

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

WASHINGTON UTILITIES AND)	DOCKETS UE-100467
TRANSPORTATION)	and UG-100468
COMMISSION,)	(consolidated)
)	
Complainant,)	ORDER 05
)	
v.)	
)	ORDER DENYING PUBLIC
AVISTA CORPORATION d/b/a)	COUNSEL’S MOTION
AVISTA UTILITIES,)	FOR PAYMENT OF EXPERT
)	WITNESS COSTS
Respondent.)	
.....)	

1 **NATURE OF PROCEEDINGS.** On March 23, 2010, Avista Corporation d/b/a Avista Utilities (Avista or Company) filed with the Washington Utilities and Transportation Commission (Commission) revisions to its currently effective Tariff WN U-28, Electric Service in Docket UE-100467, and revisions to its currently effective Tariff WN U-29, Gas Service in Docket UG-100468. The proposed revisions would have implemented a general rate increase of \$55.3 million, or 13.4 percent, for electric service and \$8.5 million, or 6.0 percent, for gas service. The stated effective date of the proposed tariff revisions was April 23, 2010; however, the Commission suspended the filings on April 5, 2010, consolidated the two dockets, and set the matters for hearing in November 2010. *See Order 01 and Order 02.*

2 **PUBLIC COUNSEL’S MOTION.** On Thursday, May 6, 2010, Public Counsel filed a motion seeking an order requiring Avista to pay up to \$150,000 toward costs Public Counsel might incur to hire expert witnesses in this case. Public Counsel relies on Revised Code of Washington (RCW) 80.24 and RCW 80.20.020, providing recovery of costs of Commission investigation from regulated utilities, as the legal basis for assessing additional regulatory fees on the Company. It cites *POWER v. Washington*

*Water Power Co (POWER)*¹ for the proposition that costs of Public Counsel are among the costs authorized to be collected from utilities pursuant to RCW 80.20.020.² Public Counsel asserts that its costs to hire expert witnesses are reasonable despite exceeding the amount allocated to Public Counsel from the ordinary regulatory fees paid by Avista each year.

3 Public Counsel explains that it has already exhausted its budget of \$400,000 for hiring expert witnesses in the 2009-2011 biennium. Public Counsel argues that it will not be able to retain experts, hindering its meaningful participation in these dockets, without additional funding. Public Counsel posits that the Commission could receive payment from Avista, deposit the monies into the Public Service Revolving Fund (PSRF), and allow Public Counsel to draw on those funds as costs are incurred.

4 **AVISTA’S RESPONSE.** On May 14, 2010, Avista filed its answer opposing Public Counsel’s motion. According to Avista, Public Counsel’s request would have the Commission unilaterally override the judgment of the Attorney General in proposing a budget and the Washington State Legislature in adopting one. Further, Avista contends that Public Counsel failed to explain how or why it has already expended its two-year budget for expert witnesses within the first year of the budget period.

5 Avista argues that RCW 80.20.020 does not apply to Public Counsel, which is a unit within the Office of the Attorney General.³ Nor does the statute apply without a showing that the “ordinary regulatory fees” paid by the Company have proven insufficient to fund the Commission’s regulatory duties. In addition, Avista points out that Public Counsel’s overspending alone does not lead to the conclusion that the Company’s regulatory fees are insufficient. Avista suggests that if Public Counsel requires additional funding, a supplemental appropriation advocated by the Attorney General’s Office as part of its budget is the correct approach. Given that no such

¹ 99 Wn.2d 289, 662 P.2d 374 (1983), *aff’d on reconsideration*, 102 Wn.2d 260, 684 P.2d 716 (1984).

² Public Counsel Motion at 3-4.

³ The statutory basis for Public Counsel is contained in RCW 80.01.100, which states in part: “It shall be the duty of the attorney general to represent and appear for the people of the State of Washington and the commission in all actions and proceedings involving any question under this title or Title 81 RCW” *See also* RCW 80.04.510. The term “public counsel” is found only in RCW 80.04.110 (relating to complaints).

request was made during the 2010 legislative session, the Company expresses its confidence in Public Counsel's ability to effectively participate in this case.

6 **COMMISSION DECISION.** Every public service company is obligated under RCW 80.24 to pay a fixed percentage of its annual gross intrastate operating revenue into the PSRF.⁴ In 2009, Avista paid nearly \$1.3 million into this fund. Public Counsel argues that the Company should now be required to deposit an additional \$150,000 to fund the hiring of Public Counsel's expert witnesses for this case. As explained below, we deny Public Counsel's motion.

7 Public Counsel relies on RCW 80.20.020 to support its request to fund additional expert witnesses. In its entirety, this section provides as follows (emphasis added):

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 commission shall ascertain such expenses, and, after giving notice and an opportunity to be heard, shall render a bill therefore by registered mail to the public service company, either at the conclusion of the investigation, valuation, appraisal or services, or from time to time during its progress. Within thirty days after a bill has been mailed such public service company shall pay to the commission the amount of the bill, and the commission shall transmit such payment to the state treasurer who shall credit it to the public service revolving fund. The total amount which any public service company shall be required to pay under the provisions of this section in any calendar year shall not exceed one percent of the gross operating revenues derived by such

⁴ See RCW 80.24.020, which provides that fees collected in the PSRF are to "be approximately the same as the reasonable cost of supervising and regulating" the public service companies making the payments. See also RCW 80.24.030.

public service company from its intrastate operations during the last preceding calendar year. If such company did not operate during all of the preceding year the calculations shall be based upon estimated gross revenues for the current year.

8 As Avista points out, by its express language, this statute can be invoked only if *Commission* expenses surpass the regulatory fees paid by Avista.⁵ By its terms, it does not apply to Public Counsel. Nor do other statutes that establish the regulatory fee system for funding the Commission’s activities reference Public Counsel.⁶

9 Public Counsel relies on the *POWER* case for its argument that costs of Public Counsel are covered by RCW 80.20.020.⁷ The issue in *POWER* was whether a public interest group was entitled to recovery of attorneys fees with respect to intervention in a Commission rate proceeding pursuant to the federal Public Utility Regulatory Policies Act (PURPA). PURPA would allow recovery of attorneys fees, but not if the state commission “has provided an alternative means for providing adequate compensation”⁸ At that time, the Attorney General had not formally created the Office of Public Counsel, but instead retained special assistant attorneys general to fulfill the role of public representation. That role, the Court held, was an adequate alternative means of public representation. The Court noted that, pursuant to the Attorney General’s general authority, such special assistants could hire experts to assist in the case.⁹ The Court went on to note that such costs “must be borne by the utility.”¹⁰ However, we do not interpret this citation to hold that RCW 80.20.020 obligates utilities to fund all of Public Counsel’s expert witness costs.

⁵ Avista Answer at 2.

⁶ See RCW 80.24.020 (“the fees collected from the several classes of companies shall be approximately the same as the reasonable cost of *supervising* and *regulating* such classes of companies”); RCW 80.24.030 (“the several groups of public service companies shall each contribute sufficient in fees to the commission to pay the *reasonable cost of regulating* the several groups respectively. . . .”).

⁷ Public Counsel Motion at 3-4.

⁸ 99 Wn.2d at 293, *citing* 16 U.S.C. § 2632(b).

⁹ 99 Wn.2d at 295.

¹⁰ *Id.*

10 It appears, however, that, in the context of the *POWER* case, costs of special assistant attorneys general assigned by the Attorney General to represent the interests of the public were assessed against Washington Water Power (WWP), Avista's predecessor, pursuant to RCW 80.20.020. In the Company's brief to the Supreme Court, counsel for Washington Water Power stated:

In accordance with the provisions of RCW 80.20.020, a 'special investigatory fee' was assessed against WWP by the Commission, in order to defray the costs associated with investigating and hearing Cause Nos. U-80-13 and -14. The Commission's costs of investigation billed to and paid by WWP in the above cause numbers totaled \$185,761.75. Included in that sum was \$24,794.84 attributed to the fees and costs of the Special Assistant Attorney General¹¹

11 Therefore, it appears that there is some tension between the plain language of the statute (which would seem to support Avista's position in this case) and past administrative practice of the Commission, apparently recognized by Avista's predecessor company (which would seem to support Public Counsel's position).¹² However, we need not opine on the legal proposition Public Counsel infers from the *POWER* Court's citation to RCW 80.20.020. This is for two reasons.

12 First, even if *POWER* could be construed to afford relief under the statute in question, Public Counsel presents no evidence demonstrating that Avista's May 2009 payment of \$1,287,473 in regulatory fees was insufficient to fund the Commission's regulation of Avista, including our contribution to Public Counsel's budget. Instead, Public Counsel's argument focuses on the perceived shortfalls of its own budgetary

¹¹ Brief of Respondent at 33, *POWER v. Washington Water Power Co.*, S.Ct. No. 48413-9 (1982). The brief also indicated that in addition to the \$185,761.75 paid in a "special investigatory fee," Washington Water Power also had paid its annual "regulatory fee" of \$131,521.82 for 1980. *Id.* at 34.

¹² Counsel for Washington Water Power suggested in its *POWER* brief that perhaps expert witness fees would not be recoverable through the Public Service Revolving Fund. *Id.* at 25. So, whatever "admission" can be gleaned from Washington Water Power's brief with regard to reliance on RCW 80.20.020 to fund attorneys representing the public, that statute may not cover costs of expert witnesses.

allotments for the current biennium. Absent evidence of the insufficiency of Avista's regulatory fee, we must deny Public Counsel's motion.

13 Second, because RCW 80.20.020 gives the Commission the authority to trigger its provisions, not Public Counsel, at most, the statute would confer discretion on the Commission to recover its costs (and possibly Public Counsel's costs) from the Company.¹³ It is discretion we decline to exercise in this case. Given the statutory construct, and consistent with historical practice, Public Counsel's proposed financial solution would be better advocated to the Legislature. As Avista correctly states in its responsive pleading, the Attorney General and the Legislature control the budgetary planning and the tracking of actual and estimated expenses for Public Counsel. The Attorney General did not include in either its initial budget request for the 2009-2011 biennium, nor in its supplemental budget request for the 2010 session, a budget proposal to increase expert witness funding for Public Counsel.¹⁴ Even if the facts of this case were such that Avista's annual regulatory fee were insufficient to cover all the costs of its pending rate case, we would be loath to substitute our judgment for that previously exercised by the Office of the Attorney General in making budget requests, or the Legislature in fixing the budget.¹⁵

14 In conclusion, while we recognize the importance of ratepayer representation by Public Counsel, Public Counsel has not persuaded us that there is any basis for the relief it seeks.

¹³ The provisions of RCW 80.20.020 operate "[w]henver . . . the commission . . . shall deem it necessary"

¹⁴ Avista Answer at 6.

¹⁵ Public Counsel is not without options. Though, historically, Public Counsel has received its funds from the Legislature through an appropriation from the PSRF, we are aware of no statutory restriction on Public Counsel being funded from other sources as well. The Attorney General has, in the past, fulfilled its other public interest representation obligations without a dedicated funding source. *See, e.g.*, RCW 80.50.080 (Counsel for the Environment in proceedings before the Energy Facility Site Evaluation Council).

ORDER

THE COMMISSION ORDERS That Public Counsel's Motion for Payment of Expert Witness Costs is denied.

Dated at Olympia, Washington, and effective May 25, 2010.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner