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July 20, 2017

Via Electronic Mail

Filing Center
Public Utility Commission of Oregon
P.O. Box 1088
Salem, OR 97308-1088
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Re: OPUC Docket No. UM 1844

Attention Filing Center:

Attached for filing in the above-captioned docket is an electronic version of *Evergreen BioPower, LLC's Motion for Partial Summary Judgment*.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Ken Kaufmann". The signature is written in a cursive style with a long horizontal line extending to the right.

Ken Kaufmann
Attorney for Evergreen BioPower, LLC

Attach.

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Attorney for Evergreen BioPower, LLC

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

Evergreen BioPower, LLC

Complainant,

vs.

Portland General Electric Company

Respondent.

CASE NO. UM-1844

**Evergreen BioPower, LLC's Motion
for Partial Summary Judgment**

(Oral Argument Requested)

COMES NOW, Evergreen BioPower, LLC (hereinafter "Complainant" or "Evergreen"), by and through its attorney, and moves against Respondent Portland General Electric Company ("Respondent" or "PGE") for Summary Judgment on Counts 1, 3, and 4 of its First Amended Complaint.¹

¹ Evergreen's Motion for Partial Summary Judgment is supported by the pleadings, Evergreen Exhibits 1-6 filed with its First Amended Complaint, and Exhibits 7-10 attached hereto.

I

INTRODUCTION

This complaint arises from a dispute whether a utility can challenge a Qualifying Facility's (QF's) eligibility for a standard contract² *after* the utility: (a) sought and obtained concessions from the QF's owner with a promise to execute a standard contract at specified prices; and (b) did execute a standard contract at those prices. Complainant Evergreen BioPower, LLC (Evergreen), seeks the Commission's confirmation that PGE is precluded--under state statute and Commission rules implementing PURPA³-- from reconsidering Evergreen's eligibility under the circumstances above and, in order to avoid further controversy in the future, a declaration that Evergreen's QF meets the Commission's size eligibility cap for a standard contract.

Based on information provided by PGE in its Answer, Evergreen believes that there are no genuine issues of material fact regarding Counts 1, 3, and 4, and now moves for summary judgment on those counts of its 5-count complaint. Specifically, Evergreen now asks that the Commission find:

² The term, "standard contract," has been widely used since passage of PURPA. The term is used to describe a standard set of rates, terms and conditions that govern a utility's purchase of electrical power from Qualifying Facilities at avoided cost. In Oregon, "Standard contracts have pre-established rates, terms and conditions that an eligible QF can elect without any negotiation with the purchasing utility. If a QF is not eligible for a standard contract, a utility is still obligated to purchase a QF's net output at the utility's avoided cost, but the QF must negotiate the rates, terms and conditions of a power purchase contract with the purchasing utility." Order No. 05-584 at 12. Oregon Qualifying Facilities overwhelmingly elect standard contracts over non-standard contracts if offered a choice. The reasons for this become apparent, below.

³ Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, and 30 U.S.C.).

- (a) That Commission rules and Schedule 201 require eligibility to be challenged, if at all, prior to offering of a final executable standard contract (Count 1);
- (b) That Portland General Electric (PGE) waived its right to challenge the size eligibility of Evergreen's facility when it sought and obtained material concessions from Evergreen in exchange for its promise to execute a standard contract (Count 3); and
- (c) That Evergreen's qualifying facility meets the 10,000 kW size eligibility limit for standard contracts (Count 4).

II

BACKGROUND

A. Oregon Framework for PURPA Power Purchases

Congress enacted PURPA to encourage development of non-utility owned small renewable generation and cogeneration. One of Congress' stated rationales was to overcome traditional reluctance of utilities to buy power from, and sell power to, non-utility generators.⁴ Among other things, PURPA requires an electric utility to purchase net output from Qualifying Facilities at its avoided cost--that is, its cost to generate or to acquire power if not purchased from the Qualifying Facility--and to do so in a non-discriminatory fashion. Order No. 05-584 at 6. Congress delegated to the States the primary responsibility for implementing PURPA, subject to requirements and limitations set forth in PURPA and its accompanying regulations. Oregon embraced the delegation with its parallel state

⁴ See *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

legislation (ORS 756.516 and ORS 758.500 *et seq.*) and authorized the Public Utility Commission (OPUC or the Commission) to promulgate rules implementing both federal and state requirements. *See* Order No. 05-584 at 7.

In Docket No. UM 1129, the Commission ordered PGE, Pacific Power Company (PacifiCorp) and Idaho Power Company (Idaho Power) to file schedules setting forth the prices, terms, conditions, and application procedures for standard Qualifying Facility power purchase agreements, and to file template standard contracts. Order No. 05-584 at 35. The Commission also established guidelines governing negotiation of prices and terms in non-standard agreements. Order No. 07-360. PGE's resulting standard and non-standard compliance filings are called Schedule 201, and Schedule 202, respectively.

Standard contracts have pre-established rates, terms and conditions that an eligible QF can elect without any negotiation with the purchasing utility. Order No. 05-584 at 12. In Docket No. UM 1610, Commission Order No. 16-174 explained the process for obtaining a standard contract: "(1) a QF initiates the process by submitting certain information, the utilities then have 15 days to provide a draft standard contract; (2) the QF may agree to the terms of the draft contract and ask the utility to provide a final executable contract, or suggest changes; (3) the utility provides iterations of the draft standard contract no later than 15 days after each round of comments by the negotiating QF; and (4) when the QF indicates that it agrees to all the terms in the draft contract, the utility has 15 days to forward a final executable contract to the QF." *Id.* at 24. The Commission held, further, that

forwarding a final executable contract to the QF is tantamount to making a binding

offer, which the QF owner can accept by signing: “We adopt Staff’s proposal that a [legally enforceable obligation, or “LEO”] exists when a QF signs a final draft of an executable standard contract that includes a scheduled commercial on-line date and information regarding the QF’s minimum and maximum annual deliveries, thereby obligating itself to provide power or be subject to penalty for failing to deliver energy on the scheduled commercial on-line date.” *Id.* at 27. Alternatively, a QF with a dispute during the contracting process may file a Commission complaint. *Id.*

B. Evergreen BioPower

Complainant Evergreen BioPower (Evergreen) is a wholly owned subsidiary of Freres Lumber Company, Inc., an Oregon company founded by T.G. Freres who purchased his first sawmill along the North Fork of the Santiam River 95 years ago. The company expanded to Lyons, Oregon in 1941, and expanded further in 1959, 1989, and 1998. T.G. Freres’ grandchildren and great grandchildren now own and work full time at the Freres facilities. Evergreen/Exhibit 10, Kyle Freres Affidavit/5. What a lumber company may lack in glamour, it makes up for in substance. Freres Lumber currently provides family wage employment to over 450 employees in rural Lyons, and Mill City, Oregon. *Id.*

In 2006, Freres Lumber Company founded Evergreen to own and operate a cogeneration facility at the Lyons mill. Evergreen is a qualifying cogeneration facility under PURPA. It is also a family owned facility under Schedule 201. It was designed and manufactured locally, and it is powered from locally sourced wood waste.

Evergreen owes its existence to PURPA and, more specifically, Commission Order No. 05-584, which required the utilities to offer standard contracts to

Qualifying Facilities 10,000 kW and under. Freres' veneer facility in Lyons uses large amounts of steam for conditioning green logs and drying veneer, consumes large amounts of electricity to run equipment, and generates large quantities of wood waste suitable for fuel, making it a prime candidate for on-site cogeneration. In consultation with PacifiCorp, Freres developed a 10,000kW Qualifying Facility (Evergreen BioPower), made possible by the guaranteed revenue of a standard PacifiCorp power purchase agreement. Evergreen/Exhibit 10, Kyle Freres Affidavit/5-6.

Evergreen selected Wellons, Inc.⁵ to design and install its facility. Wellons provides its energy customers an option to package a new Wellon's boiler and other Wellons equipment with steam turbines and generators acquired by Wellons on the pre-owned market. For Evergreen, Wellons packaged a pre-owned generator and a pre-owned turbine with its custom-built boiler. Wellons' sized its boiler capacity such that the facility lacked motive force to generate more than 10,000 kW. Blades from the turbine were removed to match the turbine's capability to the boiler. The generating capacity of the facility, based on the limiting capacity of both the boiler and the modified turbine, is 10,000 kW, as determined by Wellons. A nameplate affixed to the turbine by Wellons states: "RE-RATED TO 10,000 KW". *Id.* at 6-7.

Before purchasing the unit, Evergreen consulted PacifiCorp about its facility's eligibility for a standard contract. In addition to telephone calls where Evergreen

⁵ Wellons has manufacturing facilities in Sherwood and Grants Pass, Oregon, and Vancouver, Washington. Its biomass energy systems are known world wide for their unsurpassed ability to efficiently burn almost any combination of hogged wood, bark, sawdust, planer shavings, and other woody-biomass fuels with a broad range of moisture contents, without need for fossil fuels. <http://www.wellons.com/combinedheatpower.html>
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and PacifiCorp discussed the proposed facility, PacifiCorp required that Evergreen submit a Motive Force Plan prior to receiving a draft Schedule 37 standard contract. Pacific Power & Light Company, Oregon Schedule 37 (July 12, 2005) at 7 (adopted in Advice No. 05-006). Evergreen's Motive Force Plan plainly and accurately described its intent to use a pre-owned generator and a re-rated, pre-owned turbine:

The Evergreen facility consists of a 100,000 lb/hr Wellons 4 cell rotary grate biomass boiler with steam conditions of 850 psig and 875°F. The Turbine Generator is a General Electric machine with a turbine rated at 10,000 kw as modified and a generator rated at 24,705 Kva at a voltage of 13.8 Kv. With typical weekday process steam loads the T-G will produce 7,150 Kw of gross output, with 575 Kw of power generation auxiliary load, for a net output of 6,575 kW. On weekends, the low extraction flows will allow a T-G gross output of 10,000 Kw, with 575 Kw of auxiliaries, for a net of 9,425 kw.

Evergreen/Exhibit 7, 2006 Motive Force Plan/2. PacifiCorp approved the Motive Force Plan (which it attached to Evergreen's executed standard contract) and never disputed whether Evergreen met the 10,000 kW size cap. In reliance on PacifiCorp's determination of eligibility, Evergreen purchased the turn-key facility from Wellons. Evergreen/Exhibit 10, Kyle Freres Affidavit/8-9.

C. Evergreen's Application and Exchange of Draft PPAs

Evergreen contracted to sell power to PacifiCorp for 10 years under a standard (PacifiCorp Schedule 37) power purchase agreement, set to expire on December 31, 2017. Because PacifiCorp is capacity sufficient in renewable resources

through 2028, and PGE is capacity sufficient in renewable resources only through 2019, PGE's standard renewable avoided cost is substantially higher in years 2020 through 2028 than PacifiCorp's. When Evergreen became aware of PGE's higher avoided cost prices, in Fall 2016, it decided to sell its energy to PGE once its PacifiCorp contract expires. *Id.* at 9.

Evergreen requested a standard contract from PGE on November 15, 2016. On December 16, PGE sent Evergreen its Schedule 201 Initial Information Request, requiring Evergreen to provide more than 82 pieces of information as a condition of providing a draft standard contract. *See* Evergreen/Exhibit 8, Schedule 201 Initial Information Request. Idaho Power, for comparison, requires 18 items. *See* Idaho Power Schedule 85 (4/12/16) at 85-4. PacifiCorp requires only 11 items. *See* Pacific Power & Light (Oregon), *Avoided Cost Purchases from Eligible Qualifying Facilities* (October 25, 2016) at 10. Evergreen provided PGE with additional requested information on December 27, 2016 and on February 6, 2017. On March 20, 2017, PGE sent Evergreen a draft standard contract. Evergreen/Exhibit 10, Kyle Freres Affidavit/9-10.

The process of preparing the standard contract was bumpy but the parties got through it eventually:

- **On May 11, 2017**, PGE sent Evergreen a letter which promised PGE would execute a standard renewable contract at the then-current prices, if Evergreen agreed to change its delivery point to one favored by PGE. Evergreen/Exhibit 2, May 11 Letter.

- **On May 15, 2017**, Evergreen accepted PGE’s May 11 offer.
Evergreen/Exhibit 9, May 15 E-mail.
- **On May 16, 2017**, PGE sent Evergreen an executable standard contract with the then-current renewable prices and cover letter stating “Once Evergreen executes the attached PPA, PGE will have a legally-enforceable obligation to purchase Evergreen’s output in accordance with the prices, terms and conditions contained therein.” Evergreen/Exhibit 3, May 16 Letter.
- **On May 16, 2017**, Evergreen returned to PGE a scanned version of the May 16 PPA with Evergreen’s signature via electronic mail to PGE, creating a contract per the terms of PGE’s May 16 offer, and creating a legally enforceable obligation per the Commission’s rule, in Order No. 16-174.
Evergreen/Exhibit 4, May 16 Evergreen E-mail.

Evergreen believed that the deal was “done and dusted” save the formality of PGE’s signature on the May 16 PPA, but PGE sought to renegotiate. On May 31, the day before its sharply lower prices were to take effect⁶, PGE told Evergreen it doubted whether the Qualifying Facility had a nameplate capacity 10,000 kW or below. PGE told Evergreen it could apply for a Schedule 202 (non-standard) contract to resolve its concerns. Evergreen/Exhibit 6, May 31 E-mails/1.

As alluded to earlier (in footnote 1), Qualifying Facilities overwhelmingly prefer PGE’s standard contract to the non-standard contract. Even if the purchase price were nominally the same, the non-standard contract diverges from the

⁶ On May 1, 2017, PGE filed its annual update to avoided cost prices, seeking an effective date of May 17. Docket No. UM 1728. The planned effective date was tentatively moved to May 19 to accommodate the Commission’s hearing on the application at a May 18 special meeting. At that meeting, the Commission decided to approve the rate change effective June 1, 2017.

standard contract in significant respects that dramatically lower its value compared to the standard contract. For example, PGE has required that a Schedule 202 QF agree to dollar for dollar reductions to the purchase price whenever the hourly Market Price is negative (notwithstanding a QF's right under PURPA to elect to have contract prices fixed at the time of contract formation).⁷ Other contractual mechanisms deprive the QF of the benefit of firm prices for a significant portion of its net output, even though that output is delivered via a firm schedule and supported by spinning reserves paid for by Seller. *Id.* Furthermore, starting a Schedule 202 negotiation at this late date would give PGE tremendous leverage in negotiations, knowing that Evergreen has little time to complete its power sales, interconnection, and transmission arrangements before its contract with PacifiCorp expires. Evergreen/Exhibit 10, Kyle Freres Affidavit/12.

Evergreen rejected PGE's suggestion and, after 6 days of near silence, on May 31, PGE returned the fully executed May 16 standard contract. But the dispute remains unresolved. PGE continued to cloud Evergreen's rights under that contract by claiming that Evergreen may be in breach of the size eligibility cap. On June 13, PGE filed an answer and counterclaim in this action. The counterclaim asks the Commission to terminate the PPA. *Id.* For the reasons stated below, Evergreen now moves the Commission for an order granting summary judgment on Claims 1, 3 and 4 of its complaint.

⁷ See summary of PGE Schedule 202 contract with Airport Solar, LLC, filed June 21, 2017 by PGE in Docket No. RE-143 (<http://edocs.puc.state.or.us/efdocs/HAQ/re143haq165856.pdf>). See RM 35-000. UM 1844- EVERGREEN BIOPOWER, LLC'S MOTION FOR (PARTIAL) SUMMARY JUDGMENT

III

APPLICABLE LEGAL STANDARD

OAR 860-011-0000(3) states that the “Oregon Rules of Civil Procedure shall govern in all cases except as modified by these rules, by order of the Commission, or by ruling of the ALJ.” Motions for summary judgment are governed by ORCP 47. The legal standard regarding the motion is set out in ORCP 47 C:

The court shall enter judgment for the moving party 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 a judgment as a matter of law. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.

While on its face the rule applies to courts, the Commission applies this standard in reviewing motions for summary judgment. *City of Portland Complainant*, 06-636, 2006 WL 3594296 (Or.P.U.C. Nov. 17, 2006)(internal citation omitted).

IV

ARGUMENT

PGE’s practice of waiting until after formation of a legally enforceable obligation to challenge a Qualifying Facility’s eligibility for a standard contract is prohibited under common law principles known collectively as “avoidance of contract”, and potentially exposes it to large damages in a civil lawsuit if it does not honor its standard contract. More important, for purposes of this motion, PGE’s

practice also violates Commission rules mandating when the utility must determine a qualifying facility's eligibility and defining how to determine the nameplate capacity of a qualifying facility.

A. PGE cannot challenge eligibility after formation of a legally enforceable obligation (Count 1).

In Docket No. UM 1129, the Commission standardized the process for resolving disputes regarding standard contract eligibility. It did so, in part, by adopting the following language agreed to by a majority of the parties, including PGE, in a Partial Stipulation:

A Qualifying Facility (either a small power production facility or a cogeneration facility) ("QF") will be eligible to receive the standard rates and standard contract if the nameplate capacity of the QF, together with any other electric generating facility using the same motive force, owned or controlled by the same person(s) or affiliated person(s), and located at the same site, does not exceed 10 MW.

* * *

Dispute Resolution:

Upon request, the QF will provide the purchasing utility with documentation verifying the ownership, management and financial structure of the QF in reasonably sufficient detail to allow the utility to make an initial determination of whether or not the QF meets the above-described criteria for entitlement to the standard rates and standard contract. Any dispute concerning a QF's entitlement to the

standard rates and standard contract shall be presented to the Commission for resolution.

Order No. 06-586, Exhibit A (emphasis added). The language in PGE's Schedule 201 is similar, though not identical, to Order No. 06-586, and provides:

Upon request, the QF will provide the purchasing utility with documentation verifying the ownership, management and financial structure of the QF in reasonably sufficient detail to allow the utility to make an initial determination of whether or not the QF meets the above-described criteria for entitlement to pricing under the Standard PPA. The QF may present disputes to the Commission for resolution using the following process:

The QF may file a complaint asking the Commission to adjudicate disputes *regarding the formation of the standard contract*.

PGE Schedule 201 (June 22, 2016), at 24 (emphasis added). The (a) Partial Stipulation language ordained in Order No. 06-586, and (b) its embodiment in Schedule 201, above, appear to be substantially identical. Both require the utility to make an *initial* determination on eligibility *prior* to formation of a standard contract. It necessarily follows that a utility cannot wait until *after* formation of a standard contract to make an initial determination on eligibility. This reading is required by the plain language of the partial stipulation and Schedule 201.

The Legislature declared it is the policy of the State to “[c]reate a settled and uniform institutional climate for the qualifying facilities in Oregon.” ORS 758.515(3)(b). Permitting a utility to challenge a QF’s eligibility *after* it has already executed a standard contract would turn a shield into a sword. So long as PGE thinks it can challenge the eligibility of a Qualifying Facility for a standard contract *after* formation, the climate for QFs in Oregon can never be settled.

PGE ignored the plain requirements for determining eligibility set forth in Commission Order No 06-586 and Schedule 201. PGE admitted in its Answer that it *did not* notify Evergreen of any concern regarding size eligibility until after it sent Evergreen a final executable contract and Evergreen signed and returned it to PGE. PGE Answer, ¶15 (“PGE admits that PGE’s attorney spoke with Evergreen’s attorney by telephone on May 25 and conveyed PGE’s concern that Evergreen might not be eligible for the standard PPA.”). PGE’s attempt to challenge eligibility *after* formation of a standard contract cannot be permitted under the plain meaning of Schedule 201 and Order 06-586, nor ORS 758.515(3)(b). For the reasons above, Evergreen now moves the Commission for a declaration that Order 06-586 and Schedule 201 each require eligibility to be challenged, if at all, prior to formation of a legally enforceable obligation. If the Commission agrees either the Order or Schedule 201 (or both) so require, then PGE’s challenge is untimely as a matter of law.

B. PGE cannot challenge eligibility after it induced Seller with promises to offer a final executable contract (Count 2).

PGE admitted in its Answer that it sent Evergreen a letter on May 11, 2017, in which it promised Evergreen that PGE would sign a standard contract at then-

current prices if Evergreen agreed to change its planned point of delivery. Evergreen/Exhibit 2 (May 11 Letter)(“PGE is willing to provide and promptly execute a final PPA, consistent with the avoided cost prices in effect as of the date of this letter and with your planned commercial operation date of January 1, 2018, if you make arrangements to deliver your project’s output [in accordance with PGE’s preferences].”). This offer was done although neither Commission rule nor Schedule 201 allow the utility to determine a QF’s point of delivery, and was done on the eve of a large, downward rate change. When Evergreen accepted PGE’s offer on May 15, PGE benefitted by: (a) receiving Evergreen’s output at a preferred location; and (b) by neutralizing Evergreen’s planned protest against PGE’ proposed rate change at the Commission’s May 18 special meeting.

In Docket No. UM 1129, the Commission, in reviewing and updating Oregon’s QF standard contracting framework, “recognize[d] a need to balance our interest in reducing these market barriers [inherent in negotiated contracts] with our goal of ensuring that a utility pays a QF no more than its avoided costs for the purchase of energy.” Order No. 05-584 at 16. Balancing of these competing interests must always be the domain of the Commission, and not the utility. By inducing Evergreen to provide valuable benefits with a promise of a standard contract and then reneging on that promise, PGE improperly usurped the Commission’s role of balancing interests by creating additional market barriers for a Qualifying Facility. The Commission can remove this additional market barrier by ordering PGE to keep the promises it makes in Schedule 201 negotiations. For the reasons above,

Evergreen now moves the Commission for a declaration that PGE waived its right to

challenge the size eligibility of Evergreen's facility when it sought and obtained material concessions from Evergreen in exchange for its promise to execute a standard contract (Count 3).

C. Evergreen is eligible for the standard contract.

Because PGE waived its right to challenge eligibility by (a) inducing Evergreen with a promise to execute a standard contract; and by (b) executing a standard contract, whether Evergreen meets the Commission's bright line test for size eligibility is not relevant to validity of the May 16 PPA. Having waived timely objection and/or implicitly determined eligibility, PGE does not get a do-over. However this issue is not moot because Evergreen may apply for a standard contract again in the future, and therefore is interested in resolving its eligibility in order to clear the cloud PGE has cast on its Facility. Until the cloud is cleared, Evergreen must disclose PGE's position to potential purchasers, lenders, and investors, and the disclosure may materially diminish its market value. In fact, the Facility is eligible for a standard contract for *two* separate reasons set forth below.

1. PacifiCorp's prior determination of Evergreen's eligibility is binding on PGE.

As was discussed above (*supra* at II(B)), PacifiCorp was aware of Evergreen's facility specifications which were set forth in its application including its Motive Force Plan. Evergreen's Motive Force Plan disclosed accurately and in detail the capabilities of the main components of its proposed Facility. PacifiCorp undertook due diligence on Evergreen's application and concluded that it was eligible for a standard contract. Because eligibility criteria for standard contracts are uniformly

established by the Commission, it follows that: (a) PacifiCorp has the same duty to enforce the eligibility rules as PGE; and (b) a QF eligible for a PacifiCorp standard contract must also be eligible for a PGE standard contract. Evergreen has not modified its Facility since PacifiCorp's determination; nor did it obtain PacifiCorp's assent by fraud. Therefore, PacifiCorp's determination that the facility meets the size eligibility criterion is *res judicata*, and PGE cannot re-litigate the issue. To hold otherwise would create an unsettled and non-uniform institutional climate for Qualifying Facilities in Oregon, contrary to ORS 758.515(3)(b) and the Commission's rules set forth above.

2. Evergreen's Facility meets the Commission's unambiguous size eligibility test.

A simple, clear rule for determining a QF's size eligibility for a standard contract is a material component of Oregon's PURPA standard contracting framework. In Docket No. UM 1610, the Commission re-affirmed the bright line test for determining size eligibility (e.g. the number on the plaque) for a standard contract originally adopted in 1981:

Design capacity, as defined by the manufacturer's nameplate capacity for a QF project, will continue to be the measure of eligibility for standard contracts. *In order to be eligible to receive standard contract terms and conditions, a QF must have a manufacturer's nameplate capacity at or under 10 MW.*

Order No. 05-584 at 40 (emphasis added). This test leaves no room for interpretation. If the QF's manufacturer's nameplate capacity is at or under 10 MW,

the facility is size-eligible for a standard contract.

Idaho Power argued strongly for an alternative standard whereby the utility could look beyond the manufacturer's nameplate, claiming that nameplate capacity could be manipulated. The Commission found Idaho Power's proof lacking, and retained the bright line test. *Id.* The Commission gave Idaho Power a second chance to make its case, but the matter petered out without further contention.

In Order No. 07-360, the Commission adopted without comment the following definition of "nameplate capacity" proffered as a stipulation by a majority of Docket No. UM 1129 parties:

The full-load electrical quantities assigned by the designer to a generator and its prime mover or other piece of electrical equipment, such as transformers and circuit breakers, under standardized conditions, expressed in amperes, kilovoltamperes, kilowatts, volts, or other appropriate units. Usually indicated on a nameplate attached to the individual machine or device.

Order No. 07-360 at 38. This stipulation further clarifies that the nameplate capacity rating is not the maximum capability of any particular component, but rather the full load capability, under standardized conditions, of the generator, prime mover, and other electrical components.

PacifiCorp and Idaho Power adopted the above language in their standard contract tariff, but PGE did not. PGE's contract with Evergreen defines "Nameplate Capacity Rating" as "the maximum capacity of the Facility as stated by the manufacturer, expressed in kW, which shall not exceed 10,000 kW." See

Evergreen/Exhibit 5, May 16 PPA/4. PGE's definition hews closely to the bright-line test in Order No. 05-584, supra. It does not appear that there is a material difference between the Partial Stipulation and PGE's language. But if the Commission feels otherwise, in fairness to Evergreen, PGE (having deviated from the language approved in Order No. 07-360) should not prevail if Evergreen qualifies under either test.

Evergreen's Facility bears a manufacturer's nameplate on the turbine stating that the facility capacity rating is "10,000 kW". Evergreen/Exhibit 1, Facility Nameplate; Evergreen/Exhibit 10, Kyle Freres Affidavit/3. That nameplate rating is consistent with the facility's actual capability, as reported in the 2006 Motive Force Plan. Under either the Commission's ruling or PGE's contract, Evergreen clearly qualifies.

Evergreen expects PGE will argue (as it has previously to Evergreen) that Order No. 05-584 prohibits Evergreen from using a turbine with blades removed to limit its output to 10,000 kW. In Order No. 05-584, the Commission stated: "If a QF's nameplate capacity is greater than 10 MW, the QF is ineligible to receive a standard contract and cannot agree to operate at a lower threshold level in order to qualify for a standard contract." *Id* at 40. In pointing to that statement, PGE ignores the factual predicate "*if* a QF's nameplate capacity is greater than 10 MW". The Commission's statement responded to the following question from Weyerhaeuser in the Docket No UM 1129 investigation:

Weyerhaeuser raised another question, asking whether a QF *with a nameplate capacity greater than the size threshold for standard*

contract eligibility could agree to sell an amount of power equal to, or lower than, the threshold in order to qualify for standard contract terms.

Order No. 05-584 at 40 (emphasis added). Weyerhaeuser's question makes clear that the Commission was talking about instances where a QF nameplated larger than 10 MW agrees to sell no more than 10MW to the utility. At the time Weyerhaeuser and several other large mill operators operated cogeneration facilities that were capable of generating more than 10 MW but typically used most of that output to serve their own load behind the meter. Evergreen's situation is readily distinguishable--it's Facility nameplate capacity does not exceed 10 MW, and never has. Evergreen purchased a turnkey cogeneration facility whose boiler and turbine limit its facility capacity rating to 10,000 kW. This was done because of the availability of a turbine and generator from the pre-owned market at substantially lower cost compared to all-new equipment. PacifiCorp deemed the facility eligible for a standard contract, in 2007. PGE's new-found interpretation goes against the plain meaning of the Commission's order. PGE's interpretation, if true, would require QF owners to spend millions of dollars more to purchase all-new equipment solely to qualify for the standard contract. The Commission has never made all-new equipment a condition of eligibility for a standard contract, and doing so would run counter to the Commission's policy of encouraging economically efficient development of QFs.

3. Summation of why Evergreen is entitled to partial Summary

Judgment.

Count 1. As explained above, there is no genuine issue of material fact that PGE did not dispute whether Evergreen met the 10,000 kW eligibility cap until after it offered Evergreen a final executable standard contract. Accordingly, Evergreen asks that the Commission grant summary judgment on Count 1 of its First Amended Complaint because Commission rules and Schedule 201 require the utility to question eligibility, if at all, prior to contract formation, and PGE failed to do so.

Count 3. There also is no genuine issue of material fact that: (a) PGE, on May 11, 2017, promised Evergreen it would provide and promptly execute a standard contract with then-current avoided cost prices if Evergreen agreed to change its intended delivery point to PGE's preferred location; and (b) Evergreen accepted PGE's offer on May 15, 2017. Evergreen asks the Commission to grant summary judgment on Count 3 because PGE's waived its right to challenge the size eligibility of Evergreen's facility when it sought and obtained material concessions from Evergreen in exchange for its promise to execute a standard contract.

Count 4. There is also no genuine issue of material fact that Evergreen's facility meets the 10,000 kW size eligibility criterion. Although determination of this issue is not necessary to hold that PGE waited too long to challenge Evergreen's eligibility, this issue may come up in the context of future contracts and therefore Evergreen asks the Commission to grant summary judgment on Count 4, because (a) PacifiCorp's prior determination is *res judicata* as to the Facility's status; and (b) Evergreen's facility nameplate showing a manufacturer's facility capacity rating of 10,000 kW satisfies the Commission's size eligibility test.

Remaining Counts and Penalties. The remainder of Evergreen's claims, as well as its prayer for penalties under ORS 756.990(2), are not sufficiently developed for summary judgment at this time. Evergreen requests that the Commission defer ruling on remaining issues, including penalties. If the Commission grants Evergreen's Motion for Partial Summary Judgment, Commission resolution of the remaining counts may be unnecessary. And the factors relevant in determining to what extent penalties are justified may vary depending PGE's actions going forward.

V

CONCLUSION

Wherefore, for the reasons above, Evergreen respectfully requests that this Commission grant summary judgment on Counts 1, 3, and 4 of Evergreen's First Amended Complaint.

Dated this 20th day of July 2017.

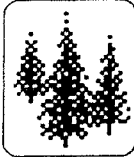
Respectfully submitted,

By: 

Kenneth E. Kaufmann, OSB 982672
Attorney for Evergreen BioPower, LLC

Attachments (Evergreen Exhibits 7-10).

EXHIBIT D-2
ENGINEER'S CERTIFICATION OF
MOTIVE FORCE PLAN



EVERGREEN ENGINEERING INC.

P.O. Box 21530 • Eugene, Oregon 97402-0409
(541) 484-4771 • FAX (541) 484-6759

November 29, 2006

#1910.0

Kyle Freres
Freres Lumber Company, Inc.
141 14th Street
PO Box 276
Lyons, OR 97358

Subject: Evergreen Biopower LLC
Motive Force Plan Certification

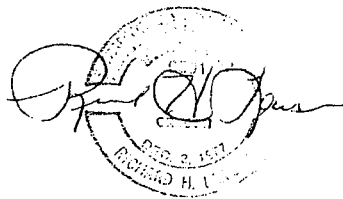
Dear Kyle,

I have completed a review of the Motive Force Plan (MFP) for your new 10MW cogeneration facility, and I have confirmed the logic of the plan and the fuel requirement calculations for the facility. Also, based on the fuel availability study that was done earlier, I certify that there is an adequate supply of fuel available to satisfy the Pacificorp contractual requirements.

Very truly yours,

Richard H. Larsen P.E.
Principal

Oregon PE # 9501



EVERGREEN BIOPOWER, LLC
10,000 kw Biomass Power Facility
Motive Force Plan

Objective

This Motive Force Plan (MFP) will determine if Evergreen Biopower, LLC (Evergreen) has under its control, or can reasonably obtain, sufficient fuel to operate the facility such as to meet the average, maximum and minimum Net Output requirements in its power purchase agreement with PacifiCorp.

In the most recent draft of the contract, the Net Output requirements are as follows:

Average Annual Net Output	-	62,556,600 Kwh
Maximum Annual Net Output	-	80,044,800 Kwh
Minimum Annual Net Output	-	38,763,570 Kwh

The Evergreen facility is a combined heat and power plant, supplying medium pressure turbine extraction steam to veneer dryers and low pressure steam to log vats from the 10,000 Kw turbine-Generator (T-G). Most of the variation in annual T-G output described in the contract is a result of different veneer plant operating scenarios. It is the intent of Evergreen to base load the 100,000 lb/hr, 850 psig, 875° F Wellons boiler for up to 8,400 hours/yr, maximizing both process steam and T-G output in the process. This analysis will determine if sufficient fuel can be obtained to maintain this operating scenario for the 10 year term of the contract.

As a worst case scenario, this analysis will assume that the veneer plant is closed for an entire contract year and it will be determined if sufficient fuel can be obtained to meet the minimum Net Output requirements in the contract.

Facility

The Evergreen facility consists of a 100,000 lb/hr Wellons 4 cell rotary grate biomass boiler with steam conditions of 850 psig and 875° F. The Turbine-Generator is a General Electric machine with a turbine rated at 10,000 kw as modified and a generator rated at 24,705 Kva at a voltage of 13.8 Kv. With typical weekday process steam loads the T-G will produce 7,150 Kw of gross output, with 575 Kw of power generation auxiliary load, for a net output of 6,575 kw. On weekends, the low extraction flows will allow a T-G gross output of 10,000 Kw, with 575 Kw of auxiliaries, for a net of 9,425 kw.

The boiler is capable of combusting various biomass fuels. The boiler will receive 230°F feedwater from a deaerator. With the mix of fuels expected, both from internal (hogged fuel, ply trim, shavings) and external sources and an average fuel moisture content of 45%, a boiler efficiency of 73% is projected. The throttle steam will have an enthalpy of 1439.0 Btu/lb while the incoming feedwater has an enthalpy of 198.2 Btu/lb, a difference of 1240.8 Btu/lb. With the 73% boiler efficiency described above, the boiler will require a heat input from biomass fuel of 1700 Btu/lb steam. With a fuel heating value of 8,750 Btu/dry lb (see below), this is a full load fuel requirement of 9.71 bone dry tons (Bdt) per hour of operation. Wellons estimated the fuel burn rate at 31,816 lb/hour of 40% moisture fuel, or 9.54 Bdt/hr. When the adjustment is made for the moisture content difference the two numbers are compatible and so the 9.71 Bdt/hr (full load) will be used.

Fuel Supply

The primary fuel supply for the facility will be the mill residues produced by the veneer plant and from a sister plywood plant located approximately 5 miles away. Depending on relative economic value of the various residuals, outside mill residuals will be purchased from one or more of 7 potential fuel suppliers within a 50 mile radius of the facility.

The facility uses a species mix of raw logs of about 75% Douglas fir and 25% hemlock. Heating values of different tree species varies considerably. Using published analyses, Douglas fir wood averages about 8,900 Btu/dry lb while the bark averages 9,850 Btu/dry lb. Hemlock wood averages 8,370 Btu/dry lb while the bark averages 9,350 Btu/dry lb.

In the specification for the boiler, Wellons assumed an aggregate heating value of 8,750 Btu/dry lb and an average moisture content of 40%. The choice of an aggregate 8,750 Btu/lb heating value appears very conservative given the above published figures, but will also be used in this analysis. Given the fuel supply quantities and moistures in the table below, it would appear that a 40% moisture content may be slightly low, in the aggregate. This analysis uses a 45% average moisture content in establishing boiler efficiency and thus fuel requirements.

The 2005 figures for wood residue production from the two Freres mills are shown in the table below:

2005 Production		
<u>Type</u>	<u>Quantity</u>	<u>Est. Moisture Content</u>
Hogged Fuel	39,951 Bdt	50%
Chips	62,929	50%
Shavings	2,390	15%
Ply Trim	<u>10,000 (est.)</u>	15%
Total	115,270 Bdt	

A survey of 7 potential wood residual suppliers (mills, processing yards) within a 50 mile radius of the facility was conducted by Freres. Without counting any higher valued paper chips, the findings are as follows:

<u>Source</u>	<u>Annual Quantity</u>
Mill Residuals	29,250 Bdt
Processing Yards	<u>42,250</u>
Total	71,500 Bdt

A final source of biomass fuel is material backhauled from outside the 50 mile radius on trucks hauling Freres chips to pulp and paper facilities, and returning to the facility empty. These sources, which assume the chips are not burned for economic reasons, could provide the following quantities of residual fuel:

<u>Source</u>	<u>Annual Quantity</u>
Mill Residuals	32,500 Bdt

An MFP For Freres

Average Generation MFP

The first MFP assumes that Freres operates the veneer plant 5 days per week as currently, and runs the boiler at full load 8,400 hours/yr. This results in the production by Evergreen of the average annual Net Output of 62,556,600 Kwh. The fuel requirement for this scenario is 81,560 Bdt/yr (9.71 Bdt/hr x 8,400 hours/yr). This motive force requirement can be met by the following fuel sources:

<u>Source</u>	<u>Annual Amount</u>
Freres Hogged Fuel	39,951 Bdt/yr
Freres Shavings	2,390
Freres Ply Trim	10,000
Outside Mill Residuals	<u>29,219</u>
Total	81,560 Bdt/yr

This MFP assumes that none of Freres 62,929 Bdt/yr of chips are used as fuel, as typically the chip economic value is much greater than any replacement delivered fuel price. In the event that the economic relationship did not hold true, Evergreen could simply burn approximately 1/2 of the Freres chips in order to satisfy the fuel requirement without having to leave the compound for fuel. This is a solid MFP for this operating scenario as the proposed mill operating scenario was the same as that followed in 2005, and would thus produce an equivalent amount of fuel.

Maximum Generation MFP

The MFP for the maximum generation of 80,044,800 Kwh/yr is identical to that for the average generation case described above. The boiler still operates at full load for 8,400 hours/yr, but the high pressure extraction is not used as Freres is selling green veneer instead of its normal dry veneer. The quantity of fuel produced internally at the veneer plant remains the same. The ply trim produced at the nearby Freres plywood mill may stay the same or decrease, and would be replaced by additional residual purchases or by combusting a larger fraction (62%) of the residual chips. In this scenario, the boiler can be fueled completely with available residuals from Freres, though this is most likely not the most economic scenario.

Minimum Generation MFP

There are two scenarios that result in the minimum Net Output of 38,763,570 Kwh/yr, and the MFP for the two is quite different. In the first scenario, the veneer plant goes to a 7 day/wk operation, thus lowering weekend generation due to extraction steam needs. In this case, the amount of internal fuel available is increased by 40% (7 days vs. 5 days), with the following approximate fuel volumes available:

<u>Type</u>	<u>Quantity</u>
Hogged Fuel	55,931 Bdt/yr
Chips	88,100
Shavings	3,346
Ply Trim	<u>14,000</u>
Total	161,377 Bdt/yr

In this scenario, the boiler fuel requirement remains the same at 81,560 Bdt/yr as the boiler continues to run at 100,000 lb/hr for 8,400 hours/yr. The result is that outside fuel purchases, without burning chips, drops from 29,219 Bdt/yr to 8,283 Bdt/yr. If economics dictate that all fuel be internal, the last increment of fuel can be satisfied by burning less than 10% of the chips.

An entirely different minimum generation scenario occurs with a complete shutdown of the Freres veneer and plywood plants for an entire contract year, and Evergreen meets the minimum Net Output of 38,763,570 entirely with purchased fuel in order to avoid default under the contract.

On an 8,400 hour/yr basis, the T-G would now be producing 4,615 kw net output, or about 5,000 kw gross output (385 kw power generation equipment auxiliaries). A turbine heat balance, with 3,000 lb/hr of low pressure extraction for the deaerator, would require an inlet steam flow of 44,000 lb/hr. Assuming that boiler efficiency drops to 70% in this low flow condition with slightly higher moisture purchased fuel, the fuel flow to the boiler will be 4.45 Bdt/hr. On a 8,400 hr/yr basis, this is a total fuel requirement of 37,380 Bdt/yr of purchased fuel.

With the loss of backhauls from chip transport, due to mill shutdown, it is logical to purchase all 37,380 Bdt/yr from mills/processors within the 50 mile radius. These purchases would represent 52% of the available fuel. While this is not a good situation to contemplate for Evergreen, it is also not an undue stress on the local fuel market, and could sustain the power plant during market shutdowns.

Conclusion

A total of four scenarios were evaluated, ranging from minimum to maximum annual generation. In three of the four scenarios, the MFP fuel requirements could be satisfied internally to the Freres mills by burning low valued mill residuals plus 10-62% of the available paper chips. In most markets, it would be economically preferable to tap the 104,000 Bdt/yr of locally available or backhaul fuel for the required chip quantity, leaving the paper chips available for sale.

In the fourth scenario, a complete shutdown of the Freres mills for a complete contract year, the goal is to generate only the minimum required Net Output, entirely from outside purchased fuels. In this case, approximately 52% of the available residual fuels (not including chips) within a 50 mile radius would be required. This could be accomplished by Evergreen without undue pressure on the existing residual fuel markets.

Since the power contract is for only a 10 year period, the chances of a complete mill shutdown due to log supply or mill obsolescence is low. Freres Lumber has been in business for 80 years, and has been operating at this location for 50 years, and the current production schedule is one that has been followed for more than the last five years. Under all reasonable scenarios, Evergreen will be able to supply the motive force necessary to meet the contractual requirements of the 10 year PacifiCorp power purchase agreement.

Evergreen/Exhibit 8
Schedule 201 Initial Information Request/1

General Information: Please complete the matrix below to provide PGE with project specific information

Contract Information

<ul style="list-style-type: none"> a. Seller Legal Name b. Type of facility (solar, or wind for example) c. County and GPS Coordinate to 3 decimals d. State e. Name Plate Rating in kW f. Section 1.11 Electric system to interconnect to g. Section 2.2.1 date to be begin delivery h. Section 2.2.3 date of Commercial Operation Date i. Section 2.3 Termination Date j. Corporation type k. State of organization l. Net Dependable Capacity in kW m. Estimated average annual Net Output n. Maximum of kWh o. Notice address line 1 p. Notice address line 2 q. Notice address line 3 r. Notice address line 4 s. Copy to address line 1 t. Copy to address line 2 u. Copy to address line 3 v. Copy to address line 4 w. On a separate sheet include a detailed facility description 	<p>Evergreen BioPower LLC Biomass Linn County Latitude: 44.771, Longitude: 122.612 Oregon 10,000 Turbine Limited PacifiCorp 1/1/18 Currently in commercial operation 12/31/33 Limited Liability Corporation Oregon 3,000 45,544,617 60,000,000 PO Box 276 Lyons, Or 97358 Not Applicable Not Applicable 1785 Willamette Falls Dr., Suite 5 West Linn, OR 97068 Not Applicable Not Applicable See Exhibit H Exhibit A1 and A2. Incorporated 5/2/2006</p>
<ul style="list-style-type: none"> 2. Status of Seller's incorporation 3. Seller's financial statements: <ul style="list-style-type: none"> a. Income statement b. Balance sheet 4. D & B report on seller, of the project sponsor if the seller is not in D & B 5. List of all entities with an ownership interest in the facility 6. The legal name of the manager of the Facility, if applicable 7. Proof of site control (lease, title to land, property tax bill, or other) 8. FERC Form 556 and docket number as proof of submittal and acceptance by FERC 9. Map adjoining QF sites owned by the same seller at this time , or within the past 12 months 10. Staffing plan for getting the project online 11. Status of interconnection and transmission agreements 12. Does Seller have FERC Market Based Rate Authority? If yes provide docket #. 	<p>See Exhibit B See Exhibit B Not Applicable See Exhibit F Freres Lumber Co., Inc. See Exhibit C See Exhibit D Not Applicable Not Applicable Currently Interconected with PacifiCorp. In the process of obtaining a transmission agreement. No</p>

Generation information

<ul style="list-style-type: none"> 1. Motive force plan 2. Expected energy delivery start date 3. Expected Availability of generation 4. Detailed generation modeling information: <ul style="list-style-type: none"> a. Annual MWh (AC) for the first calendar year of commercial operation and an annual degradation factor b. Average 24-hr profile of generation MWh (AC) for each month during the first calendar year c. Maximum 24-hr profile of generation MWh (AC) for each month during the first calendar year d. Maximum annual output (monthly MWh detail) e. Loss Diagram 	<p>The QF consumes approximately 70,000 bone dry tons (Bdt) of woody biomass fuel per year. Approximately 30-40% of the fuel is supplied by Freres Lumber Mills , with the remainder purchased from 3rd party suppliers. Since achieving commercial operation in 2007, the Facility has never had to curtail due to lack of fuel inputs. There is surplus fuel supply on the open market. 1/1/18 1/1/18 55,000- 0.05% annual degradation factor See Exhibit G See Exhibit G See Exhibit G No Applicable</p>
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Location of facility

<ul style="list-style-type: none"> 1. GPS Coordinates (rounded to three degrees) 2. Facility physical address (if available) 3. Legal description of parcel (proof of site control to be attached) 4. Aerial Facility site boundary map 	<p>Latitude: 44.771, Longitude: 122.612 141 14th St., Lyons, OR 97358 See Exhibit C See Exhibit E</p>
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Evergreen/Exhibit 8

Schedule 201 Initial Information Request/2

Note this information is considered representative design information which is to be updated at the time of project construction and is subject to design finalization

Biomass Facility Characteristics:

1. Generation
 - a. Output simulation results detail, including but not limited to:
 - i. Annual MWh (AC) for the first calendar year of commercial operation and any annual degradation factor 55,000,000- 0.05% annual degradation factor
 - ii. Average 24-hr profile of generation MWh (AC) for each month during the first calendar year See Exhibit G
 - iii. Maximum annual output (monthly MWh detail) See Exhibit G
 - b. Loss Diagram
 - c. Design Capacity factor 10 mW
 - d. Expected Capacity factor 9.75 mW
 - e. Minimum turndown capacity 0.5 mW
 - f. Minimum run time Boiler operates continuously.
 - g. Start time to full load 190 minutes
 - h. Ramp rate design (mw/min) 10 min after reaching 1,500 RPM on turbine
 - i. Ramp rate information
 - i. Ramp rate up and down 7,000 kW/hour
 - ii. Cold start time to min capacity 100 minutes
 - iii. Cold start time to max capacity 190 minutes
 - iv. Hot start time to min capacity 20 minutes
 - v. Hot start time to max capacity 60 minutes
 - vi. Holding time after cycling If already warm, no holding time. If cold start, 15 minutes on lower end
 - vii. Minimum run time Boiler operates continuously.
2. Description of Generation facility including:
 - a. Design life of the facility 30 years
 - b. Component description
 - i. Turbine Manufacturer model and type GE #178842
 - ii. Boiler Technology and Manufacturer Biomass, Welllons
 - iii. Major process cycle component descriptions Fuel System, Water Treatment, Furnace, Ash System
 - iv. Description of the process cycle See attached
 - c. Generator Manufacturer model and type GE #8384481, Air Cooled
 - ii. Design curves an technical specifications See Exhibit D
 - d. Cooling Technology
 - i. Type and manufacturer De Laval Tube & Shell 2-pss. Midwest Counter Flow Cooling Tower
 - ii. Design curves and cooling medium consumption Water
 - g. Water consumption gallons/day 150,000 gallons/day
 - h. Scheduled Maintenance (Weeks/Yr.) 3 weeks/year
 - i. Typical Maintenance Period (Month(s)) Quarterly maintenance, 3-4 days. Annual maintenance 5-6 days.
 - j. EPC period The Facility achieved commercial operation in 2007 and has operated continuously since.
 - k. Facility AC rating The manufacturer's nameplate rating of the turbine generator is 10,000kW. Biomass, Quarterly Purchase Orders, Dependable, Offsite supply delivered by truck & internal by conveyor, 1 week onsite storage
3. Fuel supply details (type, terms, dependability, delivery structure and timing, fuel storage capability on site) Title V- EPA
4. Description of Facility permitting restrictions and requirements (local, state, or federal) prior to and during operation
5. Description of transformers
 - a. # of transformers 1
 - b. Model Myers Serial #TSP149650
 - c. High Voltage Rating 72,000
 - d. Low Voltage Rating 13,800
 - e. MVA rating 15 FA- 18 FA/FA
 - f. High voltage connection The main transformer high side voltage is 69 kVA
 - g. Low voltage connection The main transformer low side voltage is 13.8 kVA
6. Description of metering, communications, and monitoring 2 meters, Fiber, PacifiCorp
7. Description of station service requirements .375 mW
8. Description and timeline of interconnection and transmission plan Currently interconnected with PacifiCorp Transmission.
9. Transaction Service Request Number, Interconnection Queue number, and System impact/interconnection study Pending

From: Ken Kaufmann Ken@kaufmann.law 
Subject: Evergreen BioPower LLC--PLEASE CONFIRM RECEIPT
Date: May 15, 2017 at 11:11 AM
To: Denise Saunders denise.saunders@pgn.com, Angeline.Chong@pgn.com
Cc: Kyle Freres kfreres@frereslumber.com, Ken Kaufmann Ken@kaufmann.law



KENNETH KAUFMANN ATTORNEY AT LAW

1785 Willamette Falls Drive • Suite 5
West Linn, OR 97068

office (503) 230-7715
fax (503) 972-2921

Kenneth E. Kaufmann
ken@kaufmann.law

May 15, 2017

VIA ELECTRONIC MAIL ([DENISE.SAUNDERS@PGN.COM](mailto:Denise.Saunders@pgn.com))

Denise Saunders
Associate General Counsel
121 SW Salmon Street, 1WTC 13
Portland, OR 97204

Subject: **Evergreen BioPower LLC Schedule 201 PPA application**

Dear Denise,

This letter follows my previous letters dated March 3, 2017, March 22, 2017, and May 11, 2017 regarding the above matter. PGE and my client, Evergreen BioPower LLC (Evergreen), completed negotiation of all terms in the standard PPA no later than March 29, 2017. Evergreen requested a final, executable, PPA on March 31, 2017.

On May 11, 2017 PGE informed Evergreen that it would not accept delivery at PACW.PGE but would accept delivery at BPAT.PGE. PGE promised that it would honor the Schedule 201 Avoided Cost Prices in effect on the date of its letter (Renewable Fixed Price Option for Base Load QF--Schedule 201 (October 12, 2016) Sheets 13-14) if Evergreen agreed to deliver to BPAT.PGE. Although this was never a condition of the Schedule 201 standard PPA or Evergreen's negotiation with PGE, Evergreen will accept PGE's offer.

Please send me via electronic mail (ken@kaufmann.law) an executable Standard Off-System Non-Variable Power Purchase Agreement consistent with Evergreen's March 31 request letter (a copy of which is enclosed herein), and the following change:

Change Termination Date in §2.3 to May 31, 2032 (or the Effective Date plus 15 years).

As you know, PGE's rates are likely to go down substantially as soon as May 17, 2017. **Therefore I ask that you please tender an executable PPA no later than 12:00 pm May 16, 2017.** Otherwise Evergreen will submit its own final draft by close of business on May 16, 2017.

Mr. Freres has appreciated PGE's courtesies and looks forward to a successful conclusion to this transaction.

Sincerely,



Ken Kaufmann

Attorney for Evergreen BioPower LLC

Copy: Angeline Chong (angeline.chong@pgn.com)
Kyle Freres (kfreres@frereslumber.com)

ATTACHMENT TO MAY 15 LETTER



"An Equal Opportunity Employer"

P.O. Box 276 / Lyons, Oregon 97358
503-859-2121
Fax 503-859-2112

March 31st, 2017

Angeline D. Chong
Portland General Electric
121 SW Salmon St. 3WTC0306
Portland, Oregon 97204

Dear Angeline,

Thank you for the second draft PPA. Evergreen BioPower hereby requests that PGE provide a final executable PPA, with no substantive changes from the second draft PPA provided on March 28 and titled "Standard Renewable Off-system Non-variable Power Purchase Agreement".

Before you send out the final executable draft can you please proof-read to make sure the following entries are accurate?

The second draft did not catch the following typos that were called out in my March 22 email:

1. Page 1, ¶1. "BioPower" s/b "BioPower"
2. Page 1, ¶2. "10,0000" s/b "10,000"
3. Page 5, §2.3. Change "March 31, 2032" to "April 30, 2032". (Based upon the reasonable targeted execution date).
4. Page 5, §3.1.1. Change "Limited Liability Corporation" to "Limited Liability Company".
5. Page 17, "BioPower" s/b "BioPower"

I understand the PPA Contract Price to be the prices set forth in Tables 4a and 4b of the October 12, 2016 vintage Schedule 201. If that is not correct please let me know.

If my counting is correct, I will receive an executable PPA by April 19, which I am optimistic both parties can execute on or before April 30. If that is incorrect please let me know.

Thank you again for your help. It has been a pleasure working with you.

A handwritten signature in black ink, appearing to read "K. Freres", is written over a horizontal line.

Kyle Freres

Vice President, Freres Lumber Co., Inc.,

Manager, Evergreen BioPower LLC

Kenneth Kaufmann, Atty OSB 982672
1785 Willamette Falls Drive, Suite 5
West Linn, OR 97068
Telephone: (503) 230-7715
FAX: (503) 972-2921
ken@kaufmann.law

Attorney for Complainant Evergreen BioPower, LLC

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

Evergreen BioPower, LLC

Complainant,

vs.

Portland General Electric Company

Respondent.

CASE NO. UM 1844

**Affidavit of Kyle Freres in support
of Complainant**

1 **Q. Please state your name and position.**

2 A. My name is Kyle Freres. I am the Managing Partner of Evergreen BioPower, LLC
3 and the Vice President of Operations of its parent company and site host, Freres
4 Lumber Co., Inc.

1 **Q. Were you Evergreen's point of communications with Portland General**
2 **Electric Company (PGE) regarding Evergreen's November 15, 2016**
3 **application for a Schedule 201 standard contract?**

4 A. Yes. Except for letters exchanged between my attorney and the attorney for PGE,
5 all communications regarding Evergreen's application went through me.

6 **Q. What is the purpose of your testimony?**

7 A. In Part I of my testimony, I authenticate Evergreen Exhibits 1-5, and 7-9. In Part
8 II, I discuss Evergreen's Schedule 201 application and its standard contract.

9 **Part I**

10 **AUTHENTICATION OF EVERGREEN'S EXHIBITS**

11 **Q. Below is a list of Exhibits filed by Evergreen in support of its Complaint:**

- 12 Evergreen/Exhibit 1, Facility Nameplate*
- 13 Evergreen/Exhibit 2, May 11 Letter*
- 14 Evergreen/Exhibit 3, May 16 Letter*
- 15 Evergreen/Exhibit 4, May 16 Evergreen E-mail*
- 16 Evergreen/Exhibit 5, May 16 PPA*
- 17 Evergreen/Exhibit 6, May 31 E-mails*
- 18 Evergreen/Exhibit 7, 2006 Motive Force Plan
- 19 Evergreen/Exhibit 8, Schedule 201 Initial Information Request
- 20 Evergreen/Exhibit 9, May 15 E-mail

21 * filed with Evergreen's First Amended Complaint.

22 **Are you familiar with Evergreen Exhibits 1-9, set forth, above?**

1 A. Yes

2 **Q. Does Exhibit 1 accurately describe the nameplate on the Evergreen**
3 **BioPower generation facility?**

4 A: Yes. This is the nameplate for the Turbine Generator, located on the turbine front
5 standard. It was placed there by Wellons Inc. It says:

6 GENERAL ELECTRIC, TURBINE GENERATOR SET

7 SERIAL NUMBER: 178842

8 RE-RATED TO 10,000 KW

9 RE-RATED PER TURBO-CARE, INC./ WELLONS, INC.

10 RE-RATED DATE: 08/01/06

11 RE-RATED CONDITIONS:

12 PRESSURE: 850 PSIG

13 TEMPERATURE: 875° F

14 EXHAUST: 1.5" HGA

15 EXTRACTION: 300 PSIG

16 **Q. Is Exhibit 2 a true copy of a letter you received from PGE on or about May**
17 **11, 2017?**

18 A: Yes.

19 **Q. Is Exhibit 3 a true copy of a letter your attorney received from PGE on or**
20 **about May 16, 2017?**

1 A. Yes. I received from my attorney a forwarded copy of that letter, along with the
2 cover E-mail from PGE attorney Denise Saunders, on May 16, 2017.

3 **Q. Is Exhibit 4 a true copy of an E-mail from your attorney to PGE, copied to**
4 **you on May 16, 2017?**

5 A. Yes.

6 **Q. Is Exhibit 5 a true copy of the Power Purchase Agreement you executed on**
7 **May 16, 2017 and authorized your attorney to deliver to PGE?**

8 A. Yes. It is a true copy, and I authorized my attorney to deliver to PGE on May 16.

9 **Q. Is Exhibit 7 a true copy of the Motive Force Plan that Evergreen submitted**
10 **to PacifiCorp with its request for a PacifiCorp Schedule 37 standard**
11 **contract?**

12 A. Yes.

13 **Q. Is Exhibit 8 a true copy of the Schedule 201 Initial Information Request you**
14 **received from PGE on or about December 15?**

15 A. Yes.

16 **Q. Is Exhibit 9 a true copy of the E-mail and attachment your attorney sent to**
17 **PGE on May 15, 2017?**

18 A. Yes.

19 */// /// ///*

20

21 */// /// ///*

1

Part II

2 **EVERGREEN'S SCHEDULE 201 APPLICATION AND ITS STANDARD CONTRACT**

3 **Q. Can you describe Evergreen BioPower and its relation to Freres Lumber**
4 **Company?**

5 A. Evergreen BioPower, LLC (Evergreen) is a wholly owned subsidiary of Freres
6 Lumber Co., Inc., an Oregon company founded by T.G. Freres who purchased his
7 first sawmill along the North Fork of the Santiam River 95 years ago. The
8 company expanded to Lyons, Oregon in 1941, and expanded further in 1959,
9 1989, and 1998. T.G. Freres' grandchildren and great grandchildren now own
10 and work full-time at the Freres facilities. Freres Lumber currently provides
11 family wage employment to over 450 employees in rural Lyons, and Mill City,
12 Oregon. In 2007, Freres Lumber Company founded Evergreen to own and
13 operate a cogeneration facility at the Lyons mill.

14 **Q. Why did Freres Lumber decide to build the Evergreen facility?**

15 A. Freres' veneer facility in Lyons uses large amounts of steam for conditioning
16 green logs and drying veneer, consumes large amounts of electricity to run
17 equipment, and generates large quantities of wood waste suitable for fuel,
18 making it a prime candidate for on-site cogeneration.

19 **Q. Was that enough?**

20 A. Evergreen owes its existence to PURPA and, more specifically, Commission
21 Order No. 05-584, which required the utilities to offer standard contracts to

1 Qualifying Facilities 10,000 kW and under. We had studied cogeneration before,
2 but found it to be too expensive. When we heard about the 10,000 kW standard
3 QF contract, we figured out how to make it work financially. Without the
4 guaranteed revenue from a standard power purchase agreement, we would not
5 have built it.

6 **Q. Why does the Evergreen Facility use a pre-owned turbine-generator?**

7 A. It came down to economics. Evergreen selected Wellons, Inc. to design and
8 install its facility. Wellons is a major manufacturer of logging mill-related
9 equipment and well known to Freres Lumber. Wellons packages turbine
10 generators with its boilers and sells turnkey cogeneration systems. They offer an
11 option to package a new Wellons boiler and other Wellons equipment with
12 steam turbines and generators acquired by Wellons on the pre-owned market.
13 For Evergreen, Wellons packaged a pre-owned generator and a pre-owned
14 turbine with its custom-built boiler. By going this route we saved about \$1-2
15 million compared to an all-new unit.

16 **Q. How did you size the facility you purchased?**

17 A. Wellons sized its boiler capacity such that the Facility had the capacity to satisfy
18 Freres Lumber's energy needs and to generate electricity with excess capacity,
19 yet lacked motive force to generate more than 10,000 kW when entire steam
20 capacity of boiler was provided for electrical generation. It then selected the
21 best-suited used turbine generator available. That turned out to be a turbine

1 paired with a 21.4 MW generator. Blades from the turbine were removed to
2 match the turbine's capability to the boiler. The generating capacity of the
3 facility, based on the limiting capacity of both the boiler and the modified
4 turbine, is 10,000 kW, as determined by Wellons. A nameplate affixed to the
5 turbine by Wellons states: "RE-RATED TO 10,000 KW". Evergreen/Exhibit 1,
6 Facility Nameplate.

7 **Q. Does Evergreen self-limit Facility generation so not to exceed 10,000 kW**
8 **net output?**

9 A. No. With the boiler running flat out, the facility cannot sustain 10,000 kW net
10 output. By way of analogy, suppose there are two cars and both have a maximum
11 speed of 100 miles per hour. Car A can only go 100 MPH because it lacks the
12 power from its engine to go faster. Car B can only go 100 MPH because it has its
13 cruise control set to 100 MPH. The Evergreen Facility is like Car A. With its
14 current boiler and turbine, it cannot exceed 10 MW.

15 **Q. Who purchases Evergreen's net output?**

16 A. Currently we sell 100% of our net output to PacifiCorp. The facility is directly
17 connected to PacifiCorp.

18 **Q. Did Evergreen discuss using pre-owned equipment with PacifiCorp?**

19 A. Of course. Before purchasing the unit, Evergreen consulted PacifiCorp about its
20 facility's eligibility for a standard contract. In addition to telephone calls where
21 Evergreen and PacifiCorp discussed the proposed facility, PacifiCorp required

1 that Evergreen submit a Motive Force Plan prior to receiving a draft Schedule 37
2 standard contract. The Motive Force Plan described our plans, and I discussed
3 them with PacifiCorp as well.

4 **Q. What does the Motive Force Plan say about the nameplate capacity of the**
5 **system?**

6 A. Evergreen's Motive Force Plan stated our intent to use a pre-owned generator
7 and a re-rated, pre-owned turbine:

8 The Evergreen facility consists of a 100,000 lb/hr Wellons 4 cell
9 rotary grate biomass boiler with steam conditions of 850 psig and
10 875°F. The Turbine Generator is a General Electric machine with a
11 turbine rated at 10,000 kw as modified and a generator rated at
12 24,705 Kva at a voltage of 13.8 Kv. With typical weekday process
13 steam loads the T-G will produce 7,150 Kw of gross output, with
14 575 Kw of power generation auxiliary load, for a net output of
15 6,575 kW. On weekends, the low extraction flows will allow a T-G
16 gross output of 10,000 Kw, with 575 Kw of auxiliaries, for a net of
17 9,425 kw.

18 Evergreen/Exhibit 7, 2006 Motive Force Plan/1.

19 **Q. Did PacifiCorp object to your proposal?**

20 A. No. PacifiCorp approved the Motive Force Plan (which it attached to Evergreen's
21 executed standard contract) and never disputed whether Evergreen met the

1 10,000 kW size cap. In reliance on PacifiCorp's determination of eligibility,
2 Evergreen purchased the turn-key facility from Wellons.

3 **Q. Why do you plan to sell to PGE (not PacifiCorp) in the future?**

4 A. Evergreen contracted to sell power to PacifiCorp for 10 years under a standard
5 (PacifiCorp Schedule 37) power purchase agreement, set to expire on December
6 31, 2017. Because PacifiCorp is capacity-sufficient in renewable resources
7 through 2028 and PGE is capacity sufficient in renewable resources only through
8 2019, PGE's standard renewable avoided cost is substantially higher in years
9 2020 through 2028 than PacifiCorp's. When Evergreen became aware of PGE's
10 higher avoided cost prices, in Fall 2016, it decided to sell its energy to PGE once
11 its PacifiCorp contract expires.

12 **Q. When did you apply for a PGE standard contract?**

13 A. Evergreen requested a standard contract from PGE on November 15, 2016.

14 **Q. How did PGE respond?**

15 A. On December 16, PGE sent Evergreen its *Schedule 201 Initial Information*
16 *Request*, requiring Evergreen to provide more than 82 pieces of information as a
17 condition of providing a draft standard contract. *See* Evergreen/Exhibit 8, PGE
18 request. Evergreen provided PGE with additional requested information on
19 December 27 and on February 6.

20 **Q. Did PGE ask if your equipment had been re-rated?**

21 A. No.

1 **Q. Did PGE ask you to specify a point of delivery?**

2 A. No.

3 **Q. When did PGE send you the first draft of the standard contract?**

4 A. On March 20, 2017, which is more than 4 months after my initial request.

5 **Q. Did you object to the amount of time it took PGE to respond?**

6 A. Each time PGE did something that appeared to be unnecessarily delaying the
7 negotiation my attorney sent a letter to PGE's attorney.

8 **Q. What did the letters say?**

9 A. They explained Evergreen's concerns and reserved Evergreen's right to
10 complain to the Commission in the event PGE's delays harmed Evergreen.

11 **Q. Why did you accept PGE's May 11 offer (in the Evergreen/Exhibit 2, May 11
12 Letter) to execute a standard renewable contract at the then-current prices
13 if Evergreen agreed to change its delivery point to one favored by PGE?**

14 A. On March 31, 2017, I requested a final executable standard contract. On April 19,
15 PGE sent an e-mail asking for Evergreen's planned point of delivery. I told PGE it
16 was PACW.PGE and provided my transmission queue number. PGE responded
17 that it might not be able to accept Evergreen's power at that point. When I heard
18 nothing more for three weeks, my attorney contacted PGE. Shortly afterward I
19 received the May 11 letter. By that time PGE had applied to the Commission to
20 approve its lower rates effective May 17. Faced with a choice between (a)
21 changing the delivery point and getting a final contract at the current prices or

1 (b) filing a complaint that would not resolve for months, I chose to rely on PGE's
2 promise. Evergreen accepted PGE's offer on May 15, 2017.

3 **Q. How did you rely on PGE's promise?**

4 A. Evergreen agreed to deliver to BPAT.PGE instead of PACW.PGE. It did not file a
5 complaint with the Commission seeking a standard contract. Evergreen also
6 didn't speak out against the proposed rate change at the Commission's Special
7 Meeting held May 18.

8 **Q. Did PGE send you a final executable contract as promised?**

9 A. Yes, it did. On May 16, 2017, PGE sent Evergreen an executable standard
10 contract with the then-current renewable prices and cover letter stating "Once
11 Evergreen executes the attached PPA, PGE will have a legally-enforceable
12 obligation to purchase Evergreen's output in accordance with the prices, terms
13 and conditions contained therein." Evergreen/Exhibit 3, May 16 Letter.

14 **Q. Did you sign and return it?**

15 A. Yes I did. Evergreen returned to PGE a scanned version of the May 16 PPA with
16 Evergreen's signature and a cover message via electronic mail to PGE on May 16,
17 2017. Evergreen/Exhibit 4, May 16 E-mail.

18 **Q. Did PGE sign it?**

19 A. On May 31, PGE told Evergreen it doubted whether the Qualifying Facility had a
20 nameplate capacity 10,000 kW or below. PGE told Evergreen it could apply for a

1 Schedule 202 (non-standard) contract to resolve its concerns. I saw no reason to.
2 PGE made an offer and Evergreen accepted. When PGE reneged, I was shocked.
3 From what I know, I believe a Schedule 202 contract would cost more to perform
4 and pay less. Starting a Schedule 202 negotiation at this late date would give PGE
5 tremendous leverage in negotiations, knowing that Evergreen has little time to
6 complete its power sales, interconnection, and transmission arrangements
7 before its contract with PacifiCorp expires. PGE's suggestion made no sense.
8 Shortly before the rate change deadline, PGE returned the fully-executed May 16
9 standard contract on May 31, 2017.

10 **Q. If PGE returned the executed agreement, why did you file a complaint?**

11 A. Even though PGE signed the standard contract, it said it might default Evergreen
12 for being too large. Claiming that Evergreen may be in breach of the size
13 eligibility cap injures Evergreen. It affects the value of anything the contract
14 affects, including a loan against the Project or a sale of the Project. I'm trying to
15 plan next year's transmission and interconnection, next year's energy costs and
16 next year's fuel supply agreements not knowing whether or not PGE will declare
17 a default. Also, Evergreen may apply for a standard contract in the future and I
18 never want to have this dispute again.

19 **Q. Why didn't you submit the 2006 Motive Force Plan to PGE?**

20 A. The 2006 Motive Force Plan was, primarily, an engineering study that
21 documented the volume of wood waste the Facility needed to meet its delivery

1 obligations and explained why Evergreen was likely to have enough fuel, given
2 its supply streams. It was prepared before the plant was constructed. Eleven
3 years later, we have 10 years of production data showing that Evergreen has
4 ample fuel supply to meet its guaranteed delivery volume. So, instead of
5 forwarding a 10-year old forecast, I sent PGE summaries of ten years of actual
6 generation data.

7 **Q. What about the description of the re-rated turbine generator, on page 1 of**
8 **the 2006 Motive Force Plan?**

9 A. PGE requested over 82 items, but did not ask about re-rating or used equipment.
10 I don't recall specifically considering whether to submit Page 1 of the Motive
11 Force Plan. I don't think I would have because I had no reason to think PGE
12 would challenge Evergreen's size eligibility, given the history with PacifiCorp.

13 **Q. Did PGE have any notice that the generator can generate more than 10,000**
14 **kW, if supplied with sufficient mechanical power?**

15 A. Yes. Exhibit B of the May 16 PPA describes the Maximum kW output as:
16 "Maximum kW output: 10,000 kW (turbine limited)" Evergreen provided this
17 information to PGE on November 15, 2016--the first time it contacted PGE.
18 "Turbine limited" discloses that other individual components of the facility may
19 have greater than 10,000 kW capacity which is unusable due to the 10,000 kW
20 nameplate capacity of the turbine.

21 **Q. Were there any other notices?**

1 A. Yes. I also disclosed that the Nameplate Rating, in kW of the Facility was "10,000
2 [kW] Turbine Limited" in my December 27, 2016 submittal of Evergreen's
3 answers to PGE's Schedule 201 initial information request.

4 **Q. Were there any other notices?**

5 A. Yes. I believe the data in FERC Form 556 I provided on November 15 and
6 December 27, 2016 would allow an engineer to determine that the Facility was
7 boiler capacity limited to 10,000 kW nominal output.

8 **Q. Were there any other notices?**

9 A. Yes. PGE has a copy of Evergreen's PacifiCorp Schedule 37 power purchase
10 agreement. It has the 2006 Motive Force Plan with the disclosures I described,
11 on page 8 above, attached to it.

12 **Q. Were there any other notices?**

13 A. No. Just those six.

14 **Q. Did you expect any issue regarding Evergreen's size?**

15 A. Never. We made sure through PacifiCorp in 2007 that the facility qualified
16 before we built it. I still can't believe that the Commission would find that the
17 facility qualified when it was built but doesn't qualify now.

18 **Q. PGE's contract with Evergreen defines "Nameplate Capacity Rating" as "the**
19 **maximum capacity of the Facility as stated by the manufacturer, expressed**
20 **in kW, which shall not exceed 10,000 kW." See Evergreen/Exhibit 5, May 16**
21 **PPA/Page 4. Were you aware of this when you executed the May 16 PPA?**

1 A. Yes I read contracts before I sign them.

2 **Q. Did you perceive any risk that the Evergreen Facility had a Nameplate**
3 **Capacity Rating greater than 10,000 kW, under the definition in the May 16**
4 **PPA?**

5 A. None. The definition says: "maximum capacity of the Facility". To me, that means
6 the Facility as a whole, not individual units. It says "as stated by the
7 manufacturer", and it says "not" in excess of 10,000 kW. With a nameplate on the
8 machine that says that the Turbine-Generator Set rated capacity is 10,000 kW, I
9 had no doubt it met the eligibility test.

10 **Q. When did PGE first challenge Evergreen's eligibility?**

11 A. Evergreen applied for a standard contract on November 15, 2016--13 months
12 early; PGE waited until May 31 to dispute Evergreen's eligibility.

13 **Q. What is your impression of PGE's First Set of Data Requests to Evergreen**
14 **BioPower, LLC?**

15 A. It looks like PGE is finally interested in performing diligence on the size
16 eligibility of Evergreen's Facility. Had PGE asked those questions initially instead
17 of waiting over 6 months to raise them, all questions about eligibility could have
18 been resolved already.

19 **Q. How has Evergreen been damaged by PGE's challenge?**

20 A. PGE acts like it hasn't signed an enforceable contract, but it has. If PGE does not
21 perform under that contract, Evergreen's damages will include the difference in

1 payment under the contract and under Evergreen's next best option. Evergreen
2 expects that those damages would be very large.


3 **Q. Does this conclude your testimony?**

4 A. Yes.

5 **Q. Do you swear your testimony is truthful to the best of your knowledge?**

6 A. Yes.

7 Dated this 18th day of July 2017.

8
9 

10 Kyle Freres
11 Manager, Evergreen BioPower
12

13 STATE OF OREGON)
14) ss.
15 County of Linn)
16

17 On this 18th day of July 2017, before me, a Notary Public in and for the State of Oregon, personally
18 appeared Kyle Freres, known or identified to me and who subscribed said name to
19 the foregoing instrument, and acknowledged to me that they executed the same.
20

21 IN WITNESS WHEREOF, I hereunto set my hand and affix my official seal the day and year first above
22 written.

23 
24 Michael Davidson, Notary Public for Oregon

25 Residing at: 141 14th St., Lyons, OR 97358

26 My commission expires: 2/1/19
27

28

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