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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Fossil Lake Solar, LLC ("Fossil Lake") submits this Reply Brief in Support of its Motion for Summary Judgment ("Reply"). This Reply shall address arguments raised by Portland General Electric ("PGE") in its Response Brief filed on June 9, 2019 ("Response").

I. INTRODUCTION

This case requires only the common-sense application of the plain language of a contract. PGE and Fossil Lake are parties to a standard Power Purchase Agreement ("PPA"). 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." According to PGE's integrated resource plan ("IRP") proceedings, PGE will not be in a renewable resource deficient state until at least 2025.[1] Therefore, PGE may not terminate the PPA at this time.

In its Response, PGE searches heroically for a way to read into Section 2.2.3 the defined term "Renewable Resource Deficiency Period." PGE incorrectly argues that the words "resource deficient" as used in Section 2.2.3 have no meaning without reference to the defined term "Renewable Resource Deficiency Period." PGE dismisses the omission of such defined term from the actual text of Section 2.2.3 simply by saying it is of "no significance." PGE argues that its insertion of that same defined term *elsewhere* within the context of the PPA is "not relevant." PGE tries to minimize Staff's stipulation that the term "Renewable Resource Deficiency Period" does not define a utility's termination

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[1] *See 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); *In the Matter of Portland General Electric Company, Update to Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 20-171 (May. 26, 2020)

rights in this context ("Stipulation"). Finally, PGE suggests that any ambiguities in its drafting of Section 2.2.3 should be construed in *its* favor. In short, PGE's Response turns the applicable rules of contract interpretation on their head.

II. THE TEXT OF SECTION 2.2.3 IS SIGNIFICANT AND THE WORDS USED THEREIN SHOULD BE CONSTRUED CONSISTENT WITH COMMISSION ORDERS

PGE's argument is built around the proposition that the words actually used in, and the words omitted from, Section 2.2.3 are of "no significance." The following assertion by PGE in its Response encapsulates the issue: "*Fossil Lake puts great weight on Section 2.2.3's lack of reference to the defined term "Renewable Resource Deficiency Period," but the drafting history confirms that this omission has no significance*."[2] (Emphasis added). Fossil Lake does indeed put "great weight" on the actual text of Section 2.2.3. This is exactly how contract terms are to be construed. As the Commission noted in Order No. 19-255, "[w]hen considering a written contract provision, the . . . first inquiry is what the words of the contract say . . .."[3] Fossil Lake is asking the Commission to give effect to the words of the contract. PGE is telling the Commission that the words are of "no significance." This is nonsense.

A. <u>The words "is resource deficient" as used in Section 2.2.3 must be given their usual meaning consistent with prior Commission orders</u>.

The operative text of Section 2.2.3 is the words: "is resource deficient." The Commission's task is to construe these words according to their plain and ordinary meaning consistent with prior Commission orders. *See Cook v. Southern Pac. Transp. Co.*, 50 Or.App 547; 623 P.2d 1125 (1981) ("contracts . . . are usually to be interpreted

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[2] PGE Response, p. 15.

[3] Quoting the rules of contract interpretation articulated by the Oregon Supreme Court in *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 405 (1995).

according to the plain meaning of the language employed, where such meaning is unambiguously expressed.”).

In its Response, PGE argues that the words “is resource deficient” as used in Section 2.2.3 cannot be construed without specific reference to the defined term “Renewable Resource Deficiency Period.” PGE conveniently ignores the present tense use of the verb “is,” and points to its projected resource position at the time of contracting. PGE writes that “[t]he only relevant, Commission-approved definition of ‘resource deficient’ is the “Renewable Resource Deficiency Period” in Schedule 201.”[4] PGE’s argument falls flat. First, the defined term “Renewable Resource Deficiency Period” did not even exist when Section 2.2.3 was drafted.[5] Second, the Stipulation confirms that the subsequent addition of the defined term “Renewable Resource Deficiency Period” to PGE’s standard contract was *not* intended to apply to the utility’s termination rights. Moreover, no reference to the defined term “Renewable Resource Deficiency Period” is needed to construe the words “is resource deficient.” The Commission knows exactly what these words mean.

The Commission has long used the words “resource deficient” in a variety of contexts to mean that a utility is in a state of requiring additional resources in order to meet its load obligations or regulatory requirements. In Order 09-343, to take just one example among many, the Commission considered a request to modify market-based rates for retail electric service charged by PacifiCorp. Writing as the majority, Commissioners Baum and Beyer noted that “[d]uring periods of ***resource deficiency***, PacifiCorp buys

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[4] PGE Response, p. 3.
[5] PGE Response, pp 4-5. (“Section 2.2.3’s drafting predates the inclusion of the defined phrase[] “Renewable Resource Deficiency Period” . . ..”)

power at market prices to serve the load . . ..” (Emphasis added).[6] According to the Commission, the fact that PacifiCorp was actually in a “resource deficient” position at the time was “obvious.”

> As noted above, shortly before Wah Chang filed this complaint, PacifiCorp filed a request to recover $260 million in excess power costs resulting from the Western Energy Crisis. Because it incurred such large amounts of excess power costs, ***PacifiCorp was obviously resource deficient*** and, thus, a net buyer of electricity.

(Emphasis added).[7] In a dissent, Commissioner Savage also analyzed the potential cost-impacts to PacifiCorp at times when it “is resource deficient” to times when it “is resource sufficient.”[8] The Commissioners were using the words “is resource deficient” in a common-sense way and without reference to PacifiCorp’s Schedule 37 or its “Renewable Resource Deficiency Period.”

B. Order No. 06-538 also uses the words “resource deficient” according to their plain meaning.

The words “resource deficient” as used in Section 2.2.3 arise directly out of Order No. 06-538. In Order No. 06-538, Commissioners Baum, Beyers, and Savage used the words “resource deficient” and “resource sufficient” in the same common-sense way that they later used those words in Order 09-343 (described above). The Commissioners

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[6] Order No. 09-343 (Sept. 29, 2009) p. 34.
[7] *Id.* at p. 35.
[8] *Id.* at p. 50. Commissioner Savage wrote:

> There are two scenarios to consider—when PacifiCorp ***is resource deficient*** and when it ***is resource sufficient***. . . . During periods of ***resource sufficiency***, PacifiCorp either uses its own resources to serve Wah Chang or, if Wah Chang were not a customer, sells the power that would otherwise serve Wah Chang into the wholesale market. . . . In fact, during periods of ***resource sufficiency***, it is possible that PacifiCorp incurs fewer line losses or less transmission-related charges by serving Wah Chang than it would by selling the equivalent amount of power on the wholesale market. (Emphasis added)

explained that "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.*" (Emphasis added).[9] On its face, nothing in Order No. 06-538 equates the Commission's use of the words "resource deficient" in this context with the defined term "Renewable Resource Deficiency Period."

That Order No. 06-538 intended to use the ordinary, common-sense meaning of the words "resource deficient utility" is corroborated by PacifiCorp's corresponding contract language. Section 11.3.1 of PacifiCorp's [then] standard QF contract read: "PacifiCorp shall not terminate . . . for a default under Section 11.1.5 unless PacifiCorp *is in a resource deficient state during the period Commercial Operation is delayed*."[10] (Emphasis added). It is no accident that neither PGE's nor PacifiCorp's termination language references the utility's avoided cost rate schedules or its "Renewable Resource Deficiency Period."

The Commission subsequently addressed the question of how to ascertain whether a utility is in a resource sufficient or a resource deficient position at any given time. In Order No. 11-505 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***."[11] (Emphasis added). By reference to the utility's IRP process rather than a particular

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

[10] 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.

[11] *In the Matter of Public Utility Commission of Oregon Investigation Into Resource Sufficiency Pursuant to Order No. 06-538*, Order No. 11-505 (December 13, 2011) p. 6.

avoided cost rate schedule, the Commission's analytical framework looks to the utility's then-current resource position at the time of delay.

III. THE CONTEXT OF THE PPA IS RELEVANT AND REFUTES PGE THEORY OF THE CASE

PGE argues in its Response that the use of the defined term "Renewable Resource Deficiency Period" in provisions of the PPA other than Section 2.2.3 is "not relevant."[12] As the Commission noted in Order No. 19-255, the first level of contractual analysis is to examine the text *and context* of the document as a whole.[13] "To determine that, the court looks at the four corners of a written contract, and considers the contract as a whole with emphasis on the provision or provisions in question." *Eagle Industries, Inc. v. Thompson*, 321Or. 398, 405 (1995).

A. <u>When PGE intended to incorporate the term "Renewable Resource Deficiency Period" into a specific PPA provision, it did so expressly</u>.

PGE's use of the term "Renewable Resource Deficiency Period" in Section 4.5 but not Section 2.2.3 is not only relevant, it creates a legal *presumption* that the two provisions have different meanings. The law on this point is clear and overwhelming. In *Markel Am. Ins. Co. v. Dagmar's Marina, LLC.,* 139 Wash App 469, 480, 161 P3d 1029, 1034 (2007), the court explained:

> These provisions demonstrate that the marina could have clearly disclaimed liability for its own negligence had it wished to do so. Additionally, the terms "property damage" and "property loss," are used in the fourth and ninth sentences of the provision, showing that the marina also knew how to use these terms to limit its liability. *When in the shadow of such clear terminology, the drafter of an agreement employs different terms instead of parallel terminology, the presumption has to be that the change in usage was purposeful and reflects different and not parallel meaning*.

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[12] PGE Response, p. 4.
[13] *Citing Yogman v. Parrott*, 325 Or. 358 (1997).

(Emphasis added); *citing Robin v. Sun Oil Co*., 548 F.2d 554, 558 (5th Cir.1977) ("Counsel in this case were competent maritime lawyers. They knew the difference between liability and negligence. They knew how to use other words if they chose to do so").

This legal principle has long been applied by Oregon courts in interpreting both contracts and statutes. In *Portland School Dist. No.1J v. Great Am. Ins. Co.* 241 Or.App 161, 171 (2001), the court construed the relationship between an excess insurance policy and the underlying policy. "Great American knew how to incorporate the terms and conditions of the underlying policy when it intended to do so. By using different phrasing in the provision at issue here . . . it is reasonable to assume that Great American intended something different." *Citing Laird v. Allstate Ins. Co.*, 232 Or. App 162, 171, 221 P3d 780, 785 (2009) (Acknowledging the principle that, in interpreting contracts, "different words are presumed to have different meanings."); *see also Nw. Nat. Gas Co. v. City of Gresham*, 359 Or. 309, 323, 374 P.3d 829, 838 (2016) ("[I]f the legislature uses *different* terms in related statutes, it likely intended them to have different meanings.") (emphasis in original).

PGE's competent energy lawyers chose to use different words in Section 2.2.3 than Section 4.5. PGE incorporated the defined term "Renewable Resource Deficiency Period" into Section 4.5 but not Section 2.2.3. Had PGE really intended for the defined term "Renewable Resource Deficiency Period" to apply to Section 2.2.3, it knew how to do so. The legal presumption is that the use of different words in Sections 4.5 and 2.2.3 is purposeful and reflects different and not parallel meanings.

B. The defined term "Renewable Resource Deficiency Period" did not even exist when Section 2.2.3 was drafted.

PGE suggests in its Response that it used the defined term "Renewable Resource Deficiency Period" in Section 4.5 but not Section 2.2.3 because the term did not exist when PGE drafted Section 2.2.3.[14] This argument makes no sense. If it was possible for PGE to amend the PPA to draft the defined term "Renewable Resource Deficiency Period" into Section 4.5, then it was equally possible for PGE to also insert such term into Section 2.2.3. There is no logical reason why the defined term, once created, could only be used in one provision of the PPA but not others.

Ultimately, PGE's argument about the drafting history of Section 2.2.3 refutes its own core theory of this case. PGE's theory is that the words "is resource deficient" as used in Section 2.2.3 can only be defined by reference to the "Renewable Resource Deficiency Period."[15] Yet, PGE admits that the words "is resource deficient" in Section 2.2.3 *predate* the defined term "Renewable Resource Deficiency Period."[16] Thus, when the words "is resource deficient" were drafted into Section 2.2.3, they *necessarily* meant something other than PGE's "Renewable Resource Deficiency Period." As explained above, the correct answer is that these words were drafted into Section 2.2.3 based on their common-sense meaning as used by the Commission in Order No. 06-538 and later Order No. 09-343, Order No. 11-505 and others.

[14] PGE Response, pp 4-5.
[15] PGE Response, p. 3 "[T]he 'Renewable Resource Deficiency Period' in the 2014 Schedule 201 is the relevant, Commission-approved definition of 'resource deficient.'"
[16] PGE Response, pp 4-5.

IV. EXTRINSIC EVIDENCE SHOWS THAT THE TERM "RENEWABLE RESOURCE DEFICIENCY PERIOD" WAS NEVER INTENDED TO APPLY TO TERMINATION RIGHTS

In this case, the Commission's analysis should rest on the text and context of the PPA. *See* Order No. 19-255 ("[O]ur analysis ends with our conclusion that the contract is unambiguous . . .."). If the defined term "Renewable Resource Deficiency Period" were intended to apply to Section 2.2.3, it would be there.

If the Commission were to proceed to examine extrinsic evidence of the defined term "Renewable Resource Deficiency Period," however, it would find that the Stipulation is the most helpful. The Stipulation was executed by and between multiple parties to UM 1610, specifically including Commission Staff. 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.

(Emphasis added). Through Order No. 14-295, the Commission adopted the Staff Report to which the Stipulation was attached.[17] The Stipulation reflects Staff's and other stakeholders' clear, unequivocal, and contemporaneous understanding that the term "Renewable Resource Deficiency Period" does *not* define the utility's termination rights.

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[17] *In the Matter of Public Utility Commission of Oregon, Staff Investigation Into Qualifying Facility Contracting and Pricing*, Order No. 14-295 (August 19, 2014) ("This order memorialized our decision, made and effective at the public meeting on August 19, 2014, to adopt Staff's recommendation in this matter.").

A. The Stipulation is powerful extrinsic evidence that the addition of the term "Renewable Resource Deficiency Period" to the PPA was not intended to modify or define PGE's termination rights in this context.

PGE devotes much of its Response to attacking the legal enforceability of the Stipulation.[18] PGE argues that the Stipulation is inapplicable to it because it speaks specifically to PacifiCorp's form of agreement; it was not signed by PGE; PGE did not participate in drafting it; and the Commission only "adopted" the Staff Report to which it was attached. PGE's heavy emphasis on the Stipulation in its Response is telling. PGE clearly understands, as it must, that the Stipulation refutes PGE's whole legal argument.

Contrary to PGE's strawman argument, Fossil Lake does not suggest that the Stipulation is directly "binding" on PGE. Fossil Lake argues that the words of the PPA are binding on PGE, and the Stipulation is extrinsic evidence of what those words mean. Staff and other stakeholders in UM 1610 had a clear understanding of the intent and meaning of the defined term "Renewable Resource Deficiency Period" in the specific context of a termination for delay in commercial operations. The defined term "Renewable Resource Deficiency Period" "*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* . . .." This is exactly the opposite of what PGE is now trying to argue in this case.

PGE's suggestion in its Response that the Stipulation is relevant only to PacifiCorp's standard contract form defies reality. PGE writes that "the stipulation is not applicable to a different contract form signed by a different utility." [19] The reality is that PGE was an active participate in the UM 1610 docket and was well aware of filings in that

[18] PGE Response, pp 7-12.
[19] PGE Response p. 9.

docket. On December 17, 2014,[20] less than four months after the Commission adopted the Staff Report to which the Stipulation was attached, *the exact same defined terms discussed in the Stipulation were also incorporated into PGE's PPA*. Further, these defined terms were inserted into PGE's standard contract in exactly the same way that they are discussed in the Stipulation and used in PacifiCorp's standard contract. Specifically, the defined terms were inserted by PGE into Section 4.5 of the PPA to demarcate the change in ownership of the Environmental Attributes. These defined terms were omitted by PGE from Section 2.2.3--the provision that discusses PGE's right to terminate for a delay. None of this is a coincidence. Ultimately, PGE's argument would require the Commission to construe the exact same defined terms in PGE's and PacifiCorp's standard contracts in a manner that is directly opposite of each other.

B. <u>Order 06-538 is the prior Commission Order that speaks directly to this issue</u>.

In its Response, PGE tries to muddy the Commission's directive in Order 06-538 by mixing-in sound-bites from other orders.[21] For example, PGE points to Order No. 05-584, in which the Commission determined that a seller may be required to post financial security upon a delay in completion of construction if the utility "is in a resource deficient position." The Commission did not say, as PGE suggests, that the utility's future resource position in such case shall be determined based on its avoided costs in effect at the time of contracting. Instead, the Commission merely noted its "expectation" that the parties would "be aware," at the time of contracting, whether or not the utility is in a resource deficient position. This is, of course, a reasonable expectation in most cases. But it is far from a mandate about how the utility's resource position at the time of delay is to be

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[20] *See* Order No. 14-435 (December 17, 2014).

ascertained. In any case, Order 05-584 has no direct bearing on the language used in Section 2.2.3 of PPA.

The issue of a delay in commercial operations was revisited by the Commission in Order No. 06-538. As explained above, Order No. 06-538 makes no reference to a utility's resource position or avoided cost rates "at the time the contract is signed." Instead, both the language and logic of Order No. 06-538 focus on the utility's replacement power costs based on its resource position at the time of delay.[22] The Commission explained that "we would expect that a resource sufficient utility would be able to minimize the damages on a going forward basis." Based on this expectation, "we determine that a QF's operational delay pursuant to a contract with a resource sufficient utility should result in default, but not termination." The Commission's reasoning behind Order No. 06-538 would make no sense with respect to a utility that is resource sufficient at the time of contracting but resource deficient at the time of the delay.

C. PGE's use of language deleted from prior drafts of Schedule 201 to contradict the plain meaning of the PPA should be rejected.

While Fossil Lake puts "great weight" on the actual text and context of Section 2.2.3, PGE retreats to language that was *deleted* from prior drafts of Schedule 201. PGE

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[22] 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."

(Emphasis in original).

notes that a prior draft of Schedule 201 used the words "the deficiency period (starting in 2020)" instead of the defined term "Renewable Resource Deficiency Period."[23] PGE argues that the deleted words establish what is missing from the final version—a direct link between Section 2.2.3 and the avoided cost rates in Schedule 201. PGE's argument is problematic because it asks the Commission to construe the PPA based on words deleted from the contract rather than the final contract language.

The Commission should avoid construing the PPA based on deleted language. Section 19.1 of the PPA states that "[*t]his Agreement supersedes all prior agreements, proposals, representations, negotiations, discussions or letters, whether oral or in writing, regarding PGE's purchase of Net Output from the Facility*." (Emphasis added). Even in the absence of Section 19.1, Oregon law generally prohibits the use of prior drafts to modify or contradict the final terms of an agreement. *See, e.g., Howell v. Oregonian Pub. Co.,* 82 Or App 241 (1986) ("Any contract term reduced to writing supersedes all prior and contemporaneous negotiations and oral understandings as to that term"). Thus, prior drafts, proposals, negotiations, or discussions by and between the parties about Schedule 201 and Section 2.2.3 are "superseded" by the final versions and should be given no weight.

Even if the words deleted by PGE from prior drafts were to be given any weight, they actually cut *against* PGE's position. The prior drafts show that PGE *could have* linked its termination rights in Section 2.2.3 to Schedule 201 but, in the end, did not do so. The deletion of these words actually supports the inference that any proposed linkage between Section 2.2.3 and Schedule 201 was *rejected*, not accepted. Thus, what is

[23] PGE Response, p. 16.

relevant to the Commission's present inquiry is not the prior draft language—it is *the omission of* such language from the final version of the PPA.

D. PGE's "declaration" about the meaning of the words "resource deficient" in Section 2.2.3 lacks credibility.

Recognizing the weakness of its substantive arguments, PGE tries a "gotcha" procedural argument. PGE points to a declaration from a PGE employee Robert Macfarlane stating his opinion that PGE was "resource deficient" as of January 1, 2020 and could therefore terminate the PPA at that time.[24] As "evidence" concerning the meaning of the PPA, the declaration should be given very little weight. The opinion is not supported by any internal documentation, external correspondence, or other corroborating information. In fact, Mr. Macfarlane's declaration contradicts PGE's own IRP process, which indicates that PGE will *not* be renewable resource deficient until 2025.[25] Mr. Macfarlane therefore stops short of declaring unequivocally that PGE is renewable resource deficient—an assertion that would be plainly false. Instead, he cleverly says PGE is renewable resource deficient only "for purposes of" the PPA. With the addition of these qualifying words, Mr. Macfarlane's declaration does nothing more than just repeat PGE's incorrect legal position that the term "Renewable Resource Deficiency Period" should be read into Section 2.2.3.

Aside from having no evidentiary value, PGE's procedural gambit should be rejected. PGE argues that the declaration constitutes a "fact" that is unrebutted in the record.[26] PGE is wrong on both counts. First, the declaration merely restates PGE's legal argument about the ultimate question in dispute and is therefore not a "fact" at all.

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[24] PGE Response, p. 17.
[25] *See* Order No. 17-347; Order No. 20-171.
[26] *See id.*

Second, the legal argument expressed in the declaration is clearly rebutted by: Order No. 17-347 and Order No. 20-171; Fossil Lake's legal pleadings in this case; and by the Joint Stipulated Undisputed Facts. Specifically, Paragraph 36 of the Joint Stipulated Undisputed Facts states that "Fossil Lake disputes that PGE had the authority under Section 2.2.3 and Section 8 to terminate the PPA effective January 2, 2020." To avoid any doubt, Fossil Lake submits herewith a declaration of David W. Brown expressly rebutting on the record Mr. Macfarlane's legal argument.

V. THE MAXIMS OF CONSTRUCTION DICTATE THAT ANY AMBIGUITY IN SECTION 2.2.3 MUST BE CONSTRUED AGAINST PGE

If the Commission finds that there is an ambiguity in Section 2.2.3 of the PPA, then such ambiguity should be construed against PGE. "[I]t is a basic tenet of contract law 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) (Applying the maxim to a form contract). In its Response, PGE argues that this maxim of construction should not apply to it here because it was somehow not the "drafter" of its own standard-form PPA.[27] The Commission has already rejected this argument. In Order No. 14-287 the Commission determined—notwithstanding stakeholder input and Commission approval—that the standard contract "was drafted by PGE."[28] To the extent that any of the terms of the PPA are ambiguous, they should be construed against PGE.

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[27] PGE Response, p. 18.

[28] *See* Order No. 14-287 (August 13, 2014) ("*We also note that the PPA was drafted by PGE* at our direction to comply with PURPA, related federal and state law, and our orders, and was subject to the review and comment by our Staff and interested parties, as well as our consideration and approval.") (Emphasis added).

PGE also suggests that Section 2.2.3 should be construed in its favor because it is the "beneficiary" of the provision.[29] This is not the case. PGE's right to terminate the PPA for an event of default is granted in Section 8.2, not Section 2.2.3. What Section 2.2.3 actually does is *condition* PGE's exercise of its termination rights under Section 8.2 for a particular type of event default—one due to a delay in commercial operations. Section 2.2.3 states that, under such circumstances, PGE may only terminate the PPA pursuant to Section 8 if it also "is resource deficient." The key words of Section 2.2.3 are prohibitive: "*Otherwise, PGE may not terminate this Agreement* but Seller shall pay PGE the Start-Up Lost Energy Value." Section 2.2.3 is clearly intended to benefit Fossil Lake by protecting it against termination pursuant to Section 8 for a delay in commercial operations while PGE is resource sufficient. This proceeding is about Fossil Lake enforcing against PGE the legal protections afforded to it under Section 2.2.3. According to PGE's own legal authority, therefore, any ambiguity in Section 2.2.3 should be construed in favor of Fossil Lake and against PGE.[30]

VI. CONCLUSION

The Commission can resolve this dispute based on the plain language of the PPA. The words used in Section 2.2.3 unambiguously state that PGE may not terminate the PPA due to a delay in commercial operations unless it "is resource deficient." In order to ascertain whether PGE "is resource deficient" at the time of delay, the Commission need look no further than PGE's IRP proceedings. PGE's IRP proceedings confirm that it does not expect to be "resource deficient" with respect to renewable resources until 2025.

[29] PGE Response, p. 18.
[30] *See, e.g.,* ORS 42.260; *Crossroads Plaza, LLC v. Oren*, 176 Or.App 306 (2001).

Under the most straight-forward reading of the words actually used in Section 2.2.3, therefore, PGE may not terminate the PPA for a delay in commercial operations until it is in a renewable resource deficient position at the time of delay. To reach any other conclusion, the Commission would have to insert into Section 2.2.3 words that were omitted.

DATED this 23rd day of June, 2020.

Respectfully submitted,

/s/ Richard Lorenz
Richard Lorenz, OSB No. 003086
Chad M. Stokes, OSB No. 004007
Cable Huston LLP
1455 SW Broadway, Suite 1500
Portland, OR 97201
Telephone: (503) 224-3092
E-Mail: rlorenz@cablehuston.com
cstokes@cablehuston.com

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.	SUPPLEMENTAL DECLARATION OF DAVID W. BROWN IN SUPPORT OF FOSSIL LAKE SOLAR LLC'S CROSS 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").
3. According to Portland General Electric's ("PGE") own submissions and Commission orders in PGE's most recent integrated resource plan ("IRP") processes, PGE is not currently resource deficient with respect to renewable resources.
4. According to its IRP processes, PGE was not resource deficient with respect to renewable resources on January 1, 2020.
5. According to its IRP processes, PGE does not expect to be resource deficient with respect to renewable resources until 2025.

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 AND SUBJECT TO PENALTY FOR PERJURY.

DATED: June 23, 2020.

DAVID W. BROWN