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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE APPLICATION OF)
AVISTA CORPORATION, DBA AVISTA) CASE NO. AVU-E-01-2
UTILITIES, FOR AN ORDER APPROVING A)
SERVICE TERRITORY AGREEMENT) COMMENTS OF THE
BETWEEN AVISTA UTILITIES AND) COMMISSION STAFF
KOOTENAI ELECTRIC COOPERATIVE, INC.)
_____)**

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its attorney of record, Donald L. Howell, II, Deputy Attorney General, and submits the following comments in response to the Notice of Application, Notice of Modified Procedure and Order No. 28642 issued on February 16, 2001.

On January 30, 2001, Avista (Company) filed an Application for approval of a service territory agreement between its predecessor (Washington Water Power)¹ and Kootenai Electric Cooperative (Kootenai). The Application notes that the Idaho Legislature amended portions of the Idaho Electric Supplier Stabilization Act (ESSA) in special session on December 8, 2000. The amendments to the ESSA provide that all service agreements which allocate territory or customers between electric suppliers be filed with the Commission. In particular, *Idaho Code* § 61-333 was amended to provide in pertinent part that

¹ Hereinafter "Washington Water Power" or "WWP" is identified as Avista.

the commission, shall after notice and opportunity for hearing, review and approve or reject [such] contracts . . . between cooperatives and public utilities. . . . The commission shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act.

Idaho Code § 61-333(1)(amended 2000). The December Legislation (HB1) was scheduled to sunset on March 1, 2001. This month HB 142 was enacted by the Idaho Legislature and signed by the Governor on February 28, 2001. HB 142 removed the sunset provision from the ESSA and became effective on February 28, 2001.

In its Application, Avista asserts that the service territory agreement is in conformance with the purposes of the ESSA. In particular, Avista maintains that the agreement reduces the duplication of electric service and capital expenditures of the parties. In addition, the Application also notes that “this agreement should reduce the possibility of disputes arising between Avista and Kootenai. . . .” Application at 2.

Following inquiries from the Staff, Avista submitted an “Addendum” to the service territory contract on February 6, 2001. The Addendum, executed on or about August 7, 1991, further defined the terms “development” and clarifies the “rules” for determining which party may serve new residential customers.

THE SERVICE CONTRACT

1. The Initial Contract. The service contract submitted for the Commission’s review was executed on February 15, 1991. In the contract, Avista and Kootenai agreed on a methodology to provide electrical service to residential developments consisting of “six or more residential lots or parcels, connected by a common street or road system, and platted on a common plat(s).” Agreement § 1.A. The contract provides that the section of which supplier will provide electric service to a residential development, shall be determined by the provisions for serving a new customer contained in *Idaho Code* § 61-332C. Agreement § 6. The parties agreed that electric service to the entire residential development and subsequent additions to the original development shall be determined by which supplier serves at least one lot of the subdivision, where “one of the parties has entered into a signed contract for the provision of electric service to

the subdivision and within three (3) years of the date of such contract that party provides service to first residential building to be constructed within the subdivision.” *Id.* § 4. After one of the parties undertakes to serve one or more lots within the development, then the parties agree “that the remainder of that particular development shall be served solely by that initial serving utility.” *Id.* § 6.

However, if the subsequent construction of a residential development intersects another supplier’s electric service line that was in existence at the time the development’s plat was first filed with the city or county, then

service to the development beyond the line of the competing company’s service line, will not be determined by this agreement. Instead, the determination as to which utility will serve the area of a continuation of the development will be first decided by application of [the ESSA rules regarding service to new customers]. Upon determination as to which electric supplier will serve the first service entrance within the continuation of the subdivision, then the remainder of that continuation shall be served solely by that determined utility.

Id. § 7.

The duration of the initial contract was for a period of 10 years from the effective date of February 15, 1991. The contract also provides that it “shall be extended automatically for successive periods of ten (10) years upon the same terms and conditions set forth in this agreement unless one of the parties notifies the other not less than sixty (60) days before the end of the initial, or renewal, term of the intent not to renew the agreement.” *Id.* § 3. It is Staff’s understanding that Kootenai did not provide notice of a desire to terminate the contract, thus the contract has been extended for another ten-year period.

The contract also contains other provisions that address: breach of the contract, severability, and other standard contract conditions.

2. The Addendum. On February 6, 2001, Avista supplemented its Application by filing the Addendum to the service contract executed on or about August 7, 1991. The Addendum further clarifies several terms and conditions in the initial contract. First, the term “development” is construed to include existing residential subdivisions “so that a party already serving a subdivision shall, in accordance with the provisions of this Agreement, continue to serve such subdivision.” Addendum at 1, § 1.A. The Addendum further provides that if both parties were serving one or more residential customers in the same development,

then this Agreement shall not apply in determining which party is entitled to serve a new service entrance within the development, or any subsequent expansion or additions of the development, but rather the parties shall be governed solely by the provisions of the Idaho Electric Supplier Stabilization Act (*Idaho Code* § 61-332 et seq.).

Id. at 2.

The Addendum also contains a mechanism that would allow the “entitled electrical supplier” to offer the other party the opportunity “to serve a consumer(s), or section of a subdivision. *Id.* at 2, § 6. If the entitled supplier believes it is in the best interest of either of itself or the consumer(s), the other party may

but is not obligated to, serve the consumer(s) so designated by the entitled party. It is specifically agreed that the party who is the recipient of such consent, shall not be entitled to any further rights or entitlement to serve any other consumer or section of such a development beyond the terms of the consent provided.

It is agreed by and between the parties hereto that all such consents to permit service to consumers or sections of a development, as indicated above, shall be in accordance with the terms of the Electric Supplier Stabilization Act.

Id.

STAFF ANALYSIS

The standard of review to be employed by the Commission for service territory agreements is set out in the amended ESSA, § 61-333(1). This section states that the Commission "shall approve such contracts only upon finding that the allocation of territories or consumers is in conformance with the provisions and purposes of this act." (Emphasis added).

The purposes of the ESSA are listed in § 61-332 and include the following five points:

- promote harmony among and between electric suppliers furnishing electricity within the state of Idaho,
 - prohibit the "pirating" of customers of another electric supplier,
 - discourage duplication of electric facilities,
 - actively supervise certain conduct of electric suppliers as it relates to this act,
- and

- stabilize the territories and customers served with electricity by such electric suppliers.

Thus, the tradition "public interest" standard as usually employed by the Commission is not applicable.

The agreement for which Avista seeks approval has been in effect for approximately ten years. As stated in the agreement, it was "... the desire of [Avista and Kootenai] to promote operational effectiveness and to enhance the reliability of their service to their respective customers and/or members." Agreement at 1 § 1. The stated purposes of the agreement were "...to reduce duplication of service, reduce capital expenditures, reduce the burdens of administrative time, hold down the cost of service, and to provide for proper engineering of subdivision projects." *Id.* § 1. The agreement was drafted specifically to be in conformance with the ESSA.

The service territories in the vicinity of Coeur d'Alene and Post Falls are a patchwork of developments, some served by Avista and some served by Kootenai. It is not uncommon for distribution lines of one utility to be located on one side of the road and distribution lines of the other to be located on the opposite side of the road. In part, this situation has evolved because both utilities share substations. Distribution lines extending from common substations must, by necessity, follow the same routes for at least some distance. Because lines of both utilities are often in close proximity to new development, customers and developers sometimes have a choice of service providers.

In the time since this agreement has been in place, there have been at least three instances of service territory conflicts that have come before the Commission. In the case involving the sale of PacifiCorp's northern Idaho service territory to Washington Water Power (WWP), Kootenai Electric and Northern Lights, Inc. sought a Commission order directing PacifiCorp and WWP and the Commission Staff to negotiate a delineation of service territory boundaries.

In resolving the service territory issue, the Commission ordered that a map be prepared for the Sandpoint area delineating service territories of each utility. The Commission found that the map adequately identified the territory in which the regulated utility subject to compliance with the ESSA is authorized to operate and extend its service. The Commission did not order any other service territory agreement, but did encourage communication and cooperation among

the electric service providers and negotiated or mediated resolution of disputes. See Order No. 25753.

In Case No. WWP-E-95-1, Kootenai sought clarification of Avista's Certificate of Convenience and Necessity. More specifically, Kootenai inquired whether the certificate permitted Avista to serve the entirety of Kootenai and Bonner counties or whether Avista was restricted to serving only certain defined territories within the counties. The Commission determined that *Idaho Code* § 61-526 permits an electric utility operating within a city or county to expand to areas contiguous to its system, without being required to secure a certificate for the expansion. The Commission also stated that expansion into unserved areas should be in accordance with the ESSA. Order No. 25692 at 4.

Finally, in Case No. WWP-E-98-5, Avista filed a petition requesting a waiver of its line extension deposit/credit requirements for a proposed residential and commercial development in Post Falls. Distribution lines of both Avista and Kootenai surrounded the proposed development. The developer of the project desired service from Avista because of its lower kilowatt-hour rates, but felt that Avista's deposit requirements were onerous. The case was resolved when Avista withdrew its petition for clarification, accepting the Commission's findings that the existing tariff language, when supplemented by further clarifying guidelines, permits Avista to assess the relative risks of various customers when selecting the appropriate credit or financial security instrument. Order No. 27555.²

While the subject agreement between the utilities will not eliminate all potential disputes over service territory, it can greatly minimize them. Staff believes that the agreement, combined with the ESSA, has provided a clear set of guidelines that can be easily followed in the majority of cases involving residential subdivisions. Had the agreement not been in place for the past ten years, Staff speculates that there would have been many more conflicts. No agreement can ever completely eliminate all conflicts. Furthermore, Staff believes that the intent of the ESSA is, in part, to permit agreements that can aid in minimizing and resolving disputes without expecting the agreement to be the sole solution or reference in all possible cases. As such, Staff believes the agreement has served a useful purpose, completely in conformance with the purposes of the ESSA.

² In *Kootenai Electric Cooperative v. The Washington Water Power Co.*, the Supreme Court found that Avista was not entitled to serve a new business park in Coeur d'Alene. 127 Idaho 432, 901 P.2d 1333 (1995).

Ten years of relatively good relations under the residential development agreement is evidence Staff believes that the agreement has served its intended purpose relatively well. In addition, the fact that both utilities have willingly agreed to allow the agreement to be renewed for a successive ten-year period, without modification, supports Staff's belief that the agreement is functioning as intended and achieving its intended objectives.

STAFF RECOMMENDATIONS

Staff recommends that the February 15, 1991 settlement agreement and the addendum to the agreement dated August 7, 1991 between the Washington Water Power Company (now known as Avista) and Kootenai Electric Cooperative, Inc. be approved. Staff believes the agreement is in conformance with the provisions and purposes of the ESSA.

Respectfully submitted this day of March 2001.

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Deputy Attorney General

Technical Staff: Rick Sterling

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