



Rob McKenna

# ATTORNEY GENERAL OF WASHINGTON

900 Fourth Avenue #2000 • Seattle WA 98164-1012

July 27, 2006

**VIA E-MAIL AND FIRST CLASS MAIL**

Carole Washburn  
Executive Secretary  
Washington Utilities & Transportation Commission  
1300 S. Evergreen Pk. Dr. S.W.  
PO Box 47250  
Olympia, WA 98504-7250

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RECORDS SECTION  
06 JUL 31 AM 8:15  
STATE OF WASHINGTON  
UTILITY AND TRANSPORTATION  
COMMISSION

Re: In the Matter of the Petition of Avista Corporation, d/b/a Avista Utilities for an Order Authorizing Implementation of Natural Gas Decoupling Mechanism And to Record Accounting Entries Associated with the Mechanism  
Docket Nos. UG-060518

Dear Ms. Washburn:

Enclosed please find the original and twelve copies of Public Counsel's Renewed Request for an Adjudication for filing in the above-entitled docket. For confirmation of receipt, I have enclosed a copy to be date-stamped and sent back to us in the enclosed self-addressed, stamped envelope.

Sincerely,

Simon J. Fitch  
Assistant Attorney General  
Public Counsel Section  
(206) 389-2055

SJf:cjw  
Enclosure

cc: David Meyer, Avista (First Class Mail & E-mail)  
Sally Johnston, AAG, Commission Staff (First Class Mail & E-mail)  
Nancy Glaser, Northwest Energy Coalition (First Class Mail & E-mail)  
Ed Finklea, Northwest Industrial Gas Users (First Class Mail & E-mail)  
Elizabeth Klumpp (E-mail only)



**BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION  
COMMISSION**

In the Matter of the Petition of Avista Corporation, d/b/a Avista Utilities for an Order Authorizing Implementation of Natural Gas Decoupling Mechanism And To Record Accounting Entries Associated with the Mechanism.

DOCKET NO. UG-060518

PUBLIC COUNSEL'S RENEWED  
REQUEST FOR AN  
ADJUDICATION

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OFFICE OF THE ATTORNEY GENERAL

**I. INTRODUCTION**

1. On April 5, 2006, Avista Corporation filed a petition for an order authorizing implementation of a decoupling mechanism (Petition). The filing consisted of a petition, a draft tariff, and various exhibits illustrating the proposal.
2. On May 1, 2006, the Public Counsel Section of the Attorney General's Office filed a letter with the Commission requesting that the above captioned matter be set for adjudicative hearings. On May 8, 2006, Avista filed a letter with the Commission requesting that the Commission "reserve judgment on the need for a hearing until this matter is brought before the Commissioners at a public meeting."
3. To Public Counsel's knowledge, the Company has not requested that the matter be brought before the Commission at an open meeting, that it be set for adjudication, or that any other formal procedure be initiated for consideration of the request. To date, the Commission has not acted on the Public Counsel request.<sup>1</sup>

<sup>1</sup> An adjudicative proceeding commences when the agency or a presiding officer notifies a party that a prehearing conference, hearing, or other stage of an adjudicative proceeding will be conducted. RCW 34.05.413(5).

4. During the period of time since the filing a number of meetings have been called either by Staff or Avista to discuss the filing. There has been an explicit effort to reach a final settlement on the petition prior to an open meeting or any formal proceeding. Public Counsel and other stakeholders have attended the meetings. Some consensual discovery has been conducted by Public Counsel and the Commission Staff.<sup>2</sup> However, Public Counsel has repeatedly advised Commission Staff and Avista that it is Public Counsel's position that that this important should matter be set for hearing.

## II. RENEWED REQUEST FOR ADJUDICATION

5. Public Counsel contests Avista's petition and hereby renews its request for adjudication of the matter, for the reasons set forth below.

A. **Where It Would Be Unlawful for a Public Service Company to Take An Action Without Commission Approval, And When There Is A Request for Adjudication of that Matter By a Person with Standing, Adjudication is Required.**

6. The Administrative Procedure Act (APA) requires an agency commence an adjudicative proceeding when any person makes a timely application and such a proceeding is "required by law or constitutional right." RCW 34.05.413(2).<sup>3</sup> Alternatively, if an agency is required to hold an adjudicative proceeding on a particular matter, it must treat an application for an agency order as an application for adjudicative proceedings, whether or not the applicant expressly requests those proceedings. RCW 34.05.413(4). A noted treatise explains: "The APA applies to *all* state agency administrative adjudicative proceedings that are *conducted to determine rights or*

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<sup>2</sup> The discovery rule has not been invoked. It is not uncommon in Commission practice, for reasons of efficiency, for preliminary discovery to begin with the consent of filing company in cases where it is expected that the case will be set for hearing. This was Public Counsel's initial expectation here.

<sup>3</sup> Additionally, an agency may commence an adjudicative proceeding at any time over any matter it has jurisdiction. RCW 34.05.413(1).

*responsibilities under state law*, subject to the exclusions listed in RCW 34.05.030.”<sup>4</sup>

WASHINGTON ADMINISTRATIVE LAW PRACTICE MANUAL (2005), §9.01[C] (Emphasis added).

See generally, WAC 480-07-300 and -305.

7. Furthermore, RCW 34.05.422(1)(b), provides that “applications for licenses that are contested by a person having standing to contest under the law...shall be conducted as adjudicative proceedings.” RCW 34.05.010(9)(a) defines “license” as “a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law” with certain exceptions not relevant here.
8. The seminal case interpreting what constitutes a “license” and what is “required by law” under RCW 34.05.010(9) is *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787 (1996) (Trades Council). The *Trades Council* case involved Washington’s Apprenticeship Council’s role in certifying apprenticeship programs. *Id.*, at 791. An apprenticeship program seeking designation by the Council had to submit proposed standards. *Id.* Council approval was not required to do business as an apprenticeship program, however, approved programs were exempted from certain prevailing wage, workers’ compensation and professional certification laws. *Id.*
9. An organization, CITC, applied to the Council for registration. *Id.* The Apprenticeship Council considered CITC's application and ultimately approved its registration after an open meeting. *Id.* The Seattle Construction and Building Trades Council (Trades Council) sought judicial review under the APA of the Council’s approval. The Trades Council argued that the APA required the Apprenticeship Council to hold adjudicatory proceedings when it considered CITC's application.

10. On appeal, the Supreme Court interpreted RCW 34.05.010(9)(a) and agreed that adjudication was required, saying:

If any statute requires the “approval,” “registration” or “similar authorization” (etc.) of the agency, a license “required by law” may be found within the meaning of the APA. In the case of the three statutes relied upon by Appellants, under certain circumstances approval is required to pay apprenticeship level wages, for apprentices to have workers' compensation coverage and benefits, and to engage in certain electrical work, or, stated conversely, *it is unlawful to do these things without agency approval.*

*Id.*, at 801. (Emphasis added). In other words, since CITC would be violating the law if it did not follow the state’s prevailing wage, workers’ compensation and professional certification laws without approval from the Apprenticeship Council, the Council’s certification of the program was a license required by law. Thus, where approval of an action requires agency approval, it is a license and adjudication is required.

11. *Wash. Indep. Tel. Ass’n v WUTC*, 110 Wn. App. 498 (2002), *aff’d*, 149 Wn.2d 17 (2003) also clarifies what is a license required by law and when an adjudication is required. When the WUTC designated non-incumbent telephone companies as “Eligible Telecommunications Companies” (ETCs) at an open meeting in 1997, WITA sued, alleging, *inter alia*, a violation of the APA.

12. The specific APA argument forwarded by WITA was that ETC designation was a “license” under the APA and as a complaining party WITA was entitled to adjudication. *Id.* at 510-11. Distinguishing the *Trades Council* case, the Court disagreed. *Id.* The Court never held that the ETC designation was not a license per se. To the contrary, the Court found that ETC

designation was an exception to the definition of a license in RCW 34.05.010(9)(a) because it was *solely* for revenue purposes. *Id.*<sup>5</sup>

13. The importance of the *WITA* case is but for the revenue purpose attendant to ETC designation, the Commission's action would have been "licensing" under *Trades Council*. *See also, Watershed Defense Fund v. Riveland*, 91 Wn. App. 454, 459, *rev. den.* 137 Wn.2d 1009 (1998) (Department of Ecology's approval of amendment to water district's comprehensive water and sewer plan constituted the granting of a "license" under the clear language of RCW 34.05.010(9)(a)).

14. In this case, Avista's petition meets the statutory definition of a license since it is a request for "approval" of a new decoupling mechanism, a petition for authorization to take action to implement decoupling and to record certain accounting entries associated with the mechanism. This reading is consistent with other case law interpreting the term "license" broadly, including the *Trades Council* decision.

**B. Even If The Commission Concludes That A Hearing Is Not Required By Statute, The Commission Should Exercise Its Discretion To Hold A Hearing.**

15. As noted above, an agency may commence an adjudicative proceeding at any time for any matter over which it has jurisdiction. RCW 34.05.413(1); WAC 480-07-305(1). There is no dispute in this case that the Commission has jurisdiction over the subject matter of the petition. As set forth below, there are strong policy reasons why the Commission should exercise its jurisdiction in the public interest to set this matter for hearing.

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<sup>5</sup> *See, Id.*, at 512 ("the sole purpose of the ETC designation is to entitle the carrier to receive federal universal service revenues").

1. **The Commission has indicated a preference that decoupling proposals be presented in the context of a general rate case.**

16. At the conclusion of its Rulemaking to Review Natural Gas Decoupling, Docket No. UG-050369, the Commission stated:

The Commission believes that the wide variety of alternative approaches to decoupling make it more efficient to address these issues in the context of specific utility proposals *included in general rate case filings* rather than through a generic rulemaking. Notice of Withdrawal of Rulemaking, October 17, 2005 (emphasis added).

The Commission further observed in explaining its decision to withdraw the rulemaking:

Any such [decoupling] proposal would necessarily be designed to fit with the utility's particular circumstances and needs to be accompanied by sufficient financial information to allow the Commission to thoroughly analyze its implications for customers and the utility. The Commission presumes that *the most efficient way to fully assess these effects would be through a general rate case filing*. Summary, Analysis of Comments and Decision to Close Docket Without Action, Attachment, Notice of Withdrawal of Rulemaking, October 17, 2005, p. 10.(emphasis added).

17. Subsequent to the rulemaking, Cascade Natural Gas filed a proposed decoupling plan (Conservation Alliance Plan Mechanism), docketed as UG-051651. Commission Staff's Open Meeting memorandum raised numerous issues with the Cascade proposal, and recommended that "if Cascade does not agree to withdraw the filing," that the Commission issue a complaint and order suspending the filing and set the matter for hearing. Staff Memorandum, December 14, 2005, Item A 1, p. 7. Cascade withdrew the proposal prior to the Open Meeting and later included it in its currently pending general rate case filing.

18. Both PacifiCorp and Puget Sound Energy have presented their decoupling proposals as part of general rate case filings. This leaves Avista as the only Company presenting a decoupling proposal to the Commission outside of an adjudicative proceeding. Not only has this proposal not been presented in the context of a rate case, the Company apparently seeks to finalize a plan and present it for approval with essentially no formal review at all. While the

Commission could direct Avista to bring this proposal back at the time of its next rate case, at a minimum, it should at least require Avista to bring the matter forward in a formal hearing process.

**2. The Commission has not yet approved a decoupling mechanism for any company in Washington.**

19. Adoption of a decoupling mechanism is a major policy choice for the Commission. It has not yet adopted or approved a decoupling mechanism for any company in Washington. On the other hand, its careful review of PacifiCorp's recent proposal is an indication of the range and complexity of the issues raised by decoupling. In that decision, the Commission listed twelve issues to be addressed in analyzing a decoupling proposal. *WUTC v. PacifiCorp*, UE-050684, Order No. 04, ¶ 109.

20. As the Commission's comments in closing the rulemaking reflect, this is not a routine decision that can simply be approved at an open meeting. Ultimately, the Commission is going to require a sufficient record upon which to evaluate and either approve, reject, or modify Avista's proposal. That record is best developed in an adjudicative hearing process. The approach taken so far by Avista, as well Commission Staff, has not developed a record for Commission review.

21. Avista's petition presents significant issues. Avista's decoupling petition, and decoupling in general, represents a profound shift in the Commission's regulatory policy. The effects of and the effectiveness of such a policy shift cannot be examined sufficiently through an open meeting process. Decoupling departs from the test year matching principle used for decades by the commission by proposing to track one effect on margins--- the decline in existing customer use-- while ignoring other effects on margins such as new customer growth. A whole host of issues



need examining to make such a determination. Which weather adjustment mechanism should be used?<sup>6</sup> How should the target for company conservation be set? How should the commission review and approve that target and review and determine that the target has been met? How much recovery of the lost sales volumes should the company be granted based on the percent of the achieved company sponsored conservation goal? How should the lost sales volumes be assigned to each customer class? How would the commission want to review the annual rate change? What is the effect of relieving company's margin recovery from the effect of price increases in company purchased gas? By tracking only the downward pressure on company margins how does that effect company's efforts to be more efficient in its operations? Is decoupling as effective a simply adopting a direct incentive program for conservation? Are there other alternatives that should be considered to encourage energy efficiency? Review of a decoupling proposal is not a simple exercise.

**3. Avista's decoupling proposal affects customer rates.**

22. Avista's proposal has the potential for changing and increasing the rates customers pay for natural gas. The "amount of the rate increase resulting from the adjustment would be subject to an annual incremental limit of 2%" with a cumulative limit of 6 % over the three year pilot. Petition, ¶ 27. Avista has done a simulation that indicates the impact of the mechanism at only the 0.3 % level would be \$550,000 over one year. *Id.*, ¶ 28. *See also*, Petition, Exhibit 3, Draft Schedule 159 Natural Gas Conservation Rate Adjustment. Where policy and methodology is well established and changes are relatively minor in impact, the Commission might reasonably choose not to set for hearing some routine filings affecting rates. This proposal does not fit that

description. Avista's ratepayers have a reasonable expectation that a proposal that is likely to affect every customer's bill as much as 6 percent over three years will not be adopted without a hearing to review evidence pro and con about the merits of the proposal, and without an opportunity for all interested parties to be heard.

**4. The important issues presented should be addressed in a fair public process.**

23. Public Counsel suggests that the unconventional approach taken to this petition so far is not consistent with fair and open public process or conducive to efficient or sound Commission decision-making. Ordinarily, a matter of this significance, with its multiple and potentially contentious issues, would have been set for hearing soon after filing. Any interested party could intervene, formal discovery rights would apply to assist in development of informed positions and testimony, and settlement conferences would have been convened, with notice and an opportunity to participate for all parties who had intervened. The discussions which have occurred would have been conducted far more productively in that context. If this matter had been set for hearing in the ordinary course, the procedures described above would have been well advanced.

24. Instead, this matter has not even come before the Commission at an Open Meeting. It has been in a procedural limbo. It is unclear how any settlement would be presented to the Commission or what the supporting record would be, particularly if the issues are contested.

25. In Public Counsel's view, this approach to settlement on a matter of this significance is completely at odds with the spirit of the discussions in the recent Commission's procedural rulemaking, Docket No. A-050208. There, the Commission conducted a serious examination of best practices for settlement before the Commission, and is currently entertaining new rules to

allow for notice to and participation by all parties in settlement. Public Counsel fully supports reasonable efforts to reach negotiated settlements in Commission cases, but not in the manner that is being attempted here, which, in our view sets a bad precedent.

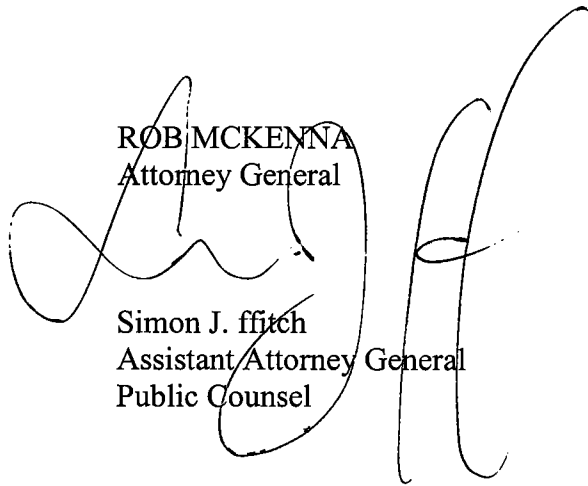
### III. CONCLUSION

26. For the foregoing reasons, Public Counsel respectfully requests that Avista's decoupling petition be set for hearing.

Dated this 27<sup>th</sup> day of July, 2006.

ROB MCKENNA  
Attorney General

Simon J. ffitch  
Assistant Attorney General  
Public Counsel

Handwritten signatures of Rob McKenna and Simon J. ffitch. The signature of Rob McKenna is on the left, and the signature of Simon J. ffitch is on the right. Both signatures are in black ink and are written over the printed names and titles of the signatories.