BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1887

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. COVANTA MARION, INC. RESPONDENT.	COVANTA MARION INC.'S ANSWER AND RESPONSE TO COMPLAINT AND REQUEST FOR DISPUTE RESOLUTION

I. INTRODUCTION

Covanta Marion, Inc. ("Covanta") respectfully submits this Answer and Response to the so-called "Complaint and Request for Dispute Resolution" filed by Portland General Electric Company ("PGE") on or about August 11, 2017. In its filing, PGE advances a number of novel legal theories and policy arguments as to why it should not be required to provide a Schedule 201 standard contract to a Qualifying Facility ("QF") that will have, upon the Commercial Operation Date of the contract, a nameplate capacity rating of 10 MW. PGE's position in this proceeding is part of a recent but widespread pattern of behavior in which it has aggressively contested, ignored and otherwise refused to honor its legal obligations under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Further, PGE's novel legal position and policy arguments in this case are directly contrary to the current Commission policy—which unambiguously states that the sole test of whether a QF is entitled to a Schedule 201 contract is its nameplate capacity rating.

Nor does PGE's filing follow the Commission's established rules of practice and procedure for either a Complaint or a Petition for a Declaratory Ruling. Seeing that it would not

be entitled to relief under any established Commission process, PGE has attempted to invent a new category of proceeding called a "Complaint and Request for Dispute Resolution." PGE's new category of proceeding would drag both the parties and the Commission into a procedural never-never land lacking clear rules or guidance for the parties' pleadings and for the Commission rulings. For example, PGE has not presented its "Complaint" with numbered paragraphs containing concise factual allegations that Covanta could systematically affirm or deny in an answer. To the extent that Covanta does not expressly affirm any issue of fact stated in PGE's initial filing, therefore, it shall deemed to be denied. In order to be as clear and helpful to the Commission as possible, Covanta is responding to PGE's initial filing as if it were a Request for a Declaratory Ruling—albeit one that is legally flawed and should be rejected.

For the reasons set forth in greater detail below, the Commission should either: (i) grant Covanta's contemporaneous motion to dismiss this proceeding altogether for failure to follow any established Commission process; or (ii) grant Covanta's motion in the alternative to stay this proceeding while the Federal Energy Regulatory Commission ("FERC") resolves Covanta's pending complaint arising out of the same set of facts; or (iii) simply decline to hear PGE's flawed Request for a Declaratory Ruling.

Should the Commission elect to move forward with this proceeding, notwithstanding its procedural defects, the Commission should issue a Declaratory Ruling stating that: (i) the Commission reaffirms its current policy of determining eligibility for a Schedule 201 contract based solely on the manufacturer's nameplate capacity rating; (ii) Covanta is entitled to a Schedule 201 contract so long as its nameplate capacity rating is verified to be 10 MW or less on or before the commercial operation date; (iii) Covanta established a Legally Enforceable Obligation ("LEO") under federal and state law for a Schedule 201 contract on or about March 2,

2017; and (iv) that PGE violated its PURPA obligations by refusing to provide Covanta a Schedule 201 contract and by refusing to negotiate a Schedule 202 contract in good faith in 2013.

II. COMMUNICATIONS

For purposes of this Proceeding, please direct communications to the following legal and party representatives of Covanta:

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III. BACKGROUND FACTS

A. Covanta and its Project

Covanta is an indirect, wholly-owned subsidiary of Covanta Holding Corporation ("Covanta Holding"). Covanta Holding is a holding company organized under the laws of the State of Delaware, is listed on the New York Stock Exchange and is engaged in the energy business through its subsidiaries. Covanta Holding's indirect energy subsidiaries are engaged in the business of developing, constructing, owing and operating projects for the conversion of

waste to energy and independent power production both domestically and abroad and providing related infrastructure services. Covanta Holding, through its subsidiaries, owns or leases and operates approximately forty-five qualifying small power production or cogeneration facilities throughout the United States, including the Project at issue here.

The Project is located in Brooks, Oregon and has been in operation since 1987. It is currently comprised of two 275-ton-per-day Martin mass burn combustion trains and the fuel is primarily municipal solid waste generated and processed in Marion County. The Project performs an important public service of reducing the volume of municipal solid waste that ends up in local landfills. The two boilers feed a steam turbine generator having an original Nameplate Capacity Rating of 13 MW. The Project has been certified by FERC as a QF pursuant to Section 210(h)(2)(B) of PURPA. As explained in greater detail below, the Project will be physically modified by Mitsubishi Power Systems and officially re-rated to have a manufacturer nameplate capacity rating of 10 MW.

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. The initial Power Purchase Agreement ("PPA") between Covanta and PGE was entered into on September 7, 1984 and expired on June 30, 2014 ("1984 PPA"). The 1984 PPA included terms and conditions relating to the interconnection of the Project to PGE's system. The price term for the 1984 PPA was set forth in the second appendix to the document. 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 yet relevant when the 1984 PPA was executed.

C. Upon Expiration of the 1984 PPA in 2014, PGE Refused To Execute a Schedule 202 Contract for the Project

Although the theme of PGE's initial filing is that Covanta seeks to re-rate the Project in order to "evade" the obligation to negotiate a Schedule 202 contract, the facts tell a much different story. Covanta actually requested and tried in vain to negotiate a Schedule 202 contract with PGE to follow the 1984 PPA. If PGE had been willing to negotiate in good faith a Schedule 202 contract when the 1984 PPA expired, this issue would not have arisen at all.

As the expiration of the 1984 PPA approached, Covanta contacted PGE around March of 2013 about negotiating a revised PURPA PPA.[1] On or about April 1, 2013, Bruce True of PGE provided Schedules 201 and 202 to Covanta to review the contracting process.[2] On or about June 10, 2013, Covanta sent a formal request to PGE to negotiate a Schedule 202 contract.[3] On or about June 19, 2013, John Morton and Bruce True of PGE provided Covanta with indicative pricing for a Schedule 202 contract.[4] On or about July 12, 2013, PGE sent Covanta a term sheet for a Schedule 202 contract.[5] Despite the efforts of Covanta to reach agreement under Schedule 202, the contract negotiations stalled. Rather than working to resolve the issues with the Schedule 202 contract, however, PGE "suggested" that Covanta accept a non-PURPA contract.[6]

Simultaneous with the floundering Schedule 202 process, the parties were also at loggerheads over the negotiation of a new interconnection agreement. On April 12, 2013, Covanta initiated the process to obtain an interconnection agreement to replace the interconnection provisions embedded in the 1984 PPA.[7] Despite the fact that the Project was

[1] See Declaration of Sami Kabbani, ¶ 2.
[2] See Declaration of Sami Kabbani, ¶ 3.
[3] See Declaration of Sami Kabbani, ¶ 4.
[4] See Declaration of Sami Kabbani, ¶ 5.
[5] See Declaration of Sami Kabbani, ¶ 6.
[6] See Declaration of Sami Kabbani, ¶ 7.
[7] See Declaration of Sami Kabbani, ¶ 8.

already existing and had been interconnected with PGE's system for over twenty-five (25) years, PGE insisted on completing unnecessary system impact studies with respect to its own system and BPA's system.[8] As of September of 2013, PGE and Covanta still had not reached agreement on the scope of the system impact studies that would be required by PGE in order to maintain the Project existing interconnection.[9] Covanta believes that PGE used the interconnection process as another lever to move Covanta away from the Schedule 202 contract and toward a non-PURPA "solution."

On or about September 23, 2013, Covanta notified PGE that it would accept PGE's suggestion that Covanta execute a "merchant" contract rather than a PURPA contract.[10] Covanta made this decision only after it became painfully obvious that PGE had no intention of finalizing either the Schedule 202 contract or the interconnection agreement prior to the expiration of the 1984 Contract. On or about October 9, 2013, PGE tendered to Covanta a "merchant" contract based on the Edison Electric Institute Master Power Purchase and Sale Agreement.[11] Shortly after Covanta relinquished its right to a PURPA contract, PGE somehow found a way to resolve the previously intractable interconnection issues. On or about December 2, 2013, the parties agreed to terms on the interconnection agreement.[12]

PGE's avoidance strategy harmed Covanta. Instead of executing a long-term PURPA contract having fixed prices reflecting PGE's avoided costs, Covanta was forced to accept a three (3) year contract based on depressed market index pricing. This move undoubtedly saved PGE, and cost Covanta, millions of dollars over the three-year term of the contract. PGE's strategy

[8] See Declaration of Sami Kabbani, ¶ 9.
[9] See Declaration of Sami Kabbani, ¶ 10.
[10] See Declaration of Sami Kabbani, ¶ 11.
[11] See Declaration of Sami Kabbani, ¶ 12.
[12] See Declaration of Sami Kabbani, ¶ 13.

probably also cost Covanta tens of millions of dollars over the entire term of the Schedule 202 contract that should have been executed. Adding insult to Covanta's financial injury, PGE now accuses Covanta of seeking to "game" the PURPA rules in order to "evade" the requirement to negotiate under Schedule 202.

D. Covanta Requested a Schedule 201 Contract to Follow the Expiration of the Merchant PPA

Having successfully rebuffed Covanta's efforts to negotiate a PURPA contract in 2013, PGE tried the same strategy in 2017. The merchant PPA executed by the parties to follow the expiration of the 1984 PPA has a term running from July 1, 2014 through September 30, 2017. On or about March 30, 2016, Covanta contacted John Morton of PGE to begin discussions for a replacement to the short-term merchant contract.[13] On or about May 2, 2016, Covanta representatives discussed contract options with John Morton and Sean Davis of PGE.[14] The parties discussed the possibility of negotiating a Schedule 202 contract, re-rating the Project to 10 MW and executing a standard Schedule 201 contract, or executing a new non-PURPA, merchant contract.[15] Covanta believed that PGE was pushing Covanta in the direction of executing another non-PURPA contract. PGE represented to Covanta during this discussion that if the Project were physically re-rated to 10 MW, then it would qualify for a Schedule 201 contract.[16]

After that discussion with PGE, Covanta ultimately decided to modify and re-rate the Project in order to execute a Schedule 201 contract rather than trying again to negotiate a Schedule 202 contract. Covanta made this decision based, in part, on three significant factors.

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[13] See Declaration of Sami Kabbani, ¶ 14.
[14] See Declaration of Sami Kabbani, ¶ 15.
[15] See Declaration of Sami Kabbani, ¶ 15.
[16] See Declaration of Sami Kabbani, ¶ 16.

First, Covanta reasonably relied on PGE's representations made during the May 2, 2016 discussion--which are consistent with current Commission policy—that Covanta could re-rate the Project and qualify for a Section 201 contract. Second, Covanta was wary of its previously failed attempt to negotiate a Schedule 202 contract with PGE. Covanta was rightfully concerned that attempting to negotiate a Schedule 202 contract with PGE would once again be an exercise in futility. Finally, Covanta perceived that that PGE was pushing during the May 2, 2016 discussion for another non-PURPA solution and would be reluctant to negotiate a Schedule 202 contract.

On or about March 2, 2017, Covanta sent PGE a formal written request for a Section 201 standard contract.[17] In its cover letter, Covanta clearly 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." Covanta fully completed the Schedule 201 standard contract and provided to PGE all of the required data and information regarding the Project. Covanta even executed and delivered the Schedule 201 standard contract, indicating its intent to be bound by its terms and to receive the pricing in effect at the time of execution.[18]

PGE initially accepted Covanta's Schedule 201 contract request in the normal course of business without questioning Covanta's eligibility for a Schedule 201 contract. On or about March 22, 2017, Angeline Chong of PGE sent Covanta a response confirming PGE's receipt of Covanta's Schedule 201 contract request and attaching PGE's initial information request.[19] In early April, Covanta communicated with John Morton of PGE and a conference call was

[17] See PGE Complaint, Attachment B, pp 57-80.
[18] See Declaration of Sami Kabbani, ¶ 17.
[19] See Declaration of Sami Kabbani, ¶ 18.

scheduled for April 17, 2017 to clarify or address any outstanding issues that PGE may have with respect to Covanta's contract request.[20]

Unfortunately, by late April of 2017 PGE reversed course. PGE abruptly canceled the scheduled call and refused to speak with Covanta about the Schedule 201 request.[21] On or about May 5, 2017, PGE sent a letter informing Covanta that it was not eligible for a Schedule 201 contract because the Project is "an existing facility with a rated nameplate capacity of 15 megawatts . . .."[22] 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.[23]

Thus, PGE clearly understood based on this correspondence that Covanta was not seeking a Schedule 201 contract for the Project as currently configured with nameplate capacity of 13 MW, but with a new nameplate capacity rating of 10 MW following a physical modification and revised nameplate capacity rating. PGE's position stated in the May 5 letter was that Covanta could re-rate the Project, but that it would not be eligible for a Schedule 201 contract unless and until the re-rate were completed.

PGE now appears to take an even more extreme position in its Complaint regarding the Project re-rating. PGE now asserts that the May 5 letter erroneously left the door open for Covanta to re-rate the Project. PGE argues 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."[24]

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[20] See Declaration of Sami Kabbani, ¶ 19.
[21] See Declaration of Sami Kabbani, ¶ 19.
[22] See PGE Complaint, Attachment B, pp 105-107.
[23] See PGE Complaint, Attachment B, pp 105-107.
[24] See PGE Complaint, fn 19.

In other words, PGE now asserts that it is "PGE policy" that even after a QF project has completed the construction work to re-rate the project to less than 10 MW, it still would not be eligible for a Schedule 201 contract.

This is, of course, the first Covanta has heard of any such "PGE policy." PGE does not attach a copy of the policy to the Complaint. It does not appear in any of PGE's Schedule 201 contracting documents. Judging from the May 5 letter, PGE's own employees were not aware of such a policy. Covanta strongly suspects that this alleged "PGE policy" did not and does not actually exist. It was likely fabricated out of whole cloth by PGE in the context of this dispute as a pretext for evading its PURPA obligations. PGE's use of such chimerical "PGE policies" to frustrate the PURPA contracting process is *exactly* why Covanta would rather physically reconfigure the Project to qualify for a Schedule 201 contract than engage in further Schedule 202 negotiations with PGE.

E. Covanta Filed a Complaint With FERC Asserting That it had Properly Established a LEO Under Federal Law for a Schedule 201 Contract

On or about July 21, 2017, Covanta filed with FERC a "Petition for Enforcement Pursuant to the Public Utility Regulatory Policies Act of 1978."[25] Covanta's FERC petition has been docketed as EL17-81-000. Covanta filed its FERC petition as a direct response to PGE's assertion in the May 5 letter that Covanta would not be eligible for a Schedule 201 contract unless and until it has completed the re-rate of the nameplate capacity of the Project. In other words, PGE's position as stated in the May 5 letter is that Covanta cannot establish a LEO under PURPA unless and until Project construction work is complete. PGE's revised position as stated in the Complaint is that Covanta cannot establish a LEO under PURPA even after Project construction work is complete. This is directly contrary to FERC's PURPA regulations and

[25] See PGE Complaint, Attachment B, pp 1-10.

precedent, which allow QFs to create a LEO prior to construction or completion of the QF. Because PGE has represented to Covanta that its position and putative "PGE policies" are consistent with this Commission's policies, Covanta's FERC petition also challenges this Commission's policies to the extent that they require QFs to complete construction work prior to establishing a LEO.

F. PGE's Refusal To Provide Covanta Either a Schedule 201 or a Schedule 202 Contract for the Project is Part of a Broad Pattern of Anti-PURPA Behavior

PGE's refusal to execute a Schedule 202 contract in 2013 or offer a Schedule 201 contract in 2017 for the Project are not isolated incidents. These are part of a well-documented pattern of behavior by PGE reflecting a deliberate corporate strategy to avoid complying with requests for PURPA contracts. *As of the date of this Answer, there are at least thirty-eight (38) different open complaint proceedings filed by or against PGE alleging in some fashion that PGE has failed or refused to comply with its obligations under PURPA.* Indeed, in its own Complaint in this docket, PGE boasts that it is either currently in litigation or anticipates initiating legal conflict with several other QF developers in its queue.[26] At the same time, in review of all of the QF contract summaries filed by PGE in Docket RE-143 going all the way back to 2011, Covanta could find *just one* (1) Schedule 202 contract that PGE has actually executed. PGE has tallied thirty-eight (38) complaint proceeding verses just one (1) successful negotiation. Those are daunting odds for a QF developer or owner seeking a PURPA contract with PGE. PGE's corporate directive for handling PURPA contract requests is clear: obfuscate, frustrate and litigate but do not negotiate.

[26] See PGE Complaint, p 10.

IV. APPLICABLE LAW AND POLICY

A. The Commission's Rules State that Eligibility For a Schedule 201 Contract is Determined Solely By the Project's Nameplate Capacity Rating

Covanta agrees with PGE that the applicable Commission policy states that a QF's eligibility for a Schedule 201 contract is to be determined based solely on the nameplate capacity rating of the QF. In Order 05-584 the Commission agreed with Staff's recommendation and reaffirmed its long-standing policy that eligibility for a standard contract is based on "the manufacturer's nameplate capacity for a QF project." As Staff suggested in its recommendation, the 10 MW policy creates a clear standard that is easily implemented by the Commission. In the context of reaching the decision, the Commission rejected arguments made by Idaho Power and PacifiCorp that the 10 MW rule is overly simplistic and that the Commission should also consider other factors such as the actual metered production of the QF.

Given the bright-line rule established by the Commission in Order 05-548, the resolution of this proceeding should be clear. The Project is eligible for a Schedule 201 contract so long as the official nameplate capacity rating of the Project is 10 MW on and following the Commercial Operation Date of the contract.

B. The Commission's Policy that QFs Operating Below the Nameplate Capacity Rating are not Eligible For a Schedule 201 Contract is Inapplicable Here

Covanta also agrees with PGE that current Commission policy states that a QF having a nameplate capacity rating greater than 10 MW may not qualify for a standard contract by choosing to operate the project beneath the manufacturer's nameplate capacity rating. In other words, the Commission reaffirmed that the 10 MW nameplate capacity rating rule would be a bright-line rule and would not allow for exceptions based on the voluntary operations of the QF owner.

Where Covanta disagrees with PGE is the applicability of the policy to this case. PGE incorrectly assets that Covanta should not be eligible for a Schedule 201 contract because Covanta proposes to voluntarily curtail the operation of a 13 MW facility to 10 MW.[27] What Covanta actually proposes to do, however, is fundamentally different and was not addressed by the Commission in Order 05-584 or elsewhere. Rather 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. Thus, Covanta is not "evading" but squarely complying with the Commission's bright-line 10 MW nameplate capacity rating rule.

C. The Commission Policy Does Not Examine a QF's "Intent" for Designing and Building a QF Under the Schedule 201 Threshold

Upon careful reading, PGE is actually asking the Commission to depart from the bright-line 10 MW policy and to adopt a new policy in which PGE could refuse to execute a Schedule 201 contract based on PGE's subjective assessment of the QF's reason for building a project with a 10 MW nameplate capacity rating. 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 . . .."[28] In other words, if PGE believes that if a QF developer lacks a valid business reason for building a project within the applicable standard contract threshold, then PGE could reject the Schedule 201 contract request. PGE understands that this would be a significant departure from the current Commission policy when it says that "PGE's interpretation of the nameplate capacity definition *must be adopted* . . .."[29] (Emphasis added). In order words, PGE

[27] See PGE Complaint, pp 8-9.
[28] See PGE Complaint, p 9.
[29] See PGE Complaint, p. 10.

not asking the Commission to apply the current policy, it is asking the Commission to adopt a new policy.

The new policy that PGE wishes for the Commission to adopt is untenable for a number of reasons. First, it would be incompatible with the Commission's existing policy that looks at—and only at—the QF's nameplate capacity rating. Second, it would be impossible to implement because it would require PGE to accurately read the minds of QF developers in order to ascertain their "reason" for choosing to build a project with a certain nameplate capacity rating. Third, taken to its logical extent, PGE's proposed policy would allow it to unilaterally disqualify 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 "game" the system by deliberately complying with the Commission's eligibility criteria. For example, PGE would be able to reject a Schedule 201 contract request for a new 3 MW solar project if PGE determines that the QF developer has sufficient space, interconnection facilities and transmission rights to build a 4 MW project and the only reason for building a 3 MW facility is to "game" the system.

D. The Commission Has Never Applied a "Means Test" to Require QFs Otherwise Eligible for a Standard Contract to Negotiate a PURPA Contract

PGE also incorrectly states that Covanta should be required to negotiate a Schedule 202 contract—notwithstanding the fact that the nameplate capacity rating of the Project will be 10 MW—simply because Covanta has the means to do so. PGE complains that "Covanta had the financial resources required to purchase a 15 MW, and further has the additional resources required to redesign the project in an effort to qualify for a standard contract."[30]

[30] See PGE Complaint, p. 9.

The current Commission policy does not allow PGE to reject an otherwise eligible Schedule 201 contract based on PGE's unilateral determination that the developer has sufficient resources to negotiate a contract. The Commission did explain in Order 05-548 that it set the eligibility threshold for standard contracts at 10 MW based on its determination that projects larger than that should have the resources to negotiate contracts. Notwithstanding the rationale behind the rule, however, the Commission deliberately established a bright-line rule for eligibility that turns entirely on the manufacturer's nameplate capacity rating. Allowing PGE to veto an otherwise eligible QF's right to execute a standard contract based on the QF's financial resources would be a substantial departure from current Commission policy. PGE has demonstrated that it would reject virtually *every* request for a Schedule 201 contract based on its own assessment that the QF developer has the means to negotiate a non-standard contract.

E. The Commission Has Never Held that a Project's Eligibility for a Standard Contract Cannot Change Over Time

Nothing in the current Commission's policies or orders indicates that a QF's eligibility for a standard contract cannot change over time. The crux of PGE's dispute seems to be its misguided belief that once a QF project has been deemed to be a Schedule 202 project, it can never thereafter become a Schedule 201 project. PGE's belief is simply not reflected in any existing Commission policy, rule, statute or order.

Indeed, there are a number of circumstances in which the eligibility of a particular QF project for a standard contract can, should and does change. For example, if the present situation were reversed and Covanta proposed to increase the nameplate capacity rating of the Project from 10 MW to 13 MW, PGE would be the first one to argue that the Project is no longer eligible for a Schedule 201 contract based on its revised nameplate capacity rating. Likewise, the eligibility threshold itself may change. For example, if an existing 10 MW solar project were to

request renewal of a Schedule 201 contract, PGE would be quick to inform the QF that it is no longer eligible for a Schedule 201 contract based on a change in the eligibility threshold to 3 MW. Under current Commission policy, the eligibility for a standard contract is not a static or immutable condition of a QF project. Rather, it can be fluid based on the then-current eligibility threshold and nameplate capacity of the project at the time of contracting and the Commercial Operation Date of the contract.

F. Under the Commission's Rules, Declaratory Rulings are not Appropriate to Establish New or Generally Applicable Policies, As PGE Seeks in This Case

As stated above, PGE's initial filing is neither a proper Complaint nor a true Request for Declaratory Ruling. Because PGE's request for relief most closely resembles a Request for a Declaratory Ruling, Covanta is responding as such. The legal standard applicable to a Request for a Declaratory Ruling is set forth in ORS 756.450. ORS 756.450 states that the Commission may "issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the Commission." Further, ORS 756.450 states that declaratory rulings are only binding between the Commission and the petitioner. Generally applicable policy issues should be addressed through a general investigation docket or a rule-making.

The problem with PGE's initial filing is that it does not meet the standard set forth in ORS 756.450. PGE does not seek a declaration as to the applicability of a specific rule or statute that would be binding only against PGE. Instead, PGE invites the Commission to retract the bright-line 10 MW nameplate capacity rule and to adopt two new and generally applicable tests to determine the eligibility of QFs for a standard contract based on PGE's subjective view of the QF's financial means and subjective intent. As PGE admits in its Complaint, this issue is

important because it would apply to several other QF developers. The proper process for PGE to follow, therefore, would be to request a general investigation or formal rule-making.

G. The Commission's Rules State that a LEO Exists When the QF is Legally Committed to Delivering Its Output to the Purchasing Utility

The Commission has recently addressed the creation of a LEO by QF developers. In Order 16-174, the Commission emphasized that the LEO can exist prior to the execution of a final contract by both parties:

> A LEO will be considered established once a QF signs the final draft of an executable contract provided by a utility to commit itself to sell power to the utility. A LEO may be established earlier if a QF demonstrates delay or obstruction of progress towards a final draft of an executable contract, such as a failure by a utility to provide a QF with required information or documents on a timely basis. Through the complaint process, the Commission will resolve a dispute and determine the avoided cost price to apply on a case-by-case basis.

The creation of a LEO is a fact-specific question based on when the QF has met all applicable contract criteria and has committed itself to selling the output of the project to the utility.

In this case, a LEO was created on March 2, 2017 when Covanta tendered to PGE a fully executed Schedule 201 agreement with the intent to commit itself to sell power to PGE. Although PGE might argue that the version of the contract executed and delivered by Covanta was not technically a final draft provided to Covanta by PGE for execution—PGE cannot show that any subsequent or final draft of the standard contract would have been different from the one executed and delivered by Covanta. Further, based on PGE's subsequent repudiation of its obligation to provide Covanta with a Schedule 201 contract for the Project--as well as initiating this legal action against Covanta in lieu of moving forward with the contracting process--there should be no question that PGE has engaged in delay or obstruction of progress toward a final draft.

V. REQUEST FOR RELIEF

A. The Commission Should Grant Covanta's Motion to Dismiss this Proceeding

Covanta is filing along with this Answer a Motion to Dismiss this proceeding. PGE's initial filing is neither a proper Complaint nor a valid Request for Declaratory Ruling. There is no such thing in the Commission's rules of practice and procedure as a "Complaint and Request for Dispute Resolution." The Commission should therefore grant Covanta's Motion to Dismiss PGE's Complaint in its entirety.

B. In the Alternative, the Commission Should Grant Covanta's Motion to Stay this Proceeding

Covanta is filing along with this Answer an alternative Motion to Stay this proceeding pending resolution of Covanta's FERC petition arising out of the same set of facts. Covanta filed its FERC petition on or about July 21, 2017, several weeks before PGE filed this action. Resolution of the FERC petition will likely render moot certain issues raised by PGE in this proceeding. Further, to the extent that Covanta has challenged the Commission's policies before FERC, it would be inappropriate for the Commission to move forward as a trier of fact or decision-making body in this proceeding with respect to any matter that might affect the outcome of the FERC proceeding. In the alternative to dismissing this proceeding outright, the Commission should grant Covanta's Motion to Stay this proceeding pending resolution of the FERC petition.

C. If It Does Not Dismiss or Stay this Proceeding, the Commission Should Simply Decline to Hear PGE's Flawed Petition for Declaratory Ruling

PGE's Complaint and Request for Dispute Resolution is really just a Request for Declaratory Ruling in disguise. For the reasons set forth above, PGE's initial filing does not meet the criteria for a Declaratory Ruling set forth in ORS 756.450. If the Commission does not

grant Covanta's Motion to Dismiss or its Motion to Stay this proceeding, then the Commission should simply decline to issue a declaratory ruling with respect to the merits of PGE's Complaint.

D. If the Commission Were to Get to the Merits of PGE's Complaint, the Commission Should Issue a Declaratory Ruling in Covanta's Favor

In the event that the Commission were to get to the merits of PGE's complaint, the Commission should issue a declaratory ruling in Covanta's favor on four key issues. First, the Commission should reaffirm its current policy that the eligibility of a QF for a standard contract shall be determined based solely on the nameplate capacity rating without reference to financial means or intent of the QF; Second, the Commission should order that the Project is eligible for a Schedule 201 contract subject to achieving a nameplate capacity rating of 10 MW or less on or before the contract's Commercial Operation Date. Third, the Commission should find that Covanta had established a LEO for the Project on March 2, 2017 by fully completing the standard contract template and executing and delivering the contract to PGE. It was clearly Covanta's intent to be bound to sell the output of the Project to PGE on the terms and conditions set forth in the executed agreement. Finally, the Commission should also issue a Declaratory Ruling that PGE violated its PURPA obligations in 2013 by refusing to execute a Schedule 202 contract and again in 2017 by refusing to offer a Schedule 201 contract.

DATED this 8th day of September, 2017.

Respectfully submitted,

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