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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT
APPLICATION OF HYDRO ONE LIMITED
AND AVISTA CORPORATION FOR
APPROVAL OF MERGER AGREEMENT

CASE NOS. AVU-E-17-09
AVU-G-17-05

**AVISTA CUSTOMER GROUP'S POST-
HEARING BRIEF REGARDING IDAHO
CODE § 61-327**

1 COMES NOW, Intervenor Avista Customer Group, through counsel, pursuant to the
2 Commission's bench request for legal briefing by the parties regarding Idaho Code § 61-327 and
3 the Commission's Rules of Procedure, and hereby files Avista Customer Group's Post-Hearing
4 Brief (I.C. § 61-327).

5 **I. INTRODUCTION**

6 At the conclusion of the two-day technical hearing in this matter, which ended on
7 November 27, 2018, the Commission requested that the parties provide legal briefing regarding
8 Idaho Code § 61-327. The Commission asked that the briefing include a discussion of Hydro One,
9 Avista, and Olympus Equity LLC (as newly formed in Idaho). Briefs were to be filed within 10
10 days and were not to exceed 10 pages.

1 **II. ARGUMENT**

2 Idaho Code § 61-327 applies to, and bars, the proposed acquisition of Avista by Hydro One.

3 This result is unchanged by the recent formation of Olympus Equity in Idaho.

4 **A. The Statute Applies to Out-of-State Entities.**

5 The Applicants argue that the statute is limited to entities in the sister states of the United
6 States. This ignores the Idaho Supreme Court’s finding that the statute applies to “out-of-state
7 organizations, governmental entities, or any entity not subject to regulation by the PUC.” *Idaho*
8 *Power Co. v. State*, 104 Idaho 575, 589, 661 P.2d 741, 755 (1983). The Commission is bound to
9 follow the legal findings of the Idaho Supreme Court. In addition, the Commission’s authority is
10 limited to what is provided for in statute. *McGuire Estates Water Co. v. Idaho PUC*, 111 Idaho 341,
11 723 P.2d 885 (1986).

12 This “foreign entities” understanding of the statute is corroborated by the legislative history,
13 as set forth and discussed in *Avista Customer Group’s Response in Opposition to Motion to Admit*
14 *and Approve First Amendment to Stipulation and Settlement* and the *Affidavit of Norman M.*
15 *Semanko in Support*, both filed in this matter on November 21, 2018 and incorporated by reference
16 herein, as though set forth in full here.

17 **B. The Statute Cannot Be Avoided by the Formation of Olympus Equity in Idaho.**

18 The analysis under I.C. § 61-327 is unchanged by Hydro One’s recent formation of Olympus
19 Equity LLC as an Idaho entity.

20 In enacting the operative legislation, the Idaho Legislature made clear that it did not want
21 to allow form to be put over substance on this critical public policy matter, so much so that the act
22 included a section of code entitled: “Evasion of act,” codified as I.C. § 61-330.

1 This section specifically provides that any conveyance or transfer “made with the intent or
2 purpose to evade or avoid the provisions of this act, shall be void.” I.C. § 61-330 (The “act”
3 included I.C. §§ 61-327 to 61-331.).

4 It is clear that the sole purpose of creating Olympus Equity in Idaho was to “evade or avoid”
5 the prohibitions set forth in I.C. § 61-327. The Applicants admitted as much at the technical hearing.
6 As a result, any transaction involving that entity is void and certainly cannot be allowed to avoid
7 the result that is otherwise dictated by I.C. § 61-327, which is to bar the proposed acquisition of
8 Avista by Hydro One.

9 The statute applies. The remaining question is whether it prohibits this particular
10 transaction.

11 **C. The Proposed Transaction Is Barred Under Multiple Prongs of the Statute.**

12 The statute sets forth four separate prohibitions, each of which is discussed below. The
13 proposed transaction is barred by at least three of them.

14 1. Government Ownership and Control by the Province of Ontario Bars the
15 Acquisition.

16 Under the first prohibition:

17 No title or interest in any public utility . . . property located in this
18 state which is used in the generation, transmission, distribution or
19 supply of electric power and energy to the public or any portion
20 thereof, shall be transferred or transferable to, or acquired by, directly
21 or indirectly, by any means or device whatsoever, **any government**
22 **or municipal corporation, quasi-municipal corporation, or**
23 **governmental or political unit, subdivision or corporation,**
24 **organized or existing under the laws of any other state.**

25 I.C. § 61-327 (emphasis added). The question under this prohibition is whether Avista will be
26 owned or controlled, directly or indirectly, by the Province of Ontario. The Applicants contend that

1 this is not the case because the Province owns less than a majority of the stock in Hydro One and
2 has agreed not to manage the company as a shareholder. This is not the end of the inquiry.

3 The Province of Ontario previously owned the entirety of Hydro One and its predecessor
4 entities. This was the case for over 100 years. Only recently, within the past three years, has a
5 portion of Hydro One been offered for purchase by others. This was done to generate revenue for
6 the Province. However, the Province has maintained a high level of ownership and control and
7 guaranteed themselves that this will remain the case.

8 Crucially, the Governance Agreement (2015) between Hydro One and the Province
9 provides that a two-thirds majority must be attained for certain critical governance matters. This
10 includes annual retention votes for both the CEO and the Chairman of the Board. With 40% of the
11 vote – more than enough to prevent a two-thirds vote from being achieved – Ontario has the
12 controlling interest. Ontario also has the right under the Governance Agreement to remove the
13 entire Board of Directors.

14 Beyond its guaranteed role as the major shareholder in Hydro One, the Province has also
15 retained its legislative authority over Hydro One *and its wholly-owned subsidiaries*, as specifically
16 noted in Section 2.2.1(d) of the Governance Agreement. This legislative authority has recently been
17 utilized with regard to executive compensation in the Hydro One Accountability Act (2018), with
18 only a self-imposed legislative carve-out for non-Canadian subsidiaries preventing the Act from
19 purporting to reach Avista in the future.

20 When it comes to Hydro One, there is seemingly no limitation on the legislation that can be
21 approved by the Province. More importantly, there is no way to predict what such legislation may
22 include in the future. Such political and financial uncertainty and the associated risks could extend

1 to Avista and its customers, directly or indirectly, if the merger occurs.¹ This is precisely the type
2 of governmental ownership and control that Idaho Code § 61-327 was calculated to preclude.

3 2. Formal Arrangements Between Hydro One and the Province of Ontario Further
4 Bar the Transaction.

5 Under the second prohibition:

6 No title or interest in any public utility. . .property located in this state
7 which is used in the generation, transmission, distribution or supply
8 of electric power and energy to the public or any portion thereof, shall
9 be transferred or transferable to, or acquired by, directly or indirectly,
10 by any means or device whatsoever,. . .**any person, firm,**
11 **association, corporation or organization acting as trustee,**
12 **nominee, agent or representative for, or in concert or**
13 **arrangement with, any such government or municipal**
14 **corporation, quasi-municipal corporation, or governmental or**
15 **political unit, subdivision or corporation.**

16 I.C. § 61-327 (emphasis added). Under this prohibition, the question is whether Hydro One is
17 acting “in concert or arrangement with” the government of Ontario. Clearly, it is.

18 An “arrangement” means an agreement. *Black’s Law Dictionary, 2d Ed.* Both the
19 Governance Agreement (2015) and the Letter Agreement (2018) between Hydro One and the
20 Province of Ontario spell out how the corporation is to be governed, *including control over its*
21 *wholly-owned subsidiaries.* Future operations will be governed by these agreements between the
22 corporation and the government.

23 A clearer example of this prohibition is hard to imagine.

¹ Subjecting Avista customers to this demonstrated political and financial uncertainty is not in the public interest and further precludes the proposed transaction under I.C. § 61-328(3)(a), even if it is not barred under I.C. § 61-327, or as an alternative ground for denial (see also Washington Utilities and Transportation Commission (Docket U-170970) *Final Order Denying Joint Application for Transfer of Property* (Order 07) (December 5, 2018), denying the proposed transaction as not being consistent with the public interest).

1 3. Provincial Ownership and Control of Hydro One Prohibits the Transaction.

2 Under the third prohibition:

3 No title or interest in any public utility . . . property located in this
4 state which is used in the generation, transmission, distribution or
5 supply of electric power and energy to the public or any portion
6 thereof, shall be transferred or transferable to, or acquired by, directly
7 or indirectly, by any means or device whatsoever, . . . **any company,**
8 **association, organization or corporation, organized or existing**
9 **under the laws of this state or any other state, whose issued**
10 **capital stock, or other evidence of ownership, membership or**
11 **other interest therein, or in the property thereof, is owned or**
12 **controlled, directly or indirectly, by any such government or**
13 **municipal corporation, quasi-municipal corporation, or**
14 **governmental or political unit, subdivision or corporation.**

15 I.C. § 61-327 (emphasis added). The question under this prohibition is whether Hydro One (which
16 would own Avista) is owned or controlled, directly or indirectly, by the Province of Ontario. The
17 question applies equally to Olympus Holding (Delaware) and Olympus Equity (Idaho).

18 As discussed above and plainly demonstrated at the technical hearing in this matter, the
19 Province of Ontario holds and has exercised sufficient major stockholder and governmental control
20 of Hydro One to demonstrate that the corporation “is owned or controlled” by the Province.

21 4. The Fourth Prohibition in the Statute Does Not Appear to Apply.

22 And, finally, under the fourth prohibition:

23 No title or interest in any public utility. . .property located in this state
24 which is used in the generation, transmission, distribution or supply
25 of electric power and energy to the public or any portion thereof, shall
26 be transferred or transferable to, or acquired by, directly or indirectly,
27 by any means or device whatsoever,. . .**any company, association,**
28 **organization or corporation, organized under the laws of any**
29 **other state, not coming within the definition of an electric public**
30 **utility or electrical corporation. . ., and subject to the jurisdiction,**
31 **regulation and control of the public utilities commission of the**
32 **state of Idaho under the public utilities law of this state.”**

1 I.C. § 61-327 (emphasis added). This prohibition does not appear to apply to the current
2 application.

3 **D. The Limited Exception in the Statute Does Not Apply.**

4 The statute provides an exception, added in 1982, and not applicable here, for “a cooperative
5 electrical corporation organized under the laws of another state, which has among its members
6 mutual nonprofit or cooperative electrical corporations organized under the laws of the state of
7 Idaho and doing business in this state.” I.C. § 61-327.

8 Hydro One is not a “cooperative” and does not otherwise qualify under the statutory
9 language. The exception therefore does not apply.

10 **III. CONCLUSION**

11 For the reasons set forth above, the Commission should conclude that I.C. § 61-327 bars the
12 proposed acquisition of Avista by Hydro One and deny the application.

DATED this 7th day of December, 2018.

PARSONS BEHLE & LATIMER

By: 

Norman M. Semanko

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 7th day of December, 2018 by the following method:

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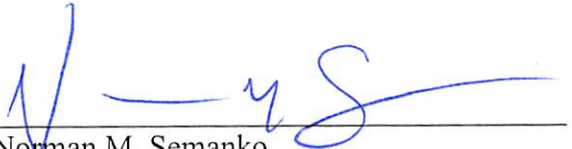
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