

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF AVISTA’S) CASE NO. AVU-E-23-06
APPLICATION FOR AN ACCOUNTING)
ORDER AUTHORIZING DEFERRAL OF) ORDER NO. 35921
CERTAIN COSTS ASSOCIATED WITH THE)
MONTANA RIVERBED LEASE)
AGREEMENT)
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On June 30, 2023, Avista Corporation, dba Avista Utilities (“Company”), applied for Commission authorization to defer certain interest costs associated with the Montana Riverbed Lease Agreement (“Lease”). The Company would record the deferred amounts as a regulatory asset in FERC Account 182.3-Other Regulatory Assets.

On August 9, 2023, the Commission issued a Notice of Application and Notice of Modified Procedure, setting public comment and Company reply deadlines. Order No. 35878. Staff filed comments to which the Company replied, accepting Staff’s position. No other comments were received.

The Commission now issues this Order approving the Company’s Application as discussed below.

BACKGROUND

According to the Application, the Lease arises from the settlement of a lawsuit in 2006 in which Montana sought past and future rent for hydroelectric dams the Company and PPL Montana owned that allegedly encroach upon the bed and banks of navigable waters of Montana. The Company has been recovering payments made under the Lease from Idaho customers for more than a decade. However, the Company’s settlement agreement with Montana contains a “Most Favored Nation Clause” providing that, if PPL Montana achieves a better result via trial or settlement, the Company would also receive the benefit of that outcome. For example, if PPL Montana obtained more favorable rental payments than those the Company agreed to, the Company’s payment obligations would be correspondingly reduced. Following a 2010 decision by the U.S. Supreme Court in favor of PPL Montana regarding the determination of title to the riverbeds subject to the Lease and ensuing lower federal court litigation, the Company believed its rental obligations required adjustment.

In *PPL Montana, LLC v. Montana*, the U.S. Supreme Court held that title to a riverbed conferred under the constitutional “Equal-Footing Doctrine” is determined on a segment-by-segment basis. 565 U.S. 576, 593 (2012). River segments that could not carry commerce when a territory attained statehood were non-navigable and title to such segments was not conferred to the new state under the Equal-Footing Doctrine. *Id.* at 595. Because the Montana Supreme Court discounted this segment-by-segment approach in affirming the determination of rent owed by PPL Montana for the riverbeds at issue in this case, the U.S. Supreme Court reversed the Montana Supreme Court’s decision and remanded for further determination of the navigability of each riverbed segment. Although the U.S. Supreme Court held that Montana did not receive title to at least one segment of the riverbeds at issue under the Equal-Footing Doctrine and that evidence in the record created a “significant likelihood” that other segments were similarly non-navigable, *see Id.* at 599, thereby diminishing the damages award against PPL Montana to at least some extent, the Company represents that a lower federal court has yet to issue a final decision on the navigability of other riverbed segments. Once a final decision issues, however, the Company represents that it will seek recovery of any overpayments made to Montana.

While the litigation described above was pending, the Company paid Montana pursuant to the Lease. However, according to their initial agreement, the Company and Montana were to attempt to renegotiate the payment terms of the Lease after ten years. As noted, following the U.S. Supreme Court decision in *PPL Montana*, the Company believed its rental obligations required adjustment and the amount of the potential refund for a “retroactive” adjustment was becoming significant. Thus, when negotiations to adjust the lease payments failed in 2016, the Company made the lease payments for the years 2016 through 2020 under protest into an escrow account. The escrow agreement provided that the Company would owe Montana the lease payments with interest reflecting the rate of return of the unified investment program administered by the Montana Board of Investment.¹

After a Montana state trial court determined that the Most Favored Nation clause in the Company’s settlement agreement had not been triggered and, therefore, did not provide a basis for disputing or adjusting the Company’s rental obligations, the Company and Montana reached a

¹ The Montana Board of Investment is the body charged with overseeing the Unified Investments Program to manage the state’s financial assets. *See Mont. Code* § 17-6-201.

settlement regarding future lease payments. Since reaching that settlement in 2021, the Company has made lease payments directly to Montana.

On May 4, 2023, the Company received notice that the lease payments held in the escrow account were to be released. At the same time, the Company was notified that it owed the State of Montana \$3,766,353 in interest on lease payments, which would be payable within thirty days of the release of the lease payments from the escrow account.

THE APPLICATION

The Company requested authority to defer \$1,298,000 of approximately \$3.8 million of total interest costs associated with the Lease due to the State of Montana in the third quarter of 2023 (“Idaho’s Share”). Application at 7; Attachment A. The Company sought the deferral to facilitate future recovery of Idaho’s Share of the interest costs from Idaho customers. The Company proposed to record Idaho’s Share of interest expenses as a regulatory asset in Federal Energy Regulatory Commission (“FERC”) Account No. 182.3-Other Regulatory Assets. Additionally, the Company requested a carrying charge on Idaho’s Share of the interest expenses at the authorized cost of debt to be established in the Company’s pending general rate case (Case No. AVU-E-23-01).²

STAFF COMMENTS

Staff generally supported the Company’s request. Staff noted that the interest payments would be allocated between Washington and Idaho based on the production/transmission ratio effective when payment of the interest expense occurs. However, consistent with other recent accounting order cases, Staff did not support the Company’s request for a carrying charge. Staff believed that granting deferral of the interest expenses that would likely be otherwise unrecoverable is sufficient relief to the Company, noting that no law directs the Commission to grant a carrying charge on deferral accounts. Accordingly, Staff recommended partial approval of the Application, permitting the Company to defer Idaho’s Share of the interest cost in FERC Account No. 182.3-Other Regulatory Assets without a carrying charge.

COMMISSION DECISION

The Commission has jurisdiction over this matter under *Idaho Code* § 61-501. The Commission has broad authority to regulate the practices and operations of public utilities and may

² On August 31, 2023, the Commission issued Final Order No. 35909 in the Company’s general rate cases for both electric and natural gas services.

prescribe rules and regulations. *Idaho Code* §§ 61-501 and 61-503. Notably, the Commission is authorized to set quality, safety, and service standards, and may regulate a public utility's accounting practices. *Idaho Code* §§ 61-520 and 61-524. The Company is a Commission-regulated public utility under *Idaho Code* § 61-129 and an electric corporation under *Idaho Code* § 61-119. As a public utility, the Company must provide service that is "in all respects adequate, efficient, just and reasonable," and at rates that are just and reasonable. *See Idaho Code* §§ 61-301 and 61-302.

The Commission has reviewed the record, including the Application and the comments of Staff and the Company. We find the Company's request to defer Idaho's Share of the interest expenses related to the Lease reasonable. We previously approved recovery of the lease payments underlying the interest expenses at issue in this case. Order No. 30647. Additionally, when granting the Company authority to defer lease payments in 2008, we noted that the settlement agreement contemplated potential renegotiation and adjustment of payments under the Lease in 2016 and arbitration should those negotiations fail. Order No. 30492 at 2. Considering the results of the federal court proceedings involving PPL Montana and the terms of the initial settlement agreement between the Company and Montana,³ we cannot say the Company's efforts seeking an adjustment to its rental payments under the Lease were unreasonable. Nor can we say that the rate of interest established in the escrow agreement, which is equal to the rate of return that Montana would have obtained had it immediately received and invested the funds, is unreasonable. Accordingly, we find it fair, just, and reasonable to authorize the Company to book Idaho's share of the interest expenses in FERC Account No. 182.3-Other Regulatory Assets without a carrying charge. The ability of the Company to defer Idaho's Share of the interest expenses for future recovery provides sufficient benefit to the Company. A carrying charge in addition to the ability to defer the interest costs would not be in the public interest.

Additionally, we remind the Company that authority to defer does not guarantee recovery. The prudence and reasonableness of the deferred expenses will be determined in a future rate proceeding.

³ The Company represents that, since the U.S. Supreme Court remanded the case following its opinion in *PPL Montana*, Northwestern Energy was substituted as a party as the successor-in-interest of the hydropower projects PPL Montana owned.

ORDER

IT IS HEREBY ORDERED that the Company is authorized to defer Idaho's Share of the interest expenses associated with the Lease in FERC Account No. 182.3 without a carrying charge.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order about any matter decided in this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 13th day of September 2023.


ERIC ANDERSON, PRESIDENT


JOHN R. HAMMOND, COMMISSIONER


EDWARD LODGE, COMMISSIONER

ATTEST:


Jan Noriyuki
Commission Secretary

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