Sanger Thompson PC
1041 SE 58th Place. Portland, OR 97215 tel (503) 756-7533 fax (503) 334-2235 irion@sanger-law.com

September 10, 2019

Via Electronic Filing

Chair David Danner
Commissioner Anne Rendahl
Commissioner Jay Balasbas
Washington Utilities and Transportation Commission
621 Woodland Square Loop SE
Lacey, WA 98503

Re: Utility PURPA Compliance Filings –
Initial Comments for September 12, 2019 Open Meeting

Docket Nos. UE-190663 – Avista
UE-190665 – Puget Sound Energy
UE-190666 – PacifiCorp

Dear Commissioners:

The Northwest and Intermountain Power Producers Coalition ("NIPPC") and the Renewable Energy Coalition ("REC") submits these Initial Comments in response to Avista's, Puget Sound Energy's ("PSE"), and PacifiCorp's Public Utility Regulatory Policies Act ("PURPA") Compliance Filings submitted in Docket Nos. UE-190663, UE-190665, and UE-190666 respectively.

In reviewing these filings, the Washington Utilities and Transportation Commission ("Commission" or "WUTC") should consider:

- First, which items are not contested and should go into effect immediately;
- Second, which items are inconsistent with PURPA or the WUTC's new PURPA rules and thus rejected outright—the utilities should be required to make new compliance filings consistent with the Commission's recently adopted rules and PURPA; and
- Third, which items are subject to debate and should be further investigated, which include the utilities proposed standard contract forms.

With these Initial Comments, NIPPC/REC hope to offer the Commission, Staff and Stakeholders a high-level preview of issues or potential issues NIPPC/REC have identified thus far and begin the process of grouping issues into the above three categories. NIPPC/REC are continuing their review of the filings and plan to offer further analysis and identify additional issues in advance of the Commission's October 10, 2019 open meeting.

1. Non-Contested Items to be Effective Immediately

- The utilities non-binding term sheets for use in negotiating contracts for QFs over 5 MW required to be posted to their websites. We note however that we could not locate the term sheets for any of the utilities.

2. Items that are Inconsistent with the Commission's Rules or PURPA and Should Be Rejected Immediately, and the Utilities Should Be Required to Promptly Make Revised Compliance Filings

- Avista's proposal to maintain its contracting procedures and standard PPA outside of Schedule 62 is inconsistent with WAC 480-106-030, which specifies that the tariff content include the contracting procedures, information requirements (for standard and non-standard QFs), and standard contract provisions.

- Avista's proposal to derive its capacity price from its 2020 Draft integrated resource plan, rather than the most recently acknowledged IRP or most recent project proposals received pursuant to a request for proposal as required by WAC 480-106-040 (1)(b)(i).

- PSE's proposal to file a revised Schedule 91 that does not list the information required for QFs 5 MW and smaller to obtain a final executable PPA and that fails to include a contracting process is inconsistent with WAC 480-106-030 which specifies that the tariff must include the contracting procedures and information requirements (for both standard and non-standard QFs).

- PSE's proposal to price its capacity in 2019 through 2022 based on market purchases rather than a simple-cycle combustion turbine ("SCCT") required by WAC 480-106-040(1)(b)(ii).

- PSE's proposal to price its capacity in 2023 and later on a year-by-year basis depending on the resources projected to be acquired in a given year rather than only on the *next* capacity addition for that and all subsequent years as required by WAC 480-106-040(1)(b)(i).

- PacifiCorp's proposal to pay for capacity only in July and December rather than include the full capacity cost of a SCCT in its avoided cost calculation for the years during which it identifies the need for capacity in the form of market purchases as required by WAC 480-106-040(1)(b)(ii).

- PacifiCorp proposed to file only a standard contract "template" for an on-system, firm, greenfield QF project that it will modify for other types of QFs (e.g., existing, off-system, or otherwise do not fit within that contract template). This is inconsistent with WAC 480-106-030, which specifies that the tariff content include standard contract provisions.

- All three utilities' proposals regarding the formation of legally enforceable obligations ("LEO") are inconsistent with WAC 480-106-030(2), which provides explicit direction on how a QF may form a LEO. Each utility provides differing language,[1] and no utility includes the language that a LEO may arise prior to executing a contract which is required by PURPA and Washington law. The Commission determined that a LEO may be found on a case-by-case basis recognizing that a LEO "is based on a [QF] committing itself to sell all or part of its electric output to an electric utility."

- All references made by any of the three utilities to a requirement that a QF must provide "all QF output,"[2] or "all of the electrical capacity and energy"[3] rather than "all or part" of the net output is inconsistent with PURPA and WAC 480-106-020, which requires the purchase of energy and capacity that is "made available" or WAC 480-106-030 which allows a LEO formation for "all or part" of the QF's electric output.

- All references made by any of the three utilities to a requirement that a QF must be "directly interconnected,"[4] "located within the Company's electric service area,"[5] otherwise "on-system" is inconsistent with PURPA and WAC 480-106-020, which requires a utility to purchase any energy and capacity that is made available from a QF either directly or indirectly via transmission over another entity's lines.

- All references made by all three utilities to any requirement that a QF must complete interconnection studies or execute an interconnection agreement prior to executing its PPA or prior to forming a LEO[6] is inconsistent with PURPA.

---

1 *See e.g.* Avista Attachment A Contracting Procedures at Section (1)(D) (providing for a LEO only where Avista failed to comply with any material requirement of the contracting procedures or Schedule 62); *See also e.g.,* PSE Schedule 91 (providing that a written PPA is required but not specifying when a LEO may arise prior to execution); PSE Schedule 92 (same); *See also e.g.,* PacifiCorp Schedule QF at Sheet QF.9 Section (I)(D) (providing that the Commission will determine the formation of a LEO based on the facts and circumstances of the case, but omitting remainder of language from the WAC regarding a QF's commitment to sell).

2 *See e.g.* Avista draft Schedule 62 at Sheet No. 62, Section (1).

3 *See e.g.* PSE draft Schedule 91 at Sheet No. 91-E, Section (5)(C).

4 *See e.g.* Avista draft Schedule 62 at Sheet No. 62.

5 *See e.g.* PSE draft Schedule 91 at Sheet No. 91.

6 *See e.g.* Avista Attachment A Contracting Procedures at Section (2)(A) (specifying that purchase of output is conditioned upon executed interconnection agreement); PSE Schedule 92 at Sheet 92-B, Section (3)(D)(vi) ("must provide the Company with any additional project information. . . which may include. . . assurance that the necessary interconnection agreements have been executed."); PacifiCorp Schedule QF at Sheet QF.4 Section (I)(B)(4)(f) ("Seller must provide Company with. . . evidence that any necessary interconnection studies . . . have been completed").

- There are a number of contract provisions which are inconsistent with the Commission's new rules and PURPA, which should be rejected out of hand. NIPPC/REC will identify those in its next round of comments.

3. **Items that Are Unclear If They Are Consistent with the Commission's Rules and Policies and Require Further Investigation by the Commission**

A. Utility Rates and Tariff Filings

- Avista's monthly energy shaping factors.

- Avista's methodology for calculating renewable capacity contribution.

- PSE's Mid-C market price forecast. PSE used a market price forecast from its PSE's current forecast of market prices for electricity in PSE's most current draft Integrated Resource Plan; however, that plan has not been made public and the forecast accuracy must be vetted.

- PSE's methodology for calculating renewable capacity contribution.

- PSE's proposal to require that QFs offer PSE an option to purchase the environmental attributes. This is inconsistent with the requirement that the QF owns the environmental attributes unless the standard rates for which they are paid is based on a renewable resource or the QF otherwise expressly conveys the attributes to the utility for additional consideration under WAC 480-106-050 (4)(c).

- PacifiCorp's proposal for its "capitalized energy cost adjustment."

- Methodology(s) for negotiating non-standard prices.

- Contracting procedures and timelines.

B. Contract Terms and Conditions

The below contract terms and conditions have been flagged as areas of concern with one or more of the utilities' filings. While there may be additional issues, this list provides a starting point to review whether each of the utilities have included commercially reasonable terms and conditions in their draft standard contracts. Many of these concerns arise from issues that have been litigated in other states either in generic PURPA implementation proceedings or in individual QF-utility LEO or contract disputes. A single commercially unreasonable term in a contract could break the contract and effectively halt any PURPA development. This is why it is important to review each utility contract carefully and be sure that it is drafted in a manner that is commercially reasonable as a whole. Otherwise, the WUTC's effort to reform its PURPA policies will be a loss.

The Commission, Staff, and Stakeholders should work towards some common understanding around the meaning and effect of each of the terms to avoid future contract disputes, and where appropriate some consistency among the utilities may be desirable. In the underlying rulemaking, NIPPC/REC made a joint recommendation with PSE and other stakeholders that "[t]here will be standard contact provisions for QFs at or below the size threshold approved by the Commission."[7] The Commission approved that recommendation, and also made it clear that each utility should be able to file its own contract, but each contract should be consistent with the Commission's policies and rules.[8]

NIPPC/REC intends to comment in more detail regarding the specific concerns with each utility's contract provisions. NIPPC/REC's preferred process would be not to litigate these issues before the Commission at an open meeting, but instead to have a litigated proceeding in which Staff and interested parties identify contested PPA provisions and the Commission makes a policy determination as to the reasonableness of each disputed provision.[9] NIPPC/REC prefer that this occur through notice and comment rather than a formal evidentiary proceeding with testimony and hearings.

The existence of the standard contract form benefits QFs, and NIPPC/REC understand that this process will delay the adoption of final contracts. However, standard contracts can actually be harmful, if they include terms which prevent a project from being financed or able to continue operating.

---

7 *In re Amending, Adopting, and Repealing Sections of WAC 480-106 and 480-107*, Docket No. U-161024, Joint Recommendation of Puget Sound Energy, Northwest and Intermountain Power Producers Coalition, Renewable Energy Coalition, Renewable Northwest, Northwest Energy Coalition, and Climate Solutions at 1 (Feb. 26, 2018).

8 WAC 480-106-030 (4) ("All utilities shall file standard contract provisions for purchases from a qualifying facility with a capacity of five megawatts or less. Standard contracts may include commercially reasonable milestone events and cure periods including, but not limited to, the qualifying facility's: (a) Provision of any necessary credit support, necessary governmental permits and authorizations, evidence of construction financing, and as-built supplements; (b) Completion of interconnection facilities; (c) Completion of start-up testing; and (d) Achievement of mechanical availability of operation."

9 In Oregon, the Oregon Public Utility Commission evaluated the compliance of standard power purchase contracts its Docket No. UM 1129, by reviewing issues identified by parties and providing guidance to the utilities to submit revised standard contracts. *In re Pub. Util. Comm'n of Or. Staff's Investigation Relating to Elec. Util. Purchases from Qualifying Facilities*, OPUC Docket No. UM 1129, Order No. 06-538 (available at: https://apps.puc.state.or.us/orders/2006ords/06-538.pdf.). Idaho and Utah do not have "standard contract forms", but instead those state's commissions approve individual contracts and terms between a QF and the utility on a case by case basis, which set policy for future contracts. In adopting a standard contract form, Washington should now take the time to make sure the form is reasonable for the QFs, utilities and ratepayers.

Below is a partial list of contract terms for which we have concerns, which NIPPC/REC may supplement in our October comments.

- **Exiting QF Fixed-Price Term.** The Commission set fixed price terms for existing QFs of 10 years and for new QFs of 15 years, using different language. It is not explicit in the WAC and as a result, the utilities each provide differing interpretations around when the 10-year term of fixed price [payments] for existing QFs commences. WAC 480-106-050 expressly provides that the 15-year term of fixed prices for new QFs starts on contract execution, but it does not make a similar finding for existing QFs.

- **Default and Cure.** Each of the utilities have differing provisions around what constitutes a default and whether or not the QF may cure that default and the amount of time a QF has to cure. Generally, some ability to cure is reasonable.

- **Damages.** While it is generally not unreasonable for a party to owe damages in the event of a default or termination, the damages that are imposed should be commercially reasonable.

- **Upgrades and Increases/Decreases.** Whether a QF is permitted to upgrade its facilities or increase/decrease its nameplate capacity, and if upon doing so, it is entitled to the rates within its existing contract, is an important topic for resolution because there may be changes to the project, equipment, or facilities that require changes to the nameplate capacity.

- **Facility Milestones.** The milestones proposed by some of the utilities are not commercially reasonable. For example, PSE's milestones would essentially require the QF to initiate commercial operation within one year after contract execution.[10] Given that it may take three years from execution to reach commercial operation and the Commission's rules allow for 3 years between execution and commercial operation, these milestones are not reasonable.

- **Interconnection Requirements and Service.** The utilities include varying levels of interconnection requirements in their standard contracts, including metering and telemetering requirements, communications requirements and that a QF must be designated as a network resource. Because interconnections are generally handled separately, these interconnection requirements may not be reasonable to include within the PPA. It may be reasonable to simply remove these requirements and state that all interconnections will comply with the applicable interconnection rules.

- **Scheduling.** The scheduling provisions are important because many small QFs do not have the capability to meet aggressive scheduling requirements. These requirements

[10] *See* PSE Schedule 91, Attachment B, Section 4.2 and Exhibit C.

should be commercially reasonable and practical in light of the utilities' need for power to be scheduled and a small QF's ability to do so.

- **Estimates and Minimum/Maximum Deliveries.** The provisions surrounding estimated energy deliveries and minimum or maximum deliveries and the damages or differing prices paid for violating such provisions are important to determining the economic viability of a project. Small QFs often do not have the bandwidth to produce down-to-the-minute estimates of energy deliveries, and then be penalized for not producing at that estimate. A commercially reasonable approach would give enough flexibility to QFs to enable them to accurately estimate.

- **Insurance.** The utilities have a wide range of insurance requirements from simply a general liability policy, but also property insurance, and an extremely detailed list of various types of other insurances, and on top of that the level of general liability insurance varies. This may be one area where it is reasonable to have some consistency or standardization.

- **Creditworthiness and Security.** The creditworthiness and security provisions vary greatly among the utilities as well. Generally, it is appropriate for some assurances around creditworthiness, but it may not be commercially reasonable for the QFs to post security unless and until it is demonstrated that the QF cannot meet the credit requirement.

- **Dispute Resolution.** The dispute resolution provisions create significant confusion around how disputes over executed contracts should be resolved and whether disputes come before the Commission, the courts, or some sort of third-party alternative dispute resolution process such as and arbitration.

- **Governmental Authority**. All three utilities include the same language in a "governmental authority" section, which notes that the agreement is "subject to" all governmental authorities having jurisdiction over the facility, the agreement and the parties. This language is similar to language in Portland General Electric Company's standard contract, which has been the subject of litigation in Oregon.

- **Commission Approval.** Avista's contract contains a provision stating that the contract is subject to Commission approval. In Idaho, the Idaho Public Utility Commission approves each individual PURPA contract executed by the utilities and based on the fact that only one utility included this provision, it is not clear whether the WUTC plans to employ a similar method, or if this was simply an error left over from something Avista may have taken out of one of its Idaho contracts.

- **Non-Termination on Repeal of PURPA.** Each of the utilities should include a provision in their standard PPAs that provides that the contract will not terminate if PURPA is repealed.

4. Conclusion

NIPPC/REC appreciate all the hard work that the Commission, Staff, utilities, and other stakeholders have put into the development of, and compliance with, the new rules. We understand that the Commission has an incredible workload related to the numerous rate proceedings, implementation of the 100% Clean Energy law, and other matters. Despite the heavy upcoming docket, NIPPC/REC believe it is important to investigate a few additional items to get PURPA implementation right, especially the methodologies for calculating larger QF prices, the contracting processes, the details of PSE and Avista's avoided cost rates, and a solid understanding of the utilities' proposed PPAs. The remaining issues the Commission can resolve at the October open meeting by rejecting all aspects of the utilities' filings that are inconsistent with its new rules and PURPA.

Sincerely,

Irion A. Sanger

cc: John Lowe, Executive Director REC
Carol Opatrny, Interim Executive Director NIPPPC