MRG
McDOWELL RACKNER GIBSON PC

ALISHA TILL
Direct (503) 290-3628
alisha@mrg-law.com

February 12, 2018

VIA ELECTRONIC FILING

Attention: Filing Center
Public Utility Commission of Oregon
P.O. Box 1088
Salem, Oregon 97308-1088

Re: Docket UM 1887: Portland General Electric Company's Reply to Cross Motions for Summary Judgment and the Response of Marion County

Dear Filing Center:

Attached for filing in the above-captioned docket is a copy of Portland General Electric Company's Reply to the Cross Motions for Summary Judgment and the Response of Marion County.

Please contact this office with any questions.

Very truly yours,

Alisha Till

Alisha Till
Administrative Assistant

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1887

Portland General Electric Company, Complainant v. Covanta Marion, Inc., Respondent.	**PORTLAND GENERAL ELECTRIC COMPANY'S REPLY TO CROSS-MOTIONS FOR SUMMARY JUDGMENT AND THE RESPONSE OF MARION COUNTY**

Covanta Marion, Inc. (Covanta) proposes to take an operational qualifying facility (QF) with a nameplate capacity of 13.1 MW offline and pay Mitsubishi Hitachi Power Systems (Mitsubishi) to modify the turbine and reduce the facility's nameplate capacity to 10 MW. Even though the facility has operated for more than 30 years—most of those as a QF—and its output has exceeded 10 MW more than 50 percent of the time in the past year, Covanta has chosen to expend significant resources to reduce the facility's output in an effort to render itself eligible for a standard power purchase agreement (PPA) under Portland General Electric Company's (PGE) Schedule 201.

Covanta's proposal is contrary to the Public Utility Commission of Oregon's (Commission) policies implementing the Public Utility Regulatory Policies Act (PURPA), which reflect the Commission's attempts to balance the interests of QF developers with its fundamental responsibility to protect utility customers. Toward that end, the Commission has repeatedly reaffirmed its intent to make standard contracts available to those QFs for whom negotiations might prove prohibitively expensive.[1] However, the Commission also has recognized that negotiated contracts can be more accurately tailored to reflect actual avoided costs.[2] The

[1] *In the Matter of the 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 40 (May 13, 2005).
[2] Order No. 05-584 at 20.

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Portland, OR 97205

Commission has exercised its discretion to balance these considerations by setting the eligibility threshold for standard contracts at 10 MW—significantly higher than the 100-kW threshold mandated by FERC—based on its view that QFs larger than 10 MW have the resources to negotiate a contract.[3] Given this determination, the Commission has stated that it does "not discern any justification for permitting a QF with a nameplate capacity larger than 10 MW to reduce operations to 10 MW or less in order to receive standard contract terms and conditions,"[4] which is exactly what Covanta proposes to do here.

Contrary to the assertions of Covanta and intervenor Marion County, PGE is not asking the Commission to disregard or revise the established 10-MW eligibility cap for standard contracts. PGE simply asks the Commission to interpret and apply its existing PURPA policies to this case. To be clear, PGE supports the Commission's maintenance of clear, easily applicable guidelines for standard contract eligibility. It does not follow, however, that the 10-MW eligibility cap should be interpreted so rigidly as to undermine its very purpose. Nor should the Commission's policy—that QFs may not qualify for standard contracts by voluntarily constraining output—be construed so narrowly as to strip it of meaningful application. By adopting PGE's position and finding that Covanta may not qualify for a standard contract by redesigning the facility to limit its output, the Commission can adhere to its prior guidance and strike an appropriate balance between maintaining a uniform regulatory environment for QFs in Oregon and ensuring that the rates electric consumers pay for their output are "just and reasonable."[5]

PGE and Covanta agree that summary judgment is appropriate on the legal issue of Covanta's eligibility for a standard contract, because the parties have jointly presented the Commission with Stipulated Facts upon which such a decision can be made.[6] As discussed in

[3] Order No. 05-584 at 40.
[4] Order No. 05-584 at 40.
[5] 16 U.S.C. § 824a-3(b).
[6] Covanta's Motion for Summary Judgment at 9 (Jan. 4, 2018).

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Portland, OR 97205

more detail below, PGE disagrees with Covanta's characterizations of PGE's actions and intent, which go far beyond the Stipulated Facts that the parties agreed to present to the Commission. However, these disputes are not relevant to the straightforward legal issue before the Commission. Therefore, for the reasons explained in PGE's Motion for Summary Judgment and in more depth herein, PGE respectfully requests that the Commission deny Covanta's Motion for Summary Judgment and grant summary judgment to PGE.

A. The Parties' Factual Disputes Are Not Relevant to Resolution of the Pending Motions.

The parties filed Stipulated Facts to support their cross-motions for summary judgment,[7] and there are no disputes of material fact relevant to the legal issue of Covanta's eligibility for a standard contract: The facility currently has a nameplate capacity rating of 13.1 MW and produced in excess of 10 MW during 56.7 percent of hours over the past year.[8] Covanta has contracted with Mitsubishi to modify the facility's turbine and decrease the capacity rating to 10 MW for the primary purpose of qualifying for a standard contract.[9]

Prior to filing their motions, the parties carefully negotiated, drafted, and filed Stipulated Facts with the Commission. Nevertheless, Covanta's recitation of "background facts" frequently strays from or embellishes the agreed-upon facts—even as Covanta cites to the Stipulated Facts as support for its allegations.[10] In this fashion, Covanta's Motion introduces a variety of assertions and allegations not contained in the Stipulated Facts, including suggestions that PGE has acted in bad faith and that PGE has an aggressive anti-PURPA strategy.[11] PGE vigorously disputes such allegations.[12]

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[7] Stipulated Facts for Cross Motions for Summary Judgment (Stipulated Facts) (Dec. 21, 2017).
[8] Stipulated Facts at ¶¶ 2-3.
[9] Stipulated Facts at ¶¶ 10, 12 & Confidential Ex. A to Stipulated Facts.
[10] Covanta's Motion for Summary Judgment at 1-9.
[11] *See* Covanta's Motion for Summary Judgment at 4-5, 7-8.
[12] There is no evidence in the record to support Covanta's assertion that its Merchant PPA was based on "depressed market index pricing," or that "PGE benefitted financially, to Covanta's detriment." Covanta's Motion for Summary Judgment at 4. There similarly is no evidence supporting Covanta's claim that "the 'PGE policy' referenced in the Complaint does not actually exist. The only 'PGE policy' in play here is the PGE policy of

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Fortunately, the Commission need not consider Covanta's extraneous allegations because they are not relevant to the resolution of the pending motions. If, however, the Commission disagrees that Covanta's allegations are immaterial to the legal issue presented, then summary judgment is not appropriate because there are material issues of fact.[13]

B. Covanta is Not Eligible for a Standard Contract Under a Straightforward Application of the Commission's PURPA Policies.

The Commission established the threshold for standard contract eligibility at 10 MW in Order No. 05-584.[14] In doing so, the Commission made clear that "the purpose of standard contracts is to eliminate negotiations for QF projects for which they would be economically prohibitive," and further stated, "we do not discern any justification for permitting a QF with a nameplate capacity larger than 10 MW to reduce operations to 10 MW or less in order to receive standard contract terms and conditions."[15] In adopting the 10-MW threshold, the Commission acknowledged that Staff recommended nameplate capacity be used to determine QF eligibility because it "provides a clear standard that is not subject to manipulation."[16] Yet, contrary to the Commission's clear direction and intent, Covanta seeks to manipulate the eligibility standard to its advantage here.

Covanta has chosen to reduce the output of its facility by hiring Mitsubishi to modify the turbine.[17] Covanta concedes that the primary purpose of its redesign and rerate is to qualify for a standard contract,[18] and despite ample opportunity, Covanta has provided no other reason for the

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contesting every possible PURPA contract request." *Id.* at 7. There also is no evidence that "PGE's failure or refusal to complete negotiations of a Schedule 202 contract with Covanta in 2013, and its refusal to offer a Standard Contract for the Project in 2017, are not isolated incidents. They are part of a pattern of behavior by PGE reflecting a deliberate business and legal strategy to avoid complying with requests for PURPA contracts." *Id.* at 7-8. PGE disputes all of these allegations.

[13] *See* ORCP 47C (stating summary judgment is appropriate where "there is no genuine issue as to any material fact").

[14] Order No. 05-584 at 17.

[15] Order No. 05-584 at 40.

[16] Order No. 05-584 at 39.

[17] Stipulated Facts at ¶ 11 & Confidential Exhibit A.

[18] Stipulated Facts at ¶ 12.

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redesign. Moreover, Covanta's decision to redesign its facility plainly is voluntary—there is no indication in the record that Covanta could not continue operating at its present nameplate capacity, producing output in excess of 10 MW for another 30 years. In sum, Covanta has not offered "any justification," much less a compelling one, for why it should be permitted to reduce its output to receive a standard contract.[19]

Covanta attempts to distinguish its proposal from the scenario the Commission specifically rejected in Order No. 05-584 on the basis that Covanta's decrease in output will result from a permanent physical modification, rather than a temporary limitation.[20] Similarly, Covanta argues that its proposal is permissible because it will amend its nameplate capacity to reflect the reduction in its output.[21] However, from a policy perspective, these are distinctions without a difference. As noted above, the basis for the Commission's decision in Order No. 05-584 was that, by constructing a project greater than 10 MW, the QF had presumptively demonstrated that it had the financial resources to negotiate a contract with the utility, and it therefore had no need for a standard contract.[22] Here, Covanta already has constructed a QF over the 10-MW threshold.[23] The fact that Covanta is proposing to spend money to redesign its facility to achieve a new nameplate capacity[24]—which will result in a permanent reduction in the amount of renewable energy produced—presents an even starker departure from the Commission's holding in Order No. 05-584, and from the fundamental goals underlying PURPA.

Covanta contends that the Commission's PURPA policies do not distinguish between the initial design and construction of a new QF and the redesign of an operational facility, and that, as a result, Covanta should be allowed to redesign its facility to its chosen size.[25] PGE disagrees

[19] *See* Order No. 05-584 at 40.
[20] Covanta's Motion for Summary Judgment at 15-16.
[21] Covanta's Motion for Summary Judgment at 11.
[22] *See* Order No. 05-584 at 40.
[23] Stipulated Facts at ¶ 2.
[24] *See* Confidential Ex. A to Stipulated Facts.
[25] Covanta's Motion for Summary Judgment at 12.

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that Covanta's situation is analogous to that of a new QF. Here, Covanta made its initial sizing decision, constructed, and operated a facility exceeding 10 MW, and now proposes to reduce the size of that facility to gain the benefit of a standard contract. As explained above, under the Commission's PURPA policies, Covanta's construction of a 13.1 MW facility indicates that Covanta has "the financial resources to engage in QF purchase contract negotiations."[26] Therefore, Covanta's situation is completely different and distinguishable from that of a new QF.

Covanta also argues that adopting PGE's position in this case would allow PGE to prohibit *new* QFs from qualifying for standard contracts if PGE believes the QF could have constructed a facility with a capacity greater than 10 MW.[27] PGE disagrees that the outcome of this case would have any effect on the rules applicable to new QFs, and PGE has expressed no intent to analyze new QFs' sizing decisions.

Covanta argues that, because a QF would no longer be eligible for a standard contract if it increased its nameplate capacity, the reverse should also be true—a QF that decreases its nameplate capacity should become eligible.[28] This argument incorrectly assumes that a move from a standard to a negotiated contract has similar implications to a move from a negotiated to a standard contract. On the contrary, because a negotiated contract more accurately reflects PGE's true avoided cost,[29] thereby protecting utility customers from harm, customers are likely to be negatively impacted if a QF moves from a negotiated to a standard contract—while the reverse is not the case. Covanta's argument also is contrary to the Commission's policy reason behind the 10-MW eligibility threshold for a standard contract, discussed above. While it is logical to presume that a QF increasing its capacity has achieved the level of sophistication and financial resources that the Commission relied upon in setting the 10-MW threshold, the reverse is not

[26] Order No. 05-584 at 40.
[27] Covanta's Motion for Summary Judgment at 23.
[28] Covanta's Motion for Summary Judgment at 17.
[29] *See* Order No. 05-584 at 20 (stating that QFs above the standard contract threshold "are still entitled to sell power to a utility at avoided costs, but receive avoided cost rates that are individually negotiated with a utility to reflect specific characteristics of the project and its interconnection with the utility.").

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419 SW 11th Avenue, Suite 400
Portland, OR 97205

true. As such, under the Commission's policy justification for setting the 10-MW standard-contract threshold, it makes perfect sense that a QF voluntarily increasing its capacity above the 10-MW threshold is required to negotiate a PPA, but that a QF voluntarily reducing its capacity below the 10-MW threshold is *not* eligible for a standard contract.

Covanta also attempts to justify its proposal by arguing that a QF's eligibility for a standard contract is not static because the Commission can change the eligibility threshold.[30] PGE agrees that the Commission can and has changed the eligibility cap for standard contracts. However, the fact that *the Commission* can change the generally applicable rules, thereby affecting a QF's eligibility, does not justify Covanta's attempt to work around the current standard and alter its own eligibility under the existing rules.

Marion County asserts without citation that "the Commission's policy has generally been to allow a generator to change the nameplate capacity of its facility."[31] Marion County notes that "section 4.4 of PGE's standard contract contemplates that the as-built capacity may be different from what was specified when the contract was first signed."[32] Based on these claims, Marion County implies that Covanta should be allowed to achieve a standard contract by changing its size. However, section 4.4 addresses two very specific scenarios that are entirely different from Covanta's proposal. First, section 4.4 contemplates that the process of constructing a new QF may result in non-material changes to the nameplate capacity of the completed facility, and therefore requires the QF to provide an as-built specification.[33] Second, section 4.4 addresses the scenario in which a material change in the nameplate capacity of an operational QF results from an upgrade or efficiency improvement.[34] In contrast, the parties' dispute in this case centers on whether Covanta may reduce the output of an existing facility to affect its standard-contract

[30] Covanta's Motion for Summary Judgment at 18.
[31] Marion County's Response at 3.
[32] Marion County's Response at 3.
[33] PGE's Complaint, Attachment B at 43 (Section 4.4 of PGE's standard contract).
[34] PGE's Complaint, Attachment B at 43 (Section 4.4 of PGE's standard contract); *see* Docket No. UM 1129, Order No. 06-538 at 37-39.

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Portland, OR 97205

eligibility. Thus, section 4.4 does not support Marion County's claim that the Commission has a broad policy allowing QFs to alter their nameplate capacity, much less suggest that Covanta's proposal in this case is consistent with Commission policy.

Finally, Covanta devotes several pages of its Motion to rebutting what it perceives to be PGE's reliance on Covanta's FERC Form 556 to determine its ineligibility for a standard contract.[35] PGE agrees that a QF's Form 556 alone does not dictate its eligibility, though it may provide evidence suggesting a QF is or is not eligible. In any event, PGE's Motion does not rely on the information contained in Covanta's Form 556, so Covanta's arguments about its Form 556 are misplaced. The Commission should grant summary judgment to PGE because Covanta's proposal to reduce its output to qualify for a standard contract is contrary to the Commission's clear guidance, and Covanta's and Marion County's misplaced analogies and arguments to the contrary do not change this simple fact.

C. PGE Asks the Commission to Interpret and Apply its Existing PURPA Policies—Not Develop New Policies.

Covanta and Marion County both assert that this proceeding is not the proper avenue for resolution of the parties' dispute over Covanta's eligibility and that a rulemaking or generally applicable proceeding must be initiated to resolve this issue.[36] PGE disagrees. Neither a rulemaking proceeding nor other generally applicable docket would be appropriate or necessary to resolve the specific dispute between Covanta and PGE about whether Covanta's proposal violates existing Commission policy.

As an initial matter, only Covanta's eligibility for a standard contract would be determined by a decision in this case. To be clear, PGE does not have any other QFs in its contracting queue that propose to go to the same lengths as Covanta by redesigning an existing project to reduce its output. PGE's statement in its Complaint that other QFs in contact with

[35] Covanta's Motion for Summary Judgment at 13-14.
[36] Covanta's Motion for Summary Judgment at 19; Marion County's Response at 7.

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Portland, OR 97205

PGE are also seeking ways to game the eligibility threshold was not intended to suggest that a new, generally applicable policy needs to be established,[37] but instead to illustrate that PGE has been grappling with numerous QF eligibility issues and to explain PGE's need to initiate this case to seek Commission guidance.

In addition, PGE supports the Commission's current policy of using nameplate capacity as a proxy for QF resources and maintaining a clear, easy-to-apply eligibility threshold based on nameplate capacity to ensure that those QFs with the financial resources to engage in contract negotiations do so.[38] The parties' disagreement in this case centers not on whether the existing 10-MW cap should be altered, but rather on whether the Commission's order establishing the cap also prohibits a QF from voluntarily reducing its output to qualify for a standard contract, as Covanta proposes. The plain language of Order No. 05-584 demonstrates that it does.[39]

Moreover, PGE believes that maintaining a simple eligibility standard does not require rigidly applying that standard and turning a blind eye to an attempt to circumvent it. This is particularly true here because the Commission also has a responsibility to ensure that PGE's customers are not harmed by its PURPA obligations.[40] Allowing Covanta to render itself eligible for a standard contract would undermine the very purpose of the eligibility cap and lead to illogical results. Covanta's proposal is a blatant attempt to game the threshold for its own economic benefit, and it is one the Commission should reject.

PGE expressly is *not* advocating—as the other parties suggest—that the Commission should examine a QF's financial information to determine its eligibility. This not only would be burdensome for all involved, it also would be almost impossible to apply in practice, given that QFs often are individually capitalized limited liability corporations owned by large national or multinational developers. For example, Covanta is a subsidiary of Covanta Holding

[37] However, PGE would welcome the opportunity to address QF gaming issues in a separate, general docket.
[38] Order No. 05-584 at 40.
[39] Order No. 05-584 at 40.
[40] *See, e.g.*, *So. Cal. Edison Co.*, 71 F.E.R.C. ¶ 61,269, 62,079-80 (F.E.R.C. 1995).

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419 SW 11th Avenue, Suite 400
Portland, OR 97205

Corporation, a company whose indirect energy subsidiaries own or lease 45 QFs in the United States.[41] The Commission can easily find that Covanta's proposal is prohibited under the Commission's policies without delving into Covanta's financial information.

PGE similarly is not arguing that the Commission should examine a developer's stated reason for a redesign when determining eligibility. On the contrary, PGE is asking the Commission to rely on the QF's own representation—a practice that occurs in virtually every aspect of the QF contracting process. Though this approach could enable gaming if the QF's statement is not credible, the Commission need not address this potential here because the facts of this case are clear: Covanta has never offered *any* reason for its redesign other than to qualify for a standard contract. In sum, this proceeding is the appropriate avenue for interpreting the Commission's existing policies and applying them to the undisputed facts to resolve Covanta's eligibility for a standard contract.

D. The Issue of Which Avoided Cost Prices Covanta Is Entitled to Receive Is Not Properly Before the Commission and Should Not Be Decided At This Time.

No matter which party prevails on the eligibility issue, the question of which vintage of avoided cost prices Covanta is entitled to receive is not properly before the Commission for decision at this time. Neither Covanta nor PGE has devoted any briefing to this issue.[42] Only intervenor Marion County's Response briefed the applicable prices, and even Marion County states that it is "not request[ing] that the Commission address this issue in these pleadings."[43] Marion County cannot properly raise a new issue or be granted summary judgment on an issue it raises, because it is not a named party or a movant and has merely filed a Response to PGE's and Covanta's Motions.[44] In addition, there is no information in the record to inform an analysis of

[41] Covanta's Answer at 3-4 (Sept. 8, 2017).
[42] Covanta's Motion merely concludes by requesting that the Commission order PGE "to honor Covanta's March 2, 2017 Standard Contract request, including the rates in effect on that date." Covanta's Motion for Summary Judgment at 24.
[43] Marion County's Response at 2, 8-9.
[44] *See Eklof v. Steward*, 360 Or 717, 730-32 (2016) (holding that a tribunal's consideration in summary judgment proceedings is limited to issues "raised in the motion" for summary judgment).

McDowell Rackner Gibson PC
419 SW 11th Avenue, Suite 400
Portland, OR 97205

the prices Covanta should receive if it is not eligible for a standard contract. For all of these reasons, the Commission should not address the applicable avoided cost prices at this time.

E. Conclusion

This Commission has specifically found that a QF sized at greater than 10 MW may not render itself eligible for a standard contract by voluntarily reducing its output. Nevertheless, Covanta claims that this policy does not apply here, because its redesign will result in a permanent reduction of its output, which will be reflected in a new nameplate capacity. Essentially, Covanta argues that, because it has the resources to *pay for* a new nameplate capacity, it should be allowed to circumvent the Commission's ruling in Order No. 05-584 and obtain a standard contract. The Commission should reject Covanta's arguments by granting summary judgment to PGE and by denying Covanta's Motion for Summary Judgment. In so doing, the Commission will reaffirm its policies that seek to protect utility customers from making payments to QFs in excess of avoided costs—while at the same time encouraging QF development and the promotion of renewable resources.

Dated: February 12, 2018.

MCDOWELL RACKNER GIBSON PC

Lisa F. Rackner
Jordan R. Schoonover
419 SW 11th Avenue, Suite 400
Portland, Oregon 97205
Telephone: (503) 595-3925
Facsimile: (503) 595-3928
dockets@mrg-law.com

PORTLAND GENERAL ELECTRIC COMPANY

Donald J. Light
Assistant General Counsel
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
Telephone: (503) 464-8315
donald.light@pgn.com

Attorneys for Portland General Electric Company