BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1887

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

I. INTRODUCTION

Covanta Marion, Inc. ("Covanta") submits this Cross-Motion for Summary Judgment pursuant to OAR 860-001-0420 and ORCP 47C. Covanta files this Motion to resolve the issues raised by Portland General Electric Company ("PGE") in its so-called "Complaint and Request for Dispute Resolution," filed in this docket on August 11, 2017 ("Complaint"). PGE has refused 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"). PGE's actions are contrary to the Commission's long-standing policy of determining Standard Contract eligibility based on the manufacturer's nameplate capacity rating. PGE's refusal to provide a Standard Contract for the Project is part of a pattern of behavior in which PGE has aggressively contested, ignored and even violated its legal obligations under the Public Utility Regulatory Policy Act of 1978 ("PURPA"). Covanta respectfully moves the Commission for an order requiring PGE to honor Covanta's March 2, 2017 request for a Standard Contract.

II. BACKGROUND FACTS

A. Covanta's Project

The Project is located in Brooks, Oregon and has been in operation since 1987.[1] The fuel source is primarily municipal solid waste.[2] The Project performs an important public service of reducing the volume of municipal solid waste that would otherwise end up in local landfills. The Project was designed and constructed by Mitsubishi Hitachi Power Systems.[3] It is comprised of two 275-ton-per-day Martin mass burn combustion boilers that feed a steam turbine generator originally having a manufacturer's nameplate capacity rating of 13.1 MW.[4] Production data collected over the previous year indicates that the Project generated 11 MW or less 98.3% of the time.[5]

As explained in greater detail below, Covanta has executed a contract to have Mitsubishi Hitachi Power Systems take the now thirty (30) year-old Project completely off-line, open up the steam turbine, reconfigure it, and then put it back together such that it will have the capacity to produce 10 MW going forward.[6] These physical modifications are scheduled to be complete by September of 2019.[7] Upon completion of this redesign and construction work, Mitsubishi Hitachi Power Systems will issue a new manufacturer's nameplate capacity rating of 10 MW.[8] PGE and Covanta stipulate, and

[1] *See* Stipulated Facts for Cross Motions for Summary Judgment ("Stipulated Facts"), ¶ 1.
[2] *See* Stipulated Facts, ¶ 1.
[3] *See* Stipulated Facts, ¶ 1.
[4] *See* Stipulated Facts, ¶¶ 1-2.
[5] *See* Stipulated Facts, ¶ 3.
[6] *See* Stipulated Facts, ¶¶ 10-11.
[7] *See* Stipulated Facts, ¶ 11.
[8] *See* Stipulated Facts, ¶ 10.

the Commission may assume for purposes of this proceeding, that the Project will have a manufacturer's nameplate capacity rating of 10 MW by September of 2019.[9]

B. 1984 PURPA PPA with PGE

Since its inception, the Project has been interconnected with, and the entire output of the Project has been sold to PGE.[10] The initial PPA between Covanta and PGE was entered into on September 7, 1984 and expired on June 30, 2014.[11] Covanta fully performed all of its obligations under the 1984 PPA. The issue of whether the Project qualified for a Schedule 201 or a Schedule 202 contract was not relevant in 1984 when the initial PPA was executed.

C. Upon Expiration of the 1984 PPA in 2014, The Parties Could Not Reach Agreement on a Schedule 202 Contract for the Project

The theme of PGE's Complaint is that Covanta seeks to modify and obtain a revised nameplate capacity rating for the Project in order to "evade" negotiating a Schedule 202 contract.[12] The Stipulated Facts tell a different story: Covanta actually tried for many months during 2013 to negotiate a Schedule 202 contract with PGE.[13] Prior to the expiration of the 1984 PPA, Covanta contacted PGE in March of 2013 about negotiating a renewal PURPA contract.[14] Following months of preliminary discussions, on June 10, 2013, Covanta sent a formal request to PGE to negotiate a Schedule 202

[9] *See* Stipulated Facts, ¶¶ 10-11.
[10] *See* Stipulated Facts, ¶ 5.
[11] *See* Stipulated Facts, ¶ 5.
[12] *See* Complaint and Request for Dispute Resolution, filed by PGE UM 1887 on August 11, 2017 ("Complaint"). In the Complaint, PGE specifically accuses Covanta of "evading" the contracting rules at least four (4) different times inside of ten (10) pages. PGE also accuses Covanta of "gaming" the system.
[13] *See* Stipulated Facts, ¶ 6.
[14] *See* Stipulated Facts, ¶ 6.

contract.[15] On June 19, 2013, PGE provided Covanta with indicative pricing for a Schedule 202 contract.[16] On July 12, 2013, PGE sent Covanta a term sheet for a Schedule 202 contract.[17] Despite months of effort, the parties were ultimately unable to reach agreement on final Schedule 202 contract terms.[18]

Faced with the failure to obtain a Schedule 202 contract, PGE and Covanta eventually executed a short-term, non-PURPA contract. On October 9, 2013, PGE tendered to Covanta a "merchant" contract based on the Edison Electric Institute Master Power Purchase and Sale Agreement ("Merchant PPA").[19] Instead of executing a long-term PURPA contract having fixed prices reflecting PGE's avoided costs, Covanta ended up with a three (3) year contract based on depressed market index pricing. PGE benefitted financially, to Covanta's detriment, from the parties' failure to successfully negotiate a Schedule 202 contract. Nevertheless, PGE now accuses Covanta of "evading" the Commission's PURPA contracting rules and "gaming" the system.

D. Covanta Requested a Standard Contract to Follow the Expiration of the Merchant PPA

The Merchant PPA expired on September 30, 2017.[20] Since its expiration, the parties have been operating under short-term extensions of the Merchant PPA.[21] On May 2, 2016, Covanta and PGE held a conference call to discuss options for a long-term replacement to the Merchant PPA.[22] Among other things, Covanta raised on this call the possibility that it might increase the Project's nameplate capacity rating or, alternatively,

[15] *See* Stipulated Facts, ¶ 6.
[16] *See* Stipulated Facts, ¶ 6.
[17] *See* Stipulated Facts, ¶ 6.
[18] *See* Stipulated Facts, ¶ 6.
[19] *See* Stipulated Facts, ¶ 7.
[20] *See* Stipulated Facts, ¶ 8.
[21] *See* Stipulated Facts, ¶ 8.
[22] *See* Stipulated Facts, ¶ 9.

decrease the Project's nameplate capacity rating to 10 MW.[23] After the May 2 discussion with PGE concerning its different contract options, Covanta elected to have the manufacturer modify the Project and reduce its nameplate capacity rating in order to qualify for a Standard Contract. Covanta decided that it would rather sacrifice a small of amount of future Project output than suffer through another unsuccessful Schedule 202 contract negotiation.

Covanta then negotiated and executed a contract to have the original manufacturer, Mitsubishi Hitachi Power Systems, overhaul and physically modify the turbine.[24] An excerpt of the contract describing the scope of work to be undertaken by Mitsubishi Hitachi Power Systems is attached to the Stipulated Facts as the confidential Exhibit A.[25] The physical modifications to be completed by Mitsubishi Hitachi Power Systems require it to take the Project completely off-line and open up the steam turbine.[26] Mitsubishi Hitachi Power Systems will then redesign and rebuild the turbine to have a generating capacity of 10 MW. This work requires a level of skill and expertise that Covanta does not possess in-house and Covanta will not be able to reverse the Project modifications.[27] Upon completion of the redesign and construction work, Mitsubishi Hitachi Power Systems shall issue a new manufacturer's nameplate capacity rating of 10 MW for the Project.[28]

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[23] *See* Stipulated Facts, ¶ 9.
[24] *See* Stipulated Facts, ¶ 10.
[25] *See* Stipulated Facts, ¶ 10.
[26] *See* Stipulated Facts, ¶ 11.
[27] Except by executing a new contract Mitsubishi Hitachi Power Systems, which would have to take the Project off-line and re-open the turbine.
[28] *See* Stipulated Facts, ¶ 10.

After executing the contract with Mitsubishi Hitachi Power Systems to reconfigure the Project, Covanta sent PGE a formal written request for a Standard Contract.[29] In its cover letter, Covanta explained that "Covanta is undertaking a turbine modification and re-rate of the project at the Facility to achieve a Nameplate Capacity rating of 10,000 kW and a Commercial Operation Date of September 20, 2019, as such capitalized terms are used in the PPA."[30] Covanta provided to PGE all of the required data and information regarding the Project. Covanta executed and delivered the Standard Contract, indicating its intent to be bound by its terms and to receive the pricing in effect at the time of execution.[31] On or about March 22, 2017, Angeline Chong of PGE sent Covanta a response confirming PGE's receipt of Covanta's Standard Contract request.[32]

On May 5, 2017, PGE sent another letter informing Covanta for the first time (despite the previous discussions and correspondence) that it was not eligible for a Standard Contract because the FERC Form 556 for the Project indicates that it has a generating capacity of approximately fifteen (15) MW.[33] PGE further wrote:

> You have shared your intention to rerate the Covanta [sic] at 10 MW or less, and upon completion of the proposed rerate you may submit a new Schedule 201 PPA request subject to the prevailing terms and conditions at the time of your request. Until such time, Covanta may be eligible for PGE's schedule 202.[34]

Based on this correspondence, PGE clearly understood that Covanta was not seeking a Standard Contract for the Project based on its current nameplate capacity rating of 13.1 MW. PGE knew that Covanta was requesting a Standard Contract to have a Commercial

[29] *See* Stipulated Facts, ¶ 13. A copy of Covanta's request for a Standard Contract is Attachment B (pp 57-80) to PGE's Complaint.
[30] *See* Stipulated Facts, ¶ 13.
[31] *See* Stipulated Facts, ¶ 13.
[32] *See* Stipulated Facts, ¶ 14.
[33] *See* Stipulated Facts, ¶ 15.
[34] A copy of the May 5, 2017 letter is attached as Exhibit C to the Stipulated Facts.

Operation Date of September 20, 2019, at which time the Project would have a manufacturer's nameplate capacity rating of 10 MW.

PGE subsequently asserted an even more extreme position.[35] PGE currently argues that, notwithstanding the manufacturer's nameplate capacity rating, PGE will *never* recognize this Project's eligibility for a Standard Contract.[36] PGE represents in its Complaint 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).[37]

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. And for good reason. It is clear that the "PGE policy" referenced in the Complaint does not actually exist. The only "PGE policy" in play here is the PGE policy of contesting every possible PURPA contract request.

E. PGE's Treatment of Covanta is Typical of PGE's Anti-PURPA Strategy

PGE's failure or refusal to complete negotiations of a Schedule 202 contract with Covanta in 2013, and its refusal to offer a Standard Contract for the Project in 2017, are not isolated incidents. They are part of a pattern of behavior by PGE reflecting a deliberate business and legal strategy to avoid complying with requests for PURPA

[35] *See* Stipulated Facts, ¶ 16
[36] *See* Stipulated Facts, ¶ 16.
[37] *See* Complaint, fn 19.

contracts. *As of the date of this Motion, there are at least thirty-eight (38) different open investigations or complaint proceedings filed by or against PGE alleging in some fashion that PGE has failed or refused to comply with its PURPA contract obligations.* In its Complaint, PGE actually boasts that it is either currently in litigation or anticipates initiating legal conflict with several other QF developers in its queue.[38] By comparison, in reviewing of all of the QF contract summaries filed by PGE in Docket RE-143 going back to 2011, Covanta could find *just two (2)* Schedule 202 contracts that PGE has actually executed. PGE currently has thirty-eight (38) pending complaint proceedings verses just two (2) successful negotiations.

In addition to the complaint proceedings described above, this Commission has had to rein-in certain other of PGE's overly aggressive PURPA strategies. In UM 1854, for example, PGE asked the Commission to impose on an interim basis an unprecedented "lifetime cap" on any single QF developer's eligibility for Standard Contracts. In Order 17-310, the Commission rejected PGE's request for interim relief. In UM 1805, several QF owners and developers challenged PGE's practice of beginning PURPA contract terms on the Effective Date, rather than the Commercial Operation Date, in order to short-change the number of years in which "deficiency period" prices are paid. In Order 17-256, the Commission agreed with the QF parties that this practice is inconsistent with its current policies and required PGE to promptly begin offering true fifteen-year contract terms that run from the Commercial Operation Date.

[38] *See* Complaint, p 10.

The Commission should view this proceeding through the same lens. PGE's treatment of Covanta is just one more example of PGE's strategy of raising market barriers to PURPA contracts even when PGE's legal or policy position lacks merit.

III. APPLICABLE LAW AND POLICY

A. Standard for Summary Judgment

The legal standard applicable to a motion for summary judgment is set forth in OAR 860-001-0420 and ORCP 47(C). Summary judgment may be granted by the Commission to resolve a legal dispute so long as no material facts are at issue.[39] Summary judgment is appropriate in this case because the parties have jointly presented the Commission with Stipulated Facts upon which a decision can be made. Each party agrees that there are no issues of material fact that would preclude summary judgment. Specifically, each party agrees that the Project will have a manufacturer's nameplate capacity rating of 10 MW on or before the Commercial Operation Date.[40] Thus, the legal question now before the Commission on summary judgment is whether, under the Commission's existing policy, a QF that will have a manufacturer's nameplate capacity rating of 10 MW is eligible to execute a Standard Contract.

B. Eligibility For a Standard Contract is Determined by the Manufacturer's Nameplate Capacity Rating

The applicable Commission policy states that a QF's eligibility for a Standard Contract is to be determined solely by the manufacturer's nameplate capacity rating. In Order 05-584 the Commission agreed with Staff's recommendation and reaffirmed its long-standing policy.

[39] *See* Order 13-062, p. 5.
[40] *See* Stipulated Facts, ¶ 10.

> Design capacity was established as the criterion for standard contract eligibility in Order 81-319. We deem the evidence introduced in this proceeding insufficient to justify imposing a different standard at this time.
>
> *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.*[41]

(Emphasis added). This policy decision to retain design capacity as the criterion for standard contract eligibility has not been replaced or materially modified by the Commission since Order 05-584.[42]

In reaffirming the manufacturer's nameplate capacity rating as the basis for Standard Contract eligibility, the Commission intended to adopt a bright-line rule. 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*."[43] (Emphasis added). The Commission echoed this testimony in its Order: "Staff recommends basing QF eligibility for standard contracts on the nameplate capacity for a particular facility. Staff maintains that the nameplate capacity provides a clear standard that is not subject to manipulation."[44]

In reaching this decision, the Commission also considered and rejected several alternative arguments. Idaho Power, PacifiCorp and Weyerhaeuser all suggested that the Commission should consider factors other than the manufacturer's nameplate capacity

[41] Order 05-584, p. 40.
[42] The applicable thresholds have been changed for wind and solar projects, but that is not applicable here.
[43] UM 1129 Staff Surrebuttal Testimony of Jack Breen, October 14, 2004, Staff/500; Breen/7.
[44] Order 05-584, p. 39.

rating, such as voluntary limits on project operations or the total metered production of the QF. Notwithstanding these arguments, the Commission found that it is appropriate to look only at the manufacturer's nameplate capacity rating and no further.

IV. ARGUMENT

A. The Project Clearly Meets the Test For Standard Contract Eligibility because it 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.

The Stipulated Facts show that on March 2, 2017 Covanta (after first discussing its contract options with PGE) submitted a request for a Standard Contract having a Commercial Operation Date of September 20, 2019.[45] The Commercial Operation Date designated by Covanta in its contract request is well within the three-year window allowed by current Commission policy.[46] The March 2 contract request clearly states, as does the accompanying cover letter, that on or before the designated Commercial Operation Date, the Project will have a manufacturer's nameplate capacity rating of 10 MW.[47] The Stipulated Facts further show that Covanta has a contractual commitment from Mitsubishi Hitachi Power System to complete the redesign and construction work and to timely provide a qualifying manufacturer's nameplate capacity rating of 10 MW.[48]

The fact that the Project's original nameplate capacity exceeded the threshold at the time Covanta requested the Standard Contract is immaterial. In terms of the

[45] *See* Stipulated Facts, ¶ 13.
[46] *See* Order 17-256, fn 5.
[47] *See* Stipulated Facts, ¶ 13.
[48] *See* Stipulated Facts, ¶¶ 10-11.

Commission's PURPA contracting policies, the redesign and reconstruction of Covanta's Project is no different from the initial design and construction of any new QF generating facility. In either case, the QF requesting a Standard Contract would not have an eligible nameplate capacity rating from the manufacturer on the Effective Date of the contract for the simple reason that construction is not yet complete. The Commission has never held that a QF must have an eligible manufacturer's nameplate capacity rating in hand at the time of executing the Standard Contract—as to so require would effectively prohibit any new QF development.[49]

What matters at the time of contracting under the policy articulated by the Commission in Order 05-584 is the QF's *design capacity*—which is to say what the manufacturer's nameplate capacity will be upon the completion of construction. In this regard, there is nothing in the Commission's PURPA policies that distinguishes between the initial design and construction of a new generating facility and the redesign and reconstruction of a thirty (30) year old facility. The Project is therefore eligible to execute a Standard Contract, as requested on March 2, 2017, on the same basis as any new QF because it will, upon completion of the redesign and construction work to be undertaken by Mitsubishi Hitachi Power Systems, have a manufacturer's nameplate capacity rating of 10 MW.

[49] Requiring a QF to have an eligible manufacturer nameplate capacity rating at the time of contracting, as PGE states in its May 5 letter, would be tantamount to requiring the completion of construction prior to contracting. This is clearly not FERC or Commission policy and it would preclude virtually all new QF development.

B. PGE Misapplies the Commission's Test for Standard Contract Eligibility As Part of its Broad Anti-PURPA Strategy

1. The estimated nameplate capacity rating stated on the FERC Form 556 filing does not override the manufacturer's nameplate capacity rating of a QF project.

PGE impermissibly ignores the fact that the Project will have a manufacturer's nameplate capacity rating of 10 MW because the FERC Form 556 filed for the Project in 1983 prior to its initial construction stated that it would have a generating capacity of "approximately 15 MW." In its May 5, 2017 letter to Covanta, PGE writes that "Covanta is an existing facility with a rated nameplate capacity of 15 megawatts *per the Form 556 submitted*, and as such, your project does not qualify for a Schedule 201 at this time." (Emphasis added)[50] In its Complaint, PGE places great emphasis on the fact that the Project "was first certified as a QF in 1984, and is currently certified with a capacity rating of approximately 15 MW."[51] PGE then reiterates in the Complaint that "the FERC Form 556 provided by Covanta listed the facility's nameplate capacity as 15 MW—*and for that reason* Covanta was not eligible for a standard contract."[52] (Emphasis added).

PGE's reliance on the FERC Form 556 is erroneous. The eligibility criterion adopted by the Commission in Order 05-584 states that design capacity is defined not by the FERC Form 556 but "by the *manufacturer's nameplate capacity rating* for a QF project." (Emphasis added). ORS 757.360 sets forth a very similar definition: "'Nameplate Capacity' means the maximum rated output of a generator or other electric power production equipment under specific conditions *designated by the manufacturer*." (Emphasis added). Even PGE's own Standard Contract template defines the term

[50] Stipulated Facts, ¶15.
[51] *See* PGE Complaint, pp 5-6.
[52] *See* PGE Complaint, p 6.

"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." (Emphasis added). Thus, the relevant inquiry is the nameplate capacity rating provided by the manufacturer—not an administrative report filed decades ago with FERC.

There is a very simple and valid reason why nameplate capacity is defined under Oregon law and policy in terms of the manufacturer's rating and not the FERC Form 556. The FERC Form 556 does not even purport to state the "nameplate capacity rating" of a QF. Instead, it is just an estimate of the maximum electric power production capacity of the facility.[53] In this case, therefore, the FERC Form 556 filed for the Project does not state that its "nameplate capacity" is 15 MW, as PGE incorrectly repeats time and again. It actually says that the Project has "a generation capacity of approximately 15 megawatts (MW)."[54]

Further, the representation that the Project has a generation capacity of approximately 15 megawatts was initially made to FERC by Covanta's predecessor *in 1983*—several years before the Project was even constructed.[55] It was, at the time first given, merely an approximation of the future generation capacity of the Project following construction—not a binding statement as to what the manufacturer's nameplate capacity rating would be in 2019. Finally, even if FERC Form 556 were relevant here, it allows for amendments based on changes to the generating facility. Covanta can and will file with FERC an updated Form 556 reflecting 10 MW after completion of the redesign and

[53] Section 7 of the FERC Form 556 requires the applicant to "Indicate the maximum gross and maximum net electric power production capacity of the facility at the point(s) of delivery by completing the worksheet below." Nothing in FERC Form 556 requires the applicant to provide the "manufacturer's nameplate capacity rating."
[54] *See* PGE Complaint, Attachment A, p. 6.
[55] *See Trans-Energy-Oregon, Inc.*, 22 FERC ¶ 62,406 (1983).

reconstruction work by Mitsubishi Hitachi Power Systems, in accordance with well-settled FERC practice.

2. *Modifying* a facility to achieve an eligible manufacturer's nameplate capacity rating is categorically different from curtailing the *operations* of a project having an ineligible manufacturer's nameplate capacity rating.

Covanta agrees with PGE that the current Commission policy states that a QF having a manufacturer's nameplate capacity rating greater than 10 MW may not qualify for a Standard Contract by choosing to simply *operate* the facility beneath the manufacturer's nameplate capacity rating. In Order 05-584, the Commission explained as follows:

> During cross examination of Staff's witnesses, Weyerhaeuser raised another question, asking whether a QF with a nameplate capacity rating 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. Staff argues no.

In context, it is clear that Weyerhaeuser was not asking whether it could *physically modify* a facility to obtain an eligible nameplate capacity rating. What Weyerhaeuser was asking was whether it could elect to *operate* a facility at 10 MW or less notwithstanding the fact that the facility would continue to have a manufacturer's nameplate capacity rating in excess of 10 MW.

In direct response to the narrow question posed by Weyerhaeuser, 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).[56] In other words, the Commission reaffirmed that the 10 MW eligibility threshold would be a bright-line test based on the manufacturer's

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

nameplate capacity rating and would not allow for exceptions based on the operating decisions of the QF.

This case is readily distinguishable from Weyerhaeuser's hypothetical. On its face, that portion of Order 05-584 quoted above is inapplicable here because the Project will *not* have a nameplate capacity rating greater than 10 MW. PGE incorrectly asserts that Covanta should not be eligible for a Standard Contract because—according to PGE—Covanta proposes to voluntarily curtail a 13.1 MW facility to 10 MW.[57] PGE's assessment is inaccurate. Covanta has never proposed to curtail the operations of a 13.1 MW Project down to 10 MW. Instead, Covanta will physically modify the Project such that the manufacturer's nameplate capacity rating will be 10 MW.

The mistake that PGE makes is that it conflates facility *operations* with facility *modifications*. Both the question posed by Weyerhaeuser and the answer furnished by the Commission address only the issue of facility operations, and not the question of facility modifications. Indeed, where the Commission intends to adopt rules or policies specifically applicable to generating facility *changes or modifications* affecting its nameplate capacity, it certainly knows how to do so. For example, OAR 860-082-0025(1)(c) provides:

> An applicant with a pending completed application to interconnect a small generator facility must submit a new application if the applicant proposes to make any changes to the small generator facility other than a minor equipment modification. *This includes changes affecting the nameplate capacity of the proposed small generator facility*.

(Emphasis). Thus, the Commission has officially recognized the distinction between changes in facility operating practices and physical facility changes or modifications that affect the nameplate capacity. As applied here, if the Commission had intended in Order

[57] *See* PGE Complaint, pp 8-9.

05-584 to preclude physical *changes or modifications* to existing facilities that affect their nameplate capacity, it could have and would have done so expressly.

3. Both the nameplate capacity rating and the eligibility of a particular QF for a Standard Contract are subject to change over time.

The crux of PGE's Complaint lies in its unfounded belief that once a QF facility has been deemed to be a Schedule 202 project, it can never thereafter become eligible for a Standard Contract. PGE argues in its Complaint 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."[58] PGE's sweeping assertion that the Project's eligibility for a Standard Contract cannot change over time finds no support in any existing Commission policy, rule, statute or order.

There should be no doubt that the eligibility of a particular QF for a Standard Contract can and will change along with changes in its nameplate capacity. Indeed, if the present situation were reversed and Covanta proposed to *increase* the manufacturer's nameplate capacity rating of the Project from 10 MW to 13 MW, PGE would certainly argue in such case that the Project is no longer eligible for a Standard Contract due to its revised nameplate capacity rating.

Likewise, the eligibility of a particular QF for a Standard Contract can change along with changing capacity thresholds. For example, if an existing 10 MW *solar* QF that has an expiring Standard Contract were to request new Standard Contract prices, PGE would be quick to inform the QF that it is no longer eligible for a Standard Contract prices based on the Commission's change in the eligibility threshold to 3 MW.

[58] *See* Complaint, fn 19.

The same principle would apply, of course, if the Commission were to *increase* the eligibility threshold. In Order 05-584, the Commission increased the threshold from 1 MW to 10 MW. There is nothing in the Commission's Order that indicates that the increased threshold would only apply to *new* QFs, or that existing QFs between 1 MW and 10 MW would somehow remain ineligible for Standard Contracts in the future under the revised threshold. Following Order 05-584, for example, a three (3) MW QF that was previously ineligible would have become eligible for a Standard Contract upon contract renewal.

Under current Commission policy, the eligibility of a particular QF for a Standard Contract is not a static or immutable condition of the QF. Rather, it can be fluid based on the then-current eligibility threshold and the then-current manufacturer's nameplate capacity rating. Just as QFs that were once eligible may become ineligible, so too can QFs that were once ineligible become eligible. PGE's assertions to the contrary are simply incorrect.

C. The Commission Should Reject PGE's Proposal to Adopt a *New* Policy for Standard Contract Eligibility Based on the Financial Means or the Intent of the QF Developer

PGE is actually asking the Commission to depart from the bright-line manufacturer's nameplate capacity rating test and to adopt an entirely new policy in which PGE could refuse to execute a Standard Contract based on PGE's subjective assessment of the QF's financial means or its reasons for designing an eligible project. PGE understands that this would be a significant departure from the current Commission policy when its says in its Complaint that "PGE's interpretation of the nameplate capacity definition *must be adopted* if the Commission's intent in setting the 10 MW cap is to

have any meaning."[59] (Emphasis added). In other words, PGE is not asking the Commission to apply its current policy—PGE is asking the Commission to *adopt* a new policy.

1. This is the wrong type of proceeding for the Commission to change its generally applicability eligibility policy.

Generally applicable policy issues should be addressed through a general investigation or a rulemaking rather than a complaint proceeding between two litigants. To the extent that this is a contested case proceeding between Covanta and PGE, the Commission is acting in its quasi-judicial capacity rather than its legislative capacity. In its Internal Operating Guidelines, for example, the Commission explains that it "acts in a quasi-judicial capacity where it determines the rights of individual parties . . .."[60] Thus, the outcome of this case should only directly affect the legal rights of the individual parties hereto, Covanta and PGE.

As PGE admits in its Complaint, however, the new policy for which PGE advocates in this docket would apply to many QFs other than Covanta. "Covanta is not the only QF currently in communication with PGE that has taken or proposes to take affirmative measures to modify its facility . . .."[61] Indeed, PGE's goal appears to be to have the Commission establish a new policy in this proceeding that would apply to "a number of solar QFs in its queue . . .."[62] With respect to such other QFs, PGE states that "support of PGE's position in this case is necessary to prevent more gaming of the Commission's 10 MW threshold."[63]

[59] *See* Complaint, p. 10.
[60] Order No. 14-358, p. 7.
[61] *See* PGE Complaint, p. 10.
[62] *See* Complaint, p. 10.
[63] *See* Complaint, p. 10.

Given that PGE is really asking the Commission to adopt a new policy of general applicability, the proper process for PGE to follow would be to request a general investigation or formal rulemaking. The Commission has explained that it "acts in a quasi-legislative capacity when it conducts rulemakings to implement or interpret a statute, or prescribe law or policy on matters of general applicability."[64] One of the fundamental differences between acting in a quasi-legislative and a quasi-judicial capacity is who gets to participate in the process, and how. If the Commission were to consider prospective policy changes of general applicability pursuant to its quasi-legislative authority, it should allow all those who would be affected a full and fair opportunity to participate in the proceeding.

2. The Commission has never applied a strict "means test" for Standard Contract eligibility, and should not begin doing so now.

Even if the Commission were to entertain generally applicable policy changes in this proceeding, the particular policy changes proposed by PGE's should be rejected. PGE incorrectly states that Covanta should be required to negotiate a Schedule 202 contract—notwithstanding the fact that the Project will have a manufacturer's nameplate capacity of 10 MW—simply because PGE believes that Covanta has the financial means to do so. PGE states in its Complaint that "Covanta has shown itself to have the financial resources to successfully negotiate a contract with PGE and should be required to continue to do so."[65] PGE conveniently ignores the fact that the parties' last attempt to negotiate a Schedule 202 contract was decidedly *unsuccessful*. Nevertheless, PGE proposes to amend the Commission's current bright-line test to state that the QF must both: (i) have a manufacturer's nameplate capacity of 10 MW or less; and (ii)

[64] Order No. 14-358, p. 5.
[65] Complaint, p. 2.

demonstrate to PGE's subjective satisfaction that the QF lacks the financial wherewithal to negotiate a Schedule 202 contract.

Commission policy does not and should not allow PGE to reject a Project that is otherwise eligible for a Standard Contract based on PGE's unilateral determination that the developer can afford the transaction costs of a Schedule 202 contract. The Commission explained in Order 05-548 that the burden of paying transaction costs is just *one of* the reasons that it set the eligibility threshold for standard contracts at 10 MW. "Staff argues that an increase in the eligibility threshold is warranted in order to recognize that transaction costs and *other* market barriers, such as the lack of transparency for negotiated QF contract rates, terms and conditions, prevent successful negotiation of a power purchase."[66] (Emphasis in original). The Commission then 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*."[67] (Emphasis added).

Thus, the 10 MW nameplate capacity rule is not, as PGE suggests, merely a "proxy" for determining which developers have the money to negotiate and which do not.[68] It is also an express recognition of the fact that the purchasing utilities can easily raise market barriers to frustrate contract negotiations even with well-heeled counterparties. "In addition to transaction costs, which in economics and related disciplines are traditionally considered to encompass only those costs that are incurred to make an economic exchange, parties identified other market barriers such as asymmetric

[66] Order 05-584, p. 14.
[67] Order 05-584, p. 16.
[68] *See* Complaint, p. 9.

information and an unlevel playing field that obstruct the negotiation of non-standard contracts."[69] Ironically, PGE's treatment of Covanta since 2013—including initiating the present legal proceeding—serves only to confirm that such market barriers still exist.

3. The Commission has never tried to guess the "intent" of a developer in determining Standard Contract eligibility, and should not begin doing so now.

PGE also argues that if a QF lacks a valid engineering or business reason for building a project within the applicable Standard Contract threshold, then PGE should be free to reject the Standard Contract request. PGE writes in its Complaint that "a QF's ability to obtain a new nameplate is [not] dispositive without any consideration of the reason for the redesign . . .."[70] Indeed, PGE informed Covanta that it would not honor the Standard Contract request unless Covanta can prove to PGE that it has an acceptable "engineering or business justification" for having a manufacturer's nameplate capacity rating of 10 MW.[71] PGE would therefore have the Commission adopt a new policy requiring both: (i) a manufacturer's nameplate capacity rating of 10 MW; and (ii) proof that the QF's "engineering or business justifications" for designing to that nameplate capacity are subjectively satisfactory to PGE.

The new policy that PGE wishes for the Commission to adopt is untenable. It would be impossible to implement because it would rely entirely upon PGE accurately reading the minds of all future QF developers in order to ascertain the true "reason" for choosing to build a project with a certain nameplate capacity rating. This obvious conflict of interest would undoubtedly result in countless more disputes between PGE and QF developers concerning their real "engineering or business justifications."

[69] Order 05-584, p. 16.
[70] *See* Complaint, p 9.
[71] *See* Complaint, p 6.

What's more, PGE's proposed rule change would authorize PGE to disqualify the majority of new QF facilities. Taken to its logical conclusion, PGE would be able to unilaterally reject any otherwise eligible QF based on PGE's subjective determination that the QF *could have* built a project in excess of the Standard Contract threshold but for the QF's desire to "evade" the rules by deliberately building within the established eligibility criteria. For example, PGE would be able to reject a Standard Contract request for a new 9.9 MW QF if PGE believes that the QF has sufficient land, interconnection facilities and transmission rights to build a 10.1 MW project instead.

And therein lies the fundamental flaw with all of PGE's arguments in this case. PGE seems to believe that any conscious effort to comply with the established contracting standards is an effort to "game" the system. PGE writes in its Complaint that "Covanta's proposal is just the tip of the iceberg. PGE is receiving numerous requests from QFs who are looking for ways to design their way around the standard-contract threshold."[72] But there is simply nothing wrong with designing a generating facility within the applicable capacity threshold in order to obtain a Standard Contract.

It is not unlike PGE's recent application to take advantage of certain tax accounting rules for the benefit of its shareholders even though it may ultimately result in less tax revenues for the government.[73] PGE's deliberate and calculated strategy to obtain advantageous tax treatment within the established rules is not tax "evasion"—it is just smart tax planning. As here, designing a new or existing generating facility to take

[72] Complaint, p. 3.
[73] *See Application for the Deferral of 2018 Net Benefits Associated with the U.S. Tax Reconciliation Act*, filed by PGE on December 29, 2017 and docketed as UM 1920.

advantage of established Standard Contract rules is not "evading" the rules, it is *complying* with them.

V. CONCLUSION

Covanta respectfully moves the Commission for an order requiring PGE to honor Covanta's March 2, 2017 Standard Contract request, including the rates in effect on that date. 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. PGE's refusal to provide a Standard Contract for the Project based on subjective factors other than the Project's nameplate capacity rating reflects PGE's broader anti-PURPA strategy and runs afoul of the Commission's long-standing eligibility criterion. PGE therefore asks the Commission to adopt modifications to the current policy allowing PGE to reject an otherwise eligible Standard Contract request based on PGE's subjective assessment of the QF developer's financial means and business purposes. For the reasons stated above, the Commission should reject such policy changes both in this proceeding and any other.

DATED this 4th day of January, 2018.

Respectfully submitted,

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