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Idaho Public Utilities Commission
Office of the Secretary
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Boise, Idaho

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT)	
APPLICATION OF HYDRO ONE LIMITED)	CASE NO. AVU-E-17-09
(ACTING THROUGH ITS INDIRECT)	CASE NO. AVU-G-17-05
SUBSIDIARY, OLYMPUS EQUITY LLC))	
AND)	SUPPLEMENTAL
AVISTA CORPORATION)	REBUTTAL TESTIMONY
FOR AN ORDER AUTHORIZING PROPOSED)	OF
<u>TRANSACTION</u>)	DAVID H. LEROY

FOR AVISTA CORPORATION

(ELECTRIC AND NATURAL GAS)

1 I. INTRODUCTION

2 Q. Please state your name, business address, and
3 present position?

4 A. I am David H. Leroy, attorney at law of Leroy Law
5 Offices, P.O. Box 193, Boise, Idaho 83701.

6 Q. What is your professional background?

7 A. I am a 1971 doctorate graduate of the University
8 Of Idaho College Of Law and was admitted to the Idaho Bar
9 that year, some 47 years ago. I hold a post-doctoral degree,
10 Master of Laws, from New York University and was admitted to
11 that State's Bar in 1972. I have been in both the public and
12 private practice of law for nearly half a century.

13 Q. Do you have public policy experience?

14 A. Yes. I served two terms as Ada County Prosecuting
15 Attorney in the 1970's, a term as Idaho Attorney General and
16 presided over the Idaho State Senate as Lieutenant Governor
17 from 1983 to 1987. In the absence of the Governor from the
18 state during that period, I served as Acting Governor of
19 Idaho for 254 days.

20 I was a presidential appointee, confirmed by the United
21 States Senate, during the administration of President G.H.W.
22 Bush, with the title of United States Nuclear Waste
23 Negotiator.

1 Subsequent to that service, I have featured the
2 practice of administrative law in my legal career and am
3 frequently hired by clients, public and private, including
4 members, committees and even chambers of the Idaho State
5 Legislature to give them opinions on matters of statutory
6 interpretation. I have also argued or briefed cases
7 frequently before the Idaho Supreme Court and various
8 federal courts and have appeared three times before the
9 United States Supreme Court.

10 **Q. Have you previously testified as an expert witness**
11 **in legal or political matters?**

12 A. Yes. On dozens of occasions before trial courts,
13 local boards or commissions, state agencies, the Idaho
14 Legislature and committees of the United States House of
15 Representatives and Senate, it has been my duty and privilege
16 to give testimony on widely varied matters of fact and
17 opinion.

18 **Q. What is your connection to the instant case?**

19 A. I was engaged by Avista Corporation ("Avista") to
20 give it an independent interpretation as to the application
21 or non-application of Idaho Code §61-327 to the proposed
22 sale of Avista to Hydro One Limited ("Hydro One"), as such
23 transaction is pending approval before the Idaho Public
24 Utilities Commission (the "Commission").

1 **Q. What is meant by an "Independent Opinion"?**

2 A. By that term I mean that I had no prior familiarity
3 with the issues involved, no predisposition as to the
4 questions presented and advised the client that I would make
5 and render judgments independently of any party's preferred
6 outcome. I explained that I would collect data from all
7 available sources and broadly research all extant statutory,
8 regulatory and case precedent to reach a reasoned
9 conclusion.

10 **Q. Are you sponsoring any exhibits in this testimony?**

11 A. Yes, I am. I will refer to the following Exhibits:

- 12 • Exh. No. 15, Schedule 1 - My Engagement Letter
13 of October 17, 2018.
- 14
- 15 • Exh. No. 15, Schedule 2 - My Legal Opinion of
16 October 26, 2018.
- 17
- 18 • Exh. No. 15, Schedule 3 - Extracts of the
19 Legislative Journals of the Idaho House of
20 Representatives and Idaho State Senate, January
21 22, 1951.
- 22
- 23 • Exh. No. 15, Schedule 4 - Idaho Session Law 1951,
24 Chapter 3.
- 25
- 26 • Exh. No. 15, Schedule 5 - An Extract from the
27 Report of the Idaho Attorney General 1951-1952,
28 pages 10 and 11.
- 29
- 30 • Exh. No. 15, Schedule 6 - An Extract from the
31 Idaho Daily Statesman, January 23, 1951, page 6.
- 32
- 33

1 Q. In reaching your opinion what resources did you
2 consult?

3 A. In addition to those items listed as Schedules 3
4 through 6 above, I reviewed the Joint Application for an
5 Order Authorizing Proposed Transaction in this case, the
6 transcripts of public hearings held by the Commission in
7 Moscow, Sandpoint and Coeur d'Alene, the Supplemental
8 Testimony of K. Collins Sprague (Avista), six prior relevant
9 decisions or final orders of the Commission issued between
10 1989 and 2016, and the June 20, 2018 Joint Comments in
11 Support of Stipulation and Settlement filed by Avista and
12 Hydro One.

13 I also, as noted in the Opinion itself, researched and
14 found several useful Idaho and related federal appellate
15 cases, two early briefs on appeal and examined the wording
16 of Idaho Code §61-327 itself in the context of those cases
17 and histories.

18 I also reached out to Commission staff counsel to
19 receive a briefing as to the background of this case and
20 those statutory issues of most concern to them. I also left
21 two unreturned phone messages for the lawyer identified to
22 me as lead counsel for the Avista Customer Group, hoping to
23 obtain from that group any other legal guidance, references
24 or reasoning.

1 Q. Would you begin by reciting the language of Idaho
2 Code §61-327?

3 A. Yes. It reads as follows:

4 ACQUISITION BY CERTAIN PUBLIC AGENCIES
5 PROHIBITED. No title to or interest in any public
6 utility (as such term is defined in chapter 1,
7 title 61, Idaho Code) property located in this
8 state which is used in the generation,
9 transmission, distribution or supply of electric
10 power and energy to the public or any portion
11 thereof, shall be transferred or transferable to,
12 or acquired by, directly or indirectly, by any
13 means or device whatsoever, any government or
14 municipal corporation, quasi-municipal
15 corporation, or governmental or political unit,
16 subdivision or corporation, organized or existing
17 under the laws of any other state; or any person,
18 firm, association, corporation or organization
19 acting as trustee, nominee, agent or
20 representative for, or in concert or arrangement
21 with, any such government or municipal
22 corporation, quasi-municipal corporation, or
23 governmental or political unit, subdivision or
24 corporation; or any company, association,
25 organization or corporation, organized or
26 existing under the laws of this state or any other
27 state, whose issued capital stock, or other
28 evidence of ownership, membership or other
29 interest therein, or in the property thereof, is
30 owned or controlled, directly or indirectly, by
31 any such government or municipal corporation,
32 quasi-municipal corporation, or governmental or
33 political unit, subdivision or corporation; or
34 any company, association, organization or
35 corporation, organized under the laws of any other
36 state, not coming under or within the definition
37 of an electric public utility or electrical
38 corporation as contained in chapter 1, title 61,
39 Idaho Code, and subject to the jurisdiction,
40 regulation and control of the public utilities
41 commission of the state of Idaho under the public
42 utilities law of this state; provided, nothing
43 herein shall prohibit the transfer of any such
44 property by a public utility to a cooperative

1 electrical corporation organized under the laws
2 of another state, which has among its members
3 mutual nonprofit or cooperative electrical
4 corporations organized under the laws of the state
5 of Idaho and doing business in this state, if such
6 public utility has obtained authorization from
7 the public utilities commission of the state of
8 Idaho pursuant to section 61-328, Idaho Code.
9 (Emphasis added)

10
11

Q. What questions did you examine?

12 A. In particular, both Avista and the Commission
13 Staff were especially concerned as to whether the language
14 of Idaho Code §61-327 which refers to the preclusion of the
15 ownership of utility property used to generate or supply
16 electric energy by any government or corporation existing
17 under the laws of "any other state" would apply to the
18 Province of Ontario, since Hydro One was formerly a Canadian
19 provincial entity. In addition, as the Province would remain
20 the holder of approximately 43% of the stock outstanding in
21 Hydro One, both Avista and the Commission staff wished to
22 know whether such ownership constituted "direct or indirect"
23 control by a government.

24 **Q. Were you able to reach an opinion on the concept of**
25 **whether a Canadian province was a "State" under the language**
26 **of Idaho Code §61-327?**

27 A. Yes. In my opinion the Idaho Legislature referred
28 only to entities organized under the laws of another of the
29 States of the United States of America and did not refer

1 thereby to foreign nations or their subdivisions by the term
2 "states." As made clear by the legislative history, it did
3 not contemplate Canadian Provinces. Therefore, the Province
4 of Ontario is not a "state" within the meaning of the
5 statute.

6 **Q. What is the basis for your opinion?**

7 A. Upon undertaking this assignment pursuant to my
8 Letter of Engagement (Exh. No. 15, Schedule 1), I initially
9 examined the statute in its original form, House Bill Number
10 26 which became Session Laws of 1951, Chapter 3 (Exh. No.
11 15, Schedule 4). The Journals of the Idaho Legislature for
12 the House and the Senate, January 22, 1951 (collectively
13 Exh. No. 15, Schedule 3) show that Idaho Code §61-327 was
14 passed under suspension of the rules through both chambers
15 in a single day. The Report of the Attorney General (Exh.
16 No. 15, Schedule 5) clarifies the "statute was patently aimed
17 at preventing acquisition by Public Utility Districts of the
18 State of Washington of the operating properties of the
19 Washington Water Power Company ("WWP") located in Northern
20 Idaho." (Emphasis added)

21 Although no official notes or transcripts of committee
22 hearings or floor debates on the Bill exist, the Idaho Daily
23 Statesman of January 23, 1951 contained verbatim and summary
24 descriptions from the passage process which confirmed and

1 expanded upon the Attorney General's comment. Most
2 specifically, the Legislators are recorded as fearing a loss
3 of property tax revenue and, to a lesser degree, Commission
4 regulatory control, if the utility operating property became
5 owned by Washington State utility districts. The following
6 is excerpted from the January 23, 1951 edition of the Idaho
7 Statesman, at p. 6 (See Exh. No. 15, Schedule 6):

8 Then Rep. David Doane (Ada), assistant
9 Republican floor leader, opened the debate for
10 the bill's supporters. He explained that the
11 major purpose was to protect power users of Idaho,
12 particularly those in North Idaho, 'to be sure
13 that the electric utility properties be owned in
14 Idaho and not escape taxation.'

15 He told the house that there was now pending
16 negotiations between the Washington Water Power
17 company and the PUD group from Washington for the
18 sale of the former's north Idaho properties.

19 'How soon they are going through with the
20 deal, we don't know," said Doane, 'but it is
21 essential that this bill be passed right away.'

22
23 This context makes it clear that the phrase "state"
24 arose in the context of, and intended most broadly to apply
25 to, the units or municipal subdivisions of Idaho's sister
26 states - notably Washington. In its ordinary, plain and
27 simple meaning, "state" means "state," not a foreign
28 province or alien nation.

29 **Q. Is there additional evidence providing context for**
30 **this legislation?**

1 A. Yes. The "Thirty-First Biennial Report of the
2 Attorney General of Idaho (1951 - 1952)", at p.10, (see Exh.
3 No. 15, Schedule 5) describes the genesis of this
4 legislation, noting that it was "patently aimed" at
5 preventing acquisition by Washington public utility
6 districts ("PUD's") of the operating property of Washington
7 Water Power ("WWP", the company name changed from WWP to
8 Avista) in State of Idaho:

9 The 1951 Legislature enacted a statute
10 which: forbade acquisition by a municipal
11 corporation of another state of facilities for
12 the generation or transmission of electrical
13 energy in Idaho. The statute was patently aimed
14 at preventing acquisition by Public Utility
15 District of the State of Washington of the
16 operating properties of the Washington Water
17 Power Company located in North Idaho, The
18 enactment of the statute was productive of the
19 most time consuming litigation in which the office
20 has been engaged in the period reported in this
21 report. Our efforts were directed at the problem
22 of securing enforcement of the new statute.
23

24 **Q. Has this Commission expressed a position on foreign**
25 **ownership?**

26 A. Yes. My understanding is that the Commission has
27 not been historically concerned when foreign-related
28 utilities, some with shareholding by governmental units or
29 subdivisions organized under the laws of other nations, have
30 been involved in prior utility regulatory acquisitions,
31 merely because some foreign ownership was involved. To the

1 contrary, the Commission has recognized the reality that
2 "increased globalization" has made the concept of an
3 "American" company more obscure and that an entity named
4 "Scottish Power" does not constitute the government of
5 Scotland.¹ Idaho Code §61-327 has no bearing on Province of
6 Ontario's involvement with Hydro One by virtue of any
7 reasonable interpretation of "state".

8 **Q. Were you able to reach an opinion on the second**
9 **question as to what concept of governmental corporate**
10 **control is precluded by Idaho Code §61-327?**

11 A. Even if "state" could be somehow construed to
12 cover the Province of Ontario, there still is no "direct or
13 indirect" transfer of property from Avista to the Province
14 of Ontario or even to Hydro One within the meaning of the
15 statute (Idaho Code §61-327), under Idaho law. The emerging
16 and modern concept of "effective control" of a corporation
17 by some block or combination of minority shareholders was
18 not within the intended definition of the statute as adopted
19 by the Idaho Legislature in 1951. Nor would the Idaho Supreme
20 Court, per its prior decisions, impute such a concept to the
21 statutory words in Idaho Code §61-327 of "controlled,

¹ Black's Law Dictionary, 10th Editions, (2014), p.403

1 directly or indirectly." Control of a corporation, under
2 that law, means majority shareholding.

3 **Q. What is the basis for your opinion?**

4 A. Idaho Code §61-327, as noted, was designed to
5 prevent a loss of tax revenue and regulatory authority. The
6 words of the law "acquired by, directly or indirectly" and
7 "owned or controlled, directly or indirectly" were chosen to
8 prevent those ends. Neither the Commission nor the taxpayers
9 of the State of Idaho suffer any such debility here as a
10 result of the retained minority stock holding of the Province
11 of Ontario, since Avista remains fully subject to local
12 taxation and regulatory enforcement obligations.

13 Where "effective," or less than majority corporate
14 control has been proscribed or intended by the Idaho
15 Legislature, the wording of such statutes have specifically
16 so stated, with detailed descriptions. In the absence of
17 such extended language, using the plain, simple and ordinary
18 test of the Idaho Supreme Court, "control" within 61-327
19 means "ownership of more than 50% of the shares of a
20 corporation."² The threat perceived and prevented by House
21 Bill 26 in 1951 was the complete divestiture of utility
22 assets to the ownership and control of a government entity.

²Black's Law Dictionary, 10th Editions, (2014), p.403

1 The Idaho Supreme Court, has not, in the best of my
2 knowledge, applied a more relaxed understanding of
3 "corporate control" where a majority ownership was not
4 present, at least absent specific statutory language to that
5 effect.

6 None of Hydro One, its indirect subsidiary, Olympus
7 Equity LLC or Avista is a government entity owned or
8 controlled, directly or indirectly by the Province of
9 Ontario, within the simple "majority of ownership" test
10 envisioned by Idaho Code §61-327.

11 **Q. What, then, is the meaning of the reference to**
12 **"indirect" control is the statute?**

13 A. As is typical in any legislature drafting, the
14 objective is to prevent the doing of something that is
15 specifically proscribed in the statute, by use of a stratagem
16 that "skirts" the legislature by some other means. For
17 example, were the Washington PUD's to set up a special
18 purpose entity (non-PUD) to directly "own" the property of
19 WWP, they could have attempted to "skirt" Idaho Code §61-
20 327.

21 **Q. To what degree of professional certainty do you**
22 **hold these opinions?**

23 A. I am very comfortable, given the sources examined,
24 legislative history and reasoning expressed above and with

1 the additional detail as explained in my written opinion,
2 that the conclusions reached are solid, substantial and
3 defensible. The Commission endeavors to be consistent and
4 predictable in its decision-making process to assure and
5 protect the public interest. The Idaho Supreme Court is a
6 conservative body which practices and defends strict
7 construction of statutes and the discernment legislative
8 intent. My opinions here expressed are consistent with my
9 professional experience and objectivity and with the
10 traditions of the Court.

11 **Q. Since issuing your written opinion on October 26,**
12 **2018, has any other matter arisen or testimony been presented**
13 **which should be discussed as to these issues?**

14 A. Yes. I have now also read the November 6th, 2018
15 Testimony of Terri Carlock, Idaho PUC Utilities Division
16 Administrator, which provides the Staff analysis of the
17 proposed Avista transaction. At pages 2 and 3 of her
18 comments, Ms. Carlock addresses, without any real discussion
19 or elaboration, the issue of "foreign ownership." She raised
20 the concern that Idaho Code §61-327 "may" provide a total
21 bar to the proposed merger, but is quick to note that she is
22 not an attorney, and is simply offering Staff's belief that

1 "the Commission should analyze this possibility prior to
2 making a final determination."³

3 I believe that my research, reasoning and opinions as
4 explained above are well-supported and can be relied upon by
5 the Commission to reach a final determination that Idaho
6 Code §61-327 is not applicable to this transaction.

7 **Q. In summary, how should the Commission regard this**
8 **issue?**

9 A. As the utility operating property remains in
10 Avista's ownership, the Commission retains unfettered
11 regulatory control over the entity and no loss of state
12 property taxation base is experienced. Accordingly, the
13 Legislature's concerns addressed in Idaho Code §61-327 do
14 not come into play with this transaction.

15 **Q. Does that conclude your testimony?**

16 A. It does.

17

³ Carlock testimony at p. 11.