IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0596

THE STATE OF MONTANA, and
MONTANA DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION,

Plaintiffs/Appellees,

v.

AVISTA CORPORATION, a Washington
Corporation,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

On Appeal from the First Judicial District Court,
Lewis and Clark County, Montana
Cause No. ADV-2004-846
Honorable Mike Menahan

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I. INTRODUCTION

Avista appeals the District Court's holding that "Avista is not entitled to a credit or refund for rent paid in any previous year by any provision of the Settlement, Consent Judgment, or Lease." Avista respectfully asks this Court to reverse that decision.

II. ARGUMENT

A. The State's arguments do not support the District Court's unsupported determination that no provision in the agreements entitles Avista to a credit or refund for rent previously paid.

The State of Montana and the Montana Department of Natural Resources (collectively "the State") maintain the conclusory position that Avista is not entitled to a refund or credit. State Mont. & Mont. DNRC Resp. Br. 32-33, May 31, 2022 ("Resp. Br."). The State inappropriately relies on the claim that the Most Favored Nations Clause ("MFNC"), Judicial Reopener, and Governmental Reopener (collectively "Reopeners") do not specifically mention a refund, credit, or overpayment. *Id*. at 33. Thus, the State argues that the language in the Judicial Reopener "confirms that a reduction in rent under the Judicial Reopener applies *prospectively* and does not require a refund." Resp. Br. 35 (emphasis added). Notably, the State did not make this argument related to all of the Reopeners before the District Court. Rather than address the fact that the State did not meet its burden on summary judgment or that the District

Court provided no analysis or reasoning for its decision, the State attempts to replace the word "retroactively" with "prospectively" in the pertinent provisions of these Agreements. This is *directly* contrary to the language as written in the Reopeners and does not negate the fact the State did not meet its burden on summary judgment as to the Reopeners before the District Court.

Avista and the State agree the Reopeners have not yet been triggered. Pls.' Br. Support Mot. Summ. J. 17, May 27, 2020; Appellant's Opening Br. 16, Mar. 29, 2022. The Reopener language of Memorandum of Negotiated Settlement Terms ("Settlement Agreement"), Hydropower Site Lease ("Lease"), and Consent Judgment all have similar, but not identical, language. *See* State Mont. & Mont. DNRC's Resp. Br. App., May 31, 2022 ("Resp. Br. App."), App. 3: Hydropower Site Lease ¶¶ 5.2, 5.3, Jan. 31, 2008 ("Lease"); Resp. Br. App., App. 2: Consent. J. Btwn. Avista & State Mont. ¶¶ 8-9, Nov. 19, 2007 ("Consent J."); Resp. Br. App., App. 1 Mem. Neg. Settlement Terms ¶¶ 4-5, Oct. 19, 2007 ("Settlement Agr."). The differing language is important because it supports that not all of the provisions have the same meaning and that the District Court erred in granting summary judgment. The fact that the District Court did not even address these differences, establishes that summary judgment on all the Reopeners is unsupported.

The MFNC, the Governmental Reopener, and the Judicial Reopener effectuate the payment change retroactively starting on the date of the triggering event. Retroactively is an adjective that modifies application of the payment change. Retroactive means times or conditions of the past. Thus, when there is an attached "start date" that start date is the point looked back from. There is no clear limitation that the retroactive application ceases at the last payment term. The District Court erred in reading that unwritten limitation into the Reopeners and the MFNC, especially without providing any analysis or allowing argument on the matter. Because the State did not meet its burden of establishing it was entitled to judgment as a matter of law, the District Court's overly broad holding should be reversed.

B. Avista is not attempting to rewrite the MFNC.

Avista appeals the State's argument that the *retroactive* language from the MFNC has a *prospective* application, which the District Court held when it granted the State's Summary Judgment Motion. Avista and the State agree that interpretation of the Consent Judgment is purely a question of law, but Avista maintains that the District Court erred in its interpretation of the MFNC. Contrary to the State's editorial liberties, Avista is merely seeking to enforce the terms of the MFNC as written. *See Kuhr v. City of Billings*, 2007 MT 201, ¶ 18, 338 Mont. 402, 168 P.3d 615. Avista's position is based upon the plain

reading of the MFNC, which states that, upon it being triggered, "the $4 million base rent to be paid by Avista *shall be reduced retroactively starting on the date* of final judgment on the PPL Montana claims[.]" Consent J. ¶ 7 (emphasis added).

Contract terms are interpreted according to their "plain, ordinary meaning." *Schwend v. Schwend*, 1999 MT 194, ¶ 39, 295 Mont. 384, 983 P.2d 988. "Section 28-3-301, MCA, provides that 'a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting.'" *Gray v. Billings*, 213 Mont. 6, 10, 689 P.2d 268, 270 (1984).

The State's interpretation ignores the plain language of the MFNC. The State attempts to rely on the "to be paid" language to support its interpretation. However, that language relates to the execution date of the Consent Judgment, not the date the MFNC is triggered. This is evidenced by the language that immediately follows in the same sentence that includes the word "retroactively." Settlement Agr. ¶ 3; Consent J. ¶ 7; Lease ¶ 5.1.

The MFNC states that Avista's payments "shall be reduced retroactively starting on the date of final judgment[.]" The ordinary meaning of retroactive is past events or time.[1] Thus, the combination of "to be" and "retroactive" read in

[1] "[E]xtending in scope or effect to a prior time or to conditions that existed or originated in the past[.]" *Retroactive*, Merriam-Webster,

context of the whole Consent Judgment means that when a PPL judgment meets the triggering criteria, the $4 million dollar annual payments that were *to be paid* from the date of the Consent Judgment until the PPL judgment must be reduced retroactively. This is further supported by the "starting on" language that immediately follows. The use of "retroactive" in the clause is stated to "start on" the date of the PPL judgment. As "retroactive" is past-looking, it is retroactive *starting on* the date of the triggering event—the PPL judgment—and is applied back in time. Thus, *starting on* in the context of a *retroactive* action means to go back in time from that "starting" point. Settlement Agr. ¶ 3; Consent J. ¶ 7; Lease ¶ 5.1.

In contrast, the State's interpretation of the same language eliminates the meaning of "retroactive" by only reducing *future* or *prospective* payments after the triggering event, that are paid in arrears. The State ignores the plain language of the Consent Judgment and the context within which it was written. Just as the State points out that there are no references to credits, refunds, or overpayments, there are no references in the MFNC to arrears or that the reduction only applies to future payments from the date of the triggering event. *See*, Resp. Br. 26.

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https://www. merriamwebster.com/dictionary/retroactive (last visited Jun. 13, 2022).

The State appears to indicate that its interpretation is consistent with the Parties' intent. Resp. Br. 26. Not only is this assertion incorrect, but courts may only turn to extrinsic evidence to determine the intent of the parties where there is an ambiguity. *Ophus v. Fritz*, 2000 MT 251, ¶ 29, 301 Mont. 447, 11 P.3d 1192. The State likewise wishes for this Court to consider the concept of fairness and equity solely from the perspective of what might be most beneficial to the State. The District Court inappropriately took the State up on its offer. However, the District Court did not find that the language of the MFNC was ambiguous and, thus, it erred in interpreting the Agreement from the perspective of what would be most beneficial to the State.

Ultimately, the Court only need consider that there was a bargain between the Parties that included some risk on both Parties' accounts. "To constitute consideration, a performance must be bargained for. A performance is bargained for when it is sought by the promisor in exchange for his promise. The consideration induces the making of the promise, and the promise induces the furnishing of the consideration." *Reeves v. U.S. Bank Nat'l Ass'n*, 2017 MT 70, ¶ 16, 387 Mont. 138, 391 P.3d 742.

The State alleges that under Avista's interpretation of the language "the MFNC would require a complete refund of all rent paid by Avista completely erasing any benefit bargained for by Montana." Resp. Br. 29 (citing Order

Grant. State's Mot. Summ. J. 8, Oct. 26, 2021). This is not accurate, unless the State does not own the riverbeds at issue. Instead, Avista, as the most favored nation, would merely have its rent retroactively reduced to put it on equal footing with PPL. Moreover, such a result is in complete accord with the underlying purpose of both the State's lawsuit and the Parties' settlement, which was not to afford the State an unjustified windfall, but rather to secure appropriate rental payments solely to the extent the State is legally entitled to the same.

Here, Avista fulfilled its contractual obligations and has continued to pay rent over the past 10 years, cumulatively paying over $75,000,000.00 in rent to the State. It is the only party involved in the original litigation to have done so. This was material consideration for the settlement, and it would be inequitable to allow the State to invalidate its agreement to retroactive rent reduction, when it was allowed to benefit from the collection of immediate rental income and forego additional litigation against Avista in the underlying matter.

This is not an inequitable result as the State argues and the District Court feared. Both Avista and the State received the benefit of avoiding continued litigation costs over the last 15 years. Avista's calculated risk and reward was that PPL's expensive and timely litigation result would prove to be a better enough deal to trigger *retroactive* decreased payments equal to PPL's. On the

other hand, the State's calculated risk and reward was that PPL would not be successful or successful enough to trigger the MFNC, thus the settlement price would be locked in, and, in the meantime, they would be able to receive payments from Avista during the lengthy PPL litigation. The Parties each accepted these potential risks and rewards in entering into the Agreements. The State should not be permitted to reap the benefits yet avoid the consequences of its bargained for promises.

The District Court ignored the plain meaning of "retroactive" and Avista was entitled to summary judgment finding that, upon the activation of the MFNC, Avista is entitled to refund or credit for overpayments made during the life of the Lease.

III. CONCLUSION

Avista respectfully requests this Court reverse the District Court's October 26, 2021 Order Granting the State's Motion for Summary Judgment and Denying Avista's Motion for Summary Judgment.

DATED this 14th day of June, 2022.

/s/ Kathryn S. Mahe
Attorneys for Avista Corporation, a Washington Corporation

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office 365 is 1773 words, excluding Certificate of Service and Certificate of Compliance.

/s/ Kathryn S. Mahe
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CERTIFICATE OF SERVICE

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