BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2051

FOSSIL LAKE SOLAR, LLC, COMPLAINANT, v. PORTLAND GENERAL ELECTRIC COMPANY, DEFENDANT.	FOSSIL LAKE SOLAR LLC'S MOTION FOR SUMMARY JUDGMENT

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Fossil Lake Solar, LLC ("Fossil Lake") submits this Motion for Summary Judgment pursuant to Oregon Rule of Civil Procedure 47 and OAR 860-001-0420. Fossil Lake respectfully moves the Public Utility Commission of Oregon ("Commission") for an order that Portland General Electric's (PGE's) attempt to terminate the parties' standard power purchase agreement ("PPA") is invalid and that the PPA remains in full force and effect consistent with its terms.

I. INTRODUCTION

PGE's attempt to terminate the PPA on January 2, 2020 was an invalid and aggressive misuse of the Qualifying Facility ("QF") contracting process. Under the plain language of Section 2.2.3 of the PPA, "PGE may not terminate this Agreement" for a delay in the Commercial Operation Date unless PGE "is resource deficient."[1] This precondition for termination has not been met. PGE is *not* resource deficient. The Commission determined in Order No. 17-347 that PGE will not be renewable resource deficient until, at the earliest, January 1, 2025.[2] The Commission's decision in this case could hardly be more straight-forward. Based on the plain language of Section 2.2.3, PGE has no right to terminate at this time.

Notwithstanding the fact that it remains renewable resource sufficient through January 1, 2025, PGE argues for the right to terminate the PPA as of January 1, 2020. PGE chose this date because it marks the beginning of PGE's "Renewable Resource Deficiency Period" as defined in PGE's then-current Schedule 201.[3] In its Notice of

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[1] A copy of the PPA is attached as Exhibit A to Fossil Lake's Complaint in this Docket.
[2] *In the Matter of Portland General Electric Company, Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 17-347 (Sept. 14, 2017) ("Order 17-347).
[3] Schedule 201 is attached as Exhibit D to the PPA.

Termination to Fossil Lake, PGE modifies the plain language of Section 2.2.3 by juxtaposing the words "is resource deficient" with the defined term "Renewable Resource Deficiency Period." PGE wrote that it "will be *resource deficient* for renewable resources as of January 1, 2020. *The Renewable Resource Deficiency Period* is noted in Schedule 201, which is attached as Exhibit D to the PPA . . .."[4] (Emphasis added). In its Answer, Affirmative Defenses, and Counterclaim filed in this proceeding, PGE reiterated that "Exhibit D includes definitions of the Renewable Resource Sufficiency Period and the Renewable Resource Deficiency Period, and these definitions make it clear that the Commission approved a specific date for when PGE moves from renewable resource sufficient to renewable resource deficient under this PPA: January 1, 2020." By PGE's own admission, therefore, it is the defined term "Renewable Resource Deficiency Period" that provides the basis for PGE's proposed January 1, 2020 termination date.

PGE's argument fails because PGE, when it drafted the PPA, omitted the defined term "Renewable Resource Deficiency Period" from the termination provision. Unlike other provisions of the PPA that do use the term "Renewable Resource Deficiency Period," Section 2.2.3 does not. This conspicuous omission is no mere scriveners error. PGE *deliberately* omitted any reference in Section 2.2.3 to its "Renewable Resource Deficiency Period" because the Commission had already confirmed that such term has no bearing on a purchasing utility's termination rights.[5] In Order No. 14-295, the Commission approved, without modification, a stipulation ("Stipulation") providing that the defined term "Renewable Resource Deficiency Period" "*will not affect the proper*

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[4] A copy of PGE's November 27, 2019 Notice of Termination is attached as Exhibit B to Fossil Lake's Complaint.

[5] *See* Order No. 14-295, Appendix A (pages 7 and 8 of 15).

interpretation of sections of the Commission-approved standard form Power Purchase Agreement . . . regarding termination due to default for delayed commercial operation date . . ..” (Emphasis added).[6]

II. BACKGROUND FACTS

A. Description of Fossil Lake Project

As stated above, this case can and should be decided by the Commission based on the plain language of the PPA and consistent with prior Commission decisions. These Background Facts are therefor provided primarily for illustrative purposes.

Fossil Lake is an Oregon based limited liability company[7] that is currently developing in Lake County, Oregon, a solar generation facility with a nameplate capacity rating of 10 megawatts (the “Facility”).[8] Fossil Lake has been working on developing the Facility for more than ten years.[9] Fossil Lake self-certified the Facility as a QF under the Federal Energy Regulatory Commission’s regulations implementing the Public Utility Regulatory Policies Act of 1978 (“PURPA”).[10] To date, Fossil Lake has invested about a million dollars ($1,000,000) of its own money on Facility development costs.[11]

In order to deliver the Net Output to PGE, Fossil Lake needs long-term firm transmission capacity across a Bonneville Power Administration (“BPA”) 115kV “sub-grid” transmission line between the Fort Rock Substation and the LaPine Substation.[12] From the LaPine Substation, the Net Output will be transferred by BPA across its 230kV

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[6] *Id.*
[7] *See* Joint Stipulated Undisputed Facts (“Stipulated Facts”), ¶ 1.
[8] *See* Stipulated Facts, ¶ 3.
[9] *See* Brown Declaration, ¶ 4.
[10] *See* Stipulated Facts, ¶ 4.
[11] *See* Brown Declaration, ¶ 5.
[12] *See* Stipulated Facts, ¶ 10.

transmission system to PGE's system.[13] Fossil Lake has not yet been able to obtain from BPA the required long-term firm transmission capacity on BPA 115kV "sub-grid" transmission line.[14] BPA is currently considering revisions to its sub-grid transmission practices proposed by Fossil Lake to resolve this issue.[15] Fossil Lake is optimistic that it can obtain the required transmission capacity by the end of this calendar year.[16]

B. Fossil Lake Executed the Standard PPA As Drafted by PGE

PGE drafted each of the terms of the PPA, including Section 2.2.3. As with all standard QF contracts in Oregon, there was no bilateral negotiation of any PPA terms by and between PGE and Fossil Lake.[17] Fossil Lake executed the PPA on March 25, 2015.[18] PGE executed the PPA on April 29, 2015, which is also the Effective Date of the PPA.[19] The term of the PPA runs through April 29, 2035, unless earlier terminated.[20] Under the terms of the PPA, PGE is to pay Fossil Lake fixed prices for delivered Net Output for a fifteen-year period that began to run on the PPA Effective Date, April 29, 2015.[21]

Section 2.2.1 of the PPA states that Fossil Lake shall begin initial delivery of Net Output to PGE by December 15, 2016.[22] Section 2.2.2 of the PPA states that Fossil Lake shall achieve the Commercial Operation Date by March 15, 2017.[23] Section 2.2.3 of the PPA says:

[13] *See* Brown Declaration, ¶ 6.
[14] *See* Stipulated Facts, ¶ 11.
[15] *See* Brown Declaration, ¶ 9.
[16] *See* Brown Declaration, ¶ 10.
[17] *See* Brown Declaration, ¶ 11.
[18] *See* Stipulated Facts, ¶ 18.
[19] *See* Stipulated Facts, ¶¶ 19-20.
[20] *See* Stipulated Facts, ¶ 21.
[21] *See* Stipulated Facts, ¶ 24.
[22] *See* Stipulated Facts, ¶ 26.
[23] *See* Stipulated Facts, ¶ 29.

> In the event Seller is unable to meet the requirements of Sections 2.2.1 and 2.2.2., and *if PGE is resource deficient (as defined by the Commission) PGE may terminate this Agreement* in accordance with Section 8. *Otherwise, PGE may not terminate this Agreement* but Seller shall pay PGE the Start-Up Lost Energy Value.[24]

(Emphasis added).

Exhibit D to the Fossil Lake PPA is the version of PGE's Schedule 201 that the Commission approved on December 16, 2014 in Order No. 14-435. Sheet No. 201-23 of Exhibit D to the Fossil Lake PPA specifically defines the term "Renewable Resource Deficiency Period" as "the period from 2020 through 2034." This defined term is *not* used in Section 2.2.3.

C. <u>The Project Commercial Operation Date Has Been Delayed</u>

Completion of the Facility has been delayed pending acquisition of long-term firm capacity on BPA's 115kV sub-grid facilities between the Fort Rock Substation and the LaPine Substation.[25]

While it is resource sufficient, PGE's exclusive remedy for a delay in the Commercial Operation Date is payment of any applicable Start-Up Lost Energy Value. Section 2.2.3 of the PPA states that, so long as it is resource sufficient, "PGE may not terminate this Agreement but Seller shall pay PGE the Start-Up Lost Energy Value."[26] PGE has billed, and Fossil Lake has timely paid, Start-Up Lost Energy Value.[27] As of the

[24] *See* Stipulated Facts, ¶ 33.
[25] *See* Brown Declaration, ¶ 8.
[26] *See* Stipulated Facts, ¶ 33.
[27] *See* Stipulated Facts, ¶ 34.

date hereof, Fossil Lake has paid PGE $126,226.59 in Start-Up Lost Energy Value.[28] The payment was made under protest.[29]

D. PGE is Renewable Resource Sufficient

There is no question that PGE is currently renewable resource sufficient. At PGE's urging, the Commission determined at its September 12, 2017 Public Meeting that PGE will *not* be renewable resource deficient until January 1, 2025. The Commission's decision is reflected in Order No. 17-347. There has been no subsequent Commission Order stating that PGE will be renewable resource deficient as of January 1, 2020.

III. APPLICABLE LAW AND POLICY

A. Legal Standard for Summary Judgment

The legal standard applicable to a motion for summary judgment by the Commission is set forth in OAR 860-001-0420 and ORCP 47(C). According to ORCP 47(C):

> The court shall grant the motion if the pleadings, depositions, affidavits, declarations, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial.

The Commission recently confirmed that ORCP 47(C) applies to motions for summary judgment before the Commission.[30]

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[28] *See. Id.*
[29] *See Id.*
[30] Order No. 19-255, p. 12.

Summary judgment is appropriate in this case. The issue presented is purely a question of contract interpretation: Under Section 2.2.3, is PGE entitled to terminate the PPA while it is renewable resource sufficient? Based on Commission Order No. 17-374, there is no genuine issue of fact about whether PGE is currently renewable resource sufficient. This question can therefore be answered by the Commission in Fossil Lake's favor as a matter of law based on the text and context of Section 2.2.3 as informed by prior Commission decisions.

B. <u>Legal Standard for Contract Interpretation</u>

The Commission will decide this case based on the text and context of Section 2.2.3. The legal standard for contract interpretation was clearly articulated by the Commission in Order No. 19-255. The Commission explained that "[w]e examine the language of the contracts between PGE and . . . QFs in accordance with the standard prescribed under Oregon law." The Commission then quoted with approval the standard set forth by the Oregon Supreme Court in *Yogman v. Parrot*, 325 Or 358 (1997): "To interpret a contractual provision . . ., the court follows three steps. 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." The Commission further cited with approval ORS 42.320.[31] Pursuant to ORS 42.320, the Commission is "to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted."

[31] *See* Order No. 19-255, fn 16.

C. State Policy: "Settled and Uniform Institutional Climate for QFs"

Oregon's policy on implementing PURPA also counsels in favor of applying the plain language of a QF contract consistent with prior Commission decisions. An essential component of Oregon's PURPA policy is to facilitate a "settled and uniform institutional climate for QFs." In Order No. 16-129, the Commission explained:

> As we have repeatedly recognized, our role implementing PURPA is to promote QF development while also ensuring that ratepayers pay no more than a utility's avoided costs. To that end, we balance the need for a "*settled and uniform institutional climate for QFs" in Oregon*, while ensuring that electric utilities "purchase power from QFs at rates that are just and reasonable to the utility's customers, in the public interest, and that do not discriminate against QFs, but that are not more than avoided costs."

(Emphasis added). Few things would "unsettle" the institutional climate for QFs in Oregon more than bestowing upon purchasing utilities a unilateral termination right that is contrary to both the plain terms a QF contract and prior Commission decisions.

IV. THE COMMISSION MUST GIVE EFFECT TO THE TEXT AND CONTEXT OF THE PPA

Fossil Lake's position in this case is based on a common-sense application of the text and context of the PPA. The text of Section 2.2.3 says that PGE may not terminate the PPA unless it "is resource deficient." The context of the PPA shows that when PGE intended to incorporate the date "January 1, 2020" into a particular contract provision, it did so expressly by reference to the "Renewable Resource Deficiency Period." The regulatory history behind the PPA confirms both that: (i) PGE may not terminate the PPA unless it is actually in a resource deficient state;[32] and (ii) that the January 1, 2020 demarcation of the Renewable Resource Deficiency Period has no bearing on PGE's

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[32] *See* Order No. 06-358, pp 26-27.

termination rights.[33] For these reasons, the text and context of the PPA are unambiguous and compel the conclusion that PGE may not terminate at this time. If there were any ambiguity in Section 2.2.3, however, then by law it should be construed against PGE as the drafter of PPA.

A. The Text of Section 2.2.3 States that "PGE May Not Terminate the Agreement" Unless "PGE Is Resource Deficient"

1. PGE May Not Terminate the PPA Because It Is Not Renewable Resource Deficient

The Commission's legal standard for contract interpretation requires it to look first and foremost at "what the words of a contract say."[34] Here, the words of Section 2.2.3 of the PPA are:

> In the event Seller is unable to meet the requirements of Sections 2.2.1 and 2.2.2., and *if PGE is resource deficient (as defined by the Commission) PGE may terminate this Agreement* in accordance with Section 8. *Otherwise, PGE may not terminate this Agreement* but Seller shall pay PGE the Start-Up Lost Energy Value.

(Emphasis added). The meaning of these words is clear. PGE may not terminate the PPA unless and until it "is resource deficient." The Commission has determined that PGE will remain renewable resource sufficient at least through January 1, 2025.[35] PGE's exclusive remedy for a delay in the Commercial Operation Date while it remains renewable resource sufficient is payment of the Startup Lost Energy Value (if any).

In construing the plain language of Section 2.2.3, the Commission must be wary of PGE's various attempt to "insert what has been omitted." There is, for example, no

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[33] *See* Order No. 14-295, Appendix A (pages 7 and 8 of 15).
[34] Order No. 19-255 (August 2, 2019). Quoting with approval *Yogman v. Parrot*, 325 Or 358 (1997).
[35] *See* Order No. 17-347.

express reference in Section 2.2.3 to January 1, 2020 as a date certain after which PGE may terminate the PPA. The term "Renewable Resource Deficiency Period" is omitted from Section 2.2.3. There is no reference to PGE's "projected resource position." Nor is there any reference to PGE's resource position "at the time of contracting." There is no reference in Section 2.2.3 to the "Schedule," or to "Exhibit D," or to the pricing contained therein. Retroactively revising the plain language of Section 2.2.3 by inserting any of these omitted terms would violate the basic rule of contract interpretation.[36]

2. Section 2.2.3 Hinges on the Present-Tense Use of the Verb "Is"

The text of Section 2.2.3 sets forth a two-part test for when PGE may terminate the PPA due to a delay in the Commercial Operation Date. Both conditions must be satisfied simultaneously and in the present tense. The first part of the test is that "Seller *is* unable to meet the requirements of Sections 2.2.1 and 2.2.2." (Emphasis added). As used in the first part of the test, the verb "is" means that Fossil Lake is presently in default with respect to Section 2.2.1 and Section 2.2.2. Similarly, the second part of the test asks whether PGE "*is* resource deficient." (Emphasis added). As with the first part, the use of the verb "is" in the second part of the test also refers to PGE's actual and present state of being resource deficient.

PGE's proposed interpretation of Section 2.2.3 attacks the common-sense understanding of the word "is." In *Pope v. Rosenberg,* 361 P.3d 824 (2015), for example, the Wyoming Supreme Court offered a "straightforward reading" of the word "is" in the context of a contract provision:

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[36] *See* Order No. 19-255, fn 16 *quoting* ORS 42.230 for the proposition that, in construing a document, a court is "to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted."

> "Is" is the present tense of the verb "be." "To be" means "to live; to exist; to have a specified state or quality." *Webster's New Dictionary and Thesaurus* 56 (1989); *see also Webster's Third New International Dictionary* 1197 (Merriam Webster 2002) ("is" means "that which is; specif [sic]: that which is factual, empirical, actually the case, or spatiotemporal—contrasted with ought").

As applied here, a straightforward reading of the words "is resource deficient" requires an empirical inquiry into whether PGE is actually and presently in a resource deficient state. By Commission Order,[37] PGE is not actually and presently in a renewable resource deficient state.

By contrast, PGE suggests that the words "is resource deficient" actually mean "*was projected to be* resource deficient *at the time of contracting.*" Courts have consistently rejected giving the present tense use of the verb "is" any such backward-looking, projected, or hypothetical meanings. In *O'Hearon v. Hansen*, 409 P.3d 85 (2017), for example, a Utah appellate court explained that the word "*is* should mean *is* and not *was* or *has been*." (Emphasis in original). Further, "the present tense *is* demands the condition to be present at the time . . .." *Id.* In *Guidiville Band of Pomo Indians v. NGV Gaming, LTD,* 531 F.3d 767 (2008), the Ninth Circuit held that a statutory provision applicable to land that "is" held by an Indian tribe excludes lands that "might later be" held by an Indian tribe. The Court explained that the "unequivocal present-tense use of the word "is" does a tremendous amount of the legwork . . .." *Id.* Likewise, the unequivocal present-tense use of the words "*is resource deficient*" in Section 2.2.3 refers to the resource position that PGE is actually in at the time of default.

[37] *See* Order No. 17-347.

3. The Qualifying Words "as defined by the Commission" Do Not Change the Plain Meaning of Section 2.2.3

The use of words "as defined by the Commission" in Section 2.2.3 does not alter the plain meaning of the rest of the provision. A plain reading of the text indicates that the words "as defined by the Commission" are intended to qualify the immediately preceding words "resource deficient." The inquiry as to whether or not PGE "is resource deficient" is to be done by reference to the Commission's definition of what it means for a utility to be in a "resource deficient" state. The terms "resource deficient" and "resource sufficient" have long been defined and used by the Commission in the context of its integrated resource planning ("IRP") processes to describe whether or not a utility needs to acquire additional generating resources.[38] In Order No. 06-538, the Order from which Section 2.2.3 was adopted, the Commission explained that "we earlier found the IRP process to be the appropriate venue for determining when a utility is resource sufficient or deficient." Thus, the use of the words "as defined by the Commission" is intended to preclude PGE from applying its own made-up definition of when it is in a "resource deficient" state in order to unilaterally terminate the PPA.

Again, PGE attempts to insert into Section 2.2.3 language that it omitted at the time of drafting. PGE asks the Commission to supplant the words "is resource deficient (as defined by the Commission)" with the words "*was projected to be* resource deficient as *determined* by the Commission *at the time of contracting*." The plain meaning of the words as drafted is very different from PGE's proposed replacement. PGE was the sole drafter of the PPA and could have easily written the latter if that is what was intended.

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[38] *See, e.g.,* Order 06-538 ("[W]e earlier found the IRP process to be the appropriate venue for determining when a utility is resource sufficient or deficient.")

Instead, PGE choose to use the exact words "as defined by the Commission," and those are the words to be given effect. The most fundamental rules of contract interpretation dictate that PGE cannot not rewrite the words of the PPA—a PPA that it alone drafted—to suit its current goals.

B. **The Context of the PPA Confirms that the Term "Renewable Resource Deficiency Period" Does Not Apply to PGE's Termination Rights**

PGE's core theory of this case depends on equating the words "is resource dependent" with the defined term "Renewable Resource Deficiency Period." In its Notice of Termination, for example, PGE tries to directly link the former to the latter.[39] PGE wrote that it "will be resource deficient for renewable resources as of January 1, 2020. The Renewable Resource Deficiency Period is noted in Schedule 201, which is attached as Exhibit D to the PPA . . .."[40] PGE reiterated in its Answer that "Exhibit D includes definitions of the Renewable Resource Sufficiency Period and the Renewable Resource Deficiency Period, and these definitions make it clear that the Commission approved a specific date for when PGE moves from renewable resource sufficient to renewable resource deficient under this PPA: January 1, 2020."

An analysis of the context of the PPA—the "four corners" of the document—refutes PGE's core theory of the case. Where PGE intended in the PPA to refer to the "Renewable Resource Deficiency Period," it did so expressly. For example, Section 4.5 of the PPA specifically uses the defined term "Renewable Resource Deficiency Period" to indicate that ownership of Environmental Attributes of the Facility will transfer to PGE as of January 1, 2020. Section 4.5 also makes express reference to the time period

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[39] *See* Notice of Termination, Attached as Exhibit B to the Complaint.
[40] *Id.*

"as specified in the Schedule," meaning PGE's Schedule 201 attached as Exhibit D to the PPA. Section 4.5 reads:

> *During the Renewable Resource Deficiency Period*, Seller shall provide and PGE shall acquire the RPS Attributes for the Contract Years *as specified in the Schedule* and Seller shall retain ownership of all other Environmental Attributes (if any). *During the Renewable Resource Sufficient Period*, and any period with the Term of this Agreement after completion of the first fifteen (15) years after the Commercial Operation Date, Seller shall retain all Environmental Attributes in accordance with *the Schedule*.

By contrast, PGE choose not to make any express reference in Section 2.2.3 to the "Renewable Resource Deficiency Period" or to "the Schedule."

Had PGE actually intended for the "Renewable Resource Deficiency Period" to establish the date after which it could terminate the PPA, PGE would have said so directly. For example, PGE would have written Section 2.2.3 as follows:

> ~~In the event~~ If, during the Renewable Resource Deficiency Period, 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. Otherwise, PGE may not terminate this Agreement but Seller shall pay PGE the Start-Up Lost Energy Value.

That PGE did not write Section 2.2.3 in this way is dispositive.

Because Section 4.5 and Section 2.2.3 use different words, the provisions mean different things.[41] This is particularly so where PGE used a defined term in one provision, but avoided using that defined term in another. Whereas the January 1, 2020 date was clearly intended to apply to Section 4.5, it just as clearly was *not* intended to apply to Section 2.2.3. The reason that the January 1, 2020 date does not to apply to

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[41] *See, e.g.,* Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretative Framework and its Lessons for the Nation. 47 Willamette Law Review 339 (2011) fn 32 (describing the use of different maxims of interpretation).

Section 2.2.3 is neither an accident nor a mystery. It is clearly explained by the Stipulation, which is described in greater detail below.

C. <u>The Regulatory Context of Section 2.2.3 Also Confirms that PGE May not Terminate the PPA While it is Resource Sufficient</u>

1. <u>In Order 06-538, The Commission Held that a Resource Sufficient Utility May Not Terminate for Delay</u>

The termination provision set forth Section 2.2.3 of the PPA springs from Commission Order 06-538 in Docket UM 1129. In Order No. 06-538, the Commission considered whether a resource sufficient utility should be permitted to terminate a QF agreement due to a delay in reaching commercial operations. The Commission held:

> Although energy may not be needed on a system basis, a utility may still be damaged. For example, in anticipation of receiving QF power, a utility may have already entered into a market arrangement to sell the power and will have to buy energy on the market to fulfill that obligation, or a utility may lose an opportunity to sell the power on the market at a price that is above the contract price. Consequently, we recognize that damages may be incurred when a QF's operation is delayed, even if a utility is resource sufficient. However, *we would expect that a resource sufficient utility would be able to minimize the damages on a going forward basis. Consequently, we determine that a QF's operational delay pursuant to a contract with a resource sufficient utility should result in default, but not termination*."[42]

(Emphasis added). The Commission's words turn on whether a utility "is resource sufficient." On its face, nothing in Order 06-538 discusses the purchasing utility's "projected" resource position "at the time of contracting." Based on this direction, PGE drafted and adopted Section 2.2.3.

The Commission's rationale in Order 06-538 depends entirely on the purchasing utility's actual resource position at the time of default. The Commission was focused on the magnitude of the potential harm to the utility caused by a delay. The magnitude of

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[42] Order No. 06-538, pp 26-27.

the harm is a function of whether or not the utility needs to acquire replacement power. Whether or not the utility requires replacement power is a function of whether the utility is actually in a resource sufficient or a resource deficient position at the time of the default. The Commission explained that:

> In Oregon No. 05-584, we identified a delay by a QF coming on line as an event of default, and recognized that the utility would potentially need to replace the energy that the QF was under contract to deliver, at market prices exceeding the contract price. We observed, however, that if the utility is in a resource sufficient position [at the time of the default], it may be that the utility could avoid replacing the energy *at any cost*. In other words, we deemed the risk to utilities and their ratepayers of operational delay by a QF when the utility was resource sufficient to be reduced."[43]

(Emphasis in original). Based on this reasoning, if a utility were projected to be resource deficient at the time of contracting but is actually resource sufficient at the time of default, then its risk exposure would be reduced. Conversely, if the utility were projected to be resource sufficient at the time of contracting but is actually resource deficient at the time of default, then its risk exposure would be heightened. That is why both Order No. 06-538 and Section 2.2.3 are focused on the utility's actual resource position rather than the projected resource position at the time of contracting.

2. PacifiCorp's Contract Language Adopted in Response to Order 06-538 Confirms What the Commission Meant.

As explained above, Order 06-538 applies with equal force to both PGE and PacifiCorp. The language adopted by PacifiCorp in response to Order 06-538 is therefore instructive as to utilities' contemporaneous understanding of the Commission's intent. Section 11.3.1 of PacifiCorp's standard QF contract adopted following Order 06-538 reads: "PacifiCorp shall not terminate . . . for a default under Section 11.1.5 unless

[43] *Id.*

PacifiCorp *is in a resource deficient state* during the period Commercial Operation is delayed."[44] (Emphasis added). PacifiCorp's language makes it clear that the appropriate inquiry is whether or not the purchasing utility is actually and presently in a resource deficient state at the time of default, and not what the purchasing utility was projected to be at the time of contracting.

The Commission should also be aware that PacifiCorp has previously--and unsuccessfully--raised the very same arguments that PGE makes in this proceeding. In Docket DR 48, PacifiCorp attempted to terminate certain QF contracts based on its projected resource position at the time of contracting rather than its actual resource position at the time of default.[45] The matter was not litigated to a final Commission order. The parties entered into a stipulation pursuant to which PacifiCorp agreed not to terminate any of the affected QF contracts at that time.[46] The stipulation was approved by the Commission in Order 14-175.

3. <u>In Order 14-295, The Commission Confirmed that the Defined Term "Renewable Resource Deficient Period" Has No Bearing on a Utility's Termination Rights</u>

The regulatory history behind the defined term "Renewable Resource Deficiency Period" clarifies that it was never intended to establish PGE's termination rights. The defined term was first added to PacifiCorp's Schedule 37 pursuant to the Stipulation.[47]

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[44] A copy of PacifiCorp's then-current standard QF contract is attached as Exhibit A to the Petition for Declaratory Ruling filed by the Renewable Energy Coalition in Docket DR 48.

[45] *See* Petition for Declaratory Ruling filed by the Renewable Energy Coalition in Docket DR 48

[46] In Order No. 14-174 approving the stipulation and closing the docket, the Commission notes that "PacifiCorp has confirmed that no projects are at risk of termination for default under the provision this calendar year."

[47] *See* Attachment A to Order No. 14-295 (August 19, 2014).

The Stipulation was executed by and between multiple parties to UM 1610, specifically including Commission Staff and Fossil Lake's sole member, Obsidian Renewables, LLC.[48] Paragraph 6(d) of the Stipulation reads:

> **Identification of resource sufficiency and deficiency period**. The Stipulating Parties agree that the terms "Renewable Resource Sufficiency Period" and "Renewable Resource Deficiency Period" will be specifically defined in Schedule 37 and the associated PPAs to assign ownership of Environmental Attributes and Green Tags in the renewable fixed price PPA. These terms were added for the purpose of determining: (a) when the QF is entitled to renewable avoided cost prices, and (2) the ownership of Environmental Attributes and the transfer of Green Tags to PacifiCorp. *Provided, however, that the inclusion of these specifically defined terms in Schedule 37 and the PPAs will not affect the proper interpretation of sections of the Commission-approved standard form Power Purchase Agreement . . . regarding termination due to default for delayed commercial operation date***,** as raised in OPUC docket DR 48.[49]

(Emphasis added). On August 19, 2014, the Commission adopted Staff's recommendation to approve this Stipulation by Order 14-295.[50]

Any suggestion that PGE's Renewable Resource Deficiency Period establishes the scope of its termination rights under Section 2.2.3 is eviscerated by the Stipulation. Although PGE was not a party to the Stipulation, it was an active participant in UM 1610. On December 17, 2014,[51] the exact same defined terms were incorporated into that version of PGE's Schedule 201 that is attached as Exhibit D to the PPA. Consistent with the Stipulation, these defined terms are expressly referenced in Section 4.5 of the PPA to demarcate the change in ownership of the Environmental Attributes. Also consistent with the Stipulation, these defined terms are deliberately omitted from the termination provision. Based on the Stipulation, as executed by Commission Staff and approved by

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[48] *See Id.*
[49] *Id.*
[50] *See Id.*
[51] *See* Order No. 14-435 (December 17, 2014).

the Commission, the January 1, 2020 date specified in PGE's "Renewable Resource Deficiency Period" does not establish PGE's termination rights under Section 2.2.3.

4. PGE's Reliance on the Commission's Guidance for Negotiating Large QF Contracts is Misplaced

In its Answer, the only thing that PGE can point to in support of its proposed re-write of Section 2.2.3 is Order 07-360. On its face, Order 07-360 is inapposite. Order 07-360 establishes guidelines for bilateral negotiation of *large* QF contracts and does not apply at all to *standard* QF contracts such as the PPA. Nothing in Order 07-360 purports to modify, interpret, construe, or describe the terms of a standard QF contract. Nothing in Order 07-360 purports to interpret any other Commission Orders, such as Order No. 06-538, that do specifically apply to small QF contracts. Any doubts about the effect of Order No. 07-360 on the PPA are resolved by the subsequent Stipulation. The Stipulation, which *does* apply directly to the terms of standard QF contracts such as the PPA, clearly states that the "Renewable Resource Deficiency Period" in effect at the time of contracting "*will not affect the proper interpretation of sections of the Commission-approved standard form Power Purchase Agreement . . . regarding termination due to default for delayed commercial operation date* **. . ..**"[52]

D. Any Ambiguity in the PPA should be Construed Against PGE

Fossil Lake believes that the plain language of Section 2.2.3 is unambiguous and means just what it says. PGE may not terminate the PPA unless it "is resource deficient." If there were an ambiguity in the PPA, however, then Oregon law is clear that such ambiguity should be construed against the drafter. "[I]t is a basic tenet of contract law

[52] Attachment A to Order No. 14-295 (August 19, 2014).

that ambiguous language in a contract is construed against the drafter of the contract." *Berry v. Lucas*, 210 Or.App. 334, (Or. Ct. Ap. 2006); *See also Scheuerman v. Mathison*, 74 Or. 40 (1914) ("As contracts of insurance are usually prepared by the companies that issue them, they are to be construed favorably to the assured when their provisions are ambiguous.")

Because PGE was the sole drafter of the PPA, any ambiguity therein should be construed against it and in favor of Fossil Lake. As the Commission knows, all standard QF contract terms in Oregon are prepared by the purchasing utilities. Any negotiation of the terms of a standard QF contract is, in fact, strictly prohibited. As the sole drafter of the terms of the PPA—specifically including Section 2.2.3—PGE had every opportunity to choose words to say exactly what it intended. If there is any ambiguity about whether Section 2.2.3 turns on PGE's actual resource position at the time of default or on its projected resource position at the time of contracting, such ambiguity must be resolved against PGE and in favor of Fossil Lake.

E. PGE's Allegations About Rate-Payer Impacts Cannot Override the Actual Terms of the Contract

Realizing that the text, context, and history of the PPA soundly refute its litigation position, PGE asks the Commission to recognize a unilateral termination right based on alleged rate-payer impacts. PGE understands that this Commission is sensitive to rate-payer costs—as it should be. Upon review, however, PGE's allegation of rate-payer impacts is nothing more than a red-herring intended to divert the Commission's attention away from the plain language of the PPA.

First, it is important to recognize that there will be no financial harm to PGE's ratepayers caused by a delay in the Commercial Operation Date. Because PGE is in a

renewable resource sufficient state through January 1, 2025,[53] PGE does not need to replace the Net Output of the Facility in order to serve its retail customers.[54] Even if PGE did choose to acquire replacement power, PGE alleges that its current avoided costs are lower than the PPA fixed prices. This means PGE is able acquire replacement power *cheaper* than purchasing it from Fossil Lake. That being the case, Fossil Lake's delay in Commercial Operation Date is actually *saving* PGE's ratepayers money.

Ultimately, the financial impact caused by the delay in Commercial Operation Date falls squarely on Fossil Lake, not PGE. Unlike PGE's current QF contracts in which the fixed price period begins running on the commercial operation date, in this case Fossil Lake's fixed price term began running on the Effective Date.[55] Thus, the operational delay is not pushing Fossil Lake's opportunity to earn fixed prices for fifteen years out into the future. Instead, it is reducing the number of years for which it can earn fixed prices when it ultimately does reach the Commercial Operation Date.

Further, just because it cannot terminate the PPA under present conditions, that does not mean that PGE is left without a contractual remedy for a default. Order 06-538 and Section 2.2.3 both state that while PGE is resource sufficient, its remedy for a delay in the Commercial Operation Date is the collection of Start-Up Lost Energy Value. This provision ensures that if PGE replaces the Net Output of the Facility at a cost that its higher than the PPA fixed price, its ratepayers would be held harmless by Fossil Lake.

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[53] *See* Order No. 17-347.

[54] *See* Order No. 06-538, p. 26. ("[I]f the utility is in a resource sufficient position [at the time of the default], it may be that the utility could avoid replacing the energy *at any cost*.") (Emphasis in original).

[55] *See* Stipulated Facts, ¶ 24.

Indeed, PGE has actually imposed, and Fossil Lake has actually paid, such Start-Up Lost Energy Value charges.[56]

Finally, the financial impact of the PPA to one party or the other is not legal grounds to read into the PPA a unilateral termination right. As the Oregon Supreme Court has explained, "the court has no authority to read into said contract a provision which does not appear therein, nor to read out of it any portion thereof. And this is true, even though the result may appear to be harsh or unjust."[57] Whether PGE's avoided costs have increased or decreased since the Effective Date of the PPA has no bearing on the interpretation of the words of the contract. Taken to its logical extent, PGE's argument suggests that it should be able to terminate *all* QF contracts every time the Commission reduces PGE's avoided cost rates. This is obviously not how contracts work.[58] And at the end of the day, the PPA is just that—a contract to be interpreted and enforced according to its terms.[59]

V. CONCLUSION

This case does not present a policy question about what Section 2.3.3 *should* say. Section 2.3.3 was modified several years ago rendering this dispute a policy orphan. Instead, this case presents a concrete question about what the words of a valid and binding contract provision actually *do* say. What the words of Section 2.2.3 say is that "PGE may not terminate this Agreement" unless and until "PGE is resource deficient."

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[56] *See* Stipulated Facts, ¶ 34.
[57] *Sellgren v. Boyer*, 207 Or. 521 (1956) *quoting City of Reedsport v. Hubbard*, 202 Or. 370 (1954).
[58] *See, e.g., Id.*
[59] *See* Order 19-255 ("We examine the language of the contracts between PGE and . . . QFs in accordance with the standard prescribed under Oregon law").

PGE is *not* resource deficient. By Commission Order, PGE will not be resource deficient with respect to renewable resources until at least January 1, 2025.

PGE's argument for a January 1, 2020 termination date would require the Commission to read into Section 2.2.3 words that were omitted therefrom. In drafting Section 2.2.3, PGE deliberately chose to use the words "is resource deficient" rather than "Renewable Resource Sufficiency Period." PGE did not link Section 2.2.3 to its "Renewable Resource Deficiency Period" because the Commission had already confirmed through the Stipulation that the "Renewable Resource Deficiency Period" has no bearing on its termination rights.

The only thing that Fossil Lake asks of the Commission in this proceeding is to apply a common-sense interpretation to the plain language of the PPA consistent with the Stipulation. If QFs like Fossil Lake cannot rely in good faith on the what the words of their contracts actually say, as such words have been previously interpreted by this Commission, then the entire QF contracting process would be rendered meaningless.

Litigation of this question should not have been necessary.

DATED this 19th day of May, 2020.

Respectfully submitted,

/s/ Richard Lorenz

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Of Attorneys for Fossil Lake Solar, LLC

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 2051

FOSSIL LAKE SOLAR, LLC, COMPLAINANT, v. PORTLAND GENERAL ELECTRIC COMPANY, DEFENDANT.	DECLARATION OF DAVID W. BROWN IN SUPPORT OF FOSSIL LAKE SOLAR LLC'S MOTION FOR SUMMARY JUDGMENT

I, David W. Brown, do declare the following, and if called to testify I would and could completely testify thereto:

1. I am over the age of 18, and make this Declaration based upon personal knowledge.

2. I am the manager of Fossil Lake Solar, LLC ("Fossil Lake"). I have been the manager of Fossil Lake at all times relevant to the Complaint filed by Fossil Lake in this proceeding.

3. Obsidian Renewables, LLC ("Obsidian Renewables") is the sole member of Fossil Lake. Obsidian Renewables is also an Oregon-based company.

4. Fossil Lake has been working for more than ten years on the development of a 10 MW solar generating facility located in Lake County, Oregon ("Facility").

5. To date, Fossil Lake has invested about a million dollars ($1,000,000) of its own money on Facility development costs. A spreadsheet prepared by Fossil Lake showing its

development costs was marked by Fossil Lake as "Fossil Lake 0038-0039" and produced to PGE on a confidential basis in response to PGE's First Set of Data Requests.

6. The Net Output of the Facility is to be delivered to Portland General Electric ("PGE") over the transmission system of the Bonneville Power Administration ("BPA"). The Net Output will first cross BPA's 115kV "sub-grid" facility from the Fort Rock Substation to BPA's LaPine Substation. From the LaPine Substation, the Net Output will be stepped-up to 230kV and will be transferred by BPA across its 230kV transmission system to PGE's system.

7. Fossil Lake does not anticipate any difficulties or delays in obtaining firm transmission capacity on BPA's 230kV transmission system from the LaPine Substation to PGE's system.

8. Completion of the Facility has been delayed pending Fossil Lake's acquisition of long-term firm capacity on BPA's 115kV sub-grid facilities between the Fort Rock Substation and the LaPine Substation.

9. BPA recently informed Fossil Lake that it is currently considering Fossil Lake's proposed revisions to BPA's sub-grid transmission practices.

10. I am optimistic that Fossil Lake will be able to obtain from BPA during this calendar year the required transmission capacity across BPA's sub-grid facilities.

11. Fossil Lake and PGE are parties to PGE's Standard Renewable Off-System Variable Power Purchase Agreement ("PPA"). There was no bilateral negotiation of any PPA terms by and between PGE and Fossil Lake.

I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND THEY ARE MADE FOR USE AS EVIDENCE IN COURT AND SUBJECT TO PENALTY FOR PERJURY.

DATED: May 19, 2020.

DAVID W. BROWN