

January 21, 2020

Via Electronic Filing

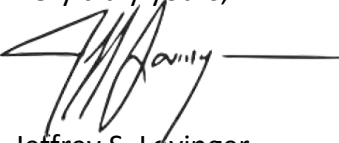
Public Utility Commission of Oregon
Attn: Filing Center
PO Box 1088
Salem, OR 97308-1088

Re: UM 2051 - Fossil Lake Solar, LLC v. Portland General Electric Company

Attention Filing Center:

Enclosed for filing today in the above-named docket is Portland General Electric Company's Answer, Affirmative Defenses and Counterclaim.

Thank you for your assistance.

Very truly yours,

Jeffrey S. Lovinger

953530

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 2051

FOSSIL LAKE SOLAR, LLC,

Complainant,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**PORTLAND GENERAL ELECTRIC
COMPANY’S ANSWER,
AFFIRMATIVE DEFENSES, AND
COUNTERCLAIM**

Pursuant to ORS 756.512 and OAR 860-001-0400, defendant Portland General Electric Company (“PGE”) submits the following answer, affirmative defenses, and counterclaim (“Answer”) to the complaint (“Complaint”) filed by Fossil Lake Solar, LLC (“Fossil Lake” or “Complainant”) on December 31, 2019.

I. INTRODUCTION

PGE and Fossil Lake entered into a Standard Renewable Off-System Variable Power Purchase Agreement (“PPA”) in 2015. The Commission approved this PPA form on December 16, 2014.¹ Section 2.2.3 provides that PGE can terminate the PPA if three prerequisites are satisfied: (1) if Fossil Lake fails to begin initial delivery of Net Output by December 15, 2016, as required by Section 2.2.1; (2) if Fossil Lake fails to achieve commercial operation by November 30, 2017, as required by Section 2.2.2;² and (3) if “PGE is resource deficient (as defined by the Commission).” Fossil Lake wrongly contends that the third condition is not yet satisfied and asks

¹ *In the Matter of Public Utility Commission of Oregon Staff Investigation Into Qualifying Facility Contract and Pricing*, Docket No. UM 1610, Order No. 14-435 (Dec. 16, 2014).

² Section 2.2.2 requires Fossil Lake to achieve commercial operation by March 15, 2017, but PGE agreed on January 30, 2017, to extend this deadline to November 30, 2017.

the Commission for a ruling that, in effect, PGE can never terminate the PPA because of Fossil Lake's ongoing default of its obligation to achieve commercial operation.

It is undisputed that Fossil Lake has failed to meet the initial delivery and commercial operation deadlines established by Sections 2.21 and 2.2.2. And PGE *is* resource deficient (as defined by the Commission). Under the plain language of Fossil Lake's PPA, PGE became renewable resource deficient for purposes of the PPA on January 1, 2020. A copy of the PPA has been filed with the Commission as Exhibit A to the Complaint. On January 2, 2020, PGE sent notice of termination to Fossil Lake; that notice terminated the PPA effective January 2, 2020. A copy of PGE's January 2, 2020 notice of termination is attached to this Answer as **Exhibit A**.

The text and context of the PPA supports the conclusion that PGE's renewable resource deficiency date under the PPA is January 1, 2020. Exhibit D to the PPA is the version of PGE's Schedule 201 that was in effect when the PPA was executed. Exhibit D is attached to the PPA and is incorporated as a part of the PPA.³ Exhibit D includes definitions of the Renewable Resource Sufficiency Period and the Renewable Resource Deficiency Period, and these definitions make it clear that the Commission approved a specific date for when PGE moves from renewable resource sufficient to renewable resource deficient under this PPA: January 1, 2020.⁴

Exhibit D also establishes the fixed prices that PGE must pay for any Net Output delivered by Fossil Lake during the first 15 years of the contract term (i.e., between April 29, 2015, and

³ Section 1.33 of the PPA defines "Schedule" as the version of PGE Schedule 201 filed with the Commission and in effect on the Effective Date of the PPA and notes that a copy is attached to the PPA as Exhibit D and incorporated into the PPA by reference.

⁴ Exhibit D to the PPA at Sheet No. 201-23.

April 29, 2030).⁵ Those fixed prices increase substantially after January 1, 2020. Before January 1, 2020, the fixed prices are intended to compensate only for the avoided cost of *energy*. But after January 1, 2020, the fixed prices increase substantially because they are intended to compensate for the avoided cost of *energy*, the avoided cost of the *renewable attributes* (“RECs”), and the avoided cost of *capacity*. The fixed prices begin to compensate for avoided RECs and avoided capacity beginning January 1, 2020, because that is the date PGE is considered renewable resource deficient for purposes of the PPA. Exhibit D unambiguously treats January 1, 2020, as the date on which PGE becomes renewable resource deficient.

In contrast, Fossil Lake asks the Commission to look outside the four corners of the PPA and to apply a renewable resource deficiency date – January 1, 2025 – that reflects a contract Fossil Lake did not sign. Fossil Lake wants to import into its 2015 PPA PGE’s currently effective 2020 version of Schedule 201 with a January 1, 2025, renewable resource deficiency date that was first approved by the Commission on September 14, 2017 (but inconsistently wants to retain the fixed prices found in the version of Schedule 201 actually attached to the PPA). There is no basis for importing the terms of PGE’s 2020 version of Schedule 201 into Fossil Lake’s 2015 PPA. In effect, Fossil Lake is asking the Commission to modify the language of Section 2.2.3 of the PPA to read:

In the event Seller is unable to meet the requirements of Sections 2.2.1 and 2.2.2, and if PGE is resource deficient (as defined by the Commission **in a version of PGE’s Schedule 201 approved by the Commission after the effective date of this PPA**) PGE may terminate this Agreement in accordance with Section 8.

⁵ Qualifying Facilities (“QFs”) have contested this interpretation of when the 15-year period of fixed prices begins. In litigation in *Portland General Electric Co. v. Alfalfa Solar I LLC, et al.*, Docket No. UM 1931, the ten QFs that were parties to the proceeding (as well as intervenor trade associations Northwest and Intermountain Power Producers Coalition, Renewable Energy Coalition, and Community Renewable Energy Association) contended that the 15-year period of fixed prices begins at the scheduled or actual Commercial Operation Date, not at execution. In Docket No. UM 1931, the Commission held it had jurisdiction to interpret the PPAs in question and that the 15-year fixed price period under the PPAs began at contract execution. The Commission’s final orders in Docket No. UM 1931 have been appealed by the QF parties to the Oregon Court of Appeals.

But Section 2.2.3 does not say this, and the Commission should not read such new language into Section 2.2.3. Instead, the Commission should look to the text and context of the PPA as a whole, including the version of Schedule 201 attached to the PPA as Exhibit D. The text and context of the actual PPA demonstrate that at the time the PPA was executed the Commission defined PGE's renewable resource deficiency date as January 1, 2020.

PGE's interpretation is also consistent with the Commission order that established the basis for Section 2.2.3. In Order No. 06-538, the Commission determined "a QF's operational delay pursuant to a contract with a resource sufficient utility should result in default, but not termination."⁶ In Order No. 07-360, the Commission adopted Guideline 4(d), which reiterated its decision on this issue from Order No. 06-538.⁷ Guideline 4(d) makes it clear that the question of when utility will become resource deficient is determined at the time of contract execution not at the time the utility is seeking to terminate a contract.⁸

Under this approach, the parties know at the time they enter into the contract when the utility will become resource deficient and therefore when PGE will begin relying upon delivery of energy, capacity, and RECs under the PPA. This allows the parties to know when the utility will be able to terminate the contract for failure to achieve commercial operations, which is then relied upon in the utility's subsequent integrated resource planning process.

The alternative approach advocated by Fossil Lake does not make sense because it would mean that PGE could never terminate the contract even though Fossil Lake is in default of its most

⁶ *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 at 27 (Sep. 20, 2006).

⁷ Docket No. UM 1129, Order No. 07-360 at 22 (Aug. 20, 2007) ("We reiterate our decision in Order No. 06-538 that a QF may be liable for damages for delay even in a resource sufficient situation ... Guideline 4 in the Appendix incorporates our decisions above.").

⁸ *Id.* at Appendix A, page 2, Guideline 4(d) ("Delay of commercial operation should not be a cause of termination if the utility determines **at the time of contract execution** that it will be resource-sufficient as of the QF on-line date specified in the contract; however, damages may be appropriate.") (emphasis added).

fundamental obligation: to achieve commercial operation so that it can deliver energy, capacity, and RECs. As a practical matter, PGE is never renewable resource deficient on a real time basis. This is because as PGE approaches its scheduled renewable resource deficiency date, PGE secures additional renewable resources based on its Integrated Resources Plan (“IRP”). As each new IRP is acknowledged and resources are procured or contracted, the renewable resource date is pushed to a later date and this is reflected in a new, later deficiency date in the next version of PGE’s Commission-approved Schedule 201.

If Fossil Lake were correct and Section 2.2.3 required that PGE be renewable resource deficient under PGE’s most-recently approved and currently effective version of Schedule 201, rather than under the version of Schedule 201 that was in effect when a contract was executed, then PGE would never reach a point when it could terminate for failure to achieve commercial operation. This would be an unreasonable result because it would allow QFs to speculatively lock in high avoided cost prices and then wait to build the project well after the scheduled operation date with no risk of termination. There is no indication in Order No. 06-538, Order No. 07-360, or the Fossil Lake PPA that the Commission intended such a result.

PGE reserves the right to argue other reasons why PGE became renewable resource deficient on January 1, 2020, and that the PPA was effectively terminated by the notice of termination sent to Fossil Lake by PGE on January 2, 2020. By this pleading PGE also asserts a counterclaim seeking an order from the Commission that PGE’s January 2, 2020, notice of termination to Fossil Lake terminated the PPA pursuant to Sections 2.2.3 and 8.2 effective January 2, 2020.

II. SERVICE

Copies of all pleadings, motions, and correspondence should be served on PGE's counsel and representatives at the addresses below:

David White
Associate General Counsel
Portland General Electric Company
121 SW Salmon Street, 1WTC1301
Portland, OR 97204
Email: David.White@pgn.com

Jeffrey S. Lovinger
Dallas S. DeLuca
Markowitz Herbold PC
1455 SW Broadway, Suite 1900
Portland, OR 97201
Email: JeffreyLovinger@MarkowitzHerbold.com
Email: DallasDeLuca@MarkowitzHerbold.com

III. ANSWER

PGE denies all allegations contained in the Complaint except as hereafter expressly admitted.

Unless otherwise specified, the capitalized term "Paragraph" refers to the numbered paragraphs of the Complaint beginning on page three of the Complaint.

The first two pages of the Complaint contain a narrative introduction and legal argument. PGE does not understand the introduction to contain allegations requiring a response. PGE expects to respond to Complainant's narrative and legal arguments as part of dispositive motion practice, through written testimony or mutually agreed statement of undisputed facts or, if needed, at a hearing and subsequent briefing in this proceeding. In the event the Commission deems the introduction to contain allegations requiring a response, PGE denies the allegations.

In answer to some of the allegations contained in numbered Paragraphs, PGE has indicated that no response is required because the allegations are legal conclusions or legal arguments. If the Commission deems that responses are required in such instances, then PGE denies the allegations in question.

Some of the numbered Paragraphs in the Complaint characterize the contents of the PPA or the contents of written communications between the parties. In answer to some of those numbered Paragraphs, PGE has noted that a copy of the PPA or the written communications have been submitted to the Commission as exhibits to the Complaint or as exhibits to this Answer and PGE has indicated that the PPA or communications speak for themselves. In those instances, PGE denies all the allegations in the associated numbered Paragraphs except to the extent that PGE expressly admits an allegation. The exhibits submitted by PGE are true and correct copies of the information exchanged by the parties.

In response to the numbered Paragraphs of the Complaint, PGE answers as follows:

IDENTITY OF THE PARTIES

1. PGE admits the allegations in Paragraph 1.
2. PGE admits that Fossil Lake Solar, LLC, is the “Seller” for purposes of the PPA. PGE lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 2 and therefore denies them.

APPLICABLE STATUTES AND RULES

3. The allegations in Paragraph 3 constitute legal conclusions or legal argument to which no response is required.
4. The allegations in Paragraph 4 constitute legal conclusions or legal argument to which no response is required.

JURISDICTION

5. The allegations in Paragraph 5 constitute legal conclusions or legal arguments to which no response is required.

6. The allegations in Paragraph 6 constitute legal conclusions or legal arguments to which no response is required.

FACTUAL BACKGROUND

7. PGE lacks information or knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 7 and therefore denies them. PGE admits that Complainant has informed PGE that its proposed solar project (“Project”) will be a 10,000 kW nameplate solar qualifying facility (“QF”) located in Lake County, Oregon, and that the Project will interconnect to Bonneville Power Administration and wheel output to PGE’s system.

8. PGE admits the allegations in Paragraph 8.

9. Paragraph 9 characterizes Section 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.

10. PGE lacks information or knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 10 and therefore denies them.

11. Paragraph 11 quotes Section 2.2.3 of the PPA, which speaks for itself. A copy of the PPA was filed with the Commission as Exhibit A to the Complaint.

12. The allegations in Paragraph 12 constitute legal conclusions or legal arguments to which no response is required.

13. The allegations in Paragraph 13 constitute legal conclusions or legal arguments to which no response is required. PGE is not currently renewable resource sufficient for purposes of the PPA. PGE denies that Order No. 17-347 controls whether PGE is renewable resource deficient for purposes of the PPA.

14. The allegations in the first sentence of Paragraph 14 characterize PGE’s November 27, 2019, notice of intent to terminate the PPA. A copy of that November 27, 2019

notice of intent has been filed with the Commission as Exhibit B to the Complaint and the document speaks for itself. PGE admits that it became renewable resource deficient for purposes of the PPA on January 1, 2020. The allegations in the second sentence of Paragraph 14 constitute legal conclusions or legal arguments to which no response is required.

15. PGE lacks information or knowledge sufficient to form a belief as to the truth of the allegations in Paragraph 15 and therefore denies them.

LEGAL CLAIMS

Complainant's First Claim for Relief

PGE may not terminate the PPA because it is not currently resource deficient.

16. In answer to the allegations in Paragraph 16, PGE repeats and realleges the responses made to Paragraphs 1 through 15.

17. Paragraph 17 characterizes Section 2.2.3 of the PPA, which speaks for itself. A copy of the PPA was filed with the Commission as Exhibit A to the Complaint.

18. The allegations in Paragraph 18 constitute legal conclusions or legal arguments to which no response is required. PGE denies that Order No. 17-347 or PGE's 2019 draft IRP filings have any bearing on PGE's renewable resource deficiency date under the Fossil Lake PPA. Under the text, context, and plain language of the Fossil Lake PPA, PGE became renewable resource deficient for purposes of the PPA on January 1, 2020.

19. The allegations in Paragraph 19 constitute legal conclusions or legal arguments to which no response is required.

20. The allegations in Paragraph 20 constitute legal conclusions or legal arguments to which no response is required.

21. The allegations in Paragraph 21 constitute legal conclusions or legal arguments to which no response is required.

22. The allegations in Paragraph 22 constitute legal conclusions or legal arguments to which no response is required.

23. The allegations in Paragraph 23 constitute hypothetical situations and legal conclusions or legal arguments to which no response is required.

PRAYER FOR RELIEF

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

25. PGE does not understand the final unnumbered paragraph of the Complaint appearing in bold and italicized text to be an allegation or prayer for relief requiring response. To the extent that the Commission deems it to contain any allegations, PGE denies them and to the extent the Commission deems it as containing any prayer for relief PGE requests that the Commission deny the requested relief. PGE notes that the Joint Utilities' Response to Stakeholders Questions in Docket AR 629 has not resulted in any effective or applicable rule related to alternative dispute resolution and that QF stakeholders have generally opposed the Joint Utilities Response in AR 629. PGE does not oppose informal settlement discussions.

V. AFFIRMATIVE DEFENSES

A. Material Breach of Contract

26. Plaintiff Fossil Lake materially breached the PPA by failing to timely meet its obligations under Sections 2.2.1 and 2.2.2 of the PPA.

B. Termination

27. On January 2, 2020, defendant PGE terminated the PPA pursuant to Section 2.2.3 of the PPA for Fossil Lake's uncured breach of Sections 2.2.1 and 2.2.2 of the PPA.

28. PGE terminated the PPA effective January 2, 2020, by providing written notice of termination to Fossil Lake on January 2, 2020, as required and authorized by Section 8.2 of the PPA.

VI. PGE's COUNTERCLAIM

For PGE's Counterclaim, PGE alleges as follows:

A. Identity of the Parties

29. Fossil Lake is a limited liability company formed under the laws of the state of Oregon. Fossil Lake's address registered with the Oregon Secretary of State is: Centerpointe Drive, Suite 590, Lake Oswego, Oregon 97035. Fossil Lake's representative who signed the 2015 PPA between PGE and Fossil Lake is David W. Brown. Mr. Brown is senior principal and co-founder of Obsidian Renewables, LLC ("Obsidian"). Obsidian describes itself as the largest developer of utility-scale photovoltaic facilities in the Pacific Northwest. Obsidian and Fossil Lake register the same address with the Oregon Secretary of State. The Registered Agent for Fossil Lake is MN Service Corporation (Oregon), 111 SW Fifth Avenue, #3400, Portland, Oregon 97204.

30. PGE is an investor-owned public utility regulated by the Public Utility Commission of Oregon ("Commission") under ORS Chapter 757. PGE is headquartered at 121 SW Salmon Street, Portland, Oregon 97204.

B. Jurisdiction and Applicable Law

31. This case involves the interpretation of a standard PPA that was executed between PGE and Fossil Lake consistent with the Commission's rules and orders implementing the Public Utility Regulatory Policies Act ("PURPA") (16 U.S.C. 824a-3) and associated state law (ORS 758.505 to ORS 758.555).

32. Pursuant to ORS 756.500, the Commission has authority to resolve disputes between parties whose business or activities are regulated by statutes under the Commission's jurisdiction. The Commission is vested with authority to implement PURPA and the Federal Energy Regulation Commission's ("FERC") implementing regulations (*see* 16 U.S.C. 824a-3(f)), and, under state law, to establish "the terms and conditions for the purchase of energy or energy and capacity from a qualifying facility" ORS 758.535(2)(a).

33. Section 17 of the PPA further grants the Commission jurisdiction to interpret the PPA.

34. Given the authority vested in the Commission, the Commission has jurisdiction to resolve disputes between PGE and Fossil Lake relating to the interpretation of the PPA. The PPA is a product of PURPA, state law, and the Commission's implementing rules and orders. The PPA is based on a standard contract form crafted pursuant to a complex history of Commission orders. Consequently, interpreting the PPA involves important issues of PURPA and state law and policy within the Commission's unique expertise and primary jurisdiction.

35. The Oregon statutes relevant to this case include ORS 756.500 to ORS 756.610 and ORS 758.505 to ORS 758.555. The Oregon rules relevant to this case include those within Divisions 1 and 29 of Chapter 860 of the Oregon Administrative Rules. Also relevant to this case are the Commission's orders related to PURPA including the Commission's orders requiring PGE to offer and maintain standard contracts for eligible QFs and standard avoided cost rates, including without limitation Order No. 06-538 and Order No. 07-360.

36. Additionally, federal law is implicated under the provisions of PURPA, 16 U.S.C. § 824, *et seq.*, 16 U.S.C. § 2601, *et seq.*, and administrative rules promulgated by FERC under PURPA, 18 C.F.R. §§ 292.101-292.602.

C. PGE's Factual Allegations

37. PGE refers to and incorporates herein all preceding paragraphs.

38. The PPA had a 20-year term measured from the PPA's April 29, 2015, Effective Date.⁹ As a result, the term of the PPA (unless terminated earlier in accordance with Section 8 or 11) was from April 29, 2015, until April 29, 2035.

39. Fossil Lake was obligated to deliver and sell to PGE any and all Net Output from the Facility during the term of the PPA, that is any and all Net Output from the Facility during the period April 29, 2015, through April 29, 2035.

40. For any Net Output from the Facility delivered to PGE during the initial 15 years of the PPA term (i.e., during the period April 29, 2015, through April 29, 2030) PGE was obligated to pay Fossil Lake the appropriate renewable fixed prices for solar QF found in tables 6a and 6b of Exhibit D to the PPA.¹⁰ The fixed prices that PGE was obligated to pay during this period increased substantially beginning January 1, 2020.

41. The substantial increase in the fixed prices found in tables 6a and 6b of Exhibit D to the PPA reflect the fact that beginning January 1, 2020, and for purposes of the PPA, PGE is considered to be renewable resource deficient and is therefore required to pay fixed prices that reflect the cost of a renewable proxy resource, which include PGE's avoided cost of capacity.

42. Exhibit D to the PPA further demonstrates that the Commission has approved January 1, 2020, as the date PGE becomes renewable resource deficient for purposes of the PPA because the definitions of Renewable Resource Sufficiency Period and Renewable Resource Deficiency Period found on Sheet 201-23 of Exhibit D demonstrate that under the Fossil Lake

⁹ See Section 2.3 of the PPA.

¹⁰ See Footnote 5 regarding QFs representative's litigation position in Docket No. UM 1931 that the 15-year fixed price period begins at scheduled or actual Commercial Operation Date.

PPA the Commission defined PGE as moving from renewable resource sufficient to renewable resource deficient at the beginning of 2020.

43. Under Section 2.2.1 of the PPA, Fossil Lake's deadline to begin initial delivery of Net Output was December 15, 2016.

44. Fossil Lake did not begin initial delivery of Net Output on or before December 15, 2016.

45. Fossil Lake did not begin initial delivery of Net Output on or before January 2, 2020.

46. Under Section 2.2.2 of the PPA, Fossil Lake's deadline to achieve the Commercial Operation Date was March 15, 2017.

47. By letter dated January 30, 2017, PGE agreed to extend the Section 2.2.2 deadline for Fossil Lake to achieve the Commercial Operation Date from March 15, 2017, to November 30, 2017. A copy of the January 30, 2017 letter is attached to this Answer as **Exhibit B**.

48. Fossil Lake did not achieve the Commercial Operation Date on or before November 30, 2017.

49. Fossil Lake did not achieve the Commercial Operation Date on or before January 2, 2020.

50. On November 27, 2019, PGE provided Fossil Lake with written notice of PGE's intent to terminate the PPA pursuant to Sections 2.2.3 and 8.2 as soon as PGE became renewable resource deficient for purposes of the PPA on January 1, 2020. A copy of PGE's November 27, 2019, notice of intent to terminate has been filed with the Commission as Exhibit B to the Complaint and is incorporated by reference.

51. On December 20, 2019, Fossil Lake sent PGE a letter indicating that Fossil Lake did not agree that PGE would be renewable resource deficient for purposes of the PPA on January 1, 2020, and asking PGE not to issue notice of termination on January 1, 2020.

52. On December 31, 2019, PGE responded to Fossil Lake's December 20, 2019, letter. PGE explained its position that it would be renewable resource deficient for purposes of the PPA beginning January 1, 2020, and indicated that it intended to issue a notice of termination pursuant to Sections 2.2.3 and 8.2 on January 2, 2020. A copy of this letter is attached to the Complaint as Exhibit C.

53. On December 31, 2019, Fossil Lake filed its Complaint.

54. The Complaint did not seek to enjoin PGE from issuing its notice of termination on January 2, 2020.

55. On January 1, 2020, PGE became renewable resource deficient for purposes of the PPA. This is demonstrated by the text, context, and plain meaning of the PPA, including Exhibit D. This is also consistent with Commission Order No. 06-538 and Order No. 07-360.

56. On January 2, 2020, PGE issued a written notice of termination to Fossil Lake pursuant to Section 2.2.3 and 8.2 of the PPA. A copy of PGE's January 2, 2020 notice of termination is attached to this Answer as **Exhibit A**.

57. PGE's January 2, 2020, written notice of termination was sent on January 2, 2020 by certified mail, return receipt requested, to the addressees listed for Fossil Lake in Section 20.1 of the PPA. A copy of the U.S. Postal Service's tracking information showing that PGE's notice of termination to Fossil Lake was mailed on January 2, 2020, is attached to this Answer as **Exhibit C**. A copy of the signed return receipt indicating that PGE's notice of termination to Fossil Lake was received on January 6, 2020, is attached to this Answer as **Exhibit D**.

58. Courtesy copies of PGE's January 2, 2020 notice of termination were also sent by email to Mr. David Brown at dbrown@obsidianrenewables.com, and to Mr. Richard Lorenz at rlorenz@cablehouston.com.

59. Pursuant to Sections 2.2.3 and 8.2 of the PPA, PGE's written notice of termination dated and mailed January 2, 2020, effectively terminated the PPA on January 2, 2020.

60. If PGE had not terminated the PPA and allows Fossil Lake to sell to PGE under the terms of the PPA, then PGE's customers will be exposed over the term of the PPA to over ten million dollars in harm from the fixed prices found in the PPA as compared with PGE's currently applicable standard renewable avoided cost prices. The PPA prices reflect stale avoided cost prices approved in 2014, over five years ago, that are substantially higher than PGE's currently applicable standard renewable avoided cost prices.

61. As a result, PGE's customers could suffer more than ten million dollars in harm if PGE is not allowed to exercise its right to terminate the PPA when PGE has passed into the renewable resource deficiency period established by Exhibit D to the PPA and Fossil Lake has failed to comply with Sections 2.2.1 and 2.2.2 of the PPA.

62. PGE is allowed to terminate the PPA and protect its customers because PGE became renewable resource deficient under the PPA on January 1, 2020, and Fossil Lake has breached the PPA and is years late in achieving initial delivery and in achieving its Commercial Operation Date.

63. PGE's termination of the PPA does not prevent Fossil Lake from developing its proposed project. Fossil Lake is free to sell its output to the local interconnecting utility or to request from PGE (or PacifiCorp) a new power purchase agreement reflecting current avoided cost prices, the current PPA form, and the current applicable schedules.

A. PGE's Claim for Relief – Determination that PGE terminated the PPA.

64. PGE re-alleges paragraphs 1-63 of this Answer.

65. Pursuant to Section 2.2.3 of the PPA, PGE had the right to terminate the PPA on January 2, 2020, because PGE was renewable resource deficient (as defined by the Commission) under the PPA beginning on January 1, 2020, and because as of January 2, 2020, Fossil Lake had failed to meet its obligation under Sections 2.2.1 and 2.2.2 of the PPA

66. PGE's January 2, 2020, written notice to Fossil Lake that PGE terminated the PPA pursuant to Sections 2.2.3 and 8.2 was effective when mailed on January 2, 2020, and terminated the PPA on January 2, 2020.

67. There is a dispute between PGE and Fossil Lake as to whether PGE's January 2, 2020, notice of termination was effective.

68. The Commission has the jurisdiction and authority to interpret the PPA; to hold that PGE was renewable resource deficient (as defined by the Commission) under the PPA beginning January 1, 2020; and to hold that PGE's January 2, 2020, notice of termination was effective and terminated the PPA on January 2, 2020.

V. PGE'S PRAYERS OF RELIEF

PGE respectfully requests that the Commission:

69. Deny Fossil Lake's Claims for Relief and dismiss the Complaint with prejudice.

70. Grant PGE's Counterclaim and issue an order holding: (A) that PGE became renewable resource deficient under the PPA, including for purposes of Section 2.2.3 of the PPA, on January 1, 2020; (B) that Fossil Lake failed to satisfy its obligations under Section 2.2.1 and 2.2.2 before January 2, 2020; and (C) that PGE's January 2, 2020, notice of termination had the effect of terminating the PPA on January 2, 2020.

71. Grant any other relief as the Commission deems necessary and appropriate.

Dated: January 21, 2020.

Respectfully submitted,

MARKOWITZ HERBOLD PC

s/ Jeffrey S. Lovinger

Jeffrey S. Lovinger, OSB #960147

Dallas S. DeLuca, OSB #072992

Markowitz Herbold PC

1455 SW Broadway, Suite 1900

Portland, OR 97201

(503) 295-3085 (office)

(503) 323-9105 (fax)

JeffreyLovinger@MarkowitzHerbold.com

DallasDeLuca@MarkowitzHerbold.com

PORTLAND GENERAL ELECTRIC COMPANY

David White, OSB #011382

Associate General Counsel

121 SW Salmon Street, 1WTC1301

Portland, Oregon 97204

(503) 464-7701

David.White@pgn.com

Attorneys for Portland General Electric Company

EXHIBIT A

JANUARY 2, 2020 NOTICE OF TERMINATION

UM 2051

Fossil Lake Solar, LLC

v.

Portland General Electric

PGE's Answer, Affirmative Defenses, and Counterclaim



Portland General Electric
121 SW Salmon Street · Portland, Ore. 97204
PortlandGeneral.com

January 2, 2020

Certified U.S. Mail, Return Receipt Requested, and by Email
(dbrown@obsidianrenewables.com)

David W. Brown
Manager, Fossil Lake Solar, LLC
5 Centerpointe Dr., Ste. 250
Lake Oswego, OR 97035-8635

Re: Notice of termination of the Fossil Lake Solar PPA

Dear Mr. Brown:

This letter addresses the failure of Fossil Lake Solar, LLC to timely establish the Commercial Operation Date¹ in its Solar Qualifying Facility Standard Renewable Off-System Variable Power Purchase Agreement (“PPA”). Portland General Electric Company (“PGE”) executed the PPA with Fossil Lake Solar, LLC (entered into as of April 1, 2015) (“Seller”). This communication is the notice of termination of this PPA, effective on the date of delivery of this letter.

PGE is terminating this PPA because the Seller did not establish a Commercial Operation Date by January 1, 2020. Under Section 2.2.3 of the PPA, PGE may terminate the PPA if (1) Seller failed to timely establish their Commercial Operation Date, and (2) PGE is resource deficient.

Concerning the first requirement, Section 2.2 of the Fossil Lake PPA required Fossil Lake to establish the Commercial Operation Date on or before November 30, 2017.

Concerning the second requirement, PGE entered a resource deficient period for renewable resources as of January 1, 2020. The Renewable Resource Deficiency Period is noted in Schedule 201, which is attached as Exhibit D to the PPA, at Sheet 201-23 and in the pricing tables in Sheets 201-17 and 201-18.

¹ Capitalized terms not defined in this letter shall have the meaning ascribed to them in the PPAs.

David W. Brown
January 2, 2020
Page 2

Because Seller did not establish their Commercial Operation Date on or before January 1, 2020, PGE is terminating the PPA pursuant to Sections 2.2.3 and 8.2 of the PPA. Pursuant to Section 8 of the PPA, PGE reserves its right, in addition to termination, to pursue any and all legal or equitable remedies provided by law or pursuant to the PPA.

Very truly yours,

PGE QF Administration

cc: Richard Lorenz, Cable Huston Benedict Haagensen & Lloyd LLP
(by certified mail return receipt requested and by email)

EXHIBIT B

JANUARY 30, 2017 LETTER GRANTING EXTENSION

UM 2051

Fossil Lake Solar, LLC

v.

Portland General Electric

PGE's Answer, Affirmative Defenses, and Counterclaim



Portland General Electric Company
121 SW Salmon Street • Portland, Oregon 97204

01/30/2017

Mr. David Brown
Fossil Lake Solar LLC
5 Centerpointe Dr. Suite 590
Lake Oswego, OR 97035

RE: Fossil Lake Solar LLC request for extension of Commercial Operations Date

Dear David,

Thank you for your email from January 16, 2017 requesting an extension of the Commercial Operations Date (COD) for Fossil Lake Solar LLC's Standard Power Purchase Agreements (Standard PPA) with Portland General Electric (PGE).

On April 1, 2015 PGE and Fossil Lake Solar LLC executed a Qualified Facility Standard Power Purchase contract under PGE's then current Schedule 201. Fossil Lake Solar committed in section 2.2.1 of the contract to commence initial delivery of energy to PGE on December 15, 2016. In section 2.2.2 of the contract Fossil Lake Solar committed to a commercial operations date of March 1, 2017.

On January 16, 2017, PGE received via electronic mail a request from Fossil Lake Solar LLC to extend the facility COD to November, 30, 2017. The reason for the extension request was stated as "an unexpected delay by the Bonneville Power Administration in confirming transmission availability for the route from La Pine, Oregon to Portland."

PGE agrees to a one time extension of the facility COD based on the information provided. Fossil Lake remains responsible for all warrants, representations and covenants in the executed contract. Additionally, Portland General Electric requests that Fossil Lake Solar provide quarterly project milestone updates.

If you have any questions, please contact me at (503) 464-7013 or Angeline Chong at (503) 464-7343.

Sincerely,

A handwritten signature in blue ink that reads "Shawn P Davis". The signature is written in a cursive style and is positioned above the printed name.

Shawn P Davis |
Portland General Electric |
121 SW Salmon St. 3WTC0306 | Portland, Oregon 97204 |
W: 503-464-7013 | F: 503-464-7608 |
E: shawn.davis@pgn.com

EXHIBIT C

UNITED STATES POSTAL SERVICE TRACKING INFORMATION
REGARDING
JANUARY 2, 2020 NOTICE OF TERMINATION

UM 2051

Fossil Lake Solar, LLC

v.

Portland General Electric

PGE's Answer, Affirmative Defenses, and Counterclaim

Track Another Package +

Track Packages
Anytime, Anywhere

Get the free Inform d Delivery® feature to receive
automated notificæ ions on your packages

Learn More

(https://reg.usps.com/xsell?

app=UspsTools&ref=homepageBanner&appURL=https%3A%2F%2Finformeddelivery.usps.com/box/pages/intro/start.action)

Tracking Number: 70181130000112602807

Remove X

Your item was delivered to the front desk, reception area, or mail room at 1:16 pm on January 6, 2020 in LAKE OSWEGO, OR 97035.

✓ Delivered

January 6, 2020 at 1:16 pm
Delivered, Front Desk/Reception/Mail Room
LAKE OSWEGO, OR 97035

Get Updates v

Text & Email Updates v

Tracking History ^

January 6, 2020, 1:16 pm

Delivered, Front Desk/Reception/Mail Room
LAKE OSWEGO, OR 97035

Your item was delivered to the front desk, reception area, or mail room at 1:16 pm on January 6, 2020 in LAKE OSWEGO, OR 97035.

January 6, 2020, 7:43 am

Out for Delivery
LAKE OSWEGO, OR 97035

January 6, 2020, 7:32 am

Arrived at Unit
LAKE OSWEGO, OR 97035

January 5, 2020, 4:11 pm

Departed USPS Facility
PORTLAND, OR 97215

January 4, 2020

In Transit to Next Facility

January 2, 2020, 7:35 pm

Arrived at USPS Facility
PORTLAND, OR 97215

Product Information ^

Postal Product:

Features:
Certified Mail™

Feedback

EXHIBIT D

FOSSIL LAKE POSTAL RETURN RECEIPT
REGARDING
JANUARY 2, 2020 NOTICE OF TERMINATION

UM 2051

Fossil Lake Solar, LLC

v.

Portland General Electric

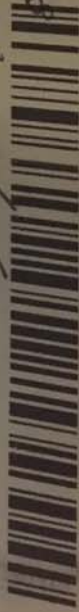
PGE's Answer, Affirmative Defenses, and Counterclaim

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. David W. Brown
Manager
Fossil Lake Salem LLC
Lake Oswego, OR 97035



9590 9402 5328 9154 5878 83

2. Article Number (Transfer from service label)

7018 1130 0001 1260 2807

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
David Brown Addressee

B. Received by (Printed Name) C. Date of Delivery
David Brown *1/6/20*

D. Is delivery address different from item 1? Yes No
If YES, enter delivery address below:

3. Service Type
- Adult Signature Restricted Delivery
 - Adult Signature Restricted Delivery
 - Certified Mail®
 - Certified Mail Restricted Delivery
 - Collect on Delivery
 - Collect on Delivery Restricted Delivery
 - Priority Mail Express®
 - Registered Mail™
 - Registered Mail Restricted Delivery
 - Return Receipt for Merchandise
 - Signature Confirmation™
 - Signature Confirmation Restricted Delivery
 - Mail Restricted Delivery
 - Mail Restricted Delivery (500)

Domestic Return Receipt