ORDER NO. 19-322

ENTERED Sep 30 2019

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.	ORDER

DISPOSITION: RELIEF GRANTED IN PART AND DENIED IN PART

I. INTRODUCTION

In this order, we grant in part and deny in part the claims for relief of Blue Marmot V, LLC; Blue Marmot VI, LLC; Blue Marmot VII, LLC; Blue Marmot VIII, LLC; and Blue Marmot IX, LLC (together, the Blue Marmots). We conclude that Portland General Electric (PGE) reasonably refused to provide Blue Marmot VIII with a final draft executable contract with a point of delivery (POD) at the PACW:PGE interface. We conclude, however, based on facts specific to this case, that it is reasonable for PGE to accept delivery at the PACW:PGE interface consistent with the exhibits included in the final draft executable contracts that PGE provided to Blue Marmot V, VI, VII, and IX.

II. PROCEDURAL HISTORY

The Blue Marmots are five 10 MW qualifying facility (QF) solar projects that began the standard contract process with PGE in 2016. PGE provided Blue Marmots V and VI with final draft executable contracts in January 2017 and provided Blue Marmots VII and IX with final draft executable contracts in March 2017. The Blue Marmots executed and returned all four contracts to PGE on March 29, 2017. When, after further review of transmission arrangements, PGE declined to countersign those four contracts and declined to provide a final draft executable contract to Blue Marmot VIII, the Blue Marmots filed complaints on April 28, 2017. PGE filed its answer on May 18, 2017.

The complaints were assigned Docket Nos. UM 1829, UM 1830, UM 1831, UM 1832, and UM 1833, and were consolidated by the assigned administrative law judge (ALJ) on June 7, 2017. Following the ALJ's decisions on multiple discovery disputes, and a supplemental round of testimony, the parties submitted their written pre-filed testimony on October 31, 2018.

On November 7, 2018, the Blue Marmots filed petitions for declaratory orders with the Federal Energy Regulatory Commission (FERC). FERC consolidated the Blue Marmots' petitions in docket EL19-13-000. The Blue Marmots moved to stay further Commission proceedings pending FERC's decision on November 7, 2018. PGE opposed the motion, and the ALJ denied the motion for stay on December 3, 2018.

Two ALJs presided over an evidentiary hearing on December 12 and 13, 2018. The parties completed legal briefing on April 22, 2019. We held an oral argument on June 27, 2019.

III. REGULATORY BACKGROUND

The Public Utility Regulatory Policies Act of 1978 (PURPA) and corresponding FERC regulations create a market for the electricity generated by small power producers and cogenerators, known as QFs.[1] Electric companies subject to this law and its implementing regulations must purchase electricity from QFs at the utility's avoided cost. Electric companies and QFs commonly execute power purchase agreements (PPAs) for the purchase and sale of energy under PURPA, but it is also possible for a QF to establish, prior to execution of a PPA, a legally enforceable obligation (LEO) that requires it to sell and the utility to buy energy at the avoided cost prices effective at the time the LEO arises.

Though FERC plays a central role in setting the boundaries for PURPA implementation, states are responsible for implementing PURPA within the limits of federal law. State regulatory bodies may implement PURPA "by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules."[2]

[1] Federal Register, Vol. 45, No. 38 at 12221 (Feb 25, 1980).
[2] *FERC v. Mississippi* at 751.

Within the bounds of federal law, states set avoided cost prices and contract terms, establish the terms of LEOs, and determine when LEOs are triggered.[3] In exercising authority over PURPA PPAs, state regulatory bodies resolve disputes between utilities and QFs with broad authority.[4] FERC has stated:

> It is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.[5]

In implementing PURPA in Oregon, this Commission requires electric companies to enter into standard Commission-approved contracts with QFs with nameplate capacities of 10 MW or less, except as otherwise determined by Commission order. We have adopted rules and approved tariffs that describe how a QF may obtain a standard contract.

Oregon developed many of its PURPA implementation rules through multi-year investigation dockets. In one such docket, we determined how a LEO is established:

> A LEO will be considered established once a QF signs the final draft of an executable contract provided by a utility to commit itself to sell power to the utility. A LEO may be established earlier if a QF demonstrates delay or obstruction of progress towards a final draft of an executable contract, such as a failure by a utility to provide a QF with required information or documents on a timely basis. Through the complaint process, the Commission will resolve a dispute and determine the avoided cost price to apply on a case-by-case basis.[6]

FERC also has given states authority over on-system interconnection costs—that is, the costs of interconnecting to the utility to which the QF will sell power.[7] We have established administrative rules for interconnection of on-system QFs 10 MW and smaller.[8] Under the rules, the host utility's transmission function performs an

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[3] *See Power Res. Group, Inc. v. PUC*, 422 F3d 231, 238.
[4] *North Am. Natural Resources v. Michigan PSC*, 73 F Supp 2d 804, 807.
[5] 72 FERC P61,015, 61050 (FERC July 6, 1995).
[6] *Investigation Into Qualifying Facility Contracting,* Docket No. UM 1610, Order No. 16-174 at 3 (May 13, 2016).
[7] *See* 18 CFR 292.306: "(a) Obligation to pay. Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics.
(b) Reimbursement of interconnection costs. Each State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and nonregulated utility shall determine the manner for payments of interconnection costs, which may include reimbursement over a reasonable period of time."
[8] The Commission has also adopted guidelines for interconnection QFs 20 MWs and greater, that specify how interconnection costs for on-system resources are allocated. *In the Matter of a Rulemaking to Adopt Rules Related to Small Generator Interconnection,* Docket No. AR 521, Order No. 09-196 at 2-3 (Jun 8, 2009), *In the Matter of Public Utility Commission of Oregon Investigation into Interconnection of PURPA*

interconnection study to identify distribution and transmission system impacts and the cost of any associated upgrades to the host utility's system. A QF must pay these costs and obtain interconnection service in order to deliver power to the host utility's merchant function under a PPA.[9]

An off-system QF interconnects within one utility's transmission or distribution system, but sells energy under PURPA to a different utility. When a QF interconnects with one utility but delivers power to another, interconnection and transmission service are obtained under the first utility's open access transmission tariff procedures, which capture impacts and costs of interconnecting to and transmitting over the first utility's system. There is, however, no generally applicable established procedure to identify and allocate transmission-related costs that the purchasing utility may incur when the QF is off-system.

In one prior instance, we addressed whether a purchasing utility could allocate the costs of third-party transmission service to a QF through an addendum to the PPA in the limited context of interconnection inside a load pocket. We determined that our finding in that proceeding was limited to the facts of that case, but recognized that the same or a similar issue could arise for other utilities. In that specific circumstance, we allowed PacifiCorp to procure third-party transmission service to move QF power from a load pocket to other load and charge the QF for the service with an addendum to the standard contract.[10]

Here, we must determine whether a group of off-system QFs that have established LEOs should be allowed to deliver to PGE's system at a location where PGE claims its transmission system is constrained and, if so, whether the QFs can be required to pay for additional transmission-related costs that PGE claims it will incur. In doing so, we examine precedent from FERC, Oregon state courts, and this Commission. We take up this decision notwithstanding the Blue Marmots' request that we defer our decision while FERC resolves the Blue Marmots' petition for declaratory ruling. We do so mindful of FERC's exclusive authority to regulate transmission, but also aware of our shared responsibility and the important role that states are asked to play in implementing PURPA within the bounds of federal law.

Qualifying Facilities with Nameplate Capacity larger than 20 Megawatts to a Public Utility's Transmission or Distribution System, Docket No. UM 1401, Order No. 10-132 (Apr 7, 2010).

[9] Transmission and Merchant functions of a utility refer to two separate business units that are functionally unbundled by FERC order to promote wholesale competition. "Transmission" refers to the business unit that operates the transmission assets of the utility. The "Merchant" function operates in the wholesale market, and transacts, as any other counterparty would, with the transmission function to schedule energy deliveries and purchase transmission products.

[10] *Investigation Into Qualifying Facility Contracting,* Docket No. UM 1610, Order No. 19-172 at 10 (May 13, 2019).

IV. FACTUAL BACKGROUND

A. EIM Participation and PGE Transmission Reservations

The Western Energy Imbalance Market (EIM) is a regional wholesale market through which participating electric companies execute energy transfers to provide utility-specific and regional benefits. The EIM is an intra-hour, centralized energy market used to economically and securely dispatch participating resources to efficiently balance supply, transfers between participating Balancing Authority Areas (BAAs), and load across the market's footprint. PGE filed an implementation agreement for EIM participation with the California Independent System Operator (CAISO) in November 2015, enabling it to begin full EIM participation on October 1, 2017.

EIM participants must make transmission capacity available for real-time dispatch by the EIM.[11] PGE accesses the EIM via the PACW:PGE interface and the California-Oregon Intertie.[12] PGE's other major interface is with Bonneville Power Administration, at the BPAT:PGE interface, but PGE does not access the EIM via this interface. Between April and June 2015, PGE's merchant function secured 418 MW of long-term firm point-to-point transmission service at the PACW:PGE interface. According to PGE, this acquisition was made for the purpose of facilitating EIM participation.

To maintain authority from FERC to transact in the EIM with "market based rate authority" or MBRA, a utility must retain a FERC-approved minimum amount of firm transfer capacity. PGE applied for MBRA with FERC on June 17, 2017. In that application, PGE represented that a minimum of 200 MW of firm transmission capacity would be dedicated solely for EIM transfers. FERC approved PGE's application on September 28, 2017.

In this order, Available Transfer Capacity (ATC) refers to the amount of transfer capacity at the PACW:PGE POD that is available to PGE's merchant function or any other transmission customer to secure or utilize. Total Transfer Capacity (TTC) refers to the total amount of transfer capacity at the PACW:PGE POD, meaning the maximum amount of physical transfer capacity. Currently, PGE's reservation of ATC at the PACW:PGE POD is 310 MW.[13] The TTC at the interface is 320 MW, and there is no remaining reservable ATC.[14]

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[11] PGE 200, Sims-Rodehorst-Sporborg/7.
[12] PGE/200, Sims-Rodehorst-Sporbord/10.
[13] PGE/500, Rodehorst-Moore/2.
[14] PGE/300, Afranji-Larson-Richard/15-16.

B. Blue Marmots' Contracting Process and Complaints

The Blue Marmots initiated the PURPA standard contracting process with PGE in fall 2016. As early as November 14, 2016, the Blue Marmots conveyed through questions regarding delivery arrangements to PGE that the projects would deliver power through PacifiCorp's system, not BPA's system.[15] Throughout the contracting process, delivery via BPA's system was never indicated by the projects.

PGE provided the Blue Marmots final draft executable standard PPAs to Blue Marmots V, VI, VII, and IX between January and March 2017. The final draft executable contracts included an exhibit specifying, as had prior contract drafts, that delivery to PGE's system would be accomplished by securing transmission from PacifiCorp.[16] Along with the final draft executable PPAs, PGE provided each of the Blue Marmots an explanatory letter stating that each project would establish a LEO entitling them the avoided cost rates in effect at the time that the QF signed the PPA and returned it to PGE for full execution.

Blue Marmots V, VI, VII, and IX executed the PPAs on March 29, 2017, and sent them to PGE the same day. The Blue Marmots' parent company then executed transmission service agreements with PacifiCorp for 50 MW of long term firm point-to-point transmission service from the Blue Marmots' point of interconnection to the PACW:PGE POD in 10 MW tranches. These agreements were executed on April 3, 2017, and May 18, 2017.[17] PacifiCorp did not identify any impediments or necessary upgrades to enable delivery to PGE's system via this path.

After receiving the partially executed PPAs, PGE circulated them for final legal and commercial review and signature. Before PGE completed its review and executed the PPAs during an internal discussion beginning April 5, 2017, the PGE personnel responsible for QF contracting learned that the ATC on the PACW:PGE interface was reserved by PGE's merchant function for PGE's participation in the EIM.[18]

Through an inquiry to the Blue Marmots beginning on April 18, 2017, PGE clarified that the Blue Marmots intended to deliver via the PACW:PGE interface. Subsequently, PGE notified the Blue Marmots that the interface was fully subscribed and declined to sign the contracts that Blue Marmots V, VI, VII, and IX had executed. At this time, PGE also declined to provide a final draft executable contract that allowed Blue Marmot VIII to deliver to the PACW:PGE interface. PGE offered the Blue Marmots two alternate options: (1) deliver to BPAT:PGE, which would require the Blue Marmots to purchase an

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[15] Blue Marmot/200, Talbott/9.
[16] Blue Marmot/201, Talbott/26.
[17] PGE/102, Greene-Moore/1.
[18] PGE/100, Green-Moore/10.

additional leg of transmission across BPA's system; or (2) request a System Impact Study to be performed by PGE's Transmission Group to identify upgrades to increase the TTC at the PACW:PGE interface to allow the Blue Marmots to deliver their output there, with any costs paid by Blue Marmots.[19]

C. PGE Contracts with Other QFs

Before and during PGE's contracting process with the Blue Marmots, PGE executed three other contracts allowing off-system QFs to deliver at PACW:PGE. PGE executed a total of 67 MW of QF contracts with delivery to the PACW:PGE POD on July 7, 2015, June 21, 2016, and April 3, 2017.[20]

Beginning in late April 2017, PGE's QF contracting team began communicating to potential QF counterparties that the PACW:PGE transfer point was fully subscribed and PGE would not accept delivery to PACW:PGE. PGE has instituted a new procedure since the filing of this complaint to review the delivery term of the QF at the outset of the contracting process.[21] PGE represents that, since late April 2017, it has clearly and consistently communicated to QFs that PACW:PGE will not be accepted as a POD.

V. DISCUSSION

We must determine whether the Blue Marmots are entitled to deliver to PGE's system at PACW:PGE, the Blue Marmots' preferred POD, and if so, whether the Blue Marmots must pay for the upgrades necessary to generate additional TTC so that ATC incremental to that already reserved by PGE's merchant function can be secured to accommodate the Blue Marmots deliveries.

We first reject the Blue Marmots' assertion that establishing a LEO carries with it the unilateral right to deliver at the QFs' preferred POD. We conclude that although a LEO must include some project details and contract terms in order to be meaningful, such terms do not extend to delivery arrangements.

We then determine that neither FERC precedent nor Oregon law require a utility to accept an off-system QF's unilateral choice of delivery point, regardless of transmission constraints and legitimate competing uses of reserved transmission. In doing so, we find that holding a reasonable amount of transmission capacity to accomplish transfers into the EIM and secure the customer benefits of participation is a legitimate justification to decline to accept delivery from QFs at a constrained delivery point. We will, however, examine whether electric companies act reasonably and without discrimination in

[19] PGE/100, Greene-Moore/3.
[20] PGE/100, Greene-Moore/14. These include the Airport Solar QF project at 47 MW, OM Power 1, a 10-MW geothermal QF, and Lakeview, a 10-MW solar QF. OM Power 1 contract was signed by PGE on June 21, 2016, and the Lakeview Project contract was signed by PGE on July 7, 2015. The Airport Solar PPA was signed by PGE on April 3, 2017. *See* PGE filing of June 21, 2017, in Docket No. RE-143.
[21] PGE/100, Greene-Moore/12.

refusing a delivery point. On this basis we conclude that PGE reasonably declined to provide Blue Marmot VIII a final draft executable contract for delivery at PACW:PGE.

We also, however, find that electric companies must communicate their transmission management decisions to the market in a clear and timely fashion. PGE did not begin to communicate to counterparties that the PACW:PGE POD was unavailable due to a transmission management decision for nearly two years after that decision was made. For reasons of fairness, accountability, and non-discrimination, and because we conclude that PGE can reasonably manage the impacts of accepting delivery, we require PGE to accept delivery at PACW:PGE for Blue Marmots V, VI, VII, and IX.

Finally, we conclude that we cannot alter the avoided costs established in the Blue Marmots' LEOs to incorporate additional direct or indirect transmission-related costs, given that our interconnection process for QFs does not identify and capture the transmission-related costs that an off-system QF's delivery to a POD constrained by a transmission management decision may cause. Our inability to alter avoided costs makes it critical that electric companies provide clear, timely communication to QFs when a delivery point is not available.

A. Legally Enforceable Obligation and Right to Delivery Terms

1. Party Positions

a. Blue Marmots

According to the Blue Marmots, a LEO includes all the terms of the final draft executable PPA that the QF executes, not just the avoided cost prices. The Blue Marmots state that PGE's view of the scope of a LEO is far too narrow, contrary to the law and Commission precedent, and in direct opposition to positions that PGE previously advocated in UM 1610. Blue Marmots argue that a finding to the contrary would render PURPA unworkable for QFs, pointing out that the Blue Marmots incurred significant costs and potential future liabilities to obtain transmission rights across PacifiCorp's system to carry out their obligation to deliver power to PGE's system in the manner provided for in the PPAs they executed.

b. PGE

PGE states that establishing a LEO does not render a partially executed PPA effective. According to PGE, a LEO is limited *solely* to establishing the QF's right to the avoided cost prices in place when the LEO arose, to be paid once the contract is executed. To conclude otherwise, PGE asserts, would render the portions of the standard PPA and PGE's Schedule 201 that provide for contract effectiveness upon signature by both parties meaningless. Though PGE acknowledges that the Blue Marmots formed a LEO, PGE argues that the LEO cannot include the delivery term.

2. *Resolution*

Determining the scope of a LEO beyond the avoided cost prices in place at the time a LEO is formed is a question of first impression in Oregon. We previously have considered when and how a LEO may be established, and determined that a LEO encompasses the avoided cost prices in place at the time the LEO is formed.

We cannot conclude, as the Blue Marmots would have it, that a LEO automatically incorporates all terms of a final draft executable contract. Under that view, there would be little meaningful difference between a LEO and a fully executed contract, and the utility's execution of the PPA would be of little significance. Nor can we conclude, as PGE asserts, that a LEO includes nothing but avoided cost pricing; without some project details and terms, the QF's legal obligation to deliver energy would lack any definition.

We can resolve this dispute, however, without establishing precisely which terms a LEO includes. Whatever elements a LEO may include beyond pricing, we conclude that they do not extend beyond the terms and conditions in the standard, Commission-approved PPA and any additional elements within the complete control of the QF (such as minimum and maximum deliveries) that are necessary to define what the QF has committed to deliver under the LEO. A LEO does not include all of the elements essential to the performance of the standard PPA that must be agreed to by both parties, such as delivery arrangements. Transmission arrangements for delivery to PGE's system from another balancing authority are not a standard term, nor one within the unilateral discretion of the QF. These are negotiated terms with potentially significant implications.

Contrary to the Blue Marmots' position, the Commission order in UM 1610 does not stand for the proposition that a POD designation is part of a LEO. In that order, we stated that "a LEO exists when a QF signs a final draft of an executable contract that includes a scheduled commercial on-line date and information regarding the QF's minimum and maximum annual deliveries, thereby obligating itself to provide power or be subject to penalty for failing to deliver energy on the scheduled commercial on-line date."[22] This language contemplates that some QF-determined contractual terms, exclusively in the control of the QF, must be part of the LEO, such as the commercial on-line date and the project size. It does not stand for the proposition that contractual elements outside the complete control of the QF, such as the delivery arrangement in the case of an off-system QF, may be incorporated into the contract by a unilateral determination by the QF.

A contrary decision would give a QF a unilateral right to designate the POD. We find such a result to be contrary to the Oregon Court of Appeals decision in *Water Power Company, Inc. v. PacifiCorp*,[23] and unreasonable in general. In *Water Power*, a small hydroelectric producer argued that PacifiCorp had breached its executed contract, despite

[22] Order No 16-174 at 3.
[23] *Water Power Company, Inc. v. PacifiCorp*, 99 Or App 125 (1990).

the fact that the contract had never culminated in a transmission agreement, which was required under the contract by a date certain. PacifiCorp and the seller disagreed on the point of delivery contract term, which PacifiCorp proposed and included in the PPA. Concerning PacifiCorp's proposed point of delivery, the court noted that the "PUC ruled that Pacific's position was reasonable in terms of its needs and consistent with the power purchase agreement."[24] The *Water Power* case establishes that designating a POD is not within the QF's unilateral control, that the POD must be reasonable, and that the Commission is responsible for resolving POD disputes.

Accordingly, the POD is not part of the Blue Marmots' LEOs. Where a LEO has been established, but the parties cannot agree to a delivery term, we must supply a reasonable term. FERC has determined that "whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine."[25] In this case, a proposed term that must be negotiated is disputed, and it is our responsibility to resolve the dispute and determine the appropriate and most reasonable term.

B. Reasonableness of Delivery at PACW:PGE

1. Party Positions

a. Blue Marmots

The Blue Marmots contend that they have performed all of the necessary acts to complete a contract with PGE, and that PGE has failed to offer a valid reason for refusing to honor its obligation to accept power from the Blue Marmots at the PACW:PGE interface. The Blue Marmots assert that PGE's voluntary, policy-driven choice to participate in the EIM is not a valid reason to refuse its legal obligation, established in FERC precedent, to accept QF energy delivered to its system. According to the Blue Marmots, PGE cannot make its purchase obligation contingent upon payment for transmission system upgrades.

The Blue Marmots assert that PGE knew throughout the contracting process that energy would be delivered at the PACW:PGE interface. Specifically, Blue Marmots contend PGE had been advised that power would be delivered via PacifiCorp transmission facilities and that no other interconnection point between the two utilities existed that was available to the Blue Marmots.

According to the Blue Marmots, receipt of Marmots' power at the PACW:PGE interface is feasible, because PGE's merchant function holds the transmission necessary to manage the Blue Marmots' delivery. The Blue Marmots point out that PGE need not procure additional transmission capacity to accept the Blue Marmots' delivery.

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[24] *Id* at 129.
[25] 72 FERC. P61,015, 61050 (FERC July 6, 1995).

Although the Blue Marmots concede that EIM participation is beneficial to ratepayers and that managing the Blue Marmots' deliveries may reduce PGE's opportunities for EIM transfers and thus create opportunity costs, they argue that maintaining transmission capacity for EIM participation does not override PGE's legal obligations under PURPA. The Blue Marmots' expert opines that accepting the Blue Marmots' output will have, at most, only a minimal opportunity cost impact on PGE's EIM participation. The Blue Marmots assert that there are alternative methods that PGE can use to provide transmission for EIM transfers in order to mitigate the customer impact of managing the Blue Marmots' deliveries.

Finally, the Blue Marmots argue that PGE is discriminating against them because it executed contracts with other QFs at the same location operating under identical conditions.

b. PGE

PGE states that there is no legal basis for requiring a utility to surrender previously reserved EIM transmission capacity to QFs, harming customers and violating the customer-indifference mandate of PURPA.

PGE argues that obtaining transmission service to the PACW:PGE interface does not satisfy the Blue Marmots' obligation to deliver to PGE's system. Because delivery to a fully subscribed delivery point is not reasonable or possible, PGE asserts that its mandatory purchase obligations have not been triggered. In support of its position that a utility may require a particular point of delivery, PGE cites the *Water Power* case, in which the Oregon Court of Appeals reasoned that neither PURPA nor other relevant statutes, regulations, or rules address the location of points of delivery for QF power. PGE disputes the Blue Marmots' view that FERC precedent allows a QF to deliver to a fully subscribed POD without incurring associated costs, because none of the cited FERC precedent involves a constrained POD.

PGE asserts, in its expert testimony, that the opportunity costs of reduced EIM transfers at PACW:PGE are much higher than the Blue Marmots assert, and that they will grow in the future as more entities join the EIM and markets expand. Furthermore PGE notes accepting delivery of the 50 MW of Blue Marmot QFs plus 67 MW of other executed QF contracts with delivery to PACW:PGE would not only erode customer benefits, but also would cause PGE to fall from its current 310 MW of transfer capacity to EIM to a level below the 200 MW minimum it committed to maintain in its MBRA application.

PGE claims that it has been a reasonable, good-faith and non-discriminatory business partner throughout the contracting process and only declined to execute the contracts, after learning of the transmission constraint, because the constraint made it impossible for the Blue Marmots to establish delivery to PGE's system. PGE represents that it stands ready to execute the PPAs and purchase output once feasible delivery arrangements have been made.

2. Resolution

a. FERC Precedent Does Not Require Utilities to Accept an Off-system QF's POD Where Legitimate Constraints Exist

In exercising our authority to supply a reasonable contract term for delivery, we look first to guidance from FERC. FERC allows a QF to choose the utility to which it will sell its output.[26] As a general proposition, FERC has established that once QF power is delivered to a purchasing utility's system the utility must make transmission arrangements necessary to deliver QF power to load. PGE's Schedule 201 indicates that where an off-system QF delivers to a utility system, the utility is responsible for transmission arrangements to load.[27]

Blue Marmots argue that FERC precedent requires PGE to accept delivery at a POD if the QF has made sufficient arrangements to delivery output to that POD. None of the cited FERC cases, however, involved delivery points at which transmission is constrained or dedicated to other uses, nor do they stand for the proposition that utilities must abandon competing uses of reserved transmission at the unilateral direction of a QF. For example, in *Entergy Service, Inc.*, FERC determined that a utility could not involuntarily curtail a QF consistent with a tariff.[28] In that case, FERC noted that utilities are required to deliver energy to load once that energy is provided to the utility, but it did not state that a utility must abandon a competing transmission use to accomplish this.[29] Similarly, in *Kootenai* FERC affirmed the discretion of a QF to deliver to a utility of its choosing, however distant, and determined that where a QF has purchased transmission rights sufficient to deliver to a utility that the utility must accept it; FERC did not opine, however, on how the utility accepting delivery must alter transmission management plans that depend on use of all available transmission to accommodate that delivery.[30]

We cannot agree that FERC would require utilities to accept delivery from QFs regardless of physical or legal constraints, or irrespective of reasonable management of legitimate competing uses for scarce transmission capacity. FERC precedent demands that utilities provide non-discriminatory access to QFs, but we do not understand FERC to have established that utilities must advantage QFs over other existing uses for transmission capacity.

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[26] *Kootenai Electric Cooperative, Inc.*, 143 FERC 61,232 at P33 (2013).
[27] Blue Marmot/202, Talbott/240 (PGE's Schedule 201 Tariff).
[28] *Entergy Services, Inc.* 137 FERC 61,199 (2011).
[29] *Id.* at 52.
[30] *Kootenai* at 14-16.

Our colleagues at the Utah Public Service Commission, in a different but analogous situation in *Glen Canyon*, also considered whether FERC would demand that a competing use of a utility's transmission reservation be diminished to support a QF's interconnection.[31] There, an on-system QF sought to locate in a remote and transmission-constrained area, requesting that the Utah Commission require the utility's merchant function to alter its management of previously reserved transmission to accommodate transmission of QF power to load at lower cost to the QF. The Utah Commission reasoned that utilities must be able to manage competing needs, though they recognized that FERC would not allow that discretion to be used to avoid the utility's PURPA obligation. Without FERC precedent on point, the Utah Commission declined to presume that FERC would require a utility to make alternate transmission management arrangements in order to accommodate a QF's siting and interconnection decision.

Like the Utah Commission, we decline to presume that FERC would require abandonment of reasonable practices for management of transmission capacity in physically or contractually constrained areas in order to accommodate QF deliveries. We have no doubt that FERC would not allow a utility to discriminate against a QF by, for example, adjusting its management of constrained transmission for a new generation resource owned or preferred by the utility but not for a QF. That is not the case we are presented with here. Instead, PGE determined that it must protect its transmission capacity for a legitimate competing use—achieving customer benefits from EIM participation—that takes precedence over all other new generation resources, not just QF resources.

In the absence of guidance from FERC, we must reach a resolution that appropriately balances the utility's legal obligations under PURPA with the need for utilities, in an increasingly constrained Pacific Northwest transmission system, to make reasonable management decisions to allocate transmission reservations in the best interest of customers. We recognize that utilities must act reasonably and without discrimination against or among QFs. We also observe that utilities will be on the strongest ground for refusing to accept deliveries from off-system QFs where they must prioritize reliable load service, preexisting legal obligations, or achieve customer benefits to which they have committed. In this case, we conclude that PGE's management decision to prioritize access to the EIM is generally reasonable, where communicated in a clear, timely, and accurate fashion.

[31] *Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's Request for Agency Action to Adjudicate Rights and Obligations under PURPA, Schedule 38, and Power Purchase Agreements with Rocky Mountain Power*, Docket No. 17035-36, Consolidated Order (Utah Pub. Serv. Comm'n Dec 22, 2017).

b. PGE May Decline to Accept Off-system QF Deliveries at a Constrained POD Based on Timely Communication of Reasonable, Non-discriminatory Transmission Management Decisions

Before completing due diligence review and before providing a final executable contract to Blue Marmot VIII, PGE contracting personnel learned that PGE had allocated its reserved transmission at the PACW:PGE POD for the purpose of EIM participation. PGE made and communicated internally a management decision that robust access to EIM was important, and that to maintain it, PGE must preserve maximum transfer capacity at PACW:PGE. PGE made a business judgment that, among the many competing uses for scarce transmission capacity at this transfer point, reserving as much transfer capacity as possible for EIM participation provided the highest value. Therefore, PGE declined to provide an executable contract to Blue Marmot VIII with the PACW:PGE POD delivery term and communicated that delivery at that POD would be impossible.

Soon after, PGE applied for MBRA at FERC. With FERC's approval, made conditional on PGE's commitment to maintain 200 MW of transfer capacity at the PACW:PGE interface, the transmission became legally encumbered. PGE would be required to re-apply for MBRA if its firm transfer capacity drops below 200 MW.

We conclude that PGE may use its business judgment to identify and prioritize uses of its transmission, but that it has a responsibility to market participants to clearly and accurately communicate these management decisions in a timely and commercially reasonable manner, particularly at a time where regional transmission constraints are among the most pressing issues in resource planning and procurement. As it did before providing a final draft executable contract to Blue Marmot VIII, PGE may communicate to a QF at a reasonable point in the contracting process that it will not accept delivery at the PACW:PGE POD in order to preserve the benefits of EIM participation.

PGE is now communicating proactively, and earlier in the QF contracting process than PGE communicated with Blue Marmot VIII, about the delivery points that are available and consistent with PGE's management of its transmission rights. QFs and counterparties may challenge the reasonableness of PGE's management decisions, but where they are clearly communicated and applied in a non-discriminatory manner, PGE is free to make such business judgments. Although we would have preferred for PGE to communicate its decision earlier in the contracting process with Blue Marmot VIII, we find it minimally sufficient that PGE did so before providing a final draft contract for Blue Marmot VIII's signature.

That noted, we determine that Blue Marmot VIII established its commitment to sell its output to PGE during the contract process in April 2017, and is entitled to an executable contract with a delivery term consistent with what PGE determines necessary considering existing transmission reservations and legitimate management objectives. In reaching this conclusion, we apply the standard articulated in Order No. 16-174. There, we determined that when faced with a complaint we would determine, on a case-by-case basis, when a LEO is formed for the purpose of establishing an avoided cost price. In this case, though we have determined that PGE acted reasonably in not providing an executable contract to Blue Marmot VIII with a PACW:PGE delivery term, Blue Marmot VIII had provided all information required or requested by PGE during the contracting process, and PGE was obligated to provide Blue Marmot VIII with an executable PPA with delivery terms acceptable to PGE. Accordingly, PGE is ordered to provide an executable PPA to Blue Marmot VIII. The executable PPA should include the avoided cost values in place when Blue Marmot VIII established its LEO, which we find occurred on April 20, 2017.

c. Delivery Terms in the Final Draft Executable Contracts PGE Provided to Blue Marmots V, VI, VII, and IX are Reasonable Under the Circumstances

Although we conclude that PGE is not required to accept delivery of Blue Marmot VIII at PACW:PGE, we reach a different conclusion for the four other Blue Marmot projects. As part of our PURPA implementation, we must set contracting standards and enforce reasonable contracting behavior. Here, we conclude that we must draw a line as a matter of fairness, accountability, and non-discrimination.

Throughout the contracting process, the Blue Marmots indicated in the relevant contract exhibits for Blue Marmots V, VI, VII, and IX that PacifiCorp transmission would be the sole arrangement for delivery to PGE's system. We are not persuaded by PGE's assertions of ambiguity in this designation; were the Blue Marmots planning to deliver to BPAT:PGE, delivery arrangements would have had to include BPA *and* PacifiCorp transmission. Despite having nearly two years before its delivery of final draft executable contracts to the Blue Marmots in January and March 2017 to determine the importance and priority of the EIM commitment relative to accepting new generation at the PACW:PGE POD, PGE never communicated this priority internally or externally. PGE never questioned the requested delivery arrangements for Blue Marmots V, VI, VII, and IX during the contracting period, failed to conduct internal due diligence before providing executable contracts, and represented as ready for signature a contract that we can only interpret to specify delivery at the PACW:PGE POD. PGE presented final draft executable contracts without ever having raised issues associated with a major barrier to successful completion of the project, and Blue Marmots V, VI, VII, and IX accepted the legal and contractual commitment to deliver by executing the PPA and establishing a LEO. We conclude that it would be inconsistent with the legislative goal of a "settled institutional climate for QF development"[32] to allow PGE to refuse delivery to Blue Marmots V, VI, VII, and IX at PACW:PGE.

PGE acknowledges responsibility for due diligence in contract review and execution, but explains that its practice was to conduct due diligence after issuing final draft executable contracts to QFs for signature. We acknowledge that at the time the relevant events occurred in 2017 PGE was less experienced in reviewing contracts from off-system QFs.[33] At the same time, we recognize QFs may invest significant project development resources to refine their project details through the contracting process, and have a legitimate expectation that major barriers will be identified and discussed during the process. We generally consider it reasonable for electric companies to complete the due diligence process before sending final draft executable contracts for signature by QFs. A utility should review significant proposed QF delivery terms as early as possible, and ideally well before providing a final draft executable contract.

We also expect electric companies to maintain reasonably consistent treatment among QFs. Yet, here, PGE executed 67 MW of other QF contracts with similar delivery terms. Most concerning is that PGE executed a QF contract for delivery at PACW:PGE in the days *after* receiving the Blue Marmots' executed contracts, raising legitimate questions about discrimination.[34] Non-discrimination among similarly situated customers is a core tenet of utility regulation, and we expect similar non-discriminatory practices in utilities' treatment of QFs.[35] PGE presented no evidence or rationale, other than internal confusion, for differential treatment of the 47 MW Airport Solar QF, whose PPA for delivery at PACW:PGE was signed days after the Blue Marmots returned their partially executed contracts to PGE.[36]

For all of the above reasons, under facts specific to Blue Marmots V, VI, VII, and IX, we conclude that PGE must accept delivery to PACW:PGE, as contemplated by the exhibits in the partially executed PPAs.

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[32] One of the legislative policies underlying Oregon's statutes implementing PURPA is to "[c]reate a settled and uniform institutional climate for the qualifying facilities in Oregon." ORS 758.515(3)(b).
[33] For the more common on-system QFs, transmission issues would have been identified through the separate interconnection process that is a precondition to commercial operation, not to contract execution.
[34] Blue Marmot Opening Brief at 74 (Feb 14, 2019).
[35] *See* ORS 757.325 "(1) No public utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or shall subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect. (2) Any public utility violating this section is guilty of unjust discrimination." *See also Chase Gardens, Inc. v. Public Utility Commission*, 131 Or App 602, 608 (1994): "A person or locality must be treated differently from other, similarly situated persons or localities in order to establish violation of [the antidiscrimination] statute. To constitute a violation, the disparate treatment must also, of course, be undue or unreasonable."
[36] The Blue Marmots delivered partially executed contracts to PGE on March 29, 2017. On April 3, 2017 PGE the Airport Solar project became effective.

We might have reached a different decision if we were persuaded that accepting delivery of 40 MW of solar from Blue Marmots V, VI, VII, and IX would cause physical transmission reliability disturbances, make PGE unable to meet other legal or contractual commitments (such as its MBRA commitment), or constrain the benefits that PGE customers receive from EIM participation so severely as to alter the net value of participation. However, the Blue Marmots have presented credible evidence that PGE can mitigate impacts to EIM benefits by adjusting the way it manages its EIM transmission arrangements. Additionally, we find that the Blue Marmots have presented credible evidence that PGE has not adequately analyzed other delivery and transmission upgrade options that would allow the Blue Marmots to deliver to PGE without PGE experiencing significant EIM impact.[37] We conclude that PGE has options for managing its transmission to continue to produce meaningful net benefits for customers. In making this determination, we take note that execution of 40 MW of Blue Marmot contracts with delivery terms through PacifiCorp's system will not compromise PGE's currently authorized MBRA. Setting aside 200 MW of ATC for PGE's commitment to FERC leaves PGE with 110 MW of ATC at PACW:PGE. Accordingly, the record demonstrates that PGE can accommodate 40 MW of Blue Marmot contracts along with the 67 MW of QF contracts that it signed (both before and after providing final draft executable contracts to Blue Marmots V, VI, VII, and IX), while still achieving material customer benefits and without compromising PGE's commitments to FERC.

Next, we consider whether PGE may assign to the Blue Marmots transmission upgrade costs or lost opportunity costs associated with actions PGE must take to accommodate delivery at PACW:PGE.

C. PGE May Not Adjust Avoided Cost Prices to Allocate the Opportunity Costs of Lost EIM Access to Blue Marmots V, VI, VII, and IX.

1. Party Positions

a. Blue Marmots

The Blue Marmots assert that there is no legal mechanism to impose additional transmission-related costs that effectively reduce the standard avoided cost prices to

[37] Blue Marmot/400, Moyer/3 and Blue Marmot/600, Moyer/3, 6. The range of anticipated financial impacts presented by PGE and the Blue Marmots ranges from $25,000 annually to $360,357 annually. PGE testifies that the annual detriment associated with the Blue Marmots' power received at PACW:PGE would be $89,790 under current levels of EIM transfer, and $360,357 if EIM transfers increased 20% over current levels. *See* PGE/700, Rodehorst-Moore/20; Hearing Transcript at 306 (Moore-Rodehorst) (Dec 13, 2018). Blue Marmots completed analysis demonstrating a lower level of potential harm, if PGE were to find no other transmission management alternative to mitigate and eliminate EIM impacts. Specifically, the Blue Marmots analysis shows that PGE's EIM benefits would be reduced by around $25,000 to $63,000 annually, amounting to less than half of one percent of PGE's EIM-related benefits. *See* Blue Marmot/600, Moyer/4-5.

which their LEO entitles them. Without a previously established framework for reducing avoided cost prices to capture transmission-related costs caused by off-system QFs, the Blue Marmots assert that they are entitled to the standard avoided cost prices in place at the time of the LEO without adjustment. The Blue Marmots assert that such costs can be allocated to QFs only on a forward going basis, through a general investigation like the one that prospectively assigned third-party transmission costs for delivery from load pockets to QFs.

The Blue Marmots also note that PGE is not exposed to additional direct transmission costs, because PGE's merchant function holds sufficient transmission to accommodate the Blue Marmots. The Blue Marmots claim that PGE's claimed indirect costs—i.e., the "opportunity costs" of reduced EIM transfer capability—are minimal and that PGE can develop transmission management solutions to accommodate the Blue Marmot projects with EIM participation. The Blue Marmots claim $25,000 to $63,000 in annual impacts, if PGE is unable to effectively mitigate costs through transmission upgrades or active management efforts, and dispute PGE's calculation of opportunity costs.[38]

b. PGE

PGE states that PURPA's customer-indifference standard requires that any costs necessary to effect delivery of the Blue Marmots' output to PGE load must be borne by the Blue Marmots and not PGE's customers. PGE argues that the Commission established this principle in UM 1610, and may apply it to assign additional transmission-related costs to the Blue Marmots without first conducting a generic examination of the issue. PGE argues the Commission's determination in UM 1610 was supported by FERC precedent in *Pioneer Wind Park*, in which FERC left open the issues as to how a Commission may account for transmission costs in relation to avoided costs.[39]

PGE asserts that accepting the Blue Marmots' delivery at PACW:PGE will limit PGE's ability to bid resources into the EIM and thereby reduce the expected customer benefits from EIM participation by $89,790 to $360,357 annually, the range changing based on the extent to which PGE utilizes the EIM in the future.[40] In PGE's view, the Blue Marmots either must pay those opportunity costs or must pay for upgrades to generate incremental TTC at the PACW:PGE interface, though PGE acknowledges that upgrades to increase TTC are not feasible or economical.

[38] Blue Marmot/600, Moyer/4-5.
[39] *Pioneer Wind Park I, LLC*, 145 FERC 61,215 (2013).
[40] PGE/700, Rodehorst-Moore/20; Hearing Transcript at 306 (Moore-Rodehorst) (Dec 13, 2018).

2. *Resolution*

For an on-system QF, completing the interconnection process with the host utility would have been a precondition to achieving commercial operation under the QF contract; in short, a separate process would have provided for allocation of transmission-related costs. For off-system QFs, however, there is no corresponding framework to identify and allocate the transmission-related costs on the purchasing utility's system.

Blue Marmots V, VI, VII, and IX have established LEOs and the purchase prices for the contracts are the avoided cost prices effective on the day the LEOs were established. We agree with the Blue Marmots that there is no mechanism in place that would allow us to effectively change the purchase price by requiring Blue Marmots to pay costs for transmission. Accordingly, we find that PGE is obligated to honor the contracts at the avoided cost prices on March 29, 2017, for Blue Marmots V, VI, VII, and IX.

PGE can avoid similar situations in the future by proactively communicating reasonable limitations on acceptance of off-system QFs at a constrained POD. Going forward, utilities should expect to use the due diligence period in the PURPA contracting process to identify and communicate major issues, such as a point of delivery that is unavailable. At the same time, QFs should understand that utilities may manage scarce transmission rights to achieve legitimate management objectives for the benefit of utility customers, subject to our reasonableness review, and that a POD cannot be unilaterally dictated by a QF to the detriment of a higher system value. If a QF wishes to deliver to a point at which PGE is not otherwise accepting delivery from off-system QFs, PGE and the QF have the option to negotiate a mutually acceptable non-standard contract that adjusts avoided cost values to incorporate additional transmission system costs that PGE cannot reasonably avoid, or allows the QF to fund upgrades to generate the necessary incremental transmission system capacity.

D. Commercial Operation Date Shall Remain as Established in Draft PPAs, Subject to Further Process.

1. *Party Positions*

a. *Blue Marmots*

Blue Marmots assert that the Commission should direct PGE to execute the revised PPAs and adjust the commercial operation date (COD) in the PPAs to reflect the delay caused by this litigation.

b. *PGE*

PGE asks that the Commission reject the Blue Marmots' request to extend the COD, a request that PGE notes the Blue Marmots made late in the proceedings. Furthermore, PGE cites the hearing transcript indicating that Blue Marmots incurred approximately 85 percent of the costs associated with these projects after PGE informed them of the PACW:PGE interface constraint, indicating that there has not been a significant delay in meeting the COD. PGE argues that granting the extension under such circumstances would unfairly provide for additional years of out-of-date avoided costs. PGE requests the opportunity to conduct discovery on this question, if we rule in favor of the Blue Marmots on the merits of the delivery dispute, before we authorize a change in COD.

2. Resolution

We conclude 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.

We further note that in the time the parties have litigated this case, PGE's standard contract terms have changed. On July 13, 2017, we issued order No. 17-256. There, we determined that all future standard contracts should include language consistent with a requirement "that the 15-year term of fixed prices commences when the QF transmits power to the utility." To ensure compliance with Order No. 17-256, PGE is directed to sign its current standard PPA, with the standard prices effective on March 29, 2017, the date Blue Marmots V, VI, VII, and IX executed the PPAs and established LEOs. We require the same treatment for Blue Marmot VIII, which we have found to have established a LEO on April 20, 2017. Because the executable contracts we order PGE to provide to the Blue Marmots in this order will have been finalized more than two years after we made the policy determination in No. 17-256, these contracts should include terms consistent with that order.

VI. ORDER

1. The Claim for Relief of Blue Marmots V, VI, VII, and IX is granted in part. PGE is ordered to submit to complainant executable contracts consistent with the currently approved standard contract that allow for delivery at the PACW:PGE POD with the avoided cost prices effective on March 29, 2017, for Blue Marmots V, VI, VII, and IX.

2. Portland General Electric Company is ordered to sign standard contracts for Blue Marmots V, VI, VII, and IX that allow for delivery at the PACW:PGE POD.

3. The Claim for Relief of Blue Marmot VIII is granted in part. PGE is ordered to provide an executable contract consistent with the currently approved standard contract with the avoided cost prices effective on April 20, 2017, to Blue Marmot VIII. PGE may propose a delivery term it determines appropriate for the Blue Marmot VIII executable contract.

Made, entered, and effective Sep 30 2019.

Megan W Decker	Letha Tawney
Megan W. Decker Chair	**Letha Tawney** Commissioner

Commissioner Bloom, *dissenting*:

While the fact pattern in this case makes our decision a close call, it is central to our duty as regulators to clearly state that the *sine qua non* lying at the heart of the PURPA statutes is that there shall be "customer indifference": customers are always entitled to receive safe and reliable service at the least cost (whether the difference be a dollar or a billion) and least risk. The Commission has thrown this guiding principle overboard over an innocent error on the part of PGE.

Although none of the contracts in question include the signature of an authorized representative of PGE, the majority has found that Blue Marmots V, VI, VII and IX are entitled to deliver power to PGE at the PACW:PGE interface because they were sent executable PPAs, but that Blue Marmot VIII, which was not sent an executable PPA, is not. I concur with the majority's decision that PGE need not provide Blue Marmot VIII with an executable PPA that includes receiving its output at the PACW:PGE POD, but my agreement with the final result is for reasons equally applicable to the other Marmot QFs.

I also agree that PGE is not and should not be compelled to agree to a POD proposed by a QF and note with approval that the order acknowledges that a LEO does not include all of the elements of the transaction necessary to facilitate a PURPA sale and that among the excluded items are delivery arrangements.

However, in carefully examining the series of events leading up to the filing of these complaints, I dissent from the decision to require PGE to accept the Blue Marmots V, VI, VII and IX output at the PACW:PGE interface.

When PGE sent the first group of contracts to Blue Marmots V and VI in January, it made a unilateral mistake due to a manager's ignorance: the manager was unaware of the capacity constraints at the PACW:PGE interface due to EIM reservations and would never have sent any of the contracts had the existence of those constraints been known to him at that time. Blue Marmots VII and IX received their executable contracts in March. All four executed their PPAs on March 28, 2017, and returned contracts to PGE on March 29, 2017.

On April 19, 2017, PGE informed Blue Marmots that the transfer point was fully subscribed. There is zero evidence that, during the 21 days between the time these four Blue Marmot QFs indicated their commitments and PGE informed them of its error, that the Marmots took any actions to their detriment in reliance upon having received executable contracts. It is also clear that PGE had been acting in good faith throughout because, on April 3, within a week after receiving the Marmot PPAs, it mistakenly executed the Airport Solar off-system PPA which had included the PACW:PGE interface PPA.

As noted by the majority, Blue Marmot VIII, unlike its companion QFs, did not receive an executable PPA but indicated its commitment to sell its output to PGE at the PACW:PGE interface on April 20, 2017, the day after it became aware of the PGE error and PGE's decision not to offer the executable PPA.

Although the Commission decision finds fault with PGE for a *two year* gap between the reservation decision and informing QFs about it, the difference in outcome between Blue Marmot VIII and its siblings hinges on the fact that they held executable, but unsigned PPAs for twenty-one days. Had PGE communicated just *twenty-one days sooner*, both internally and externally, the particulars with respect to implementing its planned EIM participation, and withheld the contracts, none of the Marmots would be entitled to a PPA with interconnection at the PACW:PGE interface.

The majority justifies its outcome by saying that PGE's failure to communicate internally led to "unreasonable" behavior. However, I fail to see a rational connection between this behavior and the decision to require PGE to allow Blue Marmots V, VI, VII, and IX to interconnect at the PACW:PGE interface.

While the order emphasizes the two-year period following the decision to join the EIM, this two-year period of alleged poor communication cannot be relied on for the majority's decision to require PGE to allow Blue Marmots V, VI, VII and IX to interconnect at PACW:PGE, because Blue Marmot VIII was not given the same relief. Instead, the majority must rely on the unintentionally but clumsily dropped communications ball between PGE's transmission function and merchant function, which the majority calls "unreasonable."

First, I am not sure the evidence supports the conclusion PGE's actions were unreasonable. The majority does not account for the context of PGE's actions in those critical three weeks. It could well be argued that PGE's negotiating staff was, at that very time, doing its utmost while being overwhelmed with a deluge of QF PPA requests.[41]

Second, there is no evidence that, because they held executable contracts, there was any detrimental reliance—commitments or expenditures undertaken by Blue Marmots V, VI, VII and IX—during that 3-week period. The nexus between PGE's short-lived communications lapse and the majority's decision PGE has forfeited its ability to require Blue Marmots V, VI, VII, and IX to seek another POD is not apparent.

The majority's approach is particularly disturbing where, as here, the contract has not been executed by both parties and there is no true mutuality of obligation; i.e., not just the LEO, but *all* obligations are one-way in the absence of signatures of all parties to the PPA. If PacifiCorp's avoided costs had risen sharply, while the Marmots held executable contracts from PGE, there is little doubt that the Marmots could, and would, walk away from the PGE negotiations with impunity, despite PGE having spent significant resources and possible lost opportunity costs in engaging in the negotiating process and resource planning. The teachable moment of this Commission's implementation of PURPA is therefore drawn into sharp focus: when you are a QF and it is your desire, an executable contract is the legal equivalent of no contract at all. When you are a utility, your signature on the dotted line is merely an option.

Nevertheless, the majority compels PGE to act contrary to our direction to actively participate in the energy imbalance market and assure benefits to ratepayers by so doing. That is not how PURPA[42] or previous Commission decisions intended the process to operate and certainly undercuts the Customer Indifference standard:

> As we have stated, one critical feature of our implementation of PURPA, including (but not limited to) the terms and conditions of our regulated PURPA contracts, is the need to ensure that ratepayers remain financially indifferent to QF development[43]

My dissent is grounded in the belief that Commission decisions should consistently reflect the centrality of ratepayer protection. PGE has invested millions of dollars in the EIM infrastructure and operations to facilitate its participation and these costs are included in customer rates.[44] Requiring acceptance of the Marmot output at the PACW:PGE interface would cause PGE and its ratepayers, to put at risk the full benefits

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[41] During the month of March 2017, Marmots' own counsel was negotiating for PPAs with PGE on behalf of Leatherback Solar LLC, Pika Solar LLC, Cottontail Solar LLC, Osprey Solar LLC, Wapiti Solar LLC, Bighorn Solar LLC, Minke Solar LLC, and Harrier Solar LLC.

[42] 16 US. § 824a-3(b), (d); 18 CFR § 292.304; *see also* Conference Report to accompany HR 4018 at 98 (Oct 6, 1978) (stating that PURPA intended to set an "upper limit" on price utilities can be required to pay). *See also S. Cal. Edison Co., et al.,* 71 FERC ¶ 61,269, 62,080 (1995), overruled on other grounds, Cal. Public Utilities Comm'n, 133 FERC ¶ 61,059 (2010).

[43] *In the Matter of Portland Gen. Elec. Co.,* Docket No. UM 1894, Order No. 18-025 at 7 (Jan 25, 2018).

[44] PGE/100, Greene-Moore/4.

of participation, including sub-hourly dispatch cost savings, reliability benefits and the enhanced ability to efficiently integrate variable renewable resources.[45]

The utility must balance competing needs of efficiency, equal treatment of renewable energy providers, its own integrated resource planning processes, its obligations to other carriers and participation in energy exchange markets while simultaneously assuring that its customers' rates are not adversely affected. Only the utility has the resources and knowledge to manage these conflicting goals in real time, although it may not, however, act in a discriminatory or arbitrary manner. I am pleased that the Commission has acknowledged that fact. I am dismayed that their actions do not reflect realization.

If this were a case of premeditated malice, the instant outcome might be justified and appropriate disallowances noted in the next rate proceeding. It is not. All of the Blue Marmot QFs should be required to negotiate the terms of interconnection with PGE and the resulting agreements must be consistent with the competing needs facing PGE in order that the Customer Indifference standard be satisfied.

I dissent.

Stephen M. Bloom
Commissioner

PUBLIC UTILITY COMMISSION OF OREGON

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

45 PGE/200, Sims-Rodehorst-Sporborg/7.