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IDAHO PUBLIC
UTILITIES COMMISSION

Attorney for the Staff of the Public Utilities Commission

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE JOINT) CASE NOS. AVU-E-17-09
APPLICATION OF HYDRO ONE LIMITED) AVU-G-17-05
AND AVISTA CORPORATION FOR)
APPROVAL OF MERGER AGREEMENT) COMMISSION STAFF'S POST-
HEARING BRIEF REGARDING
IDAHO CODE § 61-327**

The Commission has requested legal briefing on the applicability of Idaho Code § 61-327 in relation to the above-captioned matter. As discussed below, Staff does not believe Section 61-327 bars the merger because: (1) the statute only applies to transfers of a utility's interest in Idaho-based generation, transmission, and distribution property, and Avista does not propose to transfer such an interest; and (2) Avista does not propose to transfer such an interest to any of the four types of statutorily impermissible transferees.

Idaho Code § 61-327 states:

No title to or interest in any public utility (as such term is defined in chapter 1, title 61, Idaho Code) property located **in this state** which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall be transferred or transferable to, or acquired by, directly or indirectly, by any means or device whatsoever, any government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation, organized or existing under the laws of **any other state**; or any person, firm, association, corporation or organization acting as trustee, nominee, agent or representative for, or in concert or arrangement with, any such government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation; or any company, association, organization or corporation, organized or existing under the laws of

this state or any other state, whose issued capital stock, or other evidence of ownership, membership or other interest therein, or in the property thereof, is owned or controlled, directly or indirectly, by any such government or municipal corporation, quasi-municipal corporation, or governmental or political unit, subdivision or corporation; or any company, association, organization or corporation, organized under the laws of **any other state**, not coming under or within the definition of an electric public utility or electrical corporation as contained in chapter 1, title 61, Idaho Code, and subject to the jurisdiction, regulation and control of the public utilities commission of **the state of Idaho** under the public utilities law of **this state**; provided, nothing herein shall prohibit the transfer of any such property by a public utility to a cooperative electrical corporation organized under the laws of **another state**, which has among its members mutual nonprofit or cooperative electrical corporations organized under the laws of **the state of Idaho** and doing business in **this state**, if such public utility has obtained authorization from the public utilities commission of **the state of Idaho** pursuant to section 61-328, Idaho Code. [Emphasis supplied].

Id. Thus, Idaho Code § 61-327 defines four types of transferees to whom a utility is not permitted to transfer an interest in Idaho-based generation, transmission, or distribution property: (1) a government from another state; (2) an organization acting as a representative of a government from another state; (3) an organization from Idaho or another state in which a government from another state has an ownership or controlling interest; and (4) any organization “organized under the laws of *any other state*” that is not an electrical corporation as defined in the Public Utility Law or regulated by the Commission.¹

¹ In *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983), the Commission claimed Idaho Power would violate Section 61-327’s property transfer prohibitions if Idaho Power agreed with the Federal Power Commission (FPC) to subordinate Idaho Power’s hydropower water rights as a condition of being issued a federal license to build dams. The Court ultimately ruled that Section 61-327 did not apply because Idaho Power’s rights were already subordinated and, therefore, Idaho Power was not transferring an interest in them by agreeing to subordinate them to get the federal license. While the Court ruled Section 61-327 didn’t apply because there wasn’t a property transfer, the Court also summarized Section 61-327 as providing “generally that property in this state used in the generation or transmission of electricity shall not be transferred in any manner to out-of-state organizations, governmental entities, *or any entity not subject to regulation by the PUC.*” 104 Idaho at 589, 661 P.2d at 755 (emphasis supplied). The Court’s summary is non-controlling dicta and overstates the statutory bar. Idaho Code § 61-327 only precludes a utility from transferring property to certain organizations and entities *associated with another state*, and not, more broadly and as stated by the Court, to “any entity [not] subject to regulation by” the Commission. Notably, the Commission never argued, and the Court never ruled, that Section 61-327 should be broadly read to bar the transfer because the FPC was a governmental entity from another “state.”

Analysis

Idaho Code § 61-327 does not bar the merger for at least two reasons. First, Avista is not transferring an interest in Idaho-based generation, transmission, or distribution property. Second, even if Avista were transferring such an interest, it would not be not transferring the interest to one of the four types of statutorily impermissible transferees. These points are discussed below.

1. Avista is not transferring an interest in Idaho-based generation, transmission, and distribution property.

As noted in footnote 1, in *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983), the Commission claimed Idaho Power would violate the property transfer prohibitions of Idaho Code § 61-327 if Idaho Power agreed with the FPC to subordinate Idaho Power's hydropower water rights as a condition of being issued a federal license to construct certain dams. The Commission conceded, however, that the statute would not apply if the water rights were already subordinated when Idaho Power acquired them; i.e., if Idaho Power did not yet own unsubordinated rights when it agreed to subordinate them as a condition of obtaining a federal license, then Idaho Power's subordination agreement would not have transferred an interest in existing property in violation of Idaho Code § 61-327. Faced with these observations, the Court held that the statutes did not apply because Idaho Power had not transferred an interest in property; when Idaho Power ultimately acquired the water rights, they were already been subordinated. 104 Idaho at 589, 661 P.2d at 755.

Like the proposal in *Idaho Power*, the Avista/Hydro One proposal here does not involve the transfer of an interest in generation, transmission, or distribution property. Under the Avista/Hydro One proposal, Avista would continue to own its assets and Hydro One would be Avista's single shareholder through the Olympus Equity holding company. Accordingly, Idaho Code § 61-327 does not apply. Avista does not propose to transfer its utility property to Hydro One, Olympus Equity, the government of Ontario, the nation of Canada, or anyone else.

2. Avista is not transferring an interest to an impermissible transferee.

In this docket, Hydro One, a Canadian company whose largest shareholder is the Province of Ontario, proposes to have its Idaho subsidiary, Olympus Equity LLC, become Avista's sole shareholder. Even if Avista were proposing to transfer an interest in its utility property—which it is not—Section 6-327 would still not bar the transfer. Olympus Equity LLC and Hydro One are not statutorily impermissible transferees.

a. Hydro One is not an impermissible transferee.

Hydro One is a Canadian investor-owned, publicly traded company. The Province of Ontario, Canada is Hydro One's single largest minority shareholder, and owns about 47% of Hydro One's outstanding stock. While a governance agreement uniquely positions Ontario as a shareholder, Ontario's minority ownership of Hydro One does not cause Hydro One to be a statutorily impermissible transferee because neither Ontario, nor Canada is another "state" under Section 61-327.

As noted, Idaho Code § 61-327 precludes a utility from transferring an interest in its Idaho-based utility property to (1) a government from another state; (2) an organization acting as a representative of a government from another state; (3) an organization from Idaho or another state in which a government from another state has an ownership or controlling interest; or (4) any organization "organized under the laws of *any other state*" that is not an electrical corporation as defined in the Public Utility Law or regulated by the Commission. None of these bars applies to Hydro One because:

- Hydro One is a publicly traded company, not "a government;"
- There is no evidence that Hydro One is "acting as a representative" of another state;
- A government of another "state" does not have interest in Hydro One, and certainly not a "controlling" one; and
- Hydro One is not "organized under the laws of any other state."

Notably, Section 6-327 only bars transfers of property "located in this state," i.e. in the State of Idaho, to entities and governments associated with "any other state." The legislature's juxtaposition of the phrase "located in this state" with the phrase "any other state" highlights that the legislature intended "any other state" to mean "any of the other states in the United States of America." Certain opponents of the merger argue that, although "any other state" is used in contrast to "this state," i.e., to Idaho, the phrase "any other state" is really ambiguous and should be broadly construed to include foreign nations and provinces. However, as noted above, the phrase plainly refers only to states other than the State of Idaho. If the legislature had intended Idaho Code § 61-327 to apply to both U.S. states and foreign nations, then the legislature would have included the phrase "foreign nations" in the statute. *See, e.g.* Idaho Code § 61-714 (entitled "Foreign and interstate commerce" and discussing both "foreign nations" and the "several states of the union" to show the text applies to both). Instead, the legislature contrasted "this state"—Idaho—with "any

other state.” And by doing so, the legislature precluded the phrase “another state” from being read to include “foreign nations.” There is, therefore, no need for the Commission to speculate that the phrase means something else. The statute is to be read literally. *See* Idaho Code § 73-113(1) (“The language of a statute should be given its plain, usual and ordinary meaning. Where a statute is clear and unambiguous, the expressed intent of the legislature shall be given effect without engaging in statutory construction. **The literal words of a statute are the best guide to determining legislative intent**”). (Emphasis added) (Emphasis added). Furthermore, as a minority shareholder, the Province of Ontario does not have a controlling interest in Hydro One. A dictionary definition of control is instructive:

The direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee <the principal exercised control over the agent>.

Control, Black’s Law Dictionary (10th ed. 2014). And,

Ownership of more than 50% of the shares in a corporation. — Also termed *effective control*; *working control*. **2.** The power to vote enough of the shares in a corporation to determine the outcome of matters that the shareholders vote on.

Corporate Control, Black’s Law Dictionary (10th ed. 2014).

In its most plain meaning, “control,” or “corporate control” means ownership of more than 50% of shares. This is a plain reading of control, and moreover makes the most sense when considering that many publicly traded utilities have institutional and government ownership through trust and retirement accounts.

Accordingly, for these reasons, Hydro One is not a statutorily impermissible transferee.

b. Olympus Equity is not an impermissible transferee.

Hydro One’s wholly owned subsidiary, Olympus Equity LLC, is also not an impermissible transferee for many of the reasons discussed above. In addition, the fourth bar—to transfers to an organization “organized under the laws of *any other state*” that is not an electrical corporation as defined in the Public Utility Law or regulated by the Commission—does not apply to Olympus Equity because Olympus Equity is now an Idaho limited liability company. As originally proposed, the Applicants were going to make Avista a wholly owned entity of the Olympus Equity holding company. Olympus Equity was to be incorporated in Delaware, and have no purpose but

to hold Avista ownership. Thus, as originally proposed, Olympus Equity would have been organized under another state (Delaware) and not an electrical corporation as defined under Idaho law, and it would have been an impermissible transferee under Section 61-327.

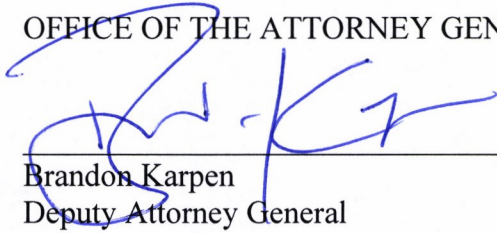
During the proceedings, however, Olympus Equity was reorganized as an Idaho limited liability company, as was thus no longer an impermissible transferee under Section 61-327's fourth prong. This change fully resolved Staff's concern that the fourth prong might bar the merger.

Conclusion

As discussed above, Avista is not proposing to transfer an interest in its Idaho-based generation, transmission, or distribution property. Further, even if such a property interest were being transferred, the Hydro One and Olympus Equity are not impermissible transferees. Staff thus submits that Idaho Code § 61-327 does not bar the proposed merger.

DATED this 7th day of December, 2018.

OFFICE OF THE ATTORNEY GENERAL



Brandon Karpen
Deputy Attorney General
Attorney for Commission Staff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 7TH DAY OF DECEMBER 2018, SERVED THE FOREGOING **COMMISSION STAFF'S POST-HEARING BRIEF REGARDING IDAHO CODE § 61-327**, IN CASE NOS. AVU-E-17-09/AVU-G-17-05, BY E-MAILING AND MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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