

**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))	MOTION TO COMPEL DISCOVERY
Blue Marmot VII LLC (UM 1831))	
Blue Marmot VIII LLC (UM 1832))	EXPEDITED CONSIDERATION
Blue Marmot IX LLC (UM 1833),)	REQUESTED
Complainants,)	
)	
v.)	
)	
Portland General Electric Company,)	
Defendant.)	

I. INTRODUCTION

Blue Marmot V, LLC, Blue Marmot VI, LLC, Blue Marmot VII, LLC, Blue Marmot VIII, LLC, and Blue Marmot IX, LLC (collectively “Blue Marmot”) file this motion to compel discovery, requesting that the Oregon Public Utility Commission (the “Commission” or “OPUC”) Administrative Law Judge (“ALJ”) Allan Arlow require Portland General Electric Company (“PGE” or the “Company”) to provide full and complete answers to Blue Marmot’s discovery requests. Blue Marmot requests expedited consideration of this motion as Blue Marmot’s Opening Testimony is due October 13, 2017. Specifically, Blue Marmot is requesting that PGE’s response be due September 1, 2017. Blue Marmot has conferred with PGE, which agrees to a respond to this motion to compel by September 5, 2017.

PGE has refused to provide basic information relevant to Blue Marmot’s complaints and the additional claims made in PGE’s answers. Blue Marmot has sought information regarding PGE’s executed qualifying facility (“QF”) power purchase

agreements (“PPAs”) to determine how PGE may have treated similarly situated QFs. This includes Blue Marmot Data Request Nos. 22, 23, and 40. PGE has refused to provide complete answers, and Blue Marmot therefore requests that the ALJ order PGE to fully respond to Blue Marmot Data Request No. 22. Specifically, Blue Marmot is requesting that the ALJ compel PGE to: 1) identify when PGE requested QFs identify their point of delivery (“POD”) for each of PGE’s executed off-system PPAs; and 2) provide complete and unredacted copies of any executed off-system PPAs that are not available on the Commission’s website, including the Airport Solar Schedule 202 PPA. Attachment A includes copies of PGE’s narrative responses listed above.

Pursuant to OAR 860-001-0420 and 860-001-0500, Blue Marmot has made a good faith effort to confer and resolve this discovery dispute. On August 25, 2017, Blue Marmot informed PGE that it may be filing a motion to compel, without providing any specifics, and that Blue Marmot would contact PGE with additional details. On August 25 and 28, 2017 counsel for Blue Marmot and PGE conferred via telephone about Blue Marmot’s request that PGE provide complete responses to Blue Marmot Data Request No. 22. Blue Marmot and PGE, however, were unable to resolve this dispute.

II. BACKGROUND

Blue Marmot filed its complaint on April 28, 2017, requesting that the Commission: 1) find PGE in violation of the mandatory purchase obligations of the Oregon and federal Public Utility Regulatory Policies Act (“PURPA”) and related state and federal regulations, policies, and orders; 2) order PGE to enter into a PPA or legally enforceable obligation with Blue Marmot to purchase the full net output of the Blue Marmot projects at the Schedule 201 rates in effect prior to June 1, 2017; and 3) impose

any other relief the Commission deems necessary. Blue Marmot is an off-system QF that is interconnected to PacifiCorp, but has made sufficient transmission arrangements to deliver its full net output to PGE by reserving third-party transmission from PacifiCorp.

PGE filed its answer on May 18, 2017, and ALJ Arlow adopted a schedule on July 7, 2017. PGE's answer alleged, *inter alia*, that PGE's obligation is contingent upon Blue Marmot being able to deliver its power to PGE, which PGE alleges cannot be done at the PACW.PGE POD.¹ PGE claims that Blue Marmot is either required to arrange to deliver its output to another POD on PGE's system or request a study to address upgrades necessary to allow for deliveries at the PACW.PGE POD (and agree to pay for the study and required upgrades).² PGE states that a lack of long-term firm available transfer capability ("ATC") at the PACW.PGE POD will prevent Blue Marmot from reaching PGE's system.³ PGE's answers ignore the fact that Blue Marmot has already made transmission arrangements to wheel its power to PGE, and therefore make its power available to PGE, at that POD.

Blue Marmot has sought to review whether PGE has agreed to accept other deliveries with similar ATC concerns. PGE has entered into at least three other QF PPAs that PGE claims identified the PACW.PGE POD.⁴ Two of these PPAs (Lakeview and OM Power) are available for review on the Commission's website.⁵ One of these PPAs

¹ Answer at 2.

² Id.

³ Id. at 9.

⁴ Attachment A (PGE's Response to Blue Marmot Data Request No. 40 identifying the Lakeview and OM Power PPAs as delivering at the PACW.PGE POD, and PGE's Response to Blue Marmot DR 22 identifying Airport Solar).

⁵ Re Portland General Electric Company Information Filing of QF Contracts or Summaries per OAR 860-029-0020(1), Docket No. RE 143, Obsidian Renewables, LLC (Sept. 16, 2015) (executed July 15, 2015); Re Portland General

(Airport Solar) is a non-standard PPA,⁶ where only a summary is available on the Commission's website.⁷

The Airport Solar PPA is particularly relevant because it was entered into on April 3, 2017,⁸ which is about the time PGE informed Blue Marmot that it was unwilling to execute a PPA with Blue Marmot.⁹ PGE claims that all other off-system QFs that are planning to deliver at the PACW.PGE will be provided similar options as Blue Marmot.¹⁰ PGE has not explained why it executed the Airport Solar PPA on April 3, 2017, but did not execute the partially-executed PPA it received from Blue Marmot on March 29, 2017. PGE has not identified when it asked Airport Solar, or any other QF, to identify its POD.

Blue Marmot has sought information regarding the terms and conditions of PGE's executed PPAs, including the Airport Solar PPA, to verify what sort of transmission arrangements or other delivery obligations may be included in the PPAs which could be relevant to the QF's deliveries at their requested PODs. Blue Marmot has established a legally enforceable obligation, but has not established what PGE has required from other similarly situated QF generators to accept and purchase their QF output.

⁶ Electric Company Information Filing of QF Contracts or Summaries per OAR 860-029-0020(1), Docket No. RE 143, OM Power 1, LLC (Sept. 14, 2016) (executed June 21, 2016).

⁷ Attachment A (PGE's Response to Blue Marmot Data Request No. 22) Re Portland General Electric Company Information Filing of QF Contracts or Summaries per OAR 860-029-0020(1), Docket No. RE 143, PGE's Summary of QF Agreements (June 21, 2017) (executed Apr. 3, 2017).

⁸ Id.

⁹ E.g., Re Blue Marmot V, LLC v. PGE, Docket No. UM 1829, Complaint at 7 (Apr. 28, 2017) ("On March 29, 2017 Blue Marmot V executed the final executable PPA without alteration.").

¹⁰ Attachment A (PGE's Response to Blue Marmot Data Request No. 23).

III. LEGAL STANDARD

In a proceeding before the Commission, discovery is a matter of right, and the Commission follows the Oregon court rules of discovery to the extent not inconsistent with the Commission's own administrative rules.¹¹ Under the Oregon Rules of Civil Procedure ("ORCP"), a party is entitled to discovery of any document that is relevant to a claim or defense.¹² Specifically, "parties may inquire regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party."¹³ Pursuant to the Commission's rules, relevant evidence must: 1) tend to make the existence of any fact at issue in the proceedings more or less probable than it would be without the evidence; and 2) be of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.¹⁴

A party may move to compel production under ORCP 46 if the opposing party is not responsive to a discovery request. On a motion to compel, "an evasive *or incomplete answer* is to be treated as a failure to answer."¹⁵ In proceedings before the Commission, parties are expected to err "on the side of producing too much information . . . rather than too little."¹⁶

¹¹ OAR 860-001-0000(1); OAR 860-001-0500; Re Pacific Power & Light, dba PacifiCorp, Docket No. UE 177, Order No. 08-003 at 2 (Jan. 4, 2008); Re Portland General Electric Co., Docket No. UE 102, Order No. 98-294 at 3 (July 7, 1998) ("[d]iscovery is a right afforded to parties in a legal proceeding by our rules and by the Oregon Rules of Civil Procedure, which we follow except where our rules differ.").

¹² ORCP 36(B).

¹³ ORCP 36(B)(1).

¹⁴ OAR 860-001-0450.

¹⁵ ORCP 46A(3) (emphasis added).

¹⁶ Re Portland General Electric Co., Docket No. UE 196, Order No. 09-046 at 8 (Feb. 5, 2009).

The Oregon courts and the Commission have affirmed that the information sought need not be admissible itself so long as it is reasonably calculated to lead to the discovery of admissible evidence.¹⁷ As such, “[i]t is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence.”¹⁸ Although not provided for in the ORCP, the Commission’s rules also provide parties with the right to written interrogatories into even *potentially* relevant matters.¹⁹

IV. ARGUMENT

Blue Marmot has made wheeling arrangements with PacifiCorp that allow Blue Marmot to deliver its net output to PGE at the PACW.PGE POD; PGE claims, however, that Blue Marmot is not able to sell power to the company at the PACW.PGE POD. PGE may be arguing that it lacks the capability to accept power from Blue Marmot, or that Blue Marmot’s right to sell to PGE is contingent upon PGE’s ability to move Blue Marmot’s power from the POD to PGE’s load or otherwise manage the power. If so, then the agreements that PGE has made with other QFs, and transmission arrangements that PGE has accepted to accommodate deliveries at the PACW.PGE POD, are relevant to determine what the company is requesting from Blue Marmot.

Blue Marmot is specifically requesting that the ALJ require PGE to:

- Identify when PGE requested QFs identify their POD for each of PGE’s executed off-system QF PPAs.
- Provide a complete and unredacted copy of any such executed off-system contract that is not posted on the OPUC’s website, including the Airport Solar Schedule

¹⁷ Baker v. English, 324 Or. 585, 588 n.3 (1997); Re Portland Extended Area Service Region, Docket No. UM 261, Order No. 91-958 at 5 (July 31, 1991).

¹⁸ ORCP 36(B).

¹⁹ OAR 860-001-0540(1) (emphasis added).

202 PPA that PGE claims has a PACW.PGE POD and was executed on April 4, 2017.

A. PGE Should Be Required to Provide Information Regarding All of Its Off-System QF Contracts

Blue Marmot has requested that PGE identify certain relevant information regarding the QFs that have entered into off-system PPAs with PGE, and to provide complete copies of any such PPAs that are not publically available on the Commission's website.²⁰ Blue Marmot requested this information because the Commission's website only has non-confidential PPAs and does not indicate the POD, what the ATC was for that POD, or when each QF was required to identify its POD. PGE objected to this request on the grounds that it is overly burdensome, irrelevant, and seeks information that is more prejudicial than probative. PGE responded with limited information, and has confirmed that one non-standard PPA (with Airport Solar) is scheduled for deliveries at the PACW.PGE POD, but has not made that PPA available to Blue Marmot. PGE has also not identified when it asked any specific QF to provide its POD or how much ATC was available at that time.²¹

The requested documents and information are relevant to PGE's argument that it cannot accept Blue Marmot's output at the PACW.PGE POD due to insufficient ATC. Since PGE has raised this defense, Blue Marmot has a right to investigate whether PGE has accepted or has agreed to accept power from other similarly situated QFs. If PGE has accepted or has agreed to accept such deliveries, then PGE would need to explain why this was appropriate for another QF, but is not appropriate for the Blue Marmot projects.

²⁰ Attachment A (PGE response to Blue Marmot Data Request Nos. 22, 40).

²¹ Id.

When PGE requested other off-system QFs identify their POD, and PGE's other executed off-system PPAs (like the Airport Solar PPA) are relevant. This information could demonstrate that PGE is able to accept power at the PACW.PGE POD for some QFs despite claiming allegedly insufficient ATC for other QFs, or that PGE has otherwise treated Blue Marmot differently than other similarly situated QFs. This information would tend to make PGE's claim more or less probable, and is therefore relevant to PGE's claim. Moreover, evidence of PGE's past actions, is not hypothetical or speculative, but rather solid evidence of PGE's ability to accept power and therefore the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.

Blue Marmot would like to review the executed PPAs rather than a mere summary to determine if QFs like Airport Solar have agreed to any additional provisions (curtailments, pricing adjustments, etc.) that mitigate or otherwise address ATC conditions at the POD. The requested documents are also relevant to PGE's claim that Blue Marmot is not able to deliver its power to PGE at the PACW.PGE POD, because this kind of information would reveal the transmission arrangements that PGE has accepted for other off-system QFs, which is relevant to understanding PGE's technical capabilities for accepting power.

When PGE requested that Airport Solar QF and the other off-system QFs identify their PODs is relevant because it provides information regarding PGE's business practices regarding similarly situated QFs. For example, if PGE requested that the other off-system QFs identify their PODs when there was allegedly no ATC, then it is relevant that PGE entered into a PPA with these QFs and not with Blue Marmot. Because the

information and documents requested by Blue Marmot are relevant, and are not privileged, they should be compelled.

B. Compelling PGE to Provide Information Regarding All of Its Off-System QF Contracts is Consistent with Prior Commission Rulings

Issues similar to these were recently address in a separate Commission proceeding.²² In UM 1742, a QF filed a complaint against PacifiCorp requesting the Commission require PacifiCorp to enter into a PPA to purchase the QF’s net output. PacifiCorp claimed that the QF had not entered into adequate transmission arrangements to allow PacifiCorp to verify that the QF’s power had been delivered to PacifiCorp’s system. The QF requested PacifiCorp provide information regarding PacifiCorp’s executed PPAs to determine what kinds of transmission arrangements PacifiCorp had been willing to accept from similarly situated QFs. PacifiCorp refused to provide certain PPA information, the parties were not able to resolve their discovery dispute, and the QF filed a motion to compel.

ALJ Michael Grant issued a Ruling compelling PacifiCorp to provide the QF with all of its executed PPAs, including those with QFs as well as non-QFs. ALJ Grant explained that the PPAs were relevant to PacifiCorp’s claim that it could not accept the QF’s output. Specifically, ALJ Grant determined that the QF was “entitled to investigate whether PacifiCorp has been willing to accept power delivered through displacement with other qualifying facilities, as well as whether the company has agreed to any unique delivery arrangements in its other contracts.”²³

²² Re Surprise Valley Electrification Corp. v. PacifiCorp, Docket No. UM 1742, ALJ Ruling at 1-2 (Nov. 19, 2015).

²³ Id. at 1.

In this case, Blue Marmot is not seeking anything beyond that which the Commission has already determined relevant when a utility claims that it cannot accept a QF's delivery. Given that PacifiCorp, which has entered into many more QF contracts than PGE, was able to provide all of its PPAs, including those executed outside of Oregon, it does not seem unreasonable for PGE to provide perhaps only one of its off-system QF PPAs here, as well as additional relevant details regarding other off-system QFs.

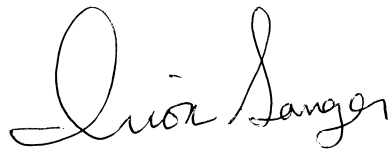
V. CONCLUSION

PGE has not provided sufficient information for Blue Marmot to understand PGE's refusal to accept its delivery. If PGE's position is that Blue Marmot's delivery is contingent upon Blue Marmot's being able to deliver at its requested POD, then PGE must explain why PGE feels it cannot accept power at the PACW.PGE POD given that PacifiCorp can deliver to the PACW.PGE POD, and identify what PGE has been willing to accept for other similarly situated QFs. Without complete responses, Blue Marmot cannot respond through testimony to the reasonableness of PGE's refusal to accept and purchase the QFs' power at the PACW.PGE POD.

For the reasons discussed above, Blue Marmot respectfully requests that the ALJ require PGE to provide complete responses to Blue Marmot Data Request No. 22.

Dated this 28th day of August, 2017.

Respectfully submitted,

A handwritten signature in black ink, reading "Irion Sanger". The signature is written in a cursive style with a large, looped initial "I".

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

Attachment A

PGE Response to Blue Marmot Data Requests

UM 1829
PGE Response to Blue Marmot's First Set of Data Requests

July 7, 2017

TO: Irion Sanger
Leslie Freiman
Will Talbott

FROM: Karla Wenzel
Manager, Pricing and Tariffs

**PORTLAND GENERAL ELECTRIC
UM 1829
PGE Response to Blue Marmot Data Request No. 22
Dated June 23, 2017**

Request:

- 22. Please identify all offsystem QFs that have entered into PPAs with PGE. Please identify the POD for each contract, when PGE requested that the QF identify the POD, and the amount of ATC available at the time of contract execution. Please provide a complete and nonredacted copy of all offsystem QF contracts that are not posted on the OPUC's website in docket number RE 143.**

Response:

PGE objects to this request on the grounds that it is overly broad and unduly burdensome and seeks information that is neither relevant nor calculated to lead to the discovery of relevant evidence. Alternatively, the information sought is more prejudicial than it is probative. Without waiving its objections, PGE responds as follows. PGE has filed its PPAs, or summaries of PPAs, with off-system QFs in OPUC Docket No. RE 143. The POD for the Airport Solar Schedule 202 contract is PACW. PGE generally began requesting that QFs identify PODs on or about April 18, 2017.

UM 1829
PGE Response to Blue Marmot's First Set of Data Requests

July 7, 2017

TO: Irion Sanger
Leslie Freiman
Will Talbott

FROM: Karla Wenzel
Manager, Pricing and Tariffs

**PORTLAND GENERAL ELECTRIC
UM 1829
PGE Response to Blue Marmot Data Request No. 23
Dated June 23, 2017**

Request:

- 23. Will PGE accept deliveries from other offsystem QFs that have entered into PPAs with PGE and/or have requested PPAs from PGE and that are planning to deliver at PACW.PGE?**

Response:

PGE is reviewing off-system QFs that have entered PPAs and has not made a determination about whether it can accept deliveries from each of them at this time. All QFs that have requested PPAs from PGE and that have requested to deliver at PACW.PGE will be given the same options as Blue Marmot.

August 2, 2017

TO: Irion Sanger
Leslie Freiman
Will Talbott

FROM: Karla Wenzel
Manager, Pricing and Tariffs

**PORTLAND GENERAL ELECTRIC
UM 1829
PGE Response to Blue Marmot Data Request No. 40
Dated July 19, 2017**

Request:

- 40) Please refer to PGE's Data Response No. 22. Please identify all off-system QF contracts that PGE entered into during 2015, 2016 and 2017 (to date) identifying the POD for each contract, including but not limited to identifying all QF contracts executed by PGE where PACW.PGE was the POD.**

Response:

The following table contains the requested information:

Project Name	POD	Contract Execution Date
Fossil Lake	BPAT.PGE	4/29/2015
Lakeview	PACW.PGE	7/15/2015
OE Solar 1	BPAT.PGE	1/25/2016
OE Solar 2	BPAT.PGE	1/25/2016
Morrow Solar	BPAT.PGE	1/25/2016
Tygh Valley Solar	BPAT.PGE	1/25/2016
Starvation Solar	BPAT.PGE	1/25/2016
Dayton Solar I	BPAT.PGE	1/25/2016
Wasco Solar 1	BPAT.PGE	1/25/2016
OE Solar 3 (Wy'East)	BPAT.PGE	1/25/2016
OE Solar 4	BPAT.PGE	3/7/2016
Fort Rock Solar I	BPAT.PGE	4/27/2016

Fort Rock Solar II	BPAT.PGE	4/27/2016
South Burns Solar I	BPAT.PGE	4/29/2016
West Hines Solar I	BPAT.PGE	4/29/2016
Suntex Solar	BPAT.PGE	5/16/2016
Energy Partners I	BPAT.PGE	6/21/2016
Energy Partners II	BPAT.PGE	6/21/2016
OM Power 1	PACW.PGE	6/21/2016
Fort Rock Solar IV	BPAT.PGE	6/26/2016
Alfalfa Solar	BPAT.PGE	6/26/2016
Harney Solar I	BPAT.PGE	6/27/2016
Riley Solar	BPAT.PGE	6/27/2016
Alkali	BPAT.PGE	8/26/2016
Rock Garden	BPAT.PGE	8/26/2016
OE Solar 5	BPAT.PGE	11/4/2016
Airport Solar	PACW.PGE	4/3/2017
Evergreen BioPower	BPAT.PGE	5/31/2017
Stark Solar	BPAT.PGE	6/2/2017
OE Solar 6	BPAT.PGE	6/15/2017