

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

AVISTA CORPORATION, D/B/A
AVISTA UTILITIES,

Respondent

DOCKETS UE-240006 &
UG-240007 (Consolidated)

ORDER 07

DENYING STAFF'S MOTION
FOR PARTIAL SUMMARY
DETERMINATION

BACKGROUND

- 1 On January 18, 2024, Avista Corporation d/b/a Avista Utilities (Avista or Company) filed with the Washington Utilities and Transportation Commission (Commission) revisions to its electric service tariff, Tariff WN U-28, and its natural gas service tariff, Tariff WN U-29, in Dockets UE-240006 and UG-240007, respectively.¹ The purpose of these filings is to increase rates and charges for the electric and natural gas services provided to customers in the state of Washington.
- 2 Avista's filing proposed rate increases to its electric and natural gas rates based on a proposed rate of return of 7.61 percent (with 48.5 percent equity and 10.40 percent return on equity). The Company also proposes a Two-Year Rate Plan, which would begin with new base rates effective in December 2024 (Rate Year 1) and December 2025 (Rate Year 2).
- 3 For Rate Year 1, Avista proposes an increase to electric base revenue of \$77.1 million, or 13.0 percent, and an overall increase to natural gas base revenue of \$17.3 million, or 13.6 percent. For Rate Year 2, Avista proposes an increase to electric base revenue of \$53.7 million, or 11.7 percent, and an overall increase to natural gas base revenue of \$4.6 million, or 3.2 percent.

¹ *Washington Utilities and Transportation Commission v. Avista Corporation, d/b/a Avista Utilities*, Dockets UE-240006 & UG-240007, filed Revisions to Tariff WN U-28 (Electric) and Tariff WN U-29 (Natural Gas) (January 18, 2024).

- 4 On January 31, 2024, the Commission entered Order 01 consolidating dockets UE-240006 and UG-240007, suspending the tariffs, and setting the matters for adjudication.
- 5 On February 20, 2024, the Commission convened a virtual prehearing conference before Administrative Law Judges James E. Brown II and Paige Doyle.
- 6 On February 27, 2024, the Commission entered Order 02, Prehearing Conference Order and Notice of Hearing. In Order 02, the Commission established the Procedural Schedule, granted petitions to intervene, and noticed an evidentiary hearing for September 30, 2024, continuing if needed to October 1, 2024.
- 7 On March 20, 2024, Commission staff (Staff) filed a Motion for Partial Summary Determination (Motion). In its Motion, Staff takes issue with the Company's portfolio forecast error adjustment and that it should not be incorporated into Avista's proforma power cost adjustment, revenue requirement or its Energy Recovery Mechanism (ERM).²
- 8 On April 9, 2024, Public Counsel filed its Reply In Support of Staff's Motion for Summary Determination (Public Counsel's Reply).³ In turn, Avista filed its Reply to Staff's Motion for Summary Determination (Avista's Answer).⁴
- 9 On April 17, 2024, Staff filed a Motion for Leave to Reply to Avista.⁵ Avista submitted its Response to Staff's Motion, on April 17, 2024.⁶ On April 25, 2024, the Commission issued a Notice Inviting Reply to Avista's Response to Staff's Motion for Summary Determination.⁷ The Notice requested that replies were to be submitted by May 6, 2024. On May 6, 2024, the Alliance of Western Energy Consumers (AWEC) and Public Counsel filed Replies to Avista's Response to Staff's Motion for Partial Summary

² Dockets UE-240006 & UG-240007, Commission staff's Motion for Partial Summary Determination (Motion) (March 20, 2024).

³ Dockets UE-240006 & UG-240007, Public Counsel's Reply In Support of Staff's Motion for Partial Summary Determination (April 9, 2024).

⁴ Dockets UE-240006 & UG-240007, Avista's Answer to Staff's Motion for Partial Summary Determination (April 9, 2024).

⁵ Dockets UE-240006 & UG-240007, Commission staff's Motion for Leave to File Reply (April 17, 2024).

⁶ Dockets UE-240006 & UG-240007, Avista's Response to Commission staff's Motion for Leave to File Reply (April 17, 2024).

⁷ Dockets UE-240006 & UG-240007, Notice Inviting Reply to Avista's Response to Staff's Motion for Partial Summary Determination (April 25, 2024). Although we concluded that Staff's Motion for Leave was out of time, we accepted that filing, Staff's subsequent Reply, along with all other Replies to Avista's Response, which were filed by May 6, 2024.

Determination.⁸ Additionally, Staff filed a Reply in Support of its Motion for Partial Summary Determination.⁹

DISCUSSION AND DECISION

I. Applicable Law

A. Summary Determination

10 “A party may move for summary determination of one or more issues if . . . there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”¹⁰ The Commission treats a motion for summary determination the same way the courts approach a motion for summary judgment.¹¹ To that point, we find case law to be helpful and instructive in evaluating and rendering our decision on Staff’s motion for summary determination.

11 In setting forth the standard and process Washington case law states, “In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact.”¹² A moving party may meet the initial burden by pointing out that there is an absence of evidence to support the nonmoving party’s case.¹³ If the moving party meets the initial burden, then the nonmoving party must then (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).¹⁴

⁸ Dockets UE-240006 & UG-240007, AWEC’s Reply to Avista’s Response to Commission staff’s Motion for Leave to File Reply (May 6, 2024); Public Counsel’s Reply to Avista’s Response to Commission staff’s Motion for Leave to File Reply (May 6, 2024).

⁹ Dockets UE-240006 & UG-240007, Staff’s Reply in Support of its Motion for Leave to File Reply (May 6, 2024).

¹⁰ See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975) cited by *Young v. Key Pharms.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

¹¹ WAC 480-07-380(2)(a); CR 56(c).

¹² See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975) cited by *Young v. Key Pharms.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

¹³ *Young v. Key Pharms.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989); See also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

¹⁴ *Young v. Key Pharms.*, 112 Wn.2d 216, 226 & n.2, 770 P.2d 182 (1989) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 332 (1986), dissent of Justice Brennan; WAC 480-07-380(2)(a); CR 56(c).

B. Ratemaking Standards

- 12 The Commission regulates, consistent with the public interest, as defined by the public service laws, the provision of utility service within Washington.¹⁵ Under the public service laws, utilities' rates and practices must be equitable, fair, just, reasonable, and sufficient.¹⁶ The Commission has stated that its mission is essentially one of determining an appropriate balance between the needs of the public to have safe and reliable electric and natural gas services at reasonable rates and the financial ability of the utility to provide such services. Among other things, the end result of Commission orders in rate proceedings is to ensure that rates shall be "fair to customers and to the [c]ompany's owners; just in the sense of being based solely on the record developed following principles of due process of law; reasonable, in light of the range of possible outcomes supported by the evidence[;] and sufficient to meet the needs of the [c]ompany to cover its expenses and attract necessary capital on reasonable terms."¹⁷
- 13 When a utility comes before the Commission to revise their rates, Commission regulations and case precedent set forth the ratemaking process the utility must follow. "The Commission's long-established and well-understood ratemaking practice requires companies filing for revised rates to start with an historical test year."¹⁸ Further, "there is a fundamental reason for this starting point in every case: costs, revenues, loads, and all other pertinent factors are known and can be measured with a high degree of certainty because they have, in fact, occurred. The practical value of the historical test year is that the cost, revenue and plant data are available for audit, and the test year captures the complex relationships among the various aspects of utility costs, revenue, load, and other factors over a uniform period of time."¹⁹
- 14 The historic test year is a baseline as the Commission realizes that there are factors fit squarely within the test year. To that point, "Washington [the Commission] relies on a hybrid test year approach to ratemaking. Although the Commission starts with a historic

¹⁵ RCW 80.01.040(3).

¹⁶ RCW 80.28.010, RCW 80.28.425; *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Dockets UE-220066, UG-220067, UG-210918, Order 24, 11-13 ¶¶ 53-57 (Dec. 22, 2022).

¹⁷ *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.*, Dockets UE-072300 & UG-072301, Order 12, 23-24 ¶ 66 (Oct. 8, 2008).

¹⁸ *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-160228 & UG-160229, Order 06, at 47 ¶ 80 (Dec. 15, 2016).

¹⁹ *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Dockets UE-160228 & UG-160229, Order 06, at 47 ¶ 80 (Dec. 15, 2016).

test year, we allow *pro forma* adjustments to rate base and expenses that often extend beyond what is known and measurable as of the end of the test year.”²⁰

- 15 Moreover, the Commission’s regulations allow the Parties to a ratemaking proceeding to adjust the test period results of operations to: (1) correct “defects or infirmities in” a utility’s “actual recorded results of operations”²¹ or “adjust from an as-recorded basis to a basis that the commission accepts for determining rates,”²² or (2) for *pro forma* adjustments “give effect for the test period to all known and measurable changes that are not offset by other factors.”²³

II. Motions and Replies of the Parties

A. Commission Staff’s Motion for Summary Determination

- 16 In its motion, Staff notes that Avista has filed tariff revisions that would raise rates it charges for electric service in Washington. According to Staff the rate increase is due in large part to a “portfolio forecast error” adjustment that Avista makes which adds \$65.8 million to its pro forma power costs, and to its ERM baseline, to account for what the company describes as difficulties in accurately forecasting its power costs.²⁴
- 17 Staff contends that the Commission should summarily determine two issues with regard to the portfolio forecast error adjustment. First, Staff asserts that the Commission should determine that Avista may not make the adjustment as part of its pro forma power cost adjustment, which reduces Avista’s alleged revenue insufficiency by \$42.183 million.²⁵ Staff adds that the portfolio forecast error adjustment represents a kludge that Avista seeks to incorporate into rates to account for the possibility that actual costs in the rate year will be higher than what Avista currently forecasts.²⁶ Staff argues “that is because the adjustment does not involve actual, forecasted costs that Avista has (or can) identify. Instead, any such costs, were they to materialize during the rate year, would result from

²⁰ *Wash. Utils. & Transp. Comm’n v. Pac. Power & Light Co.*, Dockets UE-140762, UE-140617, UE-131384 & UE-140094, Order 08, at 3 ¶ 8 (Mar. 25, 2015).

²¹ WAC 480-07-510(3)(c)(i), (Restating adjustments).

²² WAC 480-07-510(3)(c)(i) (Restating adjustments).

²³ WAC 480-07-510(3)(c)(ii) (*Pro forma* adjustments); See also *Wash. Utils. & Transp. Comm’n v. Puget Sound Energy, Inc.*, Dockets UE-090704 & UG-090705, Order 11, 11-13 ¶¶ 25-31 (Apr. 2, 2010).

²⁴ Dockets UE-240006 & UG-240007, Motion at 1.

²⁵ Dockets UE-240006 & UG-240007, Motion at 1.

²⁶ Dockets UE-240006 & UG-240007, Motion at 1.

future, real-world events that are currently unknown and unknowable, unpredictable, and unquantifiable.”²⁷ Staff claims that the Commission has long rejected attempts by utilities or others to adjust test-year results of operations based on such events, and it should do no differently here.²⁸

- 18 The second argument that Staff raises is that the Commission should determine that Avista may not incorporate the portfolio forecast error adjustment into the ERM baseline. Staff states that the adjustment, in the context of the ERM, represents Avista’s attempt to doubly insulate itself from potential variations in its power costs caused by unknown, unknowable, and currently unquantifiable events.²⁹ Staff believes that attempt malforms the ERM, results in an inequitable allocation of risk between the company and its ratepayers, and deadens the incentives to control power costs built into the ERM as it is currently structured, thus nullifying the public interest balance at the heart of the Commission’s adoption of the ERM.³⁰
- 19 With regard to the first argument, Staff alleges that although Avista witness Scott Kinney testifies that Avista has erred in valuing its portfolio in recent filings, Mr. Kinney does not identify a specific event, or specific events, that will give rise to an additional \$65.8 million in costs above and beyond what Avista has forecasted, affecting the power cost adjustment.³¹ Staff claims that Mr. Kinney’s testimony indicates that the company cannot do so. Staff observes that witness Kinney opines that “[t]here are many driving forces of forecast error each year, but markets tend to be the greatest driver of forecast error.”³² Witness Kinney testifies that these multiple driving forces interact in complex ways, and often work at cross-purposes with regard to Avista’s power costs, with one or two drivers are responsible for pushing forecast versus actual Net Power Expense (NPE) in a direction up or down from authorized each year.³³
- 20 Staff further cites to witness Kinney’s testimony where he details that “2022 witnessed an approximate 35% run-up in power prices that could have helped us with higher revenues. However, because natural gas prices were about 95% above the forecast, the relationship between electricity and natural gas fell, grossly dropping the value of our thermal fleet.

²⁷ Dockets UE-240006 & UG-240007, Motion at 1-2.

²⁸ Dockets UE-240006 & UG-240007, Motion at 2.

²⁹ Dockets UE-240006 & UG-240007, Motion at 2.

³⁰ Dockets UE-240006 & UG-240007, Motion at 2.

³¹ Dockets UE-240006 & UG-240007, Motion at 3.

³² Dockets UE-240006 & UG-240007, Motion at 3.

³³ Dockets UE-240006 & UG-240007, Motion at 3, citing Kinney, Exh. SJK-1T at 68:15-16.

The result of nearly doubling our natural gas fuel expense was a significant increase in error relative to the forecast; almost four times the error seen in 2021. In 2023, the main driver is poor hydro conditions. Natural gas prices through October 2023 fell 6% from the forecast, but electricity prices fell almost double that amount, meaning our thermal fleet underperformed the forecast. But our lowest hydro years since the energy crisis of 2000-01 magnified the difference between the forecast and actual and resulted in our largest ever delta between portfolio forecast and actual costs.”³⁴

21 Staff then notes that witness Kinney explains the difficulties he claims the company faced in putting a dollar value on the forecast error. Staff then goes on to describe the two sets of calculations and approach witness Kinney used in attempting to quantify forecast error in dollars.³⁵ The first set of calculations was a “Forward (Forecast) Value,” valued various components of the company’s portfolio for each year of a group based on historical forward market prices.³⁶ The second set was an “Actual Value,” valued those same portfolio components for those same years using actual index prices and operations.³⁷ The difference between the forecast and actual values for a given year yielded its forecast error.³⁸ Staff avers that Avista averaged the annual forecast error for the five years spanning 2018 through 2022 to produce its estimate of the portfolio forecast error, or \$65.8 million.³⁹

22 Next, Staff details Avista witness Clint Kalich’s description of the company’s incorporation of the portfolio forecast error into its ERM baseline and power costs. Mr. Kalich’s Exhibit CGK-3 identifies the adjustments that Avista made to its modeled power cost results in order to calculate its pro forma power supply adjustment.⁴⁰ Staff states that

³⁴ Dockets UE-240006 & UG-240007, Motion at 3, citing Kinney, Exh. SJK-1T at 69:2-14.

³⁵ Dockets UE-240006 & UG-240007, Motion at 4, citing Kinney, Exh. SJK-1T at 67:1-5.

³⁶ Dockets UE-240006 & UG-240007, Motion at 4, citing Kinney, Exh. SJK-1T at 67:7-12.

³⁷ Dockets UE-240006 & UG-240007, Motion at 4, citing Kinney, Exh. SJK-1T at 67:8-17.

³⁸ Dockets UE-240006 & UG-240007, Motion at 4, citing Kinney, Exh. SJK-1T at 67:15-17.

³⁹ Dockets UE-240006 & UG-240007, Motion at 4, citing Kinney, Exh. SJK-1T at 67:15-17.

⁴⁰ Dockets UE-240006 & UG-240007, Motion at 4. See also Kalich, Exh. CGK-1T at 24:1-6 (“CGK-3 identifies non-modeled [Net Power Expense] items. These are expenses and revenues common to our historical filings and relate to fuel, transmission, and other miscellaneous items associated with our power supply business. In addition to these, I have added a single line item in the exhibit entitled ‘Forecast to Actual Market Adjustment’ to reflect the \$65.8 million portfolio forecast error detailed in Mr. Kinney’s testimony.”).

exhibit lists the portfolio forecast error adjustment as a reduction to the revenues booked into FERC Account 447 (Sales for Resale).⁴¹

23 Staff claims that Avista incorporates the pro forma power supply adjustment that Mr. Kalich testifies about into its revenue requirement through the testimony of witness Kaylene Schultz. Ms. Schultz identifies the pro forma power adjustment for the first rate year as Adjustment 3.00P,⁴² which she made under the direction of Mr. Kalich.⁴³ According to Avista witness Schultz, eliminating the portfolio forecast error adjustment reduces Avista's as-filed revenue deficiency from \$77.067 million to \$34.884 million.⁴⁴

24 Staff asserts that Mr. Kalich incorporation of the portfolio error adjustment into Account 447 has consequences for Avista's ERM.⁴⁵ Staff points out that the ERM⁴⁶ is "an accounting mechanism which allows the difference between certain actual and 'baseline' power costs to be deferred on an annual basis, and allows Avista to file true-up rate surcharges to recover or credit deferral balances when costs vary beyond identified thresholds."⁴⁷ The baseline and actual costs are determined by summing the forecasted (for baseline) or actual (for actual) expenses booked in FERC Accounts 555 (Purchased Power), 501 (Thermal Fuel), and 547 (Fuel) and then subtracting the revenues booked in Account 447 (Sales for Resale).⁴⁸ Staff concludes that incorporating the portfolio forecast error as a reduction to the sales revenue in Account 447 thus elevates the ERM's baseline in addition to increasing Avista's revenue requirement.⁴⁹

25 Taking all of this into account, it is Staff's position that Avista's forecast error adjustment the Commission should reject Avista's attempt to include \$65.8 million for any portfolio error adjustment into its revenue requirement through its pro forma power cost adjustment as a matter of law based on its long-held standards for pro forma adjustments. It should also reject Avista's attempt to incorporate the portfolio forecast error into its

⁴¹ Dockets UE-240006 & UG-240007, Motion at 4-5 citing Kalich, Exh. CGK-3.

⁴² Dockets UE-240006 & UG-240007, Motion at 5 citing Schultz, Exh. KJS-1T at 50:18-51:6.

⁴³ Dockets UE-240006 & UG-240007, Motion at 5; See Schultz, Exh. KJS-1T at 50:18-22.

⁴⁴ Dockets UE-240006 & UG-240007, Motion at 5 citing Decl. of Kristen Hillstead at 2 ¶ 5.

⁴⁵ Dockets UE-240006 & UG-240007, Motion at 5.

⁴⁶ Dockets UE-240006 & UG-240007, Motion at 5; See generally *Wash. Utils. & Transp. Comm'n v. Avista Corp.*, Docket No. UE-011595, Fifth Supp. Order (June 18, 2002).

⁴⁷ Dockets UE-240006 & UG-240007, Motion at 5; *In Re Petition of Avista Corp.*, Docket UE-061411, Order 04, 2 ¶ 5 (Dec. 26, 2006).

⁴⁸ Dockets UE-240006 & UG-240007, Motion at 5 citing Kalich, Exh. CGK-1T at 31:13-15.

⁴⁹ Dockets UE-240006 & UG-240007, Motion at 5; See Kalich, Exh. CGK-1T at 31:13-15.

ERM baseline as a matter of law given the arbitrary nature of the adjustment and the public interest considerations undergirding the ERM.⁵⁰

- 26 Staff concludes that the Commission should adhere to its long-held precedent and reject the proposed adjustment as a matter of law because it does not reflect a known or measurable cost, and because Avista fails to show consideration of offsetting factors.⁵¹ With regard to the ERM, Staff notes that the Commission adopted the ERM to accommodate various interests in furtherance of the public interest. Staff contends that the ERM is meant to equitably allocate the variance risk—i.e., the risk that actual power costs will differ materially from the forecasted costs used to set the ERM baseline—between the company and its customers. Staff claims that the ERM is also meant to incent Avista to control its power costs. Staff argues that Avista’s forecast error adjustment arbitrarily elevates the company’s power cost baseline, shifting the risk associated with power cost variances from Avista to its customers. Staff contends that result is inequitable, can only deaden the incentives built into the ERM, and cannot be squared with the public interest balancing that led to the ERM’s adoption.⁵²
- 27 In further detailing Staff’s argument for the rejection of Avista’s \$65.8 million adjustment, we will examine the proposed portfolio error adjustment to the revenue requirement, and then the proposed adjustment to the ERM.

Proposed Pro Forma Portfolio Error Adjustment to Revenue Requirement

- 28 Turning first to the proposed portfolio error adjustment to the revenue requirement, Staff argues that in order for portfolio error adjustment to be applied *pro forma* to the revenue requirement, the Company must show that that the adjustment is: (1) known, (2) measurable, and (3) not offset by other factors.⁵³ More specifically, Staff maintains that Avista fails to show that: (1) the adjustment involves a known event, (2) the adjustment involves measurable dollar amounts, or (3) the company has considered offsetting factors.⁵⁴

⁵⁰ Dockets UE-240006 & UG-240007, Motion at 6.

⁵¹ Dockets UE-240006 & UG-240007, Motion at 7.

⁵² Dockets UE-240006 & UG-240007, Motion at 7.

⁵³ Dockets UE-240006 & UG-240007, Motion at 10 citing *Wash. Utils. & Transp. Comm’n v. Puget Sound Energy, Inc.*, Dockets UE-090704 & UG-090705, Order 11, 9-13 ¶¶ 22-31 (Apr. 2, 2010); WAC 480-07-510(3)(c)(ii) (*Pro forma* adjustments).

⁵⁴ Dockets UE-240006 & UG-240007, Motion at 11.

- 29 With regard to the “known” prong, Staff claims that the Commission typically accepts as known a pro forma adjustment where the proponent identifies a post-test year event that is readily observable, and which has readily ascertainable or predictable effects. Staff alleges that the proposed adjustment here does not involve known events, and that neither Mr. Kalich nor Mr. Kinney, Avista’s witnesses, identify the post-test-year event or events that will give rise to the forecast error.⁵⁵ Staff opines that this failure to show such causation means that the Commission cannot project into the rate year any of its readily observable or identifiable effects, and thus cannot in any meaningful way call the adjustment known.⁵⁶
- 30 As for the measurable prong, Staff asserts that pro forma adjustments must provide measurable amounts, not “an estimate, a projection, the product of a budget forecast, or some similar exercise of judgment – even informed judgment – concerning future . . . expense.”⁵⁷ Staff avers that Avista’s portfolio forecast error does not involve any dollar amounts, nor does it reference any contracts, receipts, ledger entries, or other proof that specifically identifies the dollar amounts involved with the overestimate of the value of its fleet or the resulting underestimate of its power costs, nor can they.⁵⁸ Staff notes that Mr. Kinney explains that the error arises from future rate-year events that have not yet happened having impacts on the value of Avista’s fleet that no one can yet quantify.⁵⁹
- 31 Staff contends that the Commission generally applies the known and measurable standard differently to modeled power cost results.⁶⁰ However, Staff contends that instead Avista finds itself dissatisfied with modeled outputs, and therefore proposes to make an adjustment to the modeled results outside of the model.⁶¹ Staff goes on to discredit Avista’s potential argument that the Commission may exercise its discretion to ascertain

⁵⁵ Dockets UE-240006 & UG-240007, Motion at 11; Kinney, Exh. SJK-1T at 68:15-16, 69:2-14.

⁵⁶ Dockets UE-240006 & UG-240007, Motion at 12.

⁵⁷ Dockets UE-240006 & UG-240007, Motion at 12; *Wash. Utils. & Transp. Comm’n v. Avista Corp.*, Dockets UE -090134, UG-090135 & UG-060518, Order 10, 21 ¶ 45 (Dec. 22, 2009).

⁵⁸ Dockets UE-240006 & UG-240007, Motion at 12-13; See Kalich, Exh. CGK-1T through Exh. CGK-6; See Kinney, Exh. SJK-1T through Exh. SJK-16.

⁵⁹ Dockets UE-240006 & UG-240007, Motion at 13; Kinney, Exh. SJK-1T at 68:15-16, 69:2-14.

⁶⁰ Dockets UE-240006 & UG-240007, Motion at 13; *Wash. Utils. & Transp. Comm’n v. Avista Corp.*, Dockets UE-090134, UG-090135 & UG-060518, Order 10, 21 ¶ 45 (Dec. 22, 2009).

⁶¹ Dockets UE-240006 & UG-240007, Motion at 13; Kalich, Exh. CGK-1T at 24:1-6.

its expenses in the context of a multiyear rate plan also frees it from application of the known and measurable standards.⁶²

32 Concerning the “not offset by other factors” prong, Staff contends that neither Mr. Kalich nor Mr. Kinney identifies the specific rate-year cause of any power cost variance. Because of this, Staff alleges that makes it difficult to characterize the adjustment as known, it also prevents Avista and other parties from attempting to analyze any direct offsetting factors that might reduce or eliminate the adjustment’s revenue requirement impacts.⁶³ Additionally, Staff claims that Avista has similarly failed to provide evidence that it considered any indirect offsetting factors, and that neither Mr. Kalich nor Mr. Kinney describes any such efforts in their testimony.⁶⁴

33 Staff contends that to the extent that Mr. Kinney’s testimony does have relevance to the issue of indirect offsetting factors, it is unhelpful to the company, for two reasons. First, that testimony discusses in some depth the ways that yearly variations in the conditions surrounding Avista’s NPE can interact with each other to cancel out to some extent. However, Staff opines that the premise of Avista’s adjustment is that it cannot know how these factors will play out or affect each other in the rate year. Staff believes that makes the consideration of offsetting factors all the more important, but that Avista provides no testimony of such consideration.⁶⁵

34 Second, Staff contends that Mr. Kinney’s testimony about Avista’s portfolio forecast error, coupled with the company’s recent history with recovery of its power costs, shows that any error is more likely than not canceled out by other factors.⁶⁶ Staff states that over a five year period, 2018-2022, in years 2018, 2019, and 2020, the company’s actual NPE was less than forecasted.⁶⁷ Staff asserts that in those three out of five years, where Avista found evidence of portfolio forecast error, Avista actually over recovered, rather than under recovered its power costs. This was due to something in the rate year that canceled out the effect of the error. In short, Staff concludes that Avista offered nothing in its

⁶² Dockets UE-240006 & UG-240007, Motion at 14.

⁶³ Dockets UE-240006 & UG-240007, Motion at 15.

⁶⁴ Dockets UE-240006 & UG-240007, Motion at 15.

⁶⁵ Dockets UE-240006 & UG-240007, Motion at 15.

⁶⁶ Dockets UE-240006 & UG-240007, Motion at 15-16.

⁶⁷ Dockets UE-240006 & UG-240007, Motion at 16.

testimony about the consideration of offsetting factors regarding offsetting factors for forecast error.⁶⁸

Inclusion of the Proposed Forecast Error Adjustment in the ERM

- 35 Staff asserts that the Commission should deny Avista the ability to include the portfolio forecast error into the ERM baseline as a matter of law.⁶⁹ Staff notes the ERM is a deferral and true up mechanism, but its purpose is not to provide Avista with dollar-for-dollar recovery for its energy costs but rather to: (1) allocate the risk of ordinary power cost variability equitably between the company and its customers, and (2) provide an incentive for Avista to prudently manage its power costs.⁷⁰ Staff believes that Avista's baseline change is problematic for three reasons, each of which should independently prompt the Commission to summarily determine that it should reject the adjustment.⁷¹
- 36 First, Staff believes that the adjustment undermines the proper functioning of the ERM by pushing up the baseline increasing the likelihood that Avista's customers overpay on their power costs.⁷² Second, Staff contends that adjusting the baseline based on unknown and unquantifiable events represents a shifting of risk within the ERM.⁷³ Third, Staff claims that the adjustment deadens the incentive to control power costs that the ERM is currently structured to provide to Avista.⁷⁴
- 37 Moreover, Avista makes the point that the Commission has found testimony similar to that of Kalich and Kinney, which state that a utility's power costs and forecasting are influenced by factors beyond its control,⁷⁵ to be insufficient to eliminate dead and sharing bands from power cost mechanisms.⁷⁶ Thus, Staff concludes that neither Mr. Kalich's nor

⁶⁸ Dockets UE-240006 & UG-240007, Motion at 16.

⁶⁹ Dockets UE-240006 & UG-240007, Motion at 16.

⁷⁰ Dockets UE-240006 & UG-240007, Motion at 17; *In re Petition of Avista Corp.*, Docket UE-060181, Order 03, 9 ¶ 23 (June 16, 2006).

⁷² Dockets UE-240006 & UG-240007, Motion at 17-18; See Avista Corp., Dockets UE-170485, UG-170486, UE-171221 & UG-171222, Order 07, at 54 ¶ 160.

⁷² Dockets UE-240006 & UG-240007, Motion at 17-18; See Avista Corp., Dockets UE-170485, UG-170486, UE-171221 & UG-171222, Order 07, at 54 ¶ 160.

⁷³ Dockets UE-240006 & UG-240007, Motion at 18.

⁷⁴ Dockets UE-240006 & UG-240007, Motion at 18.

⁷⁵ Dockets UE-240006 & UG-240007, Motion at 19; Kalich, Exh. CGK-1T at 24:7-31:7; Kinney, Exh. SJK-1T at 50:1-66:8.

⁷⁶ Dockets UE-240006 & UG-240007, Motion at 19; E.g., Wash. Utils. & Transp. Comm'n v. PacifiCorp, Docket UE-130043, Order 05, 66-68 ¶¶ 169-173 (Dec. 4, 2013).

Mr. Kinney’s testimony creates a material issue of fact that would prevent summary determination as to the impropriety of adjusting the ERM baseline.⁷⁷

38 Consequently, Staff requests that the Commission summarily determine that Avista may not incorporate the portfolio forecast error into its revenue requirement or ERM baseline.

B. Public Counsel’s Reply in Support of Commission Staff’s Motion for Summary Determination

39 Public Counsel urges the Commission to grant Staff’s Motion for Partial Summary Determination.⁷⁸ Public Counsel argues that Avista’s portfolio error adjustment lacks sufficient analytical rigor to be included as a pro forma adjustment as it is neither known nor measurable. Public Counsel adds that Avista make no effort to calculate offsetting factors.⁷⁹ Moreover, Public Counsel asserts that Avista’s request to include the error adjustment in the ERM baseline would unfairly allocate the risk of power cost fluctuations to customers. Public Counsel believes that it would make Avista the perpetual “winning” side by allowing it to systematically over collect power costs at the expense of customers.⁸⁰

Proposed Pro Forma Portfolio Error Adjustment to Revenue Requirement

40 In its Reply, Public Counsel contends that Avista can predict neither the magnitude of nor relevant factors for its future errors. The evidence it does submit demonstrates that it is far more complex than taking an average of aggregated misses.⁸¹ To that point, Public Counsel alleges that in 2022, for example, dramatically higher natural gas prices drove costs higher, but in 2023, those natural gas prices were below forecast.⁸² Avista provides no evidence or analysis about how natural gas prices will behave in 2025 or 2026 other than its net power modeling, but nonetheless asks for an adjustment.⁸³ Public Counsel

⁷⁷ Dockets UE-240006 & UG-240007, Motion at 19.

⁷⁸ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 5.

⁷⁹ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 5.

⁸⁰ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 5.

⁸¹ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 6.

⁸² Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 6; Kinney, Exh. SJK-1T, at 69:2–69:14.

⁸³ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 6-7.

adds that because Avista cannot predict what factors will ultimately drive costs, there is also no way to adjust for offsetting factors.⁸⁴

41 Public Counsel posits that Avista’s adjustment is too speculative and recalls that in 2018 the Company argued that the power costs based on known and forecast costs “should not be changed based on how current conditions benefit one party or another.”⁸⁵ Moreover, Public Counsel asserts that Avista provides little or no explanation for why the appropriate average should be the last five years. Given the significant errors in 2022 and 2023, that average is significantly skewed by a very small sample size.⁸⁶ Public Counsel also notes that during three of these years of this study, Avista over recovered,⁸⁷ making the need such a significant adjustment toward collecting more costs a dubious conclusion to draw.⁸⁸ Public Counsel admits that Avista may have successfully indicted the reliability of forward market prices, particularly in 2022 and 2023. However, Public Counsel maintains that Avista utterly fails to meet its burden that the appropriate response would be to increase rates against the possibility of under collection or to provide any analytical improvements to its modeling.⁸⁹ In addition, Public Counsel argues that even if its net power forecast is again low, it will recover costs through its ERM mechanism.⁹⁰

Inclusion of the Proposed Forecast Error Adjustment in the ERM

42 Public Counsel declares that the ERM was and is an instrument to allocate “risk between shareholders and ratepayers.”⁹¹ In addition to that, Public Counsel states that the ERM is also meant to address” the ERM has the added benefit of “motivate[ing] Avista to effective[ly] manage or even reduce its power costs.”⁹² Public Counsel raises the point that ratepayers have no ability to mitigate power cost variability, but Avista does, even if its power is not absolute. In order to achieve the goal of allocating risk, “setting a proper

⁸⁴ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 7.

⁸⁵ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 7; Wash. Utils. & Transp. Comm’n v. Avista Corp., Dockets UE-170485, et al., Final Order 07/02/02, ¶¶ 141, 147.

⁸⁶ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 7.

⁸⁷ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 7 citing Motion at 15-16, ¶ 33.

⁸⁸ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 7.

⁸⁹ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 7-8.

⁹⁰ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 8.

⁹¹ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 8; *Wash. Utils. & Transp. Comm’n v. Avista Corp.* Docket UE-011595, Final Order: Fifth Supp. ¶ 7, (June 18, 2022).

⁹² Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 9; *Wash. Utils. & Transp. Comm’n v. Avista Corp.* Docket UE-060181, Order 3, ¶ 23 (June 16, 2006).

baseline is necessary for the ERM to function as intended.”⁹³ Public Counsel adds that two years of under-collecting is not such an extraordinary circumstance that Avista needs to adjust the baseline so radically in its favor.⁹⁴

43 Public Counsel notes that rejecting a biased forecast model does not foreclose Avista from seeking alterations to the ERM itself.⁹⁵ Public Counsel contends that “the ability to control for market conditions must be assessed comparatively between the utility and ratepayers. While Avista asserts that its inability to control market conditions makes it difficult to avoid costs, ratepayers have no ability to hedge, negotiate long-term contracts, or plan new generation projects.”⁹⁶ As is stated elsewhere, Public Counsel asserts that the purpose of the ERM is to equitably allocate risk between captive ratepayers and the only party with agency—the utility. Public Counsel concludes that adopting a forecast biased in favor of the utility cannot be reconciled with the purpose of the ERM or with the statutory requirement for fair rates and must be rejected as a matter of law.⁹⁷

C. Answer of Avista to Commission staff’s Motion for Summary Determination

44 In its Answer, Avista claims that Multiple questions of fact (discussed below) demand fair examination through the hearing process, where testimony on all sides is presented, and tested through responsive testimony, cross-examination and briefing.⁹⁸ Avista contends that Staff’s Motion would preclude all of that on the issues presented, leaving Avista to wonder, “where’s my day in court?”⁹⁹ Avista believes that “the outcome of this rigorous hearing process may or may not vindicate Staff’s Motion on whether the inclusion would produce “just and reasonable rates” (they say no, it would not), but that process needs to first happen, or the Commission’s ultimate decision is vulnerable on appeal.”¹⁰⁰

⁹³ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 9; *Wash. Utils. & Transp. Comm’n v. Avista Corp.* Dockets UE-170485, et al., Order 7/02/02, ¶ 160 (Apr. 26, 2018).

⁹⁴ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 9.

⁹⁵ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 10.

⁹⁶ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 10.

⁹⁷ Dockets UE-240006 & UG-240007, Public Counsel’s Reply at 10.

⁹⁸ Dockets UE-240006 & UG-240007, Avista’s Answer at 2.

⁹⁹ Dockets UE-240006 & UG-240007, Avista’s Answer at 2.

¹⁰⁰ Dockets UE-240006 & UG-240007, Avista’s Answer at 2.

- 45 To that point, Avista invokes the right to be heard under Washington’s Administrative Procedures Act (APA) RCW 34.05.449(2) (Procedures at Hearing) as well as the criteria for initial and final orders, pursuant to RCW 34.05.461(3) (APA).¹⁰¹ Avista also raises the requirements of RCW 80.28.020 for the Commission to issue findings fixing rates post hearing as an argument that this matter should proceed to a full hearing.¹⁰²
- 46 Avista contends that “denial of Staff’s Motion, on the other hand, serves the interests of justice and assures that the issues raised are fully vetted through the hearing process.”¹⁰³ Avista adds that the very recitation of facts by Staff serves to underscore the fact-dependent nature of the question before the Commission.¹⁰⁴ In addition to recalling witness Kinney’s testimony that “there are many driving forces of forecast error each year, but markets tend to be the greatest driver of forecast error”¹⁰⁵ and that these multiple driving forces interact in complex ways and often “work at cross-purposes,”¹⁰⁶ Avista alleges that between 2022 and 2023, it experienced the doubling of its “natural gas fuel expense, resulted in a significant increase in error relative to the forecast (almost four times the error seen in 2021).”¹⁰⁷ Avista adds that “in 2023, the deterioration worsened: Avista’s lowest hydro year since the energy crisis of 2000, magnified the difference between the forecast and actual results, resulting in the largest ever delta between portfolio forecasts and actual costs.”¹⁰⁸
- 47 Avista declares that “given these significant disruptions in the power supply market and to better capture what the evidence suggests is necessary to accurately reflect power costs during the rate-effective period, Avista compared a “Forward (Forecast) Value,” valuing various components of the Company’s portfolio for each year based on five years’ worth of historical forward market prices.”¹⁰⁹ Avista further declares that “it then developed an

¹⁰¹ Dockets UE-240006 & UG-240007, Avista’s Answer at 3 citing RCW 34.05.449(2) and RCW 34.05.461(3).

¹⁰² Dockets UE-240006 & UG-240007, Avista’s Answer at 4 citing RCW 80.28.020.

¹⁰³ Dockets UE-240006 & UG-240007, Avista’s Answer at 2.

¹⁰⁴ Dockets UE-240006 & UG-240007, Avista’s Answer at 5; Motion at 2-3, ¶¶ 3-5.

¹⁰⁵ Dockets UE-240006 & UG-240007, Avista’s Answer at 5; Motion at ¶6, referring to Kinney, Exh. SJK-1T at 68, ¶¶15-16.

¹⁰⁶ Dockets UE-240006 & UG-240007, Avista’s Answer at 5; Motion at ¶6, referring to Kinney, Exh. SJK-1T at 68, ¶¶15-16.

¹⁰⁷ Dockets UE-240006 & UG-240007, Avista’s Answer at 5-6.

¹⁰⁸ Dockets UE-240006 & UG-240007, Avista’s Answer at 6 citing Motion at ¶6, referring to Kinney, Exh. SJK-1T at 69:2-14.

¹⁰⁹ Dockets UE-240006 & UG-240007, Avista’s Answer at 6; Kinney, Exh. SJK-1T at 67:7-12.

“Actual Value” which valued those same portfolio components for those same years using actual index prices and positions.”¹¹⁰ Avista then averaged the annual forecast error for the five years from 2018 – 2022, to yield a “portfolio forecast” error of \$65.8 million (system).¹¹¹ Avista emphasizes “that this is not an insignificant issue in the determination of the Company’s overall revenue requirement. If Staff’s Motion is accepted, it would reduce the proposed revenue requirement from \$77.067 million to \$34.884 million, a difference of \$43.183 million.”¹¹² The sheer significance of what is at stake is reason enough to proceed cautiously and develop a full record.¹¹³

48 Avista provides what it believes are the factual issues outstanding in this matter that the Commission should consider when weighing Staff’s motion:

- (1) What is the present state of the energy markets and their future prospects as it impacts Avista?
- (2) Will reliance on forward market prices reasonably reflect future costs during the rate period?
- (3) What are the factors driving this variability and can they be reasonably estimated and captured through the pro forma adjustment using previous methodologies.
- (4) What are Avista’s opportunities to control these power supply costs? Which ones? For how long? In what manner?¹¹⁴

Proposed Pro Forma Portfolio Error Adjustment to Revenue Requirement (Known and Measurable)

49 Avista argues that Staff’s approach to what is “known and measurable” for pro forma purposes is too narrow and runs counter to the Commission’s recent practices and future direction.¹¹⁵ Avista claims that Staff acknowledges that the “2019 and 2021 amendments to the public service laws” grant the Commission “significant discretion” in ascertaining

¹¹⁰ Dockets UE-240006 & UG-240007, Avista’s Answer at 6; Kinney, Exh. SJK-1T at 67:8-17.

¹¹¹ Dockets UE-240006 & UG-240007, Avista’s Answer at 6; Kinney, Exh. SJK-1T at 68:7-12.

¹¹² Dockets UE-240006 & UG-240007, Avista’s Answer at 6.

¹¹³ Dockets UE-240006 & UG-240007, Avista’s Answer at 6.

¹¹⁴ Dockets UE-240006 & UG-240007, Avista’s Answer at 7. See also Attachment A to Avista’s Motion for additional factual issues.

¹¹⁵ Dockets UE-240006 & UG-240007, Avista’s Answer at 7.

a utility's rate-year expenses in the context of a multi-year rate plan.¹¹⁶ Avista alleges that this has allowed the Commission to exercise "significant discretion" over various pro forma adjustments to allow for a better "matching" of rate year revenues and expenses. Moreover, Avista posits that that discretion has already been used to good effect under multi-year rate plans (MYRPs) for capital projects entering rate base during the rate-effective year.¹¹⁷ Avista emphasizes that the need to relax the strict application of "known and measures" standards in this context of MYRPs, is part and parcel of the recent legislation. (RCW 80.28.425).¹¹⁸

Proposed Pro Forma Portfolio Error Adjustment to ERM (Known and Measurable)

50 Avista stresses the need to get the get the ERM baseline right, and that failure to do so merely pushes the inevitable cost burden forward in time, as actual power costs are reflected in yearly ERM filings.¹¹⁹ In short, Avista declares that the ERM true-up serves as a correcting mechanism to capture actual costs that vary from the baseline (up or down); it also serves to capture any "offsetting" effects that actually occur.¹²⁰

51 Avista disagrees with Staff's assertion that the proposed "portfolio forecast error adjustment," somehow "unfairly, unjustly, or unreasonably modifies the ERM"¹²¹ and disagrees that the proposed adjustment alters the allocation of risk within the ERM "in a manner that unfairly, unjustly or unreasonably favors Avista and undermines the incentive to control power costs."¹²² Furthermore, Avista argues that this Motion "does not take up that question of modifying the risk allocation established through the deadbands and sharing mechanism. Avista believes that is a matter that remains set for hearing, and not before the Commission in this Motion."¹²³ Avista claims that the assessment of the deadband and sharing mechanism of the ERM in terms of "risk

¹¹⁶ Dockets UE-240006 & UG-240007, Avista's Answer at 8 citing Motion at ¶ 21.

¹¹⁷ Dockets UE-240006 & UG-240007, Avista's Answer at 8.

¹¹⁸ Dockets UE-240006 & UG-240007, Avista's Answer at 8; See also RCW 80.28.425(3)(a)-(c).

¹¹⁹ Dockets UE-240006 & UG-240007, Avista's Answer at 12 citing Staff acknowledges that the ERM allows Avista to file true-up surcharges to recover or credit balance when costs vary beyond identified thresholds. (Motion at ¶10).

¹²⁰ Dockets UE-240006 & UG-240007, Avista's Answer at 12.

¹²¹ Dockets UE-240006 & UG-240007, Avista's Answer at 12; Motion at ¶¶34-41.

¹²² Dockets UE-240006 & UG-240007, Avista's Answer at 12; Motion at ¶34.

¹²³ Dockets UE-240006 & UG-240007, Avista's Answer at 12; .

allocation” cannot be viewed in isolation, however, from vastly changed conditions in the power supply market.¹²⁴

- 52 The Commission should want to know about any fundamental shifts in the power supply market, either as to resources, pricing, availability and duration, and develop a record accordingly. Acceptance of Staff’s Motion would deprive the Commission of that very opportunity.¹²⁵
- 53 Next, Avista disagrees with Staff’s position that will “doubly insulate” itself from power cost variability.¹²⁶ However, Avista claims that it is actually attempting to more accurately set the “baseline,” upon which the ERM sharing mechanism operates.¹²⁷ To be more specific, Avista states that “it is important to set the “baseline” correctly (a factual determination), for at least two reasons: (1) to assure proper and timely cost recovery and convey price signals regarding changes in power costs (especially important in a market with dramatic price changes); and (2) to assure that the “risk allocation” method still produces results that are fair and do not unduly benefit or penalize the Company, based on that which it can and can’t control.”¹²⁸
- 54 Avista believes that even if the actual sharing mechanism itself remains unchanged, Avista would bear (absorb) approximately \$10.2 million of lost margin in Washington, given the projected power costs contained within its ERM “baseline.”¹²⁹ Avista avers that the \$10.2 million of lost margin represents almost 2% of retail revenue, and such a burden will be substantial.¹³⁰

¹²⁴ Dockets UE-240006 & UG-240007, Avista’s Answer at 12; Avista states that “the interplay of “risk sharing” and deadbands must be understood in the context of changing market conditions, requiring a factual investigation.”

¹²⁵ Dockets UE-240006 & UG-240007, Avista’s Answer at 13.

¹²⁶ Dockets UE-240006 & UG-240007, Avista’s Answer at 13; Motion at ¶39.

¹²⁷ Dockets UE-240006 & UG-240007, Avista’s Answer at 13.

¹²⁸ Dockets UE-240006 & UG-240007, Avista’s Answer at 13.

¹²⁹ Dockets UE-240006 & UG-240007, Avista’s Answer at 13-14; Under the present ERM Sharing, assuming a starting spot of \$0 deferral: Portfolio Forecast Error (System) = \$65.8 million; Portfolio Forecast Error (Washington Share) = \$42.2 million; Avista absorbs Deadband of \$4 million, then 50% of next \$6 million, which is \$3 million, then 10% of the remaining \$32.2 million, which is \$3.2 million, for a total of \$10.2 million (\$4 million + \$3 million + \$3.2 million).

¹³⁰ Dockets UE-240006 & UG-240007, Avista’s Answer at 14.

- 55 Avista notes that Staff’s Motion argues that the adjustment “unfairly and unjustly or unreasonably favors Avista and undermines the incentive to control power costs.”¹³¹ Based on this, Avista contends that Staff is asking the Commission to make that determination without any evidentiary record. Avista implies that Staff’s argument leads to questions that are fact dependent: “what are changing costs? Are they beyond Avista’s control? How would this affect Avista’s incentive to control power costs? Again, it is as if Staff wants to “skip a step” (the building of a record) and rush to a hasty conclusion around necessary adjustments to the ERM ‘baseline.’”¹³² In that regard, Avista seeks the opportunity to demonstrate why the ERM baseline should be adjusted for this “portfolio forecast error,” after a hearing and a chance to vigorously contest the positions of others who feel differently.¹³³ In short, the Company asserts that setting an appropriate ERM “baseline,” in light of all the facts and circumstances, remains an intensely factual exercise, after which the Commission can exercise its discretion in arriving at a fair allocation of risk.¹³⁴
- 56 Turning now to the issue of “offsetting factors,” Avista alleges that it uses the methodology set forth in Dockets UE-170485,¹³⁵ and that methodology already accounted for offsetting factors, such as: market prices, hydro conditions, natural gas transportation, etc.¹³⁶ Avista adds that “it is the result of that methodology that demonstrates that the resulting level of power supply expense is not representative of the rate effective period based on new and emerging changes in energy markets.”¹³⁷
- 57 In addition, Avista claims that the “true-up” within the yearly ERM review will, by its very nature, capture any offsetting factors that actually occurred.¹³⁸ Avista also claims that the “offsets” to increased power costs; some occur naturally, and as a matter of course, during the “true-up” occurring during the annual ERM review, and others are the result of actions taken by the Company through its hedging practices and resource

¹³¹ Dockets UE-240006 & UG-240007, Avista’s Answer at 14 citing Motion at ¶34.

¹³² Dockets UE-240006 & UG-240007, Avista’s Answer at 14 citing Motion at ¶34.

¹³³ Dockets UE-240006 & UG-240007, Avista’s Answer at 14.

¹³⁴ Dockets UE-240006 & UG-240007, Avista’s Answer at 14.

¹³⁵ Dockets UE-240006 & UG-240007, Avista’s Answer at 15 referencing Exh. CGK-1T, p. 2, ¶¶. 9-10.

¹³⁶ Dockets UE-240006 & UG-240007, Avista’s Answer at 15 referencing Exh. CGK-1T, p. 4, ¶¶. 2-8.

¹³⁷ Dockets UE-240006 & UG-240007, Avista’s Answer at 15 referencing Exh. SJK-1T, p. 66, ¶¶. 9-22.

¹³⁸ Dockets UE-240006 & UG-240007, Avista’s Answer at 15.

optimization.¹³⁹ Avista asserts that “naturally occurring offsets through the annual ERM true-up reflect actual changes in load supply, hydro availability, generating unit availability and actual market pricing during the ERM review period, which can, in combination, offset some of the power supply increases in cost.”¹⁴⁰ Other “offsets” are the result of concrete steps taken by the Company, which include hedging practices and “resource optimization,” all of which produce “offsets” which are reflected in the power supply adjustment itself.¹⁴¹ The Company alleges that its efforts to achieve these “offsets” is discussed within the Company’s direct case.¹⁴²

58 Avista asserts that on one hand Staff acknowledges that that the “ERM itself is intended to allocate the risk of power cost variability,” and then references a footnote where Staff culls language from Avista Order 01 (in Docket UE-180261) at para. 1, in which it is stated that the ERM is intended “to account for ordinary fluctuations in power costs outside of an authorized dead-band for power-cost recovery in base rates.”¹⁴³ The Company goes on to argue that the power fluctuations it experienced, totaling \$65.8, were not ordinary. Avista makes the argument that it would be perverse “to corrupt the ERM process to force an allocation of risk through deadbands that are supposed to operate on “ordinary” fluctuations in power costs (not on a \$65.8 million extraordinary fluctuation) from an accurate cost baseline.”¹⁴⁴

D. Staff’s Reply in Support of Motion for Partial Summary Determination

59 In its Reply, Staff disagrees with Avista’s assertion that absent a “rigorous hearing process,” it will suffer deprivation of this right.¹⁴⁵ Staff asserts that Washington’s courts recognized agencies’ power to use summary proceedings under the prior state APA,¹⁴⁶

¹³⁹ Dockets UE-240006 & UG-240007, Avista’s Answer at 15-16.

¹⁴⁰ Dockets UE-240006 & UG-240007, Avista’s Answer at 16.

¹⁴¹ Dockets UE-240006 & UG-240007, Avista’s Answer at 16.

¹⁴² Dockets UE-240006 & UG-240007, Avista’s Answer at 16 referencing See Exh. CGK-1T, p. 2, ¶¶ 9-10; p. 4, ¶¶ 2-8; Exh. SJK-1T, p. 66, ¶¶ 9-22; and Exh. SJK-1T, p. 10 et.seq. (risk management); p. 50, l. 23 et.seq. and p. 62, l. 9 et.seq. (hedging).

¹⁴³ Dockets UE-240006 & UG-240007, Avista’s Answer at 16 referencing Motion at 18, ¶ 39.

¹⁴⁴ Dockets UE-240006 & UG-240007, Avista’s Answer at 16 referencing Motion at ¶ 39.

¹⁴⁵ Dockets UE-240006 & UG-240007, Staff’s Reply at 3 referencing Answer at 3 ¶ 7.

¹⁴⁶ Dockets UE-240006 & UG-240007, Staff’s Reply at 3 citing *Asarco Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 695-98, 601 P.2d 501 (1979).

and they continue to recognize the propriety of summary-judgment-like proceedings under the currently-effective version.¹⁴⁷

60 Staff argues that practically, Avista has enjoyed every right offered by RCW 34.05.449(2). It prefiled testimony from numerous witnesses, had the opportunity to present argument in response to Staff’s motion for summary determination, and had the chance to rebut Staff’s contention that it had failed to prove necessary elements for the pro forma adjustment and change to the ERM baseline by submitting evidence to create a material issue of fact with its response.¹⁴⁸ Staff contends that “even crediting Avista’s testimony as true (for purposes of Staff’s motion only), Avista fails to make the showings necessary to incorporate the adjustment into its revenue requirement or to adjust the ERM baseline.”¹⁴⁹ Staff also disputes Avista’s reliance on RCW 80.28.020’s use of “after a hearing” as a basis to prevent summary determination.¹⁵⁰ However, Staff observes that both the state and federal courts have determined that agencies may use summary proceedings in adjudications. Their doing so recognizes that summary proceedings suffice as the “hearing” where there is no material issue of fact that would warrant a full evidentiary hearing.¹⁵¹

61 Moving to Staff’s argument about Avista’s claim about the need to build a record, Staff asserts that Avista failed to make in its opening testimony a prima facie case for the inclusion of the portfolio forecast error adjustment into the company’s rates.¹⁵² Staff contends that to the extent that the record is incomplete, it is incomplete because Avista failed to fill it out, not because the Commission deprived it of the opportunity to do so.¹⁵³

¹⁴⁷ Dockets UE-240006 & UG-240007, Staff’s Reply at 3 citing *Kettle Range Conservation Group v. Dept. of Natural Res.*, 120 Wn. App. 434, 85 P.3d 894 (2003) (“[t]he APA does not expressly authorize summary judgments, but case law has established that agencies may employ summary proceedings.”) (citing *Eastlake Cmty. Council v. City of Seattle*, 64 Wn. App. 273, 276, 823 P.2d 1132 (1992)).

¹⁴⁸ Dockets UE-240006 & UG-240007, Staff’s Reply at 4 referencing CR 56(c), (e).

¹⁴⁹ Dockets UE-240006 & UG-240007, Staff’s Reply at 4.

¹⁵⁰ Dockets UE-240006 & UG-240007, Staff’s Reply at 4 referencing Answer at 4 ¶ 7.

¹⁵¹ Dockets UE-240006 & UG-240007, Staff’s Reply at 4; See *Macomb Pottery v. NLRB*, 376 F.2d 450, 452 (7th Cir. 1967) (federal statute providing the right to appear and provide testimony “cannot logically mean that an evidentiary hearing must be held in a case where there is no material issue of fact), overruled on other grounds by *Mosey Manufacturing Co. v. NLRB*, 701 F.2d 610 (7th Cir. 1983).

¹⁵² Dockets UE-240006 & UG-240007, Staff’s Reply at 7.

¹⁵³ Dockets UE-240006 & UG-240007, Staff’s Reply at 7; WAC 480-07-380(2)(a); CR 56(c), (e); E.g., Response at 3 ¶ 6 (“the purpose of this Answer is not to debate the merits of the adjustment – only to assure that the debate eventually happens at hearing.”).

Any non-moving party responding to a motion for summary determination must present more than “argumentative assertions that unresolved factual issues remain” in order to stave off summary determination.¹⁵⁴

- 62 Staff further argues that “any attempt by Avista to build the record in rebuttal or via hearing, as the company appears to want to do, can only constitute what the Commission has repeatedly forbidden.” Avista would create a moving target where it makes the case it should have made in its opening testimony and after other parties have already responded and thus no longer have a chance to provide meaningful record evidence as a counter.¹⁵⁵ Contrary to Avista’s allegations, Staff does not believe that numerous factual issues remain for hearing, and that “not a single one of the issues Avista identifies for hearing relate to any of those; they instead relate generally to Avista’s power costs.”¹⁵⁶
- 63 Furthermore, Staff contends that a hearing is not necessary to determine whether inclusion of the portfolio forecast error adjustment into the ERM baseline produces fair, just, reasonable and sufficient results.¹⁵⁷ Staff further contends that the forecast error adjustment does not measure any specific aspect of Avista’s power costs, and it cannot do so. Also, Staff asserts that Avista cannot even identify what will be involved in the portfolio forecast error in the rate year.¹⁵⁸
- 64 Staff agrees that the “risk allocation established through the deadbands and sharing mechanism”¹⁵⁹ remains a matter set for hearing, but asserts that Avista could not create a material issue of fact as to the ERM baseline by pointing to its proposal for them. Staff states that its motion neither addresses the fate of the dead and sharing bands nor precludes the company from providing evidence about changing risk for purposes of seeking modification of the bands. Staff asserts that its motion would simply ensure that Avista cannot move the ERM baseline arbitrarily based on unknown and unmeasurable events.¹⁶⁰

¹⁵⁴ Dockets UE-240006 & UG-240007, Staff’s Reply at 7; See also, *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

¹⁵⁵ Dockets UE-240006 & UG-240007, Staff’s Reply at 8.

¹⁵⁶ Dockets UE-240006 & UG-240007, Staff’s Reply at 8; Answer at 7 ¶ 13 & Attachment A.

¹⁵⁷ Dockets UE-240006 & UG-240007, Staff’s Reply at 8; Answer at 9.

¹⁵⁸ Dockets UE-240006 & UG-240007, Staff’s Reply at 9 citing Kinney, Exh. SJK-1T at 68:15-69:14.

¹⁵⁹ Dockets UE-240006 & UG-240007, Staff’s Reply at 10 citing Answer at 12 ¶ 28.

¹⁶⁰ Dockets UE-240006 & UG-240007, Staff’s Reply at 10 citing See Avista Corp., Dockets UE-170485, UG-170486, UE-170221 & UG-170222, Order 07, at 54 ¶ 158.

- 65 Staff declares that the Commission allows pro forma power cost adjustments using modeled, future-looking results because of the analytical rigor involved in the models.¹⁶¹ Staff adds that Avista is not making a pro forma adjustment within the rigorous analysis of a vetted model.¹⁶² Staff claims that it has argued and continues to argue that the Commission relaxes the known and measurable standard only for rigorously modeled power costs.¹⁶³ Staff opines that Avista is making an adjustment to the results produced by such a model because it finds itself dissatisfied with those results.¹⁶⁴ Staff avers that Avista has never sought an adjustment like this one before, and Staff can find no example of the Commission approving any similar adjustment, meaning Avista cannot claim that some sort of precedent supports its position here.¹⁶⁵
- 66 Staff also disagrees with Avista that the Commission should relax the known and measurable standard for purposes of determining rate-year power costs based on the discretion granted it by RCW 80.28.425.¹⁶⁶ Staff alleges that contrary to precedent, Avista is asking the Commission to authorize rate inclusion for events that Avista cannot model or specifically identify and whose rate impacts Avista can neither quantify nor for which it has considered offsetting factors.¹⁶⁷
- 67 Staff disputes Avista's claim that its power cost methodology does not consider offsetting factors nor does the ERM capture them. Staff states that Avista's power cost modeling produces offsets for what the company can model.¹⁶⁸ However, Staff also states that the theory underlying the portfolio forecast error adjustment is that there will be rate year events that the Company cannot model and which cause variance (whose specific magnitude the company cannot predict) from the modeled results.¹⁶⁹ Staff's point is that

¹⁶¹ Dockets UE-240006 & UG-240007, Staff's Reply at 11 citing Staff's Motion at 13-14 ¶ 27.

¹⁶² Dockets UE-240006 & UG-240007, Staff's Reply at 11.

¹⁶³ Dockets UE-240006 & UG-240007, Staff's Reply at 11-12, n. 59.

¹⁶⁴ Dockets UE-240006 & UG-240007, Staff's Reply at 11-12.

¹⁶⁵ Dockets UE-240006 & UG-240007, Staff's Reply at 12.

¹⁶⁶ Dockets UE-240006 & UG-240007, Staff's Reply at 12; *Olson v. City of Tacoma*, 15 Wash. 148, 151, 45 P. 734 (1986) (what a tribunal has not addressed is an open question when properly presented).

¹⁶⁷ Dockets UE-240006 & UG-240007, Staff's Reply at 12-13; Staff's Motion at 11-16 ¶ 23-33.

¹⁶⁸ Dockets UE-240006 & UG-240007, Staff's Reply at 13; Kalich, CGK-1T.

¹⁶⁹ Dockets UE-240006 & UG-240007, Staff's Reply at 13; Kinney, Exh. SJK-1T at 68:15-69:14.

Avista did not, and cannot, consider offsetting factors, whether direct or indirect, for those events.¹⁷⁰

68 With regard to the ERM capturing any offsetting factors, Staff argues that the way the ERM operates prevents it from meaningfully capturing offsets in this context. Staff avers that “if Avista does not build offsetting factors in the ERM baseline, the baseline will be set too high. If it is, customers will pay too much for power costs. That overpayment will run through the ERM’s dead and sharing bands.”¹⁷¹ Staff declares “that means, from the perspective of customers, the offsets Avista claims are captured by the ERM’s operation are lessened, perhaps significantly.”¹⁷²

69 Staff takes issue with Avista’s argument that Staff errs by “forc[ing]” the portfolio forecast error through the deadbands “that are supposed to operate on ‘ordinary’ fluctuations in power costs.”¹⁷³ Staff believes that argument fails because Avista sponsored significant testimony stating that the variance underlying the portfolio forecast error was the new normal,¹⁷⁴ and repeated the claim in its response.¹⁷⁵

E. Public Counsel’s Reply in Support of Staff’s Motion for Partial Summary Determination

70 Public Counsel states that Avista’s answer raises no factual issues that need to be developed to evaluate whether using five-year average is an appropriate methodology for skewing power forecasts or altering ERM baselines.¹⁷⁶ Public Counsel argues that Avista’s Answer provides no support for its use of a five year of average forecast misses as its methodology for calculating its “portfolio forecast error” adjustment.¹⁷⁷ Additionally, Public Counsel avers that the proposed adjustment does not explain the

¹⁷⁰ Dockets UE-240006 & UG-240007, Staff’s Reply at 13; Staff’s Motion at 14-16 ¶ 29-33.

¹⁷¹ Dockets UE-240006 & UG-240007, Staff’s Reply at 14; Kinney, Exh. SJK-1T at 51:2-12.

¹⁷² Dockets UE-240006 & UG-240007, Staff’s Reply at 14.

¹⁷³ Dockets UE-240006 & UG-240007, Staff’s Reply at 14; Answer at 16 ¶ 40 (emphasis in original).

¹⁷⁴ Dockets UE-240006 & UG-240007, Staff’s Reply at 14; Kinney, Exh. SJK-1T at 70:15-71:7.

¹⁷⁵ Dockets UE-240006 & UG-240007, Staff’s Reply at 14; Answer at n.19.

¹⁷⁶ Dockets UE-240006 & UG-240007, Public Counsel’s Reply to Avista at 1.

¹⁷⁷ Dockets UE-240006 & UG-240007, Public Counsel’s Reply to Avista at 2; Avista Answer at 7, ¶ 13 and at 9, ¶ 21.

origin or causes of the errors, suggest a way to remedy or adjust the factors causing those errors, or provide any insight about how to avoid them.¹⁷⁸

- 71 Public Counsel contends that Avista’s study does not even inform the Commission whether these errors led to under-collection of costs, as in three of the years, Avista had a net refund of power costs. Public Counsel adds that the proposed portfolio forecast error makes no attempt to identify, quantify, explain, or incorporate factors driving variability of costs. It simply adds a margin in Avista’s favor. In short, Public Counsel maintains that the factual issues Avista identifies are immaterial to how the “portfolio forecast error” is calculated, and adopting Avista’s proposal will give the Commission no answers about how the current state of the energy market can be accurately incorporated into a forecast model.¹⁷⁹
- 72 Public Counsel disputes Avista’s position that “incorporation of forecast ‘error’ is not new” and that Avista has reflected some adjustments “at some level and in some form” in every filing. Public Counsel argues that this approach creates bias in favor of the Company and that incorporation of bias in the past should rarely, if ever, excuse continued bias.¹⁸⁰ For this reason, Public Counsel opines that Avista’s current “portfolio error adjustment” is not permissible under clear Commission precedent.¹⁸¹
- 73 With regard to Avista’s argument that it is unfair for it to bear \$10.2 million of potential lost margin risk, Public Counsel argues that proposal at issue here is not an effort to better forecast costs, but rather it is an effort to re-allocate risk of Avista’s errors to ratepayers.¹⁸² Moreover, the ERM true-up mechanism is no protection from bias within the ERM baseline. Specifically, Staff claims if the baseline is skewed as proposed by Avista, it will result in over-collection and ratepayers will bear the cost of the ERM sharing bands.¹⁸³

¹⁷⁸ Dockets UE-240006 & UG-240007, Public Counsel’s Reply to Avista at 2-3.

¹⁷⁹ Dockets UE-240006 & UG-240007, Public Counsel’s Reply to Avista at 3.

¹⁸⁰ Dockets UE-240006 & UG-240007, Public Counsel’s Reply to Avista at 3.

¹⁸¹ Dockets UE-240006 & UG-240007, Public Counsel’s Reply to Avista at 3 Wash. Utils. & Transp. Comm’n v. Puget Sound Energy, Inc., Dockets UE-090704 & UG 090705 (Consolidated), Final Order 11 ¶ 26 (Apr. 8, 2010) (noting that adjustments to revenue, expense, or rate base, “typically cannot be an estimate, a projection, the product of a budget forecast, or some other similar exercise of judgment—even informed judgment.”).

¹⁸² Dockets UE-240006 & UG-240007, Public Counsel’s Reply to Avista at 4.

¹⁸³ Dockets UE-240006 & UG-240007, Public Counsel’s Reply to Avista at 4.

74 Further, Staff avers that Avista is not prejudiced by the rejection of an impermissible methodology that would tip the scales in its favor. Staff believes that Avista, the parties, and the Commission can still develop a full record about the current energy market and whether it so extraordinary as to justify modifying the sharing bands or eliminating the ERM.¹⁸⁴

75 Staff states that its motion is limited to rejection of a specific, analytically unsupported adjustment, not a limitation on the Commission's ability to develop a full record about the current energy market. Where that adjustment is foreclosed by Commission precedent, Staff opines that there is no prejudice to Avista from acknowledging that via summary determination.¹⁸⁵

F. AWEC's Reply in Support of Staff's Motion for Partial Summary Determination

76 Upon review of AWEC's Reply, the organization makes substantially the same arguments set forth in Staff and Public Counsel's Replies to Avista's Answer. Additionally, AWEC recounts "in Avista's 2017 general rate case, following several years of controversy over Avista's power cost modeling, the Commission concluded that "Avista's power cost forecasts [had] been consistently unbalanced in the Company's favor,"¹⁸⁶ and ordered Avista to engage parties "in a discussion about how power cost modeling may be simplified and improved."¹⁸⁷ AWEC adds, that "through a series of workshops that took place over two years, a collaborative team, which included AWEC representatives, was able to reach agreement on a power supply modeling methodology in an effort to resolve the forecasting issues raised by parties."¹⁸⁸

77 AWEC adds "in reporting on the progress of those workshops shortly before the agreed-upon methodology was finalized, Avista testified that the over-collection of power costs the Company had experienced in recent years 'will trend towards the surcharge direction

¹⁸⁴ Dockets UE-240006 & UG-240007, Public Counsel's Reply to Avista at 5.

¹⁸⁵ Dockets UE-240006 & UG-240007, Public Counsel's Reply to Avista at 5.

¹⁸⁶ Dockets UE-240006 & UG-240007, AWEC's Reply to Avista at 4 citing Docket Nos. UE-170485 and UG-170486 Order 07 at p. 54, ¶ 156.

¹⁸⁷ Dockets UE-240006 & UG-240007, AWEC's Reply to Avista at 4 citing Docket Nos. UE-170485 and UG-170486 Order 07 at p. 55, ¶ 161.

¹⁸⁸ Dockets UE-240006 & UG-240007, AWEC's Reply to Avista at 4 citing Docket Nos. UE-200900, UG-200901, and UE-200894, EXH. CGK-10.

when market prices rise.”¹⁸⁹ AWEC provides testimony from witness Mr. Kalich, for the Company, who further testified that “[w]holesale natural gas prices and electricity prices are volatile – they always have been and always will be. For 2019, while the recent forecast shows deferrals in the rebate direction ... volatility can quickly wipe away any benefit and drive the ERM into the surcharge direction. This is normal in my view, and the ERM appropriately tracks this volatility.”¹⁹⁰

78 However, AWEC argues that although Mr. Kalich’s prediction materialized AWEC believes that the conditions should be considered “normal” and that Avista proposes to increase the ERM baseline in a manner fundamentally at odds with the outcome of the power cost workshops and Commission precedent.¹⁹¹ In support of its position, AWEC cites to a previous Commission order wherein it adjusted the ERM baseline as the result of the expiration of a contract, reasoning the expiration was “a finite, known event with a measurable impact.”¹⁹² In this case, AWEC argues that Avista proposes a specific dollar increase to the ERM baseline based on an unspecific event that Avista itself predicted would occur and previously considered “normal,” and does meet Commission precedent.¹⁹³

G. Commission Decision

79 As was articulated previously in this order, “a party may move for summary determination of one or more issues if . . . there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”¹⁹⁴ The Commission treats a motion for summary determination the same way the courts approach a motion for summary judgment.¹⁹⁵

80 In setting forth the standard and process Washington case law states, “In a summary judgment motion, the moving party bears the initial burden of showing the absence of an

¹⁸⁹ Dockets UE-240006 & UG-240007, AWEC’s Reply to Avista at 4 citing Docket Nos. UE-190334 and UG-190335, Exh. CGK-1T at 10:13-14.

¹⁹⁰ Dockets UE-240006 & UG-240007, AWEC’s Reply to Avista at 4 citing Docket Nos. UE-190334 and UG-190335, Exh. CGK-1T at 10:13-14.

¹⁹¹ Dockets UE-240006 & UG-240007, AWEC’s Reply to Avista at 4-5.

¹⁹² Dockets UE-240006 & UG-240007, AWEC’s Reply to Avista at 5; citing Docket Nos. UE-170485 and UG-170486, Order No. 07 at p. 54, ¶ 160 and p. 54, ¶ 158.

¹⁹³ Dockets UE-240006 & UG-240007, AWEC’s Reply to Avista at 5.

¹⁹⁴ WAC 480-07-380(2)(a); CR 56(c).

¹⁹⁵ WAC 480-07-380(2)(a); CR 56(c).

issue of material fact.”¹⁹⁶ A moving party may meet the initial burden by pointing out that there is an absence of evidence to support the nonmoving party’s case.¹⁹⁷ If the moving party meets the initial burden, then the nonmoving party must then (1) rehabilitate the evidence attacked in the moving party’s papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).¹⁹⁸

Staff’s Motion

81 In its Motion and Reply Staff raises some legitimate questions about Avista’s proposed rate increase. To recount, Staff notes that Avista has filed tariff revisions through its “portfolio forecast error,” which would raise rates it charges by adding \$65.8 million to its pro forma power costs, and to its ERM baseline.¹⁹⁹ While Avista claims that this increase is due to difficulties in accurately forecasting its power costs, Staff filed its Motion because of the allegedly arbitrary nature of the adjustment and the public interest considerations undergirding the ERM.²⁰⁰ Hence, because of the allegedly arbitrary nature of the adjustment the Motion questions whether there is a genuine issue of material.²⁰¹

82 The first argument Staff asserts in that regard is that the Commission should determine that Avista may not make the adjustment as part of its pro forma power cost adjustment.²⁰² The second argument that Staff raises is that the Commission should determine that Avista may not incorporate the portfolio forecast error adjustment into the ERM baseline. Regarding the first argument, Staff argues that in order for portfolio error adjustment to be applied *pro forma* to the revenue requirement, the Company must show that that the adjustment is: (1) known, (2) measurable, and (3) not offset by other

¹⁹⁶ See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975) cited by *Young v. Key Pharms.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

¹⁹⁷ *Young v. Key Pharms.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989); See also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

¹⁹⁸ *Young v. Key Pharms.*, 112 Wn.2d 216, 226 & n.2, 770 P.2d 182 (1989) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 332 (1986), dissent of Justice Brennan; WAC 480-07-380(2)(a); CR 56(c).

¹⁹⁹ Dockets UE-240006 & UG-240007, Motion at 1.

²⁰⁰ Dockets UE-240006 & UG-240007, Motion at 6.

²⁰¹ Dockets UE-240006 & UG-240007, Motion at 1.

²⁰² Dockets UE-240006 & UG-240007, Motion at 1.

factors.²⁰³ To that point the testimony of Avista witness Scott Kinney, does not focus on a specific event, or specific events, that will give rise to an additional \$65.8 million in costs above and beyond what Avista has forecasted, affecting the power cost adjustment.²⁰⁴ Mr. Kinney does identify any number of types of events that might result in the error,²⁰⁵ however, the underlying premise of the proposed adjustment is that Avista cannot know which of those events, if any, will actually cause any rate year variance (if it could, it could account for the event in its model or with a more specific adjustment).²⁰⁶ We agree with Staff that failure to show such causation prevents the Commission from projecting into the rate year any of its readily observable or identifiable effects, and thus cannot determine whether to call the adjustment known. We are persuaded that Staff has met the requirements of this prong.

83 As for the measurable prong, Staff manages to show that Avista's portfolio forecast error does not involve any dollar amounts. To this point neither Mr. Kalich, another Avista witness, nor Mr. Kinney provides to the Commission with sufficient evidence such as contracts, receipts, ledger entries, or other proof that specifically identifies the dollar amounts involved with the overestimate of the value of its fleet or the resulting underestimate of its power costs.²⁰⁷ We are persuaded that Staff has met the requirements of this prong.

84 With regard to the "not offset by other factors" prong, we agree that neither Mr. Kalich nor Mr. Kinney identifies the specific rate-year cause of any power cost variance. Because of this, it is difficult to characterize the adjustment as known, and it also prevents Avista and other parties from attempting to analyze any direct offsetting factors that might reduce or eliminate the adjustment's revenue requirement impacts. Additionally, we agree with Staff that Avista has similarly failed to provide evidence that it considered any indirect offsetting factors, and that neither Mr. Kalich nor Mr. Kinney describes any such efforts in their testimony.²⁰⁸ We are persuaded that Staff has met the requirements of this prong.

²⁰³ Dockets UE-240006 & UG-240007, Motion at 10 citing *Wash. Utils. & Transp. Comm'n v. Puget Sound Energy, Inc.*, Dockets UE-090704 & UG-090705, Order 11, 9-13 ¶¶ 22-31 (Apr. 2, 2010); WAC 480-07-510(3)(c)(ii) (*Pro forma* adjustments).

²⁰⁴ Dockets UE-240006 & UG-240007, Motion at 3.

²⁰⁵ Dockets UE-240006 & UG-240007, Motion at 11; Kinney, Exh. SJK-1T at 68:15-16, 69:2-14.

²⁰⁶ Dockets UE-240006 & UG-240007, Motion at 12.

²⁰⁷ Dockets UE-240006 & UG-240007, Motion at 12-13; See Kalich, Exh. CGK-1T through Exh. CGK-6; See Kinney, Exh. SJK-1T through Exh. SJK-16.

²⁰⁸ Dockets UE-240006 & UG-240007, Motion at 15.

- 85 We now turn to second argument of Staff's Motion, concerning the ERM. Staff asserts that the Commission should deny Avista the ability to include the portfolio forecast error into the ERM baseline as a matter of law. Staff reasons that the proposed adjustment alters the allocation of risk within the ERM in a manner that unfairly, unjustly or unreasonably favors Avista, and undermines the incentive to control power costs that the Commission has long required the ERM to contain.²⁰⁹
- 86 In prior proceedings we have described the ERM as a deferral and true up mechanism.²¹⁰ The purpose of the ERM is not to provide Avista with dollar-for-dollar recovery for its energy costs but rather to: (1) allocate the risk of ordinary power cost variability equitably between the company and its customers, and (2) provide an incentive for Avista to prudently manage its power costs.²¹¹ Staff raises three reasons for why there is no factual support for adjusting the ERM baseline by including the portfolio forecast error adjustment into the baseline.
- 87 First, Staff asserts that the adjustment undermines the proper functioning of the ERM by pushing up the baseline increasing the likelihood that Avista's customers overpay on their power costs.²¹² Staff adds that Avista gives the baseline exactly that kind of a shove, raising it by \$65.8 million based on rate year events that Mr. Kalich and Mr. Kinney do not, and cannot, identify, and whose specific impacts they therefore cannot specifically quantify.²¹³
- 88 The Second reason Staff gives is that adjusting the baseline based on unknown and unquantifiable events represents a shifting of risk within the ERM.²¹⁴ Staff recounts that the ERM is structured to equitably allocate risk between the company and its customers.²¹⁵ Staff argues that Avista seeks to raise the ERM baseline by \$65.8 million, which will eliminate the risk that it would under collect that same amount of money from

²⁰⁹ Dockets UE-240006 & UG-240007, Motion at 16.

²¹⁰ Dockets UE-240006 & UG-240007, Motion at 16; *In Re Petition of Avista Corp.*, Docket UE-061411, Order 04, 2 ¶ 5 (Dec. 26, 2006).

²¹¹ Dockets UE-240006 & UG-240007, Motion at 17; *In re Petition of Avista Corp.*, Docket UE-060181, Order 03, 9 ¶ 23 (June 16, 2006).

²¹² Dockets UE-240006 & UG-240007, Motion at 17-18; See *Avista Corp.*, Dockets UE-170485, UG-170486, UE-171221 & UG-171222, Order 07, at 54 ¶ 160.

²¹³ Dockets UE-240006 & UG-240007, Motion at 18.

²¹⁴ Dockets UE-240006 & UG-240007, Motion at 18.

²¹⁵ Dockets UE-240006 & UG-240007, Motion at 18; *Avista Corp.*; Docket UE-060181, Order 03, at 9 ¶ 23.

customers as a result of power cost variability.²¹⁶ Staff posits that that shift is perverse given that the ERM itself is intended to allocate the risk of power cost variability, but rather creates double insulation and an inequitable allocation of risk in favor of Avista.²¹⁷

89 The third reason according to Staff is that the adjustment deadens the incentive to control power costs that the ERM is currently structured to provide to Avista.²¹⁸ Avista asserts that the \$65.8 million adjustment shifts the risk from Avista to its customers and removes the incentive to control costs the ERM is designed to provide.²¹⁹

90 To these reasons Staff adds the point that the Commission has found testimony similar to that of Kalich and Kinney, which state that a utility's power costs and forecasting are influenced by factors beyond its control,²²⁰ to be insufficient to eliminate dead and sharing bands from power cost mechanisms.²²¹ Thus, Staff concludes that neither Mr. Kalich's nor Mr. Kinney's testimony creates a material issue of fact that would prevent summary determination as to the impropriety of adjusting the ERM baseline.²²² We are persuaded by the points and reasons Staff's raises as relates to the ERM.

91 Based on our review of the arguments in this case, we believe that Staff met the initial burden set forth above, pursuant to our regulations and case precedent. We will now address Avista's Answer, pursuant to our rules and case precedent.²²³

Avista's Answer

92 In its Answer, Avista persuasively argues that multiple questions of fact (discussed below) demand fair examination through the hearing process, where testimony on all sides is presented, and tested through responsive testimony, cross-examination and

²¹⁶ Dockets UE-240006 & UG-240007, Motion at 18; Avista Corp.; In re Avista Corp., Docket UE-180261, Order 01, 1 ¶ 1 (June 28, 2018) (the ERM is intended "to account for ordinary fluctuations in power costs outside of an authorized dead-band for power-cost recovery in base rates.").

²¹⁷ Dockets UE-240006 & UG-240007, Motion at 18.

²¹⁸ Dockets UE-240006 & UG-240007, Motion at 18.

²¹⁹ Dockets UE-240006 & UG-240007, Motion at 18.

²²⁰ Dockets UE-240006 & UG-240007, Motion at 19; Kalich, Exh. CGK-1T at 24:7-31:7; Kinney, Exh. SJK-1T at 50:1-66:8.

²²¹ Dockets UE-240006 & UG-240007, Motion at 19; E.g., Wash. Utils. & Transp. Comm'n v. PacifiCorp, Docket UE-130043, Order 05, 66-68 ¶¶ 169-173 (Dec. 4, 2013).

²²² Dockets UE-240006 & UG-240007, Motion at 19.

²²³ *Young v. Key Pharms.*, 112 Wn.2d 216, 226 & n.2, 770 P.2d 182 (1989) citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 332 (1986), dissent of Justice Brennan; WAC 480-07-380(2)(a); CR 56(c).

briefing.²²⁴ Additionally, Avista avers that Staff’s approach to what is “known and measurable” for pro forma purposes is too narrow and runs counter to the Commission’s recent practices and future direction.²²⁵ Avista alleges that the “2019 and 2021 amendments to the public service laws” has allowed the Commission to exercise “significant discretion” over various pro forma adjustments to allow for a better “matching” of rate year revenues and expenses.²²⁶ Avista also asserts that the need to relax the strict application of “known and measures” standards in this context of MYRPs, is part and parcel of the recent legislation. (RCW 80.28.425).²²⁷

93 With that backdrop, Avista disagrees with Staff’s application of “known and measurable.” Avista contends that it has adopted a sensible approach by comparing five years’ actual data with “Forward (Forecast) Values” for each year, with the difference characterized as a “portfolio forecast error adjustment.”²²⁸ Avista provides witness Kinney’s approach to the portfolio forecast error adjustment, which uses a 5-year average, spanning 2018 through 2022. Witness states in his testimony that:

In fact, a general trend exists illustrating how forecast error is increasing drastically over time. What used to be annual variation of \$10 to \$30 Million per year has become multiples of that in current markets. This is a value discrepancy the Company simply must reflect in its pro forma.²²⁹

94 Contrary to Staff’s allegations that Avista has abandoned any practice of actually modeling “the results, as was done with previous power supply adjustments,” the Company claims that it chose to highlight this issue separately, rather than have it “buried” in the Aurora model.²³⁰ Specifically, witness Kinney explains:

The Company decided it was better to show the value in testimony as a single adjustment rather than translate the results of the analysis into a price dataset that would bury the impacts within Aurora.²³¹

²²⁴ Dockets UE-240006 & UG-240007, Avista’s Answer at 2.

²²⁵ Dockets UE-240006 & UG-240007, Avista’s Answer at 7.

²²⁶ Dockets UE-240006 & UG-240007, Avista’s Answer at 8 citing Motion at ¶ 21.

²²⁷ Dockets UE-240006 & UG-240007, Avista’s Answer at 8; See also RCW 80.28.425(3)(a)-(c).

²²⁸ Dockets UE-240006 & UG-240007, Avista’s Answer at 9-10 citing Kinney, Exh. SJK-1T, at 67.

²²⁹ Dockets UE-240006 & UG-240007, Avista’s Answer at 10 citing Kinney, Exh. SJK-1T, at 68.

²³⁰ Dockets UE-240006 & UG-240007, Avista’s Answer at 10.

²³¹ Dockets UE-240006 & UG-240007, Avista’s Answer at 10 citing Kinney, Exh. SJK-1T, at 71.

- 95 Turning now to the ERM, Avista stresses the need to get the ERM baseline right, and that failure to do so merely pushes the inevitable cost burden forward in time, as actual power costs are reflected in yearly ERM filings.²³² Avista ably disputes that it was using the ERM to doubly insulate itself from itself from power cost variability.²³³
- 96 Avista credibly argues that “it is important to set the “baseline” correctly (a factual determination), for at least two reasons: (1) to assure proper and timely cost recovery and convey price signals regarding changes in power costs (especially important in a market with dramatic price changes); and (2) to assure that the “risk allocation” method still produces results that are fair and do not unduly benefit or penalize the Company, based on that which it can and can’t control.”²³⁴
- 97 Avista believes that even if the actual sharing mechanism itself remains unchanged, Avista would bear (absorb) approximately \$10.2 million of lost margin in Washington, given the projected power costs contained within its ERM “baseline.”²³⁵ Avista avers that the \$10.2 million of lost margin represents almost 2% of retail revenue, and such a burden will be substantial.²³⁶
- 98 In response to Staff’s claim that the adjustment “unfairly and unjustly or unreasonably favors Avista and undermines the incentive to control power costs,”²³⁷ Avista asserts that Staff is asking the Commission to make that determination without any evidentiary record. Avista implies that Staff’s argument leads to questions that are fact dependent: “what are changing costs? Are they beyond Avista’s control? How would this affect Avista’s incentive to control power costs? Again, it is as if Staff wants to “skip a step” (the building of a record) and rush to a hasty conclusion around necessary adjustments to

²³² Dockets UE-240006 & UG-240007, Avista’s Answer at 12 citing Staff acknowledges that the ERM allows Avista to file true-up surcharges to recover or credit balance when costs vary beyond identified thresholds. (Motion at ¶10).

²³³ Dockets UE-240006 & UG-240007, Avista’s Answer at 13; Motion at ¶39.

²³⁴ Dockets UE-240006 & UG-240007, Avista’s Answer at 13.

²³⁵ Dockets UE-240006 & UG-240007, Avista’s Answer at 13-14; Under the present ERM Sharing, assuming a starting spot of \$0 deferral: Portfolio Forecast Error (System) = \$65.8 million; Portfolio Forecast Error (Washington Share) = \$42.2 million; Avista absorbs Deadband of \$4 million, then 50% of next \$6 million, which is \$3 million, then 10% of the remaining \$32.2 million, which is \$3.2 million, for a total of \$10.2 million (\$4 million + \$3 million + \$3.2 million).

²³⁶ Dockets UE-240006 & UG-240007, Avista’s Answer at 14.

²³⁷ Dockets UE-240006 & UG-240007, Avista’s Answer at 14 citing Motion at ¶34.

the ERM ‘baseline.’”²³⁸ Based on this, the Company establishes and Staff fails to rebut that setting an appropriate ERM “baseline,” in light of all the facts and circumstances, remains an intensely factual exercise, after which the Commission can exercise its discretion in arriving at a fair allocation of risk.²³⁹

- 99 Next, Avista declares that it uses the methodology set forth in Dockets UE-170485,²⁴⁰ and that methodology already accounted for offsetting factors, such as: market prices, hydro conditions, natural gas transportation, etc.²⁴¹ Avista adds that “it is the result of that methodology that demonstrates that the resulting level of power supply expense is not representative of the rate effective period based on new and emerging changes in energy markets.”²⁴² In addition, Avista claims that the “true-up” within the yearly ERM review will, by its very nature, capture any offsetting factors that actually occurred.²⁴³ Avista also claims that the “offsets” to increased power costs; some occur naturally, and as a matter of course, during the “true-up” occurring during the annual ERM review, and others are the result of actions taken by the Company through its hedging practices and resource optimization.²⁴⁴
- 100 Avista claims that “naturally occurring offsets through the annual ERM true-up reflect actual changes in load supply, hydro availability, generating unit availability and actual market pricing during the ERM review period, which can, in combination, offset some of the power supply increases in cost.”²⁴⁵ Other “offsets” are the result of concrete steps taken by the Company, which include hedging practices and “resource optimization,” all of which produce “offsets” which are reflected in the power supply adjustment itself.²⁴⁶ The Company alleges that its efforts to achieve these “offsets” is discussed within the

²³⁸ Dockets UE-240006 & UG-240007, Avista’s Answer at 14 citing Motion at ¶34.

²³⁹ Dockets UE-240006 & UG-240007, Avista’s Answer at 14.

²⁴⁰ Dockets UE-240006 & UG-240007, Avista’s Answer at 15 referencing Exh. CGK-1T, p. 2, ¶¶. 9-10.

²⁴¹ Dockets UE-240006 & UG-240007, Avista’s Answer at 15 referencing Exh. CGK-1T, p. 4, ¶¶. 2-8.

²⁴² Dockets UE-240006 & UG-240007, Avista’s Answer at 15 referencing Exh. SJK-1T, p. 66, ¶¶. 9-22.

²⁴³ Dockets UE-240006 & UG-240007, Avista’s Answer at 15.

²⁴⁴ Dockets UE-240006 & UG-240007, Avista’s Answer at 15-16.

²⁴⁵ Dockets UE-240006 & UG-240007, Avista’s Answer at 16.

²⁴⁶ Dockets UE-240006 & UG-240007, Avista’s Answer at 16.

Company's direct case.²⁴⁷ Avista further alleges that the power fluctuations it experienced, totaling \$65.8, were not ordinary. Avista makes an argument worth exploring that it would be perverse "to corrupt the ERM process to force an allocation of risk through deadbands that are supposed to operate on "ordinary" fluctuations in power costs (not on a \$65.8 million extraordinary fluctuation) from an accurate cost baseline."²⁴⁸

101 Based on our review of Avista's argument, there remain a number of questions of fact wherein we have no choice but conclude that Avista has met its burden as well.

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Commission Determination

103 Rate cases and other similar proceedings that are brought before the Commission are unique in the sense that they are litigated before the Commission the same way matters are litigated before the court. Similar to the court, the Commission weighs evidence and testimony and renders a decision. What is different is the public interest standard in a rate case proceeding and the unique impact evidence and testimony serve in arriving at a decision or determining the rate structure that will operate in the public interest.

104 Although the Commission has a regulatory provision for summary determination like WAC 480-07-380(2)(a) and is further guided by CR 56 and Washington case law, which help facilitate administrative economy and the expeditious disposal of cases, the Commission must still exercise discretion regarding how to apply those laws.²⁴⁹

105 Staff's Motion for Summary Determination posed an unusual situation. While it is presented as a motion for partial summary determination, its effect would have decided a significant portion of the case without the benefit of a full proceeding where the testimony and evidence are examined, cross-examined and the Commission can act in its role as adjudicatory body, weighing the evidence, balancing the interests of the parties, and, finally, issuing a decision in the public interest.²⁵⁰

²⁴⁷ Dockets UE-240006 & UG-240007, Avista's Answer at 16 referencing See Exh. CGK-1T, p. 2, ¶¶ 9-10; p. 4, ¶¶ 2-8; Exh. SJK-1T, p. 66, ¶¶ 9-22; and Exh. SJK-1T, p. 10 et.seq. (risk management); p. 50, l. 23 et.seq. and p. 62, l. 9 et.seq. (hedging).

²⁴⁸ Dockets UE-240006 & UG-240007, Avista's Answer at 16 referencing Motion at ¶ 39.

²⁴⁹ See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975) cited by *Young v. Key Pharms.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); WAC 480-07-380(2)(a); CR 56(c).

²⁵⁰ *WUTC v. Cascade Natural Gas Corp.*, Docket UG-200568 Final Order 05 ¶ 47 (May 18, 2021).

- 106 Additionally, the motion relied on the evidence and testimony submitted for consideration by the Commission in the proceeding, which had the effect of the matter being tried and decided without the benefit of witness testimony, complete cross-examination of the witness and their testimony, and any questions from the Commission itself. Basically, a decision would be rendered without the benefit of a complete record.
- 107 Furthermore, we noted elsewhere in this order that RCW 80.28.425 confers “significant discretion” in ascertaining a utility’s rate-year expenses in the context of a multi-year rate plan.²⁵¹ Granting Staff’s Motion would curtail a substantial portion of the Commission’s discretion.
- 108 To be fair, Staff may have a point with regard to the Commission’s previous findings when a company submits speculative testimony power costs and forecasting being influenced by factors beyond their control. However, without weighing the evidence and testimony for itself and having that evidence and testimony subject to cross examination, the Commission would be abdicating its role and discretion to issue any policy, send any signals to the parties, or issue any directives in that regard.
- 109 Therefore, for the reasons set forth herein, the Commission shall deny Staff’s Motion for Partial Summary Determination.

FINDINGS OF FACT

- 110 (1) The Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.
- 111 (2) Avista Corporation d/b/a Avista Utilities is a public service company regulated by the Commission, providing service as telecommunications companies.
- 112 (3) The Commission should deny Commission staff’s Motion for Summary Determination.

CONCLUSIONS OF LAW

- 113 (1) The Commission has jurisdiction over the subject matter of, and parties to, this proceeding.

²⁵¹ Dockets UE-240006 & UG-240007, Avista’s Answer at 8 citing Motion at ¶ 21.

- 114 (2) WAC 480-07-380(2)(a); CR 56(c) establish the criteria for granting a Motion for Summary Determination.
- 115 (3) RCW 80.01.040(3) is the regulatory public service law empowering the Commission to regulate and set rates in the public interest.
- 116 (4) RCW 80.28.425 grants the Commission with the authority to approve, approve with conditions, or reject, a multiyear rate plan proposal made by a gas or electrical company.
- 117 (5) The Commission's administrative proceedings are governed by RCW 34.05.449 and the Commission issues its initial and final orders, pursuant to RCW 34.05.461.

ORDER

(1) The Commission denies Commission Staff's Motion for Partial Summary Determination of Avista Corporation d/b/a Avista Utilities' revisions to its electric service tariff, Tariff WN U-28.

DATED at Lacey, Washington, and effective August 7, 2024.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

/s/ James E. Brown II
JAMES E. BROWN II
Administrative Law Judge