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Via: UTC Web Portal

December 13, 2019

Mark L. Johnson
Executive Director and Secretary
Washington Utilities & Transportation Commission
621 Woodland Square Loop SE
Lacey, WA 98503

Re: Docket No. UE-190663 – Comments of Avista Utilities

Dear Mr. Johnson,

Avista Corporation, dba Avista Utilities ("Avista" or "Company"), submits the following comments in response to Northwest and Intermountain Power Producers Coalition ("NIPPC") and Renewable Energy Coalition ("REC") comments filed on November 15, 2019 related to Avista, Puget Sound Energy, and PacifiCorp's proposed contracting procedures. The Company's comments are limited only to Avista.

Avista, in response to the Washington Utilities and Transportation Commission's ("Commission") rules to implement the Public Utility Regulatory Policies Act ("PURPA") submitted its proposed contracting procedures on August 9, 2019.[1] The Company's proposed contracting procedures set forth the obligations of the utility and the qualifying facility ("QF") when entering into contracts for the purchase and sale of QF output.[2] Avista's proposed procedures also provide for a legally enforceable obligation ("LEO") to be memorialized in an executed

[1] See WAC 480-106-030(1).
[2] *Id.*

written contract and provides the ability for QFs to, under appropriate circumstances, obtain a LEO prior to an executed written contract.[3]

1. Contracting Timelines

In their comments, NIPPC and REC state that Avista's contracting timeline for QFs eligible for standard published prices and contracts is generally acceptable and consistent with its recitation of how the contracting process should look.[4] Nevertheless, NIPPC and REC raise two issues regarding Avista's proposed timeline.

First, NIPPC and REC state that all the utilities in the state should have the same or similar contracting timelines.[5] According to NIPPC and REC this is necessary so that "a QF knows what to expect regardless of the utility it decides to contract with."[6] Avista does not understand this objection. The timeline for each step of the contracting process is clearly set forth in Avista's proposed contracting procedure. QFs, even those that are relatively small, should have sufficient level of sophistication to read Avista's contracting procedure and to know what to expect even if Avista's timelines differ slightly from the timelines proposed by the other utilities in the state.

Ultimately, NIPPC and REC state that Avista's timelines are acceptable, with one exception. Specifically, NIPPC and REC take issue with the requirement that, once a final executable contract is tendered to the QF, the QF is required to execute the contract within 20 business days. NIPPC and REC prefer Puget Sound Energy's proposal to require execution within 60 calendar days.[7]

Avista finds NIPPC and REC's comment requesting 60 calendar days to execute a contract perplexing for at least two reasons. First, Avista is proposing 20 *business days*, which is nearly a month. Avista recognizes that public entities sometimes require time to obtain signatures; however, 20 business days should be more than enough time to execute a power purchase agreement. This is especially true here since the timelines for completing the contracting process

[3] *Id.*
[4] November 15 Comments at p. 5. Neve
[5] November 15 Comments at p. 4, 5.
[6] November 15 Comments at p. 5.
[7] It is worth noting that, in response to NIPPC and REC's request in informal discussions for more time to execute the contract, Avista did expand the time for both the QF and the utility to execute the contract from 10 to 20 business days.

are clearly stated and all parties should have plenty of advance notice of when a final contract will be available for execution.

Second, Avista has always understood the QFs' concerns to be that the contracting process is too long. In this instance, the QFs are advocating for longer timeframes.[8] 20 business days is reasonable and should provide more than enough time for QFs to execute a final contract. NIPPC and REC's request for 60 days to execute a final contract should be rejected.

2. Separate Contracting Procedures

In their comments, NIPPC and REC take issue with Avista's contracting procedure because it applies to both small QFs (those that are 5 MWs and smaller) and QFs that are larger than 5 MWs. According to NIPPC and REC, while they are not opposed in principle to a single combined contracting process for large and small QFs, but seek improvements to avoid unnecessary confusion.[9]

Avista proposed a single contracting procedure rather than two separate contracting procedures to standardize the process for *all* QFs in order to avoid confusion. Where appropriate, the procedure clarifies the process for small QFs while at the same time ensuring a single standard to be applied to all QFs.

Avista has attempted to clarify and streamline where appropriate for small QFs. For example, and as noted in our November 15 Comments, Avista clarified that the indicative pricing proposal for small QFs is deemed provided on the day the Company receives all of the information required in Section 1(A).[10] NIPPC and REC attempt to create confusion by arguing that the significance of this is not clear and they are uncertain whether they are required to immediately send another request to Avista pursuant to Section E indicating a desire to proceed.[11] Section E requires the QF to provide additional information that the Company reasonably determines is necessary, including updated information, evidence of site control, and anticipated timelines for completion of key milestones. This section is clear and applies to all QFs. There is no requirement,

[8] To the extent the time for QFs to execute is expanded, the time for the utilities to sign should similarly be expanded so that both entities are subject to the same requirement.
[9] November 15 Comments at p. 6.
[10] November 15 Comments at p. 6. Avista's contracting procedures also make clear that the standard form of power purchase agreements for small QFs is provided to small QFs under Section (1)(G) of its procedures.
[11] November 15 Comments at p. 6.

express or implied, for any QF to "immediately send another request to Avista pursuant to Section E" as NIPPC and REC suggest.[12]

NIPPC and REC raise other similar issues with the single process proposed by Avista. In general, their issues are based on the proposition that "[s]maller QFs are often not sophisticated and may become confused."[13] QFs, even small QFs, should be sophisticated enough to read and understand Avista's procedure. Simply stated, Avista's process does not create the confusion that NIPPC and REC are concerned about nor does it create any undue burden on any QF. Avista's contracting procedures are similar to those used in Idaho which, in turn, were based significantly on procedures developed earlier by PacifiCorp. To date we have had no complaints about Avista's contracting procedures being complicated or otherwise a burden to QF contracting. NIPPC and REC's objections to Avista's combined procedure should be rejected.

3. Interim Drafts

In their comments, NIPPC and REC state that "Avista should also provide interim drafts at 15-business-day intervals."[14] Avista does not understand this request. Under Avista's proposed procedure, Avista is required to provide the QF a draft contract within 15 days after it receives the information that it needs from the QF.[15] The QF has 90 days to review the draft contract.[16] It is unclear how Avista is to provide interim drafts to the QF on 15-business-day intervals, as requested by NIPPC and REC, when Avista only has 15 business days to provide the draft contract.

To the extent that NIPPC and REC are concerned that Avista will not provide timely drafts in response to concerns with the draft contract that Avista provides that are raised by QFs, that concern is already addressed by two other provisions in Avista's procedure. First, if a QF raises concerns with the draft contract, it must schedule a meeting to discuss those concerns. As discussed below, this meeting is intended to resolve any such concerns in an efficient manner. Second, if Avista does not provide timely drafts based on the negotiations that occur at the required

[12] November 15 Comments at p. 6
[13] November 15 Comments at p. 6.
[14] November 15 Comments at p. 7.
[15] Avista Contracting Procedures at Section (1)G (stating: "Following satisfactory receipt of all information required in Section (1)E, the Company shall, within fifteen (15) business days of the Company's receipt of the information required in Section (1)E, provide the Customer with a draft power purchase agreement containing a comprehensive set of proposed terms and conditions[.]").
[16] Avista Contracting Procedures at Section (1)H.

meeting, the QF can request that the Commission impose a LEO on the ground that Avista is not acting reasonably or in accordance with its procedure. A requirement to provide drafts on 15-day intervals is unnecessary and should be rejected.

4. Meeting to Discuss Changes to the Draft Contract

NIPPC and REC also take issue with Avista's procedure because it requires QFs to contact Avista and schedule a meeting to discuss any issues that the QF has with the draft contract.[17] In contrast, Avista may request such a meeting if it has any issues regarding the QF or draft power purchase agreement that it wants to discuss. In NIPPC and REC's view, "the same language should be used for both, giving each the opportunity to request a meeting but not requiring it of one party or the other."[18]

NIPPC and REC appear to fundamentally misunderstand the purposes of the meetings discussed in Section (1)I of Avista's proposed procedure. At this stage in the procedure, Avista has provided the QF a draft contract that is acceptable to Avista. If the QF has issues with that contract, then it is required to contact the Company to schedule a meeting to resolve those issues. If the QF has issues, then this meeting is mandatory and is intended to efficiently resolve any issues that the QF has with the draft contract that Avista provided and to avoid delay caused by shuffling multiple drafts back and forth to resolve an issue. If the QF does not have any issues with the draft that Avista provided, no meeting is required. In any event, such meetings are not burdensome on either party. The required meetings can take the form of in-person, telephonic or video form.

The meeting that Avista is permitted, but not required, to request serves a completely different purpose. This meeting is intended to allow, if necessary, Avista to request a meeting to resolve any issues that arose after it provided the draft contract to the QF. If no such issues arise, then the meeting is not necessary. With regard to these meetings, Avista requests that the Commission accept its contracting procedure as proposed.

[17] November 15 Comments at p. 7-8.
[18] November 15 Comments at p. 7

5. Importance of Deadlines

NIPPC and REC state that "the QF should be permitted some flexibility to remain in the contracting queue if it misses a deadline due to reasonable circumstances."[19] Specifically, NIPPC and REC take issue with Section (1)N of Avista's proposed procedure that states that if the QF fails to meet any deadline then the QF has to begin anew. This aspect of Avista's proposed procedure is essential.

As noted at the outset, the contracting procedures set forth the obligations of both the QF and the utility. Failure of either party to comply with the procedure must have consequences in order to ensure that the process is adhered to by both parties. Failure of the utility to comply provides a basis for the QF to seek a LEO in the absence of a contact.[20] Failure of the QF to comply means that the QF must start the process over. The Company is committed to complying with the requirements of the process. The Commission should expect no less from QFs.

More fundamentally, QF compliance with the timelines is essential. If QFs are allowed to remain in the process even though they fail to meet a timeline, other QFs that are complying with the procedure could be adversely impacted. This issue has happened in other states. Should QFs that are complying with the timeless, but that are behind another QF in the process that is failing to comply with those timelines, be moved in front of the QF that is falling behind? At least for larger QFs that are not subject to the published avoided cost rate, there may be a negative impact on their offered rate.

The primary purpose of the contracting procedures is to give both parties certainty regarding the process for negotiating and finalizing contract. Adherence to the timeline for negotiating and finalizing such contracts by both the utility and the QF is a fundamental and essential part of that process that provides an objective bright line test to determine whether the utility, or the QF, has complied with its obligation. The flexibility that NIPPC and REC request for QFs would create ambiguity and undermine the fundamental purpose of the procedures. One cannot have it both ways, where on one hand timelines are enforced on the utility to the benefit of the QF, but the QF can choose to honor the timelines at will based on an undefined, and in fact undefinable, set of exemptions. The Commission should reject this request.

[19] November 15 Comments at p. 8.
[20] Avista Contracting Procedures at Section (1)D.

6. Notifying QFs in the Queue of Out-of-Cycle Avoided Cost Updates

Avista is not opposed to notifying QFs in the process of obtaining a contract of any out-of-cycle tariff updates. However, as NIPPC and REC recognize, such updates will be filed with the Commission. QFs have the ability, and should have the sophistication, to monitor filings made by the utilities that they are actively contracting with. Accordingly, adding such a requirement to the tariff is unnecessary and burdensome. Avista respectfully requests the Commission not grant this request.

7. Inclusion of the Commission's LEO Rule Language

NIPPC and REC acknowledge that the language that Avista provided to comply with the LEO requirement largely mirrors the Commission's rule. Nevertheless, NIPPC and REC assert that it fails in two respects.

First, NIPPC and REC argue that Avista's language "does not recognize that '[a] [LEO] may exist prior to an executable written contract."[21] That is demonstrably incorrect. Avista's contracting procedure expressly provides the ability of the Commission to establish a LEO in the absence of (i.e., prior to) a fully executed power purchase agreement:

> In the event that a Customer or the Company requests that the Washington Utilities and Transportation Commission establish a legally enforceable obligation *in the absence of a fully executed power purchase agreement* for the output of such Customer's Qualifying Facilities, the Washington Utilities and Transportation Commission will determine whether the Customer or the Company failed to comply with any material requirement of the contracting procedures set forth in this Schedule 62 or otherwise acted unreasonably and, if so, *the Washington Utilities and Transportation Commission will determine the date upon which a legally enforceable obligation occurred based on the specific facts and circumstances*.[22]

There can be no question that Avista's procedure provides the opportunity for a QF to establish a LEO prior to a fully executed power purchase agreement.

[21] November 15 Comments at p. 9 (alterations in original).
[22] Avista Contracting Procedures at Section (1)D (emphasis added).

NIPPC and REC are seeking to have Avista restate the Commission's rule in its entirety.[23] There is no requirement to restate the rule in its entirety in Avista's contracting procedures.[24] Rather, Avista is required to have contracting procedures that implement the rule. The rule requires that (i) the contracting procedures provide that a LEO be memorialized in an executed written contract, and (ii) that a LEO may exist prior to a written contract and to provide a process for establishing such a LEO.[25] Avista's contracting procedures satisfy the requirements of the Commission's rule, ensure protection for utility customers, and are not burdensome on the QF.

What NIPPC and REC appear to be seeking is the inclusion of the portion of the rule that states: "A legally enforceable obligation may exist prior to an executed written contract."[26] While the ability to obtain a LEO in the absence of a contract is required, there is no requirement to include that specific language to effectuate the requirement. Inclusion of this sentence merely adds the potential for confusion and, therefore, the potential for significant disputes to be resolved by the Commission—which will result in wasted time and resources for the parties as well as the Commission. Avista's proposed language is consistent with, and implements, the requirements of the rule and avoids language that could raise unnecessary questions regarding when and how a LEO can arise in the absence of a written contract. The Commission's intent was clear—such a LEO can be established if an irreconcilable disagreement arises—and Avista's proposal implements that intent.

Second, NIPPC and REC state that Avista's process "ignores that '[i]n making its determination the commission will recognize that the formation of a [LEO] is based on a [QF] committing itself to sell all or part of its electric output to an electric utility."[27] Avista's procedures allow the Commission to determine the date upon which a legally enforceable obligation occurred based on the specific facts and circumstances.[28] Avista agrees that a LEO cannot exist unless the QF has committed itself to sell all or part of its electric output to the utility. Avista has revised Section (1)D of its contracting procedures to include proposed language to clarify this point.

[23] November 15 Comments at p. 8.
[24] To be sure, merely repeating the language in the rule in the Tariff serves no purpose. The Tariff is to provide for implementation consistent with the rule as approved by the Commission.
[25] WAC 480-106-030(2).
[26] *See* November 15 Comments at p. 9; *see also* WAC 480-106-030(2)(b).
[27] November 15 Comments at p. 9 (alterations in original).
[28] Avista Contracting Procedures at Section (1)D.

Finally, NIPPC and REC take issue with Avista's proposal that the Commission is to determine whether the Customer or the Company failed to comply with any material requirement of the contracting procedures or otherwise acted unreasonably before it establishes a LEO.[29] The Commission's rules contemplate that the LEO is to be memorialized in an executed written contract. If the utility acts in accordance with the contracting procedures—which prescribe strict deadlines for each step in the process—and otherwise acts reasonably, there is no principled reason to establish a LEO other than through the contract.

What NIPPC and REC appear to want is the ability to claim a LEO *even if* the utility is acting reasonably and in accordance with its procedure. This simply provides QFs with the ability to argue that they are entitled to a LEO whenever the QF thinks that it is advantageous to do so. If QFs have this ability, they will be incented to claim a LEO as early as possible to lock in the avoided cost rate as a hedge against the possibility that the avoided cost may decrease by the time they get to a fully executed contract. If the rate goes up, they simply walk away from that LEO and force a new LEO at the higher rate. This is especially problematic given that in the absence of an executed contract there is no clear standard for determining when a QF has committed to sell its output to the utility and, more fundamentally, no way to enforce any such commitment. Without a clear standard—such as the one proposed by Avista—for when the Commission will step in and establish a LEO, there is substantial potential for harm to utility ratepayers and protracted disputes to be resolved by the Commission. But for the changes Avista already has made to Section (1)D, the Commission should reject these requests in their entirety.

8. QFs that Provide As-Available Energy Are Entitled to an As-Available Rate

In their comments, NIPPC and REC argue that QFs deciding to provide some, but not all, of their output are entitled to standard rates.[30] Avista's Schedule 62 provides that QFs not all of their output shall sell to Avista at an as-available rate.

As a threshold matter, Schedule 62 rates are applicable only to small QFs (5 MWs or less). The vast majority of the small QFs that may decide to use some of their output to serve their own load and sell the remainder to the utility are solar QFs. These QFs cannot provide a firm

[29] November 15 Comments at p. 9.
[30] November 15 Comments at p. 10-11.

commitment to the utility; rather, they will simply provide whatever is left over after they serve their own load. This is, by definition, an as-available sale to the utility and, therefore, an as-available rate is appropriate.

To the extent that larger QFs, such as co-gen, decide to sell some but not all of their output, those QFs will get a negotiated rate and a negotiated contract. The terms of any such contract will therefore be negotiated based on the particular type of resources and circumstances surrounding the purchase, including the potential for compensation for reducing utility capacity obligations.

To the extent that the Commission is concerned that there are some small QFs providing significant capacity, such as hydro or co-gen QFs, that might be disadvantaged by selling at an as-available rate, the Commission can solve that issue by simply lowering the published avoided cost rate cap from 5 MWs to 100 kW solely for those types of QFs that desire to sell some, but not all, of their output to the utility (the cap would remain at 5 MW for all other QFs). As an alternative, the Commission might further subject QFs between 100kW and 5 MW to negotiating only the capacity component of the rate enabling fully eligible for published energy rates. It is worth noting here that, for the wind and solar projects that have, and are anticipated to represent the vast bulk of future QF requests, energy payments under our tariff make up the entirety of payments; no capacity payment is given. As a practical matter therefore, making the capacity payment subject to negotiation only for QFs wanting to serve their own load is unlikely to have any real effect here. Based on these facts, Avista believes its tariff should be approved absent any adjustment for small QFs prioritizing their own load service above committing to firm utility deliveries; however, where the Commission disagrees, Avista is hopeful its tariff can be modified using one of the two approaches suggested above.

9. Conclusion

Avista appreciates the opportunity to collaborate with Commission Staff and interested stakeholders and we look forward to participating in further discussions on these important topics. Please direct any questions regarding these comments to Michael Andrea at 509-495-2564 or myself at 509-495-4975.

Sincerely,

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Avista Utilities