

May 19, 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 Motion for Summary Judgment. Please note that oral argument is requested.

Thank you for your assistance.

Very truly yours,



Jeffrey S. Lovinger

Attachment
1001281

**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
FOR SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

I. MOTION

Pursuant to OAR 860-001-0420, Oregon Rule of Civil Procedure 47, and the April 28, 2020, ruling adopting an amended procedural schedule in this matter, Portland General Electric Company ("PGE") respectfully files this motion for summary judgment. PGE requests that the Public Utility Commission of Oregon ("Commission") interpret the Standard Renewable Off-System Variable Power Purchase Agreement ("PPA") that PGE and Fossil Lake Solar, LLC ("Fossil Lake") entered into in 2015 and conclude as a matter of law: (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. PGE requests oral argument on this motion. PGE respectfully requests that the Commission enter judgment in favor of PGE's counterclaim and dismiss Fossil Lake's claims with prejudice.

II. INTRODUCTION

PGE and Fossil Lake executed the PPA in 2015.¹ Section 2.2.3 of the PPA 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; and (3) if “PGE is resource deficient (as defined by the Commission).”² The parties agree that the first two conditions have been met but disagree about whether PGE is “resource deficient (as defined by the Commission).”³

PGE is “resource deficient (as defined by the Commission)” and therefore PGE properly terminated the PPA. The period in which PGE is “resource deficient” for purposes of the PPA is the “Renewable Resource Deficiency Period” defined in the 2014 version of Schedule 201, which was approved by the Commission and incorporated by reference into Fossil Lake’s PPA.

Fossil Lake asks the Commission to look to Schedule 201 modifications made in 2017 to interpret Section 2.2.3, but that approach is expressly barred by the terms of PGE’s PPA, which incorporates the 2014 Schedule 201. Further, Fossil Lake’s approach is expressly barred by Order No. 17-347.⁴ That order states that the 2017 Schedule 201 modifications are only “effective” after September 2017,⁵ and thus the modifications do not apply to Fossil Lake’s 2015 PPA.

Further, Fossil Lake’s approach is wrong because Fossil Lake asks the Commission to look to the 2017 Schedule 201 when interpreting Section 2.2.3’s termination conditions but to look to the 2014 Schedule 201 when calculating avoided cost prices. Fossil Lake wants it both ways: it

¹ Compl. ¶ 8 (Dec. 31, 2019); Answer ¶ 8 (Jan. 21, 2020); Joint Stip. Undisputed Facts (“Stip. Facts”) ¶¶ 18, 19 (May 1, 2020).

² Compl., Ex. A (Fossil Lake PPA) at 7 (Section 2); Stip. Facts ¶¶ 26, 29, 30, 33.

³ Stip. Facts ¶¶ 27, 28, 31, 32, 36.

⁴ *In the matter of PGE Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 17-347 (Sep. 14, 2017).

⁵ *Id.* at 1.

wants prices to drastically increase in 2020 and thereafter based on the resource deficiency date in the 2014 Schedule 201, but it wants to have an extension to reach the Commercial Operation Date (“COD”) until 2025 based on the resource deficiency date in the 2017 Schedule 201. The Commission should reject Fossil Lake’s incorrect and inconsistent reading of the PPA. The Commission should instead enforce the straightforward terms of the agreement Fossil Lake actually signed, and reject Fossil Lake’s attempt to pick-and-choose different vintages of Schedule 201 for different purposes under the same PPA.

III. FACT BACKGROUND

PGE and Fossil Lake entered into the PPA in 2015 using the form PPA that the Commission approved on December 16, 2014.⁶ Section 2.2.3 of the PPA states that if “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) PGE may terminate this Agreement in accordance with Section 8.”⁷ Section 2.2.1 provides that Fossil Lake must begin initial delivery of Net Output by December 15, 2016.⁸ Section 2.2.2 provides that Fossil Lake must achieve commercial operation by March 15, 2017.⁹ The dates in Sections 2.2.1 and 2.2.2 were selected by Fossil Lake and included by PGE in the PPA based on Fossil Lake’s election.¹⁰ By letter dated January 30, 2017, PGE agreed to extend the Section 2.2.2 deadline for Fossil Lake to achieve commercial operation to November 30, 2017.¹¹ Fossil Lake failed to meet the requirements of Sections 2.2.1 and 2.2.2 and to date has not delivered Net Output or achieved commercial operation.¹²

⁶ See Compl., Ex. A (Fossil Lake PPA); see Stip. Facts ¶¶ 16, 18, 19.

⁷ Compl., Ex. A at 7 (Fossil Lake PPA at Section 2.2.3); Stip. Facts ¶ 33.

⁸ Compl., Ex. A at 7 (Fossil Lake PPA at Section 2.2.1); Stip. Facts ¶ 26.

⁹ Compl., Ex. A at 7 (Fossil Lake PPA at Section 2.2.2); Stip. Facts ¶ 29.

¹⁰ Stip. Facts ¶ 17.

¹¹ Answer, Ex. B (PGE’s January 30, 2017 Letter); Stip. Facts ¶ 30.

¹² Stip. Facts ¶¶ 27, 28, 31, 32.

Fossil Lake's PPA attaches as an exhibit and incorporates by reference the version of PGE's Schedule 201 that was "in effect on the Effective Date of [the PPA]," i.e., PGE's December 17, 2014 version of Schedule 201 (the "2014 Schedule 201").¹³ The 2014 Schedule 201 provides that the "Renewable Resource Deficiency Period . . . is the period from 2020 through 2034."¹⁴ The renewable avoided cost prices for renewable energy under the 2014 Schedule 201 increase significantly beginning January 1, 2020.¹⁵

Fossil Lake has not begun construction of the solar facility.¹⁶ Further, Fossil Lake has not obtained the transmission service it needs from the Bonneville Power Administration ("BPA") to wheel facility output to PGE's system.¹⁷

On November 27, 2019, PGE sent a notice of intent to terminate the PPA.¹⁸ On January 2, 2020, PGE sent notice of termination to Fossil Lake; that notice complied with the notice requirements of the PPA and terminated the PPA effective January 2, 2020.¹⁹ Although Fossil Lake has the right to request a new PPA from PGE, it has not elected to do so.

Fossil Lake filed this complaint against PGE seeking a declaration that the PPA is not terminated. PGE filed a counterclaim asking for a declaration that the PPA is terminated. The parties attempted mediation in good faith but were unable to resolve this dispute.

¹³ Compl., Ex. A at 6 (Fossil Lake PPA at Section 1.33) and 22-34 (Fossil Lake PPA, Schedule 201, attached as Exhibit D).

¹⁴ Compl., Ex. A at 34 (Fossil Lake Schedule 201 at Sheet No. 201-23).

¹⁵ *Id.* at 31 (Fossil Lake Schedule 201 at Sheet Nos. 201-17 and 201-18, Tables 6a & 6b).

¹⁶ Stip. Facts ¶¶ 3, 13.

¹⁷ *Id.* ¶¶ 10, 11.

¹⁸ Compl., Ex. B (PGE's November 27, 2019 Termination Notice); Stip. Facts ¶ 37.

¹⁹ Answer, Ex. A (PGE's January 2, 2020 Notice of Termination); Stip. Facts ¶¶ 35, 41, 42.

IV. LEGAL STANDARD

A defendant and counterclaim-plaintiff may move for summary judgment in its favor regarding all or any of the claims and counterclaims.²⁰

The Commission interprets standard PPAs under the three-step analysis from *Yogman v. Parrot*:²¹

When interpreting a contract, we begin by examining the text in the context of the document as a whole. If the provision is clear, the analysis ends there. If the provision is ambiguous, we look to extrinsic evidence of the contracting parties' intent. If the provision is still ambiguous, we employ appropriate maxims of construction.²²

When determining whether provisions are ambiguous, the Commission should read the provisions "in the context of the document as a whole."²³ The Commission must give each PPA provision "a reasonable interpretation" and avoid an interpretation that "would directly contradict the specific language" of any of the PPAs' provisions.²⁴

A movant is entitled to summary judgment if the disputed contract provision is unambiguous or if the "competing extrinsic evidence" is insufficient to create a "triable factual issue" as to the meaning of the disputed term.²⁵ For purposes of summary judgment, "[a] material

²⁰ ORCP 47 A ("A party seeking to recover on any type of claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor as to all or any part of any claim or defense."); ORCP 47 B ("A party against whom any type of claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits or declarations, for a summary judgment in that party's favor as to all or any part of any claim or defense."); *see also* OAR 860-001-0000(1) ("The Oregon Rules of Civil Procedure (ORCP) also apply in contested case and declaratory ruling proceedings unless inconsistent with these rules, a Commission order, or an Administrative Law Judge (ALJ) ruling.").

²¹ *Portland Gen. Elec. Co. v. Alfalfa Solar, LLC, et al.*, Docket No. UM 1931, Order No. 19-255 at 12-15 (Aug. 2, 2019) (articulating and applying the *Yogman* analysis to the interpretation of standard power purchase agreements between PGE and qualifying facilities); *see Yogman v. Parrott*, 325 Or 358 (1997).

²² *Landye Bennett Blumstein, LLP v. Jeffrey S. Mutnick, PC*, 270 Or App 158, 171 (2015) (citing *Yogman*, 325 Or at 361, 363-64).

²³ *Yogman*, 325 Or at 361.

²⁴ *Hall v. Regence Bluecross Blueshield of Oregon/HMO Oregon*, CV 00-695-AS, 2001 WL 34041892, at *3 (D Or Mar. 6, 2001).

²⁵ *Petrillo v. Pub. Employees Ret. Bd.*, 286 Or App 200, 206 n.2 (2017), *rev den*, 362 Or 175 (2017) (quotation marks and citation omitted).

fact is one that, under applicable law, might affect the outcome of the case.”²⁶ If a contract is unambiguous, its construction is generally a matter of law for the court²⁷ and can be decided on summary judgment.

V. ARGUMENT

Consistent with the methods of interpretation discussed above, the Commission should enter summary judgment in PGE’s favor for five independent reasons: (1) the text and context of the Fossil Lake PPA unambiguously provides that the PPA’s resource deficiency date is January 1, 2020; (2) Order No. 17-347 did not retroactively change the PPA; (3) the Commission’s prior orders and its implementation of those orders confirm that resource deficiency periods are determined at the time of contract execution for each PPA and are not altered during the PPA’s term; (4) the pricing structure of the PPA demonstrates that under the PPA PGE is considered resource deficient on January 1, 2020, and therefore must pay higher fixed prices on that date; and (5) Fossil Lake’s interpretation cannot possibly be correct because it would have the absurd result that PGE would never be able to terminate the PPA regardless of how long COD is delayed.

A. PGE IS “RESOURCE DEFICIENT” FOR RENEWABLE RESOURCES DURING THE “RENEWABLE RESOURCE DEFICIENCY PERIOD” SPECIFIED IN THE PPA.

The period in which PGE is “resource deficient (as defined by the Commission)” is the “Renewable Resource Deficiency Period” in PGE’s Commission-approved Schedule 201. The Commission has stated that Schedule 201 is within the “four corners” of the entire agreement for contract interpretation purposes.²⁸ The Fossil Lake PPA attaches and incorporates by reference

²⁶ *Zygar v. Johnson*, 169 Or App 638, 646 (2000).

²⁷ *Britt v. Kinzua Corp.*, 124 Or App 658, 660, (1993); *see also, In the Matter of Pac-West Telecomm, Inc. v. Qwest Corp.*, Docket No. IC 9, Order No. 05-874 at 5 (Jul. 26, 2005) (noting with approval *Hekker v. Sabre Const. Co.*, 265 Or 552, 555 (1973) for the proposition “As a general rule the construction of a contract is a question of law for the court.”).

²⁸ Docket No. UM 1931, Order No. 19-255 at 14 (noting “the entire agreement includes the executed contract and Schedule 201”).

the 2014 version of PGE’s Commission-approved Schedule 201.²⁹ The 2014 Schedule 201 defines the “Renewable Resource Deficiency Period” as beginning in 2020.³⁰ Thus, PGE is “resource deficient (as defined by the Commission)” in renewable resources starting on January 1, 2020.

Fossil Lake tries to avoid this straightforward reading of the contract text, contending that the phrase “resource deficient” in Section 2.2.3 is unrelated to the defined terms in Schedule 201 because the phrase “resource deficient” is not capitalized.³¹ But where a contract defines a term, the definition applies notwithstanding the failure to capitalize the term when using it.³² Here, no provision of Fossil Lake’s executed agreement suggests that there is a period in which PGE is “resource deficient” in renewable resources other than the “Renewable Resource Deficiency Period” defined in Schedule 201.

Further, Section 2.2.3 uses the uncapitalized, general phrase “resource deficient” as opposed to the defined term “Renewable Resource Deficiency Period” because there are two defined deficiency periods, one for renewable resources and one for non-renewable resources. 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 the qualifying facility (“QF”) provides. It is for this reason that the standard non-renewable power purchase agreement available when Fossil Lake signed its renewable PPA used the same

²⁹ Compl., Ex. A at 6 (Fossil Lake PPA at Section 1.33 (“‘Schedule’ shall mean PGE Schedule 201 filed with the Oregon Public Utilities Commission (‘Commission’) in effect on the Effective Date of this Agreement and attached hereto as Exhibit D, the terms of which are hereby incorporated by reference.”).

³⁰ *Id.* at 34 (Fossil Lake Schedule 201 at Sheet No. 201-23).

³¹ Compl. ¶¶ 19-21.

³² See *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or App 24, 29 (2012), *aff’d*, 355 Or 286 (2014) (applying defined term “Substantial Completion” to contract provision that referred only to “substantial completion”); Docket No. UM 1931, Order No. 19-255 at 14-15 (applying definition of “Term” from PPA to Schedule 201 that referred only to “term”).

uncapitalized phrase “resource deficient” in section 2.2.3.³³ The lack of capitalization in the phrase “resource deficient” refers to the applicable resource deficiency period, not some extra-contractual definition of resource deficiency.

B. ORDER NO. 17-347 DID NOT ALTER FOSSIL LAKE’S 2015 PPA BECAUSE ORDER NO. 17-347 ONLY MODIFIED SCHEDULE 201 FOR PPAS EXECUTED AFTER SEPTEMBER 2017.

Order No. 17-347 does not amend Fossil Lake’s PPA. In Order No. 17-347, the Commission adopted modifications to PGE’s Schedule 201.³⁴ In relevant part, Order No. 17-347 directed PGE to “file a modified Schedule 201 that . . . [u]ses a 2025 deficiency period for renewable avoided cost prices.”³⁵ Critically, however, Order No. 17-347 stated that the modified Schedule 201 was “approved effective September 18, 2017.”³⁶ Fossil Lake executed its PPA in 2015, two years before the effective date of the modified Schedule 201.³⁷ And Fossil Lake’s PPA explicitly states that the Schedule 201 incorporated into the PPA is the Schedule 201 “in effect on the Effective Date this Agreement,” not later modifications.³⁸ Fossil Lake is simply mistaken in contending that the Schedule 201 as modified by Order No. 17-347 “is applicable to the [Fossil Lake] PPA[.]”³⁹

Further, post-execution modification of the PPA is barred by PURPA and Oregon contract law. First, Section 210(e) of the Public Utility Regulatory Policies Act of 1978 (“PURPA”) prohibits a state utility commission from subsequently modifying the terms of a qualifying facility

³³ See *In the Matter of Pub. Utility Comm. of Oregon Staff Investigation into Qualifying Facility Contracting and Pricing*, PGE’s Supp. Compliance Filing to Update Schedule 201 QF Information, Standard Off-System Variable PPA at Section 2.2.3 (Nov. 25, 2014), available at <https://edocs.puc.state.or.us/efdocs/HAH/um1610hah91524.pdf>.

³⁴ Docket No. UM 1728, Order No. 17-347 at 1-2.

³⁵ *Id.* at 1 (Item 1(c)).

³⁶ *Id.* (Item 4).

³⁷ Compl. ¶ 8, Ex. A at 1 (Fossil Lake PPA at 1); Answer ¶ 8; Stip. Facts ¶¶ 18, 19.

³⁸ Compl., Ex. A at 6 (Fossil Lake PPA at Section 1.33 (incorporating terms of Schedule 201)).

³⁹ Compl. at 9 (Prayer for Relief ¶ 4).

power purchase agreement.⁴⁰ Second, Oregon law bars post-execution modification of an executed contract absent agreement from the parties.⁴¹

C. THE COMMISSION’S ORDERS CONFIRM THAT A UTILITY IS “RESOURCE DEFICIENT” FOR THE PURPOSES OF A PPA DURING THE “RENEWABLE RESOURCE DEFICIENCY PERIOD.”

The Commission’s orders directing utilities to base pricing and default on resource deficiency confirm that resource deficiency is determined for each PPA at the time of PPA execution and does not change post-execution. In 2005 in Docket No. UM 1129, the Commission enacted policies requiring utilities to offer different prices for QF power depending on whether the utility was deficient or sufficient.⁴² In Order No. 05-584, the Commission explained that when measuring the effect of delayed operations, a utility’s resource deficiency position should be analyzed “[a]t the time the contract is signed.”⁴³

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.”⁴⁴ When conditioning termination on resource deficiency, the Commission referred to its rationale from Order No. 05-584,⁴⁵ which stated resource deficiency is determined “[a]t the time the contract is signed.”⁴⁶

⁴⁰ *Freehold Cogeneration Assocs., L.P. v. Bd. of Reg. Comm’rs of State of N.J.*, 44 F3d 1178, 1192 (3d Cir. 1995) (state agency modification of an executed PURPA power purchase agreement violates the PURPA § 210(e) prohibition on “utility-type” regulation of qualifying facilities); *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control*, 531 F3d 183, 188-189 (2d Cir. 2008); *see also City of New Martinsville v. Pub. Serv. Comm’n of W. Virginia*, 729 SE2d 188, 196 (W. Va. 2012) (“Once the state agency has approved the [PURPA] agreement, however, any attempt to modify the agreement would subject the QF to “utility-type” regulation barred by Section 210(e) of PURPA.”) (citation omitted).

⁴¹ *See, e.g., James v. Clackamas Cty.*, 353 Or 431, 443 (2013) (“The modification of an existing contract requires both mutual assent and consideration.”) (citation omitted).

⁴² *In the Matter of the Commission Staff’s Investigation Relating to Electric Utility Purchases from QFs*, Docket No. UM 1129, Order No. 05-584, 46-47 (May 13, 2005).

⁴³ *Id.* at 47 (“At the time the contract is signed, we would expect parties to be aware of whether the contracting utility is in a resource deficient or sufficient position.”).

⁴⁴ Docket No. UM 1129, Order No. 06-538 at 27 (Sep. 20, 2006).

⁴⁵ *Id.* at 26.

⁴⁶ Docket No. UM 1129, Order No. 05-584 at 47.

Finally, in Order No. 07-360 the Commission adopted guidelines for default and termination in non-standard PURPA contracts.⁴⁷ With respect to the conditions on termination, the Commission adopted guidelines that were “the same” as the rules it established “for standard contracts.”⁴⁸ The Commission adopted a guideline that stated “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.”⁴⁹ Thus, in Order No. 07-360 the Commission described its standard PPA policies and confirmed that the deficiency position is analyzed “at the time of contract execution.”⁵⁰

When implementing these orders from Docket No. UM 1129, the Commission has approved deficiency periods that are specific to a version of the approved form PPA. Each of PGE’s Commission-approved standard contracts have incorporated the terms of PGE’s then-existing schedules.⁵¹ No PGE standard contract has ever purported to incorporate terms of subsequent revisions to deficiency periods. Further, as it did in Order No. 17-347, when approving new schedules with new deficiency periods, the Commission makes the new deficiency period effective in future PPAs, not retroactive to all existing PPAs.⁵² No PPA provision or Commission order supports importing the terms of a 2017 Schedule 201 into a 2015 PPA, much less the type of selective incorporation Fossil Lake proposes where the revised deficiency period would apply to termination rights but not to pricing.

⁴⁷ Docket No. UM 1129, Order No. 07-360 at 22 (Aug. 20, 2007).

⁴⁸ *Id.* at 21-22.

⁴⁹ *Id.*, Appendix at 2 (Item 4(d)) (emphasis added).

⁵⁰ *Id.*

⁵¹ See Macfarlane Decl. ¶ 9; see also Docket No. RE 143, *In the Matter of PGE Information Filing of QF Contracts or Summaries*.

⁵² See Macfarlane Decl. ¶ 10; see e.g., Docket No. UM 1728, Order No. 17-347 at 1 (Item 4).

D. FOSSIL LAKE’S APPROACH IS INCONSISTENT WITH THE PRICE TERMS OF THE PPA.

Fossil Lake’s approach should be rejected because it is inconsistent with the price structure of the PPA. Schedule 201 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 April 29, 2030).⁵³ Before January 1, 2020, the fixed prices are intended to compensate only for the avoided cost of energy.⁵⁴ But after January 1, 2020, the fixed prices increase substantially because they are intended to compensate for the avoided cost of energy, and the avoided cost of capacity, and renewable energy credits (“RECs”).⁵⁵

The fixed prices begin to compensate for avoided capacity and RECs beginning January 1, 2020, because that is the date PGE is considered renewable resource deficient for purposes of the PPA. The Commission explained that “[i]n a period of resource deficiency, the historical calculation of avoided costs has included both the variable and fixed costs of a planned resource in order to reflect the actual deferral or avoidance of that resource.”⁵⁶ The text of Schedule 201 incorporates this reasoning, stating that “[f]or the Renewable Resource Deficiency Period, the Renewable Avoided Costs reflect the fully allocated costs of a wind plant including capital costs.”⁵⁷

Contrary to Fossil Lake’s view, the Commission does not differentiate between the resource deficiency period used in calculating avoided cost pricing and a utility’s “resource deficient” position for purposes of termination. As the Commission explained in Order No. 05-584, the fixed price calculation differs “when a utility is in a resource sufficient position

⁵³ Compl., Ex. A at 28 (Fossil Lake Schedule 201 at Sheet No. 201-12); Stip. Facts ¶ 24; Macfarlane Decl. ¶ 4.

⁵⁴ Macfarlane Decl. ¶ 5.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See* Compl., Ex. A at 24 (Fossil Lake Schedule 201 at Sheet No. 201-3).

versus a resource deficient position.”⁵⁸ Thus, the Commission-approved “Renewable Resource Deficiency Period” is the period the Commission has determined that a utility is in a “resource deficient position” under a given PPA, and thus must pay higher prices “to reflect the actual deferral or avoidance” of a proxy resource, a wind plant.⁵⁹ Nothing in the Commission’s orders or the PPA suggests that a utility can simultaneously be in a “resource deficient position” such that it is obligated to pay high fixed prices but still not be “resource deficient” and therefore unable to terminate a defaulted PPA.

Fossil Lake decries the Commission’s PPA-specific approach, contending that a utility should not “simultaneously” have different deficiency periods in different PPAs.⁶⁰ But Fossil Lake’s proposed alternative would create different sufficiency periods within the *same* PPA. As applied to its PPA, Fossil Lake asserts that PGE is currently *sufficient* in renewable resources in order to avoid contract termination but that PGE is also currently *deficient* in renewable resources such that Fossil Lake will receive high fixed prices (if it eventually achieves COD).⁶¹ Fossil Lake claims that PGE will not be “deficient” in renewable resources until 2025.⁶² But if Fossil Lake achieves commercial operation at any time (including any time before 2025), it asserts entitlement to the high fixed prices that the Commission has reserved for periods in which a utility is in a “resource deficient position.”⁶³ Fossil Lake cannot have it both ways. The Commission should enforce the PPA by its terms and rule that there is a single period in which PGE is considered “resource deficient” for the purposes of this PPA: the “Renewable Resource Deficiency Period” defined in the 2014 Schedule 201.⁶⁴

⁵⁸ Docket No. UM 1129, Order No. 05-584 at 26.

⁵⁹ *Id.*

⁶⁰ Compl. ¶ 23.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Stip. Facts ¶ 25; *See* Docket No. UM 1129, Order No. 05-584 at 26.

⁶⁴ Compl., Ex. A at 34 (Schedule 201 at Sheet No. 201-23).

E. FOSSIL LAKE’S APPROACH WOULD PREVENT PGE FROM EVER TERMINATING THE PPA EVEN IF FOSSIL LAKE NEVER BUILDS ITS FACILITY.

The approach advocated by Fossil Lake would mean that PGE could never terminate the contract even though Fossil Lake is in default of its most 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. As PGE approaches its scheduled renewable resource deficiency date, PGE secures additional renewable resources based on its Integrated Resources Plan (“IRP”).⁶⁵ As new IRPs are 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 201.⁶⁶

Under a correct interpretation of Section 2.2.3, the parties to these PPAs know at the time they enter into the contract when the utility is projected to 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 receive energy, capacity and RECs, which is then relied upon in the utility’s subsequent integrated resource planning process. Indeed, Fossil Lake specifically acknowledged in the PPA that PGE would rely on the energy from the project in making resource planning decisions.⁶⁷

If Fossil Lake is correct and Section 2.2.3 requires PGE to 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.

⁶⁵ MacFarlane Decl. ¶ 6.

⁶⁶ *See id.* ¶ 8.

⁶⁷ Compl., Ex. A at 8 (Fossil Lake PPA at Section 3.1.9).

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.

In this case, discovery has revealed that Fossil Lake has no clear path to reaching COD, because it has no way of obtaining necessary transmission service under existing BPA policies; Fossil Lake is asking BPA to change a *policy* as a part of acquiring transmission service, which will undoubtedly slow the acquisition of transmission service further.⁶⁸ Indeed, it appears Fossil Lake only recently made this request to change BPA policy, and that BPA has only begun to consider a policy change in 2020, five years after Fossil Lake signed the PPA committing it to begin initial energy deliveries to PGE in 2016.⁶⁹

Under Fossil Lake's view, PGE can never terminate the PPA even though Fossil Lake has been in default for years and still has no viable path to achieving COD. There is no indication in the PPA's terms or the Commission's previous orders that the Commission intended such a result. Fossil Lake's view that it can lock in high prices and then wait indefinitely to build its facility would cost PGE's customers approximately \$10.5 million due to the higher prices in the 2014 Schedule 201 as compared to PGE's current Schedule 201 prices and deficiency period.⁷⁰

Under the plain language of the PPA, including Exhibit D, PGE became renewable resource deficient for all contract purposes on January 1, 2020. PGE was within its right to terminate effective January 2, 2020. Termination of the 2015 PPA does not mean that Fossil Lake must abandon its project. Fossil Lake has the option of applying to PGE for a new standard power

⁶⁸ Decl. of Rebecca Dodd in Support of PGE's Mot. For Summ. J., Ex. 1 (May 4, 2020 BPA Letter to Fossil Lake) (stating Fossil Lake's proposal for obtaining transmission would be a "change to [BPA's] policy" and "will require a change to BPA's Deferral Business Practice" and stating that BPA has assembled an internal team to "assess" the change); Stip. Facts ¶ 11 (stating that Fossil Lake has not yet obtained transmission).

⁶⁹ *Id.*

⁷⁰ Decl. of Brett Greene in Support of PGE's Mot. for Summ. J., ¶ 4 and Ex. A (Payment Comparison Chart).

purchase agreement and of selecting a scheduled COD that is up to three years after the new contract effective date. This would provide Fossil Lake with more time to explore whether it can obtain the transmission service it needs from BPA, and it would result in a new PPA with a 2025 renewable resource deficiency date that would be applied consistently to all terms – both price terms and non-price terms.

VI. CONCLUSION

PGE respectfully requests that the Commission grant PGE’s motion for summary judgment to dismiss Fossil Lake’s claim and grant PGE’s counterclaim for the reasons above.

Dated: May 19, 2020.

Respectfully submitted,

MARKOWITZ HERBOLD PC

s/ Jeffrey S. Lovinger

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