

June 9, 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 Defendant Portland General Electric Company's Response to Fossil Lake Solar, LLC's Motion for Summary Judgment.

Thank you for your assistance.

Very truly yours,



Jeffrey S. Lovinger

Attachment
1008050

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 2051**

FOSSIL LAKE SOLAR, LLC,

Complainant,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**DEFENDANT PORTLAND GENERAL
ELECTRIC COMPANY'S RESPONSE
TO FOSSIL LAKE SOLAR, LLC'S
MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION

Fossil Lake Solar, LLC (“Fossil Lake”) contractually agreed to achieve commercial operations over two years ago but has not even begun constructing its facility. Section 2.2.3 of the parties’ Power Purchase Agreement (“PPA”) states that Portland General Electric Company (“PGE”) may terminate the PPA due to delayed operations if PGE is “resource deficient (as defined by the Commission).”¹ The Fossil Lake PPA incorporates PGE’s 2014 Schedule 201, which provides that PGE’s “Renewable Resource Deficiency Period” began on January 1, 2020.² Because PGE is in the Renewable Resource Deficiency Period as defined by the PPA and Fossil Lake has not achieved commercial operations, PGE properly terminated on January 2, 2020.

Despite the plain language of its PPA, Fossil Lake contends that PGE is not currently “resource deficient” under the terms of the PPA. But Fossil Lake fails to identify a relevant, Commission-approved definition of “resource deficient.” Instead, Fossil Lake relies on: (1) a stipulation by PacifiCorp (not PGE) that by its terms “does not affect” even PacifiCorp’s termination provision, much less PGE’s contract form; and (2) a later revision to PGE’s Schedule 201 that the Public Utility Commission of Oregon (“the Commission”) ordered would only be “effective” in PPAs signed after September 2017. This authority is irrelevant to the PPA Fossil Lake signed and breached. The Commission should enforce the plain terms of the Fossil Lake PPA and rule that PGE is “resource deficient” during the “Renewable Resource Deficiency Period.”

¹ Compl., Ex. A at 7 (Fossil Lake PPA at Section 2.2.3) (Dec. 31, 2019).

² *Id.* at 34 (2014 Schedule 201, attached to Fossil Lake PPA as Exhibit D, at Sheet No. 201-23).

II. ARGUMENT

A. ACCORDING TO THE TEXT OF THE FOSSIL LAKE PPA, PGE IS CURRENTLY “RESOURCE DEFICIENT.”

1. PGE is currently “resource deficient” because the “Renewable Resource Deficiency Period” in the Fossil Lake PPA began in January 2020.

As explained in PGE’s motion for summary judgment, PGE’s 2014 Schedule 201 applies to the Fossil Lake PPA.³ The 2014 Schedule 201 states that the “Renewable Resource Deficiency Period” begins in January 2020.⁴

Contrary to Fossil Lake’s motion, the Renewable Resource Deficiency Period in PGE’s 2014 Schedule 201 is not PGE’s “own made-up definition”⁵ of resource deficiency. The Commission approved the Renewable Resource Deficiency Period in Order No. 14-435 when it approved PGE’s first renewable-specific PPA forms.⁶ The 2014 Schedule 201 is an exhibit to the PPA and its terms are incorporated by reference into the PPA.⁷ Section 1.33 of the Fossil Lake PPA “incorporate[s] by reference” the PGE Schedule 201 “in effect on the Effective Date of this Agreement and attached hereto as Exhibit D.”⁸ The Effective Date of the Fossil Lake PPA is April 29, 2015,⁹ and the PPA attaches and incorporates the 2014 Schedule 201.¹⁰ Thus, under the

³ PGE Mot. for Summ. J. at 6-7 (May 19, 2020).

⁴ Compl., Ex. A at 34 (2014 Schedule 201 at Sheet 201-23) (“This is the period from 2020 through 2034.”).

⁵ Fossil Lake Mot. for Summ. J. at 12 (May 19, 2020).

⁶ *In the Matter of the Commission Investigation into Qualifying Facility (QF) Contracting and Pricing*, Docket No. UM 1610, Order No. 14-435 at 1 (Dec. 16, 2004).

⁷ Compl., Ex. A at 6 (Fossil Lake PPA at Section 1.33).

⁸ *Id.* at 6 (Fossil Lake PPA at Section 1.33).

⁹ Joint Stipulated Undisputed Facts ¶ 20 (May 1, 2020).

¹⁰ Compl., Ex A at 22-34 (2014 Schedule 201). The 2014 Schedule 201 was approved by Order No. 14-435 and effective with regard to standard contracts entered into from December 17, 2014, through June 29, 2015 (after which it was replaced by the version of Scheduled 201 approved by Order No. 15-206, effective June 30, 2015). Docket No. UM 1610, Order No. 14-435; *see In the Matter of PGE Application to Update Schedule 201 QF Information*, Docket No. UM 1728, Order No. 15-206 (Jun. 23, 2015).

first step of the *Yogman* analysis, the “Renewable Resource Deficiency Period” in the 2014 Schedule 201 is the relevant, Commission-approved definition of “resource deficient.”¹¹

Contrary to Fossil Lake’s motion, Order No. 17-347, issued in 2017, does not provide the definition of “resource deficient” for the 2015 Fossil Lake PPA. In Order No. 17-347, the Commission ordered PGE to file a revised Schedule 201 that contained a new date for the “Renewable Resource Deficiency Period.”¹² In that order, the Commission stated: “PGE’s revised Schedule 201 is approved *effective September 18, 2017.*”¹³ Consistent with this order, PGE filed an updated Schedule 201 and Commission Staff verified the updated Schedule 201 complied with Order No. 17-347.¹⁴ The 2017 Schedule 201 begins the “Renewable Resource Deficiency Period” in January 2025.¹⁵ Throughout its motion, Fossil Lake contends that the Fossil Lake PPA incorporates this new 2025 date.¹⁶ But Fossil Lake’s interpretation is barred by the express terms of the Fossil Lake PPA and Order No. 17-347.

2. Fossil Lake’s case-by-case “empirical” approach is barred by the PPA.

Fossil Lake also contends that every time PGE seeks to terminate a PPA due to delayed operations, PGE must engage in an “empirical inquiry into whether PGE is actually and presently in a resource deficient state.”¹⁷ Not so. PGE may terminate when it “is resource deficient (*as*

¹¹ See *Yogman v. Parrott*, 325 Or 358, 361 (1997) (“First, the court examines the text of the disputed provision, in the context of the document as a whole. If the provision is clear, the analysis ends.”)

¹² Docket No. UM 1728, Order No. 17-347 at 1 (Sep. 14, 2017).

¹³ *Id.* (emphasis added).

¹⁴ Docket No. UM 1728, PGE’s Revised Application to Update Schedule 201 QF Information – Compliance Filing (Sep. 14, 2017); Docket No. UM 1728, Staff’s Letter at 1 (Sep. 18, 2017) (stating PGE’s filing of September 14, 2017, is in compliance with Order No. 17-347). PGE filed an errata to its Revised Application which included a revision to the definition of “Renewable Resource Deficiency Period.” (Docket No. UM 1728, PGE Errata Compliance Filing (Apr. 12, 2019).) Staff recommended approval of PGE’s errata, and the Commission adopted the Staff’s recommendation in Docket No. UM 1728, Order No. 18-189 (May 23, 2018).

¹⁵ See PGE Errata Compliance Filing at Sheet No. 201-22 (“This is the period from 2025.”).

¹⁶ Fossil Lake Mot. for Summ. J. at 1, 6, 9, 21, 23.

¹⁷ *Id.* at 11.

defined by the Commission).”¹⁸ The only relevant, Commission-approved definition of “resource deficient” is the “Renewable Resource Deficiency Period” in Schedule 201. PGE (and all parties) are entitled to rely on the contract itself and performance under the contract to determine when the contract can be terminated.

3. Section 4.5’s use of the defined term “Renewable Resource Deficiency Period” is not relevant.

Section 4.5’s use of the phrase “Renewable Resource Deficiency Period” says nothing about the absence of that phrase in Section 2.2.3 for two independent reasons. First, Section 2.2.3, unlike Section 4.5, is a general PPA provision that appears in all versions of PGE’s standard PPA forms, renewable and non-renewable forms alike.¹⁹ Similar to Section 2.2.3, Schedule 201 applies to both sets of forms because it includes different defined “Deficiency Period[s]” for renewable resources (“Renewable Resource Deficiency Period”) and non-renewable resources (“Resource Deficiency Period”). As explained in PGE’s motion, the general phrase “resource deficient” in Section 2.2.3 refers to either the “Renewable Resource Deficiency Period” or the “Resource Deficiency Period,” depending on which resource (renewable or non-renewable) the qualifying facility (“QF”) provides.²⁰ By contrast, Section 4.5 assigns ownership of renewable attributes and is specific to renewable QFs.²¹ Unlike Section 2.2.3, Section 4.5 can only refer to the “*Renewable Resource Deficiency Period*” because it only appears in *renewable* PPAs.

Second, as described in greater detail below, Section 2.2.3’s drafting predates the inclusion of the defined phrases “Renewable Resource Deficiency Period” and “Resource Deficiency

¹⁸ Compl., Ex. A at 7 (Fossil Lake PPA at Section 2.2.3) (emphasis added).

¹⁹ *Compare* Compl., Ex. A at 7 (Fossil Lake PPA at Section 2.2.3) and 10-11 (Fossil Lake PPA at Section 4.5) (emphasis added) *with* Docket No. UM 1610, Order No. 14-435 (approving all eight versions of PGE standard contract form in effect when the Fossil Lake PPA was executed).

²⁰ PGE Mot. for Summ. J. at 2.

²¹ Compl., Ex. A at 10-11 (Fossil Lake PPA at Section 4.5).

Period” in Schedule 201. By contrast, Section 4.5’s drafting postdates the inclusion of these terms.²² Thus, the presence of the defined phrase “Renewable Resource Deficiency Period” in one provision and not the other is a feature of the PPA form’s drafting history, not as Fossil Lake contends a “deliberate[]”²³ attempt to foreclose application of Schedule 201’s deficiency periods to Section 2.2.3.

B. FOSSIL LAKE FAILS TO IDENTIFY A SINGLE, RELEVANT DEFINITION OF “RESOURCE DEFICIENT” TO SUPPORT ITS INTERPRETATION.

- 1. PacifiCorp’s 2014 stipulation is irrelevant because that stipulation (1) addressed a different issue in a materially-different PPA, (2) was signed by different parties, (3) did not resolve the meaning of the termination provision in PacifiCorp’s PPA, and (4) was never approved by the Commission.**

Fossil Lake hinges its interpretive argument on litigation regarding PacifiCorp’s 2011 PPA (Docket No. DR 48) and a related PacifiCorp stipulation in Docket No. UM 1610.²⁴ But the PacifiCorp litigation and PacifiCorp stipulation are clearly irrelevant. First, in deciding this summary judgment motion, the Commission considers extrinsic evidence such as the PacifiCorp litigation and the PacifiCorp stipulation only if the Commission first concludes that the Fossil Lake PPA is ambiguous and the Commission moves to stage two of the *Yogman* analysis. Second, even at stage two of the *Yogman* analysis, the PacifiCorp litigation and the PacifiCorp stipulation are irrelevant because they address a different utility’s materially different contract form, neither the litigation nor the stipulation involved PGE or Fossil Lake, the litigation was voluntarily dismissed without any Commission decision, and the PacifiCorp stipulation was never approved by the

²² See also *In the Matter of PGE v. Alfalfa Solar I LLC, et al.*, Docket No. UM 1931, Order No 19-255 at 15 (Aug. 2, 2019) (stating that Section 4.5 of PGE’s PPA not relevant to the price terms in Schedule 201).

²³ Fossil Lake Mot. for Summ. J. at 18-19.

²⁴ *Id.* at 16-19.

Commission. PGE addresses Fossil Lake’s argument not because it has any merit but rather to ensure that there is no confusion that:

- (1) The stipulation concerned a materially different PPA with different language;
- (2) The stipulation did not resolve the meaning of the PPA provision at issue in this case;
- (3) The stipulation did not involve PGE or PGE’s standard PPA form; and
- (4) The stipulation was never approved by the Commission.

(a) The declaratory ruling proceeding regarding PacifiCorp’s 2011 PPA ended inconclusively when the parties settled.

For background, PacifiCorp’s 2011 PPA stated that PacifiCorp could not terminate the PPA due to delayed commercial operations “unless PacifiCorp is in a resource deficient state.”²⁵ To resolve the meaning of the phrase “resource deficient state” in PacifiCorp’s standard contract form, the Renewable Energy Coalition (“REC”), filed a petition for a declaratory ruling with the Commission.²⁶ In that petition, REC represented renewable energy producers and sought a ruling on whether “resource deficient state” referred to the utility’s “actual[]” resource deficient state at the time of default or the utility’s “projected” resource deficient state at the time of contracting.²⁷

Unlike the Fossil Lake PPA’s Schedule 201, the PacifiCorp rate schedule in effect made no mention of resource deficiency and had no defined terms such as the “Renewable Resource Deficiency Period.”²⁸ Further, unlike the Fossil Lake PPA that states that resource deficient is “as defined by the Commission”, the termination provision in PacifiCorp’s contract form made no reference to any Commission definition of resource deficient state.²⁹

²⁵ *In the Matter of REC Petition for Declaratory Ruling*, Docket No. DR 48, Petition for Declaratory Ruling, Ex. A at 18 (PacifiCorp PPA for New Firm QFs with 10,000 kW Facility Capacity Rating, or Less and not an Intermittent Resource (“PacifiCorp PPA”) at Section 11.3.1) (Feb. 10, 2014) (available at <https://edocs.puc.state.or.us/efdocs/HAA/dr48haa13573.pdf>).

²⁶ *See, id.*, Petition.

²⁷ *Id.* at 6-7.

²⁸ *See, id.*, Ex. C at 3 (PacifiCorp Schedule 31 Avoided Cost Purchases from QF of 10,000 KW or Less at Original Sheet 37-1).

²⁹ *Id.*, Ex. A at 19 (PacifiCorp PPA at Section 11.3.1).

Fossil Lake contends that PacifiCorp was “unsuccessful[]” in the declaratory ruling proceeding.³⁰ In fact, PacifiCorp settled with the QFs in default. The Commission granted REC’s motion to withdraw the petition in light of these settlements, and therefore the Commission never interpreted PacifiCorp’s termination provision.³¹ The record in this summary judgment proceeding does not reveal the terms of those individual settlements.³²

Nor is the administrative record in a proceeding regarding a different utility’s forms relevant extrinsic evidence here. In Oregon, at the first step of a *Yogman*³³ contract interpretation analysis, the Commission may review extrinsic evidence “regarding the circumstances underlying the formation of a contract . . . to determine whether a contract provision is ambiguous.”³⁴ At the second step, the Commission may “examine extrinsic evidence of the contracting parties’ intent.”³⁵ As applied to standard PPAs, the regulatory history of “the key terms of the contracts that are the subject of this proceeding” is relevant extrinsic evidence at step two.³⁶ PacifiCorp’s contract form is not “the subject of this proceeding” and therefore the regulatory history behind that form is not admissible evidence.

(b) PacifiCorp’s stipulation with QFs in Docket No. UM 1610 addressed a different issue and was never approved by the Commission.

Fossil Lake also misstates the significance of a PacifiCorp stipulation from Docket No. UM 1610, which addressed renewable pricing and REC ownership, not termination. The

³⁰ See Fossil Lake Mot. for Summ. J. at 17.

³¹ Docket No. DR 48, Order No. 14-175 at 1 (May 27, 2014) (dismissing petition).

³² See Docket No. DR 48, REC Mot. to Withdraw at 2 (May 27, 2014) (stating without elaboration that PacifiCorp reached settlements with QFs “either as part of the settlement of DR 48 or on a case-by-case basis”) (emphasis added) (available at <https://edocs.puc.state.or.us/efdocs/HAO/dr48hao84148.pdf>).

³³ *Yogman v. Parrott*, 325 Or 358 (1997).

³⁴ *State ex rel. Dept. of Education. v. Vantage Technologies Knowledge Assessment*, 243 Or App 557, 565 (2011) (citing *Batzer Const., Inc. v. Boyer*, 204 Or App 309, 316-17 (2006)).

³⁵ Docket No. UM 1931, Order 19-255 at 13.

³⁶ See *id.* at 3 and 16-17 (addressing regulatory history after step one of a *Yogman* analysis).

PacifiCorp stipulation does not apply to the Fossil Lake PPA for four reasons: (1) the stipulation addressed renewable pricing and REC ownership, not the “appropriate interpretation of the termination provisions;”³⁷ (2) the stipulation addressed PacifiCorp’s materially-different contract forms;³⁸ (3) the Commission did not approve the stipulation;³⁹ and (4) neither PGE nor Fossil Lake signed the stipulation.⁴⁰ For all of these reasons, the PacifiCorp stipulation is not valid extrinsic evidence of the meaning of the Fossil Lake PPA.

In February 2014, after REC had filed its petition for declaratory ruling regarding the termination provision in PacifiCorp’s standard contracts discussed above, the Commission issued Order No. 14-058 in Docket No. UM 1610.⁴¹ In the order, the Commission altered its methodology for calculating renewable avoided cost prices and for assigning ownership of renewable energy attributes.⁴² In April 2014, while REC’s declaratory ruling proceeding was still pending, PacifiCorp filed an initial draft of contract forms to comply with Order No. 14-058.⁴³ After workshops with other stakeholders (none of whom are parties in this litigation) regarding the contents of those forms,⁴⁴ PacifiCorp and stakeholders filed a stipulation urging the Commission to approve modified revisions to PacifiCorp’s standard contract forms. The forms attached to the stipulation included the new defined terms “Renewable Resource Deficiency Period” and

³⁷ Docket No. UM 1610, Stipulation at 4 (Aug. 11, 2014) (available at <https://edocs.puc.state.or.us/efdocs/HAR/um1610har84528.pdf>).

³⁸ *Id.* at 3-6.

³⁹ Docket No. UM 1610, Order 14-295 at 1 and Appx. A at 3 (Aug. 19, 2014) (adopting Staff’s recommendation that “does not ask for Commission approval of the stipulation[.]”).

⁴⁰ Docket No. UM 1610, Stipulation at 8.

⁴¹ Docket No. UM 1610, Order No. 14-058 (Feb. 24, 2014).

⁴² *See id.*

⁴³ *See* Docket No. UM 1610, PacifiCorp’s Compliance Filing (Apr. 10, 2014) (available at <https://edocs.puc.state.or.us/efdocs/UAA/21353uaa154111.pdf>).

⁴⁴ Docket No. UM 1610, Staff Report at 1 (Apr. 24, 2014) (available at <https://edocs.puc.state.or.us/efdocs/HAU/um1610hau84611.pdf>).

“Resource Deficiency Period.”⁴⁵ However, the stipulation stated that the parties included the new defined terms “for the purpose of determining: (1) when the QF is entitled to renewable avoided costs prices, and (2) the ownership of Environmental Attributes and the transfer of Green Tags to PacifiCorp.”⁴⁶

The stakeholders expressly stated that the stipulation did not affect the dispute between PacifiCorp and REC regarding the interpretation of the termination provision:

A dispute *remains pending* before the Commission about the proper interpretation of resource deficiency for purposes of determining the Company's termination rights under the Small Firm Contract. The inclusion of specific dates in Schedule 37 and the associated Small Firm Contract is a compromise position and *does not affect the appropriate interpretation of the termination provisions*, subject to Commission order in this proceeding.⁴⁷

Fossil Lake cites the stipulation as evidence of PGE’s intent regarding the termination provisions in PGE’s standard contract forms.⁴⁸ As a threshold matter, the stipulation does not reveal even *PacifiCorp’s* intent with regard to the termination provision in its own contract, as that issue was expressly not addressed in the stipulation.

Just as important, the stipulation is not applicable to a different contract form signed by a different utility. Again, a private settlement regarding a different contract form is not admissible evidence for interpreting PGE’s form. The stipulation is not evidence of the “circumstances underlying” PGE’s forms or evidence of “the contracting parties’” intent.⁴⁹

⁴⁵ See Docket No. UM 1610, Stipulation at 3-4.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* (emphases added).

⁴⁸ Fossil Lake Mot. for Summ. J. at 18.

⁴⁹ See *State ex rel. Dept. of Education.*, 243 Or App at 565; Docket No. 1931, Order 19-255 at 13.

Fossil Lake implies that PGE was somehow involved in the drafting of the stipulation because PGE was an “active participant” in Docket No. UM 1610.⁵⁰ As the Commission knows, Docket No. UM 1610 is an open policy docket addressing many policy issues relevant to each utilities’ standard contract forms. Each utility and dozens of additional stakeholders have participated in Docket No. UM 1610 since its inception eight years ago. Nothing in the UM 1610 record or in the record here on this summary judgment motion suggests that PGE agreed to the terms of the PacifiCorp stipulation. PGE did not sign the stipulation.⁵¹ PGE did not offer written comments on the stipulation itself or on the PacifiCorp forms at issue. PGE did not even participate in the breakout sessions regarding PacifiCorp’s contract forms that resulted in the stipulation.⁵² PGE participated in Docket No. UM 1610 to revise its own contract forms, not PacifiCorp’s.

Fossil Lake also falsely states that Obsidian Renewables, LLC, Fossil Lake’s sole member, “executed” the stipulation.⁵³ It did not.⁵⁴ In fact, Obsidian Renewables, LLC, represented by Fossil Lake’s current counsel, filed separate comments disagreeing with the stipulation.⁵⁵

Fossil Lake also falsely states that the Commission “approved” the stipulation and therefore it “appl[ies] directly” to PGE’s contract forms.⁵⁶ The Commission did no such thing. Commission staff signed the stipulation and recommended that the Commission approve

⁵⁰ Fossil Lake Mot. for Summ. J. at 18.

⁵¹ Docket No. UM 1610, Stipulation ¶ 1 and at 8 (signature page of stipulation showing PacifiCorp, Commission Staff, REC, and CREA as signatories).

⁵² Docket No. UM 1610, Staff Report at 2 (Aug. 13, 2014) (stating that after an initial workshop with all utilities, “The Community Renewable Energy Association (CREA), REC, the Oregon Department of Energy (ODOE), PacifiCorp, One Energy, Inc., Obsidian Renewables, LLC., and Staff” participated in additional workshop sessions regarding PacifiCorp’s forms).

⁵³ Fossil Lake Mot. for Summ. J. at 18.

⁵⁴ See Docket No. UM 1610, Stipulation ¶ 1 and at 8 (signature page of stipulation showing PacifiCorp, Commission Staff, REC, and CREA as signatories).

⁵⁵ Docket No. UM 1610, Comments from Obsidian Renewables, LLC (Aug. 15, 2014) (“Obsidian did not join as a party to the Stipulation[.]”) (available at <https://edocs.puc.state.or.us/efdocs/HAC/um1610hac142923.pdf>).

⁵⁶ Fossil Lake Mot. for Summ. J. at 2, 18-19.

PacifiCorp’s revised contract forms which applied on a going forward basis.⁵⁷ But staff did not recommend that the Commission approve the stipulation, stating “Staff does not ask for Commission approval of the stipulation between Staff, Pacific, CREA, and REC.”⁵⁸ The Commission adopted staff’s recommendation and approved the forms but not the stipulation.⁵⁹ The Commission never approved the stipulation, nor has it ever ruled that non-signatories such as PGE are bound by the stipulation’s terms when enforcing their materially different PPAs. Again, that stipulation (not signed by PGE or Fossil Lake) concerning PacifiCorp’s forms is not relevant regulatory history for the contracts that are the subject of this proceeding because, for among other reasons, the issue in that stipulation does not address the issue in this summary judgment motion: the termination provision.⁶⁰

In sum, the stipulation regarding PacifiCorp’s PPA is irrelevant for four independent reasons: (1) the stipulation addressed renewable pricing and REC ownership, not the “appropriate interpretation of the termination provisions;”⁶¹ (2) the stipulation addressed PacifiCorp’s materially-different contract forms;⁶² (3) the Commission did not approve the stipulation;⁶³ and (4) neither PGE nor Fossil Lake signed the stipulation.⁶⁴ A stipulation that no party signed, that did not address termination, that modified a materially different PPA, and that the Commission

⁵⁷ Docket No. UM 1610, Order No. 14-295, Appx. A at 1 (“Staff recommends that the Commission issue an order approving [PacifiCorp’s revised contract forms] in compliance with Order No. 14-058, effective August 20, 2014.”).

⁵⁸ *Id.*, Appx. A at 3.

⁵⁹ *Id.* at 1 (adopting Staff’s recommendation).

⁶⁰ Docket No. UM 1610, Stipulation at 4 (stating stipulation “does not affect the appropriate interpretation of the termination provisions”).

⁶¹ *Id.*

⁶² *Id.* at 3-6.

⁶³ Docket No. UM 1610, Order 14-295 at 1 (adopting Staff’s recommendation).

⁶⁴ Docket No. UM 1610, Stipulation ¶ 1 and at 8.

never approved cannot provide the Commission-approved definition of “resource deficient” in the Fossil Lake PPA.⁶⁵

2. Read as a whole, the Commission’s orders in Docket No. UM 1129 confirm that the PPA has a single period in which PGE is considered “resource deficient” for both pricing and termination.

(a) Order Nos. 05-584 and 06-358 confirm that there is a single period in which a utility is resource deficient

Fossil Lake contends that the “Renewable Resource Deficiency Period” in Schedule 201 and “resource deficient” in Section 2.2.3 mean different things.⁶⁶ Thus, under Fossil Lake’s interpretation, there are two definitions of resource deficiency, one for pricing in Schedule 201 and one for termination in Section 2.2.3. The Commission’s orders show that Fossil Lake is wrong.

In Docket No. UM 1129, the Commission first ordered utilities to condition *both* pricing and termination on resource deficiency. The Commission’s orders in Docket No. UM 1129 do not support Fossil Lake’s bifurcated approach to resource deficiency. In Order No. 05-584, the Commission ruled that avoided cost prices would vary depending on whether a QF “is in a resource sufficient versus resource deficient position.”⁶⁷

Then, in Order No. 06-538, the Commission answered the question whether “a QF’s operational delay should result in default or breach” if “the utility is resource sufficient.”⁶⁸ The Commission, after discussing its statement in Order No 05-584 that a QF’s delay in operation was

⁶⁵ See Docket No. UM 1931, Order No. 19-255 at 17 (rejecting QFs’ reliance on terms in other utilities’ standard contract forms when reviewing PGE’s materially different forms).

⁶⁶ Fossil Lake Mot. for Summ. J. at 13-14.

⁶⁷ Docket No. UM 1129, Order No. 05-584 at 26 (May 13, 2005); *see also id.* at 47 (the Commission also ruled that the level of default security the QF must provide would depend on whether the utility was in “resource deficient or sufficient position” as determined “[a]t the time the contract is signed.”) (emphasis added).

⁶⁸ Docket No. UM 1129, Order No. 06-538 at 25 (Sep. 20, 2006).

an event of default, answered that question by stating that a QF's failure to achieve timely operations should result in termination only if the utility was resource deficient.⁶⁹

Fossil Lake asks the Commission to conclude that Order No. 06-538 and Order No. 05-584 used different definitions of resource deficiency when discussing termination and pricing, respectively. But Order No. 06-538 explicitly and repeatedly referenced Order No. 05-584's discussion of resource deficiency when conditioning termination on resource deficiency.⁷⁰ Thus, under the Commission's orders, there is a single resource deficiency period for pricing purposes *and* for termination purposes, and that resource deficiency period is set "[a]t the time the contract it is signed."⁷¹

Fossil Lake reaches its contrary reading by ignoring Order No. 05-584 entirely and focusing on Order No. 06-538's use of the present tense verb "is" when describing resource deficiency.⁷² But Order No. 05-584 also used the present tense phrase "*is* in a resource sufficient versus resource deficient position" to describe the pricing provisions of standard contracts.⁷³ The use of present tense phrasing in both orders belies Fossil Lake's assertion that the Commission intended to distinguish between "actual" deficiency for termination in Order No. 06-538 and "projected" deficiency for pricing in Order No. 05-584. Fossil Lake cannot be correct that the use of the words "*is* in a resource deficient position" means that the date for termination can change under a signed PPA, because Fossil Lake's argument necessarily and logically would also mean that the use of the word "is" in Order No. 05-584 (as quoted immediately above) results in *pricing*

⁶⁹ *Id.* at 26-27.

⁷⁰ *Id.*

⁷¹ Docket No. UM 1129, Order No. 05-584 at 47.

⁷² Fossil Lake Mot. for Summ. J. at 15-17 (citing Docket No. UM 1129, Order No. 06-538 at 26-27).

⁷³ Docket No. UM 1129, Order No. 05-584 at 26 (emphasis added).

in an executed PPA changing after the PPA is signed. Fossil Lake is wrong because, unless the parties subsequently agree, contracts do not change after they are signed.

(b) Order No. 07-360 confirms that a utility’s resource deficiency period is determined “at the time of contract execution.”

As described in PGE’s motion, Order No. 07-360 also states that a utility’s resource deficiency position is determined “at the time of contract execution.”⁷⁴ Fossil Lake urges the Commission to ignore this relevant context, arguing that in Order No. 07-360 the Commission did not “describe the terms of a standard QF contract” or “interpret” Order No. 06-538.⁷⁵ Fossil Lake is mistaken. In Order No. 07-360, the Commission adopted a staff recommendation regarding guidelines for termination of non-standard PPAs by referencing termination of standard PPAs.⁷⁶ The Commission described staff’s recommended guidelines for non-standard PPAs as “the same” as the guidelines that staff recommended, and the Commission adopted, for use in standard contracts in Order No. 06-538.⁷⁷ Indeed, in adopting the guideline for non-standard PPAs the Commission stated “[w]e reiterate our decision in Order No. 06-538[.]”⁷⁸ Thus, contrary to Fossil Lake’s argument, Order No. 07-360 *did* “describe” and “interpret” Order No. 06-538. Accordingly, Order No. 07-360 is helpful context for understanding Order No. 06-538, and Order No. 07-360 states that a utility’s resource deficiency position is determined “at the time of contract execution.”⁷⁹

⁷⁴ PGE Mot. for Summ. J. at 10 (discussing Docket No. UM 1129, Order No. 07-360, Appx. at 2 (Item 4(d)) (Aug. 20, 2007)).

⁷⁵ Fossil Lake Mot. for Summ. J. at 19.

⁷⁶ Docket No. UM 1129, Order No. 07-360 at 22.

⁷⁷ *Id.* at 21-22.

⁷⁸ *Id.* at 22.

⁷⁹ *See id.*, Appx. at 2 (Item 4(d)).

C. EXTRINSIC EVIDENCE OF THE PARTIES’ INTENT CONFIRMS THAT PGE IS “RESOURCE DEFICIENT” DURING THE “RENEWABLE RESOURCE DEFICIENCY PERIOD.”

If text and context do not provide a definition of “resource deficient,” at step two of *Yogman*, the Commission should look to extrinsic evidence to resolve the ambiguity.⁸⁰ Fossil Lake skips this step, contending that the Commission should look to maxims of construction “[i]f there were an ambiguity in the PPA.”⁸¹ Fossil Lake’s application of the law is wrong. In the face of ambiguity, the Commission should review extrinsic evidence before resorting to maxims.⁸² At *Yogman* step two, summary judgment is appropriate “in the absence of ‘competing extrinsic evidence’ that would permit a factfinder to find that the ambiguity at issue should be resolved in favor of the nonmoving party.”⁸³ Here, Fossil Lake offers no competing extrinsic evidence in support of its interpretation. Accordingly, any ambiguity must be resolved in PGE’s favor at summary judgment.

1. The drafting history confirms that PGE is “resource deficient” during the Renewable Resource Deficiency Period in Schedule 201.

Fossil Lake puts great weight on Section 2.2.3’s lack of reference to the defined term “Renewable Resource Deficiency Period,” but the drafting history confirms that this omission has no significance. In May 2014, PGE submitted redlined revisions to its standard contract forms to comply with the Commission’s policy docket orders: Order No. 11-505 and Order No. 14-058.⁸⁴ In this initial revision, Schedule 201 did not yet include defined phrases for the “Renewable

⁸⁰ See *Yogman*, 325 Or at 361.

⁸¹ Fossil Lake Mot. for Summ. J. at 19.

⁸² Docket No. UM 1931, Order No. 19-255 at 13.

⁸³ *Yale Holdings, LLC v. Capital One Bank*, 263 Or App 71, 77 (2014) (citations omitted).

⁸⁴ Docket No. UM 1610, PGE Compliance Filing (May 30, 2014) (“5/30/14 PGE Compliance Filing”) (available at <https://edocs.puc.state.or.us/efdocs/HAD/um1610had13208.pdf>); see *In the Matter of Commission Investigation Into Resource Sufficiency Pursuant to Order No. 06-538*, Docket No. UM 1396, Order No. 11-505 (Dec. 13, 2011); see also Docket No. UM 1610, Order No. 14-058.

Resource Deficiency Period” and the “Resource Deficiency Period.”⁸⁵ Instead Schedule 201 referred to “the deficiency period (starting in 2020).”⁸⁶ That initial revision included Section 2.2.3 as it appears in the Fossil Lake PPA, which conditions termination on whether a utility is “resource deficient.”⁸⁷ Thus, Section 2.2.3 did not refer to the defined phrase for the “Renewable Resource Deficiency Period” in Schedule 201, because that defined phrase did not yet appear in Schedule 201. Instead, the initial draft of Schedule 201 referred to the “deficiency period (starting in 2020)” and Section 2.2.3 used the similar, general phrase “resource deficient” to refer to Schedule 201’s “deficiency period” starting in 2020.

Over the next six months, PGE and other stakeholders, including Obsidian Renewables, engaged in a series of workshops to address potential revisions to the standard contract forms.⁸⁸ At the conclusion of this workshop process, the revised forms included the defined terms “Renewable Resource Deficiency Period” and “Resource Deficiency Period.”⁸⁹ However, nothing in Docket No. UM 1610 suggests that stakeholders intended to alter the termination provision, Section 2.2.3, when they replaced the general term “deficiency period” in Schedule 201 with the defined terms “Renewable Resource Deficiency Period” and “Resource Deficiency Period.” Instead, the record reveals that the revisions in the workshop process “implement[ed] renewable avoided costs” and made “other non-material changes and corrections.”⁹⁰ Thus, Section 2.2.3’s

⁸⁵ Docket No. UM 1610, 5/30/14 PGE Compliance Filing at 7-26 (Schedule 201).

⁸⁶ See e.g., *id.* at 16 (Schedule 201 at Sheet No. 201-10).

⁸⁷ *Id.* at 116 (Standard Renewable Off System Integrated Variable Resource PPA at Section 2.2.3); Compl., Ex. A at 7 (Fossil Lake PPA at Section 2.2.3).

⁸⁸ See Docket No. UM 1610, PGE Compliance Filing, Cover Letter at 1 (Nov. 25, 2014) (“11/25/14 PGE Compliance Filing”) (“PGE has participated . . . in several workshops and exchanges to revise the compliance filings to meet the compliance requirements of both Order No. 14-058 from Phase I of this docket and Order No. 11-505[.]”) (available at <https://edocs.puc.state.or.us/efdocs/HAH/um1610hah91524.pdf>).

⁸⁹ *Id.* at 31 (Schedule 201 at Sheet 201-23).

⁹⁰ *Id.*, Cover Letter at 1.

reference to “resource deficiency” still refers to the “Deficiency Period[s]” identified in Schedule 201.

2. Additional extrinsic evidence confirms the proper meaning of “resource deficient.”

In support of its Motion for Summary Judgment, PGE submitted the sworn declaration of Robert Macfarlane, PGE’s Manager of Pricing and Tariffs.⁹¹ Mr. Macfarlane has worked at PGE since 2008.⁹² Mr. Macfarlane participated in Docket No. UM 1610’s form revision process on behalf of PGE.⁹³ In his declaration, Mr. Macfarlane stated, “PGE is renewable resource deficient (as defined by the Commission) for purposes of the Fossil Lake PPA beginning January 1, 2020.”⁹⁴ Fossil Lake offers no contrary evidence of intent from any relevant witness to rebut this testimony. Accordingly, sworn witness statements and drafting history both confirm that PGE was “resource deficient” for purposes of the Fossil Lake PPA beginning January 1, 2020. If the Commission determines that the PPA is ambiguous, extrinsic evidence resolves the ambiguity in PGE’s favor. Because there is no contrary extrinsic evidence on this point, there is no disputed issue of fact and the Commission can rule on summary judgment on the meaning of the term “resource deficient” in Section 2.2.3 and thus that under the Fossil Lake PPA PGE has been “resource deficient” since January.⁹⁵

⁹¹ Decl. of Robert Macfarlane in Support of PGE Mot. for Summ. J. (“Macfarlane Decl.”) (May 19, 2020).

⁹² *Id.* ¶ 2.

⁹³ See Docket No. UM 1610, 11/25/14 PGE Compliance Filing, Cover Letter at 2 (directing questions regarding PPA forms to Mr. Macfarlane).

⁹⁴ Macfarlane Decl. ¶ 5.

⁹⁵ The Court of Appeals has repeatedly stated “that a dispute over an ambiguous document *can be resolved on summary judgment* in the absence of ‘competing extrinsic evidence’ that would permit a factfinder to find that the ambiguity at issue should be resolved in favor of the nonmoving party.” *Yale Holdings*, 263 Or App at 77 (emphasis added). The federal district court summarized the Oregon state court rule by stating “[w]hen the extrinsic evidence is undisputed, * * * the court may interpret an ambiguous contract term on summary judgment.” *Web Analytics Demystified, Inc. v. Keystone Solutions, LLC*, No 3:13-CV-1304-HU, 2015 WL 882577, at *5 (D. Or. Mar. 2, 2015) (citation omitted).

D. MAXIMS OF CONSTRUCTION SUPPORT PGE’S INTERPRETATION.

If the Commission determines that it is not able to resolve any ambiguity in Section 2.2.3 of the Fossil Lake PPA with extrinsic evidence, maxims of contract construction support PGE’s interpretation. Fossil Lake’s proposed maxim (construction against the drafter) is inapplicable because the PPA forms have no “sole” drafter.

- 1. The maxim that an ambiguity should be construed in favor of the party meant to benefit from the provision supports PGE’s interpretation because Section 2.2.3 is meant to provide PGE with an opportunity to terminate the PPA in the face of delayed operations.**

An ambiguity is resolved in favor of the party “in whose favor the provision was made.”⁹⁶ For instance, in *Crossroads Plaza, LLC v. Oren* a lease for space in a shopping center gave the tenant the option to terminate if the occupancy in the shopping center fell below a certain percentage.⁹⁷ The termination provision was ambiguous as to whether the drop in occupancy would be measured relative to projected occupancy or actual occupancy.⁹⁸ The Oregon Court of Appeals resolved the ambiguity in favor of the tenant, because the termination provision gave it the right to terminate and thus was meant to benefit the tenant.⁹⁹

Similarly, here, Section 2.2.3 provides PGE with the unilateral option to terminate. Section 2.2.3 provides no rights or benefits to Fossil Lake. Accordingly, any ambiguity in the provision should be construed in PGE’s favor, because the provision was meant to benefit PGE.

⁹⁶ ORS 42.260 (“When different constructions of a provision are otherwise equally proper, that construction is to be taken which is most favorable to the party in whose favor the provision was made.”); *see also Crossroads Plaza, LLC v. Oren*, 176 Or App 306, 310 (2001) (applying ORS 42.260).

⁹⁷ *Crossroads Plaza*, 176 Or App at 308.

⁹⁸ *Id.* at 309-10.

⁹⁹ *Id.* at 310 (“Because the provision is ambiguous . . . it must be construed in favor of defendants, the parties in whose favor the provision was made.” (quotation marks and citation omitted)).

2. The maxim that an ambiguity should be construed against the drafter does not apply and cannot be applied against PGE here.

The maxim that a contract should be construed against the drafter does not apply to interpretation of the Fossil Lake PPA. This maxim applies where a single party drafts a contract and therefore controlled the contract's contents.¹⁰⁰ The maxim is inapplicable to standard PPAs which are not drafted by either party. The terms of a standard PPA are set by the Commission. In policy dockets, dozens of stakeholders participate in workshops to revise the forms as part of an iterative, collaborative effort to conform the forms to the Commission's orders, which implement state and federal law. As the Commission has explained, "the terms and conditions of the contract [are] developed at the Commission after litigated proceedings."¹⁰¹

The record in Docket No. UM 1610 confirms that Fossil Lake is wrong when it asserts that PGE was the "sole drafter" of the Fossil Lake PPA. The cover letter to PGE's compliance filing in Docket No. UM 1610 explains:

PGE has participated with the other parties to this docket in several workshops and exchanges to revise the compliance filings to meet the compliance requirements of both Order No. 14-058 from Phase I of this docket and Order No. 11-505 implementing renewable avoided costs, but also to reach consensus on several other non-material changes and corrections. The enclosed documents reflect the consensus reached in those meetings.¹⁰²

Thus, the PPA forms that Fossil Lake signed implemented Commission orders and were the result of "consensus" reached over months of workshops with numerous stakeholders.

Indeed, the PPA provisions that Fossil Lake cites as creating ambiguity in the PPA were offered by stakeholders (not PGE) during the workshop process. In PGE's initial compliance

¹⁰⁰ *Heinzel v. Backstrom*, 310 Or 89, 96-97 (1990) ("As the drafter of the document, Mr. Heinzel had the opportunity to include language which would have clearly shown the parties' intentions.").

¹⁰¹ *PGE v. Pacific Northwest Solar, LLC*, Docket No. UM 1894, Order No. 18-025 at 6 (Jan. 25, 2018).

¹⁰² Docket No. UM 1610, 11/25/14 PGE Compliance Filing, Cover Letter at 1.

filing, the PPA did not include defined terms for Renewable Resource Deficiency Period and Resource Deficiency Period.¹⁰³ Relatedly, Section 4.5 did not tether REC ownership to the deficiency period identified in Schedule 201.¹⁰⁴ To the extent the inclusion of defined “Deficiency Period[s]” in Schedule 201 or Section 4.5’s reference to the “Renewable Resource Deficiency Period” injected ambiguity into the PPA forms, that ambiguity should be resolved in PGE’s favor as the non-drafter.

In any event, the canon to construe ambiguities against the drafter is a canon of last resort, and the Commission should not reach it if other canons apply, as they do here.¹⁰⁵

E. PGE’S CUSTOMERS ARE HARMED BY DELAYED OPERATIONS DURING THE RENEWABLE RESOURCE DEFICIENCY PERIOD.

Fossil Lake is wrong to contend that the underlying rationale of the Commission’s orders supports its interpretation.¹⁰⁶ In Docket No. UM 1129, the Commission conditioned PPA termination on resource deficiency because the Commission was concerned that a utility in a resource deficient position would be forced to “replace the energy that the QF was under contract to deliver” if the QF defaulted.¹⁰⁷ This policy concern supports PGE’s interpretation because a utility will often need to replace the contracted-for energy when a QF fails to reach commercial operations during the Renewable Resource Deficiency Period.

Renewable Portfolio Standards require utilities such as PGE to supply a certain percentage of their energy from renewable resources.¹⁰⁸ The “Renewable Resource Deficiency Period” in

¹⁰³ See Docket No. UM 1610, 5/30/14 PGE Compliance Filing.

¹⁰⁴ *Id.*

¹⁰⁵ *Hoffman Const. Co. of Ala. v. Fred S. James & Co. of Or.*, 313 Or 464, 470–71 (1992) (“[A]fter all other methods for resolving the dispute over the meaning of particular words fail, then the rule of interpretation against the drafter of the language becomes applicable[.]”) (emphasis omitted).

¹⁰⁶ Fossil Lake Mot. for Summ. J at 15.

¹⁰⁷ Docket No. UM 1129, Order No. 06-538 at 26.

¹⁰⁸ ORS 469A.052.

each PPA is the date on which PGE anticipates that it will not be able to meet its obligations under the RPS without acquiring more renewable energy.¹⁰⁹ PGE never fails to meet its obligations under the RPS.¹¹⁰ Instead, PGE plans ahead and acquires sufficient renewable energy to meet its obligations.¹¹¹ PGE meets its RPS obligations, in part, by contracting for renewable resources.¹¹²

In particular, PGE relies on QFs' promises to provide renewable energy during the Renewable Energy Deficiency Period to meet its obligations under the RPS.¹¹³ The prices for QF power increase dramatically during the Renewable Resource Deficiency Period to acknowledge that PGE is in fact relying on the QF's promise to deliver renewable energy.¹¹⁴ Prices during this period are based on the "avoided renewable resource" and PGE uses the energy obtained through this process to "to satisfy PGE's obligations relating to Oregon's renewable portfolio standards."¹¹⁵

Here, the Renewable Resource Deficiency Period for the 2014 version of PGE's Schedule 201 began in 2020. For all PPAs executed under this vintage of Schedule 201, including the Fossil Lake PPA, PGE relied on the promise of renewable energy during the Renewable Resource Deficiency Period to meet its RPS obligations and in turn promised to pay high, renewable fixed prices for that renewable energy.¹¹⁶ Indeed, the PPA includes in the representation and warranties section an acknowledgment that PGE relies upon the delivery of energy from the project for resource planning purposes.¹¹⁷ Where a QF, like Fossil Lake, breaks its promise to deliver

¹⁰⁹ See Macfarlane Decl. ¶ 6 (describing PGE's efforts to meet RPS obligations).

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.* ¶ 4.

¹¹⁴ See *id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Compl., Ex. A at 8 (Fossil Lake PPA at Section 3.1.9).

renewable energy, PGE must find another source of renewable energy and RECs otherwise it would risk failing to comply with its RPS obligations. The fact that the Renewable Resource Deficiency Period in PGE's more recent PPAs does not begin until 2025 only demonstrates that PGE is not currently relying on the promised delivery of renewable energy in *those* PPAs to meet its RPS obligations.

Fossil Lake contends that because PGE is currently resource sufficient it will not need to purchase additional renewable energy to replace Fossil Lake's promised energy. Fossil Lake has it exactly backwards. A utility is only able to maintain its renewable resource sufficiency status despite a QF breaching during the Renewable Resource Deficiency Period if the utility has *already* replaced the contracted-for energy from another source. This is the precise harm that the Commission sought to avoid in Order No. 06-538.

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III. CONCLUSION

Fossil Lake promised to provide PGE with renewable energy, PGE relied on that promise, and Fossil Lake failed to deliver for well over two years and counting. PGE is entitled to terminate the PPA. The Commission should deny Fossil Lake's Motion for Summary Judgment.

Dated: June 9, 2020.

Respectfully submitted,

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