

**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.

PREHEARING CONFERENCE
MEMORANDUM AND RULING

PHASE II

**DISPOSITION: JOINTLY SPECIFIED ISSUES TO BE ADDRESSED IN PHASE II
PROCEEDING; RULES OF PROCEDURE ACKNOWLEDGED AND
ADOPTED**

I. SUMMARY

In this ruling, I find that the complainants asserted a claim for a revised commercial operation date (COD) as a result of litigation delay. I adopt the issues jointly proposed by the parties and rule that they constitute the scope of this phase of the proceedings. I further clarify certain portions of the Commission's rules that will govern the evidentiary proceedings in Phase II and how they shall be generally be applied in the creation of the evidentiary record.

II. PROCEDURAL HISTORY

On September 30, 2019, the Commission issued Order No. 19-322 in this docket. The Commission stated at page 20 thereof:

We conclude that there is insufficient evidence on the record to demonstrate that achievement of the Blue Marmot' stated CODs is not possible due to litigation, and accordingly we decline to order an extension. The Blue Marmots may assert such a claim following this order, and PGE will be entitled, as it requests in its reply brief, to a full evidentiary proceeding with discovery as we consider this question.

On November 27, 2019, Blue Marmot VIII filed a petition for reconsideration of a point-of-interconnection issue in Order No. 19-322. No other complainants sought reconsideration.

On December 16, 2019, I held a prehearing conference in this docket. Representatives appeared on behalf of complainants, defendant, and Commission Staff. At the conference, the parties did not agree as to whether the subject of a revised COD should be addressed as a second phase of the original proceeding or in a new docket. The parties did, however, adopt a schedule for the remainder of the proceedings.

On December 17, 2019, PGE filed a motion to open a new docket to address the COD change issues, to which Blue Marmots responded on December 20, 2019. Pursuant to my request, the parties subsequently filed a joint issues list on January 2, 2020, stating that the issues were to be as follows:

- Whether litigation caused commercially reasonable delays in the Blue Marmots' scheduled commercial operation dates listed in their partially executed PPAs?
- Should the Blue Marmots' scheduled commercial operation dates be extended and if so, what new dates should be included in the final executable PPAs that PGE must offer consistent with the final resolution of all issues in Phase II of UM 1829 or other subsequent proceedings?

Reconsideration of Order No. 19-322 was denied on January 23, 2020, in Order No. 20-025. In this order, the Commission rejected Blue Marmot VIII's application posing potential circumstances which might entitle Blue Marmot VIII to connect at the PACW:PGE interface. That issue, noted in footnote one on the first page of the joint issues list, thus became moot.

A further prehearing conference was held on January 29, 2020, at which time the parties reiterated their positions with respect to the establishment of a new docket for the purposes of addressing the joint issues. At the conference, the parties agreed that Blue Marmots' November 26, 2019 motion for prehearing conference contained language sufficient to assert a claim that achievement of the Blue Marmots' stated CODs is not possible due to litigation.

III. POSITIONS OF THE PARTIES

PGE argues that the Commission envisioned a new docket when it stated that "PGE will be entitled, * * * to a full evidentiary proceeding," and stated that it wanted to ensure that the scope of the proceeding remained limited to the joint issues, and also acknowledged the finality of Order No. 19-322. PGE argues that the record would be clearer and shorter with a separate docket because information relevant to the COD decision would have to be specifically presented, rather than merely cited from the record in the original docket.

Blue Marmots contend that requiring them to sort through and propose the admission of documents with which the Commission and the parties are already aware would be unduly burdensome and time-consuming. Blue Marmots claim that PGE could object to any evidence that it deems to be irrelevant or beyond the scope of a new proceeding:

This is exactly the type of additional and cumbersome process for both the Commission and the parties that the Blue Marmots are seeking to avoid by keeping this case in a Phase II rather than a new proceeding. If the Commission keeps the case in a Phase II, then all PGE and the Blue Marmots need to do is *cite to evidence already in the record and then the Commission can rely upon those facts*, without having to specifically identify in its order which ones it is taking official notice of nor does the Commission then need to allow parties an opportunity to respond to any officially noticed facts.¹ (Emphasis added).

IV. DISCUSSION

In Order No. 19-322, the Commission stated that "PGE will be *entitled, * * ** to a *full evidentiary proceeding* with discovery * * *." (Emphasis added). I find that the direction provided to the parties and the presiding administrative law judge is unequivocal. The Commission intends that contested case rights may not be disregarded for the sake of convenience or efficiency.

A new docket does not, however, need to be opened to preserve PGE's procedural rights. The practical effect of captioning this proceeding as Phase II of an existing docket is that it avoids the requirement that parties resubmit, and have re-served by the Commission, numerous documents

¹ Blue Marmots' Response at 6, (Dec 20, 2019).

which may or may not be needed to resolve the issues presented. Using the Phase II methodology thus promotes efficiency for the parties and the Commission Staff, as well.

To the extent that Blue Marmots wish to cite to the record in Phase I of this docket, they may do so by seeking official notice under OAR 860-001-0460(1)(d). PGE will have the opportunity to respond under OAR 860-001-0460(2), and make whatever evidentiary arguments it deems appropriate in accordance with the direction set forth by the Commission in Order No. 19-322 and the scope of the proceedings as delineated by the joint issues list. In keeping with the direction of Order No. 19-322, the parties will also have the opportunity to conduct further discovery and submit evidence as to matters not previously contained in the record.

V. RULING

1. Blue Marmot LLCs V, VI, VII, VIII, and IX have taken sufficient steps by the filing of a Motion for Prehearing Conference filed November 26, 2019, to assert their claim that that achievement of the Blue Marmots' stated CODs is not possible due to litigation.
2. The issues set forth in the parties' Joint Issues List are adopted as delineating the scope of Phase II of this proceeding.
3. Portland General Electric Company's Motion to Open New Docket for Further Proceedings is denied.
4. The Oregon Administrative Rules applicable to the introduction, admission, and consideration of evidence relative to contested cases are acknowledged and adopted.

Dated this 31st day of January, 2020, at Salem, Oregon.



Allan J. Arlow
Administrative Law Judge

Attachment: Notice of Contested Case Rights and Procedures

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Oregon law requires state agencies to provide parties written notice of contested case rights and procedures. Under ORS 183.413, you are entitled to be informed of the following:

Hearing: The time and place of any hearing held in these proceedings will be noticed separately. The Commission will hold the hearing under its general authority set forth in ORS 756.040 and use procedures set forth in ORS 756.518 through 756.610 and OAR Chapter 860, Division 001. Copies of these statutes and rules may be accessed via the Commission's website at www.puc.state.or.us. The Commission will hear issues as identified by the parties.

Right to Attorney: As a party to these proceedings, you may be represented by counsel. Should you desire counsel but cannot afford one, legal aid may be able to assist you; parties are ordinarily represented by counsel. The Commission Staff, if participating as a party in the case, will be represented by the Department of Justice. Generally, once a hearing has begun, you will not be allowed to postpone the hearing to obtain counsel.

Notice to Active Duty Servicemembers: Active Duty Servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

Administrative Law Judge: The Commission has delegated the authority to preside over hearings to Administrative Law Judges (ALJs). The scope of an ALJ's authority is defined in OAR 860-001-0090. The ALJs make evidentiary and other procedural rulings, analyze the contested issues, and present legal and policy recommendations to the Commission.

Hearing Rights: You have the right to respond to all issues identified and present evidence and witnesses on those issues. *See* OAR 860-001-0450 through OAR 860-001-0490. You may obtain discovery from other parties through depositions, subpoenas, and data requests. *See* ORS 756.538 and 756.543; OAR 860-001-0500 through 860-001-0540.

Evidence: Evidence is generally admissible if it is of a type relied upon by reasonable persons in the conduct of their serious affairs. *See* OAR 860-001-0450. Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on grounds that the evidence is unreliable, irrelevant, repetitious, or because its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay. The order of presenting evidence is determined by the ALJ. The burden of presenting evidence to support an allegation rests with the person raising the allegation. Generally, once a hearing is completed, the ALJ will not allow the introduction of additional evidence without good cause.

Notice of Contested Case Rights and Procedures continued

Record: The hearing will be recorded, either by a court reporter or by audio digital recording, to preserve the testimony and other evidence presented. Parties may contact the court reporter about ordering a transcript or request, if available, a copy of the audio recording from the Commission for a fee set forth in OAR 860-001-0060. The hearing record will be made part of the evidentiary record that serves as the basis for the Commission's decision and, if necessary, the record on any judicial appeal.

Final Order and Appeal: After the hearing, the ALJ will prepare a draft order resolving all issues and present it to the Commission. The draft order is not open to party comment. The Commission will make the final decision in the case and may adopt, modify, or reject the ALJ's recommendation. If you disagree with the Commission's decision, you may request reconsideration of the final order within 60 days from the date of service of the order. *See* ORS 756.561 and OAR 860-001-0720. You may also file a petition for review with the Court of Appeals within 60 days from the date of service of the order. *See* ORS 756.610.