



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

800 Fifth Avenue #2000 • Seattle WA 98104-3188

December 6, 2012

SENT VIA E-MAIL AND ABC LMI

David Danner
Executive Director and Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Pk. Dr. S.W.
PO Box 47250
Olympia, WA 98504-7250

Re: *Washington Utilities and Transportation Commission v. Avista Corporation, d/b/a Avista Utilities*, Dockets UE-120436 and UG-120437, and Dockets UE-110876 and UG-110877 (Second Phase) (*Consolidated*)

Dear Mr. Danner:

Enclosed for filing please find the original and twenty (20) copies of Public Counsel's Response to Bench Request/Bench Exhibit 9, together with a Certificate of Service, for filing in the above-referenced dockets. This bench request and its response were pre-marked as Bench Exhibit 9 at the hearing held on November 29, 2012. TR. 348:5-6.

Sincerely,

LISA W. GAFKEN
Assistant Attorney General
Public Counsel Division
(206) 464-6595

LWG:cjw
Enclosures

cc: Service List (U.S. Mail & E-mail)
ALJ Marguerite E. Friedlander (E-mail only)

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

**AVISTA GRC 2012
Dockets UE-120436 & UG-120437 and
AVISTA GRC 2011
Dockets UE-110876 & UG-110877**

Public Counsel's Response to Bench Request / Bench Exhibit No. 9

Bench Request / Bench Exhibit No. 9:

Commissioner Jones requested an academic or think tank study countering the criticism of the ISS peer group cited in Mr. Norwood's testimony, Exhibit KON-7T at 30:7-12, and referred to by Ms. Feltes during her testimony at the November 29, 2012, hearing.¹

RESPONSE:

There are a number of academic studies which examine and critique benchmarking practices for executive pay. However, Public Counsel was not able to find an academic study which focuses solely on the ISS peer group, as requested by the Bench Request. Notwithstanding, it is also important to note that the citation in Mr. Norwood's testimony, and the article referred to by Ms. Feltes during the hearing, is a blog sponsored by the Harvard Law School Program on Corporate Governance. The article is not "a Harvard Law School study" as referred to by Commissioner Jones,² nor is it a "Harvard Law School article," as it was characterized at the hearing by Ms. Feltes.³

The article posted on the blog was based on a client memorandum written by guest contributor who a partner at the New York law firm of Davis Polk & Wardell LLP. A copy of the author's online firm bio is attached hereto as Attachment A. A complete copy of the blog posting is attached hereto as Attachment B. A full copy of the client memorandum which the blog posting was based on is attached hereto as Attachment C. A copy of the blog's welcome page, which notes that the views expressed on the blog are attributable only to the individuals expressing them, is attached hereto as Attachment D.

¹ Feltes, TR. 346:4-8; Commissioner Jones's request, TR. 347:13 – 348:4.

² Commissioner Jones, TR. 347:15.

³ Feltes, TR. 346:4-8.

Davis Polk



Richard J. Sandler

PARTNER

richard.sandler@davispolk.com

Mr. Sandler is co-head of Davis Polk's global corporate governance group and a leader of the firm's global capital markets practice. He has extensive experience advising on all aspects of corporate governance and serves on the New York Stock Exchange Commission on Corporate Governance.

Mr. Sandler also regularly advises on public and private securities offerings, including initial public offerings, high-yield debt securities, derivatives, venture capital and leveraged investments, spinoffs, restructurings, exchange offers and new financial products. Mr. Sandler also serves on the Legal Advisory Committee to the Committee on Capital Markets Regulation.

As well as representing other corporate and investment banking clients on domestic and international matters and transactions, he has regularly represented Aetna, Campbell Soup, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, PartnerRe and Verisk Analytics.

In addition to numerous other financings, Mr. Sandler represented Verisk Analytics in connection with its \$2.1 billion initial public offering (the largest domestic initial public offering in 2009), and represented the banks in connection with Visa's \$19 billion initial public offering (the second-largest in U.S. history).

AT A GLANCE

NEWS, RESOURCES & EVENTS

CONTACT

New York
450 Lexington Avenue
New York, NY 10017
P: 212-450-4224
F: 212-701-5224

Recognition

- Listed as a leading lawyer in several legal industry publications, including:
 - Band 1, Nationwide: Capital Markets: Debt & Equity – *Chambers USA 2012*
 - *Chambers Global: The World's Leading Lawyers for Business*
 - Legal Media Group's *Expert Guide to the World's Leading Lawyers: Best of the Best, Expert Guide to the World's Leading Structured Finance and Securitization Lawyers*; and *Expert Guide to the World's Leading Capital Markets Lawyers*
 - American Lawyer Media's *Corporate Counsel: Best Lawyers in Corporate, Mergers & Acquisitions and Securities Law*

RELATED PRACTICES

- Capital Markets
- Corporate Governance
- Financial Institutions

BAR ADMISSIONS

- State of New York
- U.S. Court of Appeals, Second Circuit
- U.S. District Court, S.D. New York

EDUCATION

- A.B., Princeton University, 1969
 - *summa cum laude*

ATTACHMENT A

J.D., Harvard Law School, 1972
cum laude

■ *Practical Law Company's Cross-border Finance: Secured Lending Handbook and Cross-border Capital Markets Handbook*

■ *Law Business Research's Who's Who Legal-International Who's Who of Business Lawyers and Who's Who Legal-International Who's Who of Capital Markets Lawyers*

■ *IFLR1000: The Guide to the World's Leading Financial Law Firms*

■ Recognized as a "BTI Client Service All-Star" in a BTI Consulting Group survey of corporate counsel at Fortune 1000 organizations

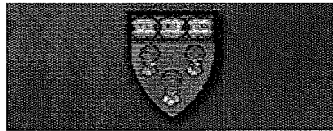
Professional History

■ Partner, 1979-present

■ Associate, 1972-1979

■ Paris office, 1982-1985

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ISS Proposes 2013 Voting Policy Updates

Posted by Richard J. Sandler, Davis Polk & Wardwell LLP, on Wednesday November 7, 2012 at 9:52 am

Editor's Note: Richard J. Sandler is a partner at Davis Polk & Wardwell LLP and co-head of the firm's global corporate governance group. This post is based on a Davis Polk client memorandum.

On Tuesday, October 16, Institutional Shareholder Services (ISS) proposed updates to its proxy voting guidelines for the 2013 proxy season.

ISS's proposed policy would:

- Recommend voting against boards of directors who do not act on shareholder proposals that were approved by the vote of a majority of shares cast in the prior year;
- Revise ISS's say-on-pay criteria by refining the peer group selection methodology, incorporating "realizable pay" analysis into the qualitative evaluation of pay-for-performance and designating pledging shares as a problematic pay practice;
- Extend the analysis of golden parachute arrangements to existing and legacy arrangements rather than just new or renewed arrangements; and
- Provide for a case-by-case assessment of shareholder proposals to link executive compensation to environmental and social "sustainability metrics."

The proposed updates were open to public comment until October 31, and the final policies are expected to be released in November. While these new policies have not yet been finalized and are subject to revision, it's not too early for public companies to consider how these changes could affect their ISS profile in the upcoming proxy season.

Board Response to Majority-Supported Shareholder Proposals

ISS is considering whether to recommend a vote against or withhold from an entire board of directors (except new nominees, who would be considered case-by-case) if the board failed to act on a shareholder proposal that received the support of a majority of shares cast in the previous year. This is a tighter standard than ISS's current approach, which is triggered if the board failed to act on a shareholder proposal that (a) received the support of a majority of the outstanding shares the previous year; or (b) received the support of a majority of shares cast in the last two out of three years.

The empirical record of the 2012 season suggests that this proposed change would have a real but limited impact. Of the 107 shareholder proposals that received the majority of votes cast as of August 2012, some 50% have already been implemented, and in any case, the bulk of those proposals received sufficient support to trigger negative recommendations under the existing policy if those boards fail to act on the proposal. The new policy would have led to a different outcome for 24 companies accounting for 33 of the remaining proposals.

The revised policy would potentially increase the pressure on boards of directors. The prospect of this year's shareholder proposal leading to next year's election contest means that, more than ever, boards will need to take a thoughtful approach toward evaluating the strategic alternatives for proposals that are thought to have a chance of success. If a proposal in fact receives a majority of votes cast, boards will have to carefully consider whether and in what form to implement the proposal and the risks of not taking action, being mindful that ISS at times takes a strict view of what constitutes sufficient implementation.

ATTACHMENT B

Say-on-Pay**1. Peer Group for Pay-for-Performance Analysis**

ISS's initial compensation screen is based on a quantitative "pay-for-performance" analysis that takes into consideration how a company's CEO compensation ranks within its ISS-selected peer group, as compared with the company's performance ranking within that peer group. ISS's peer group selection methodology has drawn heated criticism in recent years, with many companies finding themselves grouped with companies that they do not consider comparable and with which they do not compete either in business or in the recruiting and retention of talent. The proposed policy would give increased deference to a company's self-selected peer group. Under the proposed methodology, ISS will select from a company's Standard & Poor's Global Industry Classification Standard (GICS) industry group and its self-selected peer group, as well as the GICS group to which those self-selected peers belong. In addition, ISS will place a higher priority on company size vis-à-vis its peer group members. With its new methodology, ISS has indicated that it intends to capture groups beyond the company's own classification that may be relevant as comparables, since the prior methodology may not have taken into account a company's multiple business lines, or firms outside the company's GICS group that the company views as a competitor or a pay comparator.

According to ISS's own analysis, under this new method, 42% of companies will have a potential ISS peer group that overlaps at least 50% with their own, and, on average, an ISS peer group will contain 44% of a company's own selected peers. By comparison, the current method results in only 20% of companies having a potential ISS peer group that overlaps at least 50% of their own peer group. In addition, ISS says that under its new methodology, it expects over 90% of peer groups to maintain the subject company within 20% of the peer group median size by revenue (as opposed to 82% under the prior methodology). But ISS would continue to have discretion in determining company peer group composition. As a result, we would expect that during the 2013 proxy season, it may be difficult for companies to predict the composition of their ISS-selected peer group against which their crucial pay-for-performance evaluation is conducted.

ISS requests comments on whether there are additional or alternative ways that ISS should use the company's self-selected peer group, what size range should be used for peer group determination and what other factors should be considered in peer group construction for the pay-for-performance evaluation.

2. Realizable Pay Analysis as a Qualitative Factor

ISS assesses pay-for-performance first on a quantitative basis and then, for companies that fail this initial screen, on a qualitative basis. [1] The pay-for-performance analysis is conducted using the company's reported "grant-date pay" levels, or compensation amounts as they are required to be disclosed in the summary compensation table under the SEC rules. The ISS update would, for large cap companies, incorporate a comparison of "realizable pay" to grant-date compensation into the qualitative analysis. "Realizable pay" for ISS's purposes would consist of "the sum of relevant cash and equity-based grants and awards made during a specified performance period being measured, based on equity award values for actual earned awards, or target values for ongoing awards, calculated using the stock price at the end of the performance measurement period." Accordingly, realizable pay would account for increases or decreases in the company's stock price over the course of the performance period. ISS's definition of realizable pay does not appear to contemplate excluding unvested or otherwise unearned awards in their entirety. Earned awards would be calculated at their actual value, and awards that have not yet been earned would be valued based on their target levels (but using the actual company stock price at the end of the performance period). Freezing the analysis at the grant date means that ISS does not take into account subsequent stock price movements, performance vesting results and other factors that will determine the actual value of equity awards.

The incorporation of realizable pay in the qualitative analysis follows the trend of incorporating discussions regarding "realizable" or "realized" pay in company proxy disclosure. According to a recent analysis conducted by The Wall Street Journal, at least 228 companies mentioned realizable or realized pay in their proxy statements in 2012, as compared with 119 in 2011. [2] The methodologies used to calculate realizable or realized pay in these recent proxy disclosure

discussions have not been uniform, including with respect to whether or not to count unvested awards or unexercised stock options as realizable or realized pay.

Companies may want to attempt to analyze their realizable pay levels using ISS's definition to determine how this metric would affect ISS's qualitative assessment of the company, though the details of exactly how ISS would perform the calculation remain unclear. ISS also does not specify how it would use the realizable pay comparison in its qualitative analysis, but it notes that realizable pay can cut both ways, mitigating concerns for some companies while exacerbating them for others.

ISS requests comments on the definition of realizable pay, how to value stock options (e.g., based on intrinsic or Black-Scholes value) and the appropriate measurement period for realizable pay.

3. Pledging Shares as a Problematic Pay Practice

The proposed updates would add the pledging of company stock to ISS's list of generally problematic pay practices (which currently includes practices such as repricing underwater options without shareholder approval, providing excessive perquisites or tax gross-ups, and providing for excessive or single-trigger change in control payments). ISS notes that, according to a recent study, executives and/or directors have pledged company shares (either for margin accounts or other loans) at approximately 15% of companies on the Russell 3000 Index, with pledged shares at some companies exceeding 50% of the company's total market value. [3]

The ISS proposal is unclear as to whether pledging would be deemed problematic in all cases, or if there would be a materiality threshold. The means by which companies would implement a pledging prohibition or limit is also unclear.

ISS asks for comments on what level of pledging of company stock would cause investor concern; whether pledging is of significant enough concern to warrant voting action relating to say-on-pay proposals, or on board or committee members; what remedial actions on pledging might address concerns; and any other factors that should be considered by investors.

Say-on-Golden Parachutes

ISS's proposed policy recommends that investors vote on a case-by-case basis on golden parachute proposals, "including consideration of existing change-in-control arrangements maintained with named executive officers, rather than focusing primarily on new or extended arrangements." The updated policy notes that recent amendments that incorporate problematic features will carry more weight in the analysis, but the presence of multiple legacy problematic features will also be scrutinized.

ISS requests comments regarding whether investors would differentiate between new and existing arrangements when evaluating a say-on-golden parachute proposal, whether the number of problematic features would be a consideration in the analysis, and other factors that should be considered in the analysis.

Proposals to Link Sustainability Metrics to Executive Compensation

ISS has proposed changes to its existing policy on shareholder proposals to link executive compensation to sustainability (i.e., environmental and social) criteria, otherwise known as "sustainability metrics." ISS notes that shareholder proposals to incorporate sustainable metrics into executive pay have become more common in recent years—particularly in the oil and gas industry and other sectors that face significant environmental issues.

ISS's policy until now has generally been to recommend against these proposals. Under the updated policy ISS would make recommendations on a case-by-case basis depending on:

- Whether the company has significant and/or persistent controversies or violations regarding social and/or environmental issues;

- Whether the company has management systems and oversight mechanisms in place regarding its social and environmental performance;
- The degree to which industry peers have incorporated similar nonfinancial performance criteria in their executive compensation practices; and
- The company's current level of disclosure regarding its environmental and social performance.

In proposing this update, ISS notes that the incorporation of social considerations in the analysis of a company's performance is an evolving issue and has become more commonplace in certain industries.

Endnotes

[1] At the recent National Association of Stock Plan Professionals' (NASPP) conference, Carol Bowie, an ISS representative, noted that almost half of companies that did not meet ISS's quantitative assessment nonetheless still received favorable ISS recommendations, demonstrating the importance of the qualitative factors.

(go back)

[2] Emily Chasan, Executive Pay Gets a New Spin, *The Wall Street Journal*, September 25, 2012 at B1.

(go back)

[3] The study cited by ISS was conducted by its affiliated MSCI company, Center for Financial Research and Analysis (CFRA), Review of Pledged Insider Pledged Share Disclosure, May 17, 2012.

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0 Comments

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<http://blogs.law.harvard.edu/corpgov/2012/11/07/iss-proposes-2013-voting-policy-updates/>

ISS Proposes 2013 Voting Policy Updates

October 18, 2012

On Tuesday, October 16, Institutional Shareholder Services (ISS) proposed updates to its proxy voting guidelines for the 2013 proxy season.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

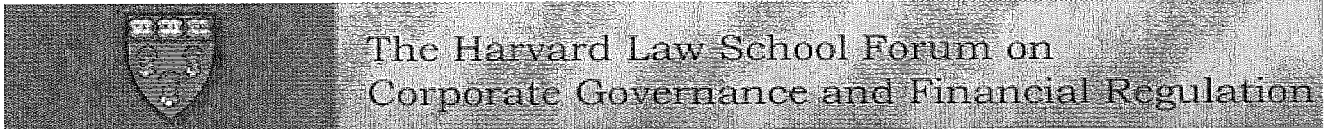
Cynthia Akard	650 752 2045	cynthia.akard@davispolk.com
Ning Chiu	212 450 4908	ning.chiu@davispolk.com
Jeffrey P. Crandall	212 450 4880	jeffrey.crandall@davispolk.com
Edmond T. FitzGerald	212 450 4644	edmond.fitzgerald@davispolk.com
William M. Kelly	650 752 2003	william.kelly@davispolk.com
Kyoko Takahashi Lin	212 450 4706	kyoko.lin@davispolk.com
Jean M. McLoughlin	212 450 4416	jean.mcloughlin@davispolk.com
Richard J. Sandler	212 450 4224	richard.sandler@davispolk.com
Veronica M. Wissel	212 450 4794	veronica.wissel@davispolk.com

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The Forum’s co-editor in charge of correspondence is Scott Hirst, he can be reached at [shirst \[at\] law.harvard.edu](mailto:shirst@law.harvard.edu). Readers of the blog may also write comments by clicking the “Comments” link below each post. Readers may also receive regular updates on new posts by clicking the RSS link on the right-hand side of the blog. We look forward to communicating with and hearing from you.

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CERTIFICATE OF SERVICE
Dockets UE-120436, et. al

I hereby certify that a true and correct copy of Public Counsel Response to Bench Request/Bench Exhibit No. 9 was sent to each of the parties of record shown below in sealed envelopes, via: U.S. Mail and E-Mail.

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AVISTA: */ **
DAVID J MEYER ESQ
VP AND CHIEF COUNSEL FOR
REGULATORY AND GOVERNMENTAL
AFFAIRS
PO BOX 3727
1411 E MISSION AVE MSC 13
SPOKANE WA 99220 3727

AVISTA: */ **
KELLY O NORWOOD
VP STATE & FEDERAL
REGULATION
PO BOX 3727
1411 E MISSION AVE MSC 13
SPOKANE WA 99220 3727

ICNU:
818 SW 3RD AVENUE #266
PORTLAND OR 97024

NWIGU:*
TOMMY A BROOKS
CABLE HUSTON
1001 SW FIFTH AVE SUITE 2000
PORTLAND OR 97204 1136

UTC STAFF: *
DONALD TROTTER
ASSISTANT ATTORNEY
GENERAL
1400 S EVERGREEN PK DR SW
OLYMPIA WA 98504 0128

ICNU:*
MELINDA J DAVISON
DAVISON VAN CLEVE P C
333 S TAYLOR SUITE 400
PORTLAND OR 97204

NWIGU:*
PAULA E PYRON
EXECUTIVE DIRECTOR
NORTHWEST INDUSTRIAL GAS
USERS
4113 WOLFBERRY COURT
LAKE OSWEGO OR 97035 1827


THE ENERNG PROJECT: (E-MAIL ONLY)*
CHARLES EBERDT
THE ENERGY PROJECT
3406 REDWOOD AVENUE
BELLINGHAM WA 98225

THE ENERGY PROJECT:*
RONALD L ROSEMAN
ATTORNEY AT LAW
2011 14TH AVE EAST
SEATTLE WA 98112

**NORTHWEST ENERGY
COALITION: (EMAIL ONLY)**
NANCY HIRSH
811 – 1ST AVE SUITE 305
SEATTLE WA 98104

**NORTHWEST ENERGY COALITION:
(EMAIL ONLY) ***
TODD TRUE
AMANDA W. GOODIN
KRISTEN L. BOYLES
MANAGING ATTORNEY
EARTHJUSTICE
705 SECOND AVE SUITE 203
SEATTLE WA 98104

DATED: December 6, 2012.


Carol Williams
Legal Assistant