

July 7, 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 are: (1) Defendant Portland General Electric Company's Motion to Admit Exhibit; (2) Affidavit of Rebecca Dodd; and (3) PGE Exhibit 100.

Thank you for your assistance.

Very truly yours,


Jeffrey S. Lovinger

Attachments

1017703

**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 MOTION TO
ADMIT EXHIBIT**

Pursuant to OAR 860-001-0420, OAR 860-001-0460, and the schedule established by Administrative Law Judge (“ALJ”) Alison Lackey’s June 23, 2020, memorandum, Portland General Electric Company (“PGE”) moves the Public Utility Commission of Oregon (“Commission”) to admit the following exhibit into the record of this proceeding:

Exhibit	Description	Date filed with OPUC
PGE/100	Excerpt from December 9, 2005, direct testimony of Staff in Docket No. UM 1129	July 7, 2020

In this proceeding, the parties dispute the meaning of the phrase “resource deficient (as defined by the Commission)” in the termination provision (Section 2.2.3) of the Fossil Lake Power Purchase Agreement (“PPA”). Section 2.2.3 was drafted to comply with Order No. 06-538 in Docket UM 1129. The regulatory history of that order is relevant in determining the meaning of Section 2.2.3.

In the excerpted testimony from Docket No. UM 1129, Staff recommended that the Commission “exclude delay of commercial operation as an event that allows 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.”¹ Staff thus urged that the relevant deficiency period for termination purposes be determined “at the time of contract execution.” No other stakeholder advocated for conditioning termination on resource deficiency.²

The Commission adopted Staff’s recommendation and conditioned termination on resource deficiency.³ In so doing, the Commission understood that Staff’s position meant that resource deficiency was determined at the time of contract execution. In Order No. 06-538, the Commission noted: “Staff asserts that standard contracts should except, from default and termination, a QF that fails to meet its commercial operational dates if the utility *expects* to be in a resource sufficient position as of the QF on-line date specified in the contract.”⁴

The excerpted material submitted by PGE for admission as an exhibit in this proceeding will aid the Commission in understanding the proposal that it ruled on in Order No. 06-538. The testimony contained within the attached exhibit is a publicly available document that is part of the Commission’s files for Docket No. UM 1129 and were made part of those files in the regular course of the Commission’s duties. As such, the Commission may take official notice of the testimony and post-hearing briefs pursuant to OAR 860-001-0860.

The excerpts demonstrate that Commission Staff recommended to the Commission that a utility not be allowed terminate a standard power purchase agreement for the qualifying facility’s failure to achieve the scheduled commercial operation date

¹ Docket No. UM 1129, Staff/1, 1000/35 (Direct Testimony at 35:12-15) (Dec. 9, 2005).

² See Docket No. UM 1129, Order No. 06-538 at 25-26 (summarizing positions of PGE, PacifiCorp, Staff, and ODOE).

³ See *id.* at 26-27 (conditioning termination on resource deficiency).

⁴ Docket No. UM 1129, Order No. 06-538 at 26 (emphasis added).

unless at the time of contract execution the utility was projected to be resource deficient when the qualifying facility failed to achieve commercial operation.

This Motion is supported by the Affidavit of Rebecca Dodd attesting that PGE/100 is a true and correct excerpt of Staff's December 9, 2005, Direct Testimony in Docket No. UM 1129.

Dated: July 7, 2020.

Respectfully submitted,

MARKOWITZ HERBOLD PC

s/ Jeffrey S. Lovinger

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1017596

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

FOSSIL LAKE SOLAR, LLC,

Complainant,

vs.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**AFFIDAVIT OF
REBECCA DODD**

STATE OF OREGON)
) ss.
County of Multnomah)

I, Rebecca Dodd, being first duly sworn on oath, depose and say:


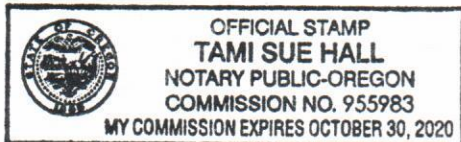
1. My full name is Rebecca Dodd. I am a paralegal for defendant's attorney.
2. I filed an exhibit on behalf of Portland General Electric Company ("PGE") in support of PGE's Motion for Summary Judgment in this matter (PGE/100). This exhibit is a true and accurate excerpt of the December 9, 2005, direct testimony provided by Commission Staff Docket No. UM 1129. A complete copy of this testimony is available through the Public Utilities Commission website at <https://edocs.puc.state.or.us/efdocs/HTB/um1129htb17134.pdf>.
3. I marked text in the exhibit PGE/100 with yellow highlighting and a red box for ease of Commission reference.

SIGNED this 7th day of July, 2020.



REBECCA DODD

SUBSCRIBED AND SWORN to me before this 7th day of July, 2020.



Notary Public for Oregon

Public Utility Commission of Oregon

Fossil Lake Solar, LLC v. Portland General Electric Company
Docket No. UM 2051

PGE Exhibit 100

December 9, 2005 Direct Staff Testimony
in Docket No. UM 1129



Oregon

Theodore R. Kulongoski, Governor

Public Utility Commission

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December 9, 2005

Via Electronic Filing and U.S. Mail

OREGON PUBLIC UTILITY COMMISSION
ATTENTION: FILING CENTER
PO BOX 2148
SALEM OR 97308-2148

RE: **Docket No. UM 1129 Phase I - Compliance** - In the Matter of PUBLIC UTILITY COMMISSION OF OREGON Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities.

Enclosed for filing in the above-captioned docket is the Public Utility Commission Staff's Direct Testimony. This document is being filed by electronic mail with the PUC Filing Center. A confidential version is being sent via first-class mail to all parties that have signed the protective order.

/s/ Kay Barnes

Kay Barnes
Regulatory Operations Division
Filing on Behalf of Public Utility Commission Staff
(503) 378-5763
Email: kay.barnes@state.or.us

cc: UM 1129 Service List - parties

CASE: UM 1129 - Phase I Compliance
WITNESS: Lisa Schwartz

**PUBLIC UTILITY COMMISSION
OF
OREGON**

STAFF EXHIBIT 1000

Direct Testimony

December 9, 2005

1 **Q. PLEASE STATE YOUR NAME, OCCUPATION, AND BUSINESS**
2 **ADDRESS.**

3 A. My name is Lisa Schwartz. I am employed by the Public Utility Commission of
4 Oregon as a senior analyst in the Resource and Market Analysis Section. My
5 business address is 550 Capitol Street NE Suite 215, Salem, Oregon 97301-
6 2551.

7 **Q. HAVE YOU FILED TESTIMONY PREVIOUSLY IN THIS CASE?**

8 A. Yes. I filed Staff/200, Exhibit Staff/201, Exhibit Staff/202 and Staff/600.

9 **Q. HAVE YOU PREPARED AN EXHIBIT?**

10 A. Yes. I prepared Exhibit Staff/1001, a summary of Staff's recommendations. I
11 also prepared Exhibits Staff/1002-1005, selected responses to Staff's data
12 requests.

13 **PURPOSE OF TESTIMONY**

14 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

15 A. First, I provide an overview of Staff's direct testimony and a summary of Staff's
16 recommendations. Next, I address provisions in the standard form contracts
17 filed by the electric utilities — for purchases from Qualifying Facilities (QFs) 10
18 MW or less — that are intended to protect the utility and its ratepayers against
19 breaches of the contract. The specific provisions I address are related to
20 creditworthiness, security, default and termination, damages and indemnity. I
21 then address other items in the standard contracts intended to mitigate risk,
22 related to force majeure, liens and encumbrances, project maintenance, and
23 release for claims against the facility prior to contract execution. Next, I

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Staff/1
1000/2

1 address procedures set forth in the tariffs for entering a PURPA contract. I then
2 address a variety of other issues related to the standard contracts. Finally, I
3 discuss issues related to the application of the Revised Protocol for PacifiCorp.

4 **Q. HAVE OTHER STAFF WITNESSES PREVIOUSLY FILED TESTIMONY IN**
5 **THIS CASE ON THESE ISSUES?**

6 A. Yes, for many of these items. I adopt and will sponsor for the remainder of this
7 proceeding the testimony of Staff witness Jack Breen, consisting of Staff/100
8 and Staff/500 and supporting exhibits, with the exception of his testimony on
9 insurance issues. Staff witness Michael Dougherty will adopt and sponsor Mr.
10 Breen's testimony on those issues. I also adopt and will sponsor the testimony
11 of Staff witness Thomas Morgan, consisting of Staff/400 and Staff/800.

12 Through the filings made in compliance with Order No. 05-584, the
13 Commission is approving standard contracts for QFs for the first time. The
14 Commission and parties first saw these contracts at the time the compliance
15 filings were made. Therefore, some issues were not vetted in Phase I of this
16 proceeding. The Commission is now investigating whether the provisions in the
17 standard contracts comply with the order and are reasonable.

18 **Q. PLEASE PROVIDE AN OVERVIEW OF STAFF'S TESTIMONY.**

19 A. In Staff/1100 and supporting exhibits, Staff witness Steve Chriss addresses
20 issues related to forecasted natural gas and power market prices, natural gas
21 trading hubs, and certain proxy plant assumptions that Portland General
22 Electric (PGE) and PacifiCorp use for determining avoided costs. In Staff/1200
23 and supporting exhibits, Staff witness Maury Galbraith addresses issues

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Staff/1
1000/32

1 utilities be allowed to submit revised standard contracts with such provisions in
2 their compliance filings for the Phase I Compliance investigation.

3 **Q. PLEASE MOVE ONTO YOUR NEXT ISSUE. DOES STAFF BELIEVE THE**
4 **QF HAS BREACHED THE AGREEMENT IF COMMERCIAL PRODUCTION**
5 **IS DELAYED OR IF IT UNDER-DELIVERS DURING THE UTILITY’S**
6 **RESOURCE SUFFICIENCY PERIOD?**

7 A. This is the question raised by Issues 5.b.vi. and 5b.ix.

8 I first address a delay in QF construction. In Order No. 05-584 (at 47), the
9 Commission stated that security should be provided in the event a QF project
10 is delayed coming on line. The Commission explained that “ the utility may
11 need to replace the contracted for energy at market prices that exceed the [QF]
12 contract price.” However, the Commission provided the following caveat:

13 At the time the contract is signed, we would expect parties to
14 be aware of whether the contracting utility is in a resource
15 deficient or sufficient position. We observe that if a utility is in
16 a resource sufficient position, the contracted-for energy will
17 likely not need to be immediately replaced. Consequently,
18 we do not discern any reason to require additional security
19 requirements in such a situation.

20
21 This passage refers specifically to whether security should be provided for
22 construction delay when a utility is resource-sufficient, rather than whether a
23 delay should constitute an event of default. However, Staff believes that the
24 citation indicates that the Commission found the utility and its customers likely
25 would not be harmed by a delay in QF commercial operation if a utility was
26 resource-sufficient. While the Order makes clear that the determination of
27 whether the utility is resource sufficient is made at the time of contract

1 execution, it is unclear whether the Commission intended that the designation
2 would be based on the utility's resource position at the time of contract
3 execution or as of the specified on-line date for the QF. If Staff correctly
4 understands the Commission's order on this point, a delay in commercial
5 operations should not be an event of default if the utility determines at the time
6 of contract execution that it will be resource-sufficient as of the QF on-line date
7 specified in the contract.

8 In fact, if a utility is resource-sufficient, there may be an *advantage* to the
9 utility and its ratepayers if the QF project is delayed, particularly if market
10 prices are low.

11 Further, ODOE states that some small QFs may not be approved for
12 financing if SELP perceives the risk of default for delays in commercial
13 operation is too great and beyond the control of the developer. ODOE states
14 that in today's project development environment, there is an increased risk of
15 delays beyond the developer's control in procuring project equipment,
16 construction material, specialized labor and transportation to get materials to
17 the site. See ODOE's response to Staff Data Request 2.d.; Staff/1004,
18 Schwartz/3.

19 Therefore, I recommend the Commission order the utilities to modify their
20 standard forms of contract to clarify that a delay in QF commercial operation is
21 not an event of default if the utility determines at the time of contract execution
22 that it will be resource-sufficient as of the QF on-line date specified in the
23 contract.

1 Regarding under-deliveries, staff finds no explicit statement in the
2 Commission's order that makes a distinction as to whether the utility is
3 resource-sufficient or resource-deficient. Once a QF project is on line, the utility
4 depends on it for its operations, including meeting retail load requirements and
5 making market sales. Further, the project is being paid based on a firm proxy
6 resource. Therefore, there should not be an exception for under-delivery as an
7 event of default for the sole reason that the utility is in a resource-sufficient
8 position.

9 **Q. WHAT IS STAFF'S POSITION REGARDING TERMINATION DUE TO**
10 **WEATHER-RELATED UNDER-DELIVERIES OR DELAYS IN PRODUCING**
11 **POWER?**

12 A. Issue 5.b.v. asks whether the utility should be able to terminate the QF contract
13 under the following conditions:

14 First, should the utility be able to terminate the contract due to weather-
15 related under-deliveries? Staff believes that annual minimum delivery
16 requirements for intermittent renewable resources should be set through a
17 MAG. However, pending the outcome of the Phase II proceeding, Staff
18 recommends an annual delivery requirement with adverse motive force
19 conditions taken into account. In either case, weather should not be a cause of
20 termination.

21 Second, should the utility be able to terminate the contract due to delays
22 in producing power? For the same reasons stated above, Staff believes that
23 Order No. 05-584 does not allow the utility to do so if it is resource-sufficient.

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Staff/1
1000/35

1 However, the QF should be required to provide an updated on-line date for
2 utility planning.

3 ODOE states that SELP would not finance a project subject to termination
4 for delays in commercial operation, or under-delivery of power, unless
5 termination is limited to the most egregious cases. In addition, SELP would
6 want the right to cure the default within a commercially reasonable time,
7 operate the facility, or sell the facility to another operator under a continuation
8 of the power purchase agreement. Further, in order for SELP to finance the
9 QF, any testing requirement to achieve commercial operation would have to
10 take into account availability of motive force. See ODOE's response to Staff
11 Data Requests 2.e. and f.; Staff/1004, Schwartz/3.

12 Staff recommends that the Commission require the utilities to modify their
13 standard contracts to exclude delay of commercial operation as an event that
14 allows termination if the utility determines at the time of contract execution that
15 it will be resource-sufficient as of the QF on-line date specified in the contract.

16 Staff further recommends that the standard contracts be modified to take into
17 account availability of motive force in the testing requirement for achieving
18 commercial operation.

19 **Q. REGARDING TERMINATION, ISSUE 5.b.xii ASKS WHETHER SECTION**
20 **11.3.2 OF PACIFICORP'S STANDARD CONTRACT IS CONSISTENT**
21 **WITH PURPA. PLEASE DESCRIBE PACIFICORP'S APPROACH.**

22 A. Section 11.3.2 of PacifiCorp's contract reads as follows:

CERTIFICATE OF SERVICE

UM 1129

I certify that I have this day served the foregoing document upon all parties of record in this proceeding by delivering a copy in person or by mailing a copy properly addressed with first class postage prepaid, or by electronic mail pursuant to OAR 860-13-0070, to all parties or attorneys of parties.

Dated at Salem, Oregon, this 9th day of December, 2005.

A handwritten signature in black ink, appearing to read 'Mike Weirich', is written over a horizontal line.

Mike Weirich
Assistant Attorney General
Of Attorneys for Public Utility Commission's Staff
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Salem, Oregon 97301
Telephone: (503) 378-6322