



Avista Corp.

1411 East Mission P.O. Box 3727
Spokane, Washington 99220-0500
Telephone 509-489-0500
Toll Free 800-727-9170

Via Electronic and Overnight Mail

July 16, 2018

Commission Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, ID 83702

RE: Case Nos. AVU-E-17-09 and AVU-G-17-05

Enclosed for filing with the Commission are an original and 7 copies of the Hydro One and Avista Motion in Opposition to IDWR's Petition to Intervene in Case Nos. AVU-E-17-09 and AVU-G-17-05.

A service list is attached, with the parties receiving a complete electronic copy of this filing. If you have any questions, please do not hesitate to contact David Meyer on behalf of Avista Corporation at 509-495-4316 or david.meyer@avistacorp.com or Liz Thomas on behalf of Hydro One Limited, at 206-370-7631 or liz.thomas@klgates.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Ehrbar", is written over the word "Sincerely,". The signature is fluid and cursive, with a long horizontal line extending to the right.

Patrick Ehrbar
Director of Regulatory Affairs

Enclosures

cc: Idaho Department of Water Resources

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of July, 2018, served the foregoing letter regarding the Motion in Opposition to IDWR's Petition to Intervene in the Merger Case Nos. AVU-E-17-09/AVU-G-17-05, upon the following parties, by sending a copy via electronic mail:

Diane Hanian, Secretary
Idaho Public Utilities Commission
472 W. Washington Street
Boise, ID 83720-5983
diane.hanian@puc.idaho.gov

Brad M. Purdy
Attorney at Law
2019 N 17th Street
Boise, ID 83702
bmpurdy@hotmail.com

Brandon Karpen
Deputy Attorneys General
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83720-0074
brandon.karpen@puc.idaho.gov

Peter J. Richardson
Richardson Adams PLLC
515 N. 27th Street
Boise, ID 83702
peter@richardsonadams.com

Danielle Franco-Malone
Schwerin Campbell Barnard
Iglitzin & Lavitt LLP
18 W. Mercer St., Suite 400
Seattle, WA 98119
franco@workerlaw.com

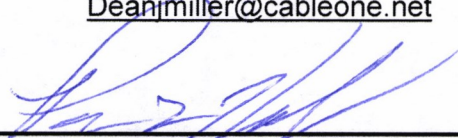
Ronald L. Williams
Williams Bradbury, P.C.
P. O. Box 388
802 W. Bannock St., Suite 900
Boise, ID 83702
ron@williamsbradbury.com

Larry Crowley
The Energy Strategies Institute, Inc.
5549 S. Cliffsedge Ave
Boise, ID 83716
crowleyla@aol.com

Ben Otto
Idaho Conservation League
710 N. 6th St.
Boise, ID 83702
botto@idahoconservation.org

Dr. Don Reading
6070 Hill Road
Boise, ID 83703
dreading@mindspring.com

Dean Miller
3620 E Warm Springs Ave.
Boise, ID 83716
Deanjmillercableone.net



Paul Kimball
Sr. Regulatory Analyst

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IDAHO PUBLIC UTILITIES COMMISSION

David J. Meyer, ISB No. 8317
Vice President and Chief Counsel of
Regulatory and Governmental Affairs
Avista Corporation
1411 E. Mission Avenue
P.O. Box 3727
Spokane, Washington 99220
Phone: (509) 495-4316, Fax: (509) 495-8851

Teresa Hill, Partner, ISB No. 6175
Elizabeth Thomas, Partner
Kari Vander Stoep, Partner
K&L Gates LLP
On Behalf of Hydro One Limited
and Olympus Equity LLC
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Phone: (206)623-7580, Fax: (206) 623-7022

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

_____)	
IN THE MATTER OF THE JOINT)	CASE NO. AVU-E-17-09
APPLICATION OF HYDRO ONE)	AVU-G-17-05
LIMITED AND AVISTA CORPORATION)	
FOR APPROVAL OF MERGER)	MOTION IN OPPOSITION TO
AGREEMENT)	IDWR’S PETITION TO INTERVENE
_____)	

1 COME NOW, Avista Corporation (hereinafter “Avista”) and Hydro One Limited
2 (hereinafter “Hydro One”), jointly referred to as the “Joint Applicants,” and respectfully oppose
3 the Idaho Department of Water Resources’ (hereinafter “IDWR”) Petition to Intervene filed on
4 July 9, 2018 (“IDWR Petition”).

I. INTRODUCTION

6 Joint Applicants understand and appreciate the important work done by both the IDWR
7 and the Commission in protecting the public interest. Notwithstanding that important
8 responsibility of the IDWR to protect water rights, it still must act within the ambit of its
9 statutory authority. (Idaho Code § 42-1701.) Joint Applicants also understand and accept the
10 dictates of Idaho Code § 61-328 to incorporate any necessary conditions imposed by the director
11 of the IDWR, as part of its merger approval process -- but only where the director is acting
12 within the scope of his authority in imposing such conditions. Because the terms and conditions

1 of the proposed merger will keep all water rights in the hands of Avista, there is no “change in
2 use of water under the water rights held for hydropower purposes” and accordingly no conditions
3 are necessary to prevent “injury to any water rights existing on the date of the sale, assignment or
4 transfer.” Moreover, under the unique terms of this merger, whereby Avista will retain all its
5 assets, will have its own independent board and will control its day-to-day operations, there is
6 also no “sale, assignment or transfer” of water rights. Accordingly, the IDWR lacks the authority
7 under its enabling statute, Idaho Code § 42-1701(6), to impose any condition on Avista’s
8 existing water rights -- rights that will remain with Avista and are not being transferred to Hydro
9 One.

10

11 **II. THIS MERGER DOCKET IS NOT THE APPROPRIATE FORUM FOR IMPOSING**
12 **WATER RIGHT CONDITIONS**

13 Avista has been and remains a strong steward of the water resources in North Idaho. It
14 takes that responsibility very seriously. It actively engages all stakeholders -- and there are many.
15 There is a statutorily-prescribed forum already established for the adjudication of water rights in
16 North Idaho in the Coeur d’Alene-Spokane and Clark Fork-Pend Oreille river basins, Idaho Code
17 § 42-1406(1)(b). Proceedings are already underway in the Coeur d’Alene-Spokane River Basin
18 Adjudication. See Commencement Order for the Coeur d’Alene-Spokane River Basin General
19 Adjudication, Case No. 49576, Fifth Judicial District (November 12, 2008). Avista’s rights and
20 those of other water right holders will be adjudicated in that proceeding. The IDWR is an active
21 participant.

22 This merger docket is not the forum for resolving water rights disputes. Moreover, the
23 Commission need not await the determinations made in other forums before acting on this
24 merger application. Why? Because Joint Applicants will agree to incorporate whatever

1 conditions on water rights that are subsequently imposed in the Coeur d'Alene-Spokane River
2 Basin General Adjudication, and will amend and supplement their merger conditions
3 accordingly, by means of a subsequent request to amend the order approving this merger. The
4 "public interest" will not be harmed by proceeding in this fashion. In fact, the public interest will
5 actually be better served by deferring to an expert forum for determining water right priorities; it
6 will also allow for a much broader participation by interested parties. This Commission is not in
7 the best position to referee any water rights disputes that may arise from the IDWR's
8 intervention in this proceeding. The unintended outcome of the IDWR's intervention may be to
9 effectively hold this merger process "hostage" in its attempt to impose what Avista believes are
10 unreasonable conditions, before this merger can be acted upon. As discussed below, Joint
11 Applicants have no problem whatsoever reconfirming that Avista's water rights are "whatever
12 they are" and will remain the same after the merger.

13

14 **III. THE INTERVENTION IS UNTIMELY AND WILL UNDULY BROADEN THE**
15 **ISSUES**

16 The proposed intervention of the IDWR at this very late juncture in this proceeding is
17 wholly inappropriate because the IDWR seeks to broaden the issues. The IDWR Petition
18 provided no explanation for why the IDWR waited until now to intervene, when the intervention
19 deadline was October 26, 2017. No "good cause" has been shown. Contrary to Commission Rule
20 73, the IDWR's late intervention will most certainly "unduly broaden the issues" in this case.
21 The IDWR will be recommending that conditions be attached to the merger concerning present
22 and future water rights as a result of the merger – something it could have done nine (9) months
23 ago when the Application was filed and intervention deadlines were set. This is unlike the
24 intervention of the "Avista Customer Group," which Joint Applicants did not ultimately object to

1 because they agreed to not broaden issues; here the IDWR wants to raise substantive issues that
2 go well beyond the current issues in the case.

3

4 **IV. THE IDWR HAS NO JURISDICTIONAL BASIS TO SUGGEST CONDITIONS IN**
5 **THIS MERGER DOCKET**

6 To understand why there are jurisdictional issues presented with respect to the IDWR's
7 asserted right to insist upon conditions as part of this merger, it is necessary to walk through the
8 statutory chain. First, the Idaho Code provides:

9 The commission shall have power to issue said authorization [to merge] and order
10 as prayed for, or to refuse to issue the same, or to issue such authorization and
11 order with respect only to a part of the property involved. The commission shall
12 include in any authorization or order the conditions required by the director of the
13 department of water resources under section 42-1701(6), Idaho Code.

14

15 Idaho Code § 61-328(4) (emphasis added).

16 This statute allows this Commission the authority to include in its merger order the
17 conditions required by the IDWR under Idaho Code § 42-1701(6).

18 But that is not the end of the inquiry. Does the director of the IDWR actually have the
19 authority in this case to require any conditions? The answer is no, if it adheres to its enabling
20 authority set forth in the Idaho Code:

21 Any authorization or order of the Idaho public utilities commission, under the
22 provisions of section 61-328, Idaho Code, approving the sale, assignment or
23 transfer of hydropower water rights used in the generation of electric power shall
24 be issued only upon such conditions as the director of the department of water
25 resources shall require as necessary to prevent any change in use of water under
26 the water rights held for hydropower purposes that would cause injury to any
27 water rights existing on the date of the sale, assignment or transfer.

28

29 Idaho Code § 42-1701(6)(a) (emphasis added).

30

(a) No Change in Use of Water

1 Under the provisions of Idaho Code § 42-1701(6)(a), the director may only impose
2 conditions “as necessary to prevent any change in use of water under the water rights held for
3 hydropower purposes that would cause injury to any water rights existing on the date of the sale,
4 assignment or transfer.” (Emphasis added.) The merger will not and cannot, under the Joint
5 Applicants’ stipulated commitments relating to governance and use of Avista’s assets,¹ cause
6 any change in use of water rights whatsoever, let alone a change that could cause injury to
7 existing water rights. Joint Applicants are happy to reconfirm as part of this merger docket that
8 Avista’s water rights are “whatever they are” and will remain the same after the merger,
9 obviating any potential need for conditions “necessary to prevent any change in use of water.”

10 Nor will it work for the IDWR to rest its authority in this merger docket on some vague
11 assertion of what it believes to be in the “public interest.” Such an assertion would allow it to
12 “bootstrap” itself into a position to adjust any existing water right at any time for any purpose,
13 based on its view of where the “public interest” lies. Rather, its authority must rest squarely
14 within the limitations of its enabling statute at Idaho Code § 42-1701(6).

15 In this Commission’s proceeding on ScottishPower’s acquisition of PacifiCorp,² it is
16 noteworthy that, while the Idaho Irrigation Pumpers Association was a very active intervenor on
17 questions of water rights and rates, the IDWR did not intervene or take a position on necessary
18 conditions at all -- notwithstanding the sensitivity around water rights in Southeastern Idaho.
19 (For its part, Avista has very little irrigation load and no active participation by holders of water
20 rights in its rate proceedings.) Joint Applicants confirm that the merger will not affect the
21 operation of the North Idaho basins relative to Avista’s Post Falls and Cabinet Gorge hydro

¹ See Stipulated Commitment Nos. 1-4 (Governance); 20-33 (Regulatory); 34-41 (Financial Integrity); and 42-51 (Ring-Fencing). In particular, Commitment No. 46 requires that assets such as water rights be retained by Avista, free from any pledges to Hydro One, for Avista’s benefit.

² Docket No. PAC-E-99-1, Order No. 28213 (Nov. 15, 1999).

1 facilities, and that its water rights will be exercised consistent with its historical practice and are
2 subject to existing licensing provisions and agreements.

3 Unfortunately, by virtue of the IDWR's late intervention and attempt to broaden the
4 issues, the effect is to forestall the issuance of an Order on the merger until the water rights
5 issues are resolved. Interestingly enough, when PacifiCorp was subsequently sold to
6 MidAmerican Energy, there was again no intervention by the IDWR, presumably because the
7 status quo with request to water rights had not changed. *In re Joint Application of MidAmerican*
8 *Energy Co. & PacifiCorp*, Docket No. PAC-E-05-8, Order No. 29973 (Feb. 13, 2006). (Avista is
9 only trying to preserve the status quo after the merger with respect to water rights — and not
10 yield to total subordination of water rights in this case.)

11 (b) No Sale, Assignment or Transfer

12 Furthermore, the director is only empowered to act (i.e., impose “conditions”) when there
13 has been a “sale, assignment or transfer” of water rights. Here, there is no such “sale, assignment
14 or transfer” of water rights. They all remain untouched, and owned and controlled by Avista.
15 Nothing changes with Hydro One ownership. This is a stock transaction where only the holders
16 of Avista's common stock have changed -- unlike a transaction involving the sale of assets (e.g.,
17 water rights).

18 Additionally, there was no mention whatsoever of water rights when the Commission
19 approved the creation of a holding company for Idaho Power.³ That proceeding involved the
20 substitution of a new “shareholder (owner)” just as is the case with Hydro One in this
21 proceeding. The water rights provision of Idaho Code § 61-328 was never invoked with respect
22 to the IDWR's conditioning of water rights.

³ *In re Application of Idaho Power*, Docket No. IPC-E-97-11, Order No. 27348, at p. 52 (Jan. 29, 1998).

1 Finally, if the Commission were to find there is a sale, transfer or assignment here, it
2 would effectively be making a determination that ownership of water rights lies with a
3 company's shareholders and not the company itself. For Avista and its shareholders, that is not
4 the case. Where ownership of a company's water rights lies with the shareholders, that is made
5 clear in the governing documents. For example, shares in irrigation companies can include an
6 interest in water rights. *Pac. States Sav. & Loan Corp. v. Schmitt*, 103 F.2d 1002, 1004 (9th Cir.
7 1939) ("the shares are mere muniments of title to rights in available water and to proportionate
8 interests in the irrigation systems operated by the corporation as agents of their shareholders");
9 *Erdoisa v. S. Side Bruneau Canal Co.*, 64 Idaho 274, 130 P.2d 669, 672 (1942) (irrigation
10 company's shareholders' contracts explicitly provide for ownership of a fraction of company's
11 water rights); *Glavin v. Salmon River Canal Co.*, 39 Idaho 3, 226 P. 739, 740 (1924)
12 (shareholders were contractually obligated to receive "during the irrigation season of each year,
13 one-hundredth of a cubic foot per second of time for the irrigation of each acre of land owned by
14 them."). Nothing in Avista's governing documents suggests its shareholders have any such
15 rights. Avista shareholders receive monetary dividends, not water or water rights. See Avista's
16 Common Stock Prospectus, available online at [http://investor.avistacorp.com/static-](http://investor.avistacorp.com/static-files/3d51dcf0-4b4a-4725-a303-010c5cdd2ad3)
17 [files/3d51dcf0-4b4a-4725-a303-010c5cdd2ad3](http://investor.avistacorp.com/static-files/3d51dcf0-4b4a-4725-a303-010c5cdd2ad3), at p. 17 ("Dividends are paid in U.S. dollars").

18

19 **V. AN ALTERNATIVE PROCESS IS AVAILABLE TO ESTABLISH ANY**
20 **CONDITIONS**

21 The IDWR's petition to intervene also contains a "Notice of Intent" to consider
22 appropriate conditions to require as part of any authorization and order issued by the
23 Commission in this matter pursuant to Idaho Code § 42-1701(6). (See IDWR Petition at p. 1). It
24 presents no proposal for how it would arrive at such conditions: by fiat? (presumably not); by

1 further administrative process? (How? When? How long? What stakeholders?) The proper forum
2 to develop the definition and priority of Avista's water rights is the statutory water rights
3 adjudication process described above. Joint Applicants' alternative proposal for incorporating the
4 results of a separate, well-thought out process into an amended Commission order approving the
5 merger resolves these problems.⁴

6 If the Commission were to grant the IDWR intervention and entertain further conditions
7 on water rights under Idaho Code § 61-328 as part of this proceeding,⁵ Joint Applicants believe
8 that any conditions calling for, e.g., total subordination of Avista's water rights (which it
9 exercises on behalf of its customers) throughout the State of Idaho, may jeopardize the merger,
10 or, in the very least, unduly prolong this case, as the Joint Applicants and the IDWR and other
11 interested parties create an evidentiary record on which the Commission would act. More
12 importantly, any disputes over water right priorities are more properly taken up through the
13 established procedures for adjudicating water rights in the State of Idaho. See Idaho Code § 42-
14 1406(1)(b). Fortunately, there is just such a proceeding now pending in the District Court of the
15 Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, regarding the
16 General Adjudication of Rights to the Use of Water from the Coeur d'Alene-Spokane River
17 Basin water system, as discussed above. Simply put, this Commission should not be asked to
18 referee disputes over water rights. That is not its statutory charge or within the realm of its
19 expertise.

20 For these reasons, and still being mindful of the Commission's responsibilities under
21 Idaho Code § 61-328 to take into account concerns or conditions of the IDWR (again, assuming

⁴ There is a complete process in Title 42 for altering a water right, which generally calls for the applicant to submit a filing expressing the change in the point of diversion, the time of use, or the nature of the use, among other factors. Then IDWR is required to notify all other affected water users in the basin so that they can weigh in and comment on the application. IDWR is violating its own process by attempting to change Avista's water rights through the IPUC process.


⁵ Avista and Hydro One understand the reluctance of this Commission to deny intervention rights to a sister agency.


1 the IDWR even has jurisdiction to lodge these concerns, absent an actual “sale, transfer, or
2 agreement” of water rights), Joint Applicants would agree to the following, believing that it best
3 serves everyone’s interests: The Commission need not further delay its action on the proposed
4 merger, and the Joint Applicants agree to whatever conditions are placed on Avista’s water
5 rights, after due adjudication or settlement of those in the appropriate forum. Applicants will then
6 amend the set of agreed-upon conditions found in the Settlement Agreement and subsequently
7 request that the Commission amend its order approving the merger to incorporate the outcome of
8 the water rights adjudication. In this way, the merger could be acted upon a timely basis without
9 prejudicing anyone’s interest.

10 Respectfully submitted this 16th day of July, 2018.

HYDRO ONE LIMITED

AVISTA CORPORATION


By: _____
Teresa Hill, Partner, ISB No. 6175
Elizabeth Thomas, Partner, Admitted *pro hac*
vice
Kari Vander Stoep, Partner, Admitted *pro hac*
vice
K&L Gates LLP
On Behalf of Hydro One Limited and
Olympus Equity LLC


By: _____
David J. Meyer, ISB No. 8317
Attorney for Avista Corporation