ORDER NO. 20-340

ENTERED Oct 12 2020

# BEFORE THE PUBLIC UTILITY COMMISSION

# OF OREGON

UM 2051

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| FOSSIL LAKE SOLAR, LLC,<br><br>Complainant,<br><br>vs.<br><br>PORTLAND GENERAL ELECTRIC COMPANY,<br><br>Defendant,<br><br>Pursuant to ORS 756.500. | ORDER |

DISPOSITION: PORTLAND GENERAL ELECTRIC'S MOTION FOR SUMMARY JUDGMENT GRANTED; FOSSIL LAKE SOLAR, LLC'S MOTION FOR SUMMARY JUDGMENT DENIED

## I. INTRODUCTION

In this order, we deny the claims for relief of Fossil Lake Solar, LLC (Fossil Lake) and grant Portland General Electric Company's counter claims. We conclude, based on the language of the contract in question, the Standard Renewable Off-System Variable Power Purchase Agreement (PPA) between Fossil Lake and PGE was terminated effective January 2, 2020, pursuant to Sections 2.2.3 and 8.2 of the PPA.

## II. PROCEDURAL HISTORY

On December 31, 2019, Fossil Lake filed a complaint seeking to prevent PGE from terminating the PPA between Fossil Lake and PGE, asserting that PGE's notice of termination is invalid because PGE is not currently renewable resource deficient. PGE filed an answer, affirmative defenses, and counterclaim on January 21, 2020, arguing that its notice of termination was effective because PGE became renewable resource deficient for purposes of the PPA on January 1, 2020. Fossil Lake filed an answer to PGE's counterclaims on February 5, 2020. On May 1, 2020, Fossil Lake and PGE filed a joint stipulated statement of undisputed facts. Fossil Lake and PGE filed motions for summary judgement on May 19, 2020. PGE filed a response to Fossil Lake's motion on June 9,

2020. On June 23, 2020, Fossil Lake filed a reply to PGE's response. The Commission held oral argument on the motion on July 23, 2020.

## III. REGULATORY BACKGROUND

The Public Utility Regulatory Policies Act of 1978 (PURPA) is intended to create a market for the electricity generated by small power producers and cogenerators, known as qualifying facilities (QFs).[1] Electric companies subject to this law and its implementing regulations must purchase electricity from QFs at the utility's avoided cost. Electric companies and QFs commonly execute power purchase agreements (PPAs) for the purchase and sale of energy under PURPA. Although FERC plays a central role in setting the boundaries for PURPA implementation, states are responsible for implementing significant aspects of the law. State regulatory bodies may implement PURPA "by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules."[2] Additionally, Oregon has enacted its own complementary legislation in ORS 758.505 et seq. The Commission has adopted rules governing PURPA's application to regulated utilities, and within the bounds of federal law, we set avoided cost prices and contract terms.[3]

In implementing PURPA in Oregon, this Commission requires utilities to make standard Commission-approved contracts available to QFs with nameplate capacities of 10 MW or less, except as otherwise determined by Commission order. The Commission's longstanding goal has been to encourage the economically efficient development of QFs, while protecting ratepayers by ensuring that utilities pay rates equal to the costs they would have incurred in lieu of purchasing power from QFs.[4] Fixed prices based on the utility's avoided cost are available to QFs during the first 15 years of the PPA.[5] Utilities must use an approved methodology to calculate these fixed prices, which are reviewed and approved by the Commission in avoided cost filings, with different fixed prices effective during periods of resource adequacy and resource sufficiency.[6] Similar to standard avoided costs, renewable resource avoided cost rates vary depending on whether the utility is renewable resource sufficient or deficient.[7]

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[1] *FERC v. Mississippi* 456 US 751 (1982).
[2] *See Power Res. Group, Inc. v. PUC*, 422 F3d 231,238.
[3] *North Am. Natural Resources v. Michigan PSC*, 73 F Supp 2d 804, 807.
[4] *In the Matter of Public Utility Commission of Oregon, Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 1 (May 13, 2005).
[5] *Id.* at 20.
[6] *Id.* at 26. Avoided costs differ depending on the resource position of the utility.
[7] *In the Matter of Public Utility Commission of Oregon, Investigation Into Determination of Resource Sufficiency, pursuant to Order No. 06-538*, Docket No. 1396, Phase II, Order No. 11-505 at 4 (Dec 13, 2011).

## IV. STIPULATED FACTS

Fossil Lake and PGE executed a PPA, effective April 29, 2015, for all delivered net output from a 10 MW solar generation QF in Lake County (Facility) during the term of the agreement. Under the PPA, beginning on the commercial operation date, PGE must pay Fossil Lake fixed prices, as set forth in Sheet Nos. 201-17 and 201-18, tables 6a and b, for the net output delivered for a 15-year period with market prices applicable for the remaining term of the PPA. The 15-year period for fixed prices commenced on April 29, 2015, the effective date of the PPA. The term of the PPA ends on April 29, 2035, unless terminated earlier.

Section 2.2.1 of the PPA provides for an initial delivery of net output by December 15, 2016, and Section 2.2.2 provides for Fossil Lake to achieve a commercial operation date by March 15, 2017. By letter, PGE extended the deadline for Fossil Lake to achieve the commercial operation date to November 30, 2017. Section 2.2.3 of the PPA provides that "[i]n the event that 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."[8]

Fossil Lake has not begun initial delivery of net output or reached the commercial operation date. Fossil Lake has not yet constructed the Facility, and indicates that it will initiate construction when and if Fossil Lake obtains from the Bonneville Power Administration (BPA) the long-term firm transmission capacity needed to deliver the net output to PGE.[9] Fossil Lake communicated to PGE in 2017 and again on December 20, 2019,[10] that the reason for the delay is difficulty in obtaining long-term firm transmission capacity from BPA. Fossil Lake estimates that once begun, construction can be completed in less than six months, not accounting for any potential delays related to the COVID-19 pandemic.

PGE has billed, and Fossil Lake has timely paid $126,226.59 in start-up lost energy value, with such payments made under protest. On November 27, 2019, PGE provided Fossil Lake with written notice of PGE's intent to terminate the PPA unless Fossil Lake cured its defaults under the PPA by January 1, 2020. Fossil Lake provided a letter to PGE on December 20, 2019, disputing PGE's right to terminate. PGE responded to

[8] Complaint, Ex. A at 34 (Dec 31, 2019) (Fossil Lake PPA, 2014 Schedule 201, attached as Exhibit D, at Sheet No. 201-23).
[9] Fossil Lake intends to interconnect with Mid-State Electric Cooperative Cooperation (Mid-State), which would wheel the Facility's net output from Mid-State's Fort Rock substation to BPA's transmission system for delivery to PGE's system.
[10] Joint Stipulated Undisputed Facts at 3 (May 1, 2020) indicate December 20, 2020, which is a clear typographical error.

Fossil Lake's letter on December 31, 2019, and on January 2, 2020, PGE issued notice of termination pursuant to Sections 2.2.3 and 8.

## V. POSITIONS OF THE PARTIES

### A. Fossil Lake

Fossil Lake contends that PGE is not renewable resource deficient because, in Order No. 17-347, the Commission determined that PGE will not be renewable resource deficient until January 1, 2025.[11] Accordingly, Fossil Lake asserts that PGE may collect monetary damages in the form of Start-Up Lost Energy Value to remedy a delay in the commercial operation date, as provided under the PPA, but cannot terminate the PPA. Fossil Lake asserts that its position is supported by both the text and the regulatory history of the PPA.

Fossil Lake argues that the plain, common sense meaning of "is resource deficient" in the PPA refers to whether PGE is actually and presently in a resource deficient state at the time PGE seeks termination. Fossil Lake contends that Section 2.2.3 does not include language referencing PGE's resource position as projected "at the time of contracting" or "projected resource position." Specifically, Fossil Lake argues that under the two-part test for whether PGE may terminate for failure to meet the COD, both conditions are described in the present tense. As a result, Fossil Lake asserts that both parts of the test look at the current state of the relevant party: (1) whether Fossil Lake is currently in default with regard to Sections 2.2.1 and 2.2.2, and (2) whether PGE is currently resource deficient. Fossil Lake asserts that courts have interpreted "is" using the straightforward meaning of the term, and have declined to give the present tense of the word either a forward, backward, or hypothetical meaning.[12]

Fossil Lake argues that the inclusion of the term "as defined by the Commission" does not change the plain meaning of the provision, but refers to the Commission's definition of "resource deficient," as used in the integrated resource planning process. Specifically, Fossil Lake asserts that by referring to the definition of "resource deficient" in terms of the IRP process rather than the particular avoided cost schedule appended to the PPA, the Commission's analysis looks at the utility's current resource position at the time of the delay.

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[11] *In the Matter of Portland General Electric Company, Application to Update Schedule 201 Qualifying Facility Information*, Docket No. UM 1728, Order No. 17-347 (Sep 14, 2017).

[12] Fossil Lake Motion for Summary Judgment at 10-11 (May 19, 2020), citing *Pope v. Rosenberg*, 361 P3d 824 (2015); *O'Hearon v Hansen*, 409 P3d 85 (2017); *Guidiville Band of Pomo Indians v. NGV Gaming*, LTD, 531 F3d 767 (2008).

Fossil Lake disputes PGE's position that, for purposes of this PPA, PGE was renewable resource deficient on the first day of the "Renewable Resource Deficiency Period" as defined in the Schedule 201 appended to the PPA. Fossil Lake argues that if PGE intended for the defined term "Renewable Resource Deficiency Period" to establish termination rights, PGE would have used that term, or included a reference to the appended Schedule 201, as it did elsewhere in the PPA,[13] rather than using the more generic term "resource deficient." Fossil Lake contends that PGE's choice to use defined terms in one section and not in another is dispositive that the provisions have different meanings. Specifically, Fossil Lake argues that using different terms creates a legal presumption that the two provisions have different meanings.[14] Fossil Lake disputes PGE's position that it did not use the term in section 2.2.3 because the term did not exist when Section 2.2.3 was originally drafted, and contends that PGE could have inserted the term into Section 2.2.3 when it was later introduced upon the addition of Section 4.5 to the standard PPA. Fossil Lake additionally contends that the Commission should not rely on language that was deleted from the PPA during drafting to construe the final version and that deletion of the parenthetical "starting in 2020" supports an inference that a link between Schedule 201 and the termination provision was rejected from the final version.

Additionally, Fossil Lake maintains that the regulatory history of the term "Renewable Resource Deficiency Period" demonstrates that the term was not intended to apply to termination for failure to meet COD.[15] Fossil Lake argues that the term "Renewable Resource Deficiency Period" did not exist when the termination provision was drafted, and thus when "is resource deficient" was included in the termination provision, it necessarily had to refer to something else.

Fossil Lake asserts that extrinsic evidence demonstrates that when the term "Renewable Resource Deficiency Period" was added to the standard contract template, it was not intended to apply to termination rights. Fossil Lake explains that this term was first added to PacifiCorp's tariff based on a stipulation in docket UM 1601. Fossil Lake states that the stipulation specified that the "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" and provided that "the inclusion of these specifically defined terms in Schedule 37 and the PPAs will not

[13] Fossil Lake Motion for Summary Judgment at 13-14 (May 19, 2020), citing Section 4.5 (using term "Renewable Resource Deficiency Period" to indicate that ownership of environmental attributes will transfer to PGE as of January 1, 2020 and referring to a time period "as specified in the Schedule" to refer to Schedule 201, appended to the PPA as Exhibit D.
[14] Fossil Lake Reply Brief at 6-7 (Jun 23, 2020), citing *Markel American Insurance Company v. Dagmar's Marina, LLC*, 139 Wash App 469, 480 (2007); *Portland School District No. 1J v Great American Insurance Company*, 241 Or App 161, 171 (2001).
[15] Fossil Lake Motion for Summary Judgment at 2-3 (May 19, 2020), quoting Order No. 14-295, Appendix A, at 7-8.

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."[16]

Fossil Lake acknowledges that PGE was not a party to the stipulation, but contends that PGE was an active participant in docket UM 1610 and that the stipulation is extrinsic evidence of the docket UM 1610 stakeholders' understanding of the term "Renewable Resource Deficiency Period." Further, Fossil Lake maintains that the Commission adopted Staff's recommendation, which put PacifiCorp's tariff into effect on August 20, 2014, and that on December 17, 2014, PGE incorporated the same defined terms into its Schedule 201. Fossil Lake argues that the implementation in PGE's standard contract was consistent with the stipulation because the defined terms are used in Section 4.5 regarding environmental attributes, but omitted from the termination section. Fossil Lake asserts that adoption of PGE's position would mean that the Commission would have to construe identical terms in PGE and PacifiCorp's PPA's differently.

Fossil Lake argues that the regulatory history of Section 2.2.3 also demonstrates that PGE may not terminate the PPA unless it is actually in a resource deficient state at the time of default. Fossil Lake asserts that the termination provision of the PPA stems from the Commission's Order No. 06-538, where the Commission determined whether a resource sufficient utility should be allowed to terminate a PPA for failure to achieve commercial operation. Fossil Lake contends that the Commission's discussion focused on the magnitude of the harm to the utility caused by delay, which depended on whether the utility would need to acquire replacement power. Fossil Lake asserts that the rationale for the Commission's decision was based on the ability of a utility that was resource sufficient at the time of the delay or default to avoid replacing the energy at any cost. Fossil Lake contends that this is why both Order No. 06-538 and Section 2.2.3 focus on the utility's actual resource position rather than the projected resource position at the time of contracting. Fossil Lake argues that, contrary to PGE's assertions, Order No. 05-584 has no direct bearing on the language of the termination provision.

Fossil Lake argues that Order No. 06-538 also governed the standard contract adopted by PacifiCorp, and that the language of PacifiCorp's standard contract more clearly specified that the relevant inquiry was the resource position of the utility at default. Specifically, Fossil Lake states that PacifiCorp's standard contract provided that "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."[17]

[16] *Id*. At 18, quoting Order No. 14-295, Attachment A (Aug 19, 2014).
[17] *Id.* at 16-17.

Fossil Lake disputes PGE's reliance on Order No. 07-360, and argues that that order established guidelines for bilateral negotiations of large QF contracts, and is thus inapplicable to standard QF contracts.

Finally, Fossil Lake argues that any ambiguity in Section 2.2.3 should be construed against PGE, as the drafter of the PPA, under Oregon law.[18] Fossil Lake asserts that the Commission has previously rejected PGE's argument that because PGE is not the drafter of its standard PPA, this maxim of construction does not apply.[19] Fossil Lake further disputes that PGE is the intended beneficiary of Section 2.2.3. Fossil Lake maintains that while PGE's ability to terminate for default is established in Section 8.2, Section 2.2.3 is intended to protect Fossil Lake by conditioning PGE's exercise of termination for delay in commercial operations to when PGE is resource deficient.

**B. PGE**

PGE contends that, under the PPA, PGE was renewable resource deficient as of January 1, 2020. PGE argues that its 2014 version of Schedule 201 (2014 Schedule 201) is incorporated by reference into the PPA, and as a result, the deficiency period defined in the 2014 Schedule 201 is the relevant Commission determination of PGE's resource position for purposes of this PPA.

PGE argues that the termination is a general PPA provision, appearing in all versions of PGE's standard template PPAs (for both renewable and non-renewable resources). As a result, the more generic term "resource deficient" is used in the termination provision because it is intended to reference either of the two defined deficiency periods (for renewable or non-renewable resources), depending on which resource the applicable QF provides. PGE contends that Section 4.5, in contrast, regarding renewable attributes, is specific to renewable QFs.

Additionally, PGE contends that the language of the termination provision was drafted prior to the addition of the terms "Renewable Resource Deficiency Period" and "Resource Deficiency Period" in Schedule 201, whereas Section 4.5 was drafted after those terms were included. Specifically, PGE describes that the redlined standard PPA revisions filed in May 2014 included the termination provision as it appears in the Fossil Lake PPA, and that the accompanying Schedule 201 used the term "the deficiency period (starting in 2020)" rather than setting out defined terms. PGE asserts that the defined terms were added in a revised version, filed after a series of workshops with stakeholders.

[18] *Id.* at 19-20, citing Berry v. Lucas, 210 Or. App. 334 (2006).
[19] Fossil Lake Reply Brief at 15 (May 23, 2020), citing Order No. 14-287 (Aug 13, 2014).

Further, PGE contends that where a contract defines a term, the definition applies even where that term is not capitalized.[20]

PGE asserts that the terminology used in PacifiCorp's standard contract, tariff, and related stipulation are not relevant to the interpretation of this PPA because they addressed a materially different contract template, different parties, and the stipulation was never adopted by the Commission. PGE contends that the consideration of extrinsic evidence such as the PacifiCorp tariff and stipulation are only considered under the second step of the *Yogman* analysis, after a determination that the disputed term is ambiguous. PGE argues that if the Commission determines that the PPA is ambiguous, extrinsic evidence resolves the ambiguity in PGE's favor because Fossil Lake offered no evidence of the intent of the parties from a witness.

PGE disputes that Order No. 17-347 establishes its renewable resource deficiency date for purposes of this PPA and contends that the 2017 Schedule 201 modifications are only effective after the effective date of September 18, 2017, and thus do not apply to the 2015 PPA. PGE contends that each of PGE's Commission-approved standard contracts has incorporated the terms of PGE's Schedule 201 in effect at the time of execution, and has never incorporated the terms of subsequent revisions to deficiency periods. PGE argues that post-execution modification of the PPA is barred by both PURPA and Oregon contract law.[21]

PGE contends that under Commission precedent, there is a single resource deficiency period for pricing purposes and for termination purposes, and that resource deficiency period is set "[a]t the time the contract it is signed." Specifically, PGE asserts that in Order No. 05-584, the Commission stated that a utility's resource position should be analyzed "[a]t the time the contract is signed" when measuring the impact of a delay in operations.[22] PGE contends that the Commission referred back to this rationale in Order No. 06-538 in determining that "a QF's operational delay pursuant to a contract with a resource sufficient utility should result in default, but not termination."[23] PGE maintains that, for non-standard QF contracts, the Commission adopted guidelines that were "the same" as the rules applicable to standard QF contracts, including a guideline that provided "[d]elay of commercial operation should not be a cause of termination if the

[20] PGE Motion for Summary Judgment at 7 (May 19, 2020), citing *Sunset Presbyterian Church v. Brockamp & Jaeger, Inc.*, 254 Or App. 24, 29 (2012), aff'd 355 Or 286 (2014), Docket No. UM 1931, Order No. 19-255, at 14-15.
[21] *Id.* at 8-9, citing (add cites from nn 40-41).
[22] *Id.* at 9, quoting Docket UM 1129, Order No. 05-584, 46-47 (May 13, 2005).
[23] *Id.* at 9, quoting Docket No. UM 1129, Order No. 06-538, at 27 (Sep 20, 2006).

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."[24]

Additionally, PGE disputes Fossil Lake's position as inconsistent with the price structure of the PPA. Specifically, PGE contends that under the PPA, the fixed prices prior to January 1, 2020, compensate for the avoided costs of energy only, with prices after January 1, 2020, increasing to also compensate for the avoided costs of capacity and renewable energy credits (RECs). PGE asserts that under Fossil Lake's interpretation, there would be different sufficiency periods within a single PPA, with PGE presently being deemed renewable resource sufficient for purposes of termination, but renewable resource deficient for purposes of fixed pricing.

PGE argues that, under its interpretation, the parties to a PPA would know at the time they enter into the contract when a utility will begin relying on delivery of energy, capacity, and RECs under the PPA, and when the utility will be able to terminate for failure to achieve commercial operation. PGE asserts the utility receiving delivery of energy, capacity, and RECs is then relied upon in the subsequent IRP process. PGE argues that under Fossil Lake's interpretation, as a practical matter, PGE would never be able to terminate a PPA for failure to achieve the commercial operation date. PGE explains that PGE is never resource deficient on a real time basis because as PGE approaches its scheduled resource deficiency date, the company secures new resources based on its IRP, and as new IRPs are acknowledged, the new renewable resource date is incorporated in an updated Schedule 201. PGE contends that Fossil Lake's interpretation would allow QFs to speculatively lock in avoided cost rates and then wait to build projects until well after the commercial operation date with no risk of termination.

PGE argues that Fossil Lake has the option of applying for a new standard contract, and selecting a COD that is up to three years after the effective date of the contract, with a 2025 renewable resource deficiency date applicable to both price and non-price terms.

PGE asserts that the maxim that an ambiguous contract term is construed against the drafter is applicable when a single party drafts a contract and thus is in control of its contents, but is not applicable here. PGE maintains that a PPA that is based on the standard Commission-approved template is drafted by neither party, but was the result of a series of workshop and collaborative stakeholder efforts. PGE contends that the relevant maxim of construction is that a provision is interpreted in favor of the party the provision was intended to benefit. Here, PGE contends that Section 2.2.3 provides PGE with the unilateral option to terminate and provides no rights or benefits to Fossil Lake, and that as a result, any ambiguity in the provision should be construed in PGE's favor.

[24] *Id.* at 10, quoting Docket No. UM 1129, Order No. 07-360, at 21-22 & Appendix at 2.

Further, PGE contends that the terms that Fossil Lake points to as creating ambiguity in the PPA were proposed by stakeholders rather than PGE during the workshop process.

## VI. LEGAL STANDARDS

### A. Summary Judgment

OAR 860-001-0000(1) provides that the Oregon Rules of Civil Procedure (ORCP) apply in contested case and declaratory ruling proceedings unless they are inconsistent with Commission rules, a Commission order, or an Administrative Law Judge (ALJ) ruling. Under ORCP 47 C, a motion for summary judgment shall be granted "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." In applying the ORCP 47 C standard, we can conclude that "[n]o genuine issue as to a material fact exists if, based upon the record before the court viewed in the 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 party moving for summary judgment has the initial burden of showing that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. To defeat a motion, the nonmoving party must demonstrate that there is an issue of genuine dispute for a hearing on the merits.

### B. Contract Interpretation

We examine the language of the contract between Fossil Lake and PGE in accordance with the standards prescribed under Oregon law.[25] In *Yogman v. Parrot*, 325 Or 358 (1997), the Supreme Court of Oregon set out the standard to be applied when reviewing a contract:

> 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.
>
> When considering a written contractual provision, the court's first inquiry is what the words of the contract say* * *. 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. The meaning of disputed text in that context is then determined. In making that determination, the court inquires

[25] *Portland General Electric Company v. Alfalfa Solar I LLC, Dayton Solar I, LLC Fort Rock Solar I LLC, Fort Rock Solar II LLC, Fort Rock Solar IV LLC, Harney Solar I LLC, Riley Solar I LLC, Starvation Solar I LLC, Tygh Valley Solar I LLC, Wasco Solar I LLC*, Docket No. UM 1931, Order No. 19-255 (Aug 2, 2019).

whether the provision at issue is ambiguous. Whether terms of a contract are ambiguous is a question of law. In the absence of an ambiguity, the court construes the words of a contract as a matter of law.[26]

If the contractual provision at issue is ambiguous, we proceed to the second of the three analytical steps that the court follows in interpreting contracts. That step is to examine extrinsic evidence of the contracting parties' intent.

"If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with the intent of the parties. Words or terms of a contract are ambiguous when they reasonably can, in context, be given more than one meaning." *Pacific First Bank v. New Morgan Park Corp.*, 319 Or 342, 347-48, 876 P2d 761 (1994) (citations omitted).

If the first two analytical steps have not resolved the ambiguity, we must reach the third and final analytical step. If the meaning of a contractual provision remains ambiguous after the first two steps have been followed, we must apply appropriate maxims of construction.

## VII. RESOLUTION

As all parties agree, 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. Here, we determine that under the first step of the *Yogman* analysis, the PPA terms in question are clear in the context of the document as a whole, and that the sufficiency period as determined by the Commission prior to the effective date of the contract is the sufficiency period applicable to the disputed provision. Accordingly, we grant PGE's motion for summary judgment, and deny the motion of Fossil Lake. Below we review the analysis supporting our conclusion.

As a threshold matter, we note that Section 2.2.3 of the contract does not refer, and cannot be interpreted to be a provision that refers, to resource sufficiency and deficiency independent of the Commission. This is because the provision specifically references a Commission determination of resource deficiency or sufficiency: "if PGE is resource deficient (*as defined by the Commission*) PGE may terminate this Agreement in accordance with Section 8."[27] But there is only one way in which the Commission determines when a utility becomes resource deficient: The regular determinations of

[26] *Eagle Industries, Inc. v. Thompson*, 321 Or 398,405 (1995). *See also* ORS 42.230 (in construing a document, the 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.")
[27] Complaint, Ex. A at 24 (Dec 31, 2019), (emphasis added).

resource position that occur in avoided cost filings and inform updates to avoided cost price schedules, like Schedule 201.[28]

The plain language of this provision means that only a Commission determination, under this contract, may set the resource deficiency or sufficiency period for the purposes of the contract. With this much clear, we must determine which Commission determination of PGE's resource sufficiency governs this contract.

Following completion of the IRP process, which occurs for each utility approximately every two years, the Commission reviews the utility's avoided cost filing (and stakeholder and Staff comments on that filing) and sets avoided cost prices and a resource sufficiency and deficiency period for standard and renewable resources. For the purposes of this controversy, two of these determinations are central to our analysis—those following PGE's 2013 and 2016 IRPs.[29]

The first Commission determination came on December 16, 2014, before the parties signed this contract (the Fossil Lake PPA's effective date is April 29, 2015). Shortly after we issued Order No. 14-435 on December 16, 2014, PGE published avoided cost prices consistent with this determination. Those avoided cost prices, which are based on a Commission determination of resource sufficiency and deficiency as of December 16, 2014, are reflected in the contract before us.[30] In that determination, we designated 2020 as PGE's renewable deficiency date.

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[28] *See Or. Trail Elec. Consumers Co-op, Inc. v. Co-Gen. Co.*, 168 Or App 466, 474-75, 7 P3d 594 (2000) (citing *Abercrombie v. Hayden Corp.*, 320 Or 279, 292, 883 P2d 845 (1994)); *accord Batzer Constr., Inc. v. Boyer*, 204 Or App 309, 317-18, 129 P3d 773 (2006) (extrinsic evidence regarding the circumstances in which the contract was executed may be considered at the first level of the *Yogman* analysis); *see also Brandup v. ReconTrust Co., N.A.*, 353 Or 668, 687, 303 P3d 301 (2013) (existing legal framework is part of the circumstances in which a contract is executed).

[29] PGE's 2013 IRP was acknowledged by the Commission on December 2, 2014 in LC 56 through order No. 14-415. PGE's 2016 IRP was acknowledged by the Commission on August 8, 2017 in LC 66 through Order No. 17-386 (Oct 9, 2017). We note that on May 26, 2020, through Order No. 20-171, we approved a further update to avoided cost prices. That order did not change the renewable deficiency date from that adopted in 2017. We also note that the termination of the contract which is the subject of the complaint occurred before this change, in January 2020. Neither party argues that this Commission determination of resource sufficiency and deficiency is controlling here, and for the purposes of the key question in this case, the 2020 determination is no different than that of the 2017 determination, because they both identify an identical 2025 deficiency start date. Accordingly, in our analysis below we refer to the 2017 determination when reviewing the two resource sufficiency and deficiency periods we must consider in this case.

[30] *See* Order No. 14-435, (Dec 16, 2014).

A second Commission determination raised by the parties occurred on September 14, 2017. At that time, the Commission reviewed the implications of docket LC 66, PGE's 2016 IRP. In docket LC 66, the Commission determined that PGE would be renewable resource deficient as of 2025.[31] Immediately after, PGE updated its avoided cost values. After September 14, 2017, all QF contracts signed by PGE and counterparties included avoided cost values consistent with this Commission determination.

Section 2.2.3 of the Fossil Lake PPA states that "if PGE is resource deficient (as defined by the Commission) PGE may terminate this Agreement in accordance with Section 8."[32] The language of Section 2.2.3 does not by itself specify which Commission definition is applicable to the contract. However, when viewed in the context of the contract as a whole, we conclude that Section 2.2.3 unambiguously refers to the Commission-determined renewable resource deficiency period identified at the time that the contract was executed. In particular, Schedule 201, which is incorporated into the contract, includes fixed price terms that do not change over time when the Commission updates PGE's sufficiency and deficiency period dates for future contracts. The 2014 Schedule 201 incorporated into the contract provides that PGE's "Renewable Resource Deficiency Period" begins on January 1, 2020.[33] These prices, once set based on the most recent Commission determination of resource position, are fixed for the entire term of the contract, consistent with section 1.6 and 4.2 of the contract.

The 2014 Schedule 201 states that: "The power purchase prices are based on either the Company's Standard Avoided Costs or Renewable Avoided Costs in effect at the time the agreement is executed."[34] Schedule 201 further explains that:

> "Renewable Avoided Costs are based on forward market price estimates through the Renewable Resource Sufficiency Period, the period of time during which the Company's Renewable Avoided Costs are associated with incremental purchases of energy and capacity from the market. For the Renewable Resource Deficiency Period, the Renewable Avoided Costs reflect the fully allocated costs of a wind plant including capital costs."[35]

[31] *See* Order No. 17-347 (Sep 14, 2017).
[32] Complaint, Ex. A at 24 (Dec 31, 2019).
[33] Complaint, Ex. A at 34 (Dec 31, 2019) (Fossil Lake PPA, 2014 Schedule 201, attached as Exhibit D, at Sheet No. 201-23).
[34] *Id.* at 24.
[35] *Id.*

These prices, which are based on the estimated costs of new renewable resources, consistent with PGE's latest IRP, are fixed for the term of the contract. They remain fixed regardless of any changed circumstances, such as a change in the estimated costs of new renewable resources, a change in anticipated market costs, or a change in PGE's resource sufficiency or deficiency period. Changes in all these factors have indeed occurred over the intervening years, yet consistent with the contract Fossil Lake is entitled to the 2014 fixed prices for the entire term of the contract, regardless of any fundamental change in the conditions upon which these prices were based and developed.

These prices also reflect, during the deficiency period, specific capacity costs. These prices are higher than those from the sufficiency period, because they are structured to provide compensation for Fossil Lake for the displacing of capacity that PGE would otherwise need to procure. This element of the bargain in the contract is important context for our determination. By agreeing to provide PGE reliable power in 2020, a deficiency year as reflected in the 2014 Schedule 201, Fossil Lake is affording PGE the opportunity to avoid independent development or purchase of alternative capacity. Accordingly, the Schedule 201 prices, which are fixed at the time of the contract, compensates Fossil Lake more richly during the deficiency period for this purpose.

This context indicates that PGE, under the terms of the contract, should be able to rely on Fossil Lake's performance during the period, starting in 2020, where under the contract PGE will pay Fossil Lake a higher price because of the capacity it brings to PGE. As of January 2020, Fossil Lake has failed to provide the capacity, promised and compensated for through the higher values in the fixed, 2014 Schedule 201 prices.

Consistent with this context regarding fixed prices and fixed damage calculation elements from the PPA, we find that the Commission definition referred to in Section 2.2.3 is fixed at the time of contract execution, and refers to the Commission's resource position determinations regularly made by the Commission in avoided cost filings. In this case, that means that the Commission determination on resource sufficiency and deficiency that is applicable to this contract is that of December 16, 2014, made in Order No. 14-435, and incorporated into Schedule 201 at the time of contract execution.

We find that there is no genuine issue of material fact and that summary judgment in favor of PGE is appropriate. The motion for summary judgment of Fossil Lake is denied, and that of PGE granted.

## VIII. ORDER

1. Fossil Lake Solar, LLC's motion for summary judgment is denied.

2. Portland General Electric Company's motion for summary judgment is granted.

Made, entered, and effective Oct 12 2020.

**Megan W. Decker**
Chair

**Letha Tawney**
Commissioner

**Mark R. Thompson**
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.