BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Joint Application of HYDRO ONE LIMITED and AVISTA CORPORATION For an Order Authorizing Proposed Transaction	DOCKET U-170970 HYDRO ONE LIMITED AND AVISTA CORPORATION'S OPPOSITION TO LAUREN FINK AND CHADWICK L. WESTON'S PETITION TO INTERVENE

I. INTRODUCTION

1. The Washington Utilities and Transportation Commission (Commission) should refuse to sanction the forum shopping tactics of Lauren Fink and Chadwick L. Weston (Shareholders Fink and Weston). Shareholders Fink and Weston are shareholders of Avista Corporation (Avista) who have made strategic and tactical decisions—and in many instances errors, one of which was to file a late petition to intervene in this proceeding—to thwart the merger of Hydro One Limited (Hydro One) and Avista.

2. These two shareholders' attempt to intervene late in this proceeding is not only forum shopping, it is also an abuse of this Commission's process and jurisdiction, which focuses on the protection of customer, rather than shareholder, interests. Indeed, addressing shareholder interests would undermine the work and role of the Commission in this proceeding because shareholder interests are not cognizable under the applicable ***net-benefits-to-customers*** standard. In addition, Shareholders Fink and Weston have no valid reason for their late filing. Moreover, they have decided to pursue their court claims after the transaction closes, indicating that their true goal is obtaining monetary relief. Hydro One and Avista respectfully ask the Commission to deny the petition to intervene.

II. RELIEF REQUESTED

3. Hydro One and Avista respectfully request that the Commission issue an order denying Shareholders Fink and Weston intervenor status in this proceeding.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Shareholders Fink and Weston Failed to File a Timely Petition to Intervene

4. On September 14, 2017, Hydro One (acting through Olympus Equity LLC, an indirect, wholly-owned subsidiary) and Avista filed a Joint Application for an Order Authorizing Proposed Transaction whereby Olympus Equity LLC would acquire all of the outstanding common stock of Avista, and Avista would become a direct, wholly-owned subsidiary of Olympus Equity LLC and an indirect, wholly-owned subsidiary of Hydro One.

5. On September 28, the Commission issued a Notice of Prehearing Conference, setting October 20, 2017, as the date for a prehearing conference.

6. The deadline to file petitions to intervene was three days before the prehearing conference, October 17, 2017.[1] Shareholders Fink and Weston do not allege they lacked notice of the deadline, yet they did not petition to intervene until January 9, 2018, almost three months after the Commission's clearly established deadline.

B. Forum Shopping Expedition by Shareholders Fink and Weston

7. On September 15, 2017, Lauren Fink, purporting to act on behalf of Avista's shareholders, filed a lawsuit, *Fink v. Morris, et al.*, case no. 17203616-6, in the Superior Court for the State of Washington for Spokane County. *See* Declaration of David J. Meyer in Support

[1] Commission rules establish a straightforward deadline for petitions to intervene: "Written petitions to intervene should be filed at least three business days before the initial hearing date or prehearing conference date, whichever occurs first." WAC 480-07-355(1)(a).

of Hydro One Limited and Avista Corporation's Opposition to Lauren Fink and Chadwick L. Weston's Petition to Intervene ("Meyer Decl.") at ¶ 2. Fink's superior court suit named Scott L. Morris, Kristianne Blake, R. John Taylor, Erik J. Sanderson, Heidi B. Stanley, Marc Racicot, Rebecca A. Klein, Donald C. Burke, Janet D. Widman, and Scott H. Maw (the "Avista Directors"), as well as Hydro One, Olympus Holding Corp., and Olympus Corp. as defendants. *Id.* The suit alleged that the Avista Directors breached their fiduciary duties in relation to the merger, aided and abetted by Hydro One, Olympus Holding Corp., and Olympus Corp., and sought to enjoin the merger. *Id.*

8. On September 25 and 26, 2017, four different plaintiffs' law firms filed three separate actions in the U.S. District Court for the Eastern District of Washington: (i) *Jenß v. Avista Corp., et al.*, case no. 2:17-cv-333 (E.D. Wash. filed Sept. 25, 2017), (ii) *Samuel v. Avista Corp., et al.*, case no. 2:17-cv-334 (E.D. Wash. filed Sept. 26, 2017), and (iii) *Sharpenter v. Avista Corp., et al.*, case no. 2:17-cv-336 (E.D. Wash. filed Sept. 26, 2017).[2] *Id.* at ¶ 3. The suits were substantially similar, each alleging that the proxy statement filed by Avista in connection with the merger omitted material facts necessary to make the statements therein not false or misleading, in violation of federal securities laws. *Id.* The suits named as defendants Avista and the Avista Directors (Sharpenter also named Hydro One, Olympus Holding Corp., and Olympus Corp. as defendants) and sought to enjoin the merger. *Id.*

9. In Fink's Superior Court suit, plaintiffs subsequently filed two amended complaints. *Id.* at ¶ 4. The first, filed on October 10, 2017, included new allegations attacking the sales process undertaken by the Avista Board and sought damages. *Id.* It also added

[2] This use of the German Eszett, *ß*, reflects the spelling used by the plaintiff in that lawsuit. In order to maintain consistency, this spelling is used in this filing as well.

defendant Bank of America Merrill Lynch and another plaintiffs' law firm—Robbins Geller Rudman & Dowd LLP. *Id.* The second amended complaint, filed on October 26, 2017, added a second plaintiff. *Id.*

C. Avista Shareholders Overwhelmingly Approve the Transaction

10. Despite seven plaintiffs' law firms filing four separate actions seeking to enjoin the merger, not one actually filed a motion or sought a hearing seeking an injunction to stop Avista's shareholder vote. *Id.* at ¶ 5. On November 21, Avista's shareholders voted their shares overwhelmingly to approve the transaction—with the holders of 98% of the shares voting supporting the merger (reflecting the support of holders of 78% of all the outstanding shares).[3] *Id.* Avista's shareholders have made their position on the merger clear—they are overwhelmingly in favor of it.

D. Shareholders Fink and Weston's Belated Attempts to Highjack the *Jenß*, *Samuel*, and *Sharpenter* Proceedings

11. In light of the overwhelming support for the transaction by the Avista shareholders, the plaintiffs in *Jenß*, *Samuel*, and *Sharpenter* decided not to proceed with their lawsuits. *Id.* at ¶ 6. Although Shareholders Fink and Weston had no prior involvement with any of these three cases, on December 13, 2017, they sought to insert themselves in the actions by filing a Motion for Consolidation, Appointment as Lead Plaintiff, and Approval of Lead Plaintiff's Section of Lead Counsel. *Id.* The plaintiffs in *Jenß*, *Samuel*, and *Sharpenter*, on the other hand, filed stipulations of voluntary dismissal in each action. *Id.* On December 20, the

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[3] *See* Avista Corporation News Releases, *Avista Shareholders Approve Acquisition by Hydro One* (Nov. 21, 2017), http://avistacorp.mwnewsroom.com/press-releases/avista-shareholders-approve-acquisition-by-hydro-o-nyse-ava-gnw_1949431_001. *See also* Spokane Public Radio, An NPR Member Station, *Avista Shareholders Approve Acquisition by Hydro One* (Nov. 21, 2017, http://spokanepublicradio.org/post/avista-shareholders-approve-acquisition-hydro-one ("[T]he vote was nearly unanimous, with shareholders representing nearly 80% of Avista's outstanding stock casting ballots.").

Court entered all three stipulations, dismissing the *Jenß*, *Samuel*, and *Sharpenter* actions, including dismissing as moot the motion filed by Shareholders Fink and Weston. *Id.*

12. Shareholders Fink and Weston nevertheless continue to pursue post-closing damages claims relating to the merger, having stated their intent to file yet another amended complaint after the close of the transaction. *Id.* at ¶ 7. In light of the anticipated timing of the closing of the transaction, which is not expected until the latter half of 2018, on January 5, 2018, Shareholders Fink and Weston, and the other parties to their superior court suit, filed a stipulation with the court seeking to stay all proceedings: "all proceedings in [the] case should be stayed until after Plaintiffs' claims are framed in their operative complaint." *Id.* The superior court entered the stipulation that same day. *Id.* The stipulation calls for Shareholders Fink and Weston to file a third amended complaint no later than 30 days after Avista or Hydro One publicly announces that the transaction has closed or the suit will be dismissed with prejudice.[4] *Id.*

IV. LEGAL STANDARD

13. WAC 480-07-355 governs interventions in Commission proceedings. "The presiding officer may grant a petition to intervene if the petitioner has a substantial interest in the subject matter of the hearing or if the petitioner's participation is in the public interest." WAC 480-07-355(3). To determine if a petitioner satisfies the requirements for intervention, "the Commission applies a zone of interest test to determine whether a petitioner has shown that there

[4] Shareholders Fink and Weston's late-intervention filing in this proceeding is best understood as a thinly-veiled attempt to conduct discovery (in another forum) into highly-confidential information in furtherance of their state court action. For example, data requests have sought, among other things, board materials and consultant analyses of a highly confidential nature—materials that Shareholders Fink and West might obtain if granted intervention. Shareholders Fink and Weston should conduct their discovery in the proper state court forum, not here at the Commission.

is a nexus between the organization's [or individual's] purpose and an interest protected by a Washington statute within the Commission's jurisdiction." *E.g.*, *In re Application of Hydro One Limited and Avista Corporation for an Order Authorizing Proposed Transaction*, Docket U-170970, Order 03, ¶ 14 (November 20, 2017) (internal citations and quotation marks omitted).

14. In addition to the zone of interest requirement, petitioners who file late-filed petitions to intervene must show good cause for their untimeliness: "The commission may grant a petition to intervene made after the initial hearing or prehearing conference, whichever occurs first, only on a showing of good cause, including a satisfactory explanation of why the person did not timely file a petition to intervene." WAC 480-07-355(1)(b). *See also In re Petition of Qwest Corporation for Approval of 2007 Additions to Non-Impaired Wire Center List*, Docket UT-073033, Order 11, ¶¶ 3 and 7 (August 22, 2008) (denying late intervention of wholesale local exchange customer of Qwest in Washington).

V. ARGUMENT

15. The Commission should deny Shareholders Fink and Weston's late-filed petition to intervene for five independent reasons.

16. *First*, Shareholders Fink and Weston's interests as shareholders are not jurisdictional to the Commission, which in the context of a utility merger in particular, must determine whether the transaction results in a net benefit to the utility's customers, not its shareholders.

17. *Second*, Shareholders Fink and Weston have no satisfactory explanation for their untimely filing. By their own admission they have simply been biding their time making tactical decisions on when to file pleadings in various proceedings in various tribunals—state, federal,

and now the Commission. Shareholders Fink and Weston should not be rewarded for choosing to disregard the Commission's filing deadline in this proceeding, no matter what strategic advantage they thought it would provide them.

18. *Third*, the vast majority of the Avista shareholders have approved the merger, with the holders of 98% of the shares voting supporting the merger (reflecting the support of 78% of all the outstanding shares), refuting any suggestion that Fink and Weston's interests are representative of shareholders generally or that additional time was needed to assess whether the intervention was beneficial for Avista shareholders. Fink and Weston have not suggested their interests differ from those of other shareholders and, while they purport to represent a class of shareholders, class certification has not been sought by Fink and Weston in the Superior Court and the Superior Court has not certified a class. Meyer Decl. at ¶ 8.

19. *Fourth*, Shareholder Fink and Weston's claims are governed by Washington state law including provisions of the Revised Code of Washington other than Title 80 and common law. The Commission is not the proper forum to adjudicate these Shareholders' state law claims.

20. *Fifth*, through their actions in the court cases, Shareholders Fink and Weston have waived any right to halt the merger and to fight it in this forum.

A. Shareholders Fink and Weston's Interests Are Not Jurisdictional to the Commission

21. Shareholders Fink and Weston's interests as Avista shareholders do not fall within the zone of interests protected by a Washington statute within the Commission's jurisdiction.[5] In the specific context of a utility merger, like the one here, the Commission's

[5] *E.g., In re Joint Application of Verizon Communications, Inc. and Frontier Communications Corporation for an Order Declining to Assert Jurisdiction Over, or, in the Alternative Approving the Indirect Transfer of Control of Verizon Northwest, Inc.*, Docket UT-090842, Order 05, ¶ 14 (September 10, 2009) ("For the purpose of analyzing whether a party has a substantial interest in the proceeding, we apply the zone of interest test which would require

mandate is to ensure "a net benefit to the customers of the company." RCW 80.12.020(1). Shareholders Fink and Weston are not Avista customers. Their interests are thus not contemplated, let alone protected, by the Washington statute that defines the Commission's jurisdiction in this proceeding.[6]

22. More generally, the Commission regulates in the public interest the rates, services, facilities, and practices of investor-owned utilities. RCW 80.01.040(3). The Commission is charged with ensuring utility rates and practices are safe and reliable, and just, fair, and reasonable. RCW 80.28.020. These general statutory duties do not include any requirement to protect the interests of individual shareholders, particularly those like Fink and Weston who do not even live in Washington State.

23. The Commission previously recognized the jurisdictional limits on interests that are cognizable in this proceeding through Order 03. *In re Application of Hydro One Limited and Avista Corporation for an Order Authorizing Proposed Transaction*, Docket U-170970, Order 03, ¶ 14 (November 20, 2017) ("We agree with Staff that such interests, related solely to collective bargaining issues, are not jurisdictional to the Commission."). In that order, the Commission allowed the limited intervention of the Washington and Northern Idaho District Council of Laborers (WNIDCL) solely for the purpose of addressing "***safety and reliability of service to customers*** where its members are actually involved in the provision of such service."

[the petitioner] to demonstrate a nexus between the *purpose* of its organization and an *interest* protected by a Washington statute within the Commission's jurisdiction.").

[6] We are aware of one utility merger, in Louisiana, in which shareholders were granted intervenor status. That case is distinguishable because there the shareholders sought timely intervention and because Louisiana law requires the Louisiana Public Service Commission to evaluate "whether the transfer will be fair and reasonable to the majority of all affected public utility shareholders." *In re Joint Application of Cleco Power LLC and Cleco Partners L.P. for: (i) Authorization for the Change of Ownership and Control of Cleco Power LLC and (ii) Expedited Treatment*, Order No. U-33434-A at 2, 12, and 48 (April 7, 2016). There is no similar requirement under Washington law.

Id. at ¶ 12 (emphasis added). Unlike in the case of WNIDCL, there is no relationship between the interests of Shareholders Fink and Weston and Avista's service to its customers or the net benefits to customers that will result from this transaction. Shareholders Fink and Weston's interests are not cognizable in this proceeding.[7]

B. Shareholders Fink and Weston Have Failed to Provide a Satisfactory Explanation for their Untimely Filing

24. Shareholders Fink and Weston should not be rewarded for their willful disregard of the Commission's rule (WAC 480-07-355(1)(b)) and Notice of Prehearing Conference. In their own words, while the other parties to this proceeding were timely intervening, attending the Commission's prehearing conference, and abiding by the Commission's prehearing conference order, Shareholders Fink and Weston were taking "additional time to assess whether intervention in this proceeding was beneficial for Avista public stockholders."[8] The Commission has granted untimely petitions for intervention in contexts wholly distinguishable from what we have here—outlier shareholders who are represented by sophisticated legal counsel, who threaten to torpedo this transaction in order to extract concessions. The Commission should not reward such tactics, which run counter to the Commission's good cause standard for allowing late interventions.

25. Shareholders Fink and Weston's excuse for their belated filing—that "they were focused on protecting Avista public stockholders' [*sic*] in another forum"—is not supported by the facts. First, the bulk of the work on their lawsuit occurred before September 15, when the initial complaint in that action was filed. Second, any additional work on the first amended

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[7] This is analogous to other contexts involving the Commission's regulatory authority. For example, the Commission ensures only litigants with sufficiently identifiable and concrete interests are allowed to pursue complaints against a utility at the Commission. *See* RCW 80.04.110(1)(b). The Commission has similar authority in the context of mergers to ensure that only litigants with sufficient interests, that fall within the zone of interests test, i.e., ensuring net benefits to the utilities' customers, are provided intervenor status.

[8] Petition to Intervene at ¶ 5.

complaint was shared by three law firms and was complete by October 10; there was no activity on their suit between October 10 and October 17, the deadline for a timely motion to intervene in this proceeding. Third, four other plaintiffs' law firms in three other actions had already filed suit to enjoin the merger as of October 2017, undermining any assertion that Shareholders Fink and Weston were providing some unique service to Avista shareholders. Fourth, there has been virtually no activity in Shareholders Fink and Weston's lawsuit since October 10, belying any claim that their nearly three-month delay should be excused. Finally, given their active participation in the shareholder lawsuits and their attention to the transaction generally, it is apparent that Shareholders Fink and Weston knew about this proceeding—indeed, they admit to simply taking "additional time to assess whether intervention in this proceeding was beneficial" *to them*[9]—and could have timely intervened.

C. Avista's Shareholders Overwhelmingly Approved the Transaction

26. Shareholders Fink and Weston claim that the merger will "harm the stockholder base."[10] They and their lawyers, however, are lone wolves in their position. As discussed above, Avista's shareholders overwhelmingly approved the merger with Hydro One—with the holders of 98% of the shares voting supporting the merger (reflecting the support of 78% of all the outstanding shares). Avista's shareholders have made their position on the merger clear— they are overwhelmingly in favor of it.

D. State Court is the Proper Forum for Shareholders Fink and Weston's Claims

27. As detailed above, Shareholders Fink and Weston's claims are outside the jurisdiction of the Commission. *See supra* ¶¶ 21-23. Their claims are state law claims based on

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[9] *Id.*

[10] *Id.* at ¶ 8.

statutes other than Title 80 and common law. *See Grassmueck v. Barnett*, 281 F. Supp. 2d 1227, 1231 (W.D. Wash. 2003). Indeed, Shareholders Fink and Weston admitted as much when they stated in their Second Amended Class Action Complaint that the Superior Court "has jurisdiction over" all of their claims. Meyer Decl. at ¶ 9. Nevertheless, they attempt to forum-shop that claim at the Commission, contending they will be harmed by the merger because the consideration is inadequate, that the Avista Directors acted disloyally in connection with the sales process, and that the Avista Directors violated Washington law.[11]

E. Shareholders Fink and Weston Waived Any Right to Halt the Merger

28. By their actions in the Superior Court, Shareholders Fink and Weston waived their right to seek to halt the merger in this proceeding. Shareholder Fink filed her first Class Action Complaint Based Upon Breach of Fiduciary Duty on September 15, 2017. Meyer Decl. at ¶ 10. In her complaint, Shareholder Fink claimed she would be "irreparably injured" if the merger closed and demanded "injunctive relief" including "[e]njoining the Defendants . . . from consummating the Proposed Transaction, unless and until [Avista] adopts and implements a procedure reasonably designed to provide the best possible value for stockholders...." *Id.* On October 10, 2017, Shareholder Fink amended her complaint and made the same demands for injunctive relief and to halt the merger. *Id.* On October 25, 2017, Shareholder Weston joined Shareholder Fink in a Second Amended Class Action Complaint Based Upon Breach of Fiduciary Duty, in which they made the same demands for injunctive relief and to halt the merger. *Id.* Notwithstanding their three separate demands to enjoin the merger, Shareholders Fink and Weston never sought to actually halt the merger by moving for a temporary injunction,

[11] *Id.*

seeking a hearing, or for any other relief prior to the Avista shareholder vote on November 21, 2017. *Id. See also* RCW 7.40.010 ("Restraining orders and injunctions may be granted by the superior court, or by any judge thereof."). Likewise, following the Avista shareholder vote on November 21, 2017, Shareholders Fink and Weston have not sought an injunction; rather, they moved the Superior Court to stay "all proceedings in" the case until *after* the transaction closes. Meyer Decl. at ¶ 10.

29. Shareholders Fink and Weston should not be allowed to seek a denial of the merger application in this forum when they have waived their right to equivalent injunctive relief in the Superior Court. They had the right to seek to enjoin the merger in Superior Court and intentionally abandoned or relinquished that right, initially through inaction and ultimately by stipulating to stay the proceedings without seeking injunctive relief. *See Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268, 1272 (1993) ("Waiver is the intentional abandonment or relinquishment of a known right.") (internal citations omitted). Shareholders Fink and Weston took clear and unambiguous actions in the Superior Court to allow the transaction to proceed in due course and to postpone their state law fiduciary claims until after the merger closes. They should not be permitted to pursue equivalent relief here when they intentionally abandoned the right to do so in the proper forum for shareholder claims.

VI. CONCLUSION

30. For the reasons stated above, Hydro One and Avista request that the Commission deny Shareholders Fink and Weston's late-filed motion to intervene in this proceeding.

Respectfully submitted this 17th day of January, 2018.

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