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 SUR-REPLY 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") have continuing concerns about Avista's revised standard power purchase agreement ("PPA") for small qualifying facilities ("QFs"). NIPPC-REC intend to address these concerns in oral comments at the Washington Utilities and Transportation Commission's (the "WUTC's" or the "Commission's") Open Meeting on September 24, 2020. NIPPC-REC provide these written comments for three purposes: 1) confirm where Avista's revisions have resolved their concerns, in full or in part; 2) respond to Avista's Reply Comments and the Staff Memo; and 3) clarify NIPPC-REC's concerns and proposed solutions on the remaining issues, which pose significant barriers to QF development.

While NIPPC-REC have continuing concerns with both Avista's revisions and, to a much lesser extent, some of WUTC Staff's proposals, NIPPC-REC appreciate the significant time and effort that both Avista and WUTC Staff have dedicated to this proceeding. While this was not a contested proceeding, the issues can be quite contentious. WUTC Staff helped bring the parties together, which allowed Avista and NIPPC-REC to find compromise on many issues. NIPPC-REC had over a dozen remaining issues with Avista's PPA, but because Avista made changes,

NIPPC-REC's initial comments only raised some of them. As a result, NIPPC-REC are confident that a substantial number of potential disputes have been avoided.

Nevertheless, NIPPC-REC are concerned that many of the remaining issues reflect a failure to fully comply with or at least harmonize PPA language with existing mandates from the WUTC and the Federal Energy Regulatory Commission ("FERC"). Avista's proposed language at times violates core principles of the Public Utility Regulatory Policies Act ("PURPA"). If the WUTC does not address these discrepancies, NIPPC-REC worries that there will be a dearth of new QF development and/or a rise in QF-related disputes against Avista.[1] In the hope of avoiding unnecessary disputes, NIPPC-REC offer these final recommendations:

- Remove the so-called "90-110 Performance Band";
- 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; and
- Add reasonable cure periods for missing milestone dates, such as a one-year cure period for missing the commercial operation date.

The most important remaining issue from NIPPC-REC's perspective is the need for a reasonable cure period for the QF's inability to meet the scheduled commercial operation date.[2] All electricity resource development is risky, and cure periods are common. PURPA projects,

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1 NIPPC-REC have used the organizational structure of their original comments, and this argument is in Section E of this document. Despite its placement at the end of the comments, NIPPC-REC wish to highlight the significance of their concern that a QF should have cure periods, especially when the utility itself prevents the QF from being able to deliver its net output.

2 NIPPC-REC understand that there are seven operating Washington PURPA projects for a total of about 40 MW (23 aMW based on 5 years of historic generation) selling power to Avista. Avista, 2020 Electric Integrated Resource Plan at p. 4-9 tbl. 4.6 (2020), available at https://www.myavista.com/-/media/myavista/content-documents/about-us/our-company/irp-documents/2020-electric-irp-final-with-cover.pdf?la=en. All of the QFs selling power to Avista are hydroelectric, biomass, or waste energy. *Id.*

especially in the small size of 5 MW and lower, are often developed by smaller scale companies, individuals, and governmental entities like cities and irrigation districts that typically lack the experience and sophistication of larger independent power producers. Thus, they are more likely to encounter project delays or unforeseen problems, and need reasonable cure periods.

However, an even more important issue related to cure periods is that Avista's draft PPA appears to allow Avista to terminate the contract if Avista's action (or lack of action) prevents the QF from reaching its commercial operation date. The primary concern is interconnection delays, which are often entirely outside of the control of the QF. Instead, the utility they interconnect to (e.g., Avista) controls the timing, speed and quality of the interconnection work, and no QF should risk having their contract terminated because the entity that they are selling power to effectively prevents them from selling power due to delays in the interconnection process properly attributed to the utility itself.

Finally, NIPPC-REC respectfully request that, when reviewing these final recommendations, the WUTC keep in mind the perspective that NIPPC-REC provide, as organizations which have the benefit of decades of collective experience developing QFs across the West.[3]

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[3] REC's members are all QF developers and operators: Arkoosh Hydro; Hydro Plus; Jordan & Susan Whittaker; Koyle Hydro, Inc.; Mink Creek Hydro; Ravenscroft Hydro; ShoRock Hydro, Inc; Snedigar Hydro; Sorenson Engineering; Biomass-One LP; Central Oregon Irrigation District; Conifer Energy Partners LLC; Deschutes Valley Water District; Eagle Point Irrigation District; Earth By Design Hydro; Ecoplexus, Inc.; Farmers Irrigation District; Frontier Technology; ICP US Hydro Holdings, Inc.; Lacomb Irrigation District; Middle Fork Irrigation District; Natel Energy; Neighborhood Power Corporation; North Unit Irrigation District; Obsidian Renewables, LLC;; Santiam Water Control District; Sulus Solar; Surprise Valley Electrification Corp.; Swalley Irrigation District; Three Sisters Irrigation District; Cottonwood Hydro; Draper Irrigation District; Monarch Renewable Energy, LLC; Wasatch Integrated Waste Management District;

II. COMMENTS

To facilitate review, NIPPC-REC maintain the same major subject headings used in their comments submitted on August 17, 2020 comments. NIPPC-REC note however that this order does not necessarily reflect the comparative importance of the outstanding issues.

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

NIPPC-REC recommend, and Staff agrees, that Avista should remove all references to the so-called "90-110 performance band."[4] The provision is coined the "90-110 Performance Band" because the QF is penalized if it delivers less than 90 percent of its monthly estimate of net output or if it delivers in excess of 110 percent of its monthly estimate of net output.[5] In either case, Avista proposes to pay the QF less than the avoided cost price established at the time of contracting.[6] NIPPC-REC appreciate Avista's agreement to the limited change that eliminates the applicability of the 90-110 Performance Band to wind and solar QFs, but it is NIPPC-REC's recommendation that *no* QF be subject to this unnecessary and punitive measure, or at least no QF that would be eligible for the standard contract, i.e., all QFs smaller than 5 MW.

Avista claims that the 90-110 Performance Band is necessary to "incentivize QFs . . . to perform in a manner that is consistent with the avoided cost rate that [they] are paid."[7]

Meyers Falls Hydroelectric Project; Sheep Creek Hydro, Inc.; Yakima-Tieton Irrigation District; TLS Capital; and Shoshone Irrigation District.

NIPPC's members include a mix of QF and non-QF developers: Calpine Corp.; Constellation Exelon; Cycle; EASE LLC; Ecoplexus; EDF Renewable Energy; EDP Renewables; Geronimo Energy; Invenergy LLC; Morgan Stanley; NewSun Energy; Obsidian Renewables; Perennial Power Holdings, Inc.; Shell Energy North America; Sierra Pacific Industries; TransAlta Energy Marketing, Inc.; and Tyr Energy.

4 Staff Open Meeting Memo at 2 (Sept. 24, 2020).

5 Joint Comments of NIPPC-REC at 4 (Aug. 17, 2020).

6 Staff Open Meeting Memo at 2 (Sept. 24, 2020).

7 Avista Reply Comments at 4.

NIPPC-REC note that, contrary to Avista's assertions that the provision is needed, no regional state except Idaho has adopted such a measure, and the measure appears to violate FERC mandates on PURPA implementation. Finally, given that Avista has already agreed to exempt QFs smaller than 3 MW, there is no reasoned explanation for treating QFs of between 3 MW and 5 MW differently. This Commission has already determined that 5 megawatts is the threshold at which QFs that size and smaller should be subject to a more streamlined process. As such, this provision should at a minimum simply be removed from the standard contract.

1. Idaho is the Only Regional State that Has Stunted QF Development by Adopting the 90-110 Performance Band

While the Idaho Public Utility Commission adopted a 90-110 Performance Band in a split decision in 2004, experience on the ground demonstrates that it and other harmful Idaho QF policies have significantly deterred QF development. Avista points to just seven PPAs executed with Idaho QFs since 2004, but many of these PPAs were for QFs renewing a prior contract.[8]

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[8] *Id.* at 5 n15 (citing as examples "New Energy One, LLC (IPC-E-10-16), Yellowstone Power, Inc. (IPC-E-10-22), MC6 Hydro, LLC (IPC-E-18-09), *Pico Energy, LLC (IPC-E-19-39), the College of Southern Idaho for Pristine Springs 1 and Pristine Springs 3 (IPC-E-20-04 and IPC-E-20-05, respectively), and Lateral 10 Ventures, LLC (IPC-E-20-03)*" (emphasis added)); *but see In Re Idaho Power Application for Energy Sales Agreement with Pico Energy, LLC*, Idaho Docket No. IPC-E-19-39, Application at 2 (Dec. 16, 2019); *In re Idaho Power Company's Application for Approval or Rejection of its Energy Sales Agreement with College of Southern Idaho for the Sale and Purchase of Electric Energy from the Pristine Springs #1 Hydro Project*, Idaho Docket No. IPC-E-20-04, Order No. 34624 at 4-5 (Apr. 16, 2020); *In Re Idaho Power Company's Application for Approval or Rejection of its Energy Sales Agreement with College of Southern Idaho for the Sale and Purchase of Electric Energy from the Pristine Springs #3 Hydro Project*, Idaho Docket No. IPC-E-20-05, Order No. 34625 at 5 (Apr. 16, 2020); *In Re Idaho Power's Application for Approval or Rejection of an Energy Sales Agreement with Lateral 10 Ventures, LLC for the Sale and Purchase of Electric Energy from the Lateral #10 Hydro Project*, Idaho Docket No. IPC-E-20-03, Order. No. 34629 at 2 (Apr. 17, 2020) (all referencing existing contracts).
Of the new QFs, at least one QF objected specifically to the 90-110 Performance Band contract provisions but lost. *See In Re Application of Idaho Power Company for Approval or Rejection of an Energy Sales Agreement with MC6 Hydro LLC, for the Sale*

Several QFs in question were developed years if not decades before the 90-110 Performance Band was adopted;[9] the fact that operating[10] projects are paid less than full avoided cost prices is cold comfort for developers interested in bringing new clean energy facilities online.

Similarly, the one Oregon QF that Avista cites is also an established QF: the City of Cove, OR began operating its facility no later than the mid-1980s.[11] NIPPC-REC are unaware of

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and Purchase of Electric Energy from the MC6 Hydro Project, Idaho Docket No. IPC-E-18-09, Order No. 34106 at 2 (July 12, 2018).

9 The Pristine Springs 1, Pristine Springs 3, and Lateral 10 Ventures, LLC facilities have all existed since prior to Idaho's 2004 adoption of the 90-110 Performance Band. *See In Re Idaho Power Application for Approval of Firm Energy Sales Agreement for the Sale and Purchase of Electric Energy between Idaho Power Company and Pristine Springs, Inc.*, Idaho Docket No. IPC-E-05-11, Application at 2 (Mar. 4, 2005) (referencing a prior PPA signed in 1994); *In Re Idaho Power Application for Approval of Firm Energy Sales Agreement for the Sale and Purchase of Electric Energy between Idaho Power Company and Pristine Springs, Inc. for Pristine Springs #3*, Idaho Docket No. IPC-E-05-12, Application at 2 (Mar. 4, 2005) (referencing a prior PPA signed in 2003); *In Re Idaho Power's Application for Approval or Rejection of an Energy Sales Agreement with Lateral 10 Ventures, LLC for the Sale and Purchase of Electric Energy from the Lateral #10 Hydro Project*, Idaho Docket No. IPC-E-20-03, Order. No. 34629 at 2 (Apr. 17, 2020) (referencing a prior PPA signed in 1984).

10 In fact, one of the seven examples Avista cites is *not* operating. *In Re Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Yellowstone Power, Inc., for the Sale and Purchase of Electric Energy*, Idaho Docket No. IPC-E-10-22, Order No. 32601 at 1 (July 31, 2012). There was a dispute over whether a delay to the QF's operations was caused by a force majeure event. NIPPC-REC discuss this issue later in these comments, because Avista's PPA appears to prevent a QF from asserting Force Majeure regarding a delay to commercial operations.

11 *See*, *e.g.*, *See*, *e.g.*, *City of Cove, OR Mill Creek Project,* FERC Docket No. P-5390-000, Operation Report for April 1985 – June 1988 (Aug. 8, 1988). This was the earliest report for the City of Cove QF available in FERC's records. News reports suggest the facility was upgraded in 1983 and an earlier installation operated prior to the 1950s. *See* Dick Mason, *Power Outage: Future of Cove hydro plant cloudy*, The La Grande Observer (Mar. 30, 2017, updated Sept. 10, 2019), https://www.lagrandeobserver.com/archive/power-outage-future-of-cove-hydro-plant-cloudy/article_2eb693e9-bce5-5f73-9fed-6f30ffdc5b65.html. Notably, this article highlights the pressure that was on the QF to renew its contract with Idaho Power, because otherwise the plant could be shut down, at significant economic cost to the city. *Id.* Also notably, the City of Cove negotiated a *reduced* penalty under the 90-110 Performance Band when it renewed its contract with Idaho Power. *In re Joint Petition of Avista and the City of Cove, Oregon to Approve Power Purchase Agreement*, Idaho Case

that QF's specific circumstances. However, NIPPC-REC note that the City of Cove is located in the service territory of Oregon Trail Electric Cooperative, and almost all electric cooperatives have lower avoided cost rates than investor owned utilities. Additionally, the state utility commission does not implement PURPA for publicly owned utilities, such as Oregon Trail Electric Cooperative, and therefore Avista's suggestion that the City of Cove sought Idaho for favorable policies like the 90-110 Performance Band is misplaced. Furthermore, to the extent the City of Cove may have been attracted to Idaho PURPA policies, the only potentially favorable hydro policies that might have applied to it are 20-year contract terms and, depending on resource type, more favorable prices than other states, including Washington.[12] Notably, Avista has not advocated to import those potentially favorable aspects of Idaho's implementation of PURPA along with its proposed use of the 90-110 Performance Band. The few success cases of continued and new QF operations in Idaho do not demonstrate that the 90-110 Performance Band is a harmless policy that the WUTC should adopt. If anything, the limited number of data points underscores NIPPC-REC's argument that the 90-110 Performance Band is harmful to the development of clean and competitively priced power, and the WUTC should not permit Avista to implement it.

2. The 90-110 Performance Band Appears to Violate FERC's Mandate to Offer QFs the Option of Receiving Avoided Cost Prices Fixed at the Time of Contract Execution

NIPPC-REC maintain that the 90-110 Performance Band likely violates FERC's rules and the WUTC's own regulations implementing those rules. NIPPC-REC noted in prior

No. AVU-E-18-05, Order No. 34177 at 2 (Oct. 25, 2018) (providing a potential penalty charge to the QF of 85% of market prices rather than 100%).

[12] Joint Comments of NIPPC-REC at 7 (Aug. 17, 2020).

comments that FERC rejected a proposal to limit fixed-price avoided cost payments to QFs who deliver firm power.[13] Avista proposes something conceptually similar here.

Avista claims the 90-110 Performance Band does not prevent QFs from earning firm power prices, since they *might* generate between 90 and 110% of their monthly estimate. Avista is concerned that QFs may be paid for something which they do not provide.[14] What Avista misunderstands is that QFs have an adequate "carrot" to deliver and there is no need for a "stick." QFs are only paid *if they deliver.* Avista will never pay for energy from a QF that it does not receive. As such, the 90-110 Performance Band is an unnecessary penalty. Further, NIPPC-REC agree with Staff that the potential harm of small QFs failing to deliver represents an insignificant impact relative to Avista's operations.[15]

NIPPC-REC remind the Commission that PSE's PPA approved by the WUTC does not contain a 90-110 Performance Band or any other "firmness" requirement. Instead, it contains a forecast of the expected annual net output that the QF expects to supply PSE,[16] which is similar to NIPPC-REC's proposal for Avista to replace the 90-110 Performance Band with a non-punitive annual forecasting requirement instead.[17]

The Commission should reject Avista's proposal to pay QFs less than the full avoided cost prices to which they are entitled. To the extent Avista remains concerned about protecting its ratepayers from capacity "premiums," those concerns should be addressed in the proceedings

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13 *Id.* at 4-5.

14 Avista Reply Comments at 7 (Sept. 4, 2020) ("provide the product for which they are being paid to provide").

15 Staff Open Meeting Memo at 3 (Sept. 24, 2020) ("Avista's system resources amount to around 1,100 MW, so a QF project qualifying for a standard contract would represent less than 1 percent of Avista's resources.").

16 Puget Sound Energy Schedule 91 Power Purchase Agreement at Exhibit D.

17 Joint Comments of NIPPC-REC at 11-12 (Aug. 17, 2020).

to set avoided cost prices and not in this proceeding. In fact, the Commission rejected Avista's arguments on capacity payments in the recent PURPA rulemaking and Avista should not be allowed to achieve, in part, its efforts to pay QFs for only a portion of the capacity value that they provide. A standard contract should not assume that the WUTC approved inaccurate avoided cost prices for Avista.

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

NIPPC-REC appreciate the revisions to Avista's PPA which resolved this issue.

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

NIPPC-REC recommend, and Staff agrees, that Avista's standard contract needs clarification on the procedures for delivering and purchasing energy from off-system QFs. NIPPC-REC identify three primary concerns: 1) lack of clarity on the treatment of sales; 2) reduced payments for energy received by Avista that may be characterized as make-up power from transmission losses; and 3) discrepancies between Avista's proposed hourly scheduling mechanics and FERC's mandate for transmission providers. Staff supports NIPPC-REC on the first item and proposes that the WUTC direct Avista to develop an off-system sales addendum similar to the one provided by NIPPC-REC. Avista disagrees on all three items.

1. The PPA Needs Reasonable Provisions for Monthly Settlement of Imbalance Energy

NIPPC-REC recommend, and Staff agrees, that an addendum for off-system sales should be added to Avista's standard contract. As we explained in our prior comments, clarity is needed because the QF must schedule and deliver its net output to Avista in whole MW blocks with increments of imbalance energy, and therefore, the QFs' net output in any hour will not match the whole-MW block of energy delivered to Avista in that hour. Therefore, any reasonable off-

system PPA must include reasonable provisions that allow the under deliveries and over deliveries of net output to settle or "balance out" over the course of the month. The exhibit proposed by NIPPC-REC is based on the addendum that PacifiCorp has used for many years in its PURPA contracts in Oregon and elsewhere, and it provides the unambiguous clarity needed to avoid confusion and disputes on this complicated issue.

Avista asserts this clarity is unnecessary, because Avista has language contained in the definition of "Surplus Energy" that achieves the same result.[18] Avista's proposed definition of "Surplus Energy" is "(i) Net Output during any month which exceeds 110 percent of the Monthly Net Output Estimate for the corresponding month; and (ii) *any electric energy that is scheduled by Seller and delivered to the Point of Delivery in any month in excess of the Net Output generated by the Facility in such month*."[19] It is helpful that Avista has clarified through its comments that it intends for this language to clarify that Avista will pay the QF the avoided cost rates in the contract for all monthly net output so long as the QF settles its under and over deliveries over the course of the month, and it will pay the lower surplus price for any excess energy. However, this very limited explanation in the definition of Surplus Energy is far from conclusive as to how the issue will be treated and implemented. Given that counsel for NIPPC-REC were still unclear on Avista's position on this point after reviewing the final PPA submitted for approval, it is not reasonable to expect the average small QF developer or owner to fully grasp how this issue will be treated from the limited language on the point proposed by Avista.

In contrast, NIPPC-REC have proposed a detailed exhibit that clearly explains how the monthly imbalance settlement process will work. Avista has identified no problems with that

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18 Avista Reply Comments at 8-9 (Sept. 4, 2020).

19 Avista PPA § 1.46.

exhibit, and NIPPC-REC therefore maintain an off-system sales addendum would clarify this issue and would help avoid future disputes.

2. Reduced Payment Due to Transmission Losses

NIPPC-REC recommend changes to Avista's definition of Losses, which is incorporated into the definition of Net Output because the definition unreasonably compensates QFs for less than their full net output. Under the monthly imbalance settlement procedures that all parties appear to agree are reasonable, an off-system QF will produce net output, the interconnecting utility will transmit that energy equal to that amount of net output to Avista, and Avista will receive the energy equal to that amount of net output. Avista is obligated to pay for the QF's net output, regardless of whether the energy physically delivered to Avista could be traceable to the electrons energized by the QF at the point of interconnection.[20] The contract is legal, not physical. In fact, WUTC regulations explicitly require Avista to purchase the energy and capacity provided as if the QF were *directly* interconnected to Avista's system.[21] Nevertheless, Avista claims that it need not pay for any "non-QF energy," which it proposes to take for free; as support, Avista quotes its own contract language defining the Losses deducted from the measure of Net Output as including the losses between the point of interconnection and the point of

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20 As a matter of physics, the actual net output injected into the grid at the QF's will follow the path of least resistance on the grid and, likely, none of that electric energy would be physically delivered to Avista's system. Instead, as is the case with all transmission transactions, the transmission provider delivers the equivalent amount of energy scheduled by the QF to Avista. On a monthly basis, the QF would aim to have the scheduled and delivered energy equal the metered amount of net output at the point of interconnection, i.e., its net output.

21 WAC 480-106-020(4) ("Any utility to which energy or capacity generated by a qualifying facility and transmitted to such utility over the facilities of another utility shall purchase the energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to the purchasing utility.").

delivery to Avista's system.[22] The WUTC should not adopt this impossible standard, which violates WUTC regulations.

Staff appears to be concerned that there may be line losses such that Avista is asked to pay for more energy than it receives.[23] This appears to be a misunderstanding. Avista's PPA states that Avista will pay only for what is delivered.[24] NIPPC-REC do not object to that requirement or argue that Avista should pay for electric energy it does not receive. NIPPC-REC refined the "Losses" definition; they did not delete it.[25] Instead, the issue is about whether Avista should be able to reduce the rate for assumed transmission losses, when the transmission provided ensures that the same amount of power that is generated is delivered without any reduction in the amount that Avista receives. In other words, the issue is whether Avista should be able to reduce what it pays by assuming there are losses, when Avista nevertheless receives the amount of energy injected at the point of interconnection (i.e., the net output) because such losses that might exist along the transmission path are replaced by the transmission provider, much in the same manner as imbalance energy is supplied by the transmission provider to facilitate the transmission of the entire net output to Avista. NIPPC-REC maintain the answer is an unequivocal no.

Further, Avista's reliance on the FERC case of *PáTu v. Portland General Electric* is misplaced.[26] The case (which NIPPC-REC counsel litigated) was a dispute over scheduling, not

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22 Avista Reply Comments at 10 (Sept. 4, 2020); Avista PPA § 1.33 (defining Net Output).

23 Staff Open Meeting Memo attach. at 1 (Sept. 24, 2020).

24 Avista PPA § 7.3 (stating that Avista will pay only for what is delivered).

25 Joint Comments of NIPPC-REC attach. A § 1.26 (Aug. 17, 2020) (changing the definition of losses to reflect physical losses that occur between the facility and the interconnection with the transmitting utility and to exclude any un-measurable changes between QF and non-QF energy that occur during transmission).

26 Avista Reply Comments at 12 (Sept. 4, 2020).

losses. The PPA provision in the *PáTu* case on which Avista hangs its hat was not disputed; therefore, the case Avista tried to discuss informally with NIPPC-REC continues to be irrelevant. On the other hand, the numerous cases cited by NIPPC-REC directly address the question of whether net output is measured at the point of interconnection to the transmitting utility's system or at the point of delivery to Avista's system.[27]

Phrased simply, Avista should not take energy the QF pays the transmission provider delivered in full, and then refuse to compensate the QF for the delivery of such net output at the full avoided cost prices in the contract. The WUTC should reject Avista's language that would allow such an outcome.

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

Avista goes on at length regarding how NIPPC-REC do not understand how scheduling works and that schedules must be made 90 minutes in advance of the hour and apparently only on an hourly basis.[28] NIPPC-REC disagree that they and their members, some of whom sell power as off-system QFs, do not understand how scheduling works.

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27 Joint Comments of NIPPC-REC at 20 (Aug. 17, 2020) (citing *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)).

28 Avista Reply Comments at 13-14 (Sept. 4, 2020).

A casual review of FERC's Order No. 764 (cited in NIPPC-REC's comments) demonstrates that FERC found that all transmission customers, including QFs, must be provided the option to deliver in 15-minute increments to reduce unreasonable imbalance charges.[29] In that order, FERC addressed the "the hourly scheduling protocols" reflected in the Open Access Transmission Tariffs in effect at the time, which are the same procedures proposed for use by Avista in its standard PPA.[30] FERC found that those hourly scheduling protocols "reflect historical practices associated with operation of conventional generating resources that are relatively predictable and controllable when compared to [variable energy resources],"[31] and the "hourly scheduling protocols can expose transmission customers to excessive or unduly discriminatory generator imbalance charges."[32] Thus, FERC expressly required that *all* transmission customers be entitled to schedule in 15-minute increments as opposed to locking in the schedule for a full hour, which allows for more accurate scheduling and lower imbalance charges to the generator.[33] Avista fails to explain how its proposed language – which locks in an hourly scheduling protocol for the life of the PPA – is consistent with this FERC order, or even respond or acknowledge that 15-minute scheduling exists.[34] Avista may well prefer to receive hourly blocks of power without any updates to the schedule 90 minutes before the hour, but such

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29 Joint Comments of NIPPC-REC at 21 (Aug. 17, 2020); *Integration of Variable Energy Resources*, Order No. 764, 139 FERC ¶ 61,246 at PP. 20, 22 (July 13, 2012).

30 *Id.* at P. 20.

31 *Id.*

32 *Id.* at P. 22.

33 *See id.* at PP. 20, 91 ("[Providing] all transmission customers the option of using more frequent transmission scheduling intervals within each operating hour, at 15-minute intervals").

34 Avista Reply Comments at 14 (Sept. 4, 2020).

arguments were made unsuccessfully to FERC and lost in Order No. 764.[35] Avista is essentially trying to defeat the use of Order No. 764 by QFs through use of draconian scheduling provisions in its QF PPA.

Similarly, Staff asserts in its attachment that NIPPC-REC edits should be rejected, stating: "Reject the arguments of NIPPC/REC because the language already allows the parties to revisit scheduling if regional changes occur."[36] The problem with this approach is that the scheduling requirements in Avista's PPA are already inconsistent with 15-minute scheduling mandated by FERC. In addition, this leaves the QF developer, which has no negotiating leverage in a difficult position, and will increase the chance of the issue being litigated before the WUTC.

The NIPPC-REC language is the better choice because it simply allows for the QF to use the same types of scheduling mechanics used by others in the industry during the term of the PPA, and resolves the issue now rather than defers it to a future dispute.

4. Term of Transmission Agreement

This issue has been resolved. Avista's PPA is unclear on whether roll-over rights would suffice, and Avista has since clarified that they do suffice. NIPPC-REC appreciate this necessary clarification. NIPPC-REC maintain that it would be better if the PPA itself clarified this question, however, NIPPC-REC are willing to accept Avista's comments as sufficient.

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35 *E.g.*, Order No. 764, 139 FERC ¶ 61,246 at P. 69 n.64 (July 13, 2012) (listing Avista as one of the utilities who argued (unsuccessfully) for FERC to allow "regional-specific scheduling practices" to evolve on their own).

36 Staff Open Meeting Memo attach. at 1 (Sept. 24, 2020).

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

NIPPC-REC recommend that Avista clarify and revise its PPA to allow facility changes, regardless of whether they change the facility nameplate capacity. Under Avista's PPA, Avista could terminate the PPA on the basis of these normal facility changes.

- First, Avista might argue a change in equipment type is an unacceptable "change[to] the primary energy source."[37] Staff agrees with NIPPC-REC that this should be clarified as a non-issue.
- Second, Avista prohibits any change in facility size, which might occur (either as increases or decreases) if the new equipment was more efficient. Staff agrees with NIPPC-REC that facility upgrades should be allowed.
- Third, Staff supports facility expansions only if the final capacity size does not exceed the standard contract threshold. NIPPC-REC recommend that a QF whose facility changes to exceed the standard contract threshold be allowed to retain its contract and have the contract prices apply for generation up to the standard contract threshold, with any excess generation paid at a separate negotiated price. The 5 MW limit should not have the effect of discouraging QFs from upgrading or increasing the size of their facilities and NIPPC-REC's recommendation would accomplish this goal. Further, without these changes, Avista's standard contract creates an uneconomic disincentive for QFs to either delay repairs or to install less efficient technology.

[37] Avista PPA § 11.8.

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

There are two sub-issues related to normal changes that typically occur in the development process. First, Avista requires QFs to make an "initial capacity determination." NIPPC-REC ask that this be clarified to be made at commercial operations instead of during development or at contract execution. As discussed further in the next section, QFs sometimes need to make changes to facility size, including during construction. Staff asserts that NIPPC-REC's request can be accomplished in the project milestones, but NIPPC-REC seek clarity now to reduce the burden on small QFs in negotiating their contracts.

Second, NIPPC-REC recommend, and Staff agrees, that Avista needs to clarify the PPA prohibition against "changes to the primary energy source."[38] The PPA currently allows Avista to terminate if a QF makes such a change, and it is unclear what Avista considers such a change. NIPPC-REC are concerned that Avista may terminate a PPA if a solar QF changes its solar panel equipment, even if it has no effect on facility size or operations. NIPPC-REC are particularly concerned that this could occur for new QFs who plan to use one type of equipment and find during construction that other panels are more available or more economic to purchase. Avista did not oppose this issue in its comments. However, Avista rejected NIPPC-REC's proposed PPA revisions and instead say it "is prepared to discuss changes."[39] The WUTC should order Avista to fix this issue before the standard contract is finalized.[40]

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38 *Id.*

39 Avista Reply Comments at 16 (Sept. 4, 2020).

40 *Id.* at 1-22 (not discussing this issue).

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

NIPPC-REC recommend allowing QFs to make normal changes that increase or decrease facility size. NIPPC-REC do not propose that QFs receive the contracted-for prices for incremental generation above the standard contract threshold; instead, NIPPC-REC recommend that the QF and Avista negotiate avoided cost rates for the incremental generation beyond the standard contract limit. Practically speaking, the two differences between Avista and NIPPC-REC's proposals are: 1) whether a QF is forced to renegotiate its PPA after making ordinary changes to its facility; and 2) whether generation attributable to the QF's original size is paid for at the contracted-for avoided cost prices. NIPPC-REC maintain that the first is an unnecessary burden on small QFs, and the second is an uneconomic disincentive to facility changes.

Avista's proposal to terminate a PPA, if a QF makes any change, overlooks the practical realities of both building and maintaining QF facilities. There can be reasonable changes over the course of the project's life that should be allowed. For example, in Oregon, Farmers Irrigation District replaced one turbine, with two separate turbines that reduced the overall nameplate capacity of the facility, but was forecast to have a 12% increase in its prior net output.[41] This is exactly the type of project that PURPA was passed to encourage and would not occur but for supportive state PURPA policies allowing project net output changes.

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[41] *Farmers Irrigation District new hydro system boosts clean energy generation*, Energy Trust (Oct. 20, 2015), https://www.energytrust.org/2015/10/20/farmers-irrigation-district-new-hydro-system-boosts-clean-energy-generation/; Patrick Mulvihill, *River Power: Farmers Irrigation District installs new 3-MW hydro turbine*, Hood River News (Jul. 27, 2020), available at https://www.hoodrivernews.com/news/river-power-farmers-irrigation-district-installs-new-3-mw-hydro-turbine/article_5ca5de7f-c0a1-51de-aaee-5bfb4c1404b5.html.

The construction process sometimes requires modifications, which can affect facility size. NIPPC-REC note, for example, that a few QFs recently had to change the proposed panels for their solar facility because, after a prolonged dispute with the utility, the original panels were no longer available on the market. Similarly, maintaining existing QFs can require modifications, which can be unexpected due to equipment breakdown. Avista's prohibition on any increase in project size would disincentivize QFs from replacing broken equipment with newer, more efficient technology. Further, if the equipment being replaced is no longer available on the market, then the QF would effectively be unable to repair its facility without Avista terminating the PPA.

Staff supports NIPPC-REC's recommendations to allow facility changes but only so long as the QF's new size does not exceed the standard contract threshold. Under this proposal, if the QF's new size exceeds the standard contract eligibility limit (here an increase above 5 MWs), then when the QF negotiates a new contract it will be ineligible for a new standard contract. The project (now above 5 MWs), will not be eligible for the standard rates but will need to negotiate the new prices. However, terminating the PPA in this instance would only delay or discourage economic facility maintenance and improvements.

Avista misunderstands NIPPC-REC as proposing to let QFs game the system by making facility changes rather than investing in a separate facility. Avista conflates these two possibilities as inextricably linked when they are not. Avista's position is that there is no difference between a businessman with a burnt-out incandescent office light buying an LED and

buying a new office building.[42] That is simply incorrect. Avista should not terminate a PPA because a QF makes an economic business decision about how to keep the lights on, as it were.

Further, Avista's concerns about how these upgrades might intersect with avoided cost prices or the interconnection process are without merit. Avista asserts that a QF should not be entitled to the same avoided cost prices if it upgrades its facility; in effect, Avista seeks to deny a QF its fixed avoided cost prices and WUTC-approved contract term. NIPPC-REC agree that upgrades that exceed the standard pricing threshold should be paid a negotiated contract price. But upgrades that do not result in an increase in capacity above that threshold should be paid at the contracted-for price.

Similarly, Avista's concerns about interconnection are without merit. Avista claims that a QF might decide to obtain interconnection service for 5 MW even if it is only a 1 MW project. NIPPC-REC note that any QF that chose to do so would likely pay a substantially higher interconnection cost. Interconnection costs are not charged on an as-used basis; to reserve 5 MW, a QF must pay to construct the facilities necessary for the utility to accept 5 MW of power. Further, a 5-MW interconnection is likely to require interconnection facilities and network upgrades that a 1 MW could avoid. Avista ignores these economics. Further, Avista does not identify any actual harm from a QF reserving additional space, because there is none.[43] If a QF wants to pay more to have a 5 MW interconnection to reserve space for a future expansion, then that should be encouraged rather than discouraged.

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42 Incidentally, incandescent light bulbs have become less available in stores due to the ban on manufacturing them in the US. *See, e.g.,* Elspeth Dehnert, *Goodbye and Good Riddance to Inefficient Incandescent Lightbulbs*, E&E News ClimateWire (Jan. 24, 2014), https://www.scientificamerican.com/article/goodbye-and-good-riddance-to-inefficient-incandescent-lightbulbs/. The light bulb is therefore also a case in point about old technology being less available, potentially to the point of being uneconomic to buy.

43 Avista Reply Comments at 16 (Sept. 4, 2020).

The WUTC should adopt NIPPC-REC's recommendations to revise the PPA to allow facility changes (either increases or decreases). If a QF changes its size above the standard contract threshold, the PPA should provide for Avista and the QF to negotiate new avoided cost rates specifically for the incremental generation. A QF should receive its contracted-for avoided cost rates for all generation up to the standard contract threshold, regardless of its initial size.

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

Staff agrees with NIPPC-REC's recommendations that Avista should: 1) clarify when a QF has a cure period; and 2) clarify that a QF is not in default or breach if the failure is caused by Avista or an event of Force Majeure.[44] However, Staff's proposal has a major loop hole, which is that Staff recommends that "if Seller fails to achieve 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 without an opportunity for cure."[45] Thus, there would be *no* cure period if the scheduled commercial operation date is three years from the effective date, which is not uncommon in QF contracts. NIPPC-REC additionally recommend that a QF that fails to achieve its scheduled commercial operation date receive a one-year cure period, even if that cure period extends into the fourth contract year. A cure period would not extend the contract term in violation of WUTC regulations, as Avista alleges; on the contrary, WUTC regulations require Avista to provide the cure period.

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44 Joint Comments of NIPPC-REC at 28-31; Staff Open Meeting Memo at 4 (Sept. 24, 2020).

45 Staff Open Meeting Memo at 4 (Sept. 24, 2020).

1. The WUTC Should Direct Avista to Clarify When Cure Periods Exist

Although Avista did not accept NIPPC-REC's proposed contract changes to clarify when cure periods apply, Avista did not express any opposition to the recommendation either.[46] NIPPC-REC and Staff support this change.[47] NIPPC-REC reserve their right to address opposition from Avista, if there is any.

2. The WUTC Should Direct Avista to Clarify that a QF is Not in Default if a Deadline is Missed due to Avista or an Event of Force Majeure

NIPPC-REC recommend that the standard contract should clarify that a QF is not in default if a deadline is missed due to an Avista-caused delay or an Event of Force Majeure.[48] Avista voices no substantive opposition but simply argues these changes are unnecessary.[49] If only for the avoidance of doubt, Avista should therefore adopt the proposed changes, which by according to Avista's comments are consistent with the its proposed implementation of the existing contract language. Despite Avista's statements that the changes are unnecessary, the proposed changes are meaningful to QFs who may need to rely upon them.

a. QFs Should Not Be Liable for Delays Caused by Avista

NIPPC-REC and Staff propose to clarify that QFs are not in default when Avista causes them to miss a contract milestone. Avista claims the reference is unnecessary because, in Avista's own words, "[t]here are not many ways that Avista could cause a QF to miss a milestone."[50] One of those ways could be in the interconnection process, which Avista asserts is subject to its own set of rules.

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46 Avista Reply Comments at 18 (Sept. 4, 2020); *see also* Joint Comments of NIPPC-REC at 30 (Aug. 17, 2020).
47 Joint Comments of NIPPC-REC at 30; Staff Open Meeting Memo at 4 (Sept. 24, 2020).
48 Joint Comments of NIPPC-REC at 30; Staff Open Meeting Memo at 4 (Sept. 24, 2020).
49 Avista Reply Comments at 19-20 (Sept. 4, 2020).
50 Avista Reply Comments at 20 (Sept. 4, 2020).

When reviewing this issue, the WUTC should consider how the issue would likely occur. A QF has an interconnection agreement whose deadlines Avista fails to meet, and, as a result, the QF fails to meet its scheduled commercial operation date in its PPA. Even though Avista's failures prevent the QF from reaching its PPA milestones, Avista could argue that it is entitled to terminate its proposed PPA. NIPPC-REC disagree that Avista would be entitled to termination and reserve their rights to oppose such a claim if it ever occurs. For one thing, such an assertion would be counter to basic contract law.[51] However, NIPPC-REC would expect that Avista would likely argue that the Commission-approved standard contract trumps normal contract law by unambiguously providing for a different result, thus requiring the QF to litigate whether its PPA can be terminated when Avista prevents the QF from delivering its net output.

This hypothetical has in fact occurred. For example, the same fact pattern occurred in an ongoing dispute against Portland General Electric Company, who caused roughly six months of delay to a QF's in-service date in the interconnection process, threatened to terminate the PPA, and charged the QF damages for the delay to commercial operations.[52] Avista's comments suggest the WUTC should handle such a dispute if and when it arises; NIPPC-REC recommend that the WUTC avoid the unnecessary dispute by clarifying the contract now.[53] Any clarification that avoids a probable and avoidable dispute is not unnecessary, as Avista claims.

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51 Walter H.E. Jaeger, Williston on Contracts §§ 295, 677 (3rd ed. 1957) ("It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure."); *see also, e.g., Lakehill Invs. v. Rushforth Constr. Co.* (Wash. App. 2020) (quoting the above).

52 *St. Louis Solar v. PGE*, Oregon Docket No. UM 2057, Complaint at 1-5 (Feb. 3, 2020); *see also* Oregon Docket No. UM 2057, Answer, Affirmative Defenses, and Counterclaim at PP. 452-453 (May 26, 2020) (asserting PGE was entitled to collect damages because, according to PGE, the QF breached the contract).

53 *Compare* Avista Reply Comments at 20 (Sept. 4, 2020) (asserting the language is unnecessary and NIPPC-REC can "seek an appropriate remedy" at a later time if

b. Avista Should Clarify When Force Majeure Applies

NIPPC-REC and Staff propose to add a reference to Force Majeure to Section 4.2 of Avista's proposed contract. That Section currently states that Avista may terminate for any QF failure to meet a contract milestone by providing written notice. Avista claims the reference is unnecessary because a different Section exists, but the reference will harmonize the two sections. Some developers, especially of small QF facilities, are often unsophisticated and may lack the resources to hire attorneys to interpret the standard contract when problems arise. Since the very purpose of a standard contract is to reduce the burden on small QF developers, the WUTC should approve this simple and discrete clarification.

3. The WUTC Should Prohibit Avista from Terminating a Contract During a Cure Period Even if the Cure Period Extends into the Fourth Contract Year

NIPPC-REC recommend that the WUTC adopt the one-year cure period for missing commercial operations which is currently used in PURPA PPAs for small QFs in Oregon.[54] 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 failure to timely meet commercial operations.[56] This is a reasonable amount of

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necessary), *with* Joint Comments of NIPPC-REC at 34 (Aug. 17, 2020) (discussing the purpose of standard contracts as reducing the burden on QF developers).

54 Joint Comments of NIPPC-REC at 29-30 (Aug. 17, 2020).

55 OAR 860-029-0120(4)("A qualifying facility may specify a scheduled commercial on-line date consistent with the following: (a) Anytime within three years from the date of agreement execution; (b) Anytime later than three years after the date of agreement execution if the qualifying facility establishes to the utility that a later scheduled commercial on-line date is reasonable and necessary and the utility agrees."); *In Re Investigation into QF Contracting and Pricing*, Oregon Docket No. UM 1610, Order No. 15-130 at 2 (Apr. 16, 2016).

56 OAR 860-029-0120(5)("If a Notice of Default is issued for failure to meet the scheduled commercial on-line date in the power purchase agreement, the qualifying facility has one year in which to cure the default for failure to meet the scheduled commercial on-line date, during which the public utility may collect damages for failure to deliver.").

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

Avista argues that WUTC regulations require the QF to achieve commercial operations with the first three contract years, but Avista misreads the regulations. The WUTC regulation in question states that

> The utility's standard rates for purchases must offer fixed rates to a new qualifying facility for a term of fifteen years beginning on the date of contract execution or a legally enforceable obligation, *but not less than twelve years from the commercial operation date of the qualifying facility*.[57]

This regulation requires Avista to offer fixed rates for at least twelve years from "the commercial operation date," which must be scheduled no more than three years after the date of contract execution. The plain language of this regulation suggests that the QF should be provided a reasonable opportunity to rely on at least a 12-year term of fixed prices after the date that it achieves commercial operation.

In addition to Avista's misunderstanding, Avista ignores a different WUTC regulation which allows for cure periods.[58] NIPPC-REC recommend that Avista revise its PPA to comply with both WUTC regulations. The two can be readily harmonized by offering a cure period for missing the *scheduled* commercial operation date and providing fixed prices for 12 years from the date of *actual* commercial operations. If the PPA is not revised, then the WUTC rule providing for cure periods will simply not apply when the scheduled commercial operation date is approximately three years from execution.

Staff generally support NIPPC-REC's proposals to clarify Avista's PPA on cure periods, but they did not remove the harmful language allowing Avista to terminate if the QF does not

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57 WAC 480-106-050(4)(i) (emphasis added).
58 WAC 480-106-030(4).

achieve commercial operations within the first three contract years.[59] It is unclear to NIPPC-REC if Staff opposes this change or simply overlooked the issue, which is admittedly one small part of the unclear language surrounding cure periods generally in Avista's proposed PPA.

4. Avista Should Remove the New and Harmful Language that Removes Force Majeure from Excusing a Failure to Meet COD

Finally, Avista's new addition of language which states that Force Majeure does not excuse a failure to meet COD within three years of the contract execution date should be removed.[60] Again, Avista appears to misunderstand the same WUTC regulation discussed above. The WUTC should direct Avista to remove the harmful addition. At a minimum, the right to sell for a 12-year term of fixed prices should be preserved in the circumstance where the delay is due to an Avista-caused delay or an event of Force Majeure.

NIPPC-REC note that a QF might miss fixed-price payments due to no fault of its own, which would be an entirely reasonable ground for extending the PPA. The WUTC should at least protect QFs from having their PPAs terminated for reasons beyond their control and reject Avista's proposed PPA language.

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

NIPPC-REC appreciate the revisions to Avista's PPA which resolved this issue.

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

NIPPC-REC appreciate the revisions to Avista's PPA which resolved this issue.

H. Transferred Environmental Attributes

NIPPC-REC appreciate the revisions to Avista's PPA which resolved this issue.

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59 Staff Open Meeting Memo at 4 (Sept. 24, 2020).

60 Avista PPA § 13.6.

I. Security Language

NIPPC-REC appreciate the revisions to Avista's PPA which resolved this issue.

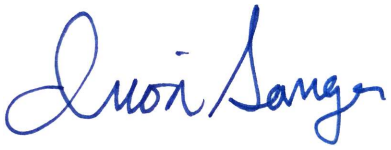
III. CONCLUSION

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

Dated this 22nd day of September 2020.

Respectfully submitted,

SANGER LAW, PC



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