

**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

PUBLIC COUNSEL RESPONSE
OPPOSING SHAREHOLDER
PETITION TO INTERVENE

1. Public Counsel submits this response pursuant to the Commission's January 10th Notice of Opportunity to Respond to Late-Filed Petition to Intervene. Public Counsel opposes the late-filed Petition to Intervene by individual Avista shareholders, Lauren Fink and Chadwick Weston. Accordingly, Public Counsel respectfully asks the Commission to deny the intervention. In the alternative, if the Commission allows the late-filed intervention, Public Counsel recommends that the scope of the intervention be limited.

I. STANDARDS FOR INTERVENTION

2. When evaluating whether to allow an intervention, the Commission must find that the party seeking to intervene has a substantial interest or that the intervention would be in the public interest.¹ A party has a substantial interest in the proceeding if it has a nexus between the potential party's purpose and an interest protected by a statute within the Commission's jurisdiction.² The Commission applies a "zone of interest test" to determine whether a party

¹ RCW 35.04.443; WAC 480-07-355.

² *Joint Application of Verizon Commc'ns, and Frontier Commc'ns Corp. ("Verizon")*, Docket UT-090842, Order 05, Order Granting IBEW's Petition for Interlocutory Review and Denying BCAW's Petition for Interlocutory Review ¶ 14 (Sept. 10, 2009).

seeking intervention has a substantial interest.³ In this case, the applicable statutes are Chapter 80.12 RCW (Transfers of Property). In particular, RCW 80.12.020 governs this proceeding and requires that the Commission approve the proposed merger only if it finds that the transaction provides a net benefit to the customers of the utility.

3. If the party seeking intervention cannot establish a substantial interest, the Commission considers whether the intervention would be in the public interest.⁴ Under the public interest test, the Commission considers whether the intervention would enhance its understanding and analysis of the issues presented and has latitude to grant intervention even if no substantial interest exists.⁵

4. Intervention must be sought in the interest of justice and must not interfere with the orderly and prompt conduct of the proceeding.⁶ As discussed below, the late-filed Petition for Intervention fails to meet the Commission's standards for intervention and should be denied.

II. THE LATE-FILED PETITION FOR INTERVENTION SHOULD BE DENIED AS UNTIMELY, BURDENSOME, AND DUPLICATIVE

5. The Petition to Intervene filed by shareholders Ms. Fink and Mr. Weston is untimely and raises issues that are better subject to the jurisdiction of Superior Court. Additionally, Avista represents shareholder interests. Thus, the intervention is unnecessary and will unduly burden the proceeding.

³ *Verizon*, Docket UT-090842, Order 05 ¶ 14.

⁴ *Verizon*, Docket UT-090842, Order 05 ¶ 14.

⁵ *Verizon*, Docket UT-090842, Order 05 ¶ 14.

⁶ *Verizon*, Docket UT-090842, Order 05 ¶ 13.

A. The Petition to Intervene Is Untimely

6. Petitions to intervene are due to the Commission by the initial hearing date or prehearing conference, whichever comes first, and the Commission's preference is to receive written petitions to intervene three days before the initial hearing or prehearing conference.⁷ The Commission may grant late petitions to intervene only on a showing of good cause, including a satisfactory explanation of why the petition was not timely.⁸

7. The Joint Petition by Avista and Hydro One was filed on September 14, 2017. The Commission held a prehearing conference on October 20, 2017. Several parties representing a broad range of interests sought intervention, but Ms. Fink and Mr. Weston did not. Instead, the shareholders waited until January 9, 2018, to seek intervention. To justify the tardiness, the shareholders stated they were seeking action in another forum and they required additional time to assess whether intervention in this proceeding would be beneficial. They do not claim to have been unaware of this proceeding, nor do they claim a compelling hardship that prevented a timely request to intervene.

8. Other non-statutory parties timely intervened, some over objection. Non-statutory intervenors represent a wide range of interests and include Industrial Customers of Northwest Utilities and Northwest Industrial Gas Users representing industrial customers, The Energy Project representing low income customers, Washington and Northern Idaho District Council of Laborers representing labor interests, and Sierra Club, Northwest Energy Coalition, Renewable Northwest, and Natural Resources Defense Council representing environmental interests. Each

⁷ WAC 480-07-355(1)(a).

⁸ WAC 480-07-355(1)(b).

of these parties had to consider whether intervention in this case would be beneficial to the interests they represent, and each of these parties were able to do so within the time contemplated by the Commission's rules.

9. Indeed, except in cases where good cause exists, determination of whether intervention would be beneficial should be made prior to the initial hearing or prehearing conference. Shareholders Ms. Fink and Mr. Weston fail to identify a satisfactory reason why their determination could not be made prior to the prehearing conference on October 20, 2017. They point to pursuit of litigation in Superior Court, however, this is not an adequate basis to allow late intervention.

10. Allowing such late intervention now would be prejudicial to parties and would interfere with the orderly process of this proceeding. Discovery is well underway, settlement conferences are to commence under the procedural schedule on February 6, and response testimony is due in two short months. Introduction of a new party without strong justification for the untimely request undermines the process before the Commission.⁹ The Commission has denied late-filed petitions for intervention on the basis that the requesting party failed to make the required showing of good cause.¹⁰ The Commission should likewise deny the shareholders' Petition here.

⁹ Shareholders Ms. Fink and Mr. Weston have the ability to file comments on the proceeding, just as any member of the public. If the Commission denies the Petition to Intervene, Ms. Fink and Mr. Weston may still file written comments with the Commission or may attend public comment hearings and provide oral comments directly to the Commission. Public Comments in Commission proceedings become a part of the record on which the Commission's decisions are based.

¹⁰ *Joint Application of MidAmerican Energy Holdings Co. and PacifiCorp* ("MidAmerican"), Docket UE-051090, Order 04, Denying Late-Filed Petition to Intervene ¶ 5 (Aug. 26, 2005).

B. The Petition to Intervene Raises Issues Better Suited for Resolution before the Superior Court

11. Shareholders Ms. Fink and Mr. Weston state in their Petition to Intervene that they believe the proposed merger will harm the stockholder base and the community, that the merger consideration is inadequate, that the Board of Directors acted disloyally, and that the Board of Directors acted in violation of Washington law.¹¹ The Commission will consider, and the existing parties will likely present evidence on, whether the merger consideration is adequate. The ultimate question for the Commission is whether the proposed transaction results in a net benefit to Avista's customers.

12. The remaining issues identified by Ms. Fink and Mr. Weston are better resolved in Superior Court and are beyond the scope of this proceeding. To the extent that Avista's Board of Directors acted in a way that causes liability, Ms. Fink and Mr. Weston's course of action is to seek redress before Superior Court. Indeed, this Commission has rejected intervention when the proposed party's interest lies outside the Commission's jurisdiction. For example, the Commission rejected Snohomish County Public Utility District No. 1's (SnoPUD) request for intervention in the 2005 PacifiCorp merger because the interest was in matters within FERC's jurisdiction and would broaden and unnecessarily complicate the proceeding.¹² Just as SnoPUD's request was rejected, so should the request by shareholders Ms. Fink and Mr. Weston.

¹¹ Petition at 2.

¹² *Joint Application of MidAmerican Energy Holdings Co. and PacifiCorp ("MidAmerican")*, Docket UE-051090, Order 04, Prehearing Conference Order ¶ 5 (Jul. 27, 2005).

C. The Petitioning Shareholders' Interest in the Matter, to the Extent Relevant, Is Represented by Avista

13. The issue of whether the merger consideration is adequate will be considered in this matter in the context of determining whether net benefits exist. To the extent that shareholder interests are relevant in determining whether the proposed transaction presents net benefits to customers, Avista is the party that represents shareholder interests. Avista has a legal obligation and fiduciary duty to consider shareholder interests in managing its business. Shareholders' disagreements with Avista's management should be adjudicated and resolved outside of the Commission's jurisdiction. Because Avista represents shareholder interests, allowing the intervention of Ms. Fink and Mr. Weston is unnecessary.

III. IF THE COMMISSION ALLOWS MS. FINK AND MR. WESTON TO INTERVENE, THE SCOPE OF THEIR INTERVENTION SHOULD BE LIMITED

14. Should the Commission deem it appropriate to allow the late-filed Petition to Intervene, Public Counsel recommends that the shareholders' intervention be limited. Issues regarding matters outside of the Commission's jurisdiction should be precluded. The shareholders' intervention, if allowed, should be limited to whether the merger consideration is adequate. It is well within the Commission's discretion to limit a party's intervention.¹³

IV. CONCLUSION

15. Public Counsel respectfully requests that the Commission deny the late-filed Petition to Intervene for the reasons stated above. In the alternative, if the Commission deems the

¹³ *Joint Application of Avista Corp. and Hydro One*, Docket U-170970, Order 03, Accepting Interlocutory Review and Granting Intervention of WNIDCL (Nov. 20, 2017).

intervention appropriate, the Commission should exercise its discretion and limit the scope of the shareholders' intervention.

16. DATED this 18th day of January 2018.

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