

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

In the matter of

AVISTA CORPORATION, d/b/a
AVISTA UTILITIES,

Schedule 62 Tariff Revision

DOCKET NO. UE-190663

JOINT COMMENTS OF
NORTHWEST & INTERMOUNTAIN
POWER PRODUCERS COALITION
AND RENEWABLE ENERGY
COALITION

I. INTRODUCTION

The Northwest & Intermountain Power Producers Coalition (“NIPPC”) and Renewable Energy Coalition (“REC”) (jointly, “NIPPC-REC”) appreciate the time that the Washington Utilities and Transportation Commission (the “WUTC”) provided for Avista and other utilities to engage with stakeholders to resolve concerns surrounding the standard contract forms.

Unfortunately, NIPPC-REC continue to have significant concerns about language in Avista’s proposed form. Overall, NIPPC-REC believe that a much shorter and more simplified standard contract form is desirable. However, in these comments, NIPPC-REC explain seven concerns and proposed modifications as well as clarification on two issues on which NIPPC-REC believe they agreement with Avista.

In short, NIPPC-REC recommend that the WUTC order Avista to modify the standard PPA to:

- Remove the so-called “90-110 Performance Band”;
- Delete or revise the contract reopener clause;
- Revise the off-system delivery and payment provisions;
- Revise provisions to allow for facility changes and upgrades in a specified process, instead of allowing Avista to terminate or unilaterally modify pricing;
- Add reasonable cure periods for missing milestone dates, such as a one-year cure period for missing the commercial operation date;

- Remove the requirement that qualifying facilities (“QFs”) provide a legal opinion about their compliance with permits and instead require QFs only to provide copies of all permits, licenses, and similar documents; and
- Modify the non-delivery provisions to acknowledge the specific circumstances of seasonally available resources.

In addition, NIPPC-REC seek support, but also seek clarification, regarding: 1) Avista’s new language regarding the transferred environmental attributes; and 2) recommend that Avista remove outdated references to security language, which Avista removed during earlier discussions. Attachment A to these comments provides a redline of Avista’s filed PPA with the changes that NIPPC-REC request. Attachment B to these comments include a new Exhibit for off-system QFs.

NIPPC-REC have many other concerns with Avista’s power purchase agreement, and, even the redline version with the proposed changes is, in many respects, less favorable to QFs than Puget Sound Energy’s (“PSE”) PPA. Avista made some meaningful changes to its initial contract form to accommodate concerns raised by NIPPC-REC; however, Avista did not agree to make the majority of the issues originally raised by NIPPC-REC with Avista. In light of Avista’s efforts to revise its contract and an understanding that the Commission wants to limit QF-related disputes, NIPPC-REC have limited their concerns to primarily major provisions that will significantly harm the financeability or continued operation of projects, and violate core Public Utility Regulatory Policies Act (“PURPA”) principles. NIPPC-REC reserve the right to raise these other concerns with Avista’s power purchase agreement in the future. NIPPC-REC note that many of the recommendations provided below are not new ideas but instead propose to follow the example set by other states, particularly Washington’s southern neighbor, Oregon.

Finally, NIPPC-REC remind the Commission that PURPA, if properly implemented, can be a powerful tool in reaching the State’s clean energy goals. PURPA was designed to

encourage the development of QFs in order to reduce dependence on foreign energy and because “Congress believed that increased use of [QFs] would reduce the demand for traditional fossil fuels.”¹ Given the recent passing of the Washington Clean Energy Transformation Act and the WUTC’s current ongoing efforts to implement this new act, the WUTC should view this final push in its PURPA implementation effort through this lens.

II. COMMENTS

A. The Commission Should Require Removal of the So-Called “90-110 Performance Band”

Avista included a version of the Idaho-based 90-110 Performance Band, which was created by a split decision of the Idaho Public Utilities Commission (“Idaho PUC”) in 2004. Aside from Idaho, no other states in the Northwest use a provision analogous to the 90-110 Performance Band, and all other states instead use performance guarantees that have developed as more reasonable provisions since 2004, such as an annual minimum net output guarantee or a mechanical availability guarantee (“MAG”). As explained below the 90-110 Performance Band is not an appropriate provision to include in a PURPA contract for any QF, especially small QFs. If approved, it is all but certain to deter many small scale renewable energy developers and lead to unnecessary contract disputes in cases where the QF agrees to execute a power purchase agreement containing the provision. While Avista made some revisions to its initial proposal, NIPPC-REC cannot support the 90-110 Performance Band and recommend that it not be adopted. If the Commission does approve the 90-110 Performance Band, NIPPC-REC request that certain additional revisions be made to limit its adverse impact on QFs. NIPPC-REC appreciate that Avista does not propose to apply the penalty provision to projects 3 MW and less,

¹ See *FERC v. Miss.*, 456 U.S. 742, 750 (1982).

but the Commission should require that the provision be removed for all QFs eligible for standard contracts, which is 5 MWs.

1. History of the 90-110 Performance Band’s Development in Idaho

The 90-110 Performance Band proposed for use in Avista’s PPA has its genesis in a misguided 2004 Idaho PUC order, and over the years the provision has been the source of contentious disputes in Idaho over its implementation.² The provision is coined the “90-110 Performance Band” because the Seller is penalized if it delivers less than 90 percent of its monthly estimate of net output or it delivers in excess of 110 percent of monthly net output. The theory behind the provision is that if the QF is delivering power outside the 90-110 Performance Band, such power is non-firm, subjecting the Seller to penalties or reduced payments, depending on the version of the contract provision used. The Idaho utilities convinced the Idaho PUC to adopt the provision in large part out of concern that wind QFs – which were just beginning to seek contracts in 2004 – would be unable to provide “firm” power and should not therefore be supplied the same fixed avoided cost rates as traditional hydropower and other baseload resources.³ It is therefore conceptually similar to the Texas “firm power” rule, which bars wind QFs from executing a long-term legally enforceable obligation with fixed prices because they

² *U.S. Geothermal, Inc. v. Idaho Power Co.*, Idaho PUC Case Nos. IPC-E-04-8, IPC-E-04-10, Order No. 29632 at 20 (Nov. 22, 2004) (adopting the 90-110 Performance Band); *see also, e.g., Idaho Hydro, Shorock Hydro, Inc., J.R. Simplot Co., and Renewable Energy Coal. for Modification of the 90/110 Performance Band and Calculation of Operation and Maintenance Charges for PURPA Qualifying Facilities*, Idaho PUC Case No. IPC-E-18-07 (May 9, 2018); *Idaho Wind Partners I, LLC v. Idaho Power Co.*, Idaho PUC Case No. IPC-E-13-19 (Apr 9, 2014); *Tariff Advice No. 13-05 of Idaho Power Co. for Auth. to Update Schedule 86*, Idaho PUC Case No. IPC-E-13-25 (March 12, 2014) (all disputes over implementation of 90-110 Performance Band).

³ Idaho PUC Case Nos. IPC-E-04-8, IPC-E-04-10, Order No. 29632 at 15-16 (citing the “growing prominence of intermittent generating technologies, such as wind and solar, require a new approach in the Company’s PURPA contracting procedures”).

cannot deliver “firm” power.⁴ However, subsequently in 2009, when presented with the question of whether wind QFs should be supplied with forecasted and fixed avoided cost rates under FERC’s PURPA rules, FERC determined that such “firm” power rules are unlawful.⁵

Notably, when the provision was approved in 2004 in Idaho, one of the three Idaho Commissioners, Marsha Smith, strongly dissented from approval of the 90-110 Performance Band. Commissioner Smith aptly explained as follows:

I strongly oppose the 90%/110% performance band proposal of Idaho Power and also do not favor the 80%/120% proposal of the Staff. It is my belief that project developers that sign PURPA contracts have a legally enforceable obligation. The incentive for them is to provide all the power they can. They need to be paid to stay in operation and if they do not produce, they do not get paid. The banding proposal would operate as a penalty, not an incentive.⁶

Also of note, even in Idaho, the provision no longer applies to wind QFs and has not been universally applied to solar QFs. For those variable energy generators, the Idaho PUC has also allowed use of a MAG, which requires the seller to make the power generation equipment available for a minimum percentage of hours each month (such as 85% of the hours each

⁴ See *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P. 3 (Nov. 19, 2009) (discussing Texas’s “firm power” rule).

⁵ *Id.* at P. 23 (stating, “we find that the Texas Commission's decision denying JD Wind a legally enforceable obligation, and the requirement in Texas law that legally enforceable obligations] are only available to sellers of “firm power,” as defined by Texas law, are inconsistent with PURPA and our regulations implementing PURPA, particularly section 292.304(d) of our regulations.)

⁶ Idaho PUC Case Nos. IPC-E-04-8, IPC-E-04-10, Order No. 29632 at 49 (*Comm’r Marsha Smith, dissenting*).

month).⁷ The advantage to the MAG is that it properly accounts for the seller's inability to precisely predict the motive force (wind or solar) weeks or a month in advance, but combined with forecasting capacities, the MAG provides the utility predictability as to the output it will receive in an day-ahead and real-time operational timeframe.

It is also important to stress that Idaho is the only regional state that has imposed the 90-110 Performance Band on QFs. Idaho Power proposed to use the 90-110 performance band in a proceeding before the Oregon Public Utility Commission ("OPUC") in 2014 for use in "non-intermittent" QF PPAs, but ultimately, the OPUC did not approve Idaho Power's proposal.⁸ Instead, Oregon uses a MAG for intermittent QFs and an minimum annual delivery guarantee for non-intermittent QFs.⁹ These provisions have adequately protected utilities and their shareholders while allowing projects to be financed, constructed and operated.

Finally, it is important to note that the 90-110 Performance Band has been part of an overall PURPA regulatory structure in Idaho that has ended viable project development. Avista

⁷ See *In Re Idaho Power Co.'s Petition to Increase the Published Rate Eligibility Cap for Wind -Powered Small Power Production Facilities and to Eliminate the 90%/110% Performance Band for Wind-Powered Small Power Production Facilities*, Idaho PUC Case No. IPC-E-07-03, Order No. 30488 at 13-14 (Feb. 20, 2008) (eliminating 90-110 Performance Band for wind QFs); *In Re Idaho Power Co.'s Application for Approval or Rejection of Energy Sales Agreement with Grand View PV Solar Two, LLC*, Case No. IPC-E-14-19, Order No. 33179 at 5 (Nov. 14, 2014) (noting that Idaho PUC Staff approved of use of a mechanical availability guarantee in solar QF PPA, which was approved by Idaho PUC).

⁸ *In Re Public Utility Comm'n of Oregon: Investigation Into Qualifying Facility Contracting and Pricing*, OPUC Docket No. UM 1610, Order No. 14-058 at 30 (Feb. 24, 2014); see also *id.* at 29 (explaining: "[Idaho Power] also proposes a modification for the performance guarantee for nonintermittent resources to introduce a 90 percent/110 percent monthly performance standard. Idaho Power recommends that a 'shortfall energy price' be applied to deliveries outside of the 90/110 percent monthly performance standard. For nonintermittent resources, Idaho Power recommends the application of a 90/110 percent monthly performance standard to which as the shortfall energy price would also be applied.").

⁹ *Id.* at 30.

has *four* Idaho QFs after 40 years of PURPA implementation, which include 3 hydro facilities (1.41 MW Ford Hydro, 0.9 MW John Day Hydro, and 0.22 MW Clark Ford Hydro), and the Plummer Saw Mill wood waste (5.8 MWs). While we are not certain, NIPPC and REC believe that each of these projects were built before 2004. Idaho has 20 year contract terms for hydro and biomass, and more favorable prices for hydro projects than other states, but no new PURPA development, in part because of the 90-110 Performance Band.

2. Avista's Proposed 90-110 Performance Band

Avista proposes to include the 90-110 Performance Band in its standard contract offered to Washington QFs. The 90-110 Performance Band is set forth through the following Sections of the Avista PPA: Sections 1.7, 1.30, 1.43, 1.44, 1.46, 1.47, 5.1-5.1.7, 7.3, and 11.3, which are reproduced in an exhibit to these comments. Avista's proposed PPA contains some unique aspects of the 90-110 Performance Band, some of which appear to have been the result of discussions with NIPPC-REC representatives, but on the whole the provision is still unacceptable.

In the finally proposed Avista PPA, the 90-110 Performance Band would penalize the QF with liquidated damages if it delivers less than 90 percent of the Monthly Net Output Estimate and pay a reduced amount for deliveries in excess of 110 percent of the Monthly Net Output Estimate. If the QF's deliveries fall below the 90-percent threshold, the shortfall would be deemed Shortfall Energy, and the QF would *owe* Avista the market energy prices for such Shortfall Energy.¹⁰ Notably, the Seller would owe such Shortfall Energy damages even if the market price is less than the contract price and Avista is therefore unharmed by the failure of the

¹⁰ Avista Standard Power Purchase Agreement § 7.3.3 (Aug. 6, 2020) [hereinafter Avista PPA].

Seller to deliver the contracted amount of power at a higher price than otherwise available on the market. In all other states, if a small QF fails to deliver below 90 percent, then it is still paid full contract rates rather than the QF having to pay a penalty.

In the case where the QF's deliveries exceed the 110-percent threshold, the deliveries in excess of 110 percent would be deemed "Surplus Energy" and Avista would not pay the contract prices for such energy, instead paying the lesser of the market prices and the contract prices.¹¹ Avista only pays the contract price (i.e., the forecasted and fixed avoided cost rates) for deliveries between the 90-percent and 110-percent thresholds, which subjects the QF to potentially extreme swings in its revenue beyond what is easily forecasted at time of contracting.

To illustrate, a typical small hydropower QF that expected to generate roughly 4 average MW in a month may submit a Monthly Net Output Estimate of 3,000 MWh.¹² To be assured that it was paid the full avoided cost rates in its PPA without penalty, the QF would need to deliver between 2,700 MWh and 3,300 MWh. If, for example, water flows were lower than expected and the QF only produced 2,500 MWh, it would owe Avista market energy price for the 200 MWh of Shortfall Energy, which assuming a typical market price of \$30/MWh could be a penalty payment of \$6,000. On the other hand, if water flows were higher than expected the QF delivered 3,500 MWh, Avista would only pay the lesser of the contract price or the market prices for the 200 MWh of Surplus Energy. The provision allows for adjustment to the Monthly Net Output Estimate after commencement of the month of delivery only for Forced Outages that last in excess of 48 hours or Force Majeure Events. It provides no excuse for lower than expected motive force or outages that are shorter than 48 hours or for which the utility disputes

¹¹ Avista PPA § 7.3.2.

¹² Generation of 4 MW over 720 hours in a month would equate to 2,880 MWh, but 3,000 MWh is used in the example for simplification of the illustrative example.

the timeliness or contents of the outage notice sent by the QF – a point of frequent dispute in Idaho Power’s contracts. Given the fact that many small QFs have difficulty predicting their precise monthly output in advance of the month due to unforeseen circumstances (e.g., higher than expected rainfall), this contract provision guarantees that the small QF will not be paid the full avoided cost rates for all of the net output it produces and delivers to Avista.

Notably, unlike even in Idaho, Avista does not propose to exempt intermittent generators from the 90-110 Performance Band. Thus, wind and solar QFs – which have even more difficulty than other generators to predict monthly output in advance of the month – would also be penalized by this provision. In that respect, Avista’s proposal is even more extreme than what has been approved in Idaho where this provision was developed.

Avista’s PPA is also more unfavorable to QFs than the current Idaho PUC PPAs in the way that it treats forced outages (referred to as Declared Suspension of Deliveries in the PPA), in the event of a forced outage, the seller can only have its monthly net output estimate adjusted downward if it supplies Avista detailed notice of the cause of the outage within 24 hours,¹³ whereas the currently approved Idaho PUC PPAs allow for up to seven days to supply such

¹³ Avista PPA § 11.3.2 (stating, to exercise a Declared Suspension of Deliveries: “Seller shall, within 24 hours after the telephone contact, provide Avista a written notice in accordance with Section 30 that will contain the beginning hour and duration of the Declared Suspension of Energy Deliveries and a description of the conditions that caused Seller to initiate a Declared Suspension of Energy Deliveries. “)

detailed notices to the utility.¹⁴ The additional time is often needed to confirm and document the cause of such emergency outages and was specifically approved by the Idaho PUC.¹⁵

Although Section 5 of Avista's PPA allows the QF to update its monthly estimate up until the day before the month of delivery consistent with the most recent Idaho PUC PPAs,¹⁶ it also penalizes the QF if it fails to update the estimate every single month and allows Avista to *terminate* if the QF does not update the schedule for three consecutive months.¹⁷ This provision is not contained in Idaho PUC PPAs, and there is no apparent reason why the PPA would be terminated if the QF determined to rely on its previously submitted Monthly Net Output Estimates instead of sending a notice to Avista every month. In most states, QFs do not even need to provide estimates, let alone be at risk for termination for not providing such estimates.

Finally, Avista proposes to exempt the 90-110 Performance Band to all QFs in excess of 3 MW in capacity so long as they are interconnected to Avista's system. For those QFs, Avista agrees that the only requirement should be that the QF provide Avista an annual forecast of its Net Output at the commencement of each year.¹⁸ However, the 90-110 Performance Band would apply to all QFs delivering to Avista from another system and QFs over 3 MW in capacity that are interconnected to Avista.

¹⁴ See, e.g., *In Re Idaho Power Co.'s Application for Approval or Rejection of Energy of Energy Sales Agreement with J.R. Simplot Co. – Pocatello Cogeneration and Small Purchase Power Project*, Idaho PUC Case No. IPC-E-19-01, Order No. 34263 at 4 (Feb. 28, 2019) (discussing the right of the QF to provide written explanation for the cause of a forced outage up to seven days after the outage to provide reasonable opportunity to determine case and explain circumstances in writing).

¹⁵ *Id.*

¹⁶ Avista PPA § 5.1.6.

¹⁷ *Id.* § 5.1.5.

¹⁸ *Id.* § 5.2.

3. NIPPC-REC's Proposal: Reject the 90-110 Performance Band

NIPPC-REC urge the Commission to reject Avista's proposed use of the 90-110 Performance Band. As Commissioner Marsha Smith recognized when the provision was adopted by a divided Idaho PUC in 2004, the provision is a penalty that deters QF development. This provision is a penalty provision that will ensure that QFs do not receive the full avoided costs set by this Commission for all net output they produce.

Moreover, the 90-110 Performance Band is inconsistent with the requirements of the Commission's newly adopted PURPA regulations. This Commission's PURPA regulations entitle each QF to sell its output at a fixed price established at the time of execution of the PPA.¹⁹ Thus, each QF is entitled to be paid the fixed prices for all of its net output, and there is no precondition of delivery of "firm" energy within a 90-110 Performance Band or otherwise allowed by the rules. Applying the very same regulatory language as contained in WAC 480-106-050(4)(b)(ii)(B), FERC determined that such "firm energy" requirements are inconsistent with each QF's option for a legally enforceable obligation to sell its net output to the utility at a fixed price.²⁰ Therefore this Commission should determine, as FERC did in 2009, that "firm energy" requirements such as the 90-110 Performance Band do not comply with those applicable regulations.

NIPPC-REC do not oppose applicability of Avista's forecasting provision contained in Section 5.2 of its PPA for all QFs up to 5 MW in lieu of use of the 90-110 Performance Band. It

¹⁹ See WAC 480-106-050(4)(b) ("A utility's standard rates for purchases must provide the qualifying facility the option to either: . . . (ii) Provide energy, capacity, or both, pursuant to a legally enforceable obligation, in which case the rates for purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on: . . . (B) The avoided costs of energy and capacity identified in the utility's schedule of estimated avoided costs in effect when the parties incur the obligation.").

²⁰ 129 FERC ¶ 61,148 at P. 23.

is not clear why Avista believes QFs between 3 MW and 5 MW should be subjected to the 90-110 Performance Band. There is no penalty for the forecasting requirement, and NIPPC-REC agree it is a reasonable requirement for small QFs. The proposed redline copy of Avista's PPA (Attachment A) removes the 90-110 provision, through deletion or modification of the several sections cited above, in favor of applying the annual forecasting requirement to all QFs eligible for the standard contract.

Notably, PSE's PPA approved by the WUTC does not contain a 90-110 Performance Band or any other "firmness" requirement. Instead, it contains a requirement that the QF supply PSE with its expected annual net output,²¹ which is analogous to NIPPC-REC's proposal for an annual forecasting requirement in Avista's PPA.

B. Avista's Contract Reopener Clause Should Be Deleted and the Section Revised

NIPPC-REC recommend revising Section 20, entitled Governmental Authorities, of Avista's proposed PPA to ensure that it is clear that this provision is not a contract re-opener and to further ensure that the PPA will survive in the event that PURPA is repealed. This Section has language that is harmful to QF developers. Specifically, the Section states that a standard PPA is subject to laws and regulations now "or hereafter" in effect. This language could be construed as a contract reopener clause. If, for instance, the WUTC issued an order approving a lower avoided cost price (which it does regularly), the reopener clause could allow Avista to argue that it has the right to "reopen" the executed contract and change the price to match the new WUTC order. Similarly, if Congress repealed PURPA, the reopener clause might allow Avista to argue this clause constitutes agreement by the QF to "reopen" the executed contract and change the

²¹ PSE Schedule 91 Power Purchase Agreement at Exhibit D [hereinafter PSE PPA].

terms to terminate it. These outcomes would violate PURPA, therefore the reopener clause must be deleted.

Under PURPA, QFs are entitled to sell energy to electric utilities at the utility's avoided cost rate.²² Under FERC and the WUTC's regulations, all QFs have the right to choose to sell either at the avoided cost rate calculated at the time of delivery or at the avoided cost rate calculated at the time a QF establishes a legally enforceable obligation (typically, the time a QF signs a contract).²³ These rules explicitly provide that offering fixed prices does not violate PURPA's avoided-cost mandate, even if the avoided cost at the time of delivery differed from the earlier calculated avoided cost price.²⁴ FERC explained that the purpose of this provision is "to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances."²⁵ To sum up, PURPA gives QFs the right to choose between a price that may change (rate at time of delivery) or a price that is fixed ahead of time (rate calculated at time of contract execution).

State regulatory commissions can adopt policies that affect these rates, such as a policy on contract length, but PURPA and FERC's implementing rules preempt state commissions from changing terms of *executed* contracts, such as price.²⁶ And this Commission has itself adopted

²² 16 USC 824a-3(a)-(d); *see also* 18 CFR 292.304.

²³ WAC 480-106-050(4)(b)(ii)(B); 18 CFR 292.304(d).

²⁴ WAC 480-106-050(4); 18 CFR 292.304(b)(5).

²⁵ *Small Power Production and Cogeneration Facilities; Reg's Implementing Sec. 210 of the Pub. Util. Reg. Policies Act of 1978*, 45 Fed. Reg. 12,214 at P.12,214, 12,224 (Feb. 25, 1980).

²⁶ FERC recently adopted new rules to implement PURPA, under which a state commission *may* choose to require that rates for energy (but not for capacity) change to match the utility's avoided cost price at the time of delivery, but these rules have not yet taken effect and are likely to face legal challenges. *See Implementation Issues Under the Pub. Util. Reg. Policies Act of 1978*, 172 FERC ¶ 61,041 (July 16, 2020); *see also* Eric Christensen, *FERC Adopts Final Rule on PURPA Reform Putting Long-Term Renewable Energy Contracts at Risk*, Nat'l L. Rev. (July 29, 2020), available at

the fixed-price rate option into its own regulations. The rule against retroactive rate changes in fixed-price contracts is a bedrock principle of the implementation of PURPA that is absolutely necessary to secure financing. In fact, this rule is so well established that in *Freehold Cogeneration Associates v. Board of Regulatory Commission of the State of New Jersey*, the Third Circuit enjoined a state commission's re-examination of a fixed-price PURPA contract well before the process was complete.²⁷

The Ninth Circuit's decision in *Independent Energy Producers Association, Inc.*, is directly on point here and controlling in Washington.²⁸ In that case, the California Public Utilities Commission ("CPUC") sought to reopen long-term PURPA contracts with fixed rates and change the terms of payment set forth in the agreements under the guise of regulating the QFs' operating characteristics.²⁹ The Ninth Circuit Court of Appeals explained:

The underlying motivation behind the CPUC program is to lower the rates set in appellees' standard offer contracts because they are higher than the Utilities' current avoided costs. As noted above, this differential exists because the standard offer contracts lock the Utilities into paying rates that were calculated on incorrect assumptions about the future cost of fossil fuels, the primary fuel source used by the utility to generate electric energy. However, the

<https://www.natlawreview.com/article/ferc-adopts-final-rule-purpa-reform-putting-long-term-renewable-energy-contracts> ("Given the controversial nature of the Final Rule, it is likely that significant litigation will follow in the U.S. Courts of Appeal, and it is also possible that litigation will be brought in the U.S. District Courts. The level of controversy engendered by the Final Rule is suggested by the statement issued by FERC Commissioner Richard Glick, who dissented from the main aspects of the Final Rule, asserting that the Final Rule will "administratively gut" PURPA."). But this new rule has no effect on the issue here because (even if it goes into effect) the WUTC has already codified the fixed-price option into its own regulations, and has no reason to change them. WAC 480-106-050(4)(b).

²⁷ *Freehold Cogeneration Assocs., L.P. v. Bd. Of Reg. Comm'rs of N.J.*, 44 F.3d 1178, 1190-92 (3rd Cir. 1995).

²⁸ *Indep. Energy Prod. Ass'n, Inc. v. Cal. Pub. Util. Comm'n*, 36 F.3d 848, 848 (9th Cir. 1994).

²⁹ *Id.* at 849.

fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed.³⁰

FERC has itself explained, interpreting its own regulation, as follows: "If we were to . . . allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered. Such a result is not, in our opinion, consistent with Congress's directive that we encourage the development of QFs."³¹ Likewise, in *Freehold Cogeneration Associates*, the Third Circuit held "once the [state utility commission] approved the power purchase agreement between Freehold and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [state commission] to reconsider its approval or to deny the passage of those rates to [utility's] consumers under purported state authority was preempted by federal law."³² Ultimately, once the parties execute a contract, the utility and QF are bound by the terms of that agreement, and no regulatory commission can modify those executed terms.³³

³⁰ *Id.* at 858 (citing 18 CFR 292.304(d)(2)); *see also Wilson v. Harlow*, 860 P.2d 793, 799-800 (Okla. 1993) (holding that 18 CFR 292.304(b)(5) and (d)(2) provide QFs the "right to receive the benefit of the contract even if, due to changed circumstances, the contract price for power at the time of delivery is unfavorable to the utility," and thus preempted contrary state law); *Smith Cogeneration Mgmt. v. Corp. Comm'n*, 863 P.2d 1227, 1240-41 (Okla. 1993) (same).

³¹ *New York State Elec. & Gas Corp.*, 71 FERC ¶ 61,027 at P. 61,117-18 (1995).

³² 44 F.3d at 1194; *accord In Re Petition of Atlantic City Elec. Co.*, 708 A.2d 775, 778-79 (App. Div. 1998); *West Penn Power Co. v. Penn. Pub. Util. Comm'n*, 659 A.2d 1055, 1066 (Pa. Cmmw. Ct. 1995).

³³ *Or. Trail Elec. Consumers Coop. v. Co-Gen Co.*, 168 Or App 466, 484 (2000) (interpreting a PURPA contract, "we hold OTECC to the bargain its predecessor made and to the risk it and its predecessor took").

It is within this context that Avista proposes to withhold contracting certainty to QFs by inserting a reopener clause in the standard contract. Avista's standard PPA should reduce hardship on QFs and minimize their need to fight for their legal rights under PURPA. Avista's standard PPA should *not* be allowed to take away a QF's rights under PURPA. The reopener clause must be deleted.

NIPPC-REC propose the following revisions to Avista's Section 20:

~~This Agreement is subject to the rules, regulations, orders and other requirements, now or hereafter in effect, of all governmental authorities having jurisdiction over the Facility, this Agreement, the Parties or either of them.~~ All laws, ordinances, rules, regulations, orders and other requirements, now or hereafter in effect, of governmental authorities that are required to be incorporated in agreements of this character are by this reference incorporated in this Agreement. This Agreement shall not terminate upon repeal of PURPA, unless such termination is mandated by federal or state law.³⁴

These changes remove the reopener clause and explicitly state that a repeal of PURPA shall not result in the automatic termination of the contract. These changes will make Avista's proposed PPA more consistent with PURPA and more comparable to standard PURPA PPAs approved by other state commissions.

In fact, the Oregon Public Utility Commission ("OPUC") specifically mandated that Oregon utilities incorporate language regarding any repeal of PURPA in their standard PPAs, stating that:

We direct utilities to insert a clause in any QF contract that specifies that QF contracts do not terminate upon the repeal of PURPA, unless such termination is mandated by federal or state law. We believe this provision provides all the protection that is available under the

³⁴ Avista PPA § 20.

law, but should not have any adverse effect on financing as it imposes no additional risk on QFs.³⁵

NIPPC-REC that the WUTC to follow Oregon’s example and revise Section 20 of Avista’s standard PPA.

The WUTC should also consider following the example of the OPUC in providing guidance now on the future effect of WUTC-approved modifications to the standard PPA forms. The OPUC has specifically prohibited the utilities from changing contract terms to incorporate later approved modifications for any executed PPA, even if the PPA was only partially executed.³⁶ The WUTC should similarly acknowledge upfront that future modifications to the PPA terms, even once approved by the WUTC, shall have no effect on previously executed agreements.

C. The Commission Should Direct Avista to Revise the Off-System Delivery and Payment Provisions of the PPA

Avista’s PPA is not well designed for use for off-system QFs that deliver to Avista over another utility’s transmission or distribution system. Under PURPA and this Commission’s regulations each QF has the right to sell to Avista “indirectly” by interconnecting to another utility’s system and delivering to a point of delivery on Avista’s system.³⁷ The right for QFs to develop outside of Avista’s territory is particularly important in the Northwest where much of the best renewable resources are located in the territory of publicly owned utilities and/or in

³⁵ *In Re Staff’s Investigation Relating to Elec. Util. Purchases from Qualifying Facilities*, OPUC Docket No. UM 1129, Order No. 05-584 at 57 (May 13, 2005).

³⁶ *Id.* at 59.

³⁷ See WAC 480-106-020 (“A utility must purchase, in accordance with WAC 480-106-050 Rates for purchases from qualifying facilities, any energy and capacity that is made available from a qualifying facility:(a) Directly to the utility; or (b) *Indirectly* to the utility in accordance with subsection (4) of this section.”) (emphasis added); *see also* 18 CFR § 292.303.

areas where generators would need to interconnect to Bonneville Power Administration Power's system. Thus, provisions enabling off-system sales to Avista are important. There are a number of elements of Avista's PPA that impose unnecessary and unreasonable problems for off-system QFs.

1. No Reasonable Provisions for Monthly Settlement of Imbalance Energy

Avista's PPA contains no scheduling settlement provisions enabling an off-system QF to settle under and over deliveries to be paid avoided cost/contract rates for all net output. Without correction, Avista's PPA is likely to lead to disputes and unfair treatment of off-system QFs.

This problem arises because scheduling conventions for transmission providers do not allow a generator to schedule and deliver energy in increments smaller than a whole MW.³⁸ Thus, a small QF that generates in some quantity other than a whole MW increment will need to schedule and deliver to Avista a different amount than it generates in each hour. Transmission tariffs account for this issue through the use of generator imbalance service, under which the transmission provider fills in the difference between the hourly generation and the hourly scheduled amount of power with additional energy (or absorbs excess generation) to deliver the scheduled amount of energy in a whole MW increment. Under transmission tariffs, the generator is expected not to "lean" on the system by consistently over or under scheduling, and instead the transmission tariffs generally require the transmission customer to schedule its expected output. The cost structure of imbalance energy will typically encourage the transmission customer to balance its under and over schedules on a monthly basis to reduce its imbalance charges.

³⁸ This issue was addressed in an Oregon PUC proceeding by an OPUC Staff witness. *See* OPUC Docket No. UM 1129, Staff/2200, Brown/5 (March 24, 2006).

Therefore, a QF that generally generates 2.5 MW in all hours, for example, would be incented to schedule 2 MW half of the hours and 3 MW the other half of the hours.

Consequently, an off-system PPA should allow for settling the over and under schedules on a monthly basis as well. The best example of such a provision in the region is the Off-System PPA's Addendum W used by PacifiCorp in Oregon.³⁹ NIPPC-REC's edits are modeled off PacifiCorp's Addendum W.

However, the Avista PPA does not address this issue in a reasonable manner and is very likely to lead to disputes if not addressed at this time. Although Avista made some very limited edits on this subject after discussions with NIPPC-REC, the PPA contains no express monthly settlement provision. Thus, the expectations for accuracy of scheduling and the requirements to receive avoided cost rates for all net output are ambiguous. Instead, the definition of Net Output, the definition of Base Energy, and the statement in Section 7.3 that Avista will pay the full avoided costs only for Base Energy could be pointed to by Avista as a basis to refuse to pay the QF for its monthly net output even if the amount of energy Avista received during the month equaled the QF's Net Output in the month. This revision could be accomplished by developing an Off-System Version of the PPA form that includes some minor revisions to Section 7.3 and an Addendum that governs the monthly settlement, as illustrated in the proposed redline copy of Avista's PPA provided as Attachment A.

³⁹ PacifiCorp, Oregon Standard Power Purchase Agreement at W-1, available at: https://www.pacificpower.net/content/dam/pcorp/documents/en/pacificpower/rates-regulation/oregon/tariffs/purpa/Power_Purchase_Agreement_for_Firm_Off_System_QF.pdf

2. Reduced Payment for Due to Transmission Losses

Next, and relatedly, the definitions of Losses and Net Output in the Avista PPA would reduce the amount of Net Output for which the QF is paid full avoided costs by the amount of transmission losses between the point of interconnection and the point of delivery to Avista's system.⁴⁰ FERC rules establish the QF is entitled to be paid avoided costs for net output measured at the point of interconnection so long as it is able to deliver that amount of power to the utility.⁴¹ In practice, the QF could secure loss service from its transmission provider to ensure that over the course of a month it delivers its precise Net Output, as measured at the point of interconnection. NIPPC-REC recommend the following edit to correct this issue:

- 1.26** “**Losses**” means the loss of electrical energy occurring as a result of the transformation and transmission of energy between the **Facility and the Point of Interconnection and the Point of Delivery**. For purposes of this Agreement, Losses shall equal ___ percent of the total generation of the Facility as metered at the Facility.
- 1.33** “**Net Output**” means the capability and electric energy generated by the Facility, less Facility Service Power and Losses expressed in megawatt-hours (MWh) or kilowatt-hours (kWh).

Without this edit, the QF would be paid for less output than it generates and delivers as net output.

⁴⁰ Avista PPA §§ 1.26, 1.33.

⁴¹ *Am. Ref-Fuel Co.*, 54 FERC ¶ 61,287 at P. 61,816 (Mar. 14, 1991) (measuring a QF's net output as the amount of generation injected to the point of interconnection to the grid over a 60-minute rolling basis); *S. Cal. Edison v. FERC*, 443 F.3d 94 (D.C. Cir. 2006) (affirming use of net output, as opposed to gross output, as the measure of the energy that a QF can compel utility to purchase under PURPA); *Conn. Valley Elec. Co., Inc. v. Wheelabrator Claremont Co., L.P., et al.*, 82 FERC ¶ 61,116 P. 61,419-21, *reh'g denied*, 83 FERC ¶ 61,136 (1998), *aff'd*, 208 F. 3d 1037 (D.C. Cir. 2000) (discussing loss service); *see also Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 114 FERC ¶ 61,102 at P. 101, *clarified*, 114 FERC ¶ 61,128 (Feb. 2, 2006), *order on reh'g*, Order No. 671-A, 115 FERC ¶ 61,225 (May 22, 2006) (utilities are required to purchase QF's net output).

3. The Commission Should Require Changes to the PPA's Scheduling Mechanics

Section 6 includes outdated and unreasonable provisions regarding scheduling mechanics. The basic problem is the scheduling provisions do not even reflect current practices in the region, such as the requirement to lock in schedules 90 minutes in advance of the hour of delivery, and the provision should instead remain flexible and require the QF to simply comply with its transmission provider's requirements. At this time, BPA already requires the updates to be made 35 minutes prior to the hour, not 90 minutes prior to the hour.

Additionally, the scheduling provision appears to attempt to lock in the QF to use of hourly block scheduling practices at a time when the markets are moving to shorter scheduling increments to increase the accuracy of schedules and reduce imbalance charges on intermittent generators. For example, FERC has determined that all transmission customers must be provided the right to 15-minute scheduling. Indeed, FERC has specifically found, "the hourly scheduling protocols of the *pro forma* OATT reflect historical practices associated with operation of conventional generating resources that are relatively predictable and controllable when compared to VERs."⁴² The "existing hourly scheduling protocols can expose transmission customers to excessive or unduly discriminatory generator imbalance charges."⁴³ Thus FERC expressly required that *all* transmission customers be entitled to schedule on increments of less than an hour.⁴⁴ Therefore, this Commission's standard PPA for small QFs should likewise accommodate use of such intra-hour scheduling and not lock QFs into the hourly scheduling protocol that imposes unjust and unreasonable imbalance charges on QFs.

⁴² *Integration of Variable Energy Resources*, Order No. 764, 139 FERC ¶ 61,246 at P. 20 (July 13, 2012).

⁴³ *Id.* at P. 22.

⁴⁴ *See id.*

NIPPC-REC proposed the following edits to improve the flexibility and reasonableness of the scheduling provisions:

- 6.2** Seller is responsible for supplying day(s)-ahead energy pre-schedules for each hour. Such schedules will, to the extent practical, be based on the anticipated actual generation of the Facility for each such hour. Seller shall submit energy pre-schedules to accommodate generally acceptable scheduling practices as mutually agreed by the Parties. In the absence of such mutual agreement, this requirement may be satisfied by Seller submitting energy pre-schedules for the next Business Day by email, or by use of the Seller's Transmitting Entity(ies) open access same time information system or other electronic mechanisms authorized by the Federal Energy Regulatory Commission~~other mutually agreed upon means~~, to Avista no later than 5:30 am on the Business Day immediately preceding the day on which energy deliveries are to be made; *provided, however*, that for estimates of deliveries on weekends and holidays (as defined by NERC), Seller and Avista shall follow scheduling procedures in accordance with then-current standard scheduling practices.
- 6.3** Seller shall create an electronic tag (e-Tag) that reflects the day-ahead hourly estimate no later than 2:00 pm on the Business Day immediately preceding the day on which energy deliveries are to be made; *provided, however*, that for estimates of deliveries on weekends and holidays (as defined by NERC), Seller and Avista shall follow scheduling procedures in accordance with then current standard scheduling practices.
- 6.4** The day-ahead estimate shall be provided for preschedule purposes and shall not restrict Seller's right to submit revised hour-ahead schedules as provided herein. ~~At least ninety (90) minutes~~ Seller may update its day-ahead schedule prior to the start of each delivery hour, or sub-hourly scheduling increment, during the delivery Business Day, ~~Seller shall by providing~~ Avista with an updated electric tag (e-Tag) that reflects the firm schedule for that delivery hour, or sub-hourly scheduling increment, in accordance with the requirements of its Transmitting Entity. Seller shall pay any energy imbalance charges or penalties imposed by the Transmission Entity on the delivery of the Net Output to the Point of Delivery.
- 6.6** Email contact information with regard to pre-scheduling and telephone contact information with regard to generation level changes, interruptions or outages are specified in Exhibit C, Communication and Reporting.
- 6.7** Should circumstances change in the WECC or WECC sub-region, within which Avista operates its electric system, dictate that scheduling protocols or timing of schedule notifications need to conform, then the Parties agree to negotiate in good faith to a mutually agreed modification of this Section 6 as necessary.

PSE's PPA does not contain any specific scheduling requirements.⁴⁵ NIPPC-REC believe that their recommendations would be allowed under PSE's PPA because the requirements proposed here are merely standard scheduling practices in the industry. In other words, PSE's PPA appears to be more favorable to QFs to the extent that it does contain any specific requirements and details proposed here for Avista's PPA and may allow for some other arrangements not specifically set forth in the NIPPC-REC proposal for the Avista PPA. However, NIPPC-REC do not recommend the deletion of this scheduling provision in Avista's PPA (which would make it more consistent with PSE's PPA) because the additional detail provided here will provide additional clarity and therefore prevent disputes.

4. Term of Transmission Agreement

Section 12.1 requires that a transmission agreement must have a term as long as the entire term of the PPA, but it is more standard in the industry to secure only a five-year transmission agreement term, which carries with it the right to renew after each five year term. The reason for that is that if something unexpected happens to require the facility to cease operating, a long-term transmission agreement cannot be terminated. The right to use such standard renewal arrangements should be unambiguously allowed in the PPA. NIPPC-REC recommend the following edit to Section 12.1:

12.1 Prior to the commencement of the first delivery of Net Output, Seller shall provide Avista with copies of all executed Transmission Agreements in a form reasonably satisfactory to Avista, providing for the firm transmission of Net Output from the Facility to the Point of Delivery for the Term of this Agreement or with renewal rights to extend its term for the entire Term of this Agreement. Seller shall not consent to any modification of any firm Transmission Agreement without Avista's advance written approval, which approval shall not be unreasonably withheld.

⁴⁵ See PSE PPA § 6.1 (requiring energy be delivered by a "reliable" method).

PSE's PPA does not directly address transmission arrangements or requirements, and therefore it does not require a QF have transmission rights for the entire term of the contract. Nevertheless, NIPPC-REC agree it is reasonable to address the issue in Avista's PPA so long as the clarifications recommended in these comments are adopted.

D. Avista's PPA Should Allow for Facility Changes and Upgrades

NIPPC-REC recommend revising Sections 3.4 and 11.8 of Avista's PPA to allow for QFs to increase their facility size, both prior to commercial operations and afterwards. NIPPC-REC notes that Oregon contracts allow, in certain circumstances: 1) increases up to the size threshold for obtaining a standard contract (here 5 MWs) with the incremental generation paid at the rate in the executed contract; and 2) increases beyond the size threshold with the incremental generation beyond the size threshold paid at a negotiated contract price.⁴⁶ NIPPC-REC supports allowing QFs to increase their nameplate capacity and encourages the WUTC to adopt a similar overall approach for Avista.

1. Avista Should Make Clear that Normal Changes that Occur Prior to Commercial Operations are Never Considered Material Modifications

The first concern that NIPPC-REC has with Sections 3.4 and 11.8 is that the sections appear to overlook development changes that occur frequently in a normal development process. Section 3.4 of Avista's PPA requires QFs to assess the facility's maximum hourly generation capability (what Avista called the "Initial Capacity Determination") and prohibits QFs from modifying the facility's capacity to exceed the Initial Capacity Determination.⁴⁷ It is unclear when a QF must make this Initial Capacity Determination. A QF may make the Initial Capacity

⁴⁶ *OPUC* Docket No. UM 1129, Order No. 06-538 at 38-39 (Sept. 20, 2006).

⁴⁷ Avista PPA at § 3.4.

Determination by looking at the facility's nameplate capacity rating or by other means.⁴⁸

Similarly, Section 11.8 of Avista's PPA grants Avista the unilateral right to terminate the PPA or adjust contract pricing if a QF makes material modifications to a facility, including any increases to the facility's nameplate capacity.⁴⁹ A material modification may also include a change in fuel source.⁵⁰

These sections ignore normal changes that occur in the development process. Consider, for instance, a QF that planned to use one type of solar panel and later found that it could obtain different solar panels that are more efficient. In fact, solar technology is developing so rapidly that solar panels that exist today will not exist in one, two or three years, and project size and other characteristics may need to occur. These changes may or may not change the facility's nameplate capacity, but, even if they did, the QF should be allowed to make these changes.

NIPPC-REC recommends that Section 3.4 be clarified first to state that the Initial Capacity Determination only needs to be made once the project has completed construction, as many projects face minor changes during the construction process. Similarly, NIPPC-REC recommend that Section 11.8 be clarified to state that a change in equipment for one fuel source does not constitute a change in fuel source (e.g., a change from one solar panel equipment type to another is not a material modification).

2. Avista Should Allow QFs to Make Upgrades that Increase Facility Size, Subject to Approved Pricing Restrictions

The second concern that NIPPC-REC has with Sections 3.4 and 11.8 are that they allow Avista to unilaterally terminate a PPA or adjust pricing if the QF changes its nameplate capacity.

⁴⁸ *Id.*

⁴⁹ Avista PPA at § 11.8.

⁵⁰ *Id.*

In contrast, NIPPC-REC recommends that Section 3.4 and 11.8 be revised to allow QFs to increase facility nameplate capacity. For generation attributable to the original nameplate capacity, the QF should continue to receive the contracted-for standard prices. For incremental generation attributable to added nameplate capacity up to the standard contract threshold, the QF should also continue to receive the standard prices in the original contract. For incremental generation beyond the standard contract threshold, the QF should negotiate a supplemental PPA with negotiated pricing.⁵¹

Consider a 4.5 MW facility. If the facility capacity increased to 4.9 MW, Avista could consider that a violation of Section 3.4 and could amend the pricing or terminate. NIPPC-REC recommend instead that the 4.5-turned-4.9 MW project receive the contracted-for standard rates for the original 4.5 MW of generation. If the 4.5 MW increased to 5.1 MW, NIPPC-REC suggest that the QF receive: 1) the contracted-for standard rates for up to 5 MW of generation; and 2) a new negotiated rate for the excess generation over 5 MW, pursuant to a new negotiated PPA.

These proposals are consistent with the principles behind a decision issued by the OPUC for QFs 10 MWs and below that were eligible for standard prices and contracts, which stated on this issue that:

In Order No. 05-584, we determined that QFs with a nameplate capacity of 10 MW, or below, should be eligible for standard contracts. Pursuant to this decision, we intended that a QF with a nameplate capacity over 10 MW, regardless of how much *over* the 10 MW limit, would need to negotiate a non-standard contract. It was not our intent to discourage QF operators from upgrading their facilities, however.

⁵¹ NIPPC-REC note that any RECs associated with this incremental generation should not be automatically transferred to the utility but should instead be part of those negotiations.

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. In the event that a new contract is negotiated and a new pricing scheme needs to be applied to a QF's output on a going forward basis, we direct parties to implement the methodology proposed by PGE.

In order to minimize contractual disputes, we recognize that there must be an administratively simple method for pricing power delivered by an upgraded QF. We adopt PGE's proposed methodology. Under this methodology, if a QF increases the nameplate capacity of its facility by a certain percentage above 10 MW, then on a going forward basis, that percentage of the power delivered by the QF will receive new, negotiated pricing, while the remaining percentage of output will receive pricing under the pre-existing standard contract. We believe PGE's allocation methodology is appropriate given the difficulty of precisely tracking electrical power deliveries, and we direct the utilities to revise their filed standard contracts to implement it.⁵²

Note that the OPUC adopted a percentage-based methodology for allocating generation to the different prices; NIPPC-REC accept this as one viable approach.

NIPPC-REC's proposal only lasts for the term of the standard PPA in which the project increases its nameplate capacity. If the project increases its size to above 5 MW, then when it renews its contract it will no longer be eligible for a standard contract and pricing because the renewal will be based on a project larger than 5 MWs. However, if the project increased its size to 5 MW or less, then it would still be eligible for standard contract and pricing.

NIPPC-REC are uncertain how PSE's PPA would address this situation. At a minimum, PSE's PPA does not specifically address this situation. NIPPC-REC are not aware of the WUTC ever addressing this question, and believe that there is no prohibition under Commission

⁵² OPUC Docket No. UM 1129, Order No. 06-538 at 38-39.

precedent or rule that would prevent a QF from being allowed to increase its net output in this manner.

E. Avista Must Provide a Reasonable Cure Period for Missing Milestone Dates, Including the Commercial Operation Date

NIPPC-REC recommend revising Sections 4.2 and 17 of Avista’s proposed PPA to provide a reasonable cure period for missing milestone dates, such as the commercial operation date. As written, Avista’s proposed PPA requires specification of milestones and a Scheduled Commercial Operation Date, but allows for immediate termination and *no* cure period if the QF developer encounters a delay in bringing the facility online.⁵³

The PPA’s omission of a cure period for a delay default is commercially unreasonable and inconsistent with the WUTC’s rules, which provide that utilities may include in standard PPAs “commercially reasonable milestone events *and cure periods*” for various events.⁵⁴ Avista’s proposal to provide no opportunity to cure a delay default is therefore in violation of the WUTC’s rules governing the contractual arrangement.

Moreover, the WUTC’s rules on this subject are in line with commercially reasonable practices in the industry. Precisely forecasting the exact date that a facility will achieve

⁵³ Avista PPA § 4.2 (“In the event that the Seller fails to achieve the milestones set forth in Exhibit J, including achieving the Commercial Operation Date of the Facility within three (3) years of the Effective date, Avista may terminate this Agreement by providing Seller written notice of termination.”).

⁵⁴ WAC 480-106-030(4) (emphasis added). The full sentence reads that “Standard contracts may include commercially reasonable milestone events and cure periods including, but not limited to, the qualifying facility’s: (a) Provision of any necessary credit support, necessary governmental permits and authorizations, evidence of construction financing, and as-built supplements; (b) Completion of interconnection facilities; (c) Completion of start-up testing; and (d) Achievement of mechanical availability of operation.” As part of the overall package of new policies, NIPPC-REC supported this provision in the administrative rulemaking, but understand it to mean that a utility may specify, in a standard contract, certain milestones but each must have an associated cure period.

commercial operation is not possible years in advance of such time. The developer of a new facility must first secure its executed PPA before it can realistically raise the capital necessary to undertake major construction efforts, such as the interconnection, procurement of major equipment for the generation facility, etc. Thus, securing the PPA will almost always occur well in advance of actual final design and construction activities. Therefore, the developer will typically need up to the full three years of final development period allowed in the WUTC's rules after execution of the PPA.

However, delays often occur and frequently are not due to issues within the developer's control, such as a delay in completing the interconnection by the interconnecting utility, whether that might be Avista for a direct interconnection and sale or another regional utility such as BPA or a cooperative. The construction of the interconnection by the utility itself can be the slowest step in the development of any power generation facility. Northwest utilities can easily take up to three years to complete final design and construction activities for an interconnection, and aside from remaining current on its own submission of deposits, the QF has little control over the pace of the utility's interconnection activities. It would be patently unfair, and contrary to the intent of the WUTC's PURPA rules, for the QF to have its PPA arbitrarily terminated as soon as the three-mark passed solely due to a delay in the interconnection that resulted, for example, from Avista being unable to complete the interconnection construction on schedule.

NIPPC-REC recommend that the WUTC adopt the cure period currently used in PURPA PPAs for small QFs in Oregon. As at the WUTC, the OPUC's current policy allows QFs to select a scheduled commercial operation date up to three years after the effective date of the PPA.⁵⁵ However, the QF is provided one year to cure the delay. This is a reasonable amount of

⁵⁵ OPUC Docket No. UM 1610, Order No. 15-130 at 2 (Apr. 16, 2016).

time for the QF to complete the development and bring the facility online in the case of a delay default.

NIPPC-REC offer the following edits to ensure the QF has a reasonable cure period for a delay default, which includes a one-year cure period and recognizes that the QF is not in default if the delay is caused by a force majeure or is caused by Avista:

Section 4.2 In the event that the Seller fails to achieve the milestones set forth in Exhibit J, including achieving the Commercial Operation Date of the Facility within three (3) years of the Effective date, and such failure is not caused by Avista or the result of an Event of Force Majeure, such failure shall constitute a Default, and Avista shall give written notice to Seller of a Default in accordance with Section 30. Seller may cure such Default within one year of receiving written notice of Default from Avista. ~~Avista may terminate this Agreement by providing Seller written notice of termination.~~

17.2 Notice and Opportunity to Cure. In the event of a Default, the non-Defaulting Party shall give written notice to the Defaulting Party of a Default in accordance with Section 30. Except as provided in Section 17.1(d) or as otherwise provided elsewhere in this Agreement, if the Defaulting Party has not cured the breach within thirty days after receipt of such written notice, the non-Defaulting Party may, at its option, terminate this Agreement and/or pursue any remedy available to it in law or equity; *provided that*, if a Default occurs under Sections 17.1(a) or 17.1(f), Seller shall not deliver any Net Output to Avista, and Avista shall have no obligation to accept any Net Output from the Facility, until such Default is cured; *provided, further*, that if a Default occurs under 17.1(g), Avista may immediately terminate this Agreement without opportunity to cure, and such termination shall become effective upon written notice of Default.

PSE's PPA is unclear on the point of termination and cure periods for missing a commercial operation date. PSE has a concept of "Excusable Delay", which is broadly defined to excuse delays caused by many different circumstances, and excuses the delay as long as the circumstance exists, up to one year following commencement of the event causing the delay.⁵⁶

⁵⁶ PSE PPA §§ 8, 14.1(b)(iii).

PSE also has a 60-day cure period for most types of defaults while Avista has a general 30-day cure period, which is not available if the default is from failure to achieve commercial operations.⁵⁷ It appears that, at a minimum, PSE's PPA is more favorable than Avista's proposed PPA.

To the extent that PSE's PPA is not as explicitly protective of the QF's ability to cure a delay default that arises from a circumstance other than an excusable delay, NIPPC-REC could be comfortable agreeing to such an arrangement with PSE. NIPPC-REC have worked with PSE on PURPA matters. Absent management changes, NIPPC-REC believe that PSE is willing to work with and not aggressively seek to narrowly interpret QF rights as some other utilities have done. NIPPC-REC do not have experience with Avista that provides similar comfort.

NIPPC-REC's proposal in the Avista PPA is simple and potentially broader in that it simply provides a blanket right to a one-year cure period in the case where the QF fails to achieve commercial operation before the scheduled commercial operation date. NIPPC-REC believe that a more simple and clear provision will avoid unnecessary litigation (and it has in fact reduced potential litigation in Oregon over delays caused by utilities).

F. Avista's PPA Should Not Require QFs to Provide a Legal Opinion

NIPPC-REC recommends deleting Section 3.2, entitled Opinion of Counsel, of Avista's proposed PPA. NIPPC-REC agree that it is not inappropriate to allow Avista to request copies of all the QF's licenses, permits and approvals, but QF developers should not be required to provide a legal opinion as to the validity of those documents or as to a QF's actual compliance. Removing this section would better align Avista's standard PPA with the WUTC's rules on standard contracts, which refer to the QF's "provision of . . . necessary government permits and

⁵⁷ Compare PSE PPA § 14.1(a), with Avista PPA § 17.2.

authorizations.”⁵⁸ The WUTC’s rules notably make no mention of a legal opinion letter regarding these documents, likely because the requirement is unduly burdensome and should not exist in standard contracts.

Avista’s PPA Section 3.3, which requires Independent Engineering Certifications, should be sufficient because it certifies that the project was adequately constructed. Section 9.3.3 of the PPA already requires the QF to “supply Avista with copies of, any new or additional permits or licenses that may be required for Seller’s operations” and “update the documentation” every five years.⁵⁹ Avista will have access to this information, and if its wishes to conduct a legal analysis of the permits and authorizations, then it is free to do so. Nothing additional is necessary or should be required.

Few lawyers would be willing to provide the legal opinion that Avista may require QF developers to provide under Section 3.2 because it is out of step with current opinion practice. The information requested is too broad in scope and highly factually specific; the opinion must address all of “Seller’s licenses, permits and approvals (including, but not limited to, evidence of compliance with Subpart B, 18 C.F.R. § 292.207, tribal, state and local business licenses, environmental permits, easements, leases and all other required approvals)” and specifically requires a “reasonable independent review” of Seller’s compliance with these documents.⁶⁰ Providing a competent opinion on these matters would likely exceed any one lawyer’s expertise and require consultations with other lawyers. In effect then, Avista would require a QF developer to hire a team of lawyers.

⁵⁸ WAC 480-106-030(4).

⁵⁹ It is unusual for a small PURPA contract to require the QF to update permit information every five years; however, NIPPC-REC are not objecting to that provision.

⁶⁰ Avista PPA § 3.2.

The American Bar Association’s (“ABA’s”) Committee on Legal Opinions has developed guidelines on requiring and providing legal opinions which explicitly recognize that it is inappropriate to require a legal opinion that a party to a contract is in compliance with all necessary permits.⁶¹ The ABA Committee has stated:

An opinion giver should not be asked for an opinion that its client possesses all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the client’s business. Similarly, an opinion giver should not be asked for an opinion that its client is not in violation of any applicable laws or regulations or that its client is not in default under any of the client’s contractual obligations. Neither a materiality exception nor a knowledge limitation makes these opinions appropriate.⁶²

According to the ABA, Avista’s Section 3.2 request is *inappropriate in all circumstances*.

Avista’s request also violates the ABA Committee on Legal Opinions’ guidance that “[t]he benefit of an opinion to the recipient should warrant the time and expense required to prepare it.”⁶³ As indicated above, a QF developer would likely need to hire a team of lawyers to comply, which would necessarily entail significant expense. Further it should be noted that the time involved with finding and hiring lawyers and having lawyers produce the opinion letter would potentially delay the QF’s operations because Section 3.2 does not indicate when Avista might request an opinion letter. Yet a QF would need to provide the opinion letter prior to delivering energy to Avista.⁶⁴ If Avista’s request came close to the expected delivery time, a QF

⁶¹ Committee on Legal Opinions, Section of Business Law of the American Bar Association, *Guidelines for the Preparation of Closing Opinions*, 57 The Business Lawyer 875, 880 (Feb. 2002), available at https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/tribar/materials/20050120000001.pdf (internal citations omitted). Quotations reprinted by permission of the American Bar Association.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Avista PPA § 3.2 (“Upon Avista’s request, prior to the commencement of the first delivery of Net Output to Avista, Seller shall submit to Avista an opinion letter . . .”).

would be forced to scramble to comply and may be unable to do so in time. In short, the time and expense involved for a QF would be quite substantial.

As a general matter, NIPPC-REC find it appropriate to remind the WUTC here that the purpose of standard PURPA contracts is to *reduce* the burden on QF developers.⁶⁵ The OPUC articulated this well in adopting standard contracts for QFs over 100 kW in 2005, stating that:

Standard contracts are designed to eliminate negotiations and to thereby remove transaction costs. In implementing PURPA, FERC recognized that some QF projects would be too small and have projected revenues too minimal to justify investing the upfront costs necessary to engage an attorney on an hourly basis to negotiate a QF power purchase contract. Classifying these costs as “transaction costs,” FERC determined that it was appropriate to eliminate transaction costs for a defined class of very small QFs. Consequently, FERC mandated that QF projects sized at 100 kW or smaller would be eligible for standard contracts. FERC discerned, however, that experience might demonstrate that this threshold was insufficient and delegated authority to state commissions to increase it. As individual states have gained greater familiarity with QF projects, many states have increased the minimal threshold. This Commission has done so in the past and is asked to do so again in this proceeding.

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

⁶⁵ *See, e.g., In Re Rulemaking for Pub. Util. Reg. Policies Act, Obligations of the Util. to Qualifying Facilities, WAC 480-107-105, Docket No. U-161024, NIPPC and REC Comments Regarding Proposed PURPA Rules at 28-29 (Apr. 18, 2017)* (“Standard contracts provide the kind of regulatory certainty that can make or break both new and existing QF projects because of the difficulty negotiating with the utilities. . . . Establishing standard contracts protects QFs negotiating with unequal bargaining power, and reduces negotiation costs imposed upon QFs. Smaller QFs are particularly vulnerable during negotiations because they are less likely to approach negotiations with a robust team and may not be able to sustain long-term negotiations. Thus, one of the goals for standard contracts should be to eliminate these market barriers and reduce transaction costs.”).

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.⁶⁶

The WUTC should follow OPUC's example in furthering standard contract forms that remove barriers to QFs, not that create new ones.

Against these burdens on QFs, the benefit to Avista is, at best, unclear. Section 9.3.3 of Avista's PPA requires the QF to maintain compliance with all necessary permits and licenses for the term of the agreement and to update Avista on its permits and licenses at least every five years after contract execution.⁶⁷ The QF is therefore already obligated to comply and to provide updated documents demonstrating its continued compliance for the duration of the contract. Small QF developers should not need to produce a legal opinion letter which does nothing more than attest that the QF is not actively breaching other terms of the standard PPA.

NIPPC-REC recommend deleting Section 3.2 of Avista's standard PPA to allow Avista to request copies of all necessary permits and licenses. Again, this requirement—that a QF provide copies of documents it is otherwise obligated to obtain—appears consistent with the WUTC's rules.⁶⁸ Avista's current language requiring QFs to provide a legal opinion letter is unduly burdensome and inconsistent with the WUTC's rules. Finding a lawyer willing to provide such an opinion would be challenging; paying them for such an opinion letter would be an unnecessary expense for small QF developers. The WUTC should not approve any requirement for a QF to procure and provide a legal opinion letter.

⁶⁶ OPUC Docket No. UM 1129, Order No. 05-584 at 16.

⁶⁷ Avista PPA § 9.3.3.

⁶⁸ WAC 480-106-030(4).

NIPPC-REC have reviewed PSE’s PPA, and it does not include a requirement to supply PSE with a legal opinion regarding all permits and licenses. PSE’s PPA requires a QF to provide a limited legal opinion about whether the QF has maintained its QF status. However, PSE will only make such a request after the QF has provided documents (not a legal opinion) regarding its QF status and PSE “in its reasonable discretion” is not satisfied with those documents.⁶⁹ Otherwise, PSE’s PPA merely requires the QF to supply PSE with copies of all permits, licenses, and approvals necessary to operate the facility, which is consistent with NIPPC-REC’s proposal for Avista’s PPA.⁷⁰

G. A QF Should Not Be in Default or Subject to Termination if It Fails to Deliver for a Six-Month Period

Avista’s defaults and termination section allows Avista to terminate the PPA if “Seller has failed to deliver output from the Facility for a period of six consecutive calendar months or a total of 180 calendar days in any calendar year.”⁷¹ NIPPC-REC are not opposed in principle to the QF committing to a reasonable minimum delivery (with appropriate cure periods) or a requirement that it be mechanically available. Avista’s PPA term, however, will have the practical impact of allowing Avista to terminate seasonal hydroelectric facilities for expected and normal operations.

Hydroelectric facilities can be the most reliable, consistent and long lived of all renewable generation types. There are some hydroelectric facilities that only operate during certain seasons because they may be “run of the river” and only generate during the rainy season or may only generate when the crops are being irrigated. While seasonal hydro do not generate

⁶⁹ PSE PPA § 10.

⁷⁰ *Id.* § 4.1.

⁷¹ Avista PPA § 17.1(g).

year round, utilities can and do plan upon this power being available in these specific times of the year, and the state of Idaho even pays seasonal hydro-electricity higher rates based on their higher capacity value and reliability.⁷²

Under Avista's contract, there will be significant risk that seasonal hydro facilities will not generate for half the year, and be at risk of termination. For example, Yakima Tieton Irrigation Districts operates two hydroelectric facilities that generate in April through October, with only partial deliveries in the month of April. It would only take a minor two week change in summer irrigation plans for an irrigation district QF to be subject to default (i.e., for not generating in the 180 days of January through April plus November and December). Winter seasonal facilities typically generate electricity in more months than irrigation season facilities, but still often only generate in 7 to 8 months out of the year. While winter season facilities generally plan all maintenance during the dry season, one unplanned forced outage for a period of 30 days would result in a default and the risk of termination. Plus the growing threat of climate change, threatens to reduce snowpack and thus water flows the rest of the year, which could shorten the spring runoff period.

NIPPC-REC recommend that Section 17.1(g) be revised to clarify it does not apply to seasonal projects, such as seasonal or run-of-river hydropower projects.

PSE's PPA does not have a provision stating the utility may terminate the PPA in the case where the QF does not deliver energy for 180 days. Thus, even with the revision for hydroelectric projects, Avista's PPA will have greater termination rights than those provided to the utility in the PSE PPA.

⁷² For example, the Idaho Public Utilities Commission requires the utilities to pay higher rates to seasonal hydro-electric facilities because they provide greater capacity value than many other generation resource types.

H. Transferred Environmental Attributes

NIPPC-REC raised four concerns with Avista regarding how its PPA addressed ownership and transfer of environmental attributes (“EA”).⁷³ Two of those issues were that the PPA: 1) required the QF to transfer EAs to Avista in all years of a renewable rate contract, even though WAC 480-106-050(4)(c) states EAs are transferred only in years there is payment for renewable capacity, which should mean the QF owns the EAs during the other years; and 2) was not clear about what qualified for a renewable rate. NIPPC-REC believe that Avista has satisfactorily addressed these two concerns, and that these issues are no longer in dispute. NIPPC-REC requests that Avista provide written clarification in any comments to confirm our understanding. Unless Avista has a different interpretation, NIPPC-REC are not recommending any further changes to the PPA.

Avista revised the contract to provide that Avista shall own a percentage of the EAs that is based on the percentage of the avoided cost price that be deemed “renewable.”⁷⁴ Simplistically, if the renewable price is calculated based on 75% of a renewable resource and 25% a non-renewable resource, then 75% of the EAs are transferred to Avista. NIPPC-REC believe this is a reasonable manner to implement and interpret WAC 480-106-050(5)(c). It appropriately requires the QF to transfer the EAs to the utility if they are being paid a rate

⁷³ NIPPC-REC raised two other concerns with Avista’s PPA regarding EAs: 1) Avista requires the QF to pay for various registration fees other than those required to meet Washington’s RPS; and 2) The PPA defines the environmental attributes transferred to Avista as compensation for the renewable avoided costs to include more than just the RPS/RECs such that the facility would also be transferring all carbon offsets “attributable to the Facility”. This could inadvertently include the carbon offset value created by upstream production of methane gas by a dairy digester, depending on how “Facility” is defined and described in the completed PPA’s Exhibit A. NIPPC-REC reserve the right to raise these issues in the future, but have elected not to request the Commission resolve them at this time to reduce the number of contested issues that need resolution.

⁷⁴ Avista PPA § 8.1.

calculated on the costs of a renewable resource, but does not require the QF to transfer EAs to the utility for the portion of the rate that is based on a non-renewable resource.

NIPPC-REC request that Avista clarify its proposal that the “the percentage of the applicable Avoided Cost Rates” is based on the avoided cost rates determined at the time of contract execution (or other legally enforceable obligation) and not avoided cost rates in any period after contract execution. The rates that the QF are paid do not vary over time, and any changes in the percentage for future years is irrelevant for the contracted for rates. In other words, if the renewable price in future years results in a different RA sharing (e.g., 50% to the QF and 50% to Avista), that only applies to PPAs executed after that change and not QFs that previously executed PPAs.

I. Security Language

NIPPC-REC raised concerns with Avista’s initial proposal regarding levelization security that would have required the QF to post a substantial security if the PPA could be construed to contain levelized rates. We appreciate that Avista agreed to remove all requirements for QFs to post levelization security. However, there remain references to “security” in the Title to Section 9 and the Exhibit I. As security is no longer required under Avista’s PPA for projects 5 MW and lower, those two references should be removed.

III. CONCLUSION

NIPPC-REC appreciates the opportunity to submit comments and looks forward to further engagement in this proceeding. In conclusion, NIPPC-REC has numerous concerns with the current draft of Avista’s standard PPA, but each concern can be alleviated through adopting NIPPC-REC’s discrete recommendations.

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Respectfully submitted,

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