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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
RESPONSE IN OPPOSITION TO
MOTION TO ADMIT AND APPROVE
FIRST AMENDMENT TO
STIPULATION AND SETTLEMENT**

1 COMES NOW Intervenor Avista Customer Group (“ACG”), through counsel, pursuant to
2 the Idaho PUC Rules of Procedure (“RP”) 57.03 and 274-276, and hereby submits its Response in
3 Opposition to the Motion to Admit and Approve First Amendment to Stipulation and Settlement
4 (“Motion”).

5 **I. INTRODUCTION**

6 The Motion requests that the Commission approve the amended settlement. For the reasons
7 set forth below, and as will be further evidenced during the hearing on this matter, the Commission
8 should deny the motion, reject the settlement, and deny the application seeking approval of the
9 acquisition of Avista by Hydro One.

1 **II. STANDARD OF REVIEW**

2 The Commission is not bound by settlements. RP 276. This is particularly true when the
3 proposed settlement is not agreed to by all parties, in which case the Commission may convene a
4 hearing to consider the settlement (RP 274), as it has in this case. The Commission will
5 independently review any settlement proposed to it to determine whether the settlement is just, fair
6 and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy. RP
7 276. The burden of showing that these conditions are met is on the proponents of the proposed
8 settlement. RP 275. In the case of a proposed utility merger or acquisition, the settlement must be
9 in accordance with both I.C. §§ 61-327 and 61-328. The Commission may accept the settlement,
10 reject the settlement, or state additional conditions under which the settlement will be accepted. RP
11 276.

12 **III. ARGUMENT**

13 The Motion asserts that the settlement “is reasonable and in the public interest and that it
14 satisfies the standards for approval set forth in Idaho Code § 61-328(3).” Motion at 1–2. Even if
15 these claims are demonstrated to be true at the hearing in this matter (which is not conceded or
16 agreed to by ACG here), they are not themselves sufficient to satisfy the burden and requirements
17 imposed on proposed settlements by RP 274–276. To be approved, the settlement must be “in
18 accordance with law.” This includes the provisions of not only I.C. § 61-328(3), but also I.C. § 61-
19 327. On its face, the Motion does not claim that it satisfies this additional provision of Idaho law –
20 and for good reason.

21 The Direct Testimony of PUC Staff Terri Carlock, to which a copy of the proposed
22 settlement is also attached, states: “With regard to foreign ownership in particular, Staff believes

1 Idaho Code § 61-327 may provide a total bar to the proposed merger. We believe the Commission
2 should analyze this possibility prior to making a final determination.” Carlock at 1–2.

3 **A. The Proposed Settlement Is Barred by Idaho Code Section 61-327.**

4 The proposed acquisition of Avista differs from previous transactions considered by the
5 Commission in one key and indisputable regard: The acquiring utility, Hydro One, is owned and/or
6 controlled, directly or indirectly, by a foreign government, the Province of Ontario, Canada. Such
7 an acquisition is barred by I.C. § 61-327.

8 As PUC Staff has recognized: “The Province of Ontario is the largest shareholder of Hydro
9 One with 47.4 percent ownership of outstanding common stock. . . . As such, it can influence Hydro
10 One as the largest shareholder through shareholder votes and as a governmental entity creating laws
11 that Hydro One must follow. Recent activities in the Province of Ontario demonstrates this
12 influence is a real risk for Hydro One. For example, less than six months ago, all of the Board of
13 Directors and the Chief Executive Officer (CEO) bowed to pressure from the Province of Ontario
14 and resigned rather than being removed following the established shareholder voting process.”
15 Carlock at 6. From Staff’s perspective, “there does not appear to be a limit on the Province of
16 Ontario’s authority over Hydro One” and “nothing prevents the Province of Ontario from passing
17 additional laws directing the operations of Hydro One.” *Id.* at 14.

18 Staff further noted: “Shortly after the new provincial government was elected in Ontario,
19 the Province passed the Hydro One Accountability Act, renegotiated the Governance Agreement
20 between Hydro One and the Province, and signed a Letter Agreement between Hydro One and her
21 Majesty the Queen in Right of Ontario. In combination, these documents removed the Board of
22 Directors and CEO of Hydro One, set forth new requirements for how the replacement Board

1 members and CEO would be selected, and outlined new requirements on executive compensation.
2 Such far reaching authority – especially around the determination of employee wages – from a
3 single shareholder demonstrates significant managerial oversight of Hydro One.” *Id.* at 12.

4 The Idaho Supreme Court has found that I.C. § 61-327 applies to “out-of-state
5 organizations, governmental entities, or any entity not subject to regulation by the PUC.” *Idaho*
6 *Power Co. v. State*, 661 P.2d 741, 755, 104 Idaho 575, 589 (1983). The Province of Ontario is a
7 governmental entity. And it is not subject to regulation by the PUC.

8 The statute’s prohibition includes “foreign entities,” not just the states of the United States.
9 This was clearly understood at the time the Idaho Supreme Court made its decision in 1983. The
10 legislative history surrounding the 1982 amendments to Idaho Code Section 61-327 is replete with
11 references to “foreign entities.” The Statement of Purpose for House Bill 472 (1982), the 1982
12 legislation itself, the House State Affairs Committee Minutes (Feb. 8, 1982), and the 1982 Session
13 Laws (Ch. 7, p. 10) all make clear that “foreign entities” were the focus of the statute, not just
14 Idaho’s sister states, and that this was the understanding of the regulated community and the State
15 Legislature. *Affidavit of Norman M. Semanko in Support of Avista Customer Group’s Response in*
16 *Opposition to Motion to Admit and Approve First Amendment to Stipulation and Settlement.*

17 Also, the definition of “state” at the time the statute was enacted in 1951 (and at the time
18 the amendments were made in 1982), was not narrowly confined to one of the states of the United
19 States. *See, e.g., Webster’s New International Dictionary*, Second Edition (1953) (“the ruling body
20 or government of a country”; “a territorial unit in which the general body of law is separate and
21 distinct from the law of any other territorial unit”); *see also, Black’s Law Dictionary*, Ninth Edition
22 (“A state is a community of persons living within certain limits of territory, under a permanent

1 organization which aims to secure the prevalence of justice by self-imposed law” (quoting Theodore
2 D. Woolsey, *Introduction to the Study of International Law* § 36, at 34 (5th ed. 1878)); “Modern
3 states are territorial; their governments exercise control over persons and things within their
4 frontiers” (quoting J.L. Briefly, *The Law of Nations* 118 (5th ed. 1955))).

5 Finally, the Idaho State Legislature clearly knew how to refer to a narrower category of
6 “state” in the public utility statutes prior to 1951. *See, e.g.*, I.C. § 61-714; ch. 61, § 79, p. 247
7 (1913) (referring to “the several states of the union”) and I.C. § 62-705; 1903, p. 343, § 1 (referring
8 to “any state or territory of the United States”). It chose not to be so narrow in its drafting and
9 adoption of I.C. § 61-327.

10 The question in this matter is not whether there should be a statute in place in Idaho which
11 bars utility ownership and/or control, directly or indirectly, by a foreign government. That is a
12 question for the Idaho State Legislature, which it has already answered in the affirmative. Rather,
13 the question here is whether Hydro One, owned and/or controlled as it is by the Province of Ontario,
14 is barred from acquiring Avista. Clearly, it is, pursuant to I.C. § 61-327. As a result, the proposed
15 settlement should be rejected by the Commission as not “in accordance with law.”

16 **B. The Transaction Is Further Prohibited by Idaho Code Section 61-328(3).**

17 Even if the transaction was permissible under I.C. § 61-327, it is further prohibited by I.C.
18 § 61-328(3), which requires that it be in the public interest. It is not in the public interest for a
19 utility in Idaho to be owned and/or controlled, directly or indirectly, by the Province of Ontario,
20 Canada. The Province is not under the jurisdiction of, and does not answer to, the Commission. The
21 Commission certainly does not control the Premier or the Legislative Assembly of Ontario, which
22 have both recently exercised control over Hydro One, the utility that proposes to acquire Avista.

1 Being subject to this unpredictable political and economic volatility is simply not in the interest of
2 Idaho ratepayers.

3 Of course, the issue of whether the proposed transaction will or will not result in higher
4 costs and/or rates for Avista and its customers than would otherwise occur without the transaction
5 is also one that must be determined under I.C. § 61-328(3). ACG believes that the Applicants have
6 thus far failed to satisfy their burden under this provision and will be unable to do so at the hearing
7 in this matter.

8 In short, the Applicants need to demonstrate that the proposed transaction will do “no harm”
9 to the public interest or cost/rates. Failing this, the settlement must be rejected as inconsistent with
10 I.C. § 61-328(3).

11 For these additional reasons, the Motion to accept the proposed settlement should be denied.

12 IV. CONCLUSION

13 For the reasons set forth above, and as may be further demonstrated at the hearing in this
14 matter, the Motion seeking approval of the proposed settlement should be denied, the settlement
15 should be rejected, and the proposed acquisition of Avista by Hydro One should be denied.

DATED this 21st day of November, 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 21st day of November, 2018 by the following method:

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