ORDER NO. 18 169

ENTERED: MAY 16 2018

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1887

PORTLAND GENERAL ELECTRIC COMPANY, Complainant, v. COVANTA MARION, INC., Respondent.	ORDER

DISPOSITION: CROSS-MOTION FOR SUMMARY JUDGMENT OF COVANTA MARION, INC., GRANTED; CROSS-MOTION FOR SUMMARY JUDGMENT OF PORTLAND GENERAL ELECTRIC COMPANY DENIED

I. SUMMARY

We grant the cross-motion of Covanta Marion, Inc. (Covanta) for summary judgment and find that the respondent is entitled to a standard contract power purchase agreement. Accordingly, we also deny the cross-motion of Portland General for summary judgment Electric Company (PGE).

II. BACKGROUND AND PROCEDURAL HISTORY

PGE is an electric utility required, upon request, to purchase the output of qualifying facilities under the Public Utility Regulatory Policies Act (PURPA) and ORS 758.525. Covanta is the owner and operator of a facility that has been self-certified with the Federal Energy Regulatory Commission (FERC) as a qualifying facility (QF). The Covanta facility has a current capacity rating in excess of 10 MW.

On August 11, 2017, PGE filed this complaint stating that Covanta had informed PGE that it was redesigning its facility to reduce its capacity to 10 MW or less and claimed that it is therefore entitled to a standard contract, rather than having to negotiate a power

purchase agreement. The complainant seeks a ruling that a QF with a nameplate capacity in excess of 10 MW may not voluntarily constrain its output in order to become eligible for a standard Schedule 201 power purchase agreement (PPA) available only to facilities with a capacity of 10 MW or less.

Covanta filed an answer and response on September 8, 2017.[1] On October 18, 2017, Marion County (Marion or the County) filed a petition to intervene. A prehearing conference was held on October 24, 2017, at which time the County's petition to intervene was granted and a procedural schedule was adopted. Pursuant to an amended schedule, PGE and Covanta filed stipulated facts, and then cross-motions for summary judgment.

III. STATEMENT OF STIPULATED FACTS

A. The Covanta Facility

Covanta has been operating a waste-to-energy facility in Brooks, Oregon since 1987. The facility includes a Mitsubishi Hitachi Power Systems (Mitsubishi) steam turbine, with a 13.1 MW nameplate capacity that regularly produces energy in excess of 10 MW, with a primary fuel source of municipal solid waste. On FERC Form 556, Covanta stated that the PURPA self-certified QF facility turbine had a generation capacity of 15 MW.

B. Previous PGE-Covanta Contracts

Since the facility became operational, Covanta has sold all of the facility's power to PGE. The initial PPA between them, a PURPA agreement, was entered into on September 7, 1984 and expired on June 30, 2014 (1984 PPA).

On June 10, 2013, Covanta sent a formal request to PGE to negotiate a Schedule 202 contract to replace the 1984 PPA. On June 19, 2013, PGE provided Covanta with indicative pricing for a Schedule 202 contract. On July 12, 2013, PGE sent Covanta a term sheet for a Schedule 202 contract. On April 12, 2013, Covanta initiated the process to obtain an interconnection agreement to replace the interconnection provisions embedded in the expiring 1984 PPA. PGE and Covanta did not reach agreement on a Schedule 202 contract.

In lieu of a Schedule 202 contract, on October 9, 2013, PGE tendered to Covanta a three-year "merchant" contract based on the Edison Electric Institute Master Power Purchase

[1] On that same date, Covanta also filed a separate motion to dismiss and alternative motion to stay, which it withdrew on September 27, 2017.

and Sale Agreement (the Merchant PPA). Following execution of the Merchant PPA, on December 2, 2013, the parties agreed to terms on the interconnection agreement. The Merchant PPA expired on September 30, 2017. Since that time, the parties have been operating under short-term extensions of the Merchant PPA pending the execution of a new PURPA contract requested by Covanta.

C. The Present Dispute

On May 2, 2016, representatives of Covanta and PGE held a teleconference to discuss options for a long-term replacement to the Merchant PPA. Among other things, Covanta raised on this call the possibility that it might increase the facility's nameplate capacity, or decrease the facility's nameplate capacity rating to 10 MW. Following the May 2, 2016 discussion with PGE, Covanta negotiated and executed a written agreement to have Mitsubishi overhaul and physically modify the turbine. Upon completion of such overhaul and modifications, the facility will have a new official manufacturer nameplate capacity rating of 10 MW.[2] The primary purpose of having Mitsubishi modify the turbine and re-rate the facility is so that it will qualify for a Schedule 201 standard contract under current Commission rules and policies implementing PURPA.

On March 2, 2017, Covanta sent a letter advising PGE of the 10 MW nameplate capacity Mitsubishi turbine modification agreement and an expected return-to-service date of September 20, 2019. With the letter, Covanta included an executed Schedule 201 standard contract.

On May 5, 2017, PGE advised Covanta that the facility was not eligible for a standard contract because Covanta's FERC Form 556 listed the facility's nameplate capacity as approximately 15 MW. The letter also stated that upon completion of the re-rate, Covanta could submit a new Schedule 201 contract request which would be subject to the rates, terms and conditions in effect at that time.

On June 8, 2017, PGE's counsel contacted Covanta's attorney and stated that it was PGE's position that, under Commission policy, a QF with greater than 10 MW capacity cannot make itself eligible for a standard contract by voluntarily modifying an existing facility to obtain a new sub-10 MW capacity. The stated purpose of the instant complaint is to answer this question.

[2] The parties provided an excerpt of the Mitsubishi agreement as a confidential exhibit. The facility is estimated to be off-line until September 2019.

IV. POSITIONS OF THE PARTIES

PGE seeks a summary judgment that Covanta, operator of a 13.1 MW generation facility, cannot render itself eligible for a PPA by undergoing voluntary modifications to reduce its nameplate capacity to 10 MW. PGE asserts that Covanta's actions to reduce its facility's output are incompatible with our PURPA policies and orders to encourage development of renewable energy and protect small energy developers. PGE also argues that Covanta's actions violate PURPA policies because Covanta is spending money not to increase generation from renewable resources, but to reduce it, and should therefore be denied the opportunity to utilize the standard contract PPA.

PGE explains that, in implementing PURPA, FERC required standard contracts for QFs of 100 kW or less to ensure that a streamlined contracting mechanism would enable small power producers to bring their power to market by lowering the associated transactional costs, while ensuring that utility customers' utility rates would be indifferent to the source of electricity. PGE adds that we exercised our discretion by increasing the maximum standard contract capacity to 10 MW, concluding that the higher threshold would allow for the development of relatively small projects where the costs of negotiating PPAs might otherwise prove economically prohibitive.[3] PGE adds that, in so doing, we made clear that a QF with a capacity greater than 10 MW could not reduce operations to qualify for a standard contract.[4]

PGE argues that, in this instance, Covanta is redesigning its equipment for the very reason we prohibited in our prior decision. PGE states that Covanta seeks to make its facility less efficient by constraining output, solely in order to obtain standard contract terms and conditions. PGE states that such actions violate Order No. 05-584, and that Covanta cannot reduce operations to 10 MW or less in order to receive standard contract terms and conditions.

Covanta responds that, because its facility will have a nameplate capacity of 10 MW, it qualifies for a standard contract. Covanta emphasizes its efforts over many months during 2013 to negotiate a renewal of a Schedule 202 contract with PGE and, faced with the failure to obtain a Schedule 202 contract, Covanta executed a short term, three-year, "merchant" contract based on "depressed market index pricing," to its detriment.[5] As noted in the stipulated facts above, Covanta decided that it would reduce nameplate

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[3] PGE Cross-Motion for Summary Judgment at 2 (Jan 4, 2018), citing *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).

[4] *Id.* at 6.

[5] Covanta Cross Motion for Summary Judgment at 4 (Jan 4, 2018).

capacity to obtain a Schedule 201 PPA and sacrifice a small amount of future project output rather than undertake another Schedule 202 contract negotiation. It then executed the contract with Mitsubishi for a 10 MW nameplate capacity rebuild.[6]

Covanta contends that PGE's requirement that the QF have a nameplate capacity established prior to construction is directly contrary to the language of Order No. 05-584 which speaks of "design capacity," *i.e.*, the nameplate capacity upon the construction's completion. Covanta notes that in Order No. 05-584, the Commission stated at page 40 that "[d]esign capacity, as defined by the manufacturer's nameplate capacity for a QF project, will continue to be the measure of eligibility for standard contract,"[7] thus establishing a bright line with respect to eligibility criteria. Staff testimony in subsequent dockets, commented upon by the Commission with approval, clearly affirmed this view:

> The 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.[8]

On the basis of the above policy analysis, Covanta argues that the Commission should reject PGE's efforts to impose a new policy standard for contract eligibility based on financial means.

Marion supports Covanta's eligibility for a standard contract and concurs in the assertion that the 10 MW nameplate capacity threshold at the time of power delivery is the sole requirement for a standard contract as a matter of law. Furthermore, Marion represents that, as far as it has been able to discern from its research into past Commission decisions, 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.[9]

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[6] *Id.* at 5.
[7] *Id.* at 10.
[8] *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities,* Docket No. UM 1129, Staff Surrebuttal Testimony of Jack P. Breen III, October 14, 2004, Staff/500; Breen/6.
[9] Marion County Response to Parties' Cross-Motions For Summary Judgment at 3 (Jan 18, 2018), citing *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 40-41 (May 13, 2005).

V. DISCUSSION

A. Applicable Law

Unless otherwise provided for in our rules, the Oregon Rules of Civil Procedure (ORCP) are utilized in the conduct of proceedings before the Commission.[10] ORCP Rule 47, which governs motions for summary judgment, provides that either party may seek a declaratory judgment, and that such a judgment may be entered if "there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law." PGE and Covanta submitted a joint stipulation with respect to all material facts, thus entitling each party to seek disposition of this case via the entry of a summary judgment addressing the legal arguments raised by each party.

B. Resolution

We grant Covanta's motion for summary judgment. The primary question posed to the Commission is whether, after a Schedule 201 or 202 contract has expired, we should treat operational facilities that are to be physically modified from a prior configuration differently from newly proposed, but unbuilt, facilities in determining eligibility for a standard contract. For the reasons set forth below, we answer that question in the negative.

In Order No. 05-584, we affirmed our decision in Order 81-319 adopting the 10 MW maximum nameplate capacity threshold level as *the* criterion to qualify for a standard contract:

> Design capacity was established as the criterion for standard contract eligibility in Order No. 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 contracts * * *.[11]

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[10] OAR 860-001-0000(1).

[11] *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).

We realize that there are legitimate policy arguments in favor of adopting different criteria for existing facilities that reduce their nameplate capacity—particularly when the record reflects that the sole reason for doing so is to become eligible for a standard contract and standard prices. We do not wish to encourage existing facilities to invest capital in order to produce less energy for the sole purpose of receiving less accurate, and in this case higher, PURPA pricing.

However, if we were to try to distinguish such actions from other legitimate business reasons for an existing facility to change its size between contracts, we could face evidentiary disputes that require us to judge the motivations for entities' internal business decisions and the legitimacy of those motivations. This type of case-by-case factual examination is what our longstanding use of an objective threshold sought to avoid, and we are not persuaded to abandon it at this time. For the sake of certainty, simplicity and uniformity, project size itself, and not exogenous factors, must remain the sole criterion for standard PPA eligibility.

We therefore find that, once an existing facility's Schedule 201 or 202 PURPA contract has expired, regardless of its present circumstances, it may approach the utility *de novo*, and negotiate pursuant to our established rules and policies.

We view this decision not as a departure from Orders No. 81-319 and No. 05-584, but as a reaffirmation of the principle of an objective threshold. In Order No. 05-584, we stated that a facility with a greater than 10 MW nameplate capacity could not enter into an agreement to operate at a level below its nameplate capacity in order to receive standard prices. That is clearly not the case here, where the nameplate capacity itself is being reduced via a new design and facilities modification.

Covanta's facility is not currently operating pursuant to a Schedule 201 or 202 PURPA PPA. Covanta is therefore free to allocate its financial assets as it sees fit and, if it chooses to do so, enter a standard Schedule 201 PPA to deliver the output of a facility with a nameplate design capacity of 10 MW or less to PGE.

VI. ORDER

IT IS ORDERED that:

1. The cross-motion for summary judgment of Covanta Marion, Inc., is granted.

2. The cross-motion for summary judgment of Portland General Electric Company is denied.

Made, entered, and effective MAY 16 2018.

Lisa D. Hardie
Chair

Megan W. Decker
Commissioner

Commissioner Bloom, *dissenting*:

Over the past 20+ years, this Commission has sought to develop a consistent set of policies that encourage the growth of renewable energy investment by as broad a range of potential groups as possible. At the same time, we have taken great care to insure that our decisions comply with our PURPA mandate that our customers' accounts remain financially indifferent to these investments. A consistent approach and a strong deference to precedent provide all parties with greater certainty, and thus encourage a more efficient marketplace leading to both a more rapid deployment of renewable resources and sustained stakeholder confidence in the Commission.

By its actions today, the Commission disregards our decades of carefully considered policy development and ignores the clear direction we have given to both utilities and qualifying facilities in the implementation of PURPA.

The driving purpose in establishing our policies for standard contract eligibility has consistently been the protection of the small QF developer. When we first increased the standard contract eligibility threshold from the FERC mandated 100kW to 1 MW, we said:

> [T]he transaction costs associated with negotiating a QF/utility power purchase agreement could be prohibitive for small QFs and effectively eliminate them from the marketplace. The standard rate is intended to address this concern by minimizing the transaction costs of negotiating a power purchase agreement.[12]

[12] *In the Matter of the Amendment of OAR 860-29-040(5)(a) relating to Qualifying Facilities*, Docket No. AR 246, Order No. 91-1605 at 2 (Nov 26 1991).

We affirmed this as our primary purpose when we subsequently increased that threshold to the current 10MW threshold:

> The evidence in this proceeding shows that market barriers other than transaction costs pose obstacles to a QF's negotiation of a power purchase contract. 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 information and an unlevel playing field that obstruct the negotiation of non-standard QF contracts. Just like transaction costs, these market barriers can render certain QF projects uneconomic to get off the ground if an individual contract must be negotiated. We conclude that it is appropriate and in keeping with the general PURPA policies of this Commission and FERC to increase the eligibility threshold for standard contracts in order to overcome economic impediments created by these market barriers.[13]

In the instant proceeding, Covanta is not a new, start up QF with limited financial resources "trying to get off the ground" in seeking to provide *additional* renewable power to the electric grid. Covanta does not face the magnitude of economic impediment that we contemplated in adopting the 10 MW standard contract threshold. Rather, it is an established, larger QF willing to commit to a significant capital investment to decrease its facility's efficiency, providing *less* renewable power than it had previously, in order to obtain an immediate commitment via a legally enforceable obligation to receive more advantageous per-megawatt-hour payments than it might otherwise be able to negotiate.

To allow Covanta to decrease its output solely to qualify for a standard contract runs counter to our prior determination that a QF could not reduce its output solely for such purposes. As we previously held:

> If a QF's nameplate capacity is greater than 10 MW, the QF is ineligible to receive a standard contract and cannot agree to operate at a lower threshold level in order to qualify for a standard contract. As we have emphasized in this Order, the 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.

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[13] *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 16 (May 13, 2005).

> *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.*[14]

Rewarding Covanta's financial ability to contract for a large scale capital investment for the purpose of reducing the efficiency of its existing facility, merely because it has concluded a prior contractual obligation, sends economic signals directly in opposition to our stated policy goals. Indeed, PGE indicated at page 3 of its complaint that Covanta's effort to modify its facility in order to obtain standard fixed prices is not an isolated event:

> 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. While these requests differ from each other in a variety of ways, they all involve players who have the financial wherewithal to negotiate a contract, but are nevertheless seeking more advantageous terms and conditions, to the detriment of PGE's customers.[15]

From our prior orders, it is clear that we have consistently interpreted our PURPA mandate to be that an existing facility operating with a nameplate capacity in excess of 10 MW should not become immediately eligible for a standard contract with fixed prices by unilaterally reducing the capacity of that facility and thereby become entitled to obtain Schedule 201 standard contract rates, terms and conditions.

Because the Commission's actions today bring life and reward to Covanta and Marion County's erroneous interpretation of our prior orders and policies, I dissent.

PUBLIC UTILITY COMMISSION OF OREGON

Stephen M. Bloom
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

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[14] *Id.* at 40 *(emphasis added)*.
[15] Covanta Complaint and Request For Dispute Resolution at 3 (Aug 11, 2017).