

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

In the Matter of the Petition of)	DOCKET UG-060518
)	
)	
AVISTA CORPORATION, D/B/A)	ORDER 05
AVISTA UTILITIES,)	
)	
)	FIRST SUPPLEMENTAL ORDER;
For an Order Authorizing)	EXTENDING DEADLINE FOR
Implementation of a Natural Gas)	FILING OF DRAFT EVALUATION
Decoupling Mechanism and to)	PLAN; IMPOSING SANCTION FOR
Record Accounting Entries)	FAILURE TO COMPLY WITH
Associated With the Mechanism.)	COMMISSION ORDER 04
.....)	

1 ***Synopsis:** The Commission finds that Avista materially breached its obligations to work with Commission Staff, and other interested parties to develop and file a draft evaluation plan for Avista’s pilot Decoupling Mechanism program. The Commission accepts the parties’ representation that it is not currently evident that Avista’s delay caused irreparable harm to the ability to evaluate the pilot program. Therefore, the Commission extends the deadlines for Avista to develop and file the required plan and to request continuation of the Decoupling Mechanism beyond its initial term, and reiterates all other deadlines previously adopted in Order 04. Finally, the Commission imposes a penalty of \$50,000 for Avista’s non-compliance.*

SUMMARY

2 **PROCEEDINGS.** Docket UG-060518 involves a petition by Avista Corporation (Avista) for authority to implement a mechanism to decouple its rates for conducting business operations, in part, from its rates for commodity sales.

3 On February 1, 2007, the Commission entered a Final Order Approving Decoupling Pilot Program. In conditionally approving a multiparty Settlement Agreement, the Final Order required Avista, Commission Staff, and other interested parties to “develop, through a collaborative process, a draft evaluation plan to be filed with the Commission no later than December 31, 2007.” See Settlement Agreement (Settlement or Agreement), ¶ 6J.

- 4 On January 31, 2008, Public Counsel sent a letter to notify the Commission that Avista had failed to timely initiate the collaborative process and failed to meet the filing deadline for the draft evaluation plan. To date, Avista has not filed the required draft evaluation plan, nor filed a request for extension of the December, 31, 2007, deadline. At its February 28, 2008 Open Meeting, the Commission designated this matter for hearing.
- 5 **COMMENTS AND HEARING ON NON-COMPLIANCE.** The parties submitted prehearing comments on March 17, 2008, and presented additional exhibits as well as a panel of witnesses at the evidentiary hearing. The Washington Utilities and Transportation Commission (Commission) convened a hearing in this docket at Olympia, Washington on March 24, 2008, before Chairman Mark Sidran, Commissioners Patrick Oshie and Philip Jones and Administrative Law Judge Adam E. Torem. The hearing sought to determine whether the substantive value of the evaluation plan and final evaluation report had been irreparably undermined through Avista's delay, and what remedy or sanction, if any, would be appropriate.
- 6 **APPEARANCES.** David Meyer, attorney, Spokane, Washington, represents Avista Corporation (Avista). Simon ffitich, Assistant Attorney General, Seattle, Washington, represents the Public Counsel Section of the Washington Office of the Attorney General (Public Counsel). Greg Trautman, Assistant Attorney General, Olympia, Washington, represents the Commission's regulatory staff (Commission Staff or Staff). Charles M. Eberdt, Bellingham, Washington, represents Intervenor The Energy Project. Nancy Hirsh, Seattle, Washington, represents Intervenor The Northwest Energy Coalition, and Ed Finklea, attorney, Portland, Oregon, represents Intervenor Northwest Industrial Gas Users (NWIGU).
- 7 **COMMISSION DETERMINATION.** The Commission finds that Avista breached its obligations to comply with the Final Order in this docket by failing to timely initiate a collaborative process with interested parties and develop a draft evaluation plan for its pilot decoupling mechanism. The Commission further finds Avista in default for failing to file its draft evaluation plan on or before the December 31, 2007, deadline or failing to file a timely motion for extension of time. Avista remains in default.

- 8 In recognition of the parties' unanimous agreement that Avista's delay has not irreparably damaged their ability to craft an appropriate evaluation plan, the Commission will allow Avista an opportunity to cure its default. Therefore, the Commission extends the filing deadline to April 30, 2008. Nevertheless, the Commission takes seriously Avista's failure to comply with Order 04, finds aggravating factors in the company's non-compliance, and imposes a financial penalty of \$50,000.

MEMORANDUM

I. Background

- 9 On December 22, 2006, the Commission conducted an evidentiary hearing on a proposed multiparty settlement to allow Avista to implement a decoupling mechanism pilot program from January 1, 2007, through June 30, 2009. Public Counsel and The Energy Project opposed the settlement.

- 10 The Settlement Agreement included the following provision:

On or before March 31, 2009 (three months prior to the end of the pilot deferral term), the Company may file a request to continue the Mechanism beyond its initial term. That filing would include an evaluation of the Mechanism and any proposed modifications by the Company. Any party is free to argue that the renewal of the Mechanism is only appropriate in the context of a general rate case. The Company would bear the burden of demonstrating why the pilot program should be extended other than in the context of a general rate case.

The Company, Commission Staff, and other interested parties will develop, through a collaborative process, a draft evaluation plan to be filed with the Commission no later than December 31, 2007.

Settlement Agreement, ¶ 6J.

- 11 At the December 2006 evidentiary hearing, in response to the Commission's inquiry about the Agreement's lack of detail regarding the evaluation of the pilot program, Brian Hirschorn, Avista's Manager of Pricing, testified that the parties would:

[C]ome back to you as a collaborative group and present an evaluation plan by the end of 2007. We thought, rather than – and obviously the Commission has certain things they'd like to see in the final evaluation plan, as well. We thought, let's take our time, develop a good evaluation plan, present it to the Commission, get the Commission's feedback. So rather than do that as part of this, let's give ourselves some time and do it right.

Transcript, Volume II, December 21, 2006, pp. 65-68.

- 12 Avista concedes that in the 11 months between the Commission's entry of its Final Order Approving Decoupling Pilot Program and the above-noted deadline of December 31, 2007, it took little or no action to convene the collaborative group or develop an evaluation plan.
- 13 In mid-January 2008, Avista recognized that it had failed to comply with the deadline to file a draft evaluation plan. Avista took no action to make this violation known to the Commission or otherwise notify the Commission of any plan to cure this defect.
- 14 On January 31, 2008, Public Counsel sent a letter to the Commission's Executive Secretary regarding the failure of Avista and the other settling parties to file the required draft evaluation plan. Public Counsel contended that failure to file the plan was a material violation of Order 04.
- 15 On February 1, 2008, Avista sent a response letter noting that it has begun working to create a draft evaluation plan for discussion purposes at a collaborative meeting to be held in the near future. Avista's letter also apologized for the delay and promised to redouble its efforts to arrive at a draft evaluation plan satisfactory to all parties. Finally, the letter stated that "the Company, within thirty (30) days, will either file a copy of the final evaluation plan or a progress report concerning the status of the plan."
- 16 On February 25, 2008, Avista sent another letter, this time conceding that the plan would not be completed by March 1, 2008, but providing a status report instead.

17 During the Commission's Open Meeting of February 28, 2008, Mr. Hirschorn of Avista accepted full responsibility for failing to comply with the Commission's order. Although Mr. Hirschorn expressed his belief that the evaluation plan would not be jeopardized by the delay, Public Counsel disagreed. The Commission set the matter for a hearing and sought formal comment on this issue.

II. HEARING ON NON-COMPLIANCE

18 At the March 24, 2008, hearing, the Commission accepted the Company's pre-filed testimony from Brian Hirschorn and Jane Peters. The Commission also permitted Public Counsel to present Policy Analyst Mary Kimball and Consultant Mike Brosch as its witnesses, and invited all parties to present their views on the impact of Avista's delay in submitting the draft evaluation plan. The Commission requested that Kelly Norwood, Avista's Vice President, State & Federal Regulation and Mr. Hirschorn's supervisor, provide additional testimony on Avista's behalf.

19 The parties all agreed that it is not currently evident that Avista's delay caused certain and irreparable harm to the substantive value of the evaluation plan or the final evaluation report.¹ Public Counsel recommended, as a sanction for Avista's failure to comply with the evaluation planning requirement, the Company should not be allowed to recover the cost of evaluation from ratepayers.² Public Counsel argues that: "It is important to send a signal to Avista, and other companies, that failure to comply with Commission Orders will be taken seriously and will result in meaningful sanctions."³ Staff did not respond in writing to the Commission's inquiry concerning what sanctions might be appropriate and its counsel remained silent on this question at the hearing.

20 The Company committed to filing the draft evaluation plan no later than April 30, 2008. The Company also agreed to a schedule proposed by Public Counsel, with relevant dates as follows:

April 30, 2008	Draft Evaluation Plan filed with Commission
May 9, 2008	Comments / Objections Filed on Draft Plan
March 31, 2009	Final Evaluation Report filed with Commission
April 30, 2009	Avista Permitted to Petition to Extend Pilot Program

¹ Public Counsel and the Energy Project argued that it was premature to know with certainty whether the program evaluation would be irreparably harmed by the delay.

² Public Counsel Comments at 9.

³ *Id.*

The Company also committed to paying for the evaluation plan without seeking to recover any associated costs in rates.

- 21 The Commission made clear that it would not take an active role in crafting the plan, but would be available to settle disputes among the parties in the unlikely event that any irreconcilable differences arise in the collaborative.
- 22 In response to questions from the bench, Mr. Norwood acknowledged several instances of noncompliance in 2007 and discussions with Staff regarding improving Avista's compliance.⁴
- 23 It is indisputable, and the Company concedes, that Avista's delay in filing the required draft evaluation plan is an ongoing violation of Order 04 and the Settlement Agreement it adopted.

III. COMMISSION DISCUSSION AND DECISION

- 24 Avista not only failed to comply with its obligations to develop and file the required plan, but also failed to promptly notify the Commission of its breach. Only when Public Counsel brought the matter to light did Avista come forward with an explanation and apology for its delay. We take seriously any failure to comply with our orders. In this case, however, there are aggravating factors beyond missing a filing deadline.
- 25 First, despite its own testimony in support of an eleven month process to develop a cogent, thorough evaluation plan, Avista did nothing for almost a year. While this delay may not cause irreparable harm to the value of the final report, it has caused harm. Work that was to be accomplished in eleven months must now be done in four (if the Company meets the new deadlines). Work that could have been done earlier, must now be done while the parties prepare for other pending cases.⁵ The Commission and the parties have had to spend time and effort on hearings addressing this matter. In short, Avista's violation has imposed real costs on others.

⁴ Transcript at 199:23 – 206:23.

⁵ Staff and Public Counsel, for example, are parties to five pending general rate cases and other major proceedings.

- 26 Second, this prolonged failure to comply with Order 04 occurred in the context of other compliance violations and penalties.⁶ In response to questions from the Bench, Mr. Norwood acknowledged discussions with Staff during the latter half of 2007 about the Company's compliance issues and Staff's view that improvement was needed in this area.⁷
- 27 Finally, given the obvious importance of decoupling as a policy issue to the Company, other parties and the Commission, it is hard to understand how Avista could lose track of its evaluation planning process.
- 28 Viewed in this context, Avista's failure to do anything meaningful to develop the evaluation plan over eleven months, its failure to file the plan on time, and its failure to notify the Commission and request an extension of time to file is inexcusable and should be sanctioned.
- 29 Failure to comply with a Commission order is subject to a penalty of up to \$1,000 per day, with each day of a continuing violation constituting a separate offense. *RCW 80.04.380*. Assuming Avista were to file the draft evaluation plan by April 30, 2008, as it has agreed, the filing would be 120 days late and the maximum penalty would be \$120,000. We believe a fine of \$50,000 is appropriate in this case.⁸

⁶ In February 2007, the Company petitioned for an accounting order to obtain retroactive approval of certain debt repurchase costs because it had deviated from the Commission's accounting rules without obtaining advance approval. On December 19, 2007, we approved a Settlement Agreement resolving Avista's petition. We imposed a \$15,000 penalty for violating our rules and Avista agreed to write off \$3.85 million of repurchased debt costs against its 2007 earnings.

In September 2007, the Company filed a petition seeking approval of certain journal entries it used in 2005 to record the repurchase of its general office building and adjacent properties. In a previous order, the Commission had required Avista to file for prior written approval of such journal entries. In light of the Company's failure to seek advance approval of its journal entries, the Commission issued a penalty assessment against Avista in the amount of \$5,000 for violating a prior Commission order, and reminded the Company that "Avista is responsible for complying with Commission orders." *Supra* fn. 4.

⁷*Id.*

⁸ When we originally approved the decoupling pilot program, we allowed the collection of funds from ratepayers before the decoupling program was tested and proven, giving the Company the benefit of the doubt. Avista is currently collecting \$305,677 under the decoupling program pursuant to the Company's filing in Docket UG-071863, which revised rate Schedule 101 effective November 1, 2007. Under the terms of Order 04 in this proceeding, Avista may seek further recovery of deferral balances in Fall, 2008, in conjunction with its purchased gas adjustment filing. We will consider Avista's performance in relation to the terms of Order 04 and this order in determining further recovery of deferred balances during the remainder of the pilot program.

30 While we conclude that it is in the public interest to allow the Company to continue with its pilot decoupling program, we remind Avista of our earlier guidance:

The settling parties should consider our approval as an opportunity to demonstrate that decoupling mechanisms do indeed increase utility sponsored conservation and that the potential flaws do not outweigh the program's benefits. We will carefully evaluate the mechanism, and will only consider an extension upon a convincing demonstration that the mechanism has enhanced Avista's conservation efforts in a cost-effective manner.

Order 04, ¶ 33.

31 As Public Counsel and the Energy Project suggest, the failure of Avista and the other settling parties to ensure timely development and filing of the draft evaluation plan may yet be found to have undermined the value of the final evaluation. All the parties have a responsibility to collaborate in good faith to produce the best possible evaluation under the circumstances. As we have previously noted, however, the ultimate burden in this regard lies squarely with Avista.⁹ We will grant Avista additional time, until April 30, 2008, to file the required draft evaluation plan. We will also adopt the schedule agreed to at the March 24, 2008, hearing, including extending the date for filing for extension of decoupling, and require the Company to strictly adhere to that schedule.

32 We will also require, as agreed to at hearing by the Company, that Avista will bear the reasonable costs of the evaluation, including the costs of consultants it retained for the hearing on March 24, 2008.¹⁰

FINDINGS OF FACT

33 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated above our findings and conclusions upon issues in dispute among the parties and the reasons supporting the findings and conclusions, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

⁹ Transcript at 151:20-21, 153:20-22, 176:21-23, and 212:5-6.

¹⁰ Exhibit BJH-1T at 12:1 – 9; Transcript at 177:25 – 178:7

- 34 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including gas companies.
- 35 (2) Avista Corporation is a “public service company” and a “gas company,” as those terms are defined in RCW 80.04.010, and as those terms are used in RCW Title 80. Avista is engaged in Washington State in the business of supplying utility services and natural gas to the public for compensation.
- 36 (3) Avista filed a petition on April 5, 2006, requesting an order authorizing a natural gas decoupling mechanism that would defer certain costs and revenues in order to potentially recover fixed costs unrelated to consumption.
- 37 (4) The Commission entered a Final Order Approving Decoupling Pilot Program on February 1, 2007. This Order, in adopting a multiparty Settlement Agreement with conditions, required Avista to collaborate with all other interested parties to develop and file a draft evaluation plan of the decoupling mechanism no later than December 31, 2007.
- 38 (5) Avista did not collaborate with interested parties to develop a draft evaluation plan during 2007. Avista failed to file a draft evaluation plan by December 31, 2007, or to file a motion to extend time for submitting a draft plan.
- 39 (6) The delay in developing or filing a draft evaluation plan does not appear to have irreparably harmed the substantive value of such a plan at this time.
- 40 (7) Avista’s delay in developing an evaluation plan has imposed burdens and costs upon other parties and the Commission.
- 41 (8) Avista has agreed to bear the reasonable costs of the evaluation without recovery in rates.
- 42 (9) An evaluation of Avista’s partial decoupling pilot program remains important to determining the value of decoupling mechanisms for regulated utilities and consumers in Washington, regardless of whether Avista seeks to continue the program after the three-year pilot period expires.

- 43 (10) Avista has agreed to file a draft evaluation plan by April 30, 2008, 120 days after the date required in Order 04.

CONCLUSIONS OF LAW

44 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

- 45 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding. *RCW Title 80.*
- 46 (2) Avista failed to comply with the requirements of Order 04 and is in breach of its Settlement Agreement.
- 47 (3) Failure to comply with Commission Order 04 violates RCW 80.04.380 and subjects the Company to penalty of up to \$1,000 per day or a total of \$100,000 for the (100) days between December 31, 2007, and April 10, 2008.
- 48 (4) The facts in this case and the context of Avista's other failures to comply with Commission rules and orders warrants a penalty in the amount of \$50,000.
- 49 (5) The Commission should retain jurisdiction over the subject matter of and the parties to this proceeding to effectuate the terms of this Order. *RCW Title 80.*

ORDER

50 THE COMMISSION ORDERS THAT

- 51 (1) Avista must pay a cumulative penalty of \$50,000 for the days it has failed to comply with the terms of Order 04, from December 31, 2007, through April 10, 2008.
- 52 (2) Avista must file a draft evaluation plan that has been developed through a collaborative process with interested parties by April 30, 2008. Any party wishing to object to the draft evaluation plan must file its objections or comments no later May 9, 2008.

- 53 (3) Avista must file a final evaluation report of its pilot decoupling mechanism project no later than March 31, 2009.
- 54 (4) Avista may not request to extend the term of or modify its decoupling mechanism until April 30, 2009. The pilot decoupling project shall not be extended beyond its expiration date of June 30, 2009, unless the Commission takes affirmative action in that regard.

Dated at Olympia, Washington, and effective April 11, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.