

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

In the Matter of the Application of  
Avista Corporation, d/b/a Avista  
Utilities for an Order Approving a  
Corporate Reorganization To Create a  
Holding Company, AVA Formation  
Corp.

DOCKET NO. UE-060273

PUBLIC COUNSEL'S RENEWED  
REQUEST FOR ADJUDICATION

**I. INTRODUCTION**

On February 15, 2006, Avista Corporation d/b/a Avista Utilities filed an application with the Commission for an Order approving its proposed corporate reorganization to create a new holding company (hereinafter Application). The filing consisted of an eleven-page application and was supported by two appendices. The first appendix contained a chart comparing the current corporate structure with the proposed structure and the second appendix contained the "Plan of Exchange" of stock.

To Public Counsel's knowledge, the Company has not requested the matter be set for adjudication, be brought before the Commission at an open meeting, or that any other formal procedure be initiated for consideration of the Application.

On May 1, 2006, the Public Counsel Section of the Attorney General's Office filed a letter with the Commission requesting that the matter be set for adjudicative hearing. To date, the Commission has not acted on the request, including failing to set a date for a prehearing conference.<sup>1</sup> On May 8, 2006, Avista filed a letter with the Commission requesting that the Commission "reserve judgment on the need for a hearing until this matter is brought before the Commissioners at a public meeting."

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

During the period of time since the filing, apparently a number of meetings have occurred between Staff and Avista, which may have produced a tentative settlement agreement. No public notice was issued regarding the settlement talks.

## II. RENEWED REQUEST FOR ADJUDICATION

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

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

The Administrative Procedure Act (APA) requires an agency commence an adjudicative proceeding when any person makes a timely application and such a proceeding is "required by law or constitutional right." RCW 34.05.413(2).<sup>2</sup> Alternatively, if an agency is required to hold an adjudicative proceeding on a particular matter, it must treat an application for an agency order as an application for adjudicative proceedings, whether or not the applicant expressly requests those proceedings. RCW 34.05.413(4). A noted treatise explains: "The APA applies to *all* state agency administrative adjudicative proceedings that are *conducted to determine rights or responsibilities under state law*, subject to the exclusions listed in RCW 34.05.030."<sup>3</sup>

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

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

Furthermore, RCW 34.05.422(1)(b), provides that "applications for licenses that are contested by a person having standing to contest under the law...shall be conducted as

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<sup>2</sup> Additionally, an agency may commence an adjudicative proceeding at any time over any matter it has jurisdiction. RCW 34.05.413(1).

<sup>3</sup> For example, the state militia and the department of corrections are exempted from the APA.

adjudicative proceedings.” RCW 34.05.010(9)(a) defines “license” as “a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law” with certain exceptions not relevant here.

The seminal case interpreting what constitutes a “license” and what is “required by law” under RCW 34.05.010(9) is *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787 (1996) (Trades Council). The *Trades Council* case involved Washington’s Apprenticeship Council’s role in certifying apprenticeship programs. *Id.*, at 791. An apprenticeship program seeking designation by the Council had to submit proposed standards. *Id.* Council approval was not required to do business as an apprenticeship program; however, approved programs were exempted from certain prevailing wage, workers’ compensation and professional certification laws. *Id.*

An organization, CITC, applied to the Council for registration. *Id.* The Apprenticeship Council considered CITC's application and ultimately approved its registration after an open meeting. *Id.* The Seattle Construction and Building Trades Council (Trades Council) sought judicial review under the APA of the Council’s approval. The Trades Council argued that the APA required the Apprenticeship Council to hold adjudicatory proceedings when it considered CITC's application.

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

If any statute requires the “approval,” “registration” or “similar authorization” (etc.) of the agency, a license “required by law” may be found within the meaning of the APA. In the case of the three statutes relied upon by Appellants, under certain circumstances approval is required to pay apprenticeship level wages, for apprentices to have workers' compensation

coverage and benefits, and to engage in certain electrical work, or, stated conversely, *it is unlawful to do these things without agency approval.*

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

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

The specific APA argument forwarded by WITA was that ETC designation was a "license" under the APA and as a complaining party WITA was entitled to adjudication. *Id.* at 510-11. Distinguishing the *Trades Council* case, the Court disagreed. *Id.* The Court never held that the ETC designation was not a license per se. To the contrary, the Court found that ETC designation was an exception to the definition of a license in RCW 34.05.010(9)(a) because it was *solely* for revenue purposes. *Id.*<sup>4</sup>

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

water and sewer plan constituted the granting of a “license” under the clear language of RCW 34.05.010(9)(a).

In this case, Avista’s petition meets the statutory definition for license since it is a request for “approval” of a new holding company structure. In its application, Avista specifically requests an Order from the Commission allowing it to create a holding company pursuant RCW 80.12 and WAC 480-143-120. Like *Trades Council* and *Watershed Defense Fund*, it would be unlawful for Avista to create a holding company without first obtaining approval from the WUTC. Indeed, there are a number of ways in which this arises in the relevant statutes and rules.

First, RCW 80.12.020 specifically requires that an order be obtained from the Commission before a company can:

sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of its duties to the public, and no public service company shall, by any means whatsoever, directly or indirectly, merge or consolidate any of its franchises, properties or facilities with any other public service company, without having secured from the commission an order authorizing it so to do.

Second, the failure to obtain Commission authorization for such a transfer, disposition, merger or consolidation renders it void. RCW 80.12.030. *See e.g., In Re: Application for Transfer of Control of United Telephone Company of the Northwest*, Docket No. UT-051291 (January 30, 2006) (Bench Ruling). In that docket, Sprint-United had failed to obtain permission for the sale of its directory business in 2002. Ruling from the Bench on behalf of the Commission, Judge Dennis Moss stated:

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<sup>4</sup> *See, Id.*, at 512 (“the sole purpose of the ETC designation is to entitle the carrier to receive federal universal service revenues”).

The Commission is frankly puzzled and concerned that Sprint's disposition of the directory publishing business in a transaction to which United was a party is not brought before the Commission for approval in 2002, 2003.

We must agree with public counsel that the Company took a considerable risk in not seeking either our disavowal of jurisdiction or our approval of the transaction. The Company's failure to file is particularly difficult to understand in light of the circumstances at that time.

During 2003, the Commission was actively considering a similar transaction in Docket No. UT-021120 in which Qwest was proposing to sell its directory publishing affiliate Dex.

The Commission had only recently concluded several proceedings under Chapter 80.12 RCW, including the Pacific Corps Scottish Power merger in Docket No. UE-981627 in October 1999, the GTE Bell Atlantic merger, Docket No. UT-981367 in December of 1999, and the U.S. West Qwest merger, Docket UT-991358 June 2000.

The orders in those proceedings included detailed discussions concerning the extent of the Commission's jurisdiction and responsibilities under Chapter 80.12 RCW.

In light of this, it seems that Sprint knew or should have known that a filing should have been made in connection with its sale of United's directory publishing affiliate. Given, however, that no such filing was made at the time of sale, the time certainly is over ripe now to review the sale, at least in terms of its implications...

Transcript, pp. 31-32.

In addition, Commission rule, WAC 480-143-120, concerning transfers of property, states:

A public service company may not complete a transfer of property necessary or useful to perform its public duties unless the company first applies for, and obtains, commission approval. Transfers include sale, lease, assignment of all or part of a public service company's property, and merger or consolidation of a public service company's property with another public service company. Applications must describe transfers in detail and must include the public service company's current financial statements and copies of all transfer instruments.

The cases cited by Avista in support of its application also support adjudication in this case.

Avista cites *Application of PacifiCorp and Scottish Power (Scottish Power)*, Docket No. UE-981627 regarding the Commission's jurisdiction over these matters. *Scottish Power* was

adjudicated. The filing occurred on December 31, 1998 and a prehearing conference was held on February 8, 1999. The case included numerous interveners, including: Public Counsel, Industrial Customers of Northwest Utilities (ICNU), Northwest Energy Coalition (NVEC), Washington State Labor Council, AFL-CIO (WSLC), International Brotherhood of Electrical Workers (IBEW) Local 125, and Avista Corporation. Formal discovery was invoked. In addition to PacifiCorp and Scottish Power, Commission Staff, Public Counsel, NVEC, and ICNU submitted prefiled direct testimony. The final settlement was reached on August 13, 1999.

Avista does not cite the recent case of the Mid-America PacifiCorp merger. *Application of Mid American Holding Company and PacifiCorp*, Docket No. UE-051090. But this too was adjudicated. Again, numerous parties intervened, engaged in discovery, arrived at a stipulated record and finally, reached a settlement agreement.

Avista cites the 2000 approval of Puget Sound Energy's proposal to create a corporate holding company structure in Docket No. UE-991779. Application, at pp. 3-4. That docket is not relevant to whether an adjudication was required because none was ever sought.

After the petition was filed, Commission Staff, Public Counsel, and Industrial Customers of Northwest Utilities ("ICNU") met with the Company to discuss the application and developed appropriate conditions to incorporate into a Commission order approving the application. As a result of these meetings, the Parties reached agreement and entered into a Stipulation identifying conditions they recommended for adoption along with the order approving the application.

In that case, neither Public Counsel nor any other party requested adjudication. This is very important. RCW 34.05.422(1)(b) provides that "applications for licenses that are contested by a person having standing to contest under the law...shall be conducted as adjudicative

proceedings. Here, Public Counsel requested adjudication.<sup>5</sup> Thus, the request for adjudication is a fundamental difference between the two cases.

In light of this overwhelming authority requiring Commission approval for the Avista transaction at issue here, and Public Counsel's request for adjudication, adjudication must be granted.<sup>6</sup>

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

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

**1. The Commission Determination of Whether This Transaction "Harms" Ratepayers is Fundamental to the Commission's Duties and Difficult to Determine without a Substantial Record.**

As recently as December 23, 2005, the Commission has articulated its crucial role in ensuring the mergers, acquisitions, spin-offs and other corporate transactions like that involved in this docket do not harm the public. *See, Verizon Communications, Inc. and MCI*, Docket No. UT-050814, Final Order (December 23, 2005).

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<sup>5</sup> ICNU has sought to intervene but that intervention has not yet been granted.

<sup>6</sup> Public Counsel's standing to request adjudication is not in dispute. *See*, RCW 80.01.100; RCW 80.04.510.

In that case the Commission rejected a settlement agreement between Commission Staff and the Company because it failed to mitigate the harms caused by the merger. The Commission described its role as follows:

In summary, the Commission determines whether the transaction is consistent with the public interest, balancing the costs and the benefits for the public and for affected customers. If the costs outweigh the benefits, the result is harm and the Commission should deny or condition the approval so no net harm results.

Docket No. UT-050814, ¶ 59.

Given the Commission's standard, it is difficult to imagine how that standard could be applied in the absence of a factual record developed in an adjudicative proceeding. Such a factual record is even more important where the Commission may be presented with a settlement agreement. This view is reflected in the Commission's order.

In this docket, we review the proposed settlement to determine whether it is consistent with the public interest and whether it is otherwise lawful. The parties assisted the Commission by providing an extensive record on which to base a decision.

The record contains considerable information about the transaction itself, and permits us to evaluate the transaction and its effects as a backdrop to the evaluation of the proposed settlement and possible alternative provisions. The record also reflects reservations about and challenges to the proposal offered by Public Counsel, and Counsel's recommended alternative or additional conditions.

*Id.* at ¶ 64-65.

Indeed, it was the factual record in Verizon/MCI that caused the Commission to reject the settlement agreement filed by Staff and the Company, saying: "we find few benefits in this transaction for Washington State customers of any of the affected subsidiaries, but do find harm to the public interest." *Id.* at ¶ 225.

It is not necessary to reiterate all of Avista's application; however, it is important to note that it contains very significant issues that should not be decided on the Company's representations alone. For instance, Avista says that it seeks to insulate its utility businesses from its non-utility businesses, but it is not clear how or whether its planned method is the most effective. It says that the transaction does not involve the transfer of assets, but as has occurred before, there are sometimes disputes over what is a "utility company asset." The Company offers "ring fencing" but it remains unclear what this means. Ring fencing could limit dividend payments; enforce capital structure requirements and a variety of other measures. Indeed, the Mid-American merger contained dozens of ring fencing conditions of varying types.

The Commission has always ensured that transactions under Chapter RCW 80.12 do not harm the public. This has always included adjudication when requested. There is no reason now for the Commission to set aside this longstanding practice in this case.

**2. Avista's petition is the first filed post-PUHCA and therefore, has the potential to raise a number of issues of first impression.**

In the request for adjudication, Public Counsel expressed the view that review of Avista's petition is particularly important since it occurs after the repeal of the Public Utility Holding Company Act of 1935 (PUHCA). Indeed, it appears that Avista's petition for reorganization is the first filed with the WUTC post-PUHCA and therefore, has the potential to raise a number of issues of first impression.

PUHCA contained "significant cost and accounting burdens" that made state oversight somewhat less important. Application, at p. 4. With PUHCA's repeal, the role of state utility

commissions has become even greater and the need to evaluate transactions even more important.

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

Public decision-making should be transparent whenever possible. Furthermore, when agencies make significant decisions with lasting effects, it is especially imperative that the public be given the opportunity to know what decisions are being made and to impact those decisions.

Unfortunately, this has not been the case in this docket. Instead, the petition has remained behind closed doors as Avista and Staff negotiate a settlement agreement that will ultimately be presented to the Commission as a fait accompli.

This approach to settlement on a matter of this significance is completely at odds with the spirit of the discussions in the recent Commission's procedural rulemaking, Docket No. A-050208. There, the Commission encouraged the participation of all parties in settlement. That spirit should guide this case as well.

**III. CONCLUSION**

For the foregoing reasons, Public Counsel contests Avista petition and hereby renews its request for adjudication of the matter.

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

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