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October 27, 2020

Via E-filing

Mark Johnson
Executive Director
Washington Utilities & Transportation Commission
621 Woodland Square Loop SE
Lacey, Washington 98503

Attn: Filing Center


Re: In the Matter of AVISTA CORPORATION, d/b/a AVISTA UTILITIES, Schedule
62 Tariff Revision
Docket No. UE-190663

Dear Mr Johnson:

Please find the Joint Supplemental Comments of the Northwest and Intermountain Power Producers Coalition, and the Renewable Energy Coalition.

Thank you for your assistance. Please do not hesitate to contact me with any questions.

Sincerely,



Irion A. Sanger

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**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 SUPPLEMENTAL
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 most recently 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 October 29, 2020.

At the Commission’s Open Meeting on September 24, 2020, there were four outstanding issues upon which the parties could not agree, and the Commission provided guidance to the parties for resolution of those issues. Avista filed a revised version of its proposed PPA on October 21, 2020, a further revision on October 23, 2020, and finally additional revisions on October 26, 2020 (referred to as “Avista’s Oct. 26th PPA”), which these comments address. While NIPPC-REC have continuing concerns with Avista’s revisions, NIPPC-REC appreciate the significant time and effort that both Avista and WUTC Staff have dedicated to this proceeding. Ultimately, despite the efforts of all parties, there remain a small handful of important issues on which we seek the Commission’s resolution.

In the hope of avoiding unnecessary disputes and unreasonably deterring development of

renewable energy projects, NIPPC-REC offer these final recommendations:

- Add a more reasonable cure period for missing scheduled commercial operation date, such as a one-year cure period, and ensure the QF's right to 12 years of fixed prices in the circumstance of an Avista-caused delay or force majeure event;
- Revise the off-system delivery and payment provisions consistent with the proposed revisions set forth below;
- Revise the PPA's language allowing for facility changes and upgrades, instead of allowing Avista to terminate or unilaterally modify pricing; and
- Delete additional provisions of the PPA to complete the removal of the so-called "90-110 performance band."

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. All electricity resource development is risky, and cure periods are common. PURPA projects, 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 still 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 within three years of execution of the PPA. The primary concern on this point 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 PPA 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.

II. COMMENTS

These comments will address each of the four outstanding issues that remained at issue

after the Commission's last public meeting. As discussed below, while NIPPC-REC maintain that their initial proposals for each of these four issues were reasonable, NIPPC-REC have agreed to limit their objections to those sub-issues that are the most critical in an effort to facilitate the Commission's resolution and approval of a standard PPA for Avista.

A. Avista Must Provide a Reasonable Cure Period for Missing the Scheduled Commercial Operation Date and Ensure Utility-Caused Delays Do Not Deprive the QF of the Minimum 12-Year Power Sale Period

NIPPC-REC previously recommended that Avista should clarify that a QF is not in default or breach if the failure to achieve commercial operation by its PPA's scheduled commercial operation date is caused by Avista or an event of Force Majeure.¹ NIPPC-REC additionally recommended that a QF that fails to achieve its scheduled commercial operation date for any reason should receive a one-year cure period, even if that cure period extends into the fourth year after execution of the PPA. A PPA should provide reasonable rights to cure the delay default, especially because the delay could be caused by the interconnection process that is largely out of the control of the QF developer.² At the public meeting, the Commissioners made statements that suggested Avista should take these considerations into account in revisions to its PPA. However, in response, Avista's Oct. 26th PPA made edits that leave the QF in a *worse* position than it would have been in had the Commission simply approved the previous version of the PPA. As explained below, NIPPC-REC object to Avista's proposed treatment.

There are at least three problems with the edits Avista made on this point in Avista's Oct. 26th PPA. Avista proposes the following critical edits to § 4.2:

¹ Joint Comments of NIPPC-REC at 28-31(Aug. 17, 2020); Staff Open Meeting Memo at 4 (Sept. 24, 2020).

² See Joint Comments of NIPPC-REC at 28-31(Aug. 17, 2020); NIPPC-REC Sur-Reply Comments at 22-26 (Sept. 22, 2020) (explaining these points at length).

Except as otherwise provided in this Section 4.2 or in Section 13, in the event that the Seller fails to achieve the milestones set forth in Exhibit J, and such failure is not cured within thirty (30) days of such failure 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; provided, however, that Avista may not terminate this Agreement if the failure to achieve such milestone(s) was caused by Avista and the Facility can achieve a Commercial Operation Date that is not later than three (3) years from the Effective Date. Notwithstanding the foregoing, failure by Seller to achieve the Commercial Operation Date of the Facility within three (3) years (or 1,095 days) of the Effective Date for any reason is not curable and, therefore, this Agreement shall automatically terminate 1,096 days after the Effective Date if the Facility fails, for any reason, achieve the Commercial Operation Date within three (3) years (1,095) days of the Effective Date.

First, and most significantly, Avista did not create any exception for delays that could extend beyond three years after the Effective Date and even introduced language expressly stating that the PPA will automatically terminate at that time even in the case of a Force Majeure or an Avista-caused delay. That language would appear to make inapplicable general contract doctrines such as prevention of performance.³ Under normal contract law, a party is excused for its failure to perform (such as failure to achieve commercial operation) if the other party prevents such performance.⁴ Avista seeks to override this basic rule of equity in its standard PPA for small renewable energy projects. That proposal is unreasonable.

³ See Avista's Oct. 26th PPA, § 4.2 (quoted above); see also *id.*, § 13.6 ("Force Majeure shall not apply to a failure to achieve the Commercial Operation Date of the Facility within three (3) years of the Effective date as required in Section 4.2 of this Agreement.")

⁴ See Richard A. Lord, 13 *Williston on Contracts* § 39.4. (4th ed., 2012) ("If a promisor prevents or hinders the occurrence or fulfillment of a condition to his or her duty of performance, the condition is excused; in other words, the nonoccurrence or nonperformance of a condition is excused where the failure of the condition is caused by the party against whom the condition operates to impose a duty." (internal footnotes and quotations omitted)).

For this treatment, Avista relies on the WUTC's administrative rule for the proposition that the PPA must automatically terminate three years after execution without any exceptions or excuse. The applicable regulation states:

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.*⁵

According to Avista, this regulation overrides basic contract law and requires automatic termination of any standard PPA where the facility is not brought online within three years of signing the PPA, even where Avista itself causes the delay during the interconnection process or a force majeure event occurs.

Avista's argument is without merit. Nothing in the quoted regulation states the QF's development period may not extend beyond three years after the effective date of a PPA, especially if the delay is caused by force majeure or by Avista. Instead, the regulation is better read to state that the QF is entitled to a PPA with a 15-year term running from the effective date of the PPA, but that in no case should the QF be provided a fixed-price period of power sales of *less than 12 years*. In other words, the PPA should allow for the QF's right to a 12-year fixed-price term to be preserved in the case where the development period takes longer than three years due to an excusable delay under the PPA. Avista's argument is also contradicted by the staff memo in the rulemaking, which stated: "The fifteen- (15) year term begins at the date of contract execution for new QFs. Payments should begin on the commercial operation date, and should

⁵ WAC 480-106-050(4)(i) (emphasis added).

continue for either twelve (12) years or until the end of the fifteen- (15) year term, *whichever period is longer.*”⁶

The language of the regulation is fully compatible with NIPPC-REC’s proposal that a QF should be entitled to cure a utility-caused delay that results in the QF achieving commercial operation more than three years after the date of execution of the PPA. Avista’s standard PPA should be revised to clarify that the QF’s right to 12 years of fixed prices will be preserved in the case where the delay is caused by Avista or an event of Force Majeure.

Second, Avista’s Oct. 26th PPA appears to use an unreasonably short 30-day cure period to cure a delay default. As NIPPC-REC’s prior comments recommended, we continue to recommend use of a one-year cure period for small QFs, as is used in Oregon standard contracts.⁷ Avista provides no explanation for why 30 days is sufficient, and in NIPPC-REC’s experience that is an exceptionally short cure period for a delay default in a small QF PPA. If the WUTC concludes that one year is too long, Avista’s PPA should at least provide a longer period than 30 days, such as a 180-day cure period.

Third, Avista made the PPA worse than its prior version by imposing a new 30-day cure period, with termination thereafter, for any missed “milestone” occurring before the scheduled commercial operation date. For example, if the PPA form is completed by the parties to contain a “milestone” that the QF obtain an executed interconnection agreement within one year of PPA

⁶ See Public Utility Regulatory Policies Act, Obligations of the Utility to Qualifying Facilities, WAC 480-107, Docket U-161024, Adoption Hearing Memorandum at Attachment C, p. 14 (Apr. 25, 2019) (emphasis added).

⁷ See 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.”).

execution, then Avista's Oct. 26th PPA would allow Avista to terminate the PPA if the QF is delayed in achieving that milestone by more than 30 days. That treatment is highly atypical. Normally, if the PPA contains such pre-operation date milestones, there is no provision to terminate for failure to meet the milestone, especially in a PPA for a small QF with capacity of 5 MW or less. In the prior version of Avista's proposed PPA, missing the milestone did not result in termination unless the QF failed to achieve commercial operation by three years after the effective date of the PPA, and Avista has not justified this new change to its proposed PPA. Instead, Avista's PPA should not include a provision that would allow it to be terminated prior to the Scheduled Commercial Operation Date because that is the critical deadline under the agreement.

To address these three issues, NIPPC-REC recommend the following edits to Avista's Oct. 26th PPA:

4.1 This Agreement shall be effective on the date last signed below or such other date set by Commission order (the "Effective Date") and shall continue for [15 years for new projects or 10 years for existing projects] after the Effective Date (the "Term"), unless otherwise terminated as provided herein; provided however, if Seller fails to achieve the Commercial Operation Date within three years of the Effective Date due to a delay caused by Avista or an event of Force Majeure, the Term of the Agreement shall continue until a date that is 12 years after the Commercial Operation Date.

4.2 Except as otherwise provided in this Section 4.2 or in Section 13, in the event that the Seller fails to achieve the Commercial Operation Date by the Scheduled Commercial Operation Date~~the milestones set forth in Exhibit J, and such failure is not caused by Avista or an event of Force Majeure, such failure shall constitute an Event of Default, and Avista may give Seller 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 and such failure is not cured within thirty (30) days of such failure Avista may terminate this Agreement by providing Seller written notice of termination;~~ provided, however, that Avista may not terminate this Agreement if the such failure to achieve such milestone(s) was caused by Avista or an event of Force Majeure, and the Facility can achieve a Commercial Operation Date that is not later than three (3) years from the Effective Date. Notwithstanding the foregoing, failure by Seller to achieve the

~~Commercial Operation Date of the Facility within three (3) years (or 1,095 days) of the Effective Date for any reason is not curable and, therefore, this Agreement shall automatically terminate 1,096 days after the Effective Date if the Facility fails, for any reason, achieve the Commercial Operation Date within three (3) years (1,095) days of the Effective Date.~~

* * * *

13.6 Notwithstanding anything to the contrary herein, Force Majeure shall not apply to, or excuse any default under, Sections 17.1(a), 17.1(b), 17.1(c), or 17.1(d). For the avoidance of doubt, Avista may declare Seller in Default if an event described in any of Sections 17.1(a), 17.1(b), 17.1(c), or 17.1(d), occurs and Avista may pursue any remedy available to it under this agreement. ~~In addition, Force Majeure shall not apply to a failure to achieve the Commercial Operation Date of the Facility within three (3) years of the Effective date as required in Section 4.2 of this Agreement.~~

B. 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 identified three primary concerns: 1) lack of clarity on the off-system QF’s right to settle under and over deliveries over the course of a month; 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 the Federal Energy Regulatory Commission’s (“FERC’s”) mandate for transmission providers. Avista’s Oct. 26th PPA did not adopt the changes recommended by NIPPC-REC on these three items.

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

NIPPC-REC recommend, and Staff previously agreed, 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 QF’s 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 should 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 J” attached to the redline PPA supplied with NIPPC-REC’s comments filed August 17, 2020, 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.

In the prior round of comments, Avista asserted the clarity, provided by the NIPPC-REC Exhibit J, is unnecessary. Avista pointed to language contained in the definition of “Surplus Energy” as a provision that achieves the same result in the PPA Avista was proposing at that time.⁸ Avista’s proposed definition of “Surplus Energy” was “(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.*”⁹ Additionally, Avista’s previously filed PPA (§ 7.3.2) clarified that Avista will pay the lesser of the avoided cost rates or the market energy price for such “Surplus Energy” that exceeds monthly Net Output of the off-system QF.¹⁰ It was helpful that Avista had clarified through its comments that it

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

⁹ Avista PPA § 1.46 (Sept. 4, 2020).

¹⁰ See Avista PPA § 7.3.2 (Sept. 4, 2020) (stating “Surplus Energy. For all Surplus Energy delivered to Avista at the Point of Delivery, Avista shall pay Seller the lower of the Market Energy Price or the Avoided Cost Rate specified in Exhibit B (‘Surplus Energy Price’). This Section 7.3.2 shall only apply to the to a Seller that elects to provide energy or capacity generated by its Facility pursuant to Section 7.1.1(ii) and will not apply to a Seller that elects to sell energy generated by the Facility pursuant to Sections 7.1.1(i) or 7.1.2. This section 7.3.2 shall not apply to Nominal Interconnected Facilities or Variable Energy Resources.”).

intended for this language to require Avista to 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 monthly deliveries in excess of monthly net output. Nevertheless, NIPPC-REC were concerned that this very limited explanation in the definition of Surplus Energy was far from conclusive as to how the issue will be treated and implemented, and they expressed continued support for approval of the proposed “Exhibit J.”¹¹

Avista’s Oct. 26th PPA still does not adequately resolve this concern. Instead, as part of its edits to remove the 90-110 performance band, Avista has deleted from Avista’s Oct. 26th PPA the entirety of the definition of “Surplus Energy” upon which it relied for explanation that it would allow the QF to settle the under and over deliveries. It is not clear why Avista could not have retained the portion of the definition of Surplus Energy that addressed this issue while only deleting the portion of it that spoke to the 90-110 performance band. Specifically, Avista could have made the following edit to the definition in the PPA § 1.46:

“‘Surplus Energy’ means ~~(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.”¹²

That edit would have at least maintained the clarity that Avista provided previously in this proceeding. Additionally, Avista could have maintained the statement in § 7.3.2 that clarified Avista will pay the lesser of the avoided cost rates or the market energy price for such “Surplus

¹¹ See NIPPC-REC Sur-Reply Comments at 10-11 (Sept. 22, 2020).

¹² Avista PPA § 1.46 (Sept. 4, 2020) (NIPPC-REC’s proposed alterations in in strikethrough).

Energy” delivered in excess of Net Output on a monthly basis.¹³ But Avista deleted the price for such deliveries in excess of monthly Net Output in § 7.3.2 of Avista’s Oct. 26th PPA.

NIPPC-REC understand that Avista may now be relying on the definition of “Base Energy Amount” (§ 1.7) and the description of the payment for Base Energy in § 7.3.1 of Avista’s Oct. 26th PPA for purposes of clarifying Avista will pay the fixed avoided cost rates in the PPA for all Net Output over the course of the month. The definition of Base Energy Amount, in § 1.7, is “*monthly* Net Output delivered to the Point of Delivery that is not Test Energy.”¹⁴ Avista’s Oct. 26th PPA states that Avista will pay the QF for all “Base Energy delivered to Avista at the Point of Delivery”¹⁵ However, NIPPC-REC remain very concerned with the PPA’s lack of clarity and fear that it will lead to disputes. This language in Avista’s proposed PPA is not unambiguously clear that Avista will allow the off-system QF to settle the under and over deliveries on a monthly basis. There is also no statement in Avista’s cover letter or elsewhere in the record confirming that Avista will interpret Avista’s Oct. 26th PPA to allow an off-system QF to settle under and over deliveries over the course of a month. And Avista’s Oct. 26th PPA no longer states that Avista will pay the lesser of the avoided cost rates or the market price for deliveries in excess of Net Output in each month, creating another issue that could be a source of future disputes.

In sum, NIPPC-REC continue to recommend use of our proposed “Exhibit J,” submitted with the PPA redline attached to the NIPPC-REC comments filed August 17, 2020. In the alternative, if the Commission will not require use of the proposed Exhibit J, we recommend that the Commission require Avista to confirm its interpretation of Avista’s Oct. 26th PPA is

¹³ Avista PPA § 7.3.2 (Sept. 4, 2020).

¹⁴ Avista’s Oct. 26th PPA, § 1.7 (emphasis added).

¹⁵ Avista’s Oct. 26th PPA, § 7.3.1.

consistent with the treatment in that proposed exhibit and its prior statements regarding the former provisions for Surplus Energy. Additionally, the Commission should require Avista to clarify in § 7.3.2 that it will pay an off-system QF the lesser of the avoided cost rates or the market price for deliveries in excess of Net Output in each month.

2. Reduced Payment Due to Transmission Losses

NIPPC-REC have recommended 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.¹⁶ While NIPPC-REC continue to maintain that this treatment of transmission losses is unreasonable and unfair to off-system QFs, NIPPC-REC will withdraw the argument to limit the issues in dispute and focus on the most significant and impactful remaining issues.

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

NIPPC-REC's initial comments proposed that revisions be made to § 6 of Avista's PPA to clarify that an off-system QF may use the scheduling practices allowed by the QF's transmission provider, including intra-hour scheduling.¹⁷ The language proposed was an attempt to allow for flexibility in the scheduling requirements over the PPA's 15-year term because these practices evolve over that type of timeframe. In contrast, Avista's initial PPA and Avista's Oct. 26th PPA (which contains no revisions on the point) both include statements suggesting that schedules may not be updated closer than 90 minutes to the hour of delivery and must be hourly block schedules.¹⁸

¹⁶ Joint Comments of NIPPC-REC at 20 (Aug. 17, 2020).

¹⁷ Joint Comments of NIPPC-REC at 21-23 (Aug. 17, 2020).

¹⁸ Avista's Oct. 26th PPA § 6.

As we noted previously, FERC’s Order No. 764 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.¹⁹ 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.²⁰ Avista fails to explain how its proposed language – which could be interpreted to lock in an hourly scheduling protocol for the life of the PPA – is consistent with this FERC order.²¹ It may be that Avista believes its PPA language allows for 15-minute scheduling, but if that is the case, it is not clear why the PPA should not include NIPPC-REC’s minor clarifying edits to make the point unambiguously clear.

In the cover letter to Avista’s Oct. 26th PPA, Avista asserts that, due to the requirements of the Western Energy Imbalance Market (“EIM”), Avista “needs all schedule changes no later than 90 minutes prior to the hour.”²² It is ironic that Avista would rely on the EIM – which is supposed to facilitate integration of variable energy resources – as a basis to refuse to accept use of scheduling practices that allow for more accurate transmission schedules and reduced imbalance costs for QFs. Notably, other regional utilities do not require all schedules be locked in 90 minutes prior to the hour. It appears that Avista is referring to a forecast it must provide to the EIM 90 minutes prior to the hour of delivery. NIPPC-REC would not object to a requirement in the PPA that QFs provide such a forecast to Avista so long as QFs may update their e-tags and

¹⁹ 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).

²⁰ See Order No. 764, 139 FERC ¶ 61,246 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”).

²¹ Avista Reply Comments at 14 (Sept. 4, 2020).

²² Avista’s Cover Letter at 2 (Oct. 23, 2020).

the amount of energy that is actually scheduled and delivered in accordance with their transmission provider's tariff and business practices.

NIPPC-REC recommend the following revised edit to Avista's Oct. 26th PPA:

- 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 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 and any applicable scheduling requirements of Avista's Open Access Transmission Tariff. Seller shall also make commercially reasonable efforts to provide Avista a forecast of its expected final schedule for each hour at least 90 minutes prior to each hour. 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. ~~Seller may update its schedule consistent with the scheduling requirements of Avista's Open Access Transmission Tariff.~~
- 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.

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

NIPPC-REC recommend that Avista's Oct. 26th PPA be further clarified with respect to capacity expansions. There were two primary issues raised in NIPPC-REC's prior comments:

(1) upgrades that increase capacity to up to 5 MW, and (2) upgrades that increase capacity beyond 5 MW.

Avista made no changes in Avista's Oct. 26th PPA to allow expansion beyond 5 MW. Avista's Oct. 26th PPA would allow Avista to terminate the QF's PPA if the QF were to increase the capacity in excess of 5 MW.²³ Avista maintains that a QF that increases its size above the 5-MW threshold should not be entitled to retain the terms and conditions of the standard PPA, and it would be difficult to have two different rates in the PPA.²⁴ However, as NIPPC-REC previously demonstrated, such increases have been facilitated in other states. In Oregon, the official policy is that the QF with a standard PPA may increase its capacity above the threshold for the standard rates, but if it does so the utility may pay the non-standard rates in effect at the time of the increase pursuant to a new negotiated PPA for the incremental capacity addition.²⁵ This is a reasonable policy that allows for a developer to expand a facility where it is economic to do so. Avista's proposal to bar such expansions, unless the QF forfeits the standard PPA and the rates contained therein for the initial 5 MW of capacity, would be an unreasonable obstacle to

²³ Avista's Oct. 26th PPA, § 11.8.

²⁴ Avista's Cover Letter at 1-2 (Oct. 23, 2020); Avista's Cover Letter at 1-2 (Oct. 21, 2020).

²⁵ Joint Comments of NIPPC-REC at 24-28 (Aug. 17, 2020) (discussing *In Re Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 06-538 at 38-39 (Sept. 20, 2006)).

renewable energy development.

With respect to upgrades up to 5 MW, Avista's cover letter states that it intended to make revisions to the PPA to allow for upgrades up to 5 MW during the term and allowing for use of the same contract rates for the incremental capacity, which is consistent with NIPPC-REC's proposal.²⁶ However, while Avista revised some of the language to which NIPPC-REC objected in §§ 3.4 and 11.8, Avista's Oct. 26th PPA still contains language that provides Avista sole discretion to bar "[a]ny material changes" to the facility.²⁷ It also expressly bars a change in the energy source or fuel used.²⁸ There is no explanation for why a change in generator fuel or primary energy source would result in termination of the PPA or any explanation as to why Avista needs sole discretion to reject any other modification. NIPPC-REC are concerned that this language could bar reasonable expansions of a facility, including the addition of storage or perhaps another energy source to maximize the energy potential of the site.

Accordingly, NIPPC-REC propose the following edit § 11.8 of Avista's Oct. 26th PPA to appropriately address the right to upgrade a QF up to, and beyond, the 5-MW threshold:

11.8 Modifications. Seller shall notify Avista in writing of any material modifications to the Facility. Material modifications to the Facility include, but are not limited to, any modification that increases or decreases the Facility nameplate capacity rating, changes the primary energy source, and changes to the generator fuel. If Seller's modification to the Facility increases the Facility Nameplate Capacity to 5,000 kW or less, Avista shall pay Seller the prices as elected by Seller on the Effective Date and reflected in Section 7. If Seller's modification to the Facility increases the Facility Nameplate Capacity to more than 5,000 kW, Avista shall pay Seller (on a going forward basis): (i) the prices elected by Seller on the Effective Date and reflected in Section 7 for all Net Output in each hour that is less than or equal to 5 MW pursuant to the terms of this Agreement, and (ii) new negotiated prices pursuant to a new negotiated agreement for all Net Output in each hour that exceeds 5 MW. Seller may amend Exhibit A to reflect the modifications made consistent with this Section. Seller

²⁶ Avista's Cover Letter at 1-2 (Oct. 21, 2020).

²⁷ Avista's Oct. 26th PPA, § 11.8.

²⁸ Avista's Oct. 26th PPA, § 11.8.

~~shall be responsible for ensuring that any planned increase in the Facility Capacity Rating or the maximum instantaneous capacity of the Facility complies with Seller's Interconnection Agreement and any other agreements with Avista. Any material modifications to the Facility, including but not limited to the generator or turbine, that (1) increases the Facility nameplate capacity rating such that the total installed capacity rating is greater than five (5) MWs, or (2) changes the primary energy source, or (3) changes to the generator fuel, will require a review of the Agreement terms, conditions and pricing and Avista, at its sole determination, may adjust the pricing or terminate the Agreement. If the Agreement is terminated because of said modifications, the Seller will be responsible for any termination damages.~~

D. Additional Revisions Are Needed to Remove of the So-Called “90-110 Performance Band”

NIPPC-REC recommended, and Staff agreed, that Avista should remove all references to the so-called “90-110 performance band,”²⁹ which penalizes the QF 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.³⁰ Avista’s cover letter attached to the Avista’s Oct. 26th PPA states that it intended to remove the 90-110 performance band.³¹ NIPPC-REC appreciate that Avista has agreed to remove the 90-110 performance band from the standard PPA. However, Avista’s Oct. 26th PPA requires additional deletions to completely remove the 90-110 performance band. Specifically, Avista’s Oct. 26th PPA still contains elements of the performance band in §§ 1.12 and 11.3, which contain a provision allowing for “Declared Suspension of Energy Deliveries” that was designed to allow the QF to adjust its monthly net output schedule used for the performance band in the case of an unexpected forced outage that lasts at least 48 hours.³² These sections (§§ 1.12 and 11.3) were only included in the PPA for

²⁹ Staff Open Meeting Memo at 2 (Sept. 24, 2020).

³⁰ Joint Comments of NIPPC-REC at 4 (Aug. 17, 2020).

³¹ Avista’s Cover Letter at 1 (Oct. 23, 2020).

³² Avista’s Oct. 26th PPA, § 11.3 (providing specific requirements for the Seller to initiate a “Declared Suspension of Energy Deliveries” if the outage meets certain criteria); *see also id.*, § 5.1.7 (deleted provision in redline PPA copy that allows for adjustment of monthly

purposes of the 90-110 performance band, and it should be deleted to avoid confusion as to why such a provision might remain in the PPA.

III. CONCLUSION

NIPPC-REC appreciate 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 27th day of October 2020.

Respectfully submitted,

SANGER LAW, PC

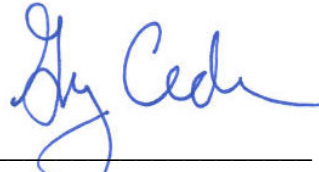


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energy delivery schedule in the event of a qualifying Declared Suspension of Energy Deliveries).

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