BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1887

Portland General Electric Company Complainant, v. Covanta Marion, Inc. Respondent.	MARION COUNTY'S RESPONSE TO PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This response is submitted on behalf of intervenor Marion County in the matter of Portland General Electric Company ("PGE") v. Covanta Marion, Inc. ("Covanta") in response to PGE and Covanta's cross-motions for summary judgment ("PGE's Motion," "Covanta's Motion," collectively the "Motions"). Marion County appreciates the opportunity to comment, and the main focus of this response is to support the substantive legal arguments in Covanta's Motion,[1] clarify Oregon Public Utility Commission (the "Commission") policy regarding changes to generator nameplate capacity, and raise the additional issue of which rates should apply if either party is granted summary judgment.

II. RESPONSE

Covanta correctly articulates that the standard for determining a qualifying facility's eligibility for a standard contract is a bright line rule based on the manufacturer's nameplate capacity rating at or below 10 megawatts ("MW"). Therefore, because it is undisputed that

[1] Unless expressly noted, Marion County does not take a position regarding issues not specifically addressed in the response, including but not limited to their respective characterization of the negotiations between Covanta and PGE.

Covanta's facility will have a manufacturer nameplate capacity rating of 10 MW at the time of power deliveries under a new contract,[2] Covanta is entitled to judgment as a matter of law. PGE's primary argument fails because it relies on the Commission inquiring into Covanta's reason for changing its nameplate capacity rather than applying the Commission's existing policy that facilities with a nameplate capacity rating at or below 10 MW are eligible for standard contracts.[3] Because the stipulated facts indicate that the facility's nameplate capacity rating will be 10 MW,[4] PGE's argument fails as a matter of law. As a result, Covanta is entitled to a standard contract.

Regardless of whether Covanta is entitled to a standard or a negotiated contract, the Commission will also need to decide which rates apply. The parties did not fully address the rate issue in the Stipulated Fact Statement or in their Motions. Therefore, there may still be some disagreement regarding these facts, and this issue may not be properly before the Commission at this time. Marion County is not requesting that the Commission address this issue in these pleadings; however, should the Commission decide this issue, then the rates in effect as of March 2017 should apply because that is when Covanta committed to sell power to PGE. Covanta should not be penalized because there is a dispute regarding whether Covanta is entitled to a standard contract and PGE's decision to bring this suit. A qualifying facility should be allowed to resolve its dispute with a utility so that it is entitled to the avoided costs in effect at the time it

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2 See Stipulated Facts at ¶10.

3 See PGE's Cross-Motion for Summary Judgment at 3 ("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.' But Covanta seeks to do precisely that") (quoting Re Commission Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. 1129, Order No. 05-584 at 40 (May 13, 2005)).

4 See Stipulated Facts at ¶10.

commits itself to sell its power rather than the avoided costs in effect at the time the Commission resolves the dispute.

A. The Commission Allows Generators to Change Their Nameplate Capacity

The Commission's policy has generally been to allow a generator to change the nameplate capacity of its facility. As far as Marion County is aware, the Commission has also never imposed any restrictions on a generator's ability to initially size or change its nameplate capacity to be eligible to obtain standard rates. Instead, the Commission adopted a bright-line rule holding that facilities with a "manufacturer's nameplate capacity at or under 10 MW" met the requirement for a standard contract.[5] Schedule 201 also contains the eligibility requirement that nameplate capacity "not exceed 10 MW."[6] The standard contract allows for facilities that have a nameplate capacity "not to exceed 10,000 kW."[7] Separately, section 4.4 of PGE's standard contract contemplates that the as-built capacity may be different from what was specified when the contract was first signed, and that if capacity increases above the 10 MW threshold, new rates for the excess power will be negotiated.[8]

All of these documents contemplate that nameplate capacity may change. The only substantive restriction is that, if an increase exceeds the threshold for standard rates, then the portion that does not exceed 10 MW is eligible for standard rates. If a facility is upgraded such that its nameplate capacity exceeds the 10 MW threshold, the Commission found it appropriate

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5 Re Commission Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 05-584 at 40-41 (May 13, 2005).

6 PGE's Complaint, Exhibit A, at 21 (Schedule 201).

7 Id. at 28 (Standard In-System Non-Variable Power Purchase Agreement Form).

8 PGE's Complaint, Exhibit A, at 32.

for the utility to continue paying the contract rate up to 10 MW, but the parties should negotiate rates for power deliveries above 10 MW.[9]

In Order No. 05-584, the Commission set the limitation at 10 MW for eligibility for standard contracts because of perceived market barriers that obstructed negotiation such as asymmetric information and an unlevel playing field between qualifying facilities and the utilities.[10] PGE argues that larger qualifying facilities "have the financial wherewithal to negotiate a contract" and that is the sole reason why the Commission established a 10 MW threshold.[11] However, the Commission believed that the same barriers existed for qualifying facilities above 10 MW, but found that improved negotiation parameters were a better remedy for those larger facilities.[12] In that proceeding (Docket No. UM 1129), some utilities urged the Commission to adopt a different method for determining capacity and asserted that the manufacturer's nameplate capacity was an inappropriate measure.[13] The Commission found that there was not sufficient evidence in the record to establish "the inappropriateness of using the manufacturer's nameplate capacity," and so adopted that standard.[14]

PGE argues that, because Covanta's facility is currently larger than 10 MW, Covanta should not be permitted to reduce its nameplate capacity for the sole goal of acquiring a standard

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9 See Re Commission Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 06-538 at 39 (Sept. 20, 2006) ("We determine that a QF may upgrade operations and continue to receive its existing contract price for all power delivered up to 10 MW, but if the QF project is upgraded to a capacity that is above 10 MW, a new contract must be negotiated to price any power delivered over 10 MW at updated avoided cost rates.").

10 Docket No. UM 1129, Order No. 05-584 at 16.

11 PGE's Cross-Motion for Summary Judgment at 7.

12 Docket No. UM 1129, Order No. 05-584 at 17.

13 Id. at 39-40.

14 Id. at 40-41.

contract. PGE asserts that Covanta's decision to reduce capacity must not be voluntary,[15] or that Covanta must have some other business reason for changing the capacity other than to come within the 10 MW threshold.[16] PGE proposes a new interpretation of Commission policy. The plain language of the Commission's orders and PGE's Schedule 201 leave no room for ambiguity by creating a simple 10 MW threshold for eligibility for standard rates.

Covanta's reason for changing the nameplate capacity should not make a difference and whether that decision is voluntary or involuntary does not affect its eligibility for a standard contract. The Commission specifically adopted a bright-line rule for eligibility. As articulated in Covanta's Motion, the manufacturer's nameplate capacity is a clear measure and prevents manipulation from either party.

The Commission recognizes that a generator may change its facility's nameplate capacity for a variety of reasons. The nameplate capacity rating may change by "replacement, modification, or addition of existing equipment."[17] It is normal for cogeneration, waste energy, hydroelectric, and biomass facilities to change their nameplate capacity due to business cycle changes, thermal host site steam needs, equipment updating or replacement, increases or decreases in salvage lumber, waste or other fuel source availability, stricter environmental or other permitting requirements, etc. For example, Farmers Irrigation District, which has a

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15 See PGE's Cross-Motion for Summary Judgment at 8 ("Such a voluntary reduction by an existing QF—physical or not—does not grant that QF access to standard contract terms").

16 Id. at 2-3 ("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, Covanta agrees, that it undertakes for "the primary purpose" of gaining access to standard contract terms and conditions").

17 PGE's Complaint, Exhibit A, at 32.

qualifying facility with a nameplate capacity in its 2010 power purchase agreement of 4.8 MW,[18] but it recently replaced two 30-year-old turbines for a total maximum nameplate capacity of only 3 MW.[19] These upgrades lowered the nameplate capacity, but made the operations more efficient actually increasing the total annual generation.[20] The Commission should not evaluate the justifications for these changes and develop new policies to adjudicate which justifications are permitted and which are not allowed.

Changes such as these are contemplated by Commission policy, the standard contract and associated documents. The Commission policy and contract focus on increases, not because decreases are not allowed, but because there is a 10 MW ceiling on eligibility for the standard contract and the parties need to know what to do if capacity increases, but is still below that ceiling or if it exceeds that ceiling. There are no provisions in the standard contract or Schedule 201 that impose or restrict any reduction in nameplate capacity.

Even if the reason for the change mattered, Covanta's reason is a legitimate business decision because they are simply trying to structure their business to take advantage of an existing legal framework. Businesses do this all the time. They structure their businesses to take advantage of existing law (or changes to the law). This is not an attempt to evade the law, but an attempt to comply with it. Covanta asserts that it experienced significant barriers in its efforts to negotiate and execute a contract with PGE. If, as a result, Covanta internally concluded that it was a better business decision to sell less energy so that it could reduce or eliminate its

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18 See Re PacifiCorp, dba Pacific Power, Information Filing of Qualifying Facility Contracts or Summaries per OAR 860-029-0020(1), Docket No. RE 142, Informational Filing – Farmers Irrigation District (Aug. 26, 2014).

19 See Farmers Irrigation District, Hydroelectric (available at: http://www.fidhr.org/index.php/hydroelectric).

20 Id.

transaction costs, then it is not for the Commission to second-guess that business decision. In terms of eligibility for standard contracts, Covanta's decision need not be reasonable and could even be uneconomic, but it is Covanta's decision to make. Therefore, Covanta's choice to modify its facility in order to be eligible for a standard contract is a legitimate business decision that PGE and the Commission should not second guess.

In addition, if the Commission wants to revisit the 10 MW threshold or using the manufacturer's nameplate capacity as the measuring stick, then it should do so in a rulemaking or generic proceeding. It should not address that issue in this contested case matter.

Finally, if a qualifying facility is unable to acquire a standard contract by reducing its nameplate capacity, it is possible that no contract will be entered into at all. PGE argues that Covanta should not be permitted to lower its capacity rating and obtain a standard contract because this reduces power from qualifying facilities inconsistent with PURPA's goal to encourage qualifying facility power production.

PGE ignores that qualifying facilities are constantly sizing their projects to obtain standard contracts because they can face challenges in negotiating a contract with a utility. If qualifying facilities are not able to take advantage of a standard contract, they may conclude that the transaction costs are just too high to make continued operation of their facilities feasible. For example, while there are numerous qualifying facilities built at the 10 MW size threshold, very few, if any, are sized at 10 MW because that is the optimal size. Instead, QFs make the decision to build at a lower size because they believe it is too difficult or costly to negotiate a contract at a larger size. While the economics may be different for an already operating project, many of the same contracting obstacles exist. Therefore, refusing Covanta the traditional protections

afforded to qualifying facilities with a 10 MW or less nameplate capacity rating would be inconsistent with PURPA's goals and could result in fewer projects remaining in operation.

B. Covanta is Entitled to March 2017 Avoided Cost Rates

Regardless of whether the Commission concludes that Covanta is entitled to a standard or a negotiated contract, Covanta is entitled to the avoided cost rates in effect at the time it committed itself to sell power, which appears to be no later than March 2017. PGE's Motion did not address which rates would apply. In contrast, Covanta expressly asked that the Commission direct PGE to enter into a contract at the standard contract rates in effect on March 2, 2017, but did not address what rates would apply if the Commission rules against Covanta. If the Commission concludes that Covanta is not eligible for the Schedule 201 rates in effect on March 2, 2017, then Covanta should at least be entitled to the Schedule 202 rates that were in effect on that same day.[21] Marion County does not believe this issue of what rates would apply if Covanta is not eligible for Schedule 201 is ripe for resolution, but simply addresses it now in case the Commission is inclined to resolve that issue at this time.

When the utility delays the negotiating process or fails to execute a contract, the qualifying facility should not be penalized for those delays or for seeking assistance from the Commission. In order to establish a legally enforceable obligation in the absence of an executed

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[21] Non-standard rates are negotiated, based on Commission approved guidelines and requirements, that start with the then effective standard rate and make adjustments based on then current information. See Re Commission Investigation Relating to Electric Utility Purchases from Qualifying Facilities, Docket No. UM 1129, Order No. 07-360 at 15-29 (Aug. 20, 2007). Thus, if the Commission finds that Covanta is not entitled to reduce its nameplate capacity and is not eligible for the March 2017 Schedule 201 rates, Covanta should nevertheless be entitled to Schedule 202 rates based on the March 2017 Schedule 201 rates. Marion County is only aware of one qualifying facility being able to finalize a Schedule 202 contract with PGE.

contract, negotiations must progress beyond the initial contact by the qualifying facility.[22] In this case, Covanta is entitled to the March 2017 rates because that is well beyond its initial contact with PGE of at least May 2, 2016,[23] and at the time Covanta executed the standard contract on March 2, 2017.[24] PGE should not be permitted to delay the process by treating Covanta's March 2, 2017 letter as an initial contact because of the parties long history of negotiations.[25] PGE should also not be permitted to delay the process further by refusing to sign the standard contract and bringing the present action.[26] If Covanta is entitled to a standard contract, then it should be the Schedule 201 avoided cost rates in effect in March 2017, and if Covanta is entitled to a negotiated contract, then it should at least be at the Schedule 202 avoided cost rates in effect in March 2017. Forcing Covanta to be paid current Schedule 202 prices would penalize Covanta for exercising its rights to obtain a resolution to its dispute with PGE.

III. CONCLUSION

Covanta correctly articulates the Commission's bright-line rule for determining eligibility for standard contracts: if the qualifying facility's nameplate capacity is at or below 10 MW. Because the Commission allows generators to change their nameplate capacity, PGE cannot refuse to enter a standard contract with Covanta merely because Covanta seeks to lower the nameplate capacity of its facility to become eligible for a standard contract. Because Covanta committed itself in March 2017 to sell power from a facility that will have a 10 MW nameplate capacity rating, Covanta is entitled to a standard contract at March 2017 Schedule 201 avoided

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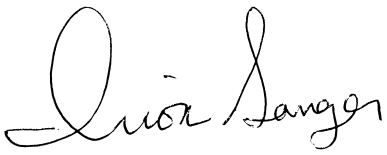
22 Re Commission Investigation into QF Contracting and Pricing, Docket No. UM 1610, Order No. 16-174 at 27 (May 13, 2016).
23 Stipulated Facts at ¶9.
24 Id. at ¶13.
25 Id. at ¶¶9 &14.
26 Id. at ¶¶15-17.

cost rates. While the Commission need not resolve this issue at this time, even if the Commission determines that Covanta is not entitled to a standard contract, Covanta should be entitled to rates based at least as high as the Schedule 202 in effect in March 2017.

Dated this 18th day of January, 2018.

Respectfully submitted,



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