BEFORE THE WASHINGTON

UTILITIES & 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

J. RANDALL WOOLRIDGE ON BEHALF OF PUBLIC COUNSEL

EXHIBIT JRW-3

Utility Merger Standards in Other Jurisdictions

April 10, 2018

Exhibit JRW-3

Utility Merger Standards in Other Jurisdictions

Avista's Service Territory

Every state or regulatory jurisdiction sets the standard that utilities must meet in order to complete a transaction. Avista operates in several states with the lion's share of electric and/or natural gas customers residing in Washington, Idaho, and Oregon.[1] Idaho code requires that a transaction will not increase rates and is "consistent with the public interest."[2]

On the other hand, the Oregon law provides the state Public Utilities Commission with the discretion to apply a net-benefit standard. The Commission can weigh whether or not the "acquisition or merger serves the utility's customers and is in the public interest."[3] In sum, this means that the Commission applies a two-part test:

1) A merger that "serves the utility's customers" results in a net benefit to those customers, and;
2) The merger does not impose harm on the residents of the state, including those not served by the utility.

Notably, the Oregon Public Utility Commission (PUC) rejected Texas Pacific's bid to purchase Portland General Electric in 2005. OPUC indicated that the potential harms to customers outweighed any benefits stemming from the transaction.[4]

More recently, the Oregon Commission applied the two-part test to Northwest Natural Gas' corporate reorganization. In that docket, Commission Staff indicated that the statute gives the

[1] Avista has a very small number of electric customers in Montana and owns an independent natural gas company in Alaska.

[2] Idaho Code 61-328, referenced in Press Release from Idaho PUC, (Sept. 15, 2017) (available at http://www.puc.idaho.gov/press/170915%20Avista%20merger%20application.pdf).

[3] ORS 757.511 (available at: https://www.oregonlaws.org/ors/757.511).

[4] David Cay Johnston, *Oregon Regulators Reject Utility's Sale to Buyout Firm*, N. Y. Times (Mar. 11, 2005) (available at http://www.nytimes.com/2005/03/11/business/oregon-regulators-reject-utilitys-sale-to-buyout-firm.html).

"Commission discretion in its assessment of whether a net benefit will result—such a decision is flexible, and depends on the facts and total set of concerns of each case."[5]

Additionally, Oregon Staff indicated that rate credits are not a requirement to demonstrate a net benefit, but the Commission has "generally required such terms."[6] No matter the specific terms that produce a net benefit to customers, "conditions proposed by an applicant solely to mitigate the new risks or harms from the corporate restructuring should not be seen as benefits."[7] Simply put, any conditions or commitments included in a merger or reorganization agreement should not only mitigate risks resulting from the transaction to produce no harm to customers, but they should also produce tangible benefits to customers beyond that threshold.

The Oregon Commission used a "comparator" to weigh whether or not Northwest Natural's application for reorganization produced a net benefit to customers. Under this approach, the Commission compared the new company resulting from the application to "the continued prudent and well-managed operation of the utility today."[8] Essentially, this means that recognition of potential benefits to customers would be measured against the applicant as though it exists under the current ownership and corporate structure and if it is prudently managed. The assumption is that (a) the Company is currently well-managed or (b) if the Company is not well-managed, the Commission would have to determine what a well-managed utility would look like in terms of financial health and customer service. Oregon Staff "notes that [this] is a very high standard for comparison."[9]

[5] *In re: a Legal Standard for Approval of Mergers*, Docket No. UM 1011, Order No. 01-778 at 11 (Oregon PUC Sept. 4, 2001) (available at: http://apps.puc.state.or.us/orders/2001ords/01-778.pdf).

[6] *In re: NW Natural Gas Co. Application for Approval of Corporate Reorganization to Create Holding Company*, Docket UM 1804, Staff Exhibit 100, Reply Testimony of Matt Muldoon at 12:11 (Oregon PUC Jun. 14, 2017) (available at: http://edocs.puc.state.or.us/efdocs/HTB/um1804htb124521.pdf).

[7] *Id*. at 12:13-14.

[8] *Id*. at 12:21-22.

[9] *Id*. at 13:9-10.

District of Columbia

Jurisdictions other than Washington have a net benefit standard for utility transactions, including the District of Columbia.[10] The D.C. Commission has faced two transactions since 2015 under the standard. The following is a timeline:

- **2015**: Pepco (PHI) and Exelon sought to merge. The Commission denied their application because it did not meet the net benefit standard, which includes a 7 Factor Test.[11]
- **2016**: After re-opening the case and offering a non-unanimous settlement proposal, the D.C. Commission rejected the merger application a second time. The applicants sought to re-open the case again, and interveners submitted appearances for another review of the package presented to the Commission. The D.C. Commission approved PHI and Exelon's re-filed application for merger, indicating that it met the legal standard. Though the Customer Investment Fund and rate credits remained at the same level as the aforementioned non-unanimous settlement, $72.8 million and $25.6 million respectively, other changes to the agreement satisfied the Commission. Specifically, additional mechanisms helped offset future rate increases, ensure that other providers committed to renewable resources could compete, and guarantee that Exelon would bring 107 MW of renewable resources online in the region. The settlement also included provisions for energy efficiency measures, particularly intended for low-income customers.[12]
- **2017**: AltaGas (a Canadian company) applied with the D.C. Commission to purchase the Washington Gas Light Company. The D.C. Commission initially rejected the application, indicating that the Company did not adequately demonstrate the benefits of the transaction. Another application was submitted and the Commission is expected to issue a ruling in March or April 2018. The D.C. People's Counsel opposes the

[10] D.C. Code, § 34–504.

[11] *In re: the Joint Application of Exelon Corp. for Authorization and Approval of Proposed Merger Transaction*, Case No. 1119, Order No. 17947 (D.C. Commission Aug. 27, 2015).

[12] *In re: the Joint Application of Exelon Corp. for Authorization and Approval of Proposed Merger Transaction*, Case No. 1119, Order No. 18148 (D.C. Commission Mar. 23, 2016) (available at: https://edocket.dcpsc.org/apis/pdf_files/e4399611-a652-4fad-892d-53912288d323.pdf).

transaction, indicating that it exposes the Commission and ratepayers to excessive risk and fails to pass the 7 Factor Test.[13]

The D.C. Commission's 7 Factor Test[14] requires applicants for a utility transaction to demonstrate benefits as the transaction impacts:

- Ratepayers, shareholders, and financial health of company
- Utility management and administrative operations
- Public safety and reliability of services
- Risks associated with all of applicants' affiliated non-jurisdictional business operations
- The Commission's ability to regulate the resulting entity
- Competition in the local market[15]
- Conservation of natural resources and preservation of environmental quality

New York

New York law indicates that no transfer of stock in the sale of an investor-owned utility shall be executed unless it has "been shown that such acquisition is in the public interest."[16] The law was first applied in Fortis' 2012 application to acquire Central Hudson (CH) Energy Group.[17] In the order approving the transaction, the New York Public Service Commission (NYPSC) indicated that the acquisition would "provide a significant net public benefit."[18] The Commission interpreted the statute to indicate that the acquisition would (1) mitigate potential risks arising

[13] *In re: Merger of AltaGas Ltd. and WGL Holdings, Inc.*, Case No. 1142, Initial Brief of Office of People's Counsel (D.C. Commission Jan. 16, 2018) (available at: https://edocket.dcpsc.org/apis/pdf_files/4674a5cc-aaae-4484-8dd6-034c392e7d22.pdf).

[14] *In re: the Joint Application of Exelon Corp. for Authorization and Approval of Proposed Merger Transaction*, Case No. 1119, Order No. 17947 (D.C. Commission Aug. 27, 2015) (available at: https://edocket.dcpsc.org/apis/pdf_files/f400b2a4-aadb-4078-a380-e80857223118.pdf).

[15] Not applicable in nearly all of Washington's electric and natural gas service areas.

[16] New York Public Service Laws § 70(5).

[17] Fortis is a Canada-based utility.

[18] *Joint Petition of Fortis and CH Energy Group for Approval of the Acquisition of CH Energy Group by Fortis and Related Transactions*, Case 12-M-0192, Order Authorizing Acquisition Subject to Conditions at 2 (NYPSC Jun. 26, 2013) (available at: http://www.dps.ny.gov/, click on 'Search' located on top banner menu, enter in case number in the search field, scroll down to Sr. No. 122, and click on hyperlink provided in 'Document Title' column to access document.)

from the transaction and (2) ensure that there would be a net positive in public benefits resulting from the acquisition.[19]

The terms of the merger deal included a guaranteed $9.25 million in savings in rates, a $35 million fund to mitigate future rate increases, $5 million for low-income rate assistance and economic development, a rate freeze, and more favorable earnings sharing for customers.

Among the most recent mergers subject to the NYPSC's review was Altice's application to acquire Cablevision. Although the landscape of telecom regulation is generally different than that applied to energy utilities, the NYPSC has authority to apply conditions to ensure a merger transaction is consistent with the public interest. The Commission used discretion to evaluate the level of savings and benefits that should be passed along to customers. In a previous case, the NYPSC determined that shareholder and customers should share savings created through synergies equally.[20] Due to differing dynamics in competitive forces in this company's service territory, the PSC determined that 25 percent of savings should be passed along to customers while the remainder would flow to the Company.[21] This ratio of customer to company benefits provides a way to quantify the benefits that should flow to customers on an annual basis. In the Cablevision order, the PSC reiterated the sentiment that monetized customer benefits are "an exercise of informed judgment because there is no mathematical formula on which to base such a decision."[22] The NYPSC acknowledges that there is no universal way to calculate quantifiable customer benefits resulting from a merger, so discretion must be exercised to determine what is appropriate in each case.

Louisiana

[19] *Id*. at 11.

[20] *Joint Petition of Altice N.V. and Cablevision Systems Corp. and Subsidiaries for Approval of a Holding Company Level Transfer of Control of Cablevision Lightpath and Cablevision Cable Entities, and for Certain Financing Arrangements,* Case 15-M-0647, Order Granting Joint Petition Subject to Conditions at 36 (NYPSC Jun. 15, 2016) (available at: http://www.dps ny.gov/, click on 'Search' located on top banner menu, enter in case number in the search field, scroll down to Sr. No. 58, and click on hyperlink provided in 'Document Title' column to access document).

[21] *Id*. at 41.

[22] *Id*. at 35.

In October 2014, three investment firms (Macquarie Infrastructure, British Columbia Investment Management Corporation, and John Hancock Financial) filed a joint application to purchase Cleco Power, a utility operating in Louisiana. Their application included:

- $125 million in customer rate credits spread over 15 years
- Annual cost of service reductions
- Annual debt limitations
- Ring-fencing considerations
- Customer service and service quality commitments
- 72 additional commitments

The Louisiana Public Service Commission applies an 18-point test to ensure that merger transactions are "in the public interest." The Louisiana Commission determined that the transaction exposed customers to too much risk, despite meeting a number of the factors established by precedent.

Ultimately, the Louisiana Public Service Commission approved the transaction with a $136 million rate credit applied at the close of the transaction, rather than over 15 years. In addition, the Commission required the applicants to maintain Cleco's investment-grade credit ratings, freeze base rates, and participate in an industry-wide examination of tax and debt structures.

Maryland

Merger transactions in Maryland must be "consistent with the public interest" such that ratepayers realize "benefits and no harm."[23] Additionally, state law indicates that the burden of proof is on the applicant to demonstrate no harm and net benefits to the utility's ratepayers.[24] Though Maryland law does not explicitly mention "net benefits," it is clear that the applicant for acquisition must prove that existing customers will not be harmed and they will enjoy tangible

[23] Maryland Public Utilities Article § 6-105(g)(3).
[24] Maryland Public Utilities Article § 6-105(g)(5).

benefits resulting from the merger.

Maryland law goes one step further and outlines specific criteria the Maryland Public Service Commission must weigh when reviewing the applicant's case. The PSC considers the following non-exhaustive list of factors:

- The potential impact of the acquisition on rates and charges paid by customers and on the services and conditions of operation of the public service company;
- The potential impact of the acquisition on continuing investment needs for the maintenance of utility services, plant, and related infrastructure;
- The proposed capital structure that will result from the acquisition, including allocation of earnings from the public service company;
- The potential effects on employment by the public service company;
- The projected allocation of any savings that are expected to the public service company between stockholders and rate payers;
- Issues of reliability, quality of service, and quality of customer service;
- The potential impact of the acquisition on community investment;
- Affiliate and cross-subsidization issues;
- The use or pledge of utility assets for the benefit of an affiliate;
- Jurisdictional and choice-of-law issues;
- Whether it is necessary to revise the Commission's ring fencing and code of conduct regulations in light of the acquisition; and
- Any other issues the Commission considers relevant to the assessment of acquisition in relation to the public interest, convenience, and necessity.[25]

Within the bounds of statute, the Maryland PSC has discretion to determine what or if components of an application for merger or acquisition amount to benefits while mitigating risk to customers.

[25] Maryland Public Utilities Article § 6-105(g)(2).

New Jersey

Like a number of other states, New Jersey law indicates that a utility acquisition must produce benefits to customers. In reviewing an application for acquisition or merger, the New Jersey Board of Public Utilities cannot approve the transaction "unless [the Board] is satisfied that positive benefits will flow to customers and the State of New Jersey and, at a minimum, that there are no adverse impacts on any of the criteria" established in statute.[26] More specifically, the transaction must not inhibit the newly formed entity from providing "safe and adequate utility service at just and reasonable rates," in addition to providing ratepayer benefits.[27] Like numerous jurisdictions, the New Jersey Board of Public Utilities is charged with determining that an application for merger does not inflict harm on customers and produces benefits. However, the law does not establish specific criteria outside of ensuring safe, reliable service and reasonable rates.

[26] New Jersey Administrative Code 14:1-5.14(c).
[27] New Jersey Rev Stat § 48:2-51.1.