October 3, 2018

VIA – Commission Web-Portal

Mark L. Johnson
Executive Director and Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive S. W.
P.O. Box 47250
Olympia, Washington 98504-7250

Re: Joint Utility Comments in Response to NIPPC and REC's Proposed LEO Definition
Docket UE-161024

Dear Mr. Johnson,

Avista Corporation, dba Avista Utilities ("Avista"), and Pacific Power & Light Company, a division of PacifiCorp ("Pacific Power") (Avista and Pacific Power collectively, the "Joint Utilities"), submit the following comments to the Washington Utilities and Transportation Commission ("Commission") in response to the definition of legally enforceable obligation ("LEO") proposed by Northwest and Intermountain Power Producers Coalition ("NIPPC") and the Renewable Energy Coalition ("REC") on September 13, 2018 ("September 13 Comments"). The Joint Utilities appreciate the opportunity to submit these comments.

As discussed more fully herein, the Joint Utilities disagree with NIPPC and REC's proposed definition of the LEO and, in particular, the apparent assertion that a QF providing preliminary information required as the first step of a contracting procedure can by itself be sufficient for the establishment of a non-contractual LEO. Taking the first step of the earlier proposed contracting procedure in isolation – where a QF developer simply delivers a variety of preliminary project information to the utility without the utility yet confirming the information provided is reasonably accurate – as criteria for establishing a non-contractual LEO would allow QFs to unilaterally create put options on utilities without communicating even a minimal level of commitment to bind themselves to anything. Rather, such a result would merely encourage QFs to create put options on the utility that they can easily back away from, but that would create substantial risk for utility ratepayers.

As a threshold matter, in their September 13 Comments, NIPPC and REC propose the following definition of "Legally Enforceable Obligation":

> *A "Legally Enforceable Obligation" is the binding obligation of a qualifying facility to sell, and of an electric utility to purchase, the energy, capacity, or both of the facility over a specified term that is established by the qualifying facility communicating its unequivocal commitment to sell such product to the utility in accordance with these rules.*

While the Joint Utilities agree that a LEO is a binding obligation of a QF developer to sell and an electric utility to purchase the energy, capacity, or both of the QF over a specified term that is established by the QF, such binding obligation should be generally accomplished through a contract between the electric utility and QF developer. Only in those circumstances when a contract cannot be reached is the extraordinary remedy of a non-contractual LEO warranted under PURPA. In a general sense, among commercial parties *written contracts* set forth the legally enforceable obligations between them. Contracts are important because they set the terms of the relationship between the parties; not just price. A written contract sets forth, among many other items, invoicing terms, events of default, remedies for default, operational requirements, and financial assurances of performance.

Establishing the LEO through a written contract, except in extraordinary circumstances, is consistent with Federal Energy Regulatory Commission ("FERC") requirements. As FERC has stated, "[I]f the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA."[1] Therefore, a written contract should, absent an extraordinary circumstance where a utility refuses to sign a contract, be the method for establishing a LEO. When a QF can demonstrate that the utility failed to satisfy its obligations under PURPA, and the QF developer has otherwise demonstrated an unequivocal commitment to sell the QF output to the utility, the state regulatory commission (in this case, the Commission) is to determine whether, and if applicable when, the LEO is established.

The Joint Utilities urge the Commission to be clear that the LEO is determined by written contract <u>unless</u> the utility refuses or fails to timely execute a contract. Only in those situations where the utility refuses or fails to timely execute a contract (which should be determined through a prescribed contracting procedure) should a LEO be established through a non-contractual means—and only then when the QF developer has been able to reasonably demonstrate an unequivocal commitment to sell its output to the utility. The Joint Utilities further urge the Commission to recognize that a QF sponsor's "unequivocal commitment" cannot be established by the naked representations of a QF sponsor alone, but must be reasonably demonstrated through customary due diligence by the utility. For example, if a QF sponsor seeks to establish a fixed price long-term purchase obligation that is based on a commercial operation date in 2020, the electric utility should have the ability to reasonably confirm through

[1] *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, P 32 (2011) (footnote omitted).

its customary due diligence that the QF can reasonably commence commercial operation on the represented date that informed the indicative avoided cost pricing.

The Joint Utilities support the proposal that the Commission establish, by rule, a requirement that utilities have a contracting procedure in their Commission-approved tariffs that clearly articulates the obligations of both the QF and the utility in reaching a contract. Such contracting procedure should be clear that, unless the utility refuses or fails to timely execute a contract, the LEO should be established at such time as both parties execute a contract. Only if the utility refuses or fails to timely execute a contract should a QF sponsor be capable of establishing a non-contractual LEO, and only then when the Commission is satisfied that the QF sponsor has demonstrated an unequivocal commitment to sell its output to the electric utility in a manner consistent with its representations that informed and established the applicable avoided cost price.

The Joint Utilities appreciate the opportunity to submit these comments in response to NIPPC and REC's September 13 Comments. As with the Joint Utilities' prior comments, the policies recommended herein attempt to reach a balance that provides QF developers with the opportunity to obtain the avoided costs rates that they are entitled to while at the same time still protecting utility customers from excessive risks and burdens. Please direct any questions regarding this filing to any of the undersigned.

Sincerely,

AVISTA CORPORATION

/s/Linda Gervais

Sr. Manager, Regulatory Policy
Regulatory Affairs
linda.gervais@avistacorp.com
509-495-4975
Avista Utilities

PACIFIC POWER & LIGHT COMPANY

/s/ Etta Lockey
Etta Lockey
Vice President, Regulation
Pacific Power & Light Company
825 NE Multnomah Street, Suite 2000
Portland, OR 97232
(503) 813-5701
etta.lockey@pacificorp.com