BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,

Complainant,

v.

AVISTA CORPORATION, d/b/a AVISTA UTILITIES,

Respondent.

DOCKETS UE-150204 and UG-150205 (*Consolidated*)

POST-HEARING BRIEF OF AVISTA CORPORATION

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1 COMES NOW, Avista Corporation (hereinafter "Avista" or the "Company"), by and through its undersigned attorney, and respectfully submits this Post-Hearing Brief in the above-captioned matter. A reasonable outcome is one that:

(i) Addresses only the eleven (11) month refund period in 2016;

(ii) Removes "attrition rate base" ($27 million/electric and $33 million/gas);

(iii) Substitutes actual levels of "used and useful" rate base for the 2016 rate year (now known with certainty), or uses proformed historical or prior end-of-period rate base levels for 2015 (see Avista's "compromise" position or Staff's "alternative" position);

(iv) Offsets refund amounts with any prior sharing of over-earnings under the 50/50 sharing mechanism of Avista's decoupling mechanism.

I. INTRODUCTION

2 The Court's direction was clear and unambiguous – i.e., to "recalculate Avista's rates without relying on rate base that is not used and useful" with respect to the 2015 rate case on appeal.[1]

3 Each of the Parties have proposed significantly larger refunds than Avista for both electric and natural gas customers, including refunds for a period of 2.3 years from January 11, 2016 to April 30, 2018. The various positions of the Parties, as compared to Avista, are shown in the excerpted Table No. 5 below:[2]

[1] See Order Granting Joint Motion of the Parties to Remand Cause to WUTC, at pp. 1-2. (Exh. EMA-10R).
[2] Exh. EMA-20TR at 11:3-17.

Table No. 5 – Position of Each Party

	Avista	Commission Staff	Public Counsel	AWEC
Electric Refund	$0	$36.0 Million	$36.2M or $12.0M[1]	$57.8 Million
Natural Gas Refund	$0	$7.1 Million	$4.9M or $8.7M[1]	$19.2 Million
Time Period	11 Months	2.3 Years	2.3 Years	2.3 Years
Earnings Test Offset?	Yes	No	Yes if Power Supply Calculation Adjusted	No
Actual 2016 Rate Base	Yes	No	No	No

[1]Public Counsel includes "earnings sharing" amounts already paid to customers, only if the power supply "computational error" is included, resulting in $36.2 million for electric and $4.9 million for natural gas. Otherwise, their proposed refunds (excluding the power supply correction and "earnings sharing") are $12.0 million for electric and $8.7 million for natural gas.

4 Upon review of the testimony of the Parties, the Company has prepared an alternative or "compromise position" shown in Table No. 2 below[3], although the law does not allow for a refund, and the Company's primary position is that no refund is owing.[4]

Table No. 2 – "Compromise Position" of Avista on Rebuttal

	Avista Ocotober 2019 Testimony
Electric Refund	$1.326 Million
Natural Gas Refund	$1.582 Million
Time Period	11 Months
Earnings Test Offset?	Yes
Rate Period Rate Base	No

II. SCOPE OF REMAND

5 In the agreed-upon remand order presented to and issued by the Thurston County Superior Court on April 16, 2019 (its Mandate to the Commission), the limited scope of the remand was explicit:

> We strike all portions of the attrition allowance attributable to Avista's rate base and reverse and remand for the WUTC to recalculate Avista's rates without relying

[3] *Id.* at 6:11-18.

[4] In *POWER v. Utilities & Transp. Comm'n,* 101 Wn.2d 425 (1984), the Supreme Court reversed and remanded to the Commission with instructions to remove CWIP from rate base. On remand, this Commission determined that no refund was owing, notwithstanding the illegal inclusion of CWIP in rate base. Accordingly, the case mirrors this case involving a rate base "tool" (CWIP vs. "attrition") and a reversal on "used and useful" grounds under RCW 80.04.250. This Commission articulated several grounds for rejecting a refund: "end result" must still be just, reasonable and sufficient rates; the result would be "confiscatory" and, as an independent ground, the failure of Public Counsel to seek a stay and post a bond. *Wash. Utils. & Transp. Comm'n v. Wash. Water Pwr.,* Cause No. U-81-15, Fourth Suppl. Order on Remand (Jan. 1985).

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> on rate base that is not used and useful. (See Order Granting Joint Motion of the Parties to Remand Cause to WUTC, at pp. 1-2 (quoting from *Pub. Counsel v. WUTC*, provided as Exhibit EMA-10.) (Emphasis added.)[5]

This remand order from the Court is noteworthy for several reasons:

- First, defines the scope of the remand as relating just to that portion of the Commission's Order 05 dealing with "attrition" rate base—not "attrition" expenses such as depreciation or other O&M or A&G expenses.
- Second, the Court's action was limited to only the 2015 case (not later cases from which no appeals were taken).
- Third, the Court simply directed the "WUTC to recalculate Avista's rates without relying on rate base that is not used and useful" (See Order Granting Remand, supra, at p. 2) —nothing more and nothing less. "Recalculate" does not mean to remove rate base and stop there; rather, the Commission was to substitute other means of determining "used and useful" rate base (use of EOP 2015 or actual 2016 rate base).
- Fourth, if the Parties still believe that power costs (including any possible mistakes in their calculation) remain an issue, notwithstanding the express—and limited—mandate from the Court, they should have sought immediate clarification from the Court of Appeals, which did not reverse the Commission on the disputed issue of power costs, or otherwise sought further appeal of that decision to the State's Supreme Court; this they did not do.[6]

6 The precise language of the Court's Remand Order (see Exhibit EMA-10) is a directive to "remand for the WUTC to recalculate Avista's rates without relying on rate base that is not used and useful." The Remand Order could also have said, "remand to correct any power supply calculation." But, of course, it did not. It also could have said, "remove all rate base derived from the attrition analysis – and stop there." But again it did not; instead, it directed the Commission to recalculate rates that included rate base that was, in fact, "used and useful," without the use of an attrition analysis. And we know now what the actual level of used and useful electric rate base in the 2016 rate period was – i.e., nearly $40 million higher than what was built into 2016 rates.[7]

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5 Exh. EMA-9TR at 4:13-27.

6 All parties, including Staff and Public Counsel, jointly moved the Thurston County Superior Court for the mandate order that was issued on April 16, 2019 – the agreed-upon Order, as drafted and presented by Staff, makes no mention whatsoever of power supply costs. Exh. EMA-9TR at 5:9 – 6:8.

7 See Exh. EMA-9TR at 14:1-4.

7 Not surprisingly, the law in this area is well-settled: on remand, the Commission must stay within the scope of the remand order/mandate. *Stempel v. Department of Water Resources*, Supreme Court of Washington *en banc*, March 29, 1973, 82 Wn.2d 109, 508 P.2d 1660. The scope of remand is determined by the appellate court's mandate. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). *See also, Godfrey v. Reilly*, 140 Wash. 650, 657, 250 P. 59 (1926).[8]

A. Identification of Attrition Rate Base.

8 We now definitively know what the level of undisputed "used and useful" rate base was for the 2016 rate year. In place of the $28 million of attrition-related electric rate base based on attrition projections for 2016, we know that the actual level of AMA rate base that was used and useful during 2016 was $1.443 billion (WA Electric)[9], as shown on page 2 of Exhibit No. EMA-16R. This exceeds by nearly $100 million the level of assumed electric rate base (based on attrition) in the 2015 case for this same period in 2016 ($1.443 billion actual versus $1.344 billion projected through attrition). As explained by Ms. Andrews:

> In a perfect regularly construct, the challenged 2015 electric rates should actually be increased on remand to reflect higher levels of actual used and useful plant that were assumed in the attrition study.[10]

9 And, as discussed below, even if we use the more conservative starting point of the 2015 pro forma historical test period, as did Staff in the ensuing 2016 rate case, the actual used and useful (and undisputed) rate base was still $40 million higher than the disputed attrition-adjusted electric rate base in 2015.[11]/[12]

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[8] Where a court gives unmistakable instructions that a case be remanded for trial on a specific issue, that issue alone shall be tried. When an appellate court remands to a lower court, the lower court interferes with the appellate court's jurisdiction "if the lower court makes any decision outside the specific directive to the lower court contained in the remand." *Williams v. Leone & Keeble, Inc.*, 170 Wn.App. 696, 704, 285 P.3d 906 (2012) (*citing Garratt v. Dailey*, 49 Wn.2d 499, 500, 304 P.2d 681 (1956)); *Robert Morton Organ Co. v. Armour*, 179 Wash. 392, 396, 38 P.2d 257 (1934); *Frye v. King County*, 157 Wash, 291, 293-94, 289 P. 18 (1930), *rev. den.*, 176 Wn.2d 1030 (2013).

[9] See Electric December 2016 Commission Basis Report filed on April 28, 2017; a copy of excerpted summary pages (page 1-6) appearing in the report are provided as Exhibit No. EMA-16R. See page 2, Rate Base column total $1,442,726 (billion).

[10] Exh. EMA-9TR at 18:15 – 19:2.

[11] *Id.* at 14:1-4.

[12] Under revisions to RCW 80.04.250, the Commission is also free to take into account actual 2016 rate base during the 2016 rate effective period – resulting in no electric refunds. (See discussion, *infra*.)

10 Avista has supplied actual "used and useful" plant data in several iterations: year end 2015 and AMA actual rate base for 2016, 2017 and 2018. Staff, for its part, has also supplied historical pro forma 2015 test period amounts as the starting point for the 2016 case. Any of those levels of actual "used and useful" plant could and should be substituted for the "attrition rate base" levels, in order to accomplish what regulation intends.[13]

11 **Errors of Law:** Should the Commission merely "strip out" the 2016 level of "attrition rate base" and not replace it with actual levels of "used and useful" rate base, it will have:

(i) Deprived the Company of any opportunity to earn a fair return on property devoted to the public service, thereby resulting in rates that are not "fair, just, reasonable and sufficient" under RCW 80.20.020;

(ii) Created an unconstitutional taking and produced an "end result" that does not comport with *Hope* and *Bluefield* (discussed *infra*);

(iii) Violated the rate base statute RCW 80.04.250, as recently amended, requiring the Commission to "ascertain and determine the fair value for rate making purposes of the property of any public service company used and useful for service in this state by or during the rate effective period and shall exercise such power whenever it deems such valuation or determination necessary or proper under any of the provisions of this title. (Emphasis added) This statute works both ways: It shall exclude property that is not "used and useful," but shall include property that is. In other words, it is a "two-edged sword"; and

(iv) Reached a decision that is arbitrary, capricious and not based on substantial evidence of record. (*See* RCW 34.05.570)

2. Depreciation Expense Should Not Be Adjusted.

12 AWEC seeks to introduce additional adjustments, arguing that depreciation is an attribute of rate base and for the assessment of interest on any refunds owing. (See Mullins, Exh. BGM-7TR at 24-26; 34-36). In his Cross-Answering Testimony, Mr. McGuire, along with the Company, takes issue with this:

> The escalations for rate base and depreciation expense [were treated] as separate and distinct elements of the calculations . . . [and] the depreciation expense embedded in the authorized attrition allowance was never dependent on or attributable to the escalation of rate base. Therefore, the Court's decision, with its specificity with respect to "rate base," does not affect depreciation expense."[14]

[13] Exh. EMA-20TR at 29:17 – 30:4. Staff, AWEC and Public Counsel made other mistakes, as well, in their recalculation" of the attrition rate base. (See Andrews Rebuttal at Exh. EMA-20TR at 30-35.)
[14] Exh. CRM-14TR at 11:10-19.

13 AWEC is stretching the Court of Appeals' intent by trying to attach attrition-related depreciation expense (not rate base) to the remand of attrition rate base. The Court specifically referenced "attrition rate base," which in this context refers to the escalated "Net Plant after ADFIT" balances that are separate and distinct in the approved attrition studies – i.e., escalated by a consolidated escalation factor related to the historical change of net plant after ADFIT. This factor did not include expense-related amounts of any kind, nor was it somehow tied directly to escalated depreciation expense.[15] It is to be remembered that the Court did not remand the "attrition allowance" related to expense, such as depreciation.

3. No Interest is Owing Until Refund Obligation is Established.

14 AWEC also proposes to add interest to the amounts allegedly owing to customers for the period January 11, 2016 until April 30, 2018.[16] AWEC's proposal would add approximately $17.3 million of incremental interest to electric and natural gas refunds that it proposes to return to customers for the period of 2.3 years (2016-2018). Typically, interest is added on balances only after an amount is determined to be owed to or due from customers (e.g., decoupling surcharges and rebates; "earnings sharing" amounts to be refunded under the decoupling mechanism; purchased gas adjustment surcharges or rebates), at which time the Company begins accruing interest over time at the current FERC rate. This interest is applied once the obligation is known and continues to be applied until refunds are paid to, or surcharges are collected from, customers. At this time (and certainly not as of January 11, 2016), no actual refunds are owed to or have been ordered by this Commission -- hence there is no "liability upon which interest should accrue."[17]/[18]

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[15] In fact, within the attrition studies, the Commission approved escalation factors for the following separate components: (1) Net Plant after ADFIT; (2) O&M and A&G expense; (3) Depreciation expense; (4) Taxes Other Than Income; and (5) Revenues. All separate and distinct components (excluding revenues) were based on historical time periods to reflect expectations in the rate period. Exh. EMA-20TR at 37:7-13.

[16] See BGM-7T at 34-36.

[17] In his Cross-Answering Testimony, Mr. McGuire also testified that he did not include "interest" as argued by AWEC, because "until the Commission rules on this case, there is no liability upon which to apply an interest rate . . . and even if the Commission determines a refund is owed to ratepayers, the liability exists at that point in time forward." Exh. CRM-14T R at 14:3-12.

[18] To retroactively go back almost four years after the fact – after rates were established and collected from customers based on Commission-ordered rates, would be punitive and would constitute unlawful retroactive ratemaking, producing an unreasonable end result.

B. Any Additional Power Cost Adjustment is Beyond the Scope of Remand.

15 Company Witness Andrews was emphatic in her assertion that, "power supply net costs are separate and distinct from all other expenses and rate base costs normally included in the Company's electric rate filings."[19] She explained how net power supply costs were later included as a separate entry in the overall 2016 revenues and costs included in the 2015 case:[20] Accordingly, the power supply adjusted revenue and expense have no bearing on the "attrition" rate base at issue in this remand proceeding.[21]

16 The Commission resolved the power supply update issues raised by the Parties in its 2015 GRC Orders 05 and 06. Public Counsel's petition for judicial review requested that the Court determine whether the Commission correctly determined the power supply adjustment. The Court of Appeals did not simply forget about this issue; rather, it specifically stated that it did not remand the power supply update back to the Commission. Consequently, this issue should not be reconsidered yet again here. Indeed, the decision of the Court was explicit:

> Because we resolve the case on other grounds, we do not reach the alleged computational errors [re power supply costs] and do not discuss them further (emphasis added). (Court of Appeals Opinion No. 48982-1-11, fn. 13.)

Despite the Court's ruling, the Parties persist in rearguing power supply issues that were previously rejected by the Commission on Reconsideration (Order 06, ¶31), and which were specifically not remanded back to the Commission.[22]

17 Mr. McGuire, for Staff attempts to sidestep this dispute by suggesting that: "All the Commission needs to do is use an updated electric attrition model, such as the one I provided as Exh. CRM-8, to recalculate the attrition allowance, and any concerns regarding an asserted power cost error are at once dispelled."[23] (He does trenchantly observe, however, that there is no

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[19] Exh. EMA-9TR at 8:9-10.
[20] *Id.* at 10:4-6.
[21] *Id.* at 10:14-15.
[22] Public Counsel and AWEC both argue the Commission should refund annual power supply costs, totaling approximately $12.3 million and $12.1 million, respectively. Exh. EMA-20T R at 19:5-23.
[23] Exh. CRM-14TR at 4:13-17.

conclusive evidence that there even was an error -- it has merely been assumed as true by Public Counsel and AWEC.) (McGuire, Exh. CRM-14TR at 4-5)

18 It is one thing to correct for a court-mandated removal of "attrition rate base," but quite another to seek to reintroduce a power supply calculation nearly four years later, after failing previously with the Commission on Reconsideration and before the Court of Appeals – and unlawfully expanding the scope of its mandate on remand. This is also unlawful retroactive and "single issue" rate making, constitutes a collateral attack on prior orders, and to do so, either directly as Public Counsel and AWEC have done, or indirectly as Staff has done, is inappropriate. Further, for the Commission to now include this issue on remand, would prejudice the Company and retroactively impose unlawful refunds, causing significantly reduced and confiscatory ROEs for the periods 2016 to 2018 without any opportunity for the Company to remedy those deficiencies through aggressive cost-cutting[24], or for the Commission itself to re-examine other offsetting adjustments to expense or rate base (to assure a reasonable "end result").

C. The Only Impacted Time Period is the 2016 Rate Year.

19 The "Refund Period" should relate to no more than the 11-month period – January 11, 2016 through December 15, 2016.[25]/[26] (Even then, the law does not support any refunds.) The 2015 GRC rate period ended on December 15, 2016. Thereafter, rates were re-examined and "redetermined" in Docket Nos. UE-160228 and UG-160229, based on fresh evidence and a new test period, with an order received in that case on December 15, 2016. In the Commission's Order

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[24] Exh. EMA-20T R at 29:1-9.

[25] The rate effective period from January 11, 2016 – December 15, 2016 is approximately 338 days or 92.6% of the 2016 calendar year (338/365).

[26] Indeed, because of Public Counsel's failure to seek a stay of that portion of 2016 rates attributable to attrition rate base and the posting of a supersedeas bond, even refunds of 2016 rates are illegal. Again, in *WUTC v. Wash. Water Pwr*. (U-81-15), *supra*, the language is instructive:

> The Commission considers that the rates approved in Cause No. U-81-15 were lawful and legal rates despite the appeal which ultimately led to the remand. Pursuant to RCW 80.04.180 and RCW 34.04.130(3), the filing of the appeal did not itself operate to suspend the Commission's order. Appellants did not secure a stay of the Commission order pursuant to the statutes or a supersedeas bond. Absent a stay of the Commission's order, the rates set by that order were legal and lawful rates. For this reason, as well, no refund can be ordered. (Emphasis added)

in UE-160228/UG-160229, the Commission made a fresh "determination" that the then-existing rates were just, reasonable and sufficient. No party challenged or appealed the Commission's fresh determination of just, reasonable and sufficient rates.[27] No party pressed the claim that these existing rates were too high because they somehow continued to reflect "attrition rate base."

20 The following schematic shows the "rate period" for each of these cases, the effective date and the "Refund Effective Period" of this remand proceeding of January 11, 2016 through December 15, 2016:[28]

Chart No. 1 – GRC Activity 2016-2018

Calendar Filings And Rate Relief			
Calendar Year:	**2016**	**2017**	**2018**
Refund Effective Period			
Case Nos. UE-150204/UG-150205 Filed February 9, 2015 [Appealed] Effective January 11, 2016	**2016** -$8.1 million Electric $10.8 million Natural Gas (Challenged Rates)		
Case Nos. UE-160228/UG-160229 Filed February 19, 2016 [Not Appealed] Effective December 15, 2016		**2017** $0 million Electric $0 million Natural Gas (Not Challenged)	
Case Nos. UE-170485/UG-170486 Filed May 26, 2017 [Not Appealed] Effective May 1, 2018			**2018** $10.8 million Electric -$2.1 million Natural Gas (Not Challenged)

21 As part of the Commission's subsequent "determination" in the 2016 GRC, it found the existing rates were "just, reasonable and sufficient" (2016 GRC Order 06 at ¶112), reaching this fresh determination, based on a new test period, and a different record. In doing so, it rejected a further increase proposed by Avista[29] and rate decreases proposed by Staff and other parties. It could not have lawfully done so without a fresh examination of new evidence based on a more recent test period -- none of which included any evidence of the challenged "2015 attrition rate base" (the subject of the appeal).[30] It would have violated the State's Administrative Procedure Act (RCW 34.05.476) to have based its decision on, or even considered, the "attrition" evidence

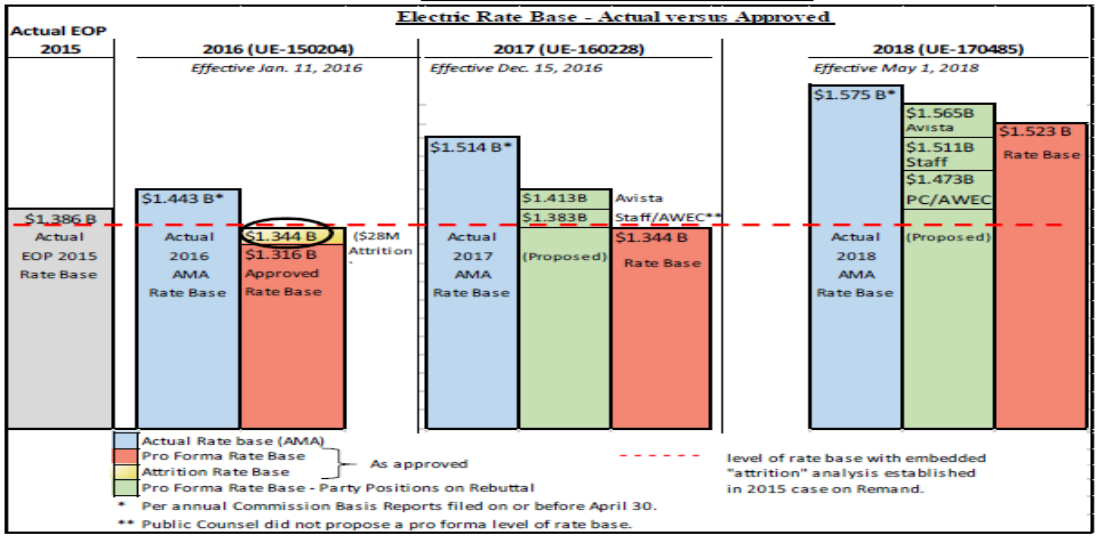
[27] Exh. EMA-20 TR at 4:8-17.
[28] *Id.* at 40:6-16.
[29] *Ibid.*
[30] Exh. EMA-20TR at 42:3-10.

in the earlier 2015 case that was not then before it and not part of the record. In other words, it reaffirmed existing rate levels based on new and fresh evidence.[31]

22 No party appealed this 2016 Order and claimed that the rates reaffirmed by the Commission were somehow still based on an inappropriate continuation of the "attrition adjustment." What is even more remarkable is that Staff and AWEC presented testimony in this subsequent 2016 case that began with a pro formed level of electric rate base for 2016 that exceeded by $40 million the attrition level of rate base at issue in the previous case on appeal (i.e., this case). Stated differently, for the 2016 case (Docket No. UE-160228/UG-160229) both Staff and ICNU (AWEC) began with a pro formed 2015 historical test period electric rate base of $1.383 billion (before any attrition adjustments were made) that was well above (nearly $40 million) the so-called "attrition-adjusted rate base" in the previous case on appeal of $1.344 billion.

23 The following schematic (Chart No. 2) for electric rate base demonstrates this point for the 2016 rate period, showing the approved rate base, with its attrition and pro forma adjustments, as compared with what we now know to be the actual level of rate base in 2015 on an EOP basis and 2016 on an AMA basis. (Exh. EMA-20TR at 42:3-10):

Chart No. 2 – Electric Rate Base



[31] This would be a different case altogether if the Commission had simply dismissed the filing at the outset and not proceeded to hear the fully adjudicated case in order to reaffirm existing rate levels based on new evidence.

A careful review of this chart demonstrates that the level of attrition-derived electric rate base in the challenged 2015 case was approximately $28 million ($1.344 billion - $1.316 billion). As explained by Ms. Andrews, "[t]his should make it plain that this segment of "attrition rate base" (represented above in "tan" and circled) did not 'carry over' or somehow 'bleed through' to the subsequent case."[32]

24 The Parties, however, do not stay within the Court's mandate on remand: to recalculate the rates after removing the level of attrition-related rate base, in the case before it (i.e., for the 2016 rate year). The Court did not direct the Commission to take any action on matters not before it – namely, the subsequent GRCs reaffirming or establishing rates for the 2017 and 2018 rate years. Those subsequent cases were each based on their own respective records, yielding their own decisions, none of which were before the Court. Indeed, if Public Counsel or others thought that "infirmities" relating to attrition somehow carried over and somehow "infected" the subsequent dockets, they should have filed an appeal to the courts in those cases as well. This they did not do.[33] Moreover, they should have argued in the subsequent case that it was necessary to "strip out" any embedded "attrition rate base" left over from the 2015 case not before it. (Of course, there wasn't any, because it was superseded by actual used and useful rate base.)

25 The fact that base rates did not change as a result of the 2016 GRC is irrelevant. These "existing rates" were reaffirmed after a "determination" based on new evidence (not "attrition" evidence in the 2015 case). Under this State's Administrative Procedures Act (RCW 34.05.476), the Commission could only make a "determination" to reaffirm existing rates based on the new evidence filed in that case and not on attrition evidence in the earlier case (the one appealed from).[34]

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[32] Exh. EMA-20TR at 44:15-20.
[33] Exh. EMA-20TR at 45:1-7.
[34] RCW 34.05.476 requires that any agency action be based only on the agency record before it:
> . . . (3) Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.

26 The other parties refer to paragraph 60 of the Commission's Order 06 in the 2016 case (Dkts UE--160228 and UG-160229) as support for their position that the refund must carry on through the 2017 and 2018 rate periods:

> That is the Commission must first determine the question whether the Company's existing rates "are unjust, unreasonable, unjustly discriminatory or unduly preferential, in any wise in violation of the provisions of the law, or that such rates or charges are insufficient to yield a reasonable compensation for the service rendered." If, and only if, the Commission determines the answer to this threshold question is "yes," does the Commission have the authority, and the obligation, to determine revised rates that meet the fair, just, reasonable, and sufficient standard. (Emphasis added)

27 In fact, this supports the very position taken by Avista -- namely, that the Commission must first make a "determination" of whether existing rate levels are unreasonable. And that is precisely what the Commission did: It made a "determination" in the only way it legally could, based on a new, fresh record in the 2016 case that demonstrated that existing rate levels were supported by evidence of the actual pro forma levels of test period rate base in the case before it. It did not, and could not, consider the challenged attrition rate base in the prior record. It should be remembered that it is not the rate levels themselves that matter for this purpose; rather, it is how the Commission got to its determination that the existing rates still remained fair (i.e., based on new evidence of actual used and useful rate base).

28 Remember that no party to that subsequent case, based on a different test period, challenged the Commission's Order in those dockets arguing that they were somehow "infected" or "afflicted" with prior attrition results. They, of course, could have (and should have), if they believed that the infirmities of the previous Order 05 on appeal somehow "carried over" into the new case and impacted the results.

29 What the Parties now essentially seek to do is to "reopen" the decision of the Commission in the 2016 case and retroactively disturb the filed rates, by refunding a portion of them, thereby upsetting the finality of the rates established for 2017 and early 2018. Where was the "notice" that 2015 attrition levels may still be an issue in the 2016 case? (The pendency of an appeal of a prior

case is not such "notice" where the issue of the 2015 attrition rate base was not again brought before the Commission, and rates were reaffirmed based on different evidence.) Lack of notice is a hallmark of illegal retroactive ratemaking and violates the filed-rate doctrine.

30 **Errors of Law:** Should this Commission retroactively adjust rates for 2017 and early 2018, it will have:

(i) Violated the Administrative Procedure Act (RCW 34.05.476) which requires an administrative entity to decide a case only upon the record before it (the 2015 record was not before it);

(ii) Engaged in retroactive ratemaking,[35] violated the "filed rate doctrine"[36] and allowed the parties to collaterally attack[37] the final rate determination for 2017 and 2018;

(iii) Retroactively engaged in single-issue ratemaking and violated the "matching principle," denying the Company the opportunity to revisit the entirety of the case, thereby depriving it of due process;[38]

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[35] The Rule Against Retroactive Ratemaking applies in this case to prohibit refunds in the December 15, 2016 – April 30, 2018 time period. The Commission sets rates on a prospective basis only. The Commission adheres to the doctrine against retroactive ratemaking (the Commission's statutes require that if the Commission determines that rates are unjust or unreasonable, it shall determine just and reasonable rates "to be thereafter observed and in force" (RCW 80.28.020), which "prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections, when such errors were not properly challenged (2017/2018 rates. "*Re Application of Puget Sound Energy for Authorization Regarding the Deferral of the Net Impact of the Conservation Incentive Credit Program*, Docket UE-010410, Order (Nov. 9, 2001) Denying Petition to Amend Accounting Order (Nov. 9, 2001).) The Commission has previously stated that "retroactive ratemaking . . . is extremely poor public policy and illegal under the statutes of Washington State as a rate applied to a service without prior notice and review." (emphasis added) *Ibid*. *See also Wash. Utils. and Transp. Comm'n v. Puget Sound Power & Light Co.*, Docket U-81-41, Sixth Supplemental Order (December 19, 1988) at 17; *Columbia Gas Transmission Corp. v. Federal Energy Reg. Comm'n*, 895 P.2d 791, 797 (D.C. Cir. 1990). If Public Counsel believed the infirmities of an attrition rate base carried over into the rates in 2017 and early 2018, it should have brought this issue before the Commission, thereby providing notice to the Company and the Commission that it believed those rates were unlawful as well.

[36] The Filed Rate Doctrine also prohibits changing the rates established in the 2016 rate case order. Under RCW 80.28.080, a utility must charge the rates specified in its rate schedule filed and in effect at the time and cannot "directly or indirectly refund or remit in any manner or by any device any portion of the rates or charges so specified." The Commission described the filed rate doctrine as providing that "[s]o long as a final, nonprovisional rate is in place it can be changed only prospectively. *Re Wash. Utils. & Transp. Comm'n v. Puget Sound Energy*, Docket UE-981238, 4th Supp. Order (Apr. 5, 1999). As a result, ordering refunds of a nonprovisional rate would violate the filed rate doctrine. The effect of the proposals of Staff, AWEC and Public Counsel is to reach back in time to alter the tariffed rates ordered by the Commission in the 2016 GRC order. The Commission should find that the filed rate doctrine embodied in RCW 80.28.080 also prohibits this result.

[37] Staff, AWEC and Public Counsel's proposals constitute unlawful collateral attacks on the 2016 GRC order. A collateral attack is an attempt to challenge a Commission's decision in a proceeding other than the case in which the Commission renders that decision. Staff and AWEC/PC attack the Commission's final orders in the 2016 GRC by proposing to retroactively account for revenue requirements that were considered by the Parties and the Commission in those rate cases. The Commission should reject this as an improper collateral attack on the Commission's 2016 GRC order. If Staff, AWEC and Public Counsel had appropriately challenged the 2016 GRC order under RCW 80.04.210, the Commission would have had the opportunity to evaluate the validity of the orders as a whole, as is consistent with the ratemaking framework used by the Commission.

[38] The Commission also disfavors "single-issue ratemaking" because it violates the matching principle. (*Wash. Utils. & Transp. Comm'n v. Avista*, Docket UG-060518, Order 04 at ¶ 19 (Feb. 1, 2007).) Single issue ratemaking

(iv) Deprived the Company of any opportunity to earn a fair return on property devoted to the public services, thereby resulting in rates that are not "fair, just, reasonable and sufficient" under RCW 80.20.020 (*see* discussion in Section III, below);

(v) Created an unconstitutional taking and producing of an "end result" that does not comport with *Hope* and *Bluefield* [see discussion, infra];

(vi) Reached a decision that is arbitrary, capricious and not based on substantial evidence of record. (*See* RCW 34.05.570).

D. Any Refund Must Be Offset by Previously Returned Earnings Shared with Customers.

31 Pro-rated "earnings sharing" amounts already refunded to customers related to 2016 (11 months) must offset any ordered refunds, in order to avoid double counting.[39] The sharing amounts themselves are not in dispute. To ignore these amounts would provide a duplication of refunds to customers – a "double dip" into earnings of the Company and overstate refunds to customers. The subset (and it is only that) [40] of "earnings sharing" used to offset refunds by Avista total $1.33 million for electric and $1.58 million for natural gas for 2016 (11 months).[41]/[42]

32 By way of summary, as shown in Table No. 18 in Ms. Andrews' Testimony, the refunds owed customers, after giving effect to "sharing of earnings" total $1.326 million for electric and $1.582 million for natural gas related to 2016, under Avista's "compromise position."

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violates this principle because it sets rates based upon an examination of only one component. (*See Re U.S. West Comm., Inc.,* Docket UT-920085, 3rd Suppl. Order, at 5 (Apr. 15, 1993) ("without considering other aspects of the company's rate structure [this] would amount to single issue ratemaking"); *Re U.S. West Communications, Inc.,* Docket UT-970766, 14th Suppl. Order at 5 (Mar. 24, 1998) ("the proper means to examine [revenues and expenses] is a general rate case"); *MCI Telecommunications Corp. v. GTE Northwest, Inc.,* Docket UT-970653, Second Suppl. Order (Oct. 22, 1997 ("The Commission has consistently held that these questions are resolved by a comprehensive review of the Company's rate base and operating expenses determining a proper rate of return, and allocating rate charges equitably among ratepayers.")

39 On November 25, 2014, the Commission issued Order 05 in Docket Nos. UE-140188 and UG-140189, approving the Company's current electric and natural gas Decoupling Mechanisms. A component of the electric and natural gas Decoupling Mechanisms is the "Earnings Test" with a 50/50 revenue sharing. Exh. EMA-9TR, 15: fn. 13.

40 This "subset" consists of any earnings otherwise attributable only to any revenues derived from the removed "attrition" component of the rate base, and not the total level of earnings shared. (*See* EMA-9TR at 47:12 – 48:16)

41 Ordered refunds for a larger period of 2.3 years, if any, would require offsets in the amount of $2.76 million for electric and $3.32 million for natural gas. (*Ibid.)*

42 If this Commission orders refunds that include the "power supply correction" or recalculation using an attrition model, as proposed by the parties, total "earnings sharing" should be applied (rather than the above "subset" associated with rate base only) for electric of $2.405 million (2016 rate year) and $3.899 million (2.3 years). For natural gas, the amounts to apply would be $2.711 million (2016 rate year) and $5.340 million (2.3 years). See EMA-23 TR at 4:fn. 4.

33 Should the Commission fail to recognize the over-earnings previously returned to customers (under the 50/50 decoupling sharing arrangement), as an offset to any refund, it will have engaged in the unconstitutional confiscation of Company earnings and arrived at an unreasonable "end result." (See discussion, infra.)

E. The Manner of Returning Any Refunds.

34 Mr. Mullins states if the Commission is to make an "earnings sharing" adjustment associated with the decoupling mechanism, he recommends that the adjustment only apply to those customers subject to decoupling.[43] This the Company does agree with -- i.e., any "earnings sharing" amounts that offset Commission-ordered refunds should be applied to only those customers who received those refunds, which does not include Electric Rate Schedules 25 and 41-48, or Natural Gas Rate Schedules 112, 122, 132, and 146. To do otherwise would understate any ordered refunds owed to those customers.[44] The Company has also proposed that any refunds occur coincident with the rate adjustments to occur on April 1, 2020, and part of Avista's pending GRCs.[45]

III. THE IMPACT OF PARTIES' PROPOSALS WILL NOT RESULT IN JUST, REASONABLE AND SUFFICIENT RATES

A. Various Refund Proposals Will Result in Confiscatory Rates, Well Below Authorized Returns.

35 Parties' positions do not ultimately lead to reasonable "end results." The Parties' "primary" positions would impose refunds ranging from $36 million to $57.8 million for electric, and $4.9 million to $19.2 million for natural gas. The ROE impact on the Company of any such level of refunds for 2016, range as low as 6.98% to a high of 8.37% - for a staggering 113 to 252 basis

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[43] See Mullins at Exh. BGM-7 at 33:11-13.

[44] Mr. Miller, at Exh. JDM-4TR, starting at page 2, discussed how any ordered refunds should apply by rate schedules, including the impact of decoupling earnings sharing. His exhibits, Exhs. JDM-5R (electric) and JDM-6R (natural gas) provide the detailed calculations.

[45] Similarly, Mr. Ball argues to exclude the "earnings sharing" due to the fact not all customers are subject to decoupling, and that a complicated additional analysis would be required to determine the correct amounts owed customers. (See JLB-7T at 7:14-22). Mr. Miller addresses these concerns within his testimony and exhibits, starting at page 2 of Exh. JDM-4TR.

points below the authorized 9.5% ROE. These results would approximate or be below the 8.22% that this Commission already found was not a reasonable "end result" in this very docket.

36 In Table No. 20, excerpted from Ms. Andrews' submitted Testimony, the actual Washington Commission Basis ROEs on a combined electric and natural gas basis is provided to show the returns the Company would have experienced during 2016-2018, if this Commission were to approve any one of the refunds as proposed by the Parties.[46]

Table No. 20 - Earned Returns Incorporating Parties' Positions - WA Jurisdiction

"End Result" of Proposed Refund - ROE Impact Washington System	2016	2017	2018 [2]
Authorized ROE	**9.50%**	**9.50%**	**9.50%**
Actual Commission Basis ROE[1]	9.60%	9.60%	9.29%
ROE After Application of Refund:			
WA Commission Staff	8.24%	8.18%	8.75%
Public Counsel	8.37%	8.23%	8.71%
AWEC	6.98%	7.16%	8.42%

[1] Includes impact of actual 50/50 Earnings Sharing.
[2] 2018 new rates effective May 1, 2018.

37 The Commission has already determined in this docket that an 8.22% ROE would not produce a reasonable "end result"[47]/[48]:

> Even with Staff's third revised electric revenue requirement of $19.6 million calculated using Staff's "corrected" attrition model, Avista argues it would have an opportunity to earn an ROE of no more than **8.22 percent**, which is nearly 130 basis points lower than the 9.5 percent agreed to in the parties' settlement and approved by the Commission . . . To the extent the adjustments proposed by Staff and Joint Parties result in rates that make it highly unlikely that Avista could earn the rate of return the Commission approved in Order 05, Avista is correct that such adjustments do not produce acceptable end results in accordance with *Hope* and *Bluefield* standards. Rates that have such an effect cannot be said to be fair, just, reasonable and sufficient. (Emphasis added, footnotes omitted)

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46 As discussed further by Mr. Thies, the Company's investors and rating agencies focus their attention on the overall Washington jurisdiction results.

47 For electric operations alone, applying the refund as proposed by the Parties would have had an even greater impact on ROEs in 2016 (causing as much as nearly 230 basis points of under-earnings (AWEC proposal)); the highest result under Public Counsel's proposal results in 142 basis points of under-earnings. (See Table 21, Exh. EMA-20TR, at 55: 5-12.) ROEs for Washington natural gas, although better, still would result in significant under-earnings under most of the Parties' proposals for the Washington operation. (See Table 22, EMA-20TR at 56:4-11.) The Washington natural gas operations helped in each of the years to prop up already anemic Washington electric ROEs when examined on a Washington total jurisdiction basis.

48 Exh. EMA-20TR at 56:1-14.

Whether taken as a whole (electric and natural gas) or reviewed separately, all of the proposals will, at best, only approximate (or be far lower than) the 8.22% ROE already deemed insufficient and confiscatory by the Commission.[49]

38 The Commission might have made other determinations in its Order 05, had it known that attrition rate base was not a tool available at the time in order to reach a reasonable end result. Although one can only speculate as to what actions the Commission might have taken, we do know, as the Commission stated, that they would have kept one eye on the "end result" in the process. [50] In order to bring the "end result" of its Order into the realm of reasonableness, it may very well have reached different determinations on a whole host of other issues.[51] Indeed, they could not do otherwise and still arrive at a reasonable end result. At a minimum, had the Commission reopened the record, it would have given all of the parties the appropriate due process to argue for particular adjustments that would have led to an appropriate end result. That, of course, was not the path chosen by the Commission, so now, almost four years later, to make a single adjustment in isolation, would not be fair, nor just, nor reasonable, and does not comport with *Hope* and *Bluefield*.[52]

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[49] *See WUTC v. Wash. Water Pwr. (Cause U-81-15), supra*: "This approach [simply removing CWIP] would produce a rate level confiscatory in nature. Besides ignoring ratemaking theory, the result DPL, *et al.,* request is unconstitutional. *See, FPC v. Hope, supra* and *Bluefield, supra*."

[50] In *WUTC v. Wash. Water Pwr*. (Cause U-18-15), *supra,* this Commission stated:

> Removal of the element of CWIP in rate base cannot be done in a vacuum. The Commission still has the duty under RCW 80.28.010 to set rates which are fair, just, reasonable and sufficient. This duty cannot be accomplished by removing a single element when all elements are interrelated . . .. The fundamental error in the reasoning of *POWER* and *Public Counsel* is that they view the CWIP issue as the beginning and end of this case. It is not . . .. (Order at pp. 6-8) (Emphasis added)
>
> If the Commission had been advised by the Court in 1981 that the tool of CWIP in rate base could not be used, the Commission obviously would have chosen a different approach. It is unnecessary for the Commission to speculate at this time which of the alternate approaches would have been used. It is sufficient that the Commission in 1981 would have set rates, at a level fair, just, reasonable, sufficient, and nondiscriminatory in light of the company's financial situation at the time.

[51] E.g., it could have allowed the Company to include a higher level of "threshold" pro forma capital projects, it might have determined that a higher O&M escalation was appropriate, or that a hypothetical capital structure was warranted.

[52] Testimony of Thies, at 11:9-10. The Commission, in the very Order appealed from in this docket (Order 05 at ¶¶ 132-133) was very mindful of the Constitutional limitations on its actions:

> . . . the result under Staff's modified historical test year pro forma analysis would be a reduction in electric revenue requirement of more than $20 million. Public Counsel and the intervenors recommend even more severe reductions based solely on a modified test year analysis with known and measurable pro forma adjustments. We cannot reasonably conclude such an end result would be appropriate under the standards in *Hope* and *Bluefield*. The Commission's responsibility to set rates that are fair, just,

39 Perhaps the most distressing of all, is that the Company, four years later, can't go back and try and "manage around" a retroactive result by extensive cost-cutting, as testified to by Mr. Thies:[53]

> But, now, almost four years after Order 05, there is no way that we can go back in time and manage around the level of refunds proposed for 2016, 2017, and 2018, and still earn a fair return. The silence around this issue in the testimony of the Parties is notable.

Nor could the Company somehow "manage around" a $40-$70 million refund obligation billing in this year (2020), when the impact would be felt on the Company's books. Merely shifting the impact from one period to another does not make the "end result" any less confiscatory. [54] (The settlement proposal now pending before the Commission in Dkts. UE-190334 and UG-190335, already assumes that the Company has work to do to achieve the agreed-upon results.)

B. Adverse Reactions of Rating Agencies and Investment Community.

40 Mr. Thies testified that "the Rating Agencies are watching this case, along with the Company's 2019 general rate case, extremely closely."[55] He went on to observe that:

> One of the conditions that led to Moody's Investors Service December 2018 downgrade was that the "Baa2 rating also looks at Avista's less predictable regulatory outcomes in Washington, where the Company generates about 60% of its revenue."[56] They later state that a "rating upgrade could be considered with a demonstrated improvement in regulatory relationships."[57]

This remand proceeding will provide guidance to Moody's.

41 Mr. Thies also observed that, should the Commission decide a level of refund in the ranges proposed by the Parties, it could have an impact in the debt and equity markets: "I believe that it

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reasonable, and historical test year attrition, but on its outcome, or "end results." (*See Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603, 64 Sc.D. 281, 88 L.Ed. 333 (1944) (Hope*) (the methods by which government regulators determine a utility's rate are inconsequential so long as the *end result* is fair).

53 Exh. MTT-6TR, 12:1-3.

54 The impact in 2020 could range anywhere from 300 to 600 basis points in 2020 to Washington operations, depending on the refund level -- already providing the Company with no reasonable opportunity to earn a fair return in 2020. (TR. p. 699, ll. 1-10)

55 Exh. MTT-6TR at 12:8-9.

56 Moody's Investors Service, "*Moody's Downgrades Avista Corp. to Baa2, Outlook Stable*," December 20, 2018, p. 1.

57 *Ibid.*

may cause the rating agencies to potentially look at a possible downgrade, or at least put the Company on negative watch", all to the detriment of customers.[58] (Emphasis added)

IV. CONCLUSION: AVISTA'S COMPROMISE POSITION / A PATH FORWARD

A. The Company's "Compromise Position."

42 The Company has defined the scope and time period to be limited to the electric and natural gas rate base associated with the "attrition adjustment" for the 11-month period January 11, 2016 – December 15, 2016. Arguably, no refunds are in order, given levels of actual rate base in 2016 that exceed the so-called "attrition levels." In order to provide a "pathway" for resolution of this case, however, Avista has put forth a "compromise position" that excludes the consideration of actual 2016 rate base and substitutes approved pro formal levels of rate bases, resulting in refunds of $1.326 million for electric and $1.582 million for natural gas. This excludes a power cost adjustment (which was not remanded back to the Commission) and is for the 11-month refund period and gives effect to a partial offset for previous earnings sharing.

B. Staff "Alternative Position" Would Also Produce Reasonable Results if Properly Adjusted.

43 Another alternative resolution that still might produce reasonable results would be Staff Witness Mr. McGuire's alternative recommendation using an end-of-period 2015 rate base (updated for other model corrections addressed in Ms. Andrews' testimony).[59] The result of this approach shows no further refunds owing to natural gas customers and $3.57 million of refunds owing electric customers for the 11 months of 2016, after "earnings sharing" offsets are applied.[60] This "alternative" at least checks two of the four boxes -- i.e., it removes any attrition rate base (as

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[58] Exh. MTT-6TR at 15:4-12. *See also*, the Williams Capital Group, in their "Equity Research," provided a report titled, "*Reducing Rating to Sell on Valuation, Unfavorable WA Staff Testimony for Refunds*." (Exh MTT-6TR, 14:12-28)

[59] Mr. McGuire testified that if the Commission were to choose to use actual used and useful rate base prior to the date of its Order, it could use 2015 EOP levels. (TR at 734:8-12 and TR at 736:1-14)

[60] Mr. McGuire agreed that "This is a reasonable place that I could see the Commission landing. It's not what I'm recommending, but I don't -- I don't see this to be unreasonable." (TR at 737:18-21) Ms. Andrews explains why Mr. McGuire's proposed refund amount of $5.97 million must be further adjusted for certain errors. (See EMA-20TR at 61-64)

per the Court's order) and it captures the impact of any alleged power cost error (albeit not required). It does not, however, appropriately recognize the earnings offset, nor is it limited to 11 months.[61]

45 Notwithstanding the above, the Company submits that the Commission, at a minimum, must take into consideration Mr. McGuire's use of the actual 2015 EOP rate base or the "compromise" proposal of the Company relying on pro forma levels of rate base, which was in service serving customers prior to rates going into effect. These levels of rate base do not rely on any "attrition" analysis. It is, therefore, not subject to any possible infirmity based on the "used and useful" principle.

V. CONCLUSION

46 Avista respectfully requests that the Commission either find that no refunds are owing, or that, as a "compromise," $1.326 million and $1.582 million of refunds be awarded to Avista's electric and natural gas customers for the affected 11-month refund period. Staff's alternative position would also be acceptable, as adjusted by Avista, resulting in a refund of $3.57 million for electric customers -- but only for the same 11-month refund period.[62]/[63]

RESPECTFULLY SUBMITTED this 8th day of January 2020.

AVISTA CORPORATION

By: _____

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[61] According to Mr. McGuire, "it would resolve that issue [removal of attrition rate bases] and it would dispel any notion that there's an issue associated with a power cost error at the same time. (TR at 734:21-23)

[62] If this Commission orders a remand time period of 2.3 years, the Commission must consider the total "earnings sharing" amounts already refunded to customers over the 2016-2018 time period of $3.9 million electric and $5.34 million natural gas (pro-rated). For informational purposes, the resulting refunds owed customers under this approach would result in a refund of $10.7 million for electric and no further refunds owed natural gas customers, related to the January 11, 2016 – April 30, 2018 time period.

[63] In comparison, Avista's compromise position," includes refunds of $1.326 million for electric and $1.58 million for natural gas, for a total of $2.91 million for 11 months. For informational purposes, if refunds are ordered to apply to the 2.3 years, the results would be $3.71 million for electric and $4.4 million for natural gas, for a total of $8.11 million for Washington electric and natural gas. (Exh. EMA-20TR at 63:20 – 64:9)