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January 4, 2018

VIA ELECTRONIC FILING

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

Re: Docket UM 1887 - Portland General Electric Company's Cross-Motion for Summary Judgment

Dear Filing Center:

Attached for filing in the above-captioned docket is a copy of Portland General Electric Company's Cross-Motion for Summary Judgment.

Please contact this office with any questions.

Very truly yours,

Alisha Till

Alisha Till
Administrative Assistant

Attachment

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1887

Portland General Electric Company, Complainant v. Covanta Marion, Inc., Respondent.	**PORTLAND GENERAL ELECTRIC COMPANY'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to Oregon Rule of Civil Procedure 47, OAR 860-001-0000(1), and the Prehearing Conference Memorandum issued on October 25, 2017, Portland General Electric Company (PGE) respectfully files this Cross-Motion for Summary Judgment (PGE's Motion). PGE moves the Public Utility Commission of Oregon (Commission) for an order granting PGE summary judgment on the basis that Covanta Marion, Inc. (Covanta)—a 13.1 MW generation facility— cannot render itself eligible for a standard power purchase agreement (PPA) under the Public Utility Regulatory Policies Act (PURPA), by undergoing voluntary modifications to reduce its nameplate capacity to 10 MW.

I. INTRODUCTION

Congress enacted PURPA to encourage distributed and renewable power development, while ensuring "just and reasonable" rates for electric consumers.[1] PURPA's Section 210 balances these goals by requiring utilities to purchase energy output from qualifying facilities (QFs), but also limiting the price utilities pay for that energy to the cost that utilities would otherwise pay to generate or purchase the energy from another source (generally known as "avoided costs").[2]

[1] 16 U.S.C. § 824a-3(b).

[2] 16 U.S.C. § 824a-3(d).

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The Federal Energy Regulatory Commission (FERC), implementing PURPA's policies, further requires that standard terms and conditions be made available to QFs sized at 100 kW or less.[3] This streamlined contracting mechanism ensures that small power producers can effectively bring their power to market by lowering the associated transactional costs,[4] while ensuring that utility customers remain "indifferent" to the source of power generation.[5] This Commission has since exercised its discretion to broaden the group of QFs entitled to standard contracts, setting the generally-applicable eligibility cap at 10 MW,[6] based on the nameplate capacity of the project components.[7] The Commission reasoned that such a threshold would allow for the development of relatively small projects, where the costs of negotiating PPAs might otherwise prove "economically prohibitive."[8] The need to alleviate transaction costs is balanced against the greater accuracy offered by negotiated PPAs; by "reflect[ing] specific characteristics of the project," negotiated PPAs can more closely tailor prices to reflect actual avoided costs.[9]

In this case, Covanta seeks to evade the Commission's 10 MW standard contract threshold for its 13.1 MW project by redesigning its equipment to constrain output—an effort,

[3] 18 C.F.R. § 292.304(c).

[4] *See In the Matter of PacifiCorp's Application to Reduce the Qualifying Facility Contract Term and Lower the Qualifying Facility Standard Contract Eligibility Cap*, Docket No. UM 1734, Order No. 16-130 at 2 (Mar. 29, 2016) (noting that "standard contract terms are intended to reduce transaction costs associated with QF contract negotiation").

[5] *So. Cal. Edison Co.*, 71 F.E.R.C. ¶ 61,269, 62,079 (F.E.R.C. 1995).

[6] This Commission has revised the threshold over time and has since reduced the threshold for PacifiCorp and Idaho Power for wind and solar QFs. Order No. 16-130; *In the Matter of Idaho Power Co., Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term*, Docket No. UM 1725, Order No. 16-129 (Mar. 29, 2016). Recently, the Commission temporarily reduced PGE's threshold for solar QFs from 10 MW to 3 MW, subject to further proceedings. *In the Matter of Portland General Electric Co., Application to Lower the Standard Price and Standard Contract Eligibility Cap for Solar Qualifying Facilities*, Docket No. UM 1854, Order No. 17-310 at 7-8 (Aug. 18, 2017).

[7] *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 40 (May 13, 2005).

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

[9] Order No. 05-584 at 20.

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Covanta agrees, that it undertakes for "the primary purpose" of gaining access to standard contract terms and conditions.[10] The Commission should reject this effort because it (1) violates the Commission's orders and (2) is incompatible with the Commission's PURPA policies, which seek to encourage the development of renewable energy and to protect small energy developers.

First, the Commission has specifically concluded that "a QF with a nameplate capacity larger than 10 MW" may not simply "reduce operations to 10 MW or less in order to receive standard contract terms and conditions."[11] But Covanta seeks to do precisely that. Covanta's facility has a nameplate capacity of 13.1 MW and has routinely operated over the 10 MW threshold for more than thirty years. Covanta now voluntarily seeks to voluntarily limit its facility's output for the primary purpose of avoiding the more tailored terms of a negotiated contract.[12] Covanta's impermissible attempt to avoid the 10 MW threshold in order to receive more favorable prices and terms should not be rewarded.

Second, Covanta's attempt to downgrade its facilities is contrary to the central purpose of PURPA. PURPA was enacted to promote the development of renewable energy—not the deliberate curtailment of that energy. Covanta's efforts, far from ***increasing*** distributed renewable generation while maintaining ratepayer indifference, involve costly redesign efforts to ***reduce*** its facility's output, explicitly to take advantage of the more favorable standard contract terms, while avoiding the more accurate negotiated contract prices and terms.

In sum, Covanta's decision to downgrade an operational 13.1 MW QF is a particularly blatant effort to voluntarily constrain output in order to avoid the 10 MW threshold for negotiating contracts. PGE asks the Commission to apply its established precedent and find that such a voluntary reduction in output does not entitle Covanta to a standard PPA.[13]

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[10] Stipulated Facts at ¶ 12.

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

[12] Stipulated Facts at ¶ 12.

[13] The fact that similar abuses may be forestalled does not transform this complaint into a question of general applicability. *See* Covanta's Answer and Response to Complaint and Request for Dispute Resolution at 16-17 (Sept.

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II. UNDISPUTED FACTS

The following undisputed facts are relevant to PGE's Cross-Motion for Summary Judgment:[14]

Covanta is a wholly-owned subsidiary of Covanta Holding Corporation.[15] Covanta Holding Corporation's various energy subsidiaries develop, construct, own, and operate energy and power projects in both the United States and abroad, with domestic operations including "approximately forty-five qualifying small power production or cogeneration facilities."[16] One of these projects is the waste-to-energy facility at issue in this case, owned by Covanta.

Covanta's facility is self-certified with FERC as a QF under PURPA.[17] The facility has been a QF since 1984, operating under negotiated contracts with a nameplate capacity of 13.1 MW[18]—first through a negotiated PURPA PPA, and more recently under a short-term negotiated merchant PPA.[19] The parties agree that Covanta's facility "regularly produces energy in excess of 10 MW."[20] Indeed, the facility's net hourly output in 2017 exceeded 10 MW 56.7 percent of the time.[21]

On June 10, 2013, approximately one year before Covanta's negotiated PURPA PPA was set to expire, Covanta sent a formal request to PGE to negotiate a replacement Schedule 202 contract.[22] PGE and Covanta did not reach an agreement on a Schedule 202 contract.[23] The

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8, 2017) (Covanta Answer) (arguing that PGE should request a general investigation or formal rule-making); *see also* Covanta Marion Inc.'s Withdrawal of Motion to Dismiss and Alternative Motion to Stay (Sept. 27, 2017).

[14] All of the facts relied on PGE in this Motion are included in the Parties Stipulated Facts, filed on __. Not all of these facts are relevant to PGE's Motion, and therefore are not included in this section.

[15] Covanta Answer at 3.

[16] Covanta Answer at 3-4.

[17] Stipulated Facts at ¶ 4.

[18] Stipulated Facts at ¶ 2.

[19] Stipulated Facts at ¶ 5, 7-8.

[20] Stipulated Facts at ¶ 3.

[21] Stipulated Facts at ¶ 3.

[22] Stipulated Facts at ¶ 6.

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parties ultimately executed a three-year merchant PPA, which expired on September 20, 2017.[24] Since then, the parties have operated on short-term extensions of the merchant PPA, pending execution of a new PURPA contract requested by Covanta.[25]

During communications between Covanta and PGE in 2016, Covanta expressed an interest in either increasing or decreasing its facility's nameplate capacity.[26] Covanta then contracted with Mitsubishi Hitachi Power Systems to modify the existing generating station to yield a revised capacity rating of 10 MW.[27] The parties agree that the primary purpose of this redesign is to bring the facility below the Commission's 10 MW threshold for standard contract eligibility.[28] The parties dispute whether this redesign qualifies Covanta for a standard PPA.[29]

III. DISCUSSION

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to prevail as a matter of law."[30] Here, the essential facts described above are undisputed.[31] Resolution turns on a single legal issue: whether a 13.1 MW QF can voluntarily reduce its capacity to 10 MW for the primary purpose of gaining access to a standard PPA. For the reasons explained in detail below, such a course would violate both Commission precedent and the central purpose of PURPA. PGE therefore asks that the Commission grant this motion for summary judgment and require Covanta to negotiate a PPA for its facility.

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[23] Stipulated Facts at ¶ 6.

[24] Stipulated Facts at ¶ 7-8.

[25] Stipulated Facts at ¶ 8.

[26] Stipulated Facts at ¶ 9.

[27] Stipulated Facts at ¶ 10.

[28] Stipulated Facts at ¶ 12.

[29] Stipulated Facts at ¶ 17

[30] ORCP 47C.

[31] *See* Stipulated Facts.

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A. The Commission's Precedent Precludes a QF from Voluntarily Constraining Output to Qualify for a Standard Contract.

In Order No. 05-584, the Commission established the 10 MW threshold for standard contract eligibility.[32] In that order, the Commission emphasized two critical points: ***First***, that nameplate capacity would continue to be used as the reference point for determining eligibility.[33] ***Second***, the Commission clarified that QFs would not be allowed to evade the 10 MW threshold by voluntarily constraining output.[34]

In that case, Staff recommended the use of nameplate capacity because "nameplate capacity provides a clear standard ***that is not subject to manipulation***."[35] The issue arose at the hearing when Staff's witness was asked whether a QF with a nameplate capacity greater than the standard contract cap could agree to sell power in an amount less than or equal to 10 MW, and thereby qualify for standard contract terms.[36] Soundly rejecting this notion, the Commission emphasized that such action would be counter to the purpose of standard contracts:

> [T]he purpose of standard contracts is to eliminate negotiations for QF projects for which they would be economically prohibitive. We have determined that QF projects larger in size than 10 MW have the financial resources to engage in QF purchase contract negotiations despite the hurdles posed by market barriers that they face. Consequently, ***we do not discern any justification for permitting a QF with a nameplate capacity larger than 10 MW to reduce operations to 10 MW or less in order to receive standard contract terms and conditions***.[37]

Thus, Commission precedent makes clear that a QF with a nameplate capacity greater than 10 MW is deemed to have the necessary resources to engage in QF contract negotiations.

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

[33] Order No. 05-584 at 40; *see also In the Matter of the Investigation into Electric Utility Tariffs for Cogeneration and Small Power Production Facilities*, Docket No. R-58, Order No. 81-319 at 4 (May 6, 1981).

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

[35] Order No. 05-584 at 39 (emphasis added).

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

[37] Order No. 05-584 at 40 (emphasis added).

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The Commission has consistently referenced financial resources as the primary market barrier faced by QFs, and has found that QFs larger in size than 10 MW have the financial wherewithal to negotiate a contract.[38] In this sense, the 10 MW cap serves as a proxy determination for whether a particular QF has the financial ability to negotiate a PPA. A QF does not diminish this ability by simply "agree[ing] to operate at a lower threshold level in order to qualify for a standard contract."[39]

Here, Covanta built a 13.1 MW QF, establishing itself as an entity with the resources to negotiate a PPA.[40] Indeed, Covanta did negotiate a PURPA PPA.[41] Now, Covanta proposes to invest in a costly redesign to ***reduce*** the output of its facility. There is no reason to conclude that Covanta will be any less able to negotiate a PPA after retrofitting its existing 13.1 MW QF. Thus, by both its plain terms and clear purpose, Order No. 05-584 precludes Covanta from receiving standard contract terms and conditions by voluntarily reducing the operations of its 13.1 MW QF.[42]

Covanta attempts to distinguish its proposed modification by stating that, "[r]ather than voluntarily operating the Project below its nameplate capacity rating, Covanta will physically modify the Project such that the manufacturer's nameplate capacity rating will actually be 10 MW."[43] This argument signals the absurdity of Covanta's position, as the physical nature of Covanta's output constraint is wholly immaterial. ***Covanta's decision to reduce its facility's***

[38] Order No. 05-584 at 16 (noting that "market barriers can render certain QF projects uneconomic to get off the ground if an individual contract must be negotiated").

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

[40] Order No. 05-584 at 40 ("QF projects larger in size than 10 MW have the financial resources to engage in QF purchase contract negotiations.").

[41] Stipulated Facts at ¶ 5.

[42] Order No. 05-584 at 40 ("[W]e do not discern any justification for permitting a QF with a nameplate capacity larger than 10 MW to reduce operations to 10 MW or less in order to receive standard contract terms and conditions.").

[43] Covanta Answer at 13.

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output from 13.1 MW to 10 MW is plainly voluntary. Such a voluntary reduction by an existing QF—physical or not—does not grant that QF access to standard contract terms.

In sum, Covanta's proposed action would not change the fact that its QF was built with "a nameplate capacity larger than 10 MW," and that it seeks to voluntarily "reduce operations" for the primary purpose of "receiv[ing] standard contract terms and conditions."[44] Covanta's attempt to manipulate the Commission's standard contract threshold violates the Commission's precedent and should not be rewarded. The Commission should therefore grant PGE's motion for summary judgment and require Covanta to negotiate a PPA.

B. The Commission's PURPA Policies Prohibit a QF from Receiving a Standard Contract by Voluntarily Constraining Output.

Apart from the above legal precedent, Covanta's efforts to invest in the reduction of generation capacity run contrary to the very premise of PURPA. PURPA's central goal is to encourage the development of cogeneration and small power production facilities. As the U.S. Supreme Court has explained, "Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels."[45] The landmark legislation thus provided for mandatory purchasing obligations in order to ***increase*** distributed generation development.[46] Covanta's efforts, by contrast, would voluntarily ***reduce*** output—while incurring additional costs—merely to obtain more favorable contract prices and terms. This maneuvering does a disservice to the very goal that PURPA was enacted to support, while requiring consumers to pay more for less energy. In sum, Covanta's efforts to evade the negotiation requirement are contrary to PURPA's policy purpose and should be rejected.

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

[45] *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

[46] *Am. Paper Inst. v. Am. Elec. Power Serv. Corp*., 461 U.S. 402, 404 (1983) ("Section 210 of PURPA was designed to encourage the development of cogeneration and small power production facilities.").

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IV. CONCLUSION

PGE is entitled to summary judgment because (1) there are no disputed material facts; (2) Commission precedent precludes a QF with a nameplate capacity above 10 MW from voluntarily reducing its output in order to obtain standard contract terms and conditions; and (3) Covanta's actions are inconsistent with PURPA, which encourages the development of renewable energy—not the reduction of available energy at increased expense.

Thus, consistent with both Commission precedent and PURPA, the Commission should find that Covanta is not entitled to a standard contract by virtue of voluntarily reducing its output. PGE is therefore entitled to judgment as a matter of law.

Dated: January 4, 2018.

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