

**BEFORE THE PUBLIC UTILITY COMMISSION OF  
OREGON**

FOSSIL LAKE SOLAR, LLC,

Complainant,

v.

PORTLAND GENERAL ELECTRIC  
COMPANY,

Defendant.

DOCKET NO. UM 2051

**FOSSIL LAKE SOLAR, LLC'S  
ANSWER TO PGE'S  
COUNTERCLAIMS**

In this Answer to Defendant Portland General Electric Company's ("Defendant" or "PGE") counterclaims contained in its Answer, Affirmative Defenses and Counterclaim ("PGE Counterclaims"), Fossil Lake Solar, LLC ("Complainant" or "Fossil Lake") addresses PGE's factual allegations, made in support of its counterclaims, in the form of an answer to each factual allegation. Fossil Lake denies each and every factual allegation not specifically admitted, and reserves the right to supplement this Answer if PGE amends any of its counterclaims. The answers below address only those factual allegations made in the PGE Counterclaims, which begin with numbered paragraph 29. To the extent PGE made other allegations that warrant a response, Fossil Lake denies each and every one of those allegations. In response to PGE's Counterclaims, Fossil Lake answers each on a paragraph-by-paragraph basis and answers, denies, and alleges as follows:

29.

Fossil Lake admits that it is an Oregon limited liability company whose registered address is in Lake Oswego. Fossil Lake further admits that David Brown executed on behalf of Fossil Lake the 2015 Standard Renewable Off-System Variable Power Purchase Agreement between PGE and Fossil Lake ("PPA"). Fossil Lake does not confirm or deny the additional allegations made by PGE concerning Obsidian Renewables, LLC ("Obsidian"). Obsidian is not

a party to the PPA or to this proceeding. Furthermore, PGE's characterizations of Obsidian are wholly irrelevant to PGE's unlawful termination of the PPA.

30.

Fossil Lake admits paragraph 30.

31.

The allegations in Paragraph 31 constitute legal conclusions or legal arguments to which no response is required.

32.

Although Fossil Lake generally admits that this Commission has the authority to resolve this dispute, the specific allegations in Paragraph 32 constitute legal conclusions or legal arguments to which no response is required.

33.

Paragraph 33 characterizes Section 17 of the PPA, which speaks for itself. A copy of the PPA was filed with the Commission as Exhibit A to the Complaint.

34.

Although Fossil Lake generally admits that this Commission has the authority to resolve this dispute, the specific allegations in Paragraph 34 constitute legal conclusions or legal arguments to which no response is required.

35.

The allegations in Paragraph 35 constitute legal conclusions or legal arguments to which no response is required.

36.

The allegations in Paragraph 36 constitute legal conclusions or legal arguments to which no response is required.

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37.

Paragraph 37 simply incorporates preceding paragraphs in PGE’s Counterclaims, and requires no answer. To the extent an answer is required, Fossil Lake denies the preceding paragraphs in PGE’s Counterclaims.

38.

Paragraph 38 characterizes Section 2 of the PPA, which speaks for itself. A copy of the PPA was filed with the Commission as Exhibit A to the Complaint.

39.

Paragraph 39 characterizes Section 4.1 of the PPA, which speaks for itself. A copy of the PPA was filed with the Commission as Exhibit A to the Complaint.

40.

Paragraph 40 characterizes Tables 6a and 6b of Exhibit D to the PPA, which speak for themselves. A copy of the PPA, which includes Tables 6a and 6b, was filed with the Commission as Exhibit A to the Complaint.

41.

Fossil Lake specifically denies PGE’s allegation that it is renewable resource deficient beginning January 1, 2020. This allegation is demonstrably false. At PGE’s urging, the Commission determined at its September 12, 2017 Public Meeting (“September Public Meeting”) that PGE will not be renewable resource deficient until January 1, 2025. The Commission’s decision is reflected in Order No. 17-347. PGE does not, and cannot, allege that any subsequent Commission decision or order modified the renewable resource deficiency period as defined by the Commission.

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42.

Paragraph 42 characterizes Tables 6a and 6b of Exhibit D to the PPA, which speak for themselves. A copy of the PPA was filed with the Commission as Exhibit A to the Complaint, which includes Tables 6a and 6b. Fossil Lake specifically denies PGE's allegation that January 1, 2020 is the Commission-approved start date to PGE's renewable resource deficiency period. To the contrary, the Commission determined at the September Public Meeting that PGE will not be renewable resource deficient until January 1, 2025. This decision is reflected in Order No. 17-347. PGE does not, and cannot, allege that any subsequent Commission decision or order modifies the renewable resource deficiency period as defined by the Commission.

43.

Paragraph 43 characterizes paragraph 2.2.1 of the PPA, which speaks for itself. A copy of the PPA was filed with the Commission as Exhibit A to the Complaint.

44.

Fossil Lake admits it did not begin initial delivery of Net Output on or before December 15, 2016. Fossil Lake has spent more than one million dollars (\$1,000,000) to develop the project. The delay has been caused by an unforeseen lack of capacity on the Bonneville Power Administration's ("BPA") transmission line from its Fort Rock substation to its LaPine substation. Fossil Lake is currently in discussions with BPA regarding access to such transmission capacity.

45.

Fossil Lake admits it did not begin initial delivery of Net Output on or before January 2, 2020. Fossil Lake has spent more than one million dollars (\$1,000,000) to develop the project. The delay has been caused by an unforeseen lack of capacity on BPA's transmission line from its Fort Rock substation to its LaPine substation. Fossil Lake is currently in discussions with BPA regarding access to such transmission capacity.

46.

Paragraph 46 characterizes paragraph 2.2.2 of the PPA, which speaks for itself. A copy of the PPA was filed with the Commission as Exhibit A to the Complaint.

47.

Fossil Lake admits that PGE agreed to extend the date by which to achieve the Commercial Operation Date. The letter attached as Exhibit B to PGE's Counterclaims speaks for itself.

48.

Fossil Lake admits the allegations in paragraph 48.

49.

Fossil Lake admits the allegations in paragraph 49.

50.

Fossil Lake admits that, by letter dated November 27, 2019, PGE provided Fossil Lake with written notice of PGE's intent to terminate the PPA ("Termination Notice"). The Termination Notice was attached as Exhibit B to Fossil Lake's Complaint. In the Termination Notice, PGE incorrectly claims that Section 2.2.3 allows PGE to terminate the PPA at the start of the "Renewable Resource Deficiency Period." Section 2.2.3 of the PPA, unlike other Sections of the PPA, does not use or refer to the defined term "Renewable Resource Deficiency Period." It uses the generic term "resource deficient." PGE is not, in fact, renewable "resource deficient." The Commission determined at the September Public Meeting that PGE will not be renewable resource deficient until January 1, 2025. This decision is reflected in Order No. 17-347. PGE does not, and cannot, allege that any subsequent Commission decision or order modifies the renewable resource deficiency period as defined by the Commission.

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51.

Fossil Lake admits that it sent PGE a letter dated December 20, 2019. A copy of the December 20, 2019 letter is attached as **Exhibit A** to this Answer. In this letter, Fossil Lake explained to PGE the difference between the defined term “Renewable Resource Deficiency Period,” which is used, for example, in Section 4.5 of the PPA, and the generic term “resource deficient,” which is specifically used in the termination provision of Section 2.2.3. Fossil Lake noted the fact that PGE will not actually be renewable “resource deficient,” as such term is used in Section 2.2.3, until January 1, 2025. Fossil Lake requested that PGE therefore withdraw its notice of intent to terminate. Fossil Lake further requested that, in order to avoid bringing this dispute before the Commission, the parties engage in alternative dispute resolution consistent with PGE’s own recommendations to the Commission in Docket AR 629.

52.

Fossil Lake admits that, by letter dated December 31, 2019, PGE responded to Fossil Lake’s December 20 letter. PGE’s response, attached as Exhibit C to the Complaint, speaks for itself. Fossil Lake admits that, in the December 31, 2019 letter, PGE made the assertion that it will be renewable “resource deficient” as of January 1, 2020. Fossil Lake denies, however, that PGE will actually be renewable resource deficient as of January 1, 2020. The Commission determined at the September Public Meeting that PGE will not be renewable resource deficient until January 1, 2025. This decision is reflected in Order No. 17-347. PGE did not allege in its December 31, 2019 letter that any subsequent Commission decision or order modified the renewable resource deficiency period as defined by the Commission. In its December 31, 2019 letter, PGE also expressly declined to engage in any form of alternative dispute resolution with Fossil Lake.

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53.

Fossil Lake admits that it filed its Complaint on December 31, 2019.

54.

Paragraph 54 attempts to characterize the Complaint, which speaks for itself.

55.

Fossil Lake specifically denies that PGE became renewable resource deficient as of January 1, 2020. The Commission determined at the September Public Meeting that PGE will not be renewable resource deficient until January 1, 2025. This decision is reflected in Order No. 17-347. PGE does not allege that any subsequent Commission decision or order modified the renewable resource deficiency period as defined by this Commission.

56.

Fossil Lake admits that PGE sent a written notice of termination of the PPA on January 2, 2020. That written notice, which is attached to PGE's Counterclaims as Exhibit A, speaks for itself.

57.

The allegations in paragraph 57 characterize Exhibit C and Exhibit D to PGE's Counterclaims, which Exhibits speak for themselves.

58.

Fossil Lake admits that it received PGE's notice of termination by email.

59.

The allegations in paragraph 59 contain legal conclusions or legal arguments to which no response is required. Fossil Lake denies that PGE lawfully terminated the PPA. PGE's attempt to terminate the PPA rests entirely on its assertion that it actually became renewable "resource deficient" on January 1, 2020. It did not. The Commission determined at the September Public Meeting that PGE will not be renewable resource deficient until January 1, 2025. This decision is reflected in Order No. 17-347. PGE does not allege that any subsequent Commission decision

or order modified the renewable resource deficiency period as defined by the Commission. Unless and until the Commission changes PGE's renewable resource deficiency period, PGE may not terminate the PPA pursuant to Section 2.2.3 until January 1, 2025.

60.

Fossil Lake does not have sufficient information related to the allegations in paragraph 60 to admit or deny and therefore denies each and every allegation in paragraph 60. Fossil Lake specifically denies that PGE's customers have been harmed by the delay in Commercial Operation Date. What PGE is alleging in Paragraph 60 is exactly the *opposite*--that PGE's Customers would be harmed if and when Fossil Lake *does* reach Commercial Operation Date. Ultimately, PGE's allegations about cost impacts to customers if and when Fossil Lake does reach its Commercial Operation Date are not relevant to the proper interpretation of Section 2.2.3 of the PPA. Such cost impacts, be they real or imagined, would not justify PGE's unlawful termination of a PPA.

61.

Fossil Lake does not have sufficient information related to the allegations in paragraph 61. To the extent a response is required, Fossil Lake denies each and every allegation in Paragraph 61. Fossil Lake specifically denies PGE's allegation that, absent an immediate termination right, it is without remedy for a delay in Commercial Operation Date. Under the plain language of Section 2.2.3 of the PPA, PGE is allowed to collect money damages if and when Fossil Lake's failure to timely deliver Net Output causes PGE to incur increased power costs. Section 2.2.3 says that PGE may terminate the PPA for a delay in Commercial Operation Date only if PGE is "resource deficient." Section 2.2.3 then expressly states that: "**Otherwise, PGE may not terminate this Agreement but Seller shall pay PGE the Start-Up Lost Energy Value.**" (Emphasis added).

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62.

Fossil Lake admits that there is currently a delay in achieving its Commercial Operation Date. Fossil Lake has spent more than one million dollars (\$1,000,000) to develop the project. The delay has been caused by an unforeseen lack of capacity on BPA's transmission line from its Fort Rock substation to its LaPine substation. Fossil Lake is currently in discussions with BPA regarding access to such transmission capacity. Fossil Lake denies, however, that PGE is renewable resource deficient beginning January 1, 2020. The Commission determined at the September Public Meeting that PGE will not be renewable resource deficient until January 1, 2025. This decision is reflected in Order No. 17-347. PGE does not allege that any subsequent Commission decision or order modified the renewable resource deficiency period as defined by the Commission.

63.

Fossil Lake denies the allegations in Paragraph 63. The allegations are irrelevant to the dispute. PGE does not have the right to terminate a PPA just because its counterparty can execute a replacement contract.

64.

Paragraph 64 simply incorporates preceding paragraphs in PGE's Counterclaims, and requires no answer. To the extent an answer is required, Fossil Lake denies the preceding paragraphs.

65.

Fossil Lake admits that it has not yet begun initial deliveries of Net Output or established a Commercial Operation Date as set forth in Sections 2.2.1 and 2.2.2 of the PPA. Fossil Lake has spent more than one million dollars (\$1,000,000) to develop the project. The delay has been caused by an unforeseen lack of capacity on BPA's transmission line from its Fort Rock substation to its LaPine substation. Fossil Lake is currently in discussions with BPA regarding

access to such transmission capacity. Fossil Lake denies that PGE is renewable resource deficient beginning January 1, 2020. The Commission determined at the September Public Meeting that PGE will not be renewable resource deficient until January 1, 2025. This decision is reflected in Order No. 17-347. PGE does not allege that any subsequent Commission decision or order modified the renewable resource deficiency period as defined by the Commission. Therefore, Fossil Lake denies PGE's allegation that it had a right to terminate the PPA as of January 1, 2020.

66.

The allegations in paragraph 66 contain legal conclusions or legal arguments to which no response is required. Fossil Lake denies that PGE lawfully terminated the PPA.

67.

Fossil Lake admits there is a dispute between PGE and Fossil Lake as to whether PGE's notice of termination was effective.

68.

To the extent that the allegations in paragraph 68 contain legal conclusions or legal arguments, no response is required. Fossil Lake generally admits that this Commission has authority to interpret the PPA. Fossil Lake further agrees that the Commission has at all times had the authority to determine, if the facts warranted, that PGE became renewable resource deficient as of January 1, 2020. But this Commission, despite having the authority to do so, has reached no such decision. The Commission determined at the September Public Meeting that PGE will not be renewable resource deficient until January 1, 2025. This decision is reflected in Order No. 17-347. PGE does not allege that any subsequent Commission decision or order modified the renewable resource deficiency period as defined by the Commission. Therefore, Fossil Lake denies PGE allegation that it had a right to terminate the PPA as of January 1, 2020.

**ANSWER TO PRAYER FOR RELIEF**

Fossil Lake does not understand the prayers for relief in PGE’s Counterclaims to contain allegations requiring a response, but to the extent they do, Fossil Lake denies all allegations contained in PGE’s Prayers for Relief and requests that the Commission deny the relief requested.

DATED: February 5<sup>th</sup>, 2020.

CABLE HUSTON LLP

s/ Richard G. Lorenz

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*Attorneys for Fossil Lake Solar, LLC*

EXHIBIT A  
UM 2051  
LETTER TO PGE  
REGARDING  
FOSSIL LAKE SOLAR, LLC

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# CABLE HUSTON<sup>LLP</sup>

RICHARD G. LORENZ  
ADMITTED IN OREGON AND WASHINGTON

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[www.cablehuston.com](http://www.cablehuston.com)

December 20, 2019

**VIA EMAIL – [David.white@pgn.com](mailto:David.white@pgn.com)  
& U.S. MAIL**

David F. White  
Assistant General Counsel  
Portland General Electric Company  
121 SW Salmon Street, 1WTC1301  
Portland, OR 97204

**Re: Fossil Lake Solar, LLC**

Dear David:

I am writing in response to the letter from Portland General Electric (“PGE”) to Fossil Lake Solar, LLC (“Fossil Lake”) dated November 27, 2019. For your convenience, a copy of the letter is enclosed herewith. The letter informs Fossil Lake of PGE’s intent to terminate the parties’ Standard Renewable Off-System Variable Power Purchase Agreement, dated April 1, 2015 (“PPA”), effective January 1, 2020, for failure to timely reach the Commercial Operation Date.

Under Section 2.2.3 of the PPA, PGE may only terminate for failure to reach the Commercial Operation Date if PGE is “resource deficient” with respect to renewable resources at the time of termination. PGE is *not* currently resource deficient with respect to renewable resources. PGE projects that it will not be resource deficient with respect to renewable resources until January 1, 2025. In its letter, PGE asserts that it may terminate the PPA effective January 1, 2020—notwithstanding the fact that it is not resource deficient—because that marks the end of the “Renewable Resource Sufficiency Period” as defined in Schedule 201 in effect at the time of contracting. For the reasons stated below, Fossil Lake disputes PGE’s attempt to read the defined term “Renewable Resource Sufficiency Period” into Section 2.2.3. Given the parties’ differing views on how Section 2.2.3 is to be interpreted, Fossil Lake requests that PGE suspend its notice of termination and participate in a mutually agreeable alternative dispute resolution (“ADR”) process similar to what you recently described on behalf of the Joint Utilities in Oregon Public Utility Commission (“Commission”) Docket AR 629.

PGE’s notice of intent to terminate the PPA improperly conflates the generic term “resource deficient” with the defined term “Renewable Resource Sufficiency Period.” PGE correctly summarizes Section 2.2.3 of the PPA by stating that PGE may terminate only if: “(1) Seller has failed to timely establish the Commercial Operate Date, and (2) PGE is *resource*

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Portland General Electric  
December 20, 2019  
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*deficient.*” (Emphasis added). The key to Section 2.2.3 is the use of the generic term “resource deficient” rather than the defined term “Renewable Resource Sufficiency Period.” The problem is that PGE next states in the letter that it is “resource deficient,” for purposes of Section 2.2.3, based on the definition of the “Renewable Resource Sufficiency Period” set forth in Schedule 201. The term “Renewable Resource Sufficiency Period” is defined in Schedule 201 (in effect as of the Effective Date of the PPA) as a specific date range ending on January 1, 2020.

PGE’s leap from the plain term “resource deficient” to the defined term “Renewable Resource Sufficiency Period” is not a permissible interpretation of Section 2.2.3. Unlike the defined term “Renewable Resource Sufficiency Period,” the words “resource deficient” are not defined with respect to a specific date range in either the PPA or Schedule 201. Nor is the term “resource deficient” anywhere expressly tied to the “Renewable Resource Sufficiency Period.” Because it is not specifically defined in the PPA or Schedule 201, the words “resource deficient” as used in Section 2.2.3 must be given their plain meaning. As noted above, PGE is not currently “resource deficient” under the plain meaning of the term.

If PGE had intended for the defined term “Renewable Resource Sufficiency Period” to establish the scope of its termination rights in Section 2.2.3, it would have said so expressly. For example, Section 4.5 of the PPA specifically uses the defined term “Renewable Resource Sufficiency Period” to describe when Fossil Lake retains the Environmental Attributes of the project. Section 4.5 could have used the plain term “resource sufficient” with respect to renewable resources, but PGE chose instead to use the defined term “Renewable Resource Sufficiency Period” in order to track the pricing tables attached to Schedule 201. Likewise Section 2.2.3 could have used the defined term “Renewable Resource Sufficiency Period,” but PGE chose instead to use the plain term “resource deficient” in order to preserve PGE’s right to terminate the PPA if PGE had in fact become renewable resource deficient earlier than the Renewable Resource Sufficiency Period date range.

The rules of contract interpretation in Oregon compel the rejection of PGE’s reading of Section 2.2.3. First, there is a presumption that the use of different words in different contract provisions is intended to convey different meanings. By choosing to use the term “Renewable Resource Sufficiency Period” in Section 4.5 of the PPA, PGE intended for the date range specified in Schedule 201 to apply to that provision. But by choosing to use the different term “resource deficient” in Section 2.2.3, it is presumed that PGE intended that the date range specified in Section 201 would *not* apply to that provision. Second, in interpreting a contract, one may not insert into a provision words that have been omitted. In this case, PGE is improperly attempting to insert into Section 2.2.3 the words “as determined by the Renewable Resource Sufficiency Period set forth in Schedule 201 in effect as of the Effective Date.” The fact that PGE deliberately omitted those words from Section 2.2.3 is dispositive.

PGE’s reading of Section 2.2.3 is also inconsistent with the intent of the Commission. In Docket UM 1129, the Commission determined that purchasing utilities do not need a termination

**CABLE HUSTON LLP**

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right for failure to meet the Commercial Operation Date unless the utility is resource deficient. The Commission did not say that such termination right arises automatically upon the expiration of the projected “Renewable Resource Sufficiency Period.” The Commission emphasized that while there could still be monetary damages to the utility while it is resource sufficient—damages that Fossil Lake has actually paid to PGE in this case—the nature of the damages is fundamentally different when the utility is resource deficient and presumably needs the power. The Commission’s rationale for adopting this rule only makes sense by looking at the nature of the damages that would be incurred by the utility at the time of termination. This turns on whether the utility is actually resource sufficient or actually resource deficient at the time of termination. To hold otherwise could force the utility to incur substantial damages by restricting its termination right if it were to become resource deficient sooner than was anticipated by the Renewable Resource Sufficiency Period in effect at the time of contracting.

Based on the forgoing analysis and explanation, Fossil Lake requests that PGE suspend its notice of termination without prejudice to either party’s rights under the PPA in order to allow time to pursue a mutually agreeable ADR process. On October 4, 2019, you submitted in AR 629 on behalf of PGE and other “Joint Utilities” a “Response to Stakeholder Questions” (“Response”). In the Response, you advocated that the Commission adopt and implement a non-binding but mandatory ADR process for certain types of PURPA disputes. Among those would be disputes regarding the interpretation of an existing contract term. You further wrote that the ADR process should be informal, efficient, and not protracted. Finally, you wrote that the participating parties’ due process rights should be preserved and not prejudiced while pursuing the ADR process. Fossil Lake finds that your recommendations in AR 629 have merit here. Fossil Lake suggests that we submit our disputed interpretation of Section 2.2.3 to an efficient and non-binding decision by a single mediator. The mediator could be a retired judge or someone with legal training who is more knowledgeable about utility matters, such as Jason Eisdorfer.

I respectfully request that PGE respond in writing on or before December 27 to advise whether PGE is amendable to a non-binding ADR process. We can discuss in greater detail the specifics of the ADR process at that time.

Very truly yours,

  
Richard G. Lorenz

RGL:tb

Enclosure

Cc: Contracts Manager  
QF Contracts, 3 WTC0306  
PGE – 121 SW Salmon St.  
Portland, Oregon 97204

**CERTIFICATE OF SERVICE**

I certify that on February 5<sup>th</sup>, 2020, I filed the foregoing Answer on behalf of Fossil Lake Solar, LLC with the Oregon Public Utility Commission by electronic Communication as consistent with OAR 860-001-0170.

s/ Richard G. Lorenz

Richard G. Lorenz, OSB No. 003086

Chad M. Stokes, OSB No. 004007

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