UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

	)	
	)	
Blue Marmot V, LLC	)	**Docket No. EL19-13**
Blue Marmot VI, LLC	)	
Blue Marmot VII, LLC	)	
Blue Marmot VIII, LLC	)	
Blue Marmot IX, LLC	)	
	)	

MOTION TO INTERVENE OF THE NORTHWEST & INTERMOUNTAIN POWER PRODUCERS COALITION, COMMUNITY RENEWABLE ENERGY ASSOCIATION, AND RENEWABLE ENERGY COALITION AND COMMENTS IN SUPPORT OF PETITION

The Northwest and Intermountain Power Producers Coalition ("NIPPC"), the Community Renewable Energy Association ("CREA"), and the Renewable Energy Coalition ("REC") (collectively, the "Pacific Northwest Energy Industry Associations") hereby respectfully seek to intervene in this proceeding in support of the Blue Marmots' solar energy projects.[1] The Associations strongly advocate for the fair and lawful implementation of the Public Utility Regulatory Policies Act ("PURPA").

In this case, Portland General Electric Co. ("Portland General") seeks to escape its mandatory purchase obligations under PURPA, in violation of the statute and long-standing, unequivocal precedent at the Federal Energy Regulatory Commission ("FERC" or "the Commission"). The Commission has consistently rejected similar Portland General efforts in the past and it should do so again because, as decades of precedent make clear, there are only two narrow exceptions permitting an electric utility to reduce its purchases of power from QFs,

[1] We refer to each of the five Petitioners collectively as "Blue Marmots."

neither of which apply here. Further, decades of precedent impose on the utilities purchasing qualifying facility ("QF") power the responsibility to manage and deliver the power to load. Portland General therefore cannot, as it is attempting to do here, rely on claims of transmission congestion in its own system to defeat or evade its mandatory purchase obligation under PURPA.

Pacific Northwest Energy Industry Associations therefore urge the Commission to grant the Blue Marmots' Petition and issue a Declaratory Order making clear that, under long-standing PURPA precedent, Portland General is obligated to purchase the net output of the Blue Marmots' QFs delivered to Portland General's system. Congestion internal to Portland General's transmission system does not excuse PURPA's mandatory purchase obligation. This is particularly true under the facts of this case because: (1) the congestion is voluntarily created by Portland General; (2) the Blue Marmots have executed power purchase agreements proffered by Portland General that constitute "legally enforceable obligations"; and (3) the power purchase agreements do not require delivery to any specific location.

I. MOTION TO INTERVENE

In accordance with the Commission's Notice of Petition for Declaratory Order in this action and Rule 214 of the Commission's Rules of Practice and Procedure,[2] the Pacific Northwest Energy Industry Associations respectfully seek to intervene in the matter.

NIPPC, a Washington State nonprofit corporation, is a coalition comprised of thermal and renewable independent power producers, power marketers, energy storage providers, and independent transmission companies, located in the Pacific Northwest and Intermountain West. NIPPC members collectively have invested billions of dollars in over 8,000 MW of generation

[2] 18 C.F.R. § 385.214.

resources. NIPPC members also have an estimated 3,000 MW of new generation under advanced development in the Pacific Northwest. A complete list of all of NIPPC's members can be found at www.nippc.org/about/members/.

NIPPC exists to promote the public interest in competitive energy markets, to protect consumers by promoting policies that assure that regulators and utilities follow the least-cost, least-risk pathways to provide electric energy, to promote new energy technologies such as energy storage, and to ensure that independent power producers can compete with incumbent utilities on a level playing field.

CREA was established in 2007 and is an intergovernmental association. See ORS 190.003-190.118. CREA consists of local governments seeking to promote locally-owned renewable energy projects for all forms of renewable generation recognized in Oregon's Renewable Portfolio Standard (biomass, geothermal, hydropower, ocean thermal, solar, tidal, wave, wind, and hydrogen). CREA is comprised of several Oregon counties which provide active participation through their county commissioners, including Sherman, Wasco, Gilliam, Harney, Hood River, Morrow, Polk, Union, Wheeler, Curry, and Wallowa. In addition to these counties, CREA's current membership includes the Mid-Columbia Council of Governments, Columbia Gorge Community College, and 25 irrigation districts, businesses, individuals, and non-profit organizations who have an interest in a viable community renewable energy sector for Oregon.

REC was established in 2009, and is comprised of over thirty members that are both small and large QFs who own and operate approximately fifty renewable energy generation facilities in Oregon, Idaho, Washington, Utah, and Wyoming. Several types of entities are members of REC, including irrigation districts, water districts, corporations, and individuals.

The majority of the individual QFs are small hydroelectric projects less than 7 megawatts, but the membership includes biomass, solar, geothermal, and waste energy. Most of REC's members operate existing projects that have been operating and selling to Oregon utilities for many years, but many of the members are developing or planning to develop new projects. REC's members sell power to investor owned utilities in the Pacific and Rocky Mountain West, including Portland General.

The Pacific Northwest Energy Industry Associations' interests, and the interests of the members of each of the Associations, are directly affected by Portland General's actions challenged here, which violate fundamental precepts of PURPA. The intervention of the Associations serves the public interest because their participation in this proceeding will help ensure that both this Commission and the Oregon Public Utility Commission ("OPUC") adopt policies that benefit electric consumers through effective competition.

II. COMMENTS

This case involves straightforward application of long-standing Commission precedent. Since PURPA was adopted in 1980, the Commission has required electric utilities to purchase the entire output of any QF that delivers electricity to the purchasing utility. The Commission has made clear that, for off-system QFs like the Blue Marmots, the mandatory purchase obligation is triggered if the QF obtains transmission to deliver its electric output to the boundary of the purchasing utility's service territory. The Blue Marmots have met this requirement. Portland General therefore has an unequivocal obligation under PURPA to purchase all electric energy and capacity provided by the Blue Marmots. Portland General's claim that it can escape this obligation because of congestion inside Portland General's transmission system is simply

incorrect. There is no exception to the mandatory purchase obligation that would permit a purchasing utility to decline to purchase QF output for this reason.

A. PURPA's Mandatory Purchase Obligation Applies Except in Narrow Circumstances Not Present Here; Portland General Therefore Violates PURPA By Refusing to Execute the Blue Marmot PURPA Contracts.

PURPA's core purpose is to overcome the reluctance of traditional, vertically-integrated utilities like Portland General to purchase power from non-traditional renewable generators like the Blue Marmots.[3] To fulfill this purpose, the Commission has, beginning with its first interpretation of PURPA in Order No. 69, read Section 210(a) of PURPA "to impose on electric utilities an *obligation* to purchase *all electric energy and capacity* from qualifying facilities with which the utility is directly or indirectly interconnected," with only two narrow exceptions: (i) system emergencies under 18 C.F.R. § 292.308(b); or (ii) low-demand periods where the QF is selling on an as-available basis and QF purchases might require curtailment of inexpensive base-load resources, as described in 18 C.F.R. 292.304(f).[4] Neither of those exceptions applies here. Portland General therefore remains fully obligated under PURPA to purchase the entire amount of electric energy and capacity Blue Marmot delivers to its system at full avoided-cost rates. As the Ninth Circuit has observed, FERC's PURPA "regulations contain no provision that would permit a utility to decline to purchase energy from a QF."[5]

The Commission has consistently enforced the mandatory purchase obligation throughout the four decades since PURPA's enactment. The Commission has concluded that PURPA's

[3] *See FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982).

[4] Order No. 69, *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, FERC Stats. & Regs. Preambles (1977-81) ¶30,128 at p. 30,870 (1980) (emphasis added); *see also Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, at 36 (2013).

[5] *Indep. Energy Producers Ass'n, Inc. v. California Pub. Utilities Comm'n*, 36 F.3d 848, 855 (9th Cir. 1994).

mandatory purchase obligation creates an "*absolute obligation*"[6] to "purchase power from *any* QF that can deliver its power" to the purchasing utility.[7] Portland General has generally been recalcitrant to accept its PURPA obligations, but the Commission has consistently rejected Portland General's attempts to evade its purchase obligation, concluding that PURPA requires that "Portland General must take from [a QF's] its *entire* net output . . . and to do so at avoided cost rates."[8] The courts have likewise consistently held that PURPA's "obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed,"[9] and PURPA requires that "a utility *must* purchase electricity made available by QFs at a rate up to the utility's full avoided cost."[10]

The Commission has left no doubt about the extent of this obligation. Throughout the decades since its enactment, the Commission has consistently held that the mandatory purchase obligation applies equally to QFs that are directly interconnected with the purchasing utility and to QFs, like Blue Marmots, that interconnect with a different utility and transmit their power across third-party systems to the purchasing utility.[11] Similarly, because PURPA requires electric utilities to purchase all QF output, the mandatory purchase obligation extends to both

---

[6] *Sw. Power Pool, Inc.*, 143 FERC ¶ 61,018, at P 17 (2013) (emphasis added).

[7] *Delta-Montrose Elec. Ass'n*, 151 FERC ¶ 61,238, at P 54, *reh'g denied*, 153 FERC ¶ 61,028 (2015) (emphasis in original).

[8] *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co* , 151 FERC ¶ 61,223, at P 44 (2015), *aff'd, Portland General Electric Co. v. FERC*, 854 F.3d 692 (D.C. Cir. 2017); *see also id.*, 151 FERC ¶ 61,223, at P 56 ("PURPA. . . require[s] Portland General to purchase PáTu's entire net output, including both the scheduled as well as the unscheduled net output delivered to Portland General's system, at full avoided cost rates").

[9] *Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 599, 734 P.2d 1366, 1370 (1987).

[10] *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Comm'rs of State of N.J.*, 44 F.3d 1178, 1183 (3rd Cir. 1995).

[11] 18 C.F.R. § 292.303(d) (2018); *PáTu Wind Farm*, 151 FERC ¶ 61,223, at P 46; *Kootenai Elec. Coop., Inc.*, 145 FERC ¶ 61,229, at P 15 (2013) ("A QF has the discretion to sell to a more distant utility, and thus has the discretion where to sell, as long as the QF can deliver its power to the utility"); *Morgantown Energy Associates City of New Martinsville, W. Virgina*, 140 FERC ¶ 61,223, at P 23 n. 48 (2012); *Pub. Serv. Co. of N.H.*, 83 FERC ¶ 61,224, at 61,998 - 62,000 (1998), *reh'g denied*, 85 FERC ¶ 61,044 (1998).

scheduled and unscheduled output.[12] And the Commission has throughout PURPA's history held that the mandatory purchase obligation even supersedes conflicting contractual obligations[13] and cannot be subordinated to other tariff obligations.[14]

As the Blue Marmots' petition in this docket makes clear, the need for a clarifying declaration from this Commission is driven by Portland General's contention before the OPUC that it is excused from PURPA's mandatory purchase obligation because of congestion on Portland General's transmission system. As it has with Portland General's previous attempts to evade its PURPA obligations, the Commission must reject Portland General's latest attempt to ignore its PURPA obligations. Well-established Commission precedent makes clear that Portland General's mandatory purchase obligation is triggered by the Blue Marmots' delivery to Portland General's system. As the Commission concluded in *PáTu Wind Farm*, Portland General must accept the QF's "*entire* net output (all energy less onsite uses and losses) delivered to the Portland General balancing authority area."[15] The off-system QF's "responsibility ends, and Portland General's transmission responsibility begins, with the delivery of [the QF's] net output to the Portland General system."[16] It is the purchasing utility's "responsibility to deliver that energy to its load (or otherwise manage the energy)."[17] Thus, Portland General, as the

[12] *PáTu Wind Farm,* 151 FERC ¶ 61,223, at P 46; *Entergy Servs., Inc.*, 137 FERC ¶ 61,199 at P 52 (2011), *reh'g denied,* 143 FERC ¶ 61,143 (2013).

[13] Order No. 69 at p. 36870-71; *Delta-Montrose Elec. Ass'n*, 153 FERC ¶ 61,028 at P 18 (2015) (an electric utility is "obligated to purchase power from any QF that can deliver its power to [it] *regardless of conflicting contract terms.*" (emphasis added)); *Pub. Serv. Co. of N.H.*, 83 FERC ¶ 61,224, at 61,998 - 62,000.

[14] *Entergy Servs., Inc.*, 137 FERC ¶ 61,199, at PP 51-57.

[15] *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co. Pátu Wind Farm, LLC,* 150 FERC ¶ 61,032, at P 49, *reh'g denied,* 151 FERC ¶ 61,223, at P 44 (2015), *aff'd, ,* 854 F.3d 692 (D.C. Cir. 2017).

[16] *PáTu Wind Farm,* 151 FERC ¶ 61,223, at n. 102*; see also Pioneer Wind Park,* 145 FERC ¶ 61,215 at P 38 ("the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility").

[17] *Entergy Servs., Inc.*, 137 FERC ¶ 61,199, at P 52*; see also PáTu Wind Farm,* 150 FERC ¶ 61,032, at P 54 (once the QF's "net output is delivered to Portland General's" balancing authority, "[i]t is Portland General's merchant function's decision" as to "how to subsequently deliver that net output to Portland General's load").

purchasing utility, has the obligation to "arrange the necessary transmission service to dispose of its purchase of the QF's entire net output once it has been delivered to" Portland General.[18]

Similarly, in *Pioneer Wind Park,* the Commission flatly rejected the purchasing utility's attempt to limit its mandatory purchase obligation under PURPA through transmission curtailments. There PacifiCorp attempted to insert a provision into its PURPA contracts allowing it to curtail purchases from QFs before curtailing output from PacifiCorp's own generation. The Commission rejected PacifiCorp's attempt, concluding that "the Commission's PURPA regulations permit a purchasing utility to curtail a QF's output in two circumstances: (1) in system emergencies; or (2) in light load periods . . . but only if the QF is selling its output on an 'as available' basis."[19] The Commission defines a "system emergency" narrowly to encompass only "a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property."[20] Simple congestion on Portland General's system is therefore not a "system emergency" justifying curtailment of its PURPA mandatory purchase obligation. Nor is the low-load condition applicable because the Blue Marmots do not propose to sell their output on an as-available basis.[21]

Because PacifiCorp proposed to curtail its QF purchases "in broader circumstances than those permitted by the Commission's PURPA regulations which authorize curtailments in

---

[18] *PáTu Wind Farm,* 150 FERC ¶ 61,032, at P 53*; see also id.* at P 56 (concluding that Standards of Conduct are not violated where "Portland General's merchant function decided the form of transmission delivery that it would take to deliver PáTu's output from the [delivery point on Portland General's system] to Portland General's load"); *Pioneer Wind Park,* 145 FERC ¶ 61,215, at 38 ("the QF is not required to obtain transmission service, either for itself or on behalf of the purchasing utility…to the purchasing utility's load").

[19] *Pioneer Wind Park,* 145 FERC ¶ 61,215, at P 36.

[20] *Id.* at P 37 (*quoting* 18 C.F.R. § 292.101(b)(4)).

[21] *Idaho Wind Partners 1, LLC,* 143 FERC ¶ 61,248, at PP 37-40 (2013), *reh'g denied,* 143 FERC ¶ 61,248 (2013); *Entergy Servs., Inc.*, 137 FERC ¶ 61,199, at PP 54-56.

system emergencies," the Commission concluded that its proposed contractual curtailment provision violates PURPA.[22] Portland General's violation here is even more blatant because it does not just propose to curtail Blue Marmot output when congestion arises, but refuses to even enter into PURPA contracts with Blue Marmot, which would completely defeat its PURPA obligations, even in circumstances where there is no congestion on its system. Worse, this is true even though the contracts that Portland General proffered to the Blue Marmots and that the Blue Marmots executed constitute "Legally Enforceable Obligations." Portland General agrees that it is already legally obligated to purchase the Blue Marmots' net output at specific avoided cost prices, and the proffered contracts do not require the Blue Marmots to deliver their net output to any specific location. On the contrary, the contracts that Portland General provided to Blue Marmots specifically require only that the Blue Marmots arrange for transmission across the system of the utility with which they directly interconnect (here PacifiCorp) for delivery to Portland General's system. The Blue Marmots have unequivocally met this requirement.

Accordingly, the Commission should rule in favor of Blue Marmots by simply concluding that Portland General must accept the power at the location of the QF's choosing, when the utility offers and the QF executes a power purchase agreement that does not limit the point of delivery and contemplates that deliveries will occur at the specific location that the QF has chosen. The Blue Marmots' petition is not an appropriate vehicle to address broader PURPA policy questions.

Worse still, the transmission congestion Portland General complains of is largely an artifact of Portland General's own decisions to, for example, reserve capacity at the point of delivery designated by Blue Marmot for other uses, including deliveries to the California Energy Imbalance Market ("EIM"). Just as it would do with its own generation, Portland General is free

[22] *Pioneer Wind Park*, 145 FERC ¶ 61,215, at P 37.

to designate energy from Blue Marmot for sale into the EIM. Portland General can also participate in the EIM in multiple ways, and accepting the Blue Marmots' net output will not limit Portland General's ability to participate in the EIM. What Portland General cannot do, however, is to refuse its obligation under PURPA to purchase the entire net output of Blue Marmot delivered to Portland General's balancing authority. Portland General is attempting to use the "transmission bottleneck" it controls to "refuse to wheel the QF's power," exactly the kind of monopoly abuse PURPA was intended to remedy and that the D.C. Circuit condemned in *Environmental Action, Inc. v. FERC.*[23] The Commission should therefore declare that Portland General's conduct violates PURPA.

Further, *Pioneer Wind Park* makes clear that "the purchasing utility cannot curtail the QF's energy as if the QF were taking non-firm transmission service on the purchasing utility's system."[24] Rather, to the extent congestion on the purchasing utility's transmission system requires curtailments, QFs must be treated so that they are not "at a disadvantage to any similarly situated transmission customer."[25] To assign QFs a lower transmission priority would be to treat the QF "as if it were a non-firm, secondary network service transmission customer that can be curtailed by PacifiCorp before any existing PacifiCorp Network Resource."[26] Again, Portland General's conduct here is far worse than the conduct condemned in *Pioneer Wind Park* because Portland General does not propose just to impose a discriminatory curtailment policy on the Blue Marmots when transmission congestion requires curtailments, but refuses even to execute contracts with Blue Marmot.

---

[23] *Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1062 (D.C. Cir. 1991).

[24] *Pioneer Wind Park*, 145 FERC ¶ 61,215, at PP 6, 24. .

[25] *Entergy Servs., Inc.*, 137 FERC ¶ 61,199, at P 51.

[26] *Pioneer Wind Park*, 145 FERC ¶ 61,215, at P 38; *see also Exelon Wind I, LLC*, 140 FERC ¶ 61,152, at P 50 (2012).

The possibility of congestion on the Portland General transmission system does not excuse this obligation. On the contrary, the obligation to manage the net output delivered to Portland General's system falls squarely on Portland General's shoulders, as it does when Portland General must transmit its own generation across the Portland General transmission system. If transmission congestion is a genuine problem, Portland General must employ all the same tools it would use to address transmission congestion in delivering its own generation to its load – redispatch, remedial action schemes, construction of new transmission facilities, etc. But these are Portland General's obligations alone, and long-standing FERC precedent dictates that Portland General cannot use congestion on its own system as an excuse to escape its mandatory purchase obligations under PURPA.

B. 18 C.F.R. § 292.306 Does Not Apply to the Delivery of Power Across the PacifiCorp-PGE Interface.

Portland General also seeks to evade its mandatory purchase obligation under PURPA by relying on the Commission's regulation governing the costs of interconnection between a QF and the utility to which the QF's facilities directly interconnect. 18 C.F.R. § 292.306. But the Commission has long held that this regulation applies only to the interconnection facilities between a purchasing utility and the QF with which it directly interconnects.[27] The interface between PacifiCorp and PGE, which is at issue here, is not such a direct QF interconnection. Accordingly, 18 C.F.R. § 292.306 is wholly irrelevant to this case.

[27] *Niagara Mohawk Power Corp.*, 77 FERC ¶ 61,224 (1996).

III. CONCLUSION

Decades of Commission and court precedent make clear that PURPA's mandatory purchase obligation applies in all circumstances, with but two narrow exceptions. Neither of those exceptions – system emergencies and curtailment of as-delivered PURPA contracts to avoid curtailment of base-load resources – apply here. Further, the Commission has also made unequivocally clear that the purchasing utility is obligated to deliver QF power to its customers on its own transmission system, and that it cannot use transmission curtailments to discriminate against QFs. Finally, decades of precedent make clear that 18 C.F.R. § 292.306 has no relevance here. The Commission should therefore grant the declaratory order as requested by the Blue Marmots.

CAIRNCROSS & HEMPELMANN, P.S.

/s/ Eric L. Christensen

Eric L. Christensen
524 Second Ave., Suite 500
Seattle, WA 98104
Telephone: (206) 587-0700
Facsimile: (206) 587-2308
Email: echristensen@cairncross.com
Attorneys for the Pacific Northwest Energy Industry Associations

CERTIFICATE OF SERVICE

In accordance with Section 2010 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010), I certify that this pleading was served electronically on the Official Service List maintained by the Commission for this proceeding.

CAIRNCROSS & HEMPELMANN, P.S.

/s/ Eric L. Christensen

Eric L. Christensen, WSBA #27934
524 Second Ave., Suite 500
Seattle, WA 98104
Telephone: (206) 587-0700
Facsimile: (206) 587-2308
Email: echristensen@cairncross.com
Attorneys for the Pacific Northwest Energy Industry Associations