BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of AVISTA CORPORATION, D/B/A AVISTA UTILITIES, For an Order Approving Avista's Update of its Base Power Supply and Transmission Costs.	DOCKET UE-061411 ANSWER OF COMMISSION STAFF TO MOTION TO DISMISS

I. INTRODUCTION

1 On August 31, 2006, Avista Corporation, d/b/a Avista Utilities ("Avista" or "the Company") filed with the Commission a petition for an order approving an update of Avista's production and transmission costs and a corresponding increase in its rates and charges for electric service in the state of Washington. The filing seeks to increase rates by $28.9 million (8.8%).

2 Public Counsel and the Industrial Customers of Northwest Utilities (collectively, the "Moving Parties") have filed a motion asking the Commission to dismiss Avista's petition without prejudice. They argue that dismissal is appropriate because there is no set of facts under which the Commission can grant the Company's requested relief based on the information provided in Avista's initial filing.[1]

3 Commission Staff does not support the Motion to Dismiss for two reasons. First, the relief the Commission may ultimately grant is not limited to the specific relief requested by Avista. Second, the Company's direct case is adequate to proceed on the merits of the Company's petition.

[1] Motion to Dismiss at ¶ 8.

II. ARGUMENT

A. The Moving Parties Have A Substantial Burden To Prove That The Commission Should Dismiss The Petition

4 The Commission may grant a motion to dismiss when "the opposing party's pleading fails to state a claim on which the commission may grant relief."[2] The Commission's ruling on a motion to dismiss is guided by Washington Superior Court Rules 12(b)(6) and 12(c). Dismissing a case under CR 12(b)(6) is appropriate only "if it appears beyond a reasonable doubt that no facts exist that would justify recovery."[3]

5 Successful motions to dismiss under CR 12(b)(6) are rare. They should be granted "only in the unusual case in which the [moving party] can show on the face of the [initial pleadings and pre-filed direct evidence] that there is some insuperable bar to relief."[4]

6 Thus, the Moving Parties have a substantial burden to convince the Commission to dismiss Avista's petition based only upon the petition itself and the Company's pre-filed direct testimony and exhibits.[5]

7 The Moving Parties can also find no support in the plain language of WAC 480-07-380(1)(a). They interpret the rule to allow dismissal where there is a failure to state a claim upon which "the commission must grant the requested relief." However, the rule, instead, states expressly that dismissal is allowed for a failure to state a claim upon which "the commission may grant relief."

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[2] WAC 480-07-380(1)(a).
[3] *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).
[4] *Id.*
[5] The Moving Parties acknowledge that the Commission may treat their motion as a motion for summary determination. (Motion to Dismiss at ¶¶ 7-8.) That treatment would present an even more difficult challenge to the Moving Parties. In ruling upon a motion for summary determination, the Commission considers the standards under CR 56. (WAC 480.07-380(2)(a).) CR 56(c) states that summary judgment is appropriate if the moving party can show that there is no issue of material fact and that the moving party is entitled to judgment as a matter of law. In other words, the Moving Parties would be required to prove that the Commission has no discretion and must summarily reject Avista's petition.

8 Thus, the issue is not whether the Company's direct evidence states a claim on which the Commission must grant the petition only as presented by Avista. Rather, the issue is whether Avista's initial presentation is sufficient to allow the Commission to consider any form of relief that falls within the general scope of the issues raised by the petition, which is to be liberally construed.[6] Staff answers that question in the affirmative.

B. The Company's Petition And Direct Evidence Are Sufficient To Survive The Motion To Dismiss

9 The Moving Parties argue that Avista does not provide the information necessary for the Commission to comprehensively examine the Company's costs in order to fulfill the Commission's statutory duty to set just and reasonable rates.[7] They base their argument on:

- the Commission's filing requirements for general rate cases;
- the ERM Stipulation from Docket No. UE-060181;
- the "prohibition" against single issue ratemaking; and
- the matching principle of historical test-year ratemaking.

The Moving Parties also argue that Avista did not provide the authorized costs from the Company's last general rate case which is the informational foundation for Avista's request in this proceeding.

10 The fatal flaw in the Motion to Dismiss is that none of the Moving Parties' arguments constitute a legal bar to Commission consideration of Avista's petition on the merits.

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[6] WAC 480-07-395(4). This is not to say that a motion to dismiss is never warranted. The Commission has dismissed a tariff filing of Puget Sound Energy, Inc. that sought to pass through changes in its cost of acquiring the power that it sells to its customers. *WUTC v. Puget Sound Energy, Inc.*, 6th Suppl. Order, Docket Nos. UE-011163 and UE-011170 (October 4, 2001). However, that case involved a request for "interim" or extraordinary rate relief. Thus, the bar PSE was required to clear was exceedingly high.

[7] Motion to Dismiss at ¶ 2.

1. The Commission's general rate case filing requirements may be waived in appropriate circumstances

11 The Moving Parties argue that Avista's petition violates Commission rules regarding general rate case filing requirements.[8] However, those rules are procedural in nature. The Commission may grant an exemption from or modify its procedural requirements in individual cases if consistent with the public interest, the purposes of underlying regulation and applicable statutes.[9]

12 Thus, even if Avista's petition is a general rate case, its failure to provide all of the information required for a general rate case does not, in and of itself, require the Commission to grant the motion to dismiss.

2. The Commission has authorized single issue ratemaking for the recovery of power supply costs

13 The Moving Parties argue that Avista's petition violates the "prohibition" against single issue ratemaking.[10] However, the prohibition against single issue ratemaking is not a rule of law. Rather, it is a matter of policy from which the Commission may elect to depart for the facts and circumstances of a particular case or issue.

14 Indeed, the Commission has authorized single issue ratemaking when a comprehensive examination of a company's results of operations, including all costs, all revenues and all elements of rate base, was not necessary in order to insure that rates are just and reasonable. Single issue ratemaking is expressly authorized for periodic rate

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[8] Motion to Dismiss at ¶¶ 10-22. These filing requirements are contained in WAC 480-07-510. They include a detailed representation of a company's actual results of operations and rate base during a test period, and a detailed portrayal of all restating actual and pro forma adjustments that the company uses to support its filing.
[9] WAC 480-07-110(1).
[10] Motion to Dismiss at ¶¶ 31-32.

adjustments such as purchased gas adjustment mechanisms that allow gas utilities to pass through the costs of fixed and variable gas supply.[11]

15 Another example of single issue ratemaking is the Power Cost Only Rate Case ("PCORC") that allows Puget Sound Energy, Inc. ("PSE") to recover the cost of significant production and transmission assets and changes in power supply costs outside of a general rate case. The Commission has explicitly authorized the PCORC as a single issue, periodic rate adjustment that is exempt from the rule governing general rate case filings.[12] Admittedly, the Commission has not yet authorized a PCORC-like mechanism for Avista, but neither has the Commission in any order, including those regarding the ERM, prohibited Avista from making such a filing.[13]

16 Critical to the Commission's authorization of the PCORC was the fact that PSE would be required to file information of the same detail necessary to support power supply costs in a general rate proceeding.[14] That detailed information does not include historical test period expense levels with pro forma adjustments, as is used for other components of the overall revenue requirement. Rather, it includes power supply expense levels on a

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[11] WAC 480-07-505(2)(a). The PGA mechanism has allowed companies to increase revenues far in excess of the 3% threshold that would otherwise define the filing as a general rate case. For example, PGA increases for PSE over the last three years were: 9.8% in October 2003 (Docket No. UG-31485), 17.6% in October 2004 (Docket No. UG-014565), 14.7% in October 2005 (Docket No. UG-051297), and 9.8% in October 2006 (Docket No. UG-061394).

[12] *WUTC v. Puget Sound Energy, Inc.*, 12th Suppl. Order at ¶¶ 25 and 27, Docket Nos. UE-011570 and UG-011571 (June 20, 2002).

[13] Our citation to the PCORC does not imply that a similar mechanism is *per se* appropriate for Avista. However, the Moving Parties are wrong to allege that the PCORC is irrelevant here because it resulted from a negotiated settlement. (*See*, Motion to Dismiss at ¶ 34.) In fact, the PCORC is the result of a Commission order that upheld the legality of the PCORC and categorized it as authorized single issue ratemaking. *Pub. Counsel v. Utils. & Transp. Comm'n*, 128 Wn. App. 818, 832, 116 P.3d 1081 (2005) (settlement is a joint recommendation to the Commission that becomes Commission order when approved).

The Commission has perhaps even expressed a willingness to entertain PCORC-like filings from other utilities. The Commission has stated that "[n]ew resources must be considered in general rate cases or power cost only rate cases . . ." *WUTC v. PacifiCorp, d/b/a Pacific Power & Light Co.*, Order No. 03 at ¶ 91, third bullet, Docket Nos. UE-050684, *et al.* (April 17, 2006).

[14] *WUTC v. Puget Sound Energy, Inc.*, 12th Suppl. Order at ¶ 25, citing the testimony of Staff witness Merton Lott, Docket Nos. UE-011570 and UG-011571 (June 20, 2002).

normalized basis using statistical samplings of many different water years and the effect on net power supply costs. The overall normalized power supply expense amount is a statistical sum of each of the water year results used in the study and does not represent any actual or historical test year.

17 In this case, Avista has provided sufficient information for a normalized power supply analysis.[15] Other information required for a general rate case is not necessary in order for the Commission to set just and reasonable rates. Thus, the absence of such other information in Avista's filing does not justify dismissal.

3. The matching principle is not a legal bar to the Company's petition

18 The Moving Parties argue that the petition should be dismissed because it violates the "matching principle" of ratemaking.[16] As discussed above, however, the matching principle is satisfied for purposes of power supply analysis by normalizing power supply expenses without examination of a fully adjusted historical test period.

19 Avista's direct case provides adequate information for a normalized power supply analysis even if parties may dispute the merits of that analysis. Thus, the matching principle does not bar Commission consideration of the Company's petition.

4. The ERM stipulation is not a legal bar to the Company's petition

20 The Moving Parties argue that the petition should be dismissed because the Company did not provide direct evidence on the cost of capital impact of the ERM beyond a

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[15] The Company provided testimony, exhibits, and work papers supporting updated costs associated with recent power supply and transmission additions and upgrades, as well as updates to wholesale electric and natural gas costs. Additional information was provided through discovery, including a power supply dispatch model study consistent with the updated power supply expense costs and 2007 pro forma loads. This study results in the updated normalized power supply expense levels that, together with the revenue requirement effect of the new or upgraded generation and transmission plant, form the basis for the Company's request in this filing. Avista does not propose changes to methodologies approved previously by the Commission for determining hydroelectric generation and wholesale electric and natural gas prices.

[16] Motion to Dismiss at ¶¶ 23-24.

reduction in Avista's average cost of debt.[17] Nor did the Company provide direct evidence of its hedging strategy for power purchases and purchases of gas used for power generation.

21 It is true that the stipulation adopted by the Commission in Docket No. UE-060181 requires Avista to file testimony in its next general rate case addressing the cost of capital impacts of the ERM and the prudence of its hedging strategy.[18] However, these requirements do not apply because the petition in this proceeding is not a general rate case.

22 Thus, while the record would have benefited from direct testimony regarding cost of capital impacts and hedging, the absence of such information does not warrant outright dismissal of the Company's petition. Staff will, however, take these deficiencies into consideration in formulating its recommendation in this proceeding.

III. CONCLUSION

23 For the reasons set forth above, the Commission should deny the Motion to Dismiss. Staff is prepared to submit testimony according to the case schedule. Staff's testimony and the testimony of all other parties will establish the record upon which the Commission will determine whether to grant relief to Avista and in what form that relief may take.

DATED this 15th day of November, 2006.

Respectfully submitted,

ROB MCKENNA
Attorney General

ROBERT D. CEDARBAUM
Senior Counsel
Counsel for Washington Utilities and
Transportation Commission Staff

[17] Motion to Dismiss at ¶¶ 25-30.
[18] *In the Matter of the Petition of Avista Corp., d/b/a Avista Utilities*, Order No. 03, Appendix A at 4 (June 16, 2006).