BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1887

PORTLAND GENERAL ELECTRIC COMPANY, COMPLAINANT, v. COVANTA MARION, INC. RESPONDENT.	COVANTA MARION, INC.'S REPLY TO PORTLAND GENERAL ELECTRIC COMPANY'S CROSS MOTION FOR SUMMARY JUDGEMENT

I. INTRODUCTION

Covanta Marion, Inc. ("Covanta") submits this Reply to Portland General Electric Company's ("PGE") Cross-Motion for Summary Judgment. At issue in this proceeding is PGE's refusal to provide a Schedule 201 Standard Contract to a Qualifying Facility ("QF") owned by Covanta that will have a manufacturer's nameplate capacity rating of 10 MW (the "Project"). The applicable Commission policy is clear: The Parties agree that QFs having a manufacturer nameplate capacity rating of 10 MW are eligible to receive a Standard Contract. The applicable facts are clear: The Parties have stipulated that Covanta's Project will have a nameplate capacity of 10 MW.[1] There is, therefore, no rational basis for PGE's refusal to provide Covanta with a Standard Contract as of the date of Covanta's notice of exercise, March 2, 2017.

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[1] *See* Stipulated Facts for Cross Motions for Summary Judgment ("Stipulated Facts"), ¶ 1.

II. ARGUMENT

In its Cross-Motion for Summary Judgment, PGE advances four different arguments in defense of its refusal to provide Covanta a Standard Contract as required by law. None of these arguments have merit.

- First, PGE accuses Covanta of violating existing Commission policy by proposing to "operate" the Project beneath an ineligible nameplate capacity rating. This is not the case. PGE is well aware that Covanta will redesign and rebuild the Project such that the original manufacturer will legitimately issue a new and eligible nameplate capacity rating.

- Second, PGE argues that a QF such as Covanta may not "voluntarily" design and build a facility that is under the threshold for a Standard Contract unless it has what PGE deems to be an independent and legitimate business reason for selecting such design capacity. PGE's position does not reflect the Commission policy and wrongly equates voluntary compliance with "evasion."

- Third, PGE argues that the Commission's eligibility policy is nothing more than a proxy for determining which QFs have the financial means to negotiate a Schedule 202 contract. This is not an accurate statement of the Commission's policy.

- Finally, PGE advances a policy argument that PURPA somehow prohibits QFs from sizing their generating facility at anything less than their maximum potential capability. There is no such legal requirement in PURPA or otherwise. Further, sound policy favors the continued survival of the Project at lower capacity as opposed to its complete demise.

Covanta responds to each of these four arguments in turn below.

A. Covanta does not seek to "operate" the Project beneath its nameplate capacity rating.

The Commission has articulated a very clear policy for determining a QF's eligibility for a Standard Contract. In Order 05-584 the Commission held:

> Design capacity, as defined by the manufacturer's nameplate capacity for a QF project, will continue to be the measure of eligibility for standard contract. In order to be eligible to receive standard contract terms and conditions, a QF must have a manufacturer's nameplate capacity rating at or under 10 MW.[2]

[2] Order 05-584, p. 40.

Under this policy, eligibility for a Standard Contract shall be based solely on *design capacity*. Design capacity is, in turn, defined by the manufacturer's nameplate capacity rating.

The Commission intended for its policy to establish a bright-line rule that is not subject to manipulation by developers *or utilities*. Commission Staff testified that "[t]he size limit for standard rates and contracts should be based on the manufacturer's nameplate capacity rating. This is a clear standard as requested by PacifiCorp, not subject to manipulation by either party, and verifiable."[3] The Commission echoed this testimony in its Order: "Staff maintains that the nameplate capacity provides a clear standard that is not subject to manipulation."[4] Under this standard, a purchasing utility does not have the discretion to unilaterally reject a QF having an eligible nameplate capacity rating based on the QF's financial means or business motives.

Covanta's Project satisfies the Commission's bright-line eligibility criterion. PGE and Covanta both stipulate that the Project will have a manufacturer's nameplate capacity rating of 10 MW.[5] PGE now argues that, notwithstanding the manufacturer's revised nameplate capacity rating of 10 MW, PGE will *never* recognize this Project's eligibility for a Standard Contract.[6] PGE represented that it is "*PGE's policy* . . . that a QF with a nameplate capacity greater than 10 MW is not entitled to a standard contract by virtue of undergoing a redesign to constrain output for the purpose of avoiding the 10 MW threshold." (Emphasis added).[7]

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[3] Um 1129 Staff Surrebuttal Testimony of Jack Breen, October 14, 2004, Staff/500; Breen/7.
[4] Order 05-584, p. 39.
[5] *See* Stipulated Facts, ¶¶ 10-11.
[6] *See* Stipulated Facts, ¶ 16.
[7] *See* Complaint, fn 19.

The problem with PGE's purported "policy"[8] is that it is not the Commission's policy. PGE's "policy" rests entirely on its misreading of Order 05-584. In Order 05-584, the Commission determined that "[*i]f a QF's nameplate capacity is greater than 10 MW*, the QF . . . cannot agree to *operate* at a lower threshold level in order to qualify for a standard contract." (Emphasis added).[9] For example, a QF having a nameplate capacity rating of 15 MW is not eligible for a Standard Contract even if it agrees to schedule and deliver no more than 10 MW. In its Motion, PGE incorrectly asserts that this is precisely what Covanta seeks to do. According to PGE, Covanta is "voluntarily reducing the operations of its 13.1 MW QF."[10] PGE's assessment of the facts is inaccurate.

PGE incorrectly equates the "operations" of a QF with its actual design capacity. Covanta has never proposed to constrain the *operations* of a 13.1 MW Project down to 10 MW. Rather, Covanta will literally redesign and physically modify the Project such that the original manufacturer will legitimately issue a new nameplate capacity rating of 10 MW. The Project will *not* have a nameplate capacity rating greater than 10 MW, and Covanta is *not* seeking permission to simply schedule and deliver power from the Project beneath its design capacity. On its face, therefore, that portion of Order 05-584 upon which PGE builds its entire case is simply inapplicable.

[8] Although PGE bases its refusal to provide a Standard Contract for the Project on "PGE's policy," PGE did not attach a copy of the policy to any correspondence or to the Complaint. No such "policy" appears in any of PGE's Schedule 201 or Schedule 202 tariff or contracting documents. Judging from prior discussions between the parties and from the March 22 and May 5 letters, even PGE's own employees were not aware of such policy.

[9] Order 05-584, p. 40.

[10] *See* PGE Motion for Summary Judgment ("PGE Motion"), p 3.

B. QFs are not prohibited from voluntarily complying with the eligibility threshold for Standard Contracts.

Recognizing that the plain language of Order 05-584 does not apply to this case, PGE next attempts to insert its own text into the Commission's policy. PGE argues that the Commission actually intended in Order 05-584 (without so saying) to also preclude QFs from voluntarily designing and building facilities under the threshold for the primary purpose of "rendering themselves eligible" for a Standard Contract. PGE argues that physically designing and building a QF to meet the eligibility threshold, absent some other business justification to PGE's liking, is just another form of "voluntarily constraining" the QF's operations in violation of Order 05-584. According to PGE, "the physical nature of [such] output constraint is wholly immaterial."[11] By ignoring the plain language of the Order and attempting to "insert what was omitted," PGE's strained reading of Order 05-584 violates the cannons of textual construction long recognized under Oregon law.[12]

The error of PGE's interpretation of Order 05-584 is illuminated when applied to a hypothetical *new* QF. According to PGE, a solar developer having the ability and resources to design and construct a 4 MW QF would be *required to do so* and may not "voluntarily constrain" the physical design or construction of the facility to 3 MW for the

[11] *See* PGE Motion p. 7.

[12] *See generally Portland General Electric, Co. v. Bureau of Labor and Industries*, 317 OR 606 (Or. 1993) ("In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent. In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute, including, for example, the statutory enjoinder 'not to insert what has been omitted, or to omit what has been inserted.' Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning.")(Internal citations omitted).

purpose of obtaining a Standard Contact. This is, of course, not what Order 05-584 says. The new solar QF's eligibility for a Standard Contract under Order 05-584 would be determined by its design capacity—which is defined by its nameplate capacity rating upon the commercial operation date. Eligibility is not based on what the QF *could have been* if the developer had elected to design and construct the facility to maximize its generating potential. Further, Order 05-584 makes no distinction between the eligibility criteria applied to new and existing facilities. Nothing in Order 05-584 precludes either new or existing QFs from voluntarily designing and building facilities beneath the applicable threshold in order to "render itself eligible" for a Standard Contract.

Textual analysis aside, PGE is wrong to conflate a QF's "voluntary compliance" with the Commission's policies with an "evasion" of those policies. This situation is perhaps most analogous to a tax-payer that "voluntarily complies" with the tax rules so as to reduce its tax obligation. The Supreme Court has long held that voluntary compliance with the tax code to avoid taxes is *not* the same as violating the code to evade taxes. In *Superior Oil Co. v. Mississippi ex Rel. Knox*, 280 U.S. 390, 395 (1930), the Court held:

> The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana, and hoped not to be in Mississippi. The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.

This fundamental legal principle is directly applicable here. The Commission has drawn a line in the law. Covanta—like many other QFs—has intentionally gone close to that line, but without passing it. This is not "evasion," as PGE suggests, but permissible business planning within the established rules.

C. The Commission's eligibility threshold for Standard Contracts is not merely a proxy for judging the financial means of the QF.

In its Motion, PGE incorrectly states that Commission policy requires Covanta to negotiate a Schedule 202 contract—notwithstanding the fact that the Project will have an eligible manufacturer's nameplate capacity rating—simply because PGE believes that Covanta has the financial means to do so. PGE argues that the eligibility threshold established by the Commission in Order 05-584 is nothing more than a "proxy" for determining which developers have the financial means to negotiate and which do not.[13] According to PGE's argument, therefore, a QF as small as 100kw would be required to negotiate a Schedule 202 contract if PGE believes that the developer has deep pockets. Once again, PGE's position is completely at odds with the Commission's actual policy.

Contrary to PGE's argument, the eligibility criterion established by the Commission in Order 05-584 is a bright-line rule and not a "proxy" for other factors that would be left to PGE's subjective and unilateral determination. What the Commission actually said in Order 05-548 is that the burden of paying transaction costs associated with negotiating a PURPA contract is just *one of* the reasons that it established an eligibility threshold. The Commission held that "[t]he evidence in this proceeding shows that market barriers *other than transaction costs* pose obstacles to a QF's negotiation of a power purchase contract."[14] (Emphasis added). That is why the Commission established a bright-line test for Standard Contract eligibility that looks solely at the QF's nameplate capacity rating.

[13] *See* PGE Motion, p. 7.
[14] Order 05-584, p. 16.

D. PURPA allows QFs the Flexibility to choose their own design capacity.

Finally, PGE crafts a novel policy argument suggesting that PURPA forbids QFs from designing and building facilities that do not absolutely maximize their potential generating capability. PGE argues in its Motion that PURPA's "central goal" is to "increase" renewable energy production.[15] By voluntarily redesigning and rebuilding the Project to reduce its nameplate capacity to 10 MW, Covanta is somehow undermining PURPA's central goal.[16] It must first be noted that this is not a legal argument. PGE musters no authority indicating that there is an actual legal mandate in PURPA or otherwise requiring QFs to maximize their generating capability. Although PGE recites *dicta* from two Supreme Court cases in an attempt to lend *gravitas* to its policy argument, the holding of neither case is remotely relevant to the point PGE tries to make.[17] Thus, PGE's PURPA argument offers no legal basis or justification for its refusal to provide Covanta a Standard Contract.

Even as a pure policy argument, PGE's reliance of PURPA's supposed "central goal" is overly simplistic and not compelling. In fact, PURPA is intended to encourage both the initial development of new QFs and continued viability of existing QFs. In this case, the Project is now thirty (30) years old and its continued viability as a renewable generating resource may be jeopardized if PGE is allowed to block its rightful access to a Standard Contract. As a policy matter, therefore, PURPA certainly would favor the

[15] *See* PGE Motion, p. 8.
[16] *See* PGE Motion, p. 8.
[17] *FERC v. Mississippi*, 456 U.S. 742 (1982) upholds the validity of those provisions of PURPA that direct states to adopt consistent implementing policies and procedures; *Am. Paper Inst. v. Am. Elec. Power Service Corp.*, 461 U.S. 402 (1983) holds that FERC did not act arbitrarily or capricious in adopting its avoided cost rule and that FERC did not exceed its authority in adopting interconnection rules.

continued existence of the Project at 10 MW as compared to its total demise for lack of an economic long-term power sales agreement.

III. CONCLUSION

The parties agree that the applicable Commission policy states that a QF is eligible for a Standard Contract so long as the manufacturer's nameplate capacity rating will be 10 MW or less. The Stipulated Facts show that the Project will have a manufacturer's nameplate capacity rating of 10 MW. Given the bright-line rule established by the Commission in Order 05-548, the resolution of this dispute is easy. The Project is eligible for a Standard Contract because it will have a manufacturer's nameplate capacity rating of 10 MW.

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PGE's refusal to provide a Standard Contract for the Project tramples upon the Commission's long-standing eligibility criterion. PGE therefore requests the Commission to ignore the Commission's current policy as stated and allow PGE to unilaterally reject an otherwise eligible Standard Contract request based on PGE's subjective assessment of Covanta's financial means and business motives. For the reasons stated above, the Commission should reject PGE's request and grant Covanta's motion for an order requiring PGE to honor Covanta's March 2, 2017 Standard Contract request, specifically including the rates in effect on that date.

DATED this 12th day of February, 2018.

Respectfully submitted,

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