

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,  
  
Complainant,

v.

AVISTA CORPORATION, d/b/a AVISTA  
UTILITIES,  
  
Respondent.

Docket No. UE-100467  
Docket No. UG-100468  
(consolidated)

PUBLIC COUNSEL MOTION FOR  
PAYMENT OF EXPERT WITNESS  
COSTS

2010 MAY -7 AM 10:01

**I. MOTION**

1. Pursuant to RCW 80.20.020, WAC 480-07-375, and paragraph 19 of the Complaint and Order Suspending Tariff Revisions and Order of Consolidation (Order No. 01),<sup>1</sup> Public Counsel hereby moves the Washington Utilities and Transportation Commission (Commission) for an order requiring Avista Corporation (Avista) to pay amounts not to exceed \$150,000 in total, for Public Counsel's reasonable expert witness costs in this case. This amount is an estimate of Public Counsel's reasonable expert witness costs based on our review of Avista's initial filing and experience in previous Avista general rate cases. This Motion is supported by the attached Declaration of Simon J. ffitch.

<sup>1</sup> Providing, "Avista Corporation shall pay the expenses reasonably attributable and allocable to the Commission's investigation, consistent with RCW 80.20" (hereinafter *Suspension Order*). See also, Op. Atty. Gen. 1979, L.O. No. 26 (requiring that a tariff change matter be suspended for investigation for the cost assessment provisions of RCW 80.20.020 to be applicable).

2. A schedule for testimony and hearing has now been adopted in this case and time for witnesses to assist with discovery and prepare testimony is now growing shorter.<sup>2</sup> Accordingly Public Counsel requests that the Commission give this Motion expedited treatment.

## II. MEMORANDUM

### A. Public Counsel's Expert Witness Funding Is Encompassed Within The Regulatory Fees And Costs Collected From Utilities.

3. Washington law provides that utilities must bear the reasonable cost of regulation. This is accomplished through a system of regulatory assessment fees established under RCW Chapter 80.24. Each year, utilities file reports of their gross revenues and pay a regulatory fee based on a percentage of gross revenues. These funds are then remitted to the State Treasurer<sup>3</sup> and deposited in the Public Service Revolving Fund (PSRF).<sup>4</sup>

4. The Commission is required to fix the regulatory fee at a level such that the amount collected from utilities "shall be approximately the same as the reasonable cost of supervising and regulating" those companies. RCW 80.24.030 states that it is the Legislature's intent that each group of utilities "contribute sufficient in fees... to pay the reasonable cost of regulating" the group. Regulatory assessment fees are not ultimately borne by utilities but are recovered in rates from their customers.

5. In the event that fees are insufficient in a particular case, the Commission may order a utility to pay expenses not covered by the existing regulatory fee. RCW 80.20.020 provides, in pertinent part:

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<sup>2</sup> Direct testimony of non-company parties is due in approximately four months, on September 2, 2010. See Prehearing Conference Order; Notice of Hearing (Order No. 01), Appendix B.

<sup>3</sup> RCW 80.24.040.

<sup>4</sup> RCW 80.01.080.

Whenever the commission in any proceeding upon its own motion or upon complaint shall deem it necessary in order to carry out the duties imposed upon it by law to investigate the books, accounts, practices and activities of, or make any valuation or appraisal of the property of any public service company, or to investigate or appraise any phase of its operations, or to render any engineering or accounting service to or in connection with any public service company, and the cost thereof to the commission exceeds in amount the ordinary regulatory fees paid by such public service company during the preceding calendar year or estimated to be paid during the current year, whichever is more, such public service company shall pay the expenses reasonably attributable and allocable to such investigation, valuation, appraisal or services[.]

The statute includes mandatory language, stating that whenever reasonable costs exceed the regulatory fees paid by a utility, the utility *shall* pay such costs. The Commission's Suspension Order in this proceeding specifically provides notice to Avista that RCW 80.20.020 is applicable here and may be used to require additional payment of investigation-related costs from Avista.<sup>5</sup>

**B. The Commission Has Authority Within the Existing Statutory Funding Scheme To Order Avista To Pay Public Counsel's Reasonable Expert Witness Costs.**

6. Public Counsel has the duty under RCW Chapters 80.01 and 80.04 to represent the public in matters before the Commission. RCW 80.01.100 and 80.04.510 declare: “[i]t *shall be the duty* of the attorney general to represent and appear for the people of the state of Washington... in all actions and proceedings involving any question under this title...”<sup>6</sup> Public Counsel is specifically designated by the Attorney General and acknowledged by the Commission in this proceeding to appear on behalf of the public as a representative of Avista's ratepayers.<sup>7</sup>

7. The Washington Supreme Court has recognized that the provisions of RCW 80.20.020 extend to the funding of customer representation by the Attorney General. In *POWER v. Washington Water Power Co.*, the Court held that RCW 80.20.020 applies to the Attorney

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<sup>5</sup> *Suspension Order*, ¶ 19.

<sup>6</sup> Emphasis added.

General's costs of retaining expert witnesses necessary to aid in its rate case representation when acting as counsel for the public.<sup>8</sup> The Court stated:

Under existing statutes the Attorney General is authorized to hire special assistant attorneys general. [statutory citations omitted]. The special assistant is authorized to hire the "experts, scientists, technicians, or other specially qualified persons as he deems necessary" to aid in a proceeding. RCW 43.10.080.[<sup>9</sup>] See also RCW 80.20.020. RCW 80.01.100 imposes on the attorney general the "duty ... to represent and appear for the people of the state of Washington" in all ratemaking actions before the Commission under RCW Titles 80 and 81. *These costs must be borne by the utility.* RCW 80.20.020. [additional citations omitted].<sup>10</sup>

8. The effect of this ruling has been incorporated and reflected in the long-standing mechanism in place for funding the Public Counsel office through the PSRF as a component of the regulatory scheme – public representation paid for by the public. Thus, Public Counsel's expert witness costs are part of "the expenses reasonably attributable and allocable to such investigation, valuation, appraisal or services."<sup>11</sup>

**C. Public Counsel's Costs Exceed Ordinary Regulatory Fees Paid by Avista and Allocated to Public Counsel.**

9. Public Counsel's entire expert witness budget for the 2009-2011 biennium has been exhausted.<sup>12</sup> Thus, Public Counsel will not be able to retain experts in this case without additional funds.<sup>13</sup>

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<sup>7</sup> Notice of Prehearing Conference, ¶¶ 9 and 11; Prehearing Conference Order; Notice of Hearing, ¶ 4 and Appendix A.

<sup>8</sup> *POWER v. Washington Water Power Co.*, 99 Wn.2d 289, 295, 662 P.2d 374, 378 (1983) (hereinafter *POWER*). The case was decided before the formal establishment of Public Counsel as a unit within the Attorney General's Office, during the period when the Public Counsel function was performed by special assistants appointed by the AG. The current performance of this function by AAGs rather than special assistants does not affect the applicability of the holding with respect to the Attorney General's role.

<sup>9</sup> RCW 43.10.080 applies generally to the Attorney General and is not limited to special assistants.

<sup>10</sup> *POWER*, 99 Wn.2d at 295 (internal citations omitted, emphasis added). *POWER* was affirmed on reconsideration. 102 Wn.2d 260 (1984).

<sup>11</sup> RCW 80.20.020.

<sup>12</sup> Declaration of Simon J. Fitch, ¶ 7 (hereinafter Declaration).

10. As a practical matter, it is not possible to track specific utility assessment payments to specific dollars in the Public Counsel budget, since the budget is not developed on a company by company basis. However, a reasonable estimate can be calculated from currently-available information. This information shows that Public Counsel's costs of participating in Avista cases in this biennium have substantially exceeded the portion of Public Counsel's expert budget attributable to Avista regulatory payments.

11. For the year 2008, the Commission received regulatory fees from regulated gas, electric, and telephone companies totaling \$12,391,269. Avista's portion of this amount was \$1,287,472 or approximately 10 percent.<sup>14</sup> Public Counsel's total budget for expert witnesses for the 2009-2011 was set at \$400,000.<sup>15</sup> The budget was intended to cover all electricity, gas, and telecommunications matters before the Commission in which Public Counsel might participate. Applying the 10 percent of regulatory fee payments attributable to Avista to the Public Counsel expert budget, approximately \$40,000 of the Public Counsel's biennial expert witness budget can be attributed to Avista's regulatory fee payments.<sup>16</sup>

12. Avista's previous rate case<sup>17</sup> imposed costs on Public Counsel's biennial expert witness budget in excess of the Avista portion of the budget. Public Counsel's expenditures for expert

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<sup>13</sup> *Id.*

<sup>14</sup> The exact portion of regulatory fees for these industry groups paid by Avista is 10.39 percent. Public Counsel requests that the Commission take official notice under WAC 480-07-495(2)(a) of the regulatory assessment fee data on file at the Commission. The 2010 data (covering assessments in connection with 2009 revenues) was filed at the beginning of May and was not available to Public Counsel for the filing of this motion.

<sup>15</sup> This was a reduction of \$112,000 or over 20 percent from the budgeted level for the preceding 2007-2009 biennium. See Declaration, ¶ 5.

<sup>16</sup> The actual Avista 10.39 percent share of the PSRF payments applied to the Public Counsel budget amounts to \$41,561.

<sup>17</sup> *WUTC v. Avista Corporation*, Docket Nos. UE-090134, UG-090135, and UG-060518 (consolidated) (hereinafter *2009 Avista GRC*).

witnesses for the prior Avista rate case were \$173,300.<sup>18</sup> Of that amount, \$106,117 was paid in the current biennium, easily exceeding the \$40,000 of the Public Counsel expert budget allocable to Avista.<sup>19</sup> Thus *any* expert witness expenditure for the instant case would also exceed the amounts paid by Avista.

**D. An Order Providing Additional Funding Is Necessary For Public Counsel To Carry Out The Duties Imposed Upon It By Law.**

13. Public Counsel cannot meaningfully participate in this case without expert witness funding. Public Counsel does not have the staff necessary to thoroughly review and analyze a general rate case filing. Moreover, presentation of positions and recommendations solely by means of cross-examination and briefing significantly limits the breadth and scope of review which Public Counsel is able to perform; it is a supplement rather than a substitute for the presentation of expert testimony.

4. The Washington Supreme Court has observed that the ability to present expert witnesses is necessary for a public representative's effective participation in Commission proceedings.<sup>20</sup> In *POWER*, the Court held that the public consumer advocate could provide adequate representation in a general rate proceeding because, in part, he was authorized to hire expert witnesses:

Commentators generally suggest effective public participation in utility regulatory proceedings depends largely on the consumer advocate's ability to employ expert witnesses to testify on behalf of residential consumers in utility proceedings. *Without technical resources sufficient to match those of the utility companies they oppose, consumer advocates will become little more than nominal representatives of the public interest. . . .* The [public consumer advocate] is authorized to hire

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<sup>18</sup> Declaration, ¶ 6.

<sup>19</sup> *Id.*

<sup>20</sup> *POWER*, 99 Wn.2d at 298.

the ‘experts, scientists, technicians, or other specially qualified persons as he deems necessary’ to aid in a proceeding.”<sup>21</sup>

Other commentators have reiterated that “the ability to hire expert witnesses is critical to effective representation by a public advocate.”<sup>22</sup>

15. Public Counsel has no alternative means for presenting expert witness testimony. Public Counsel’s technical staff, consisting of 2.3 analysts, does not have the professional qualifications to present expert testimony on the cost of capital, rate spread/rate design, power costs, or revenue requirement issues presented in this case.<sup>23</sup> In addition, Public Counsel regulatory analysts have a broad range of job duties. It is not feasible to assign them to the resource-intensive task of preparing and presenting testimony in a general rate case without impairing other essential functions of the Office. These job duties include: litigation support and case management for this and other cases; preparation, tracking, and review of discovery; representation of Public Counsel in rulemakings including drafting comments; representation of Public Counsel on utility collaborative and advisory committees; substantive research; and, representation of Public Counsel on Commission Open Meeting agenda items.<sup>24</sup>

**E. Public Counsel’s Presentation Of Expert Testimony In This Proceeding Is Important.**

16. Public Counsel’s involvement in this specific rate case is important. Avista’s requested increase would place a substantial burden on residential and small business consumers; the Company is requesting to raise residential and small business electric rates by 14.8 and 12.4

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<sup>21</sup> *POWER*, 99 Wn.2d at 294-95 (internal citations omitted).

<sup>22</sup> See *Consumer Representation at PURPA Hearings*, 20 Gonz. L. Rev. 567, 579 (1985) (internal citations omitted).

<sup>23</sup> Declaration, ¶ 9. Public Counsel has only one full time analyst, along with a 0.7 analyst position and a 0.6 position. *Id.*

<sup>24</sup> *Id.*

percent respectively, and natural gas rates by over six percent for both classes of customers.<sup>25</sup>

These increases are even more burdensome given the fact that Avista was authorized to raise rates in 2007<sup>26</sup>, 2008<sup>27</sup>, and 2009.<sup>28</sup>

17. In its Final Order in the previous Avista case, the Commission expressly left open a number of important issues for parties to address in the next case, including: prudence of Avista's investment in the Lancaster Purchase Power Agreement (PPA),<sup>29</sup> cost-effectiveness, and results-measurement of Avista's demand-side management (DSM) programs,<sup>30</sup> Avista's incentive compensation program,<sup>31</sup> impact of decoupling on Avista's return on equity (ROE),<sup>32</sup> and application of decoupling on non-residential customers.<sup>33</sup> Public Counsel presented testimony on all of these issues in the previous case and would plan to retain expert witnesses on one or more of these issues if funds were made available on behalf of the public.

18. Other issues may also come to light. Avista has filed direct testimony, exhibits, and workpapers from seventeen individual witnesses, which may raise additional matters of importance to the customers represented by Public Counsel.

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<sup>25</sup> Summary of Requested Rate Increase, Electric Service, p. 1; Summary of Requested Rate Increase, Natural Gas Service, p. 1.

<sup>26</sup> *WUTC. v. Avista Corporation d/b/a Avista Utilities*, Final Order Rejecting Tariff Sheets; Approving and Adopting Settlement Stipulation; Requiring Compliance Filing (Order No. 05), Docket Nos. UE-070804/UG-070805 (consolidated), ¶¶ 26-27.

<sup>27</sup> *WUTC. v. Avista Corporation d/b/a Avista Utilities*, Final Order Approving and Adopting Multi-Party Settlement Stipulation and Requiring Compliance Filing (Order No. 08), Docket Nos. UE-080416/UG-080417 (consolidated), ¶¶ 15 and 79.

<sup>28</sup> *2009 Avista GRC*, Final Order Rejecting Tariff Filing; Approving and Adopting Multi-Party Partial Settlement Stipulation; Deferring Lancaster Costs; Extending Decoupling Mechanism; Authorizing Tariff Filing; and Requiring Compliance Filing (Order No. 10), ¶ 10.

<sup>29</sup> *Id.* at ¶¶ 226-232.

<sup>30</sup> *Id.* at ¶ 305.

<sup>31</sup> *Id.* at ¶ 129.

<sup>32</sup> *Id.* at ¶ 308.

<sup>33</sup> *Id.* at ¶ 303. This case will also review of a new cost of service study, rate spread, and rate design, which have important effects on residential and small business customers.



- Scott L. Morris – Overview and summary
- Elizabeth M. Andrews – Results of operations, restating, and pro forma adjustments
- Dr. William E. Avera – Capital structure and return on equity
- Kevin J. Christie – Jackson Prairie natural gas storage facility acquisition
- Dave B. DeFelice – Pro forma adjustments for capital investments
- Patrick D. Ehrbar – Rate spread, rate design; application of decoupling mechanism to non-residential classes
- Karen S. Feltes – Incentive compensation program
- Bruce W. Folsom – DSM and energy efficiency program prudence
- William G. Johnson – Pro forma adjustments for power supply and ERM credit
- Clint G. Kalich – Resource modeling (AURORA<sub>XMP</sub>) and ERM modifications
- James M. Kensok – Increasing costs of information technology
- Scott J. Kinney – Pro forma period transmission revenues and expenses
- Tara L. Knox – Cost of service studies
- Don F. Kopczynski – Energy delivery facilities and operations; customer support programs
- Robert J. Lafferty – Lancaster PPA acquisition
- Richard L. Storro – Resource planning and power supply operations
- Mark T. Thies – Overall rate of return, cost of total debt and equity, and capital structure

9. In order to address the above issues, Public Counsel believes that an amount of \$150,000 (as a cap) is a reasonable projection of Public Counsel's expert witness costs. This amount is based on our review of Avista's initial filing and experience in previous Avista general rate cases, in particular the 2009 docket.<sup>34</sup>

**F. The Funding and Payment Mechanism Would Follow Current Procedures.**

20. The mechanics of a cost assessment should not present any administrative difficulty and would follow the procedures laid out in the RCW 80.20.020 and other applicable statutes or rules. Consistent with that, Public Counsel anticipates that payment would be made to the Commission for deposit in the PSRF for the use of Public Counsel as costs are incurred.

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<sup>34</sup> Declaration, ¶ 10. Public Counsel's request does not exceed the cap set by RCW 80.20.020. Based on Avista's gross intrastate gas and electric operating revenues of \$643.7 million for 2008, the cap is \$6.43 million.

### III. CONCLUSION

21. For the foregoing reasons, Public Counsel hereby moves the Commission for an Order requiring Avista to pay an amount not to exceed \$150,000 for Public Counsel's reasonably anticipated expert witness costs in this case.

22. DATED this 6<sup>th</sup> day of May, 2010.

ROBERT MCKENNA  
ATTORNEY GENERAL



Simon J. Fitch  
Senior Assistant Attorney General

Sarah A. Shifley  
Assistant Attorney General