

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1829- UM 1833

BLUE MARMOT V LLC,
BLUE MARMOT VI LLC,
BLUE MARMOT VII LLC,
BLUE MARMOT VIII LLC,
BLUE MARMOT IX LLC,

Complainants,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

RULING

DISPOSITION: MOTION TO STRIKE DENIED

I. SUMMARY

Blue Marmot V LLC, Blue Marmot VI LLC, Blue Marmot VII LLC, Blue Marmot VIII LLC, and Blue Marmot IX LLC (collectively complainants or Marmots) seek to strike portions of the response testimony filed on behalf of Portland General Electric Company (PGE) by Brett Greene and Geoffrey Moore, identified as PGE/100-102, Greene-Moore; the testimony submitted by Brett Sims, Aaron Rodehorst and Pam Sporborg, identified as PGE/200-201, Sims-Roderhorst-Sporborg; and the testimony submitted by Frank Afranji, Sean Larson and Matthew Richard, identified as PGE/300-302, Afranji-Larson-Richard. For the reasons that follow, the motion to strike is denied.

II. BACKGROUND AND PROCEDURAL HISTORY

The essence of Marmots' complaints relate to the obligation of PGE to purchase the output of Marmots at a specific point of delivery without upgrades. PGE asserted that its obligation to purchase is contingent on Marmots' delivery of power to the PACW.PGE point of delivery, which the utility claims is not possible without upgrades that address the lack of long-term firm available transfer capability (ATC) at that point.¹ In its direct testimony, Marmots

¹ See ALJ Ruling on Motion to Compel (Oct 30, 2017), for a more detailed summary description of the dispute.

challenged PGE's assertion that PGE's obligation was a contingent one. Pursuant to motions to strike filed by PGE alleging improper legal argument, a ruling granting in part and denying in part the PGE motions was issued on December 13, 2017. That PGE assertion of contingent obligation formed the basis for the PGE response testimony. The complainants then moved to strike portions of PGE's response testimony on February 12, 2018. PGE responded to the motion to strike on March 6, 2018, to which Marmots replied on March 20, 2018.

III. DISCUSSION

A. Positions of the Parties

Marmots seek to strike from the record references to the results of PGE's Transmission Study on the grounds that the Federal Power Act and the Federal Energy Regulatory Commission (FERC) regulations preempt this Commission from addressing or resolving questions regarding the accuracy of the Transmission Study. At the heart of Marmots' motion is the assertion that this Commission lacks both jurisdiction and the technical expertise that would allow it to assess the Transmission Study in resolving the instant complaint.² Marmots explain that "the Commission's role is to simply implement federal law, as interpreted by FERC and the courts. The Commission cannot second guess or dispute whether any FERC-jurisdictional transmission arrangements are in fact sufficient. * * * Because there is no jurisdictional 'hook' for the Commission to address PGE's disputed facts, PGE's Transmission Study and testimony should be stricken."³

Nevertheless, Marmots also contend that the Commission has jurisdiction "to determine whether PGE must accept the Marmots' net output at the point of ownership change and take responsibility for managing that power. PGE's alternatives for allocating capacity across different contractual commitments are not relevant to that determination."⁴ The core argument, according to Marmots, is that this Commission's authority to implement PURPA is bound by FERC decisions stating that a qualifying facility (QF)'s sole transmission-related obligation is to deliver power to the purchasing utility; it is then the utility's obligation to accept and manage the power from that point.⁵ Finally, Marmots state that the transmission study should be excluded "[r]egardless of the ultimate relevancy * * * because it confuses the issues, distracts from the core legal questions, and may cause undue delay."⁶

In response, PGE asserts the question for the Commission is a straightforward but critical one: which party bears responsibility for the costs required to facilitate the delivery of energy

² Complainants Motion to Strike at 1-2, 10-16 (Feb 12, 2018).

³ Marmots Reply in Support of Motion to Strike at 7-8 (March 20, 2018).

⁴ *Id.* at 3.

⁵ Complainants Motion to Strike at 3 (Feb 12, 2018).

⁶ *Id.* at 29.

generated by an off-system QF? PGE argues that, if there is insufficient ATC at the QF's chosen interconnection point, the QF should bear the costs for the upgrades to the transmission system necessary to enable such power delivery. PGE states that the testimony which Marmots propose to strike bears directly on PGE's analysis of the constraints of the current transmission facilities and the magnitude of those necessary upgrade costs. Such testimony, PGE argues is relevant to the parties' arguments and necessary for Commission resolution of the dispute, clarifies the issues and is necessary for the Commission's resolution of the case.⁷

B. Resolution

The Motion to Strike is denied. The instant pleadings relate only as to whether portions of PGE's testimony should be stricken and OAR 860-001-0450(1)(a) states that the purpose of testimony is to provide "relevant evidence," which means that it tends to make the existence of any fact at issue more or less probable than without the evidence.

I do not reach Marmots' premature contention that this Commission lacks jurisdiction to address all aspects of the complaint Marmots filed and presented for adjudication. Were the Commission to exclude the subject testimony, on jurisdictional grounds or otherwise, the Commission would essentially have concluded that all discussion of costs and feasibility of the proposed means of power delivery are irrelevant—a judgment on the merits of the case in its totality.

Furthermore, inclusion of the portions of PGE's testimony subject to the motion will not prejudice Marmots' rights to make jurisdiction-related argument in the future.

IV. RULING

The Motion to Strike filed by Blue Marmot V LLC, Blue Marmot VI LLC, Blue Marmot VII LLC, Blue Marmot VIII LLC, and Blue Marmot IX LLC is denied.

Dated this 22nd day of March, 2018, at Salem, Oregon.



Allan J. Arlow
Administrative Law Judge

⁷ PGE's Response to Blue Marmots' Motion to Strike at 1-2, 8-11 (Mar 6, 2018).