BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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| WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,<br><br>Complainant,<br><br>v.<br><br>AVISTA CORPORATION,<br><br>Respondent | DOCKETS UE-240006 & UG-240007 (Consolidated)<br><br>COMMISSION STAFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DETERMINATION |

## I. INTRODUCTION

*1* The Commission's summary determination rule allows it to decide an issue as a matter of law in certain circumstances.[1] One of these is where the party with the burden of proof at hearing fails to produce any evidence upon which the Commission could find in its favor.[2] The theory behind the rule is that, in such a case, the Commission need not hold a full evidentiary hearing on the issue because doing so would be pointless.[3]

*2* The Commission confronts exactly this situation here. Avista does not, at any point in its opening testimony, justify the inclusion of its portfolio forecast error adjustment into its revenue requirement by showing that it involves known events and measurable dollar amounts properly matched against offsetting factors. Nor does Avista show that incorporating the error adjustment into its Energy Recovery Mechanism (ERM) baseline

[1] WAC 480-07-380(2).
[2] *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 808, 6 P.3d 30 (2000) ("[w]here there is a complete failure of proof concerning an essential element of the nonmoving party's case, all other facts become immaterial and the moving party is entitled to judgment as a matter of law.") (internal quotation omitted); WAC 480-07-380(2)(a) (Commission will consider standards applicable to CR 56 motions when deciding a motion for summary determination).
[3] *Fischer-McReynolds*, 101 Wn. App. at 808; *see Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 951, 421 P.2d 674 (1966) ("[t]he object and function of summary judgment procedure is the avoidance of a useless trial.").

will produce fair, just, reasonable, and sufficient results. Compounding those failures, Avista introduces no evidence in response to Staff's motion that would create a material issue of fact on either of those issues, relying instead on conclusory statements and claims about immaterial issues. The record is thus devoid of anything upon which the Commission could base a decision in Avista's favor. As discussed above, summary determination is meant for just such circumstances. The Commission should grant it here after rejecting Avista's counterarguments.[4]

## II. ARGUMENT

*3* Avista contends that the Commission should deny Staff's motion because: (1) summary determination is incompatible with the Administrative Procedure Act (APA) and the public service laws; (2) Avista has a right to build a record on various topics, including the proper setting of the ERM baseline; (3) the Commission should apply a relaxed version of the known and measurable standard; and (4) Avista has considered the matching of the adjustment with offsetting factors. Those arguments are without merit and the Commission should reject them.

### A. Summary Determination does not Infringe on Avista's Right to a Hearing or Conflict with the Administrative Procedure Act (APA)

*4* Avista first argues that a grant of summary determination would deprive it of its right to be heard[5] and would conflict with the APA's requirement for initial and final orders.[6] The company has it wrong on all counts.

[4] *See generally Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-240006 & UG-240007, Answer of Avista Corporation to Staff's Motion for Partial Summary Determination (Apr. 9, 2024) ("Response").
[5] Response at 3-4 ¶ 7.
[6] Response at 3 ¶ 7.

*5* Avista roots its right to a hearing in RCW 34.05.449(2),[7] which requires that presiding officers, "to the extent necessary for the full disclosure of all relevant facts and issues, . . . afford . . . to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence." Avista contends that, absent a "rigorous hearing process," it will suffer deprivation of this right.[8] That argument is both theoretically and practically incorrect.

*6* At the theoretical level, Avista implicitly argues that the APA forbids agencies from employing summary proceedings, as any such proceeding would avoid the type of full evidentiary hearing that Avista claims RCW 34.05.449(2) protects. But any interpretation of chapter 34.05 RCW must preserve the law applicable to the pre-1989 versions of the state APA;[9] it must also attempt to interpret the APA in harmony with its federal counterpart.[10] Washington's courts recognized agencies' power to use summary proceedings under the prior state APA,[11] and they continue to recognize the propriety of summary-judgment-like proceedings under the currently-effective version.[12] Federal courts have similarly recognized the propriety of summary proceedings under the federal APA.[13] Given that body of law, the APA does not preclude summary determination here.

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[7] Response at 3 ¶ 7.

[8] Response at 2 ¶ 5.

[9] RCW 34.05.001 ("[t]he legislature intends that to the greatest extent possible and unless this chapter clearly requires otherwise, current agency practices and court decisions interpreting the [APA] in effect before July 1, 1989, shall remain in effect.").

[10] RCW 34.05.001.

[11] *Asarco Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 695-98, 601 P.2d 501 (1979).

[12] *Kettle Range Conservation Group v. Dept. of Natural Res.*, 120 Wn. App. 434, 85 P.3d 894 (2003) ("[t]he APA does not expressly authorize summary judgments, but case law has established that agencies may employ summary proceedings.") (citing *Eastlake Cmty. Council v. City of Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132 (1992).

[13] *E.g., Weinberger v. Hynson, Wescott, & Dunning, Inc.*, 412 U.S. 609, 620-21, 93 S. Ct. 2469, 37 L. Ed. 2d 207 (1973) (approving the FDA's summary judgment procedures); *Fed. Power Comm'n v. Texaco*, 377 U.S. 33, 39, 84 S. Ct. 1105, 12 L. Ed. 2d 112 (1964) (approving the FPC's use of summary proceedings).

*7* Practically, Avista has enjoyed every right offered by RCW 34.05.449(2). It prefiled testimony from numerous witnesses, had the opportunity to present argument in response to Staff's motion for summary determination, and had the chance to rebut Staff's contention that it had failed to prove necessary elements for the pro forma adjustment and change to the Energy Recovery Mechanism (ERM) baseline by submitting evidence to create a material issue of fact with its response.[14] While it has not cross-examined any Staff witnesses, it had no need to do so to disclose "all relevant facts and issues"[15] related to the portfolio forecast error adjustment – even crediting Avista's testimony as true (for purposes of Staff's motion only), Avista fails to make the showings necessary to incorporate the adjustment into its revenue requirement or to adjust the ERM baseline.

*8* Avista also seems to indicate that the public service laws preclude summary determination, citing RCW 80.28.020's use of "after a hearing" for that proposition.[16] That argument proves too much. *Every* APA adjudication, by definition, requires the opportunity for a hearing.[17] Yet, as noted above, both the state and federal courts have determined that agencies may use summary proceedings in adjudications. Their doing so recognizes that summary proceedings suffice as the "hearing" where there is no material issue of fact that would warrant a full evidentiary hearing.[18]

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[14] CR 56(c), (e).

[15] RCW 34.05.449(2).

[16] Response at 4 ¶ 7.

[17] 34.05.010(1) (defining an "adjudicative proceeding" as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.").

[18] *See Macomb Pottery v. NLRB*, 376 F.2d 450, 452 (7th Cir. 1967) (federal statute providing the right to appear and provide testimony "cannot logically mean that an evidentiary hearing must be held in a case where there is no material issue of fact), *overruled on other grounds by Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983).

*9* Further, Avista's argument here effectively reads the Commission's summary determination rule out of existence. If the Commission cannot grant summary determination in any case for which the public service laws offer a hearing, then it cannot use the procedure in rate-setting proceedings;[19] most, if not all, cancellation proceedings;[20] contested planning dockets;[21] and penalty proceedings save for those conducted under RCW 80.04.405 and RCW 81.04.405.[22] As those are the bulk of the Commission's adjudications, Avista's argument here would mean that the Commission adopted a rule for adjudicatory proceedings that it cannot use in adjudications. The Commission should reject that result as absurd.

*10* Avista also claims that any grant of summary determination would result in a legally infirm order under RCW 34.05.461(3).[23] As Avista notes, RCW 34.05.461(3) requires agencies to "include a statement of findings and conclusions," with explanations for each, in initial and final orders, but only as to the "material issues of fact, law, or discretion." The company's argument here suffers from two flaws.

*11* First, the Commission's final order in this docket will contain numerous findings and conclusions about the *material* issues of fact and law, the ones for which the parties will proceed to hearing. It simply will not contain findings or conclusions about the portfolio forecast error. But that is not legally problematic because, in granting summary

[19] *E.g.*, RCW 80.28.020.
[20] *E.g.*, RCW 81.80.280 (requiring an opportunity for hearing in motor carrier cancellation cases).
[21] *E.g.*, RCW 19.405.060(1)(c).
[22] RCW 80.04.110 (hearing on a complaint); RCW 81.04.110 (same).
[23] *E.g.*, Response at 1¶ 3, 4 ¶ 9 & n.5.

determination, the Commission will have concluded that no material issues of fact exist with regard to the adjustment.[24]

*12* Second, no reviewing court will look for findings and conclusions related to a grant of summary determination. If the Commission did make those findings and conclusions, the court would disregard them as inappropriate and superfluous;[25] the court will instead review de novo both the administrative record and the decision to grant summary determination.[26] The lack of findings and conclusions thus would not constitute error[27] and, regardless, given a reviewing court's treatment of any such findings and conclusions, their lack would not prejudice Avista in any way that would allow relief.[28]

### B. Avista had Multiple Chances to Develop the Record with Regard to the Portfolio Forecast Error; it Has Simply Declined to Take Those Opportunities

*13* Avista makes two arguments about building a record – those related to the pro forma power cost adjustment and those related to the ERM baseline. Staff addresses each in turn.

#### 1. The pro forma portfolio forecast error adjustment.

*14* Avista makes frequent reference to the need to build a record, claiming that the grant of Staff's motion will deprive it of the opportunity to build one.[29] It also argues that a hearing is needed to resolve various factual issues[30] and is required given the subject matter of Staff's motion.[31] The Commission should reject each of those arguments.

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[24] WAC 480-07-380(2)(a); *Verizon Nw., Inc. v. Emp't Sec. Dept.*, 164 Wn.2d 909, 915-16, 194 P.3d 255 (2008) (setting out the standard for summary judgment in the administrative context).
[25] *Kries v. WA-SPOK Primary Care*, 190 Wn. App. 98, 362 P.3d 974 (2015).
[26] *See City of Seattle v. Am. Healthcare Servs., Inc.*, 13 Wn. App. 2d 838, 850-51, 468 P.3d 637 (2020).
[27] *Cf. Larson v. State*, 9 Wn. App. 2d 730, 745, 447 P.3d 168 (2019) ("the law does not require a futile act.").
[28] RCW 34.05.570(1)(d).
[29] *E.g.*, Response at 2-3 ¶¶ 5-6.
[30] Response at 7 ¶ 13 & Attachment A.
[31] Response at 6 ¶ 12.

*15* At the outset, Staff filed its motion because Avista failed to make in its opening testimony a prima facie case for the inclusion of the portfolio forecast error adjustment into the company's rates. Avista was the master of that filing, controlling both its timing and the data used to support it.[32] To the extent that the record is incomplete, it is incomplete because Avista failed to fill it out, not because the Commission deprived it of the opportunity to do so.

*16* Further, Avista could have provided evidence that would create a material issue of fact regarding the forecast error in response to Staff's motion for summary determination.[33] It chose not to.[34] Again, any gaps in the record exist because Avista keeps declining to fill them (because, as described in Staff's original motion, it cannot fill them), not because the Commission is denying the company the chance to do so.

*17* Indeed, Avista's failure to respond with something more than assurances that issues of fact remain for resolution at hearing has consequences. Any non-moving party responding to a motion for summary determination must present more than "argumentative assertions that unresolved factual issues remain" in order to stave off summary determination.[35] Avista's refusal to provide evidence on which the Commission could determine that a material issue of fact exists as to whether the portfolio forecast error is known, measurable,

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[32] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-200900, UG-200901 & UE-200894, Order 08 (Sept. 27, 2021).

[33] WAC 480-07-380(2)(a); CR 56(c), (e).

[34] *E.g.*, Response at 3 ¶ 6 ("the purpose of this Answer is not to debate the merits of the adjustment – only to assure that the debate eventually happens at hearing.").

[35] *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); CR 56(e) ("[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations of denials in a pleading, but a response by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. *If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party*.") (emphasis added); *see* WAC 480-07-380(2)(a) (Commission considers the standards applicable to a motion for summary judgment when ruling on a motion for summary determination).

and properly matched against offsetting factors both justifies and necessitates the grant of Staff's motion.[36]

*18* Finally, any attempt by Avista to build the record in rebuttal or via hearing, as the company appears to want to do, can only constitute what the Commission has repeatedly forbidden. Avista would create a moving target where it makes the case it should have made in its opening testimony and after other parties have already responded and thus no longer have a chance to provide meaningful record evidence as a counter.[37] Avista has had two bites at the apple; the Commission should decline to offer the company a third, especially one that so prejudices the non-company parties.

*19* Avista, as just noted, nevertheless posits that numerous factual issues remain for hearing.[38] Setting aside that its statements to that effect do not suffice to create material issues of fact, Staff moved, as relevant to the discussion here, for summary determination on the limited issue of whether the Commission should reject inclusion of the portfolio forecast error in Avista's pro forma power costs because it is not known, not measurable, and not matched to potential offsetting factors.[39] Not a single one of the issues Avista identifies for hearing relate to any of those; they instead relate generally to Avista's power costs.[40] They

[36] *Seven Gables*, 106 Wn.2d at 12-13 ("the adverse party must set forth specific facts showing there is a genuine issue for trial or have the summary judgment, if appropriate, entered against them.").
[37] *E.g., In re Petition of Union Pac. R.R. Co.*, Docket TR-210809 & TR-210814, Order (May 5, 2022); Wash. Utils. & Transp. Comm'n v. PacifiCorp, Docket UE-210402, Order 05, (Nov. 2, 2021); *Wash. Utils. & Transp. Comm'n v. Harbor Water Co.*, Docket U-87-1054-T, 1988 Wash. UTC Lexis 30, *31 (Mar. 21, 1988); *cf. Wash. Utils. & Transp. Comm'n v. Avista*, Dockets UE-160228 & UG-160229, Order 05 (Nov. 22, 2016) (declining to allow a post-response power cost update because it couldn't be properly vetted).
[38] Response at 7 ¶ 13 & Attachment A.
[39] *See generally Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-240006 & UG-240007, Commission Staff's Motion for Partial Summary Determination (Mar. 20, 2024) ("Staff's Motion").
[40] See generally Response at 7 P 13 & Attachment A.

are immaterial to the subjects of Staff's motion and cannot be used to prevent summary determination.[41]

*20* Avista also seems to suggest that the dollar amount involved here requires a hearing.[42] But the stakes involved are irrelevant for purposes of disposing of a motion for summary determination; only the existence of a material issue of fact is.[43] Courts, for example, may grant summary judgment in suits involving even the most heavily protected constitutional rights where the parties do not dispute material facts.[44] As no material issue of fact exists here, the Commission should grant Staff's motion.

**2. The ERM.**

*21* Avista contends that a hearing is necessary to determine whether inclusion of the portfolio forecast error adjustment into the ERM baseline produces fair, just, reasonable and sufficient results. Not so.

*22* Avista first claims that Staff incorrectly argues that the forecast error allows Avista to unfairly shift risk onto its customers. But the forecast error adjustment does not measure any specific aspect of Avista's power costs. Indeed, it cannot: Avista cannot even identify what will be involved in the portfolio forecast error in the rate year.[45] The portfolio forecast error instead represents Avista's attempts to quantify the amount that it is at risk of under-collecting due to future events that it could not and did not model when calculating its power

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[41] *Jacobsen v. City of Seattle*, 98 Wn.2d 668, 672, 658 P.2d 653 (1983) ("[i]n each instance, the fact allegedly in dispute was either admitted by the defendants or was immaterial, and thus not a bar to summary judgment.").

[42] Response at 6 ¶ 12.

[43] CR 56; WAC 480-07-380(2).

[44] *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13 ("MGM/UA implies that any raising of constitutional issues summarily defeats a summary judgment and mandates that its claims must be resolved at trial. This is not the case. Courts can and have upheld decisions on summary judgment regarding constitutional issues.").

[45] *See* Kinney, Exh. SJK-1T at 68:15-69:14.

costs.[46] Staff's point was that by adjusting the baseline upward to account for that risk, Avista is biasing the ERM, which was already intended to address the risk of Avista under-collecting on its power costs. Put otherwise, Avista is building risk-insulation into a mechanism meant to insulate Avista from some risk associated with its power costs.

*23* Relatedly, Avista notes that the "risk allocation established through the deadbands and sharing mechanism"[47] remains a matter set for hearing, but nevertheless on the next page argues that "when ultimately addressing any proposed changes to deadband or sharing mechanisms meant to address the allocation of risk within the ERM, one would want to know" certain things.[48] Avista was correct the first time. Staff's motion does not address the dead and sharing bands other than to point out that Avista could not create a material issue of fact as to the ERM baseline by pointing to its proposal for them.[49] Staff's motion neither addresses the fate of the dead and sharing bands nor precludes the company from providing evidence about changing risk for purposes of seeking modification of the bands. Staff's motion would simply ensure that Avista cannot move the ERM baseline arbitrarily based on unknown and unmeasurable events.[50]

*24* Avista also contends that a hearing is necessary to determine whether it has adjusted the ERM baseline "based on 'speculative events' and in an arbitrary fashion." The Commission need not hold a hearing for that purpose, for it need look no further than Avista's opening testimony, which makes clear that Avista cannot identify the events that

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[46] Kinney, Exh. SJK-1T at 67:1-68:12.
[47] Response at 12 ¶ 28.
[48] Response at 13 ¶ 31.
[49] Staff's Motion at 19 ¶ 41.
[50] *See Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-170485, UG-170486, UE-171221 & UG-171222, Order 07, 54 ¶ 158 (Apr. 26, 2018) (authorizing incorporation of a known and measurable event into the ERM baseline).

will produce the portfolio forecast error. The Commission has signaled that it will not adjust the ERM baseline based on unknown and unmeasurable events,[51] which reflects that making such an adjustment is arbitrary. The Commission should simply apply that principle here.

### C. The Portfolio Forecast Error is not Known or Measurable

*25* Avista contends that "both Staff and the Company agree that test period results of operations should be adjusted . . . to give effect to all 'known and measurable' changes not offset by other factors."[52] Yes, but Avista does not take the next step and explain how the portfolio forecast error involves known events and measurable dollar amounts – it instead blithely asserts that the known and measurable standard does not really apply to power costs[53] and that the Commission should relax application of the standard.[54]

*26* As to the first argument, Avista alleges that "it has been long-established practice to go beyond 'known and measurable' historical data . . . with necessary pro forming adjustments to power supply."[55] Avista offers no citation to authority for that blanket assertion,[56] and, regardless, Staff has already addressed it.[57] The Commission allows pro forma power cost adjustments using modeled, future-looking results because of the analytical rigor involved in the models.[58] Again, Avista is not making a pro forma adjustment within the rigorous analysis of a vetted model.[59] It is instead making an

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[51] *See Avista Corp.*, Dockets UE-170485, UG-170486, UE-170221 & UG-170222, Order 07, at 54 ¶ 158.
[52] Response at 7 ¶ 16.
[53] Response at 8-11 ¶¶ 18-26.
[54] *E.g.*, Response at 8 ¶ 17.
[55] Response at 9 ¶ 19.
[56] *See generally* Response at 9-11 ¶ 19-26.
[57] Staff's Motion at 13-14 ¶ 27.
[58] Staff's Motion at 13-14 ¶ 27.
[59] Avista contends that Staff somehow suggests that Avista has "abandoned any practice of actually modeling the results" of its power costs, "as was done with previous power supply adjustments." Response at 10 ¶ 22. Staff said no such thing. *See generally* Staff's Motion. Staff simply argued, and continues to argue, that the Commission relaxes the known and measurable standard only for rigorously modeled power costs. Staff's

adjustment to the results produced by such a model because it finds itself dissatisfied with those results. That is exactly the type of adjustment to which the Commission has always applied the known and measurable standards.[60] It should do no differently here.

*27* Relatedly, Avista contends that its power supply adjustment "has always" contained forecast error "at some level and in some form."[61] Avista does not explain exactly what that means or what the Commission has previously approved;[62] it also again fails to offer citation to supporting authority.[63] Regardless, Avista has never sought an adjustment like this one before, and Staff can find no example of the Commission approving any similar adjustment, meaning Avista cannot claim that some sort of precedent supports its position here.[64]

*28* As for the second argument, Avista argues that the Commission should relax the known and measurable standard for purposes of determining rate-year power costs based on the discretion granted it by RCW 80.28.425.[65] It need not. And it should not. As just noted, the Commission has long allowed future-looking, analytically-rigorous modeled results for power costs, and its rules specifically authorize pro forma adjustments for known and measurable changes to a utility's revenue requirement if those changes are properly matched to offsetting factors.[66] What Avista asks the Commission to include in rates is fundamentally

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Motion at 13-14 ¶ 27. To that end, Staff does not contend that Avista cannot make post-model adjustments to arrive at its pro forma power supply adjustment, as it seems to claim, but that those adjustments must be known and measurable and involve consideration of offsetting factors. The adjustment at issue here notably does not meet those requirements.

[60] WAC 480-07-510(3)(c))(ii).

[61] Response at 10 ¶ 24.

[62] Response at 10 ¶ 24.

[63] Response at 10 ¶ 24.

[64] *Olson v. City of Tac*oma, 15 Wash. 148, 151, 45 P. 734 (1986) (what a tribunal has not addressed is an open question when properly presented).

[65] Response at 8-9 ¶ 18.

[66] *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-090134, UG-090135 & UG-060518, Order 10, 21 ¶¶ 45-46 (Dec. 22, 2009); WAC 480-07-510(3)(c).

different: it asks the Commission to authorize rate inclusion for events that Avista cannot model or specifically identify and whose rate impacts Avista can neither quantify nor for which it has considered offsetting factors.[67] That type of arbitrary adjustment will not produce the fair, just, reasonable and sufficient rates that the public service laws require the Commission to set in this proceeding. [68]

**D. Avista Failed to Consider Offsetting Factors**

*29* Finally, Avista contends that it did consider offsetting factors, either through its power costs methodology or because the ERM operates to capture them. Avista is wrong on both counts.

*30* Avista chides Staff for "fault[ing] Avista for not providing 'offsetting factors' as part of its portfolio forecast error adjustment,"[69] claiming that its power cost methodology already incorporates those offsetting factors.[70] It does not. Avista's power cost modeling produces offsets for what the company can model.[71] The theory underlying the portfolio forecast error adjustment is that there will be rate year events that the company cannot model and which cause variance (whose specific magnitude the company cannot predict) from the modeled results.[72] Staff's point is that Avista did not, and cannot, consider offsetting factors, whether direct or indirect, for those events.[73] Avista's pointing to its modeled results does not answer that criticism.

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[67] Staff's Motion at 11-16 ¶ 23-33.
[68] RCW 80.28.020, .425.
[69] Response at 15 ¶ 37.
[70] *See generally* Kalich.
[71] See generally Kalich, CGK-1T.
[72] Kinney, Exh. SJK-1T at 68:15-69:14.
[73] Staff's Motion at 14-16 ¶ 29-33.

*31* Avista also repeatedly indicates that the ERM true up will capture any offsetting factors, obviating it of the need to look at them in the initial setting of rates.[74] The way the ERM operates prevents it from meaningfully capturing offsets in this context. If Avista does not build offsetting factors in the ERM baseline, the baseline will be set too high. If it is, customers will pay too much for power costs. That overpayment will run through the ERM's dead and sharing bands.[75] That means, from the perspective of customers, the offsets Avista claims are captured by the ERM's operation are lessened, perhaps significantly.[76] The Commission should decline to view a mechanism meant to reward Avista for controlling its power costs[77] properly matches the portfolio adjustment error with any offsetting factors.

*32* Finally, Avista argues that Staff errs by "forc[ing]" the portfolio forecast error through the deadbands "that are supposed to operate on '<u>ordinary</u>' fluctuations in power costs."[78] That argument might have force if Avista had not sponsored significant testimony stating that the variance underlying the portfolio forecast error was the new normal,[79] and repeated the claim in its response.[80]

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[74] *E.g.*, Response at 12 ¶ 27, 15-16 ¶ 38-39.
[75] *See* Kinney, Exh. SJK-1T at 51:2-12.
[76] This structural feature also makes the ERM true up different than the type of true up the Commission envisioned for plant valuation in the context of multi-year rate plans. *In re the Commission Inquiry Into the Valuation of Public Serv. Co. Property that Becomes Used & Useful after Rate Effective Date*, Docket U-190531, Policy Statement, 7 ¶ 20 (Jan. 31, 2020) (discussing the need to match costs with offsets).
[77] *See Wash. Utils. & Transp. Comm'n v. PacifiCorp*, Dockets UE-230172 & UE-210852, Order 08, 124 ¶ 391 (Mar. 19, 2024) (noting that power cost adjustment sharing bands are meant to incent utilities to control costs).
[78] Response at 16 ¶ 40 (emphasis in original).
[79] *E.g.*, Kinney, Exh. SJK-1T at 70:15-71:7.
[80] *E.g.*, Response at n.19.

## III. CONCLUSION

*33* Staff requests that the Commission reject the arguments that Avista offers in response, and summarily determine that Avista may not incorporate the portfolio forecast error into its revenue requirement or ERM baseline.

DATED this 6th day of May 2024.

Respectfully submitted,

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