

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1887**

PORTLAND GENERAL ELECTRIC  
COMPANY,

Complainant,

v.

COVANTA MARION, INC.

Respondent.

COVANTA MARION INC.'S MOTION  
TO DISMISS AND ALTERNATIVE  
MOTION TO STAY

**CONFERENCE WITH OPPOSING COUNSEL**

Pursuant to OAR 860-001-0420(2), Covanta Marion, Inc.'s ("Covanta") undersigned legal counsel certifies that he made a good faith effort to confer by telephone with Plaintiff Portland General Electric's ("PGE") legal counsel to resolve the dispute at issue in this motion, but was unable to resolve the issues raised herein.

**BACKGROUND FACTS**

The facts relevant to this Motion are set forth in greater detail in Covanta's Answer filed in this Docket, which is supported by the Declaration of Sami Kabbani. What follows is therefore not intended to be an exhaustive recitation of the facts but rather a summary to give context to the Motion.

Since 1987, Covanta has owned and operated an electric generating facility located in Brooks, Oregon that is fueled by the incineration of municipal solid waste (the "Project"). The Project is certified by the Federal Energy Regulatory Commission ("FERC") as a Qualifying Facility ("QF") for purposes of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Project has at all times been interconnected with the electric system of Portland General

Electric (“PGE”). Between 1987 and 2014, the output of the Project was sold to PGE pursuant to a power purchase agreement executed by the parties to implement PGE’s legal obligation under PURPA to purchase the output of QFs. Between 2014 and 2017, however, PGE purchased the output of the Project pursuant to a short-term non-PURPA contract. Covanta wishes to execute another long-term PURPA contract following the expiration of the current short-term agreement.

PGE and Covanta disagree about whether the Project is eligible for a standard PURPA contract, or whether the parties must negotiate a bespoke PURPA contract. Under Oregon law, the Project is eligible for a standard contract so long as the nameplate capacity rating is 10 MW or less. The original nameplate capacity rating of the Project is approximately 13 MW. Thus, in order to meet the Commission’s eligibility criteria for a standard contract, Covanta proposes to physically modify the Project such that it will have a revised nameplate capacity rating of 10 MW on or before the Commercial Operation Date of the standard contract.

On March 2, 2017, Covanta tendered to PGE a fully complete and executed version of PGE’s standard PURPA contract. Covanta explained that the Project’s nameplate capacity rating would be 10 MW by the Commercial Operation Date of the contract. By letter dated May 5, 2017, PGE rejected Covanta’s contract based on PGE’s determination that the Project is not eligible for the standard contract unless and until the work needed to reduce the nameplate capacity rating to 10 MW is actually completed. PGE has subsequently taken the more extreme position that the Project will not be eligible for a standard contract even when the work needed to reduce the nameplate capacity rating to 10 MW is actually completed.

On or about July 21, 2017, Covanta filed with FERC a “Petition for Enforcement Pursuant to the Public Utility Regulatory Policies Act of 1978.” Covanta’s FERC petition has

been docketed as EL17-81-000. Covanta filed its FERC petition as a direct response to PGE's assertion in the May 5 letter that Covanta is not eligible for a Schedule 201 contract unless and until it has completed the re-rate of the nameplate capacity of the Project. This is directly contrary to FERC's PURPA regulations and orders, which allow QFs to create a Legally Enforceable Obligation ("LEO") prior to construction or completion of the QF.

On or about August 11, 2017, PGE filed with this Commission a document called a "Complaint and Request for Dispute Resolution." In its filing, PGE advances a number of novel legal theories and policy arguments as to why it should not be required to provide a standard contract to a QF that will have, upon the Commercial Operation Date of the contract, a nameplate capacity rating of 10 MW. PGE's filing does not follow the Commission's established rules of practice and procedure for either a Complaint or a Petition for a Declaratory Ruling.

### **MOTION TO DISMISS**

Covanta hereby respectfully requests that the Commission dismiss PGE's co-called "Complaint and Request for Dispute Resolution" on the basis that the Commission's rules of practice and procedure do not recognize or contemplate such a proceeding. PGE's filing is not a true "Complaint" under the Commission's rules in which it makes specific factual allegations and seeks relief from or against Covanta. Nor is it styled as a Request for Declaratory Ruling under ORS 756.540 and applicable Commission rules. What PGE seeks in this docket is not an application of an existing rule or law to a specific set of facts, but a general investigation or a rulemaking in which it asks the Commission to adopt new and generally applicable eligibility criteria for standard contracts.

Seeing that it would not be entitled to relief under any established Commission process, PGE has attempted to invent a new category of proceeding called a “Complaint and Request for Dispute Resolution.” PGE’s new category of proceeding would drag both the parties and the Commission into a procedural never-never land lacking clear rules or guidance for the parties’ pleadings and for the Commission rulings. The Commission should therefore dismiss PGE’s co-called “Complaint and Request for Dispute Resolution” against Covanta without prejudice to PGE’s right to request a general investigation or rule-making into the issues raised herein.

### **ALTERNATIVE MOTION TO STAY**

In the alternative to dismissing PGE’s “Complaint and Request for Dispute Resolution,” Covanta hereby respectfully requests that the Commission stay this docket pending resolution of Covanta’s FERC petition. Covanta’s FERC petition was filed several weeks prior to PGE’s initial filing in this docket. As explained above and in greater detail in the Answer, Covanta’s FERC petition arises out of the same set of facts that are at issue in this docket. The fundamental question that Covanta has put before FERC is whether PGE has or can have a legally enforceable obligation to purchase the output of the Project prior to the completion of construction work. FERC’s resolution of this issue (one way or the other) will have a direct impact on the issues raised by PGE in this docket.

Further, Covanta’s FERC petition involves the Commission as a party to that proceeding. Because PGE has represented to Covanta that its position is consistent with Commission policies, Covanta has challenged such Commission policies in its FERC petition. It would therefore be inappropriate for the Commission to act as a trier of fact and/or substantive decision maker in this docket with respect to the same policies—or at least PGE’s representation of those policies—that are currently being challenged by Covanta before FERC. To avoid any

appearance of bias, to conserve the Commission’s time and resources, and to avoid reaching contradictory decisions, the Commission should simply stay this proceeding pending resolution of the FERC petition.

**CONCLUSION**

Covanta respectfully requests that the Commission dismiss PGE’s so-called “Complaint and Request for Dispute Resolution” for failing to follow any contested case process recognized by the Commission’s rules of practice and procedure. In the Alternative, Covanta respectfully requests that the Commission stay this proceeding pending resolution of Covanta’s FERC petition, which was filed well before PGE’s initial filing in this docket and arises out of the same set of facts.

DATED this 8<sup>th</sup> day of September, 2017.

Respectfully submitted,

/s/ Richard Lorenz

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Of Attorneys for *Covanta Marion Inc.*

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DECLARATION OF SAMI KABBANI  
IN SUPPORT OF RESPONDENT,  
COVANTA'S MOTION TO DISMISS

I, Sami Kabbani, do hereby declare:

1. I am the Senior Vice President for Covanta Energy LLC. I have personal knowledge of each of the matters set forth below.
2. Covanta contacted PGE in around March of 2013 about negotiating a revised PURPA PPA.
3. On or about April 1, 2013, Bruce True of PGE provided Schedules 201 and 202 to Covanta to review the contracting process.
4. On or about June 10, 2013, Covanta sent a formal request to PGE to negotiate a Schedule 202 contract.
5. On or about June 19, 2013, John Morton and Bruce True of PGE provided Covanta with indicative pricing for a Schedule 202 contract.
6. On or about July 12, 2013, PGE sent Covanta a term sheet for a Schedule 202 contract.
7. PGE suggested that Covanta accept a non-PURPA contract.

16. PGE represented to Covanta at the May 2, 2016 meeting that if the Project were physically re-rated to 10 MW, then it would qualify for a Schedule 201 contract.
17. On or about March 2, 2017, Covanta executed and delivered the Schedule 201 standard contract, indicating its intent to be bound by its terms and to receive the pricing in effect at the time of execution.
18. On or about March 22, 2017, Angeline Chong of PGE send Covanta a response confirming PGE's receipt of Covanta's Schedule 201 contract request and attaching PGE's initial information request.
19. In early April, Covanta communicated with John Morton of PGE and a conference call was scheduled for April 17, 2017 to clarify or address any outstanding issues that PGE may have with respect to Covanta's contract request. PGE abruptly canceled the scheduled call and refused to speak with Covanta about the Schedule 201 request.

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

DATED this 8<sup>th</sup> day of September, 2017.



SAMI KABBANI