frequently present  
4 interrelated legal and factual matters, and that therefore it is sometimes appropriate for witnesses  
5 to reference statutes, regulations, and legal decisions to provide background or context for the  
6 factual matters presented. That is not the present situation. Here, the Blue Marmots impermissibly  
7 are offering legal argument through the opinions of non-lawyer witnesses regarding key legal  
8 issues presented by this case.

9 For these reasons, PGE respectfully requests that the Commission strike the portions of the  
10 Blue Marmots' testimony marked in Exhibit A and require the Blue Marmots to restrict their legal  
11 argument to briefing and oral argument. PGE has conferred with the Blue Marmots, and they  
12 oppose this motion.

## II. DISCUSSION

13 It is a “well-established principle that legal argument *per se*, belongs in briefs and not in  
14 the testimony of non-lawyer witnesses.”<sup>10</sup> The reason for this rule is simple. The purpose of  
15 testimony is to provide *relevant evidence*,<sup>11</sup> which is defined as “evidence tending to make the  
16 existence of any *fact* at issue in the proceedings more or less probable than it would be without the  
17 evidence.”<sup>12</sup> Thus, witness testimony is intended to provide factual evidence, while legal argument  
18 is reserved for briefing.

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<sup>10</sup> *In the Matter of 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).

<sup>11</sup> *See, e.g., Am. Can Co. v. Lobdell*, 55 Or App 451, 466 (1982) (upholding Commission's exclusion of irrelevant evidence); *see also* OAR 860-001-0480(10) (“written testimony is subject to rules of admissibility”).

<sup>12</sup> OAR 860-004-0450(1)(a) (emphasis added).

1           Although it is common for testimony in Commission proceedings to reference statutes,  
2 rules, or Commission orders, to provide context for the factual and technical information provided,  
3 the Blue Marmots’ testimony goes far beyond this accepted convention.<sup>13</sup> The Blue Marmots’  
4 testimony offers extensive argument regarding key legal issues, frequently without citation to  
5 support, other than the advice of counsel. The portions of the Blue Marmots’ testimony marked  
6 in Exhibit A must be stricken because they do not contain relevant, admissible evidence, and  
7 because responding to these witnesses’ legal opinions would inappropriately require PGE to  
8 conduct discovery on legal argument and to provide expert legal opinions in its own testimony.

9       **A. The legal argument contained in the Blue Marmots’ testimony constitutes the opinions**  
10       **of non-lawyers on contested legal issues in this case and is therefore irrelevant and**  
11       **inadmissible.**

12           The testimony offered by the Blue Marmots’ witnesses Messrs. Talbott and Moyer is  
13 replete with these non-lawyers’ opinions as to key legal issues in this case. Mr. Moyer, in  
14 particular, expounds at length about what PURPA requires of utilities and QFs with respect to the  
15 very issues the parties will be asking the Commission to resolve. For instance, Mr. Moyer opines  
16 that “QFs are not restricted to delivering power to a *specific* POD” and that “[t]he purchasing  
17 utility must accept an off-system QF’s output at any delivery point on its transmission system.”<sup>14</sup>  
18 On that same topic, Mr. Moyer concludes that “[a] QF cannot be given the choice between funding  
19 transmission upgrades or being unable to deliver its net output when there is transmission  
20 congestion or limited ATC.”<sup>15</sup>

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<sup>13</sup> In Exhibit A, PGE attempted to distinguish between statements of black letter law and statements involving legal argument and conclusions, and to move to strike the latter only. There are some gray areas, however.

<sup>14</sup> Blue Marmot/300, Moyer/7:18-20 (emphasis original).

<sup>15</sup> Blue Marmot/300, Moyer/13:3-7.

1 Similarly, Mr. Moyer opines that “PGE Merchant’s existing agreements regarding power  
2 sales, participation in the Western Energy Imbalance Market (“EIM”), or other contractual  
3 commitments cannot supersede their PURPA obligations.”<sup>16</sup> He also testifies regarding avoided  
4 cost rates and LEOs—including taking the position that requiring the Blue Marmots to pay for  
5 upgrades effectively would change their avoided cost rate—and offers conclusions about whether  
6 PGE has complied with Commission and FERC precedent surrounding these issues.<sup>17</sup> Conceding  
7 that he is not an attorney, Mr. Moyer seeks to bolster his opinions by stating that they are “based  
8 on communications with counsel.”<sup>18</sup>

9 Mr. Talbott’s testimony addresses only one legal issue—the Commission’s and the Federal  
10 Energy Regulatory Commission’s requirements for the formation of a LEO. The majority of his  
11 testimony presents the facts regarding the Blue Marmots’ contracting processes with PGE, all of  
12 which is perfectly appropriate and may serve to support legal argument regarding whether and  
13 when a LEO was formed, as well as the legal implications of that LEO for the parties to this case.  
14 Unfortunately, however, Mr. Talbott then proceeds to provide this legal argument himself,  
15 concluding that “all five projects have satisfied both the OPUC’s and FERC’s standard for forming  
16 legally enforceable obligations.”<sup>19</sup>

17 The Blue Marmots offer Messrs. Moyer and Talbott’s opinions on key legal issues  
18 presented in this case as if their opinions represent settled fact. In reality, they address legal issues

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<sup>16</sup> Blue Marmot/300, Moyer/12:20-22.

<sup>17</sup> Blue Marmot/300, Moyer/27:3-28:12. Mr. Moyer also testifies at length regarding a FERC order permitting PacifiCorp to deal with transmission constraints by “liv[ing] within its means,” Blue Marmot/300, Moyer/20:1-21:20, and opines that PacifiCorp’s actions in that case illustrate that there are alternative approaches PGE could take to its PURPA obligations. Blue Marmot/300, Moyer/21:23-24. This testimony also is problematic because Mr. Moyer offers his analysis of the FERC order and compares PGE’s situation to that of PacifiCorp. Discussion of an order and application of that order to the facts underlying the present case are subjects appropriately addressed in legal briefing, not the fact testimony of a non-lawyer.

<sup>18</sup> Blue Marmot/300, Moyer/27:23; *see also* Blue Marmot/300, Moyer/28:5, 29:18.

<sup>19</sup> Blue Marmot/200, Talbott/15:12-13, 17-20.

1 that are very much in dispute, and the outcome of this case may hinge on whether the Blue  
2 Marmots' view of these contested legal issues is correct. The Blue Marmots properly may  
3 advocate their position on legal issues in briefing and at oral argument, but not in testimony.

4 The legal assertions and conclusions in the Blue Marmots' testimony do not make any fact  
5 at issue in this case more or less probable and do not enhance the record in this proceeding.<sup>20</sup> And  
6 because Messrs. Moyer and Talbott are not lawyers, their unsupported opinions and conclusions  
7 regarding the law are irrelevant and inadmissible, regardless of whether they are based on  
8 communications with counsel.<sup>21</sup> The testimony marked in Exhibit A must be stricken because it  
9 is legal in nature and therefore irrelevant and inadmissible as evidence.

10 **B. Admitting the legal argument and conclusions in the Blue Marmots' testimony would**  
11 **prejudice PGE and significantly complicate the case.**

12 In addition to being improper, the inclusion of legal argument in the Blue Marmots' witness  
13 testimony would unnecessarily complicate PGE's presentation of its case. Under normal  
14 circumstances, PGE would reserve its own legal argument to its briefs and oral argument.  
15 However, if the legal argument contained in the Blue Marmots' testimony is allowed to stand, PGE  
16 will need to respond—which it would do through the testimony of legal experts on the issues  
17 presented. Importantly, because the Blue Marmots' witnesses do not provide appropriate citations  
18 to precedent supporting their legal argument and conclusions, PGE will be required to conduct  
19 discovery as to the bases of their assertions, including those areas for which the Blue Marmots  
20 have waived attorney-client privilege by presenting witness statements revealing the content of  
21 conversations with counsel. The only way PGE can explore the basis for statements based on the  
22 advice of counsel is to require the Blue Marmots to provide details of the content of the attorney-

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<sup>20</sup> See OAR 860-001-0450(1).

<sup>21</sup> Compare Docket No. UM 1121; Ruling (Oct. 18, 2004) (denying motion to strike a bankruptcy lawyer's expert opinion testimony). In contrast, non-lawyers may not permissibly offer expert opinion testimony on legal matters. See OAR 860-001-0450(1); *Olson v. Coates*, 78 Or App 368, 371 (1986) ("A witness may not testify regarding a legal conclusion").



1 client communications referenced. In fact, PGE already has served such discovery on the Blue  
2 Marmots so that it will be prepared in the event the Commission denies this motion.

3           Requiring PGE to perform discovery into the bases of the legal opinions offered by Messrs.  
4 Moyer and Talbot, and then to offer expert legal testimony, would constitute an awkward and  
5 expensive approach to addressing the important legal issues in this case. It also would lengthen  
6 the testimony and confuse the factual issues therein, making it more cumbersome for the  
7 Commission to resolve the issues presented by this case.

8 *////*

9 *////*

10 *////*

11 *////*

12 *////*

### III. CONCLUSION

1 PGE respectfully requests that the Commission strike the portions of the Blue Marmots'  
2 testimony marked in Exhibit A because they contain legal argument and conclusions, which are  
3 irrelevant and inadmissible. If the testimony is not stricken, PGE's response will require  
4 significant discovery, some of which is likely to be controversial. A much cleaner and simpler  
5 approach to developing a record in this case would be to strike the legal argument from the Blue  
6 Marmots' testimony and require the parties to present their legal arguments, with appropriate  
7 citations, in briefs.

Dated October 25, 2017

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**Exhibit A**

To

Portland General Electric Company's

Motion to Strike

**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 )  
vs. )  
PORTLAND GENERAL ELECTRIC )  
COMPANY )  
Defendant )  
Pursuant to ORS 756.500. )  
\_\_\_\_\_ )

**OPENING TESTIMONY OF**

**WILLIAM TALBOTT**

**ON BEHALF OF THE**

**BLUE MARMOT V, VI, VII, VIII, AND IX**

**October 13, 2017**

1 **I. INTRODUCTION**

2 **Q. Mr. Talbott, please state your name and business address.**

3 **A.** My name is William Talbott. I am employed as a Development Project Manager  
4 with EDP Renewables North America (“EDPR NA”). My business address is 53  
5 SW Yamhill Street, Portland, Oregon 97204.

6 **Q. Please describe your background and experience.**

7 **A.** I lead development of solar projects for EDPR NA in the West Region, which  
8 includes market analysis and prioritization based on commercial prospects, site  
9 identification, site acquisition, interconnection, permitting, power marketing and  
10 power purchase agreement (“PPA”) negotiations. I have served in this role since  
11 2015. Prior to joining EDPR NA, I worked as a management consultant with  
12 McKinsey & Company. I received a Bachelor of Arts in Economics from  
13 Pomona College, a Master of Business Administration from the MIT Sloan  
14 School of Management and a Master of Public Administration from the Harvard  
15 Kennedy School.

16 **Q. On whose behalf are you appearing in this proceeding?**

17 **A.** Blue Marmot V, Blue Marmot VI, Blue Marmot VII, Blue Marmot VIII, Blue  
18 Marmot IX (jointly, “Blue Marmots”) and their parent company, EDPR NA. The  
19 Blue Marmots own each of the individual projects (jointly, “Blue Marmot  
20 Projects”).

21 **Q. How is your testimony organized?**

22 **A.** First, I will describe the series of exchanges through which the Blue Marmots  
23 pursued and ultimately signed standard renewable off-system variable PPAs with  
24 Portland General Electric Company (“PGE”). Second, I will summarize the

1 position PGE has taken in justifying not countersigning the partially executed  
2 Blue Marmot PPAs on the grounds of transmission constraints. Third, I will  
3 explain the transmission arrangements required by Schedule 201 and the PPA and  
4 how the Blue Marmots have satisfied those requirements. Fourth, I will  
5 summarize the concept of a legally enforceable obligation, including the Federal  
6 Energy Regulatory Commission (“FERC”) precedent on the factors that establish  
7 a legally enforceable obligation, as well as the Oregon Public Utility Commission  
8 (“OPUC”) policy regarding legally enforceable obligations. Finally, I will  
9 explain how, contrary to PGE’s position, the Blue Marmots have demonstrated  
10 the ability to meet the requirements under Schedule 201 and the PPA for  
11 delivering power to PGE.

12 **II. POWER PURCHASE AGREEMENT NEGOTIATIONS**

13 **Q. When did development of the Blue Marmot Projects begin?**

14 **A.** Work began in the first quarter of 2016. This entailed desktop mapping of the  
15 Lakeview area of Lake County to identify development constraints, reaching out  
16 to owners of potentially suitable sites to gauge their interest in leasing or selling  
17 land for purposes of solar development, and traveling to the Lakeview area to  
18 meet with interested landowners. Initial work also included reviewing PGE’s  
19 Schedule 201 for terms and eligibility rules. In February 2016, we requested the  
20 list of materials and information required to request a PPA from PGE under  
21 Schedule 201.

22 **Q. Did each Blue Marmot project pursue a PPA on the same timeline?**

23 **A.** No. Since the projects did not all secure site control on the same timeline, they  
24 did not all pursue PPAs on the same timeline. Blue Marmot V and VI were the

1 first projects to begin the process and moved on the same timeline. Blue Marmot  
2 VII and IX were the next to begin the process and moved on the same timeline,  
3 and Blue Marmot VIII was the last and moved on its own timeline.

4 **Q. Can you please summarize the series of events that led to Blue Marmot V**  
5 **and VI executing PPAs provided by PGE?**

6 **A.** On August 1, 2016, Blue Marmot V and VI provided information and materials  
7 required for requesting PPAs with PGE. Over the course of the next few months,  
8 Blue Marmot V and VI and PGE exchanged information and communicated  
9 regarding issues related to the sale of the net output of the Blue Marmot V and VI  
10 Projects to PGE, including but not limited to contract terms, required information,  
11 and project details. On December 20, 2016, Blue Marmot V and VI requested  
12 final draft PPAs for the Blue Marmot V and VI Projects.

13 On January 12 and January 16, 2017, PGE provided Blue Marmot V and  
14 VI with executable PPAs for the Blue Marmot V and VI Projects, as well as  
15 accompanying cover letters.<sup>1</sup> The letters stated that PGE had determined that  
16 Blue Marmot V and VI had provided sufficient information to allow PGE to  
17 prepare executable PPAs, and that PGE had attached executable PPAs for the  
18 Blue Marmot V and VI Projects. Each letter further stated that, if Seller “executes  
19 the enclosed agreement without alteration and returns the partially executed  
20 agreement to PGE for full execution, Seller will have established a legally  
21 enforceable obligation.” Finally, the letters stated that Blue Marmot V and VI

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<sup>1</sup> Blue Marmot/201, Talbot/1-121 (PGE emails and Blue Marmot V and VI executable PPAs)(On January 12, 2017, PGE initially provided the incorrect draft of the Blue Marmot V PPA, but then provided the correct executable PPA on January 16, 2017.).

1 were entitled to receive PGE’s renewable avoided cost rates in effect at the time  
2 of execution, if Blue Marmot V and VI executed the final executable PPAs  
3 without alteration.

4 On March 29, 2017, Blue Marmot V and VI executed the final executable  
5 PPAs without alteration.<sup>2</sup> The executed PPAs were delivered by hand to PGE on  
6 March 31, 2017.

7 **Q. Can you please provide the same summary for Blue Marmot VII and IX?**

8 **A.** On December 21, 2016, Blue Marmot VII and IX provided information and  
9 materials required for requesting PPAs with PGE. Over the course of the next  
10 couple months, Blue Marmot VII and IX and PGE exchanged information and  
11 communicated regarding issues related to the sale of the net output of the Blue  
12 Marmot VII and IX Projects to PGE. On February 28, 2017, Blue Marmot VII  
13 and IX requested final executable PPAs for the Blue Marmot VII and IX Projects.

14 On March 21, 2017, PGE provided Blue Marmot VII and IX with cover  
15 letters and executable PPAs for the Blue Marmot VII and IX Projects.<sup>3</sup> The  
16 letters stated that PGE had determined that Blue Marmot VII and IX had provided  
17 sufficient information to allow PGE to prepare executable PPAs, and that PGE  
18 had attached executable PPAs for the Blue Marmot VII and IX Projects. Each  
19 letter further stated that, if Seller “executes the enclosed agreement without  
20 alteration and returns the partially executed agreement to PGE for full execution,  
21 Seller will have established a legally enforceable obligation.” Finally, the letters

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<sup>2</sup> Blue Marmot/202, Talbot/1-131 (Blue Marmot V and VI executed PPAs).

<sup>3</sup> Blue Marmot/201, Talbot/122-220 (PGE emails and Blue Marmot VII and IX executable PPAs)(PGE’s letter incorrectly identified the Blue Marmot IX Project as Blue Marmot XI).



1 stated that Blue Marmot VII and IX were entitled to receive PGE's renewable  
2 avoided cost rates in effect at the time of execution, if Blue Marmot VII and IX  
3 executed the final executable PPAs without alteration.

4 On March 29, 2017, Blue Marmot VII and IX executed the final  
5 executable PPAs without alteration.<sup>4</sup> The executed PPAs were delivered by hand  
6 to PGE on March 31, 2017.

7 **Q. Did the letters sent by PGE along with the executable PPAs for Blue Marmot**  
8 **V, VI, VII and IX state any contingencies or conditions upon which the**  
9 **provisions of the letter were based?**

10 **A.** No, these were unconditional statements. Each letter stated: "If Seller executes  
11 the enclosed agreement without alteration and returns the partially executed  
12 agreement to PGE for full execution, Seller will have established a legally  
13 enforceable obligation. Seller is entitled to receive PGE's [Standard Avoided  
14 Costs **OR** Renewable Avoided Costs] in effect at the time Seller executes the  
15 enclosed agreement without alteration." Therefore, PGE clearly and  
16 unambiguously stated that signing the executable PPAs would create a legally  
17 enforceable obligation at the renewable avoided costs in effect at the time of  
18 signing.

19 **Q. What happened after Blue Marmot V, VI, VII and IX sent PGE executed**  
20 **PPAs?**

21 **A.** On April 5, 2017, Blue Marmot asked PGE when PGE would execute the four  
22 final executable PPAs signed by Blue Marmot V, VI, VII and IX. On April 5,  
23 2017, PGE informed Blue Marmot that PGE usually takes a couple of weeks from

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<sup>4</sup> Blue Marmot/202, Talbott/132-197, 264-329 (Blue Marmot VII and IX executed PPAs).

1 the date the QF executes the executable PPA for PGE to execute the partially  
2 executed PPA.

3 On April 6, 2017, PGE informed Blue Marmot that there were two  
4 changes PGE wished to make to the PPAs that PGE had provided to Blue Marmot  
5 V, VI, VII and IX as executable and that Blue Marmot V, VI, VII and IX had  
6 executed. These two non-substantive and immaterial changes were to: 1) attach  
7 the FERC Form 556 qualifying facility (“QF”) self-certification forms that Blue  
8 Marmot V, VI, VII and IX had previously provided to PGE; and 2) adding page  
9 numbers. It is my understanding that PGE has executed previous PPAs with QFs  
10 without including the FERC Form 556, and that these non-substantive and  
11 immaterial changes did not change the Blue Marmot V, VI, VII and IX Projects’  
12 legally enforceable obligations. On April 7, 2017, PGE provided corrections to  
13 the partially executed PPAs to add the FERC form 556 and to correct the page  
14 numbers. On April 10, 2017, Blue Marmot approved the corrections to the  
15 partially executed PPAs.

16 **Q. What about the timeline for Blue Marmot VIII?**

17 **A.** On February 2, 2017, Blue Marmot VIII provided information and materials  
18 required for requesting a PPA with PGE. Over the next several weeks, Blue  
19 Marmot VIII and PGE exchanged information and communicated regarding  
20 issues related to the sale of the net output of the Blue Marmot VIII Project to  
21 PGE. On March 22, 2017, PGE provided a final draft PPA for the Blue Marmot  
22 VIII Project.<sup>5</sup> On March 24, 2017, Blue Marmot VIII requested an executable

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<sup>5</sup> Blue Marmot/201, Talbot/221-270 (PGE emails and Blue Marmot VIII draft PPA).

1 PPA for the Blue Marmot VIII Project. On March 28, 2017, PGE informed Blue  
2 Marmot VIII that it would provide an executable PPA, or request additional or  
3 clarifying information by April 17, 2017.

4 **Q. What interaction did you have with PGE on April 17, 2017?**

5 **A.** On April 17, 2017, PGE inquired about the point of delivery (“POD”) for the Blue  
6 Marmot Projects. On April 18, 2017, PGE was informed that the anticipated POD  
7 for the Blue Marmot Projects was PACW.PGE.<sup>6</sup> On April 19, 2017, PGE stated  
8 that the POD was constrained and that it was concerned that deliveries to the POD  
9 might not be feasible. On April 19, 2017, PGE stated that if PGE’s evaluation of  
10 the alleged congestion at the POD went past May 1, 2017, then PGE would honor  
11 the avoided cost prices currently in effect for both the partially executed PPAs for  
12 Blue Marmot V, VI, VII and IX, as well as for Blue Marmot VIII.

13 **Q. Did the Blue Marmot Projects continue to attempt to obtain fully executed**  
14 **PPAs?**

15 **A.** Yes. On April 19, 2017, Blue Marmot expressed its concern with PGE’s refusal  
16 to execute the partially executed PPAs for Blue Marmot V, VI, VII and IX, and to  
17 provide an executable PPA for Blue Marmot VIII. On April 19, 2017, PGE  
18 refused to execute the partially executed PPAs. On April 20, 2017, Blue Marmot  
19 specifically informed PGE that its expectation was that PGE countersign without  
20 delay the partially executed PPAs, and that Blue Marmot V, VI, VII and IX were  
21 continuing to commit and obligate themselves to sell power to PGE from the Blue  
22 Marmot V, VI, VII and IX Projects at the Schedule 201 rates, terms, and

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<sup>6</sup> PACW.PGE is a scheduling point between PGE’s and PacifiCorp’s systems, and constitutes several actual points of physical interconnections between PGE’s and PacifiCorp’s systems.

1 conditions in the partially executed PPAs. On April 24, 2017, Blue Marmot  
2 attempted to reach an agreement regarding PGE's execution of the partially  
3 executed PPAs, and was unable to reach agreement. On April 24, 2017, Blue  
4 Marmot sent PGE a demand letter requesting that PGE execute the partially  
5 executed PPAs or Blue Marmot V, VI, VII and IX would file a complaint with the  
6 OPUC on April 28, 2017. On April 27, 2017, PGE informed Blue Marmot that it  
7 would not execute the partially executed PPAs.

8 **Q. What about Blue Marmot VIII?**

9 **A.** On April 20, 2017, Blue Marmot VIII communicated to PGE that it was  
10 committing and obligating itself to sell power to PGE from the Blue Marmot VIII  
11 Project at the Schedule 201 rates, terms, and conditions in the final draft PPA  
12 provided by PGE. On April 28, 2017, Blue Marmot VIII executed the last draft  
13 PPA that PGE provided to Blue Marmot VIII. Blue Marmot VIII made no  
14 changes to the last draft PPA, other than executing the PPA. Blue Marmot VIII  
15 did this because it was concerned that PGE would not provide an executable PPA  
16 for Blue Marmot VIII, and because Blue Marmot VIII had requested an  
17 executable PPA exactly matching the final draft PPA and was prepared to commit  
18 itself to sell power to PGE under the terms of that PPA.<sup>7</sup> Blue Marmot VIII  
19 unequivocally committed itself to sell the net output of the Blue Marmot VIII  
20 Project at the terms and conditions included in the partially executed PPA,  
21 including but not limited to being subject to penalties for failing to deliver energy  
22 on the scheduled commercial on-line date.

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<sup>7</sup> Blue Marmot/202, Talbot/198-263 (Blue Marmot VIII executed PPA).

1 **Q. Had PGE previously inquired about or expressed concern over the viability**  
2 **of Blue Marmot’s POD?**

3 **A.** Prior to April 17, 2017, PGE never specifically requested information regarding  
4 the POD for any of the Blue Marmot Projects or provided any indication  
5 regarding its concerns about potential constraints at the POD. Although PGE  
6 never specifically requested information about the POD, each Blue Marmot  
7 Project communicated in its request for an initial draft PPA that it would be  
8 interconnecting with PacifiCorp, from which it could reasonably be inferred that  
9 each Project would deliver to PGE’s system at the interface point between the  
10 PacifiCorp and PGE systems, or the PACW.PGE POD.

11 Moreover, on November 14, 2016, Blue Marmot sent several questions to  
12 PGE seeking to clarify settlement details under the PPA for projects delivering to  
13 PGE via PacifiCorp, again implying that the projects intended to deliver to PGE’s  
14 system at the PACW.PGE POD. PGE did not raise any concerns about the Blue  
15 Marmot Projects delivering to the PACW.PGE POD in response to these  
16 questions. Additionally, the Required Facility Documents in the partially  
17 executed PPAs specifically state that the Blue Marmots will secure transmission  
18 service agreements with PacifiCorp, but do not mention transmission service from  
19 the Bonneville Power Administration (“BPA”), which would be required to  
20 deliver to another POD.

21 With any reasonable level of attention, PGE could have determined that  
22 the Blue Marmots intended to deliver to PGE’s system at the PACW.PGE POD.  
23 By providing executable PPAs, PGE committed to purchase the Blue Marmots’  
24 net output at this POD, and pay the then current Schedule 201 avoided cost rates

1 without requiring the Blue Marmots to pay for studies or upgrades on PGE's  
2 transmission system or pay for transmission service to a different POD.

3 **Q. Please summarize your interactions with PGE since April 27 regarding this**  
4 **matter.**

5 **A.** PGE communicated on May 18, 2017 that it cannot accept delivery from Blue  
6 Marmot at the PACW.PGE POD because of transmission constraints at this POD  
7 arising from PGE's acquisition of transmission rights to participate in the Western  
8 Energy Imbalance Market ("EIM"). Blue Marmot met with PGE on June 1, 2017  
9 and again on June 19, 2017 to explore potential settlement options.

10 **Q. What has PGE's position been?**

11 **A.** PGE has stated that there is "insufficient long-term firm available transmission  
12 capacity (ATC) at this POD" and that, "Given the lack of long-term firm ATC at  
13 the PACW.PGE POD, PGE cannot agree to accept delivery of Blue Marmot's  
14 output at this POD." PGE has "declined to sign the executable PPA[s] until the  
15 parties agree on an alternative delivery arrangement." PGE has communicated  
16 that Blue Marmot has two options: 1) either pay for upgrades at the PACW.PGE  
17 POD; or 2) deliver to a different POD, i.e. the BPAT.PGE POD.

18 **Q. Has PGE changed its position about whether the Blue Marmot V, VI, VII**  
19 **and IX have formed legally enforceable obligations?**

20 **A.** Yes. PGE now claims that the legally enforceable obligations described in the  
21 cover letters accompanying the executable PPAs for Blue Marmot V, VI, VII and  
22 IX are actually contingent upon Blue Marmot making alternative delivery  
23 arrangements.

1 **III. TRANSMISSION ARRANGEMENTS**

2 **Q. What transmission arrangements have Blue Marmot already made and what**  
3 **new transmission arrangements would be required to deliver at BPAT.PGE?**

4 **A.** EDPR NA has executed on the Blue Marmots' behalf transmission service  
5 agreements with PacifiCorp for long term firm point to point transmission service  
6 with rollover rights for the full capacity of the Blue Marmot Projects to deliver the  
7 net output to the PACW.PGE POD, which is the interface between the PacifiCorp  
8 and PGE systems. The total interconnection cost for the Blue Marmots is  
9 expected to be approximately \$9.5 million, of which \$5.4 million would  
10 eventually be reimbursed to Blue Marmot, and the cost of PacifiCorp transmission  
11 is expected to be approximately \$34 million over the term of the PPAs.

12 Delivering at BPAT.PGE would entail redirecting the PacifiCorp  
13 transmission service to the PACW.BPAT interface point, and then adding a  
14 second path of BPA transmission service from PACW.BPAT to the interface  
15 between BPA and PGE at the BPAT.PGE POD. This second leg of transmission  
16 would add over \$14 million in costs total to the Blue Marmot Projects over the  
17 term of the PPAs. The testimony of Keegan Moyer will address transmission  
18 topics in greater detail.

19 **Q. What are the Seller's obligations under Schedule 201 PPAs?**

20 **A.** The Sellers' obligations are to deliver power to PGE's system. Section 4.1 states  
21 "Commencing on the Effective Date and continuing through the Term of this  
22 Agreement, Seller shall sell to PGE the entire Net Output delivered from the  
23 Facility at the Point of Delivery" and Section 1.27 states "Point of Delivery means  
24 the PGE System." There is no further delineation of acceptable PODs and neither

1 solution offered by PGE (upgrades at the PACW.PGE POD or delivery to an  
2 alternative POD) is contemplated under the contract. PGE is now seeking to alter  
3 the PPA and require the Blue Marmots to agree to specify that it will pay for  
4 transmission costs not contemplated under the PPA.

5 Indeed, PGE repeatedly emphasized through multiple conversations with  
6 Blue Marmot that other than variable terms in the contract, there can be no  
7 changes to the Schedule 201 contract to clarify or stipulate unique details or  
8 arrangements for specific projects. There is no variable term for the POD and, as  
9 stated previously, PGE never inquired about PODs prior to April 17, 2017, until  
10 after providing executable PPAs.

11 The closest thing to a variable term for POD in the PPA is specifying the  
12 interconnecting utility. For off-system QFs such as the Blue Marmot projects  
13 interconnecting with PacifiCorp, it could be reasonably inferred that the  
14 PACW.PGE POD would be the interface point between the PacifiCorp and PGE  
15 systems.

16 Additionally, the Blue Marmot Projects stipulated in the list of Required  
17 Facility Documents in Exhibit B that prior to the Commercial Operation Date, the  
18 projects would secure Transmission Service Agreements with PacifiCorp. Given  
19 that there was no mention of Transmission Service Agreements with BPA, it  
20 could be reasonably inferred that each of the projects intended to deliver to the  
21 PACW.PGE POD.

22 In sum, the contract simply requires delivery to PGE's system, with no  
23 negotiation on a mutually agreeable POD required, and Blue Marmot's intention



1 to deliver to the PACW.PGE POD was clear from the information included in the  
2 executable contracts provided by PGE.

3 **Q. What has PGE communicated regarding the ability of Blue Marmot to**  
4 **receive the renewable avoided costs in effect at the time Blue Marmot**  
5 **executed PPAs for the Blue Marmot Projects?**

6 **A.** PGE confirmed in its May 18, 2017 answer to complaints filed by Blue Marmot  
7 that it communicated in April 2017 that if evaluating the feasibility of Blue  
8 Marmot delivering at the PACW.PGE POD went past May 1, 2017 (when PGE  
9 filed to reduce its renewable avoided cost rates), then PGE would continue to  
10 honor the avoided cost prices in effect at the time Blue Marmot executed its  
11 PPAs.

12 **IV. LEGALLY ENFORCEABLE OBLIGATIONS**

13 **Q. What is a legally enforceable obligation?**

14 **A.** While I am not a lawyer, I will explain my understanding of legally enforceable  
15 obligations. FERC has established an administrative rule and policy that ensures  
16 that a QF has the right and obligation to sell its net output to a utility pursuant to a  
17 contract or a legally enforceable obligation.<sup>8</sup> The QF enters into a legally  
18 enforceable obligation by committing itself to sell power to an electric utility. A  
19 legally enforceable obligation is broader than simply a contract between a utility  
20 and a QF, and may exist without a contract. Thus, a QF can require a utility to  
21 purchase its power even if the utility has refused to enter into a contract.

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<sup>8</sup> 18 CFR 292.304(d).

1 Q. **What is the purpose of a legally enforceable obligation?**

2 A. It is intended to ensure that a utility cannot refuse to sign a contract, so that a later  
3 and lower avoided cost becomes applicable, or cannot impose additional terms  
4 and conditions like curtailing power deliveries. In other words, a legally  
5 enforceable obligation allows a QF to “lock in” current avoided cost rates and  
6 contract terms, especially when a utility is delaying or otherwise imposing  
7 unreasonable terms and conditions.

8 Q. **How is a legally enforceable obligation formed?**

9 A. When the QF commits itself to sell its net output at specific terms and conditions.  
10 While I am not an expert in issues related to the Public Utility Regulatory Policies  
11 Act (“PURPA”), my understanding is that the OPUC has concluded that it is up to  
12 the QF, and not the utility, to determine when a legally enforceable obligation has  
13 been formed. In a recent 2016 order, the OPUC noted that “a QF has the power to  
14 determine the date for which avoided costs are calculated by obligating itself to  
15 provide power.”<sup>9</sup>

16 Q. **Has the OPUC provided further guidance regarding the formation of legally  
17 enforceable obligations?**

18 A. Yes, in the same order, the OPUC explained that a legally enforceable obligation  
19 cannot be formed until the utility and QF have undertaken the contracting process,  
20 and negotiations have progressed beyond the initial communications. The OPUC  
21 then adopted a policy that a legally enforceable obligation and a QF’s right to then  
22 current avoided cost rates begins at the time the QF signs a final draft of an

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<sup>9</sup> Re OPUC Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 23-24 (May 13, 2016)

1 executable contract that includes specific requirements, including on line dates,  
2 minimum and maximum output, penalties for failure to deliver, etc. The OPUC  
3 also recognized that there may be problems, delays or obstructions toward the  
4 execution of a final contract that will entitle a QF to then current avoided cost  
5 rates prior to the utility sending an executable PPA.

6 **Q. How do these factors apply to the Blue Marmot Projects?**

7 **A.** All five projects were well past the point of initial communications, and all five  
8 projects unequivocally committed themselves to sell their net output at specific  
9 terms and conditions. This included the terms and conditions of the executed  
10 PPAs, which determined the applicable avoided cost rates and included details  
11 regarding commercial operation dates, minimum and maximum net output,  
12 penalties, etc. Thus, all five projects have satisfied both the OPUC's and FERC's  
13 standard for forming legally enforceable obligations.

14 **Q. Have the Blue Marmot V, VI, VII and IX Projects exceeded the standard for**  
15 **forming legally enforceable obligations?**

16 **A.** Yes. PGE provided executable PPAs with all the required terms, conditions and  
17 rates, which Blue Marmot V, VI, VII and IX all signed. I agree with PGE's  
18 statements in its letters that Blue Marmot V, VI, VII and IX established a legally  
19 enforceable obligation once they executed without alteration the executable PPAs  
20 and then returned the partially executed PPAs to PGE for full execution.

21 **Q. Has PGE agreed that the Blue Marmots have formed legally enforceable**  
22 **obligations?**

23 **A.** No. PGE takes the position that the Blue Marmots will only have formed legally  
24 enforceable obligations if they agree to pay for transmission upgrades at the

1 PACW.PGE POD, or deliver to a different POD. This is directly inconsistent  
2 with PGE's prior statements made when it provided the executable PPAs.

3 In addition, PGE appears to be taking the position that the Blue Marmots  
4 will not have formed legally enforceable obligations or otherwise be eligible for  
5 the avoided cost rates at the time they executed the PPAs, even if the OPUC,  
6 FERC or a court agrees with the Blue Marmots that the Blue Marmots have  
7 satisfied their obligations under PURPA and the partially executed contracts by  
8 arranging delivery at the PACW.PGE POD. Regardless of the outcome of this  
9 litigation, or whether PGE can impose additional transmission costs on a QF that  
10 delivers its net output to a POD on its system, the Blue Marmots should be  
11 eligible for the prices at the time they executed their PPAs. The Blue Marmots  
12 have committed to sell their net output under the terms and conditions of the  
13 partially executed PPAs regardless of transmission arrangements the OPUC,  
14 FERC, or a court ultimately decide are necessary.

15 **V. CONCLUSION**

16 **Q. Does this conclude your testimony?**

17 **A.** Yes.

**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        )  
  vs.                                )  
PORTLAND GENERAL ELECTRIC            )  
COMPANY                                    )  
  Defendant                )  
Pursuant to ORS 756.500.                )  
\_\_\_\_\_ )

**OPENING TESTIMONY OF**

**KEEGAN MOYER**

**ON BEHALF OF THE**

**BLUE MARMOT V, VI, VII, VIII, AND IX**

**October 13, 2017**

1 **I. INTRODUCTION**

2 **Q. Mr. Moyer, please state your name and business address.**

3 **A.** My name is Keegan Moyer. My business address is 215 South State Street, Suite  
4 200, Salt Lake City, Utah, 84111.

5 **Q. By whom are you employed and in what capacity?**

6 **A.** I am a Principal in the firm of Energy Strategies, LLC (“Energy Strategies”).  
7 Energy Strategies is an independent energy consulting firm specializing in  
8 economic and policy analysis applicable to energy production, transportation, and  
9 consumption.

10 **Q. Please describe your professional responsibilities, background, and**  
11 **experience.**

12 **A.** As a Principal with Energy Strategies, where I have been employed since 2014, I  
13 assist private and public sector clients in the areas of electric transmission,  
14 generation, and energy-related economic and public policy analyses. In that  
15 capacity, I specialize in transmission system analysis and strategy for power  
16 generation and transmission projects. I have performed numerous technical and  
17 economic assessments of transmission and generation projects and have a strong  
18 understanding of power markets, system planning, and the services that allow  
19 power to interconnect and move across the transmission system.

20 Prior to joining Energy Strategies, I was the Manager of Transmission  
21 Expansion Planning at the Western Electricity Coordinating Council (“WECC”).  
22 In that role, I was responsible for regional transmission assessments and the  
23 development of transmission plans for the Western Interconnection. I was  
24 responsible for providing leadership and direction to the WECC Transmission

1 Expansion Planning Department, facilitating Transmission Expansion Planning  
2 Policy Committee stakeholder activities, and managing the \$14.5 million  
3 Department of Energy Regional Transmission Expansion Planning Grant. I also  
4 advised WECC senior management on the Federal Energy Regulatory  
5 Commission (“FERC”) Order 1000 and other relevant energy and planning  
6 policies.

7 In addition to my transmission policy background, I have extensive  
8 technical experience designing and conducting production cost model and power  
9 flow simulation studies, and providing policy-oriented analyses of complex power  
10 system issues. I regularly deal with FERC-approved Open Access Transmission  
11 Tariffs, qualified facilities (“QFs”), interconnection and transmission analyses,  
12 and support clients in navigating generation interconnection, transmission service,  
13 and transmission planning processes.

14 My academic background is in both engineering and business  
15 management. I have completed a Master of Science in Engineering and  
16 Technology Management and a Bachelor of Science in Engineering with  
17 Mechanical Specialty, both at the Colorado School of Mines.

18 In connection with my testimony in this docket, I am familiar with the  
19 relevant transmission systems, obligations of QFs as it relates to transmission and  
20 interconnection, avoided cost pricing, and the types and nature of transmission  
21 service available under Portland General Electric Company’s (“PGE”) transmission  
22 function’s (“PGE Transmission”) Open Access Transmission Tariff.

1 **Q. Have you testified previously before any other state utility regulatory**  
2 **commissions?**

3 **A.** Yes. I have testified regarding transmission issues before the Colorado Public  
4 Utilities Commission and the Utah Public Service Commission.

5 **Q. On whose behalf are you appearing in this proceeding?**

6 **A.** Blue Marmot V, VI, VII, VIII and IX (“Blue Marmots”).

7 **Q. Please summarize your testimony.**

8 **A.** The Blue Marmot QFs have signed power purchase agreements (“PPAs”) to sell  
9 their output to PGE under the Public Utility Regulatory Policies Act (“PURPA”).  
10 As “off-system” QFs, the Blue Marmots have arranged for transmission service  
11 that will allow them to deliver the QF output to PGE’s system. However, PGE’s  
12 merchant function (“PGE Merchant”) is refusing to counter-sign the Blue Marmot  
13 PPAs on account of transmission constraints on PGE Transmission’s system at  
14 the location where the Blue Marmots have arranged to deliver the power. PGE  
15 Merchant’s refusal to execute the PPAs is not consistent with the requirements of  
16 PURPA and how off-system QFs are handled in Oregon and by FERC. I spend  
17 the majority of my testimony explaining why this is the case, while also  
18 discussing practical transmission options that could be implemented that would  
19 allow PGE Merchant to effectively and efficiently discharge their PURPA  
20 responsibilities to accept and manage the QF net output at the location the Blue  
21 Marmots have identified.

22 In addition, I address the notion that the Blue Marmots should be held  
23 responsible for potential costs to upgrade PGE’s transmission system to further  
24 facilitate their delivery, which would have the effect of altering the Blue



1 Marmots' avoided cost rates available at the time the Blue Marmots established  
2 legally enforceable obligations ("LEOs").

3 Lastly, I review two potential discrimination issues at play that appear to  
4 be working against the Blue Marmot projects. The first relates to how PGE  
5 Merchant is handling the Blue Marmot QFs relative to other QFs with similar  
6 transmission arrangements and contractual obligations, and the other considers  
7 PGE Merchant's inability to act objectively and fairly when there is a parallel  
8 need to reserve transmission for itself and QFs at the same location.

9 **II. PURPA OBLIGATIONS**

10 **Q. Please summarize this portion of your testimony.**

11 **A. The Blue Marmots have satisfied their obligations to sell their net output to PGE  
12 as QFs under PURPA.** While I am not a lawyer, I will explain my understanding  
13 of a QF's obligations under PURPA, and then explain why the Blue Marmots  
14 have met these obligations.

15 The Blue Marmots are only obligated to arrange for delivery to a point of  
16 delivery ("POD") on PGE Transmission's system, after which PGE Merchant is  
17 required to make transmission arrangements to accept and manage the power.  
18 PGE Merchant, however, has refused to purchase the Blue Marmots' net output  
19 and is instead demanding that they pay for transmission upgrades on PGE  
20 Transmission's system or deliver their net output to a POD on PGE  
21 Transmission's system that has sufficient long-term Available Transfer Capability  
22 ("ATC"). PGE Merchant should be barred from raising these obstacles, and  
23 should be required to purchase their net output because the Blue Marmots have

1 satisfied their QF obligations by obtaining firm transmission service to PGE  
2 Transmission's system as required under PGE's Schedule 201.<sup>1</sup>

3 In addition, I will explain what PGE Merchant should have done instead  
4 of refusing to purchase the Blue Marmots' net output, which is to accept the  
5 power and manage it like their other generation resources or market purchases.  
6 PGE Merchant is inappropriately attempting to push its PURPA obligations to  
7 accept and manage the Blue Marmots' net output back on to the Blue Marmots.  
8 The Blue Marmots are not required to manage PGE's system or identify all the  
9 solutions that PGE could consider, but I have identified some options that PGE  
10 could have and may still implement to remedy the situation. These include:

- 11 (1) PGE Merchant converting or otherwise managing existing transmission  
12 rights to enable and appropriately prioritize the delivery of QF output to  
13 their network loads, which could include reducing its own generation or  
14 market purchases to accommodate the QF power within those rights;  
15
- 16 (2) PGE Merchant making alternative transmission arrangements on other  
17 third-party transmission systems to deliver the QF output to a location of  
18 PGE's choosing; or  
19
- 20 (3) PGE Merchant requesting and paying for PGE Transmission to construct  
21 network transmission upgrades.  
22

23 In the end, it is not the Blue Marmots' responsibility to manage PGE's  
24 operations, and there may be more cost-effective ways for PGE Merchant to  
25 accept the QF power and fulfill its PURPA obligations.

---

<sup>1</sup> See e.g., Blue Marmot/202, Talbott/44 (PGE Schedule 201 attached to Blue Marmot V executed Power Purchase Agreement Sheet No. 201-3: "...and making the arrangements necessary for transmission of power to the Company's [PGE] system.").

1 **Q. Is PGE required to purchase the net output of the Blue Marmots' electric**  
2 **generation?**

3 **A.** Yes. Each of the Blue Marmot projects are QFs under PURPA, which obligates  
4 PGE Merchant to purchase each Blue Marmot project's net output. My  
5 understanding is that PGE Merchant does not dispute that it is obligated in  
6 principle to purchase the Blue Marmots' generation. Instead, PGE Merchant is  
7 refusing to purchase the output at the POD on PGE Transmission's system that  
8 the Blue Marmots have identified, and is requiring the Blue Marmots to deliver to  
9 a different POD or pay for transmission upgrades to PGE's system.

10 **Q. What is your understanding of a QF's obligation to deliver power to a utility**  
11 **under PURPA?**

12 **A.** PGE is obligated to purchase a QF's net output regardless of whether a QF is  
13 directly interconnected to the purchasing utility (which in Oregon is called an  
14 "on-system QF") or is interconnected with a different utility and wheeling its net  
15 output over a third party's transmission system (which in Oregon is called an  
16 "off-system QF") to the purchasing utility. My understanding is that the  
17 characterization of the Blue Marmots as "on-system" or "off-system" projects is  
18 irrelevant to the matter at hand because PGE Merchant must purchase a QF's net  
19 output, whether the power is delivered within or wheeled to the PGE system. An  
20 off-system QF has the discretion to choose to sell to a purchasing utility that is  
21 different than the utility to which the project will interconnect, and thus has the  
22 discretion to choose where to locate its project, as long as the QF can deliver its  
23 power to the purchasing utility's system from its interconnection point.  
24 Therefore, a QF's responsibility is limited to delivering its power to the point of  
25 interconnection ("POI") in the case of an on-system QF, or to a POD on the

1 utility's system for an off-system QF, and the purchasing utility's responsibility is  
2 to buy that power, make any necessary arrangements to deliver that power to its  
3 load, or otherwise manage the power.

4 **Q. Can you explain what you mean by a QF only needing to deliver its power to**  
5 **PGE's POI or POD?**

6 **A.** Yes. A QF is not required to obtain transmission service, either for itself or on  
7 behalf of the purchasing utility, to deliver its energy from the POI or POD with  
8 the purchasing utility to the purchasing utility's load. In addition, the purchasing  
9 utility cannot curtail the QF's energy except under very limited circumstances.

10 **Q. Does this also apply to an off-system QF, like the Blue Marmots?**

11 **A.** Yes. Off-system QFs like the Blue Marmots only need to deliver their power to a  
12 POD that connects the purchasing utility to the transmitting utility. The only  
13 restriction on an off-system QF's ability to sell power to a utility other than the  
14 utility to which it is interconnecting is whether the QF can make the necessary  
15 arrangements to deliver its power from the POI to the purchasing utility's system.  
16 The off-system QF does not need to transmit the power to the purchasing utility's  
17 load, but only to the point of change of ownership where the two utilities'  
18 transmission systems interconnect. Furthermore, QFs are not restricted to  
19 delivering power to a *specific* POD. The purchasing utility must accept an off-  
20 system QF's output at any delivery point on its transmission system.

21 **Q. Have the Blue Marmots satisfied the requirement to deliver power to the**  
22 **POD of their choosing, and thus required PGE to buy that power and deliver**  
23 **to its load or otherwise manage the power?**

24 **A.** Yes. As explained by Mr. Talbott, the Blue Marmots will be interconnected with  
25 PacifiCorp and have executed transmission service agreements to purchase firm

1 point-to-point transmission service from PacifiCorp to deliver the net output of  
2 the QF projects to PGE at the “PACW.PGE” POD. This means that the Blue  
3 Marmots have reserved capacity on PacifiCorp’s system to deliver their net output  
4 to PGE at the point of change of ownership between PacifiCorp and PGE. PGE  
5 Merchant agrees that the PACW.PGE POD is located on its system,<sup>2</sup> and the  
6 PACW.PGE POD is the only point on PGE’s transmission system where PGE can  
7 receive delivery of power directly from PacifiCorp’s transmission system.

8 **Contrary to PURPA requirements,** PGE Merchant contends that it is  
9 willing to accept the Blue Marmots’ delivery at a POD of *its* choosing, namely  
10 where PGE Transmission and Bonneville Power Administration’s (“BPA”)   
11 transmission systems interconnect. However, this would require Blue Marmot to  
12 incur significant, unnecessary transmission charges to move power from  
13 PacifiCorp’s system, through BPA’s system to the POD where BPA and PGE  
14 intersect (BPAT.PGE). **The problem with PGE Merchant’s request is that the**  
15 **Blue Marmots are not obligated to obtain transmission service for themselves or**  
16 **on behalf of PGE Merchant on PGE’s transmission system, or in this case on**  
17 **BPA’s transmission system to accommodate PGE Merchant’s transmission**  
18 **requests. Instead, the Blue Marmots have the choice to sell their power to PGE at**  
19 **the specific point of their choosing where ownership of the transmission between**  
20 **PacifiCorp and PGE changes.**

---

<sup>2</sup> Blue Marmot/301, Moyer/26-28 (PGE Response to Blue Marmot Data Request (“DR”) 44-46).

1                   Ultimately, the Blue Marmots have satisfied their QF obligations by  
2                   obtaining the necessary transmission arrangements to deliver their power to the  
3                   PGE system at the PACW.PGE POD (the interface point between PGE's and  
4                   PacifiCorp's transmission systems), because the Blue Marmots are not required to  
5                   deliver QF power to PGE Merchant's preferred POD, and certainly are not  
6                   obligated to incur additional costs to wheel the power on other third-party systems  
7                   to accommodate PGE's preferences.

8   **Q.**    Are you aware of any exceptions to PGE's mandatory purchase obligation?

9   **A.**    Yes, but they do not apply here.<sup>3</sup> There are two general categories of exceptions:  
10           1) exceptions that allow a utility to refuse to enter into a QF PPA; and 2)  
11           exceptions that allow a utility to temporarily refuse to purchase the output from an  
12           operating QF project. Neither category applies to the Blue Marmots.

13                   The first category, which allows utilities to avoid PURPA obligations  
14                   entirely, including executing PPAs, applies only if QFs have nondiscriminatory  
15                   access to competitive markets in which they can meaningfully sell their capacity  
16                   and electric energy output. This exception can only be established through FERC  
17                   filings and approvals. Since Oregon QFs do not have access to competitive  
18                   markets and PacifiCorp and PGE have not made these filings, this exception does  
19                   not apply.

20                   The second category of exceptions are temporary in nature and apply to  
21                   QFs that are *already operating* under a PPA. One allowable exception under this

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<sup>3</sup> 18 CFR 292.304(f);18 CFR 292.307(b).

1 category authorizes a utility to not purchase a QF project's net output during any  
2 limited period when there is a system emergency.

3 Another temporary exception for *operating* QFs allows a utility to curtail a  
4 QF's net output during specific operational circumstances during which accepting  
5 unscheduled QF output would require reductions in the output of base load  
6 generation units due to light load conditions.

7 **Q. Do any of these exceptions allow PGE Merchant to issue a blanket refusal to**  
8 **even enter into a power purchase agreement?**

9 **A.** No. As explained above, the Blue Marmots do not have access to competitive  
10 markets and exceptions for system emergencies and light load conditions only  
11 apply during specific periods of time when the QF is operational. Thus, these  
12 provisions cannot be used as justification for PGE Merchant's refusal to execute  
13 contracts with the Blue Marmots.

14 **Q. Please explain what is meant by system emergency conditions.**

15 **A.** A system emergency is when there is an imminent risk of significant disruption of  
16 service to customers or danger to life or property. A system emergency occurs  
17 when the transmission system is operating within its planned limits with sufficient  
18 transfer capability, but there is an unplanned or unusual event that requires the  
19 transmission provider to curtail electricity to prevent the system emergency.

1 **Q. Does PGE claim that there would be system emergencies if it accepted the**  
2 **Blue Marmots' net output?**

3 **A.** Yes. PGE Merchant claims that accepting the delivery of Blue Marmot's output  
4 could harm system reliability by resulting in usage of the path above its total  
5 transfer capability which could be detrimental to system reliability.<sup>4</sup>

6 **Q. Do you agree with PGE?**

7 **A.** No. PGE Merchant is describing a situation in which PGE accepts the Blue  
8 Marmots' net output without otherwise operating its system as a reasonable or  
9 prudent utility. As explained below, PGE Merchant has options for accepting the  
10 Blue Marmots' net output without causing system emergencies by either  
11 increasing the total transfer capability of the relevant path or staying within the  
12 existing transfer capability on its system by managing existing transmission  
13 capacity differently.

14 **Q. Please explain what is meant by light load conditions.**

15 **A.** Light load conditions are a narrow circumstance in which a utility operating only  
16 base load units would be forced to cut back output from the generation units to  
17 accommodate unscheduled QF energy purchases. These base load units might not  
18 be able to increase the output rapidly enough if the QF resource output suddenly  
19 drops off, which may result in the utility relying upon higher cost units to  
20 maintain system reliability. FERC has confirmed that this exception only applies  
21 during this unique light loading scenario and does not apply to curtail energy for  
22 only general economic reasons.

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<sup>4</sup> Blue Marmot/301, Moyer/36 (PGE Response to Blue Marmot DR 103).



1 **Q. Does PGE claim that there would be curtailments because of light load**  
2 **conditions if it accepted the Blue Marmots' net output?**

3 **A.** No. PGE concedes that it does not anticipate this type of circumstance based on  
4 current conditions.<sup>5</sup>

5 **Q. Even if these circumstances applied, are they relevant to the Blue Marmots?**

6 **A.** No. A utility that has entered into a power purchase agreement or a LEO may not  
7 curtail the QF's power during light load conditions. This exception only applies  
8 when a QF does not have a long-term obligation and is instead delivering  
9 unscheduled or non-firm energy. As explained by Mr. Talbott, the Blue Marmots  
10 have LEOs with PGE.

11 **Q. Is there an exception for a utility that has entered into contractual**  
12 **commitments that limit its ability to accept the QF power?**

13 **A.** No. If utilities could simply enter into contracts and eliminate their PURPA  
14 obligations, then utilities could easily circumvent their responsibility to purchase  
15 and manage QF power. A utility cannot enter into a contract with terms and  
16 conditions that limit a QF from selling or delivering its power to the purchasing  
17 utility or limit the ability of the purchasing utility to purchase the net output of the  
18 QF. My understanding is that a utility's PURPA obligations supersede any  
19 contractual obligations that a utility might claim would prohibit its ability to  
20 purchase a QF's net output. PGE Merchant's existing agreements regarding  
21 power sales, participation in the Western Energy Imbalance Market ("EIM"), or  
22 other contractual commitments cannot supersede their PURPA obligations.

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<sup>5</sup> Blue Marmot/301, Moyer/37 (PGE Response to Blue Marmot DR 104).

1 Q. **Is there an exception that allows a utility to refuse to purchase a QF's power**  
2 **because of transmission congestion or constraints?**

3 A. No. A QF cannot be given the choice between funding transmission upgrades or  
4 being unable to deliver its net output when there is transmission congestion or  
5 limited ATC. Even when there is no ATC on the purchasing utility's system to  
6 deliver the net output to load, the purchasing utility must accept and manage the  
7 power at the POD (or, in the case of an on-system QF, where the QF chooses to  
8 interconnect on the purchasing utility's system). The purchasing utility's options  
9 do not include refusing to sign a contract, abdicating its responsibility for  
10 managing the power, and requiring the QF to pay for firm transmission service or  
11 transmission upgrades on the utility's own system.

12 Q. **Does this mean that the Blue Marmots do not pay for any transmission costs?**

13 A. No. The Blue Marmots will pay for point-to-point transmission service from  
14 PacifiCorp to wheel their power to PGE, and are paying for the costs to  
15 interconnect to PacifiCorp's system at the POI. Thus, the Blue Marmots are  
16 already paying significant transmission and interconnection costs to deliver their  
17 power to PGE.

18 Q. **Why is PGE Merchant refusing to execute a contract with the Blue**  
19 **Marmots?**

20 A. PGE Merchant claims that the Blue Marmots have not made necessary  
21 transmission arrangements to deliver their net output to PGE's system.  
22 Specifically, PGE Merchant is refusing to agree to accept any power deliveries at  
23 the PACW.PGE POD. PGE Merchant appears to agree that the Blue Marmots

1 have made arrangements to deliver the power to PGE's system,<sup>6</sup> but PGE says  
2 that it will not accept delivery at that the PACW.PGE POD because there is  
3 insufficient ATC to deliver the QF power from the POD to PGE Merchant's load.

4 **Q. What is PGE Merchant's justification for refusing to execute a PPA?**

5 PGE Merchant has proposed that the Blue Marmots must either: 1) make  
6 arrangements to deliver their power to PGE's system through another POD that is  
7 not constrained; or 2) pay for required studies and upgrades to PGE's system at  
8 the PACW.PGE POD.<sup>7</sup> Instead of taking responsibility for the power that is  
9 delivered to its system, PGE Merchant has taken the position that the Blue  
10 Marmots must deliver to a different POD or pay for transmission upgrades to  
11 increase transmission capability on PGE's system between the PACW.PGE POD  
12 and PGE's network load.

13 **Q. Please explain what PGE Merchant means by making arrangements to**  
14 **deliver to another POD.**

15 **A.** As one of two alternatives offered by PGE Merchant to overcome the  
16 transmission congestion PGE Merchant claims to exist on PGE's transmission  
17 system, PGE Merchant would require the Blue Marmots to purchase transmission  
18 on BPA's system to deliver at the PGE.BPA POD. This would require a "double  
19 wheel" as the Blue Marmots would need to purchase point-to-point transmission  
20 from both PacifiCorp and BPA. As explained in Mr. Talbott's testimony, this  
21 would result in approximately \$14 million in additional costs for the Blue  
22 Marmots over the term of the PPAs.

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<sup>6</sup> Blue Marmot/301, Moyer/26 (PGE Response to Blue Marmot DR 44).

<sup>7</sup> E.g., UM 1829 PGE Answer to Blue Marmot V Complaint at ¶¶ 70-71.

1 **Q. Please explain what PGE Merchant means by paying for transmission**  
2 **studies and upgrades at the PACW.PGE POD.**

3 **A.** There is limited ATC at the PACW.PGE POD, primarily because PGE Merchant  
4 has reserved the transmission for itself, including for its participation in the EIM,  
5 serving its own load, and other uses.

6 **Q. How would the Blue Marmots pay for transmission studies and upgrades?**

7 **A.** PGE Merchant has not made it clear how this would work. QFs, by nature, are  
8 not transmission customers on the purchasing utility's system, so the specifics are  
9 unknown. It appears that PGE Merchant is requiring that the Blue Marmots  
10 become PGE transmission customers and make a transmission service request to  
11 deliver from one location on PGE's transmission system (i.e., the PACW.PGE  
12 POD) to another location on PGE's transmission system (i.e., PGE load). PGE  
13 Transmission would then study whether any transmission upgrades are necessary  
14 and how much they would cost. PGE Merchant would then require the Blue  
15 Marmots to pay for any needed transmission upgrades and for transmission  
16 service on PGE's system. While PGE Merchant does not appear willing to do so,  
17 it is possible that PGE may reimburse the Blue Marmots for these paid upgrades  
18 and reduce the transmission rates they pay to PGE Transmission (if any). Even if  
19 PGE Transmission reimburses or credits the Blue Marmots for payment of these  
20 transmission upgrades, the Blue Marmots would not be held harmless because  
21 they would then have to pay PGE Transmission for use of PGE's transmission  
22 system as long as they are selling power to PGE. This process is consistent with a  
23 non-QF generator seeking point-to-point transmission service, however this is not  
24 at all appropriate for QFs. Given that QFs are not required to purchase

1 transmission on the purchasing utility's system and the unprecedented nature of  
2 PGE Merchant's actions, PGE Merchant may not even understand what it intends  
3 to require the Blue Marmots to do.

4 **Q. Do you agree with PGE Merchant's proposal that the Blue Marmots must**  
5 **make arrangements to deliver to a different POD or that the Blue Marmots**  
6 **must pay for transmission studies and upgrades at the PACW.PGE POD to**  
7 **allow PGE Merchant to accept the power?**

8 **A. No.** As explained above, the Blue Marmots are only required to deliver their net  
9 output to a POD of their choosing on the purchasing utility's transmission system,  
10 which is the PACW.PGE POD. A QF cannot be given the choice of funding  
11 transmission delivery upgrades, facing curtailment, or delivering at a POD of the  
12 purchasing utility's choice. PGE Merchant is attempting to avoid its PURPA  
13 obligation to purchase the Blue Marmots net output because it has failed or  
14 refused to properly manage the QF power.

15 **Q. Instead of requiring the Blue Marmots to deliver to another POD or pay for**  
16 **network upgrades, what are PGE's options?**

17 **A.** After assuming its responsibility for the power, PGE Merchant must then decide  
18 what it wants to use the net output for. PGE Merchant can make this decision  
19 independently. After doing so, PGE Merchant can make the necessary  
20 transmission arrangements to ensure that the Blue Marmots' net output is  
21 transferred from the PACW.PGE POD to the location in which PGE elects to use  
22 the power. Some of the specific options that PGE Merchant can take when  
23 managing the power could include PGE Merchant: 1) completing transmission  
24 upgrades that increase ATC and allow for PGE to accept the QF output at  
25 PACW.PGE POD by obtaining *new* transmission rights; 2) obtaining transmission  
26 service from a third-party transmission provider to wheel the power from the

1 PACW.PGE POD to another location of PGE's choosing; or 3) utilizing its own  
2 currently held *existing* transmission rights to accept and deliver the power,  
3 including reducing its own generation or market purchases to accommodate the  
4 QF power within those rights. There may be other options as well.

5 It is important to keep in mind that the Blue Marmots do not have the  
6 expertise and are not responsible for managing PGE Merchant's network  
7 resources or identifying all of PGE's options. PGE is a sophisticated, vertically  
8 integrated utility that serves its load with a variety of generation resources and  
9 market purchases transferred using both network and point-to-point transmission  
10 rights. If PGE makes an effort, I am confident that PGE can figure out a least cost  
11 and least risk approach to ensuring that the Blue Marmots' net output that is  
12 delivered to the PACW.PGE POD can be accepted and used to serve load.

13 **Q. Please explain what you mean by PGE Merchant can request and pay for**  
14 **transmission upgrades.**

15 **A.** Rather than the Blue Marmots making a transmission service request, PGE  
16 Merchant can make a transmission service request with PGE Transmission, pay  
17 for any studies associated with the request, and then pay for transmission  
18 upgrades to increase ATC at the PACW.PGE POD. These transmission upgrades  
19 could provide significant benefits to all of PGE Transmission's customers.

20 **Q. Are you certain that there would be additional costs or required upgrades?**

21 **A.** No. PGE Merchant has not analyzed what the specific impacts would be if PGE  
22 decided to accept the Blue Marmots net output at the identified POD.<sup>8</sup> The Blue

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<sup>8</sup> Blue Marmot/301, Moyer/21, 30, 38-41 (PGE Response to Blue Marmot DR 18, 53, 105-108).

1 Marmots sought to understand in the discovery process what actions PGE  
2 Merchant has taken to verify if there is any transmission available to PGE, and if  
3 PGE Merchant has done anything other than look at PGE Transmission's Open  
4 Access Same Time Information System.<sup>9</sup> PGE Merchant has not requested  
5 transmission service from PGE Transmission to wheel the Blue Marmots' net  
6 output from the PACW.PGE POD to load or another location. It is not known  
7 what, if any, the costs and nature of the additional upgrades might be. We also do  
8 not know if there are any strategies (e.g., re-dispatch) that could be put into place  
9 to mitigate the need for the upgrades in the first place.

10 **Q. How would the costs of these network upgrades be recovered?**

11 **A.** FERC's transmission policy requires transmission costs to generally be assessed  
12 in a rolled-in rate, and not as an incremental basis for upgrades. Thus, PGE  
13 Transmission function would construct the upgrades and then the costs would be  
14 charged to all of PGE Transmission's customers, including PGE Merchant. This  
15 process is clear and well accepted, unlike PGE Merchant's effective requirement  
16 that a QF become a transmission customer of the purchasing utility and pay the  
17 purchasing utility for both transmission upgrades and transmission rates. Blue  
18 Marmot's preference is for PGE Merchant to work out a solution that avoids the  
19 need for transmission upgrades altogether.

20 **Q. Does PGE Merchant have other options?**

21 **A.** Yes. PGE could seek to convert its existing point-to-point transmission rights  
22 between PACW and PGE to network integration transmission service rights by

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<sup>9</sup> Blue Marmot/301, Moyer/30 (PGE Response to Blue Marmot DR 53).

1 seeking to designate the Blue Marmots as network resources delivered at the  
2 PACW.PGE POD. While I understand that PGE Merchant has committed to use  
3 the point-to-point rights to facilitate imports (and exports) when participating in  
4 the EIM, PGE Merchant cannot enter into contractual restrictions that have the  
5 practicable effect of overriding its obligation to purchase from QFs. For example,  
6 PGE could, during hours in which the Blue Marmots are generating, temporarily  
7 reduce its imports of power at the PACW.PGE POD. Doing so would impact  
8 PGE Merchant's operations only in situations where scheduled imports are  
9 *greater* than the transfer capability remaining after the Blue Marmots' net output  
10 is scheduled. Alternatively, PGE could temporarily adjust the amounts of  
11 transmission included in the EIM (again, only as required when the Blue Marmots  
12 are generating, and only in partial reductions relative to PGE's total transmission  
13 rights on the path). Both options would allow PGE to accept the Blue Marmots'  
14 net output while still allowing PGE Merchant to benefit from accessing these  
15 markets.

16 **Q. Has PGE Merchant taken any actions to understand how it could manage its**  
17 **generation and transmission resources, including backing down its own**  
18 **generation or re-allocating its transmission to accept the Blue Marmots net**  
19 **output?**

20 **A.** Not that the Blue Marmots are aware of. Submitting a transmission service  
21 request to PGE Transmission would be the first step and PGE does not appear to  
22 have done this.



1 **Q. Are you aware of other utilities which have attempted to better manage their**  
2 **transmission assets to incorporate more QF power?**

3 **A.** Yes. FERC has allowed PacifiCorp to attempt to better manage its transmission  
4 assets to accept QF power in transmission constrained areas by amending  
5 PacifiCorp's Network Operating Agreement.<sup>10</sup>

6 **Q. What was the problem PacifiCorp was trying to solve?**

7 **A.** PacifiCorp recognized that PURPA requires utilities to purchase QF power under  
8 all circumstances, even when the QF has chosen to site in a constrained area.  
9 PacifiCorp took the position that FERC does not allow the designation of a new  
10 network resource until sufficient ATC is available, and PacifiCorp argued that  
11 requirement put the utility in the position of having to construct network upgrades  
12 to accommodate a QF using firm transmission service since the utility would not  
13 have otherwise constructed those upgrades. Ultimately, FERC allowed  
14 PacifiCorp to "live within its means" by managing new QFs and existing network  
15 resources within its existing transmission rights, provided that the output of the  
16 new QF was prioritized ahead of other non-QF generation and rights of other  
17 transmission customers were not impacted.

18 **Q. Is this situation similar to what PGE is facing?**

19 **A.** Yes, it is very similar. The main difference is that PacifiCorp was facing a  
20 situation related to QF facilities on its system that were located in remote,  
21 constrained areas and PGE's constraint is at a commonly used interface integrated  
22 into its system. Both areas can be considered transmission constrained in terms of  
23 a lack of long-term firm ATC.

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<sup>10</sup> PacifiCorp, 151 FERC ¶ 61,170 (2015).

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

12   **Q.   How did PacifiCorp propose to solve the issue of delivering a QF's net output**  
13   **from a constrained area on its own system to its load?**

14   **A.**   PacifiCorp proposed that its transmission function be able to grant additional  
15           designated network resource status for its merchant function to enable firm  
16           delivery from QFs even *when* there is no long-term firm ATC. Commensurately,  
17           the PacifiCorp merchant function agreed to operate its portfolio of designated  
18           network resources in the affected area within system reliability limits and curtail  
19           QF power last, even if that is out of economic merit order. PacifiCorp would  
20           curtail its own non-QF generation before curtailing QF power.

21   **Q.   Are you recommending that PGE Merchant adopt PacifiCorp's approach?**

22           No. The point is not that PGE Merchant must take exactly the same approach as  
23           PacifiCorp. Instead, I am referring to PacifiCorp's actions as an illustrative  
24           example that there are practical approaches that a utility like PGE can take to

1 efficiently and effectively discharge its PURPA obligations. PGE Merchant has  
2 taken the approach of simply refusing to purchase the Blue Marmots' net output  
3 rather than looking for creative solutions, which could include allowing PGE  
4 Transmission to grant designated network resource status to enable firm delivery  
5 from QFs, even when there is no long-term firm ATC.

6 While I do not agree with certain other aspects of PacifiCorp's  
7 characterizations of its PURPA obligations, creative approaches like this would  
8 be reasonable steps for PGE to take. The Commission should recognize that  
9 FERC has allowed utilities some latitude to manage their QF power, and it is  
10 reasonable to leave it up to PGE Merchant to properly manage its network  
11 resources, including QF generation, because PGE Merchant is responsible for the  
12 Blue Marmots' net output.

13 **Q. Could PGE manage its EIM participation in a manner that accommodates**  
14 **delivery of the Blue Marmots' output to PGE load?**

15 **A.** Yes. PGE could choose to manage its participation in the EIM in such a way that  
16 would allow it to accept the output from the Blue Marmots at the PACW.PGE  
17 POD and deliver that output to PGE load.

18 **Q. Please explain the options for PGE transfer of EIM energy with other EIM**  
19 **participants and how PGE could manage EIM participation while accepting**  
20 **delivery from Blue Marmot.**

21 **A.** Under PGE's tariff, PGE has established, and FERC has accepted, two methods  
22 for enabling transfers between itself and other EIM Entities (such as PacifiCorp).  
23 One method to enable EIM Transfers<sup>11</sup> is referred to as the "Interchange Rights

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<sup>11</sup> Under PGE's Tariff, EIM Transfers are defined as: "The transfer of real-time energy resulting from an EIM Dispatch Instruction: (1) between the PGE BAA and the CAISO BAA; (2) between the PGE BAA and an EIM Entity BAA; or (3)

1           Holder” methodology. A PGE Interchange Rights Holder is “a Transmission  
2           Customer who has informed the PGE EIM Entity that it is electing to make  
3           reserved firm transmission capacity available for EIM Transfers without  
4           compensation.”<sup>12</sup> This methodology allows a PGE Interchange Rights Holder to  
5           “donate” its reserved transmission capacity to the EIM. For instance, to facilitate  
6           EIM Transfers between PacifiCorp and the CAISO, PacifiCorp Merchant donates  
7           some of its transmission rights on the California-Oregon Intertie. PGE indicated  
8           it plans to use the Interchange Rights Holder methodology for EIM Transfers on  
9           two paths that will enable energy exchanges between PGE and the CAISO.<sup>13</sup>

10                   Notably, PGE did not indicate that it planned to use the PGE Interchange  
11           Rights Holder method for EIM Transfer to and from PacifiCorp. Instead, for the  
12           transfer of EIM energy to and from PacifiCorp West, PGE’s FERC filing stated  
13           that PGE will utilize the ATC method for EIM Transfers at the direct interface  
14           between the PGE Balancing Authority Area (“BAA”) and the PacifiCorp West  
15           BAA.<sup>14</sup> The ATC method allows for EIM Transfers based on the ATC that PGE  
16           calculates to exist prior to the operating hour. The ATC calculation for EIM  
17           Transfers takes place at approximately 40 minutes prior to the operating hour and  
18           takes into account all scheduled uses of the relevant path that have been

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between the CAISO BAA and an EIM Entity BAA using transmission capacity available in the EIM.”

<sup>12</sup> Portland General Electric, *Pro Forma Open Access Transmission Tariff*; updated May 1, 2017 at 1.78.

<sup>13</sup> Portland General Electric Company, “*Amendments to the Portland General Electric Company Open Access Transmission Tariff to Facilitate Energy into the Energy Imbalance Market*,” FERC Docket No. ER17-1075-000, filed March 1, 2017, at II.E.

<sup>14</sup> Id.

1 submitted. Note that 40 minutes prior to the operating hour will occur after the  
2 Blue Marmots have scheduled their output, giving PGE the information it would  
3 need to release any unused transmission rights into the EIM.

4 The remaining ATC on the path is then communicated to the EIM operator  
5 (the CAISO) and the EIM is optimized based on the transmission capacity that the  
6 EIM Entity (in this case PGE) has indicated to be available. Under this method,  
7 there is no requirement for transmission service to be donated by a PGE  
8 Interchange Rights Holder and PGE Merchant has no obligation to hold long-term  
9 firm transmission capacity on the path to enable its EIM participation. Therefore,  
10 one option available to PGE is to schedule the anticipated output from the Blue  
11 Marmot on the PACW.PGE to PGE path along with other uses of the path, and  
12 then utilize the remaining transmission capacity on the path to enable EIM  
13 Transfers, consistent with the ATC method for EIM Transfers.

14 **Q. Would this approach be consistent with the approaches of other EIM**  
15 **Entities?**

16 **A.** Yes. Most other EIM Entities participate in the EIM primarily using the ATC  
17 method. To the best of my knowledge, these EIM Entities continue to enable  
18 other uses of their transmission system prior to the EIM time horizon and no other  
19 EIM Entity's merchant function has procured new transmission capacity that is  
20 purely dedicated to enabling EIM Transfers.

21 **Q. Is there any reason PGE couldn't manage its EIM participation in the**  
22 **manner described above, which would allow delivery of the Blue Marmots'**  
23 **output to PGE load?**

24 **A.** Not that I am aware of. In fact, the method of accepting Blue Marmot's output  
25 and conducting EIM Transfers is consistent with the manner in which PGE told

1 FERC it would be effectuating EIM Transfers between its own BAA and the  
2 PACW BAA. When PGE sought, and subsequently received, Market Based Rate  
3 Authority in the EIM, PGE represented to FERC that its merchant function would  
4 provide at least 200 megawatts (“MW”) of transmission to the EIM in all  
5 intervals.<sup>15</sup> Therefore, should PGE choose this option for accepting the Blue  
6 Marmots’ net output, PGE would likely need to make a Market Based Rate  
7 Authority change in status filing at FERC. The change in status filing, and any  
8 resulting decisions, should not prevent PGE from managing its EIM participation  
9 in a manner that allows for delivery of the Blue Marmots output.

10 **Q. Are you recommending that PGE manage its EIM participation to allow**  
11 **delivery of the Blue Marmots’ output to PGE load?**

12 **A.** No. I am not familiar enough with all of the details of PGE’s EIM participation  
13 and system operations to know whether this is the appropriate action for PGE to  
14 take to accept the Blue Marmots’ net output. I am simply pointing out that PGE  
15 has a variety of options available to accept the Blue Marmots’ net output and that,  
16 should PGE choose this option, it would be consistent with PGE’s tariff, its  
17 representations to FERC in filing for approval of its EIM tariff modifications, and  
18 with the approaches of other EIM Entities.

19 **III. AVOIDED COST RATES**

20 **Q. Please summarize this portion of your testimony.**

21 **A.** The avoided cost rate at the time a QF enters into a contract or LEO cannot  
22 change or be altered by the utility. Since the Blue Marmots have legally

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<sup>15</sup> Blue Marmot/301, Moyer/1-20 (PGE Response to Blue Marmot DR 2, Appendix A).

1 enforceable obligations at the rates that were in effect in April 2017, PGE cannot  
2 now change the Blue Marmots avoided cost rate. This change to the Blue  
3 Marmots' avoided cost rates cannot be in the form of an actual change to the  
4 contract price, nor can it be an effectual change resulting from incremental  
5 transmission costs.

6 **Q. What is your understanding of how PGE's avoided cost rates are set?**

7 **A.** While I am generally familiar with and have reviewed PGE's avoided cost rate  
8 workpapers, I am not an expert on all the details regarding the calculation of  
9 Oregon avoided cost rates. There are a variety of different ways in which avoided  
10 cost rates are calculated around the country,<sup>16</sup> and Oregon uses a form of the  
11 "proxy" methodology for QFs under the size threshold for standard rates.<sup>17</sup> At the  
12 time the Blue Marmots obtained their LEOs, the standard rate eligibility cap was  
13 10 MW for solar generation selling power to PGE. These standard rates are  
14 intended to reflect the utility's full avoided costs, but are administratively  
15 determined by the OPUC. The standard rates are adjusted to be based on the  
16 generic resource characteristics of each QF technology type, which means that a  
17 solar QF's rates reflect the different peak capacity credit versus a baseload QF  
18 with a different generation profile. Thus, there are generic resource type

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<sup>16</sup> Carolyn Elefant, REVIVING PURPA'S PURPOSE: The Limits of Existing State Avoided Cost Ratemaking Methodologies In Supporting Alternative Energy Development and A Proposed Path for Reform, First Impression – Last resort (Oct. 2011), <http://lawofficesofcarolynelefant.com/reports-publications/>. (explaining basic methodologies for calculating avoided cost rates).

<sup>17</sup> Re OPUC Investigation Into Qualifying Facility Contracting and Pricing, Docket No. UM 1610, Order No. 14-058 at 8-14 (Feb. 24, 2014).

1 adjustments, but there are no project specific adjustments to the avoided cost rate  
2 calculation.

3 **Q. Can PGE adjust an off-system QF's avoided cost rates to reflect the costs of**  
4 **transmission on its system?**

5 **A. While I am not an attorney, my understanding is that PGE cannot. As mentioned**  
6 **above, FERC regulations provide that off-system QFs like the Blue Marmots can**  
7 **wheel their power to a purchasing utility like PGE, and the purchasing utility must**  
8 **purchase the net output as if the QF were supplying the net output directly.**  
9 **FERC's regulations also state that the rate "shall not include any charges for**  
10 **transmission."<sup>18</sup> This is consistent with the discussion above that the purchasing**  
11 **utility is responsible for accepting and managing the power that is delivered to its**  
12 **system. Therefore, the rate paid to the off-system QF cannot directly or indirectly**  
13 **include any transmission charges.**

14 **Q. Is PGE seeking to impose a transmission charge on the Blue Marmots and**  
15 **thereby lower the Blue Marmots' effective avoided cost rates?**

16 **A. Yes. PGE is not explicitly seeking to change the specific rate that is paid to the**  
17 **Blue Marmots; however, PGE is requiring that before it will accept the Blue**  
18 **Marmots' net output, they must purchase transmission from PGE or another third-**  
19 **party, or fund transmission upgrades. This is a de facto transmission charge**  
20 **which ultimately lowers the avoided cost rate paid to the Blue Marmots.**

21 **Q. Is PGE allowed to change the avoided cost rate after the QF has entered into**  
22 **a contract or obtained a legally enforceable obligation?**

23 **A. No, my understanding based on communications with counsel is that under**  
24 **existing OPUC and FERC policy, any adjustments to avoided cost rates must be**

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<sup>18</sup> 18 CFR 292.303(d).



1 made prospectively and prior to establishing a LEO. Thus, even if PGE could in  
2 theory impose a transmission charge or otherwise reduce the avoided cost rate  
3 paid to the Blue Marmots, this would need to be done prior to when the LEO  
4 occurred, which was the date that the Blue Marmots executed the PPAs and  
5 returned them unaltered to PGE. I have been informed by counsel that PGE or the  
6 OPUC cannot unilaterally adjust rates in a fixed price contract, or otherwise  
7 adjust the compensation paid to the QF under the contract because PURPA  
8 prohibits utilities and regulators from exercising any kind of post-contractual  
9 price modification. In the context of this case, because the Blue Marmots have  
10 executed contracts with PGE that establishes a LEO under a specific avoided cost  
11 rate, no other costs associated with transmission upgrades on PGE's system can  
12 be allocated to the Blue Marmots.

13 **IV. DISCRIMINATION**

14 **Q. Please summarize this portion of your testimony.**

15 **A.** PGE is discriminating against the Blue Marmots because it has refused to execute  
16 the Blue Marmots' PPAs while executing contracts with other QFs that are  
17 planning to deliver their net output at the PACW.PGE POD. PGE has also  
18 discriminated in favor of itself over the Blue Marmots by claiming that there is no  
19 ATC to accept their power, but then obtaining ATC that becomes available at the  
20 PACW.PGE POD for other non-QF purposes. This is troubling because PGE  
21 appears to be procuring transmission solely for its own purposes when it should  
22 be seeking to arrange for transmission service to be used to deliver power from  
23 QFs that have LEOs.

1 **Q. Is PGE allowed to discriminate against similarly situated QFs?**

2 **A.** No. Again, while I am not a lawyer, my understanding is that PGE cannot unduly  
3 discriminate between different QFs.

4 **Q. Is PGE discriminating against the Blue Marmots?**

5 **A.** Yes, PGE is discriminating or treating the Blue Marmots differently from other  
6 similarly situated QFs. PGE has entered into at least three off-system QF  
7 contracts that will deliver to the PACW.PGE POD.<sup>19</sup> These include the Airport  
8 Solar PPA, which is also planned to interconnect to PacifiCorp and deliver its net  
9 output to PGE via PacifiCorp's system. The Airport Solar PPA was executed a  
10 couple weeks before PGE informed the Blue Marmots that it would not execute  
11 PPAs but after PGE had provided executable PPAs and after Blue Marmot had  
12 executed these PPAs.<sup>20</sup>

13 **Q. What should PGE have done?**

14 **A.** PGE should have executed the Blue Marmots' contracts, just as it had already  
15 done for the other off-system QFs delivering at the PACW.PGE POD. If PGE has  
16 any concerns regarding the specific transmission arrangements, then it should not  
17 use those as an excuse not to execute these contracts and should have handled all  
18 of the tendered PPAs similarly. I have been informed by counsel that, once PGE  
19 issues executable PPAs, it is required to honor those PPAs, and is barred from  
20 raising any new concerns. Thus, PGE should have counter-signed the PPAs

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<sup>19</sup> Blue Marmot/301, Moyer/25 (PGE Response to Blue Marmot DR 28).  
<sup>20</sup> Re PGE Information Filing of Qualifying Facility Contracts or Summaries per OAR 860-029-0020(1), Docket No. RE 143, PGE's Summary of Qualified Facility Agreements (June 21, 2017) (PGE summary of Airport Solar PPA with an execution date of April 3, 2017) Available at: <http://edocs.puc.state.or.us/efdocs/HAQ/re143haq165856.pdf>

1 signed by Blue Marmot and started making arrangements to manage the QF  
2 power.

3 **Q. Are you taking the position that PGE should now refuse to accept the net**  
4 **output of the other off-system QFs that it has already agreed to accept**  
5 **deliveries from at the PACW.PGE POD?**

6 **A.** No. PGE should not remedy its discriminatory treatment against the Blue  
7 Marmots by refusing to accept the net output of any off-system QFs that have  
8 entered into contracts or otherwise have established legally enforceable  
9 obligations.<sup>21</sup> Instead, PGE should accept responsibility for managing at least the  
10 power of all the QFs that have entered into contracts or obtained legally  
11 enforceable obligations.

12 **Q. Is PGE treating the Blue Marmots as QFs that have contracts or legally**  
13 **enforceable obligations?**

14 **A.** No. PGE has vaguely stated that “All QFs that have requested PPAs from PGE  
15 and that have requested to deliver at PACW.PGE will be given the same options  
16 as Blue Marmot.”<sup>22</sup> This statement only applies to QF requests, and not to QFs  
17 that have already entered into contracts. Thus, PGE appears to be treating Blue  
18 Marmot as a QF that has merely requested a PPA from PGE, rather than as a QF  
19 that has executed a contract or established a legally enforceable obligation.

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<sup>21</sup> As noted above, PGE is obligated to purchase the net output of all off-system QFs and manage their power regardless of whether they have entered into a contract or not. There are additional reasons why PGE cannot refuse to purchase the net output of QFs like the Blue Marmots which have legally enforceable obligations or contracts.

<sup>22</sup> Blue Marmot/301, Moyer/23 (PGE Response to Blue Marmot DR 23).

1 **Q. Do we know what PGE is planning to do regarding QFs that have entered**  
2 **into fully executed contracts with PGE?**

3 **A.** No. The Blue Marmots sought to obtain this information in the discovery  
4 process, and PGE has not determined how to proceed.<sup>23</sup> For example, the Blue  
5 Marmots sought to obtain PGE’s position on what it would do with any additional  
6 ATC that is made available at the PACW.PGE POD, whether PGE would use that  
7 ATC for other off-system QFs, and whether there would be any priority between  
8 off-system QFs that are requesting to deliver at the PACW.PGE POD.<sup>24</sup> PGE  
9 claims that it “is in the process of developing a policy to address” these  
10 circumstances, that it has not yet made a determination about whether it can even  
11 accept deliveries, or how deliveries will be handled.<sup>25</sup>

12 **Q. What does PGE mean by stating that it “is reviewing off-system QFs that**  
13 **have entered PPAs and has not made a determination about whether it can**  
14 **accept deliveries from each of them at this time” or that “PGE is evaluating**  
15 **how deliveries anticipated to be made from [the projects that have executed**  
16 **contracts] to the PACW.PGE POD will be handled”?**

17 **A.** We do not know. PGE’s statement is inconsistent with its other positions in this  
18 case. On one hand, PGE claims that it cannot accept any power deliveries at the  
19 PACW.PGE POD because of insufficient ATC. However, on the other hand,  
20 PGE has not made a determination about how it will handle deliveries or whether  
21 it can even accept deliveries at the same location that has insufficient ATC from  
22 those QFs that have already entered into contracts.

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<sup>23</sup> Blue Marmot/301, Moyer/22-24 (PGE Response to Blue Marmot DR 22-24).

<sup>24</sup> Blue Marmot/301, Moyer/24 (PGE Response to Blue Marmot DR 24).

<sup>25</sup> Blue Marmot/301, Moyer/23-24, 25, 34-35 (PGE Response to Blue Marmot DR 23-24, 28, 91, 92).

1                   There are over 67 MW of off-system QFs that have already entered into  
2                   contracts with PGE to deliver at the PACW.PGE POD, and PGE appears to be  
3                   holding open the door to accept some or all of their net output at this POD.<sup>26</sup> PGE  
4                   also appears to be taking the position that the time a QF enters into a contract  
5                   somehow impacts whether PGE has to accept delivery at the PACW.PGE POD.

6   **Q.   Separate from its obligations to individual QFs, is PGE discriminating**  
7   **against the Blue Marmots in favor of other transmission uses?**

8   **A.**   It appears so. Additional ATC became available after PGE informed the Blue  
9                   Marmots that PGE would not purchase their net output due to limited ATC.<sup>27</sup>  
10                  PGE could have reserved or obtained this to accept at least a portion of the Blue  
11                  Marmots' net output or otherwise meet its PURPA obligations, but PGE elected  
12                  to reserve this for itself as point-to-point transmission. PGE also could have  
13                  informed the Blue Marmots that this ATC had become available. Instead PGE  
14                  appeared to act as if it had no knowledge of its obligations to accept the Blue  
15                  Marmots' output on that same transmission path.

16   **V.   CONCLUSION**

17   **Q.   Does this conclude your testimony?**

18   **A.**   Yes.

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<sup>26</sup>   The Airport Solar QF (47.25 MW), OM Power (10 MW), and Obsidian  
Renewables (10 MW).

<sup>27</sup>   Blue Marmot/301, Moyer/29-32 (PGE Response to Blue Marmot DR 52-55).