

**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.

RULING

DISPOSITION: MOTION TO COMPEL DISCOVERY GRANTED

**I. SUMMARY**

In this ruling, I grant Portland General Electric Company's motion to compel discovery for the information set forth in Data Requests 1, 4, 8 and 12.

**II. BACKGROUND AND PROCEDURAL HISTORY**

On February 14, 2019, after the evidentiary record was closed, Blue Marmots filed their opening brief in Phase I of this docket. On page 76 thereof, they raised the issue of resetting the Commercial Operation Dates (CODs) for the first time:

In light of the litigation that has been required by the Blue Marmots in order to enforce their rights under PURPA to sell their power to PGE, the Complainants request that the Commission exercise its authorities to modify the Commercial Operation Date ("COD") required under the PPAs that the Blue Marmots signed. FERC has recognized state commissions' ability to do so under circumstances such as this, where delay from litigation makes specific milestones in the PPA impractical. In this case, the Blue Marmots request that the Commission modify the COD in their PPAs on a day for day

basis from the date upon which PGE refused to execute the power purchase agreements to the day of the final order in this proceeding.<sup>1</sup>

At pages 77-78 of its response brief, PGE asked the Commission to deny the request:

As an initial matter, the Blue Marmots' complaints did not ask for an adjustment to their CODs—nor was this issue raised in the Blue Marmots' filed testimony or at hearing. As a result, PGE has been deprived of an opportunity to litigate such a proposal, and the Commission should deny the Blue Marmots' request for this reason alone. More importantly, the Blue Marmots have not met their burden of proving that this litigation has actually hindered their ability to achieve the CODs in the PPAs to which they claim they are entitled. Indeed, approximately 85 percent of EDPR's costs associated with these projects have been incurred since the date that PGE informed the Blue Marmots of the constraint at the PACW-PGE interface—suggesting that the projects have continued to proceed at a full pace. In the absence of a showing of delay resulting from the litigation, and in light of the cursory discussion provided, the Commission should conclude that the Blue Marmots fail to meet their burden to prove that relief is required or appropriate.

In Order No. 19-322 at page 20, the Commission concluded “that there is insufficient evidence on the record to demonstrate that achievement of the Blue Marmots' 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.”

The second phase of these dockets was opened and a procedural schedule, including data response discovery deadlines, was adopted by ruling of December 20, 2019. The parties agreed that the scope of the proceeding was to address two questions:

- 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?

The questions, of necessity, had to be addressed sequentially. The first question requires findings of fact and conclusions of law; the second question addresses how those conclusions should be given practical effect.

In seeking to address the first question, the parties have been engaged in discovery. On February 21, 2020, PGE filed a motion to compel with respect to the completeness of Blue Marmots' responses to PGE's data requests. The dispute between the parties relates to the adequacy of Blue Marmots' responses to the following data requests:

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<sup>1</sup> Blue Marmot Opening Brief at 12 fn 25 (Feb 14, 2019). Blue Marmots put the dates in question for Blue Marmot V, VI, VII and IX at “the end of March, 2017,” and for Blue Marmot VIII at April 20, 2017.

Re Land Use Permitting

**PGE Data Request 1.** Please provide all communications between EDPR/ Blue Marmots and Oregon Department of Energy (ODOE)/ Energy Facility Siting Council (EFSC).

**PGE Data Request 4.** Please provide all communications between EDPR/ Blue Marmots and Lake County Planning Department.

Re: Project Economics

**PGE Data Request 8.** Assuming the Blue Marmots were able to achieve their original CODs, please provide the total expected profit, by year, not adjusted for present value or inflation, expected over the term of the Power Purchase Agreements (PPA).

Re Interconnection Process

**PGE Data Request 12.** Please provide all communications between EDPR and PacifiCorp Transmission regarding the Blue Marmots' interconnection process, including but not limited to executed study agreements, questions and responses, etc.

**PGE Data Request 15.** Was one of the reasons the Blue Marmots sought restudies (of either or both the SIS and Facilities Study) Blue Marmots' desire to be studied for interconnection as an aggregated project? \* \* \*

(c) If so, what are the interconnection cost savings and/or equipment cost savings from aggregated interconnection?<sup>2</sup>

### III. POSITIONS OF THE PARTIES

#### A. PGE

**PGE Data Requests 1 and 4.** PGE states that the information it seeks to discover is directly relevant to this case. The correspondence between the Blue Marmots and ODOE/EFSC and Lake County, respectively, will assist PGE in its attempt to better understand the reasons for, and circumstances surrounding, the Blue Marmots' decision to delay the development of their projects. In particular, PGE seeks to understand whether there may be permitting issues independent from litigation in this case that drove decisions to delay the projects. PGE claims that its request for communications with state and local permitting entities is reasonably calculated to lead to the production of evidence regarding permitting obstacles contributing to delay, if any exist, and therefore constitutes a request for relevant information.<sup>3</sup>

**PGE Data Request 8.** PGE asserts that the information it seeks to discover is directly relevant to this case because it helps to address the question of whether delays were commercially reasonable. PGE argues that the worst-case scenario for Blue Marmots would have been to decrease expected profits by \$14 million. The financial data would help to determine whether

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<sup>2</sup> PGE Reply in Support of First Motion to Compel (Mar 6, 2020). PGE confirmed that its Motion to Compel no longer seeks to compel a response to DR 15.

<sup>3</sup>PGE Motion to Compel at 13-14 (Feb 21, 2020).

such a reduction would have provided a commercially reasonable basis to alter the business plans of EDPR, Blue Marmots' parent, and delay construction.<sup>4</sup> Questions of sensitivity can be addressed by how, rather than whether, the information is shared. Finally, the Commission has the authority to compel responses to PGE's requests.<sup>5</sup>

**PGE Data Request 12.** PGE argues with respect to DR 12, that it is requesting information relevant to the key issues of this phase of the case and that, contrary to Blue Marmots' assertions, its data requests are not burdensome or overbroad and that Blue Marmots' initial response unilaterally narrowed its scope.<sup>6</sup>

## **B. Blue Marmots**

Blue Marmots state that discovery is not unlimited; it must not be “unreasonably cumulative, duplicative, burdensome, or overly broad and even relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or undue delay.”<sup>7</sup>

Blue Marmots contend that they have provided all relevant and potentially relevant permitting communications and that “any additional production would be “wasteful and potentially harmful.”<sup>8</sup>

Blue Marmots address the scope of the discovery specifically applicable to this phase of the proceedings as follows:

Whether or not there may have been other challenges associated with the projects' development related to permitting, financing, construction, weather, U.S trade policy, U.S. tax law, or a myriad of other factors is irrelevant. This is not a proceeding about the strategies, plans, risks and solutions that would have been involved to date in the development of the Blue Marmots had PGE countersigned the PPAs. PGE should not be permitted to litigate—and we expect that the Commission has no interest in (or jurisdiction over) the litigation of—a hypothetical issue about all of the various factors that could potentially have resulted in the Blue Marmots meeting or not meeting their original scheduled CODs.<sup>9</sup>

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<sup>4</sup>*Id.* at 9-10.

<sup>5</sup>*Id.* at 11.

<sup>6</sup>*Id.* at 17-19.

<sup>7</sup> Blue Marmots Response to PGE's Motion to Compel at 8 and Commission Rules cited therein (Mar 2, 2020).

<sup>8</sup>*Id.* at 10-11.

<sup>9</sup>*Id.* at 11-12.

#### **IV. DISCUSSION**

A central question in this case is “whether litigation caused commercially reasonable delays in the Blue Marmots’ scheduled commercial operation dates listed in their partially executed PPAs.”

Accordingly, other potential causes of delay are relevant to the review of whether or not litigation caused commercially reasonable delay.

If the delay is to be attributed to the process of litigation, the other factors of delay may be considered as a part of the analysis leading to such a finding. These potential factors are therefore relevant.

#### **V. RULING**

Portland General Electric Company’s motion to compel discovery pursuant to Data Requests 1, 4, 8 and 12 is granted.

Dated this 18<sup>th</sup> day of March, 2020 at Salem, Oregon.



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Allan J. Arlow  
Administrative Law Judge