

**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.

DOCKETS U-170970

COMMENTS OF PUBLIC COUNSEL
REGARDING ADDITIONAL
PROCESS

1 Public Counsel submits these comments in response to the Commission's *Notice of Intent to Conduct Additional Process and Opportunity for Parties to Submit Comments*, dated July 12, 2018. Public Counsel strongly agrees that further process is necessary to determine the effect of recent current events on the Parties' Settlement Stipulation, the commitments made by the Applicants, and the Commission's ultimate decision. Public Counsel does not presuppose the effect without further information, but believes the changes described below are significant enough to cause concern and require further due diligence.

2 Media reports on July 11 stated that the entire Board of Directors for Hydro One resigned and that Hydro One's Chief Executive Officer (CEO), Mayo Schmidt retired effective immediately.¹ This is a material change of circumstances warranting further review by the Commission. Indeed, Public Counsel witness Dr. J. Randall Woolridge observed in his testimony supporting the Settlement Stipulation that, "[a] shift in political winds among Hydro One's customers could lead to sudden and perhaps unexpected changes in the management of the parent company."² This is precisely the situation presented now.

3 At the May 22nd hearing, the Commissioners posed questions to the Applicants regarding

¹ See, for example, <https://www.theglobeandmail.com/canada/article-entire-ontario-hydro-one-board-to-resign-ceo-to-step-down/>; <https://globalnews.ca/news/4325958/doug-ford-hydro-one-ceo-board-of-directors/>; <https://finance.yahoo.com/news/hydro-one-limited-announces-process-205000613.html>.

² Settlement Testimony of J. Randall Woolridge, Exh. JRW-1T at 27:15-17 (discussing political risks posed by the proposed merger).

the political issues facing Hydro One. Mr. Schmidt testified that a governance agreement controls the interactions between the Province of Ontario and Hydro One. Under the contract according to Mr. Schmidt, the Province “is a shareholder and is not a manager of the business.”³

4 Mr. Schmidt also explained in some detail the positions taken by the three major political parties during the Ontario elections regarding Hydro One.⁴ He offered insight regarding the Progressive Conservative party, which ultimately won the election.⁵ Mr. Schmidt asserted that the Province was “not in a position to terminate the CEO.”⁶ On changing the Board, Mr. Schmidt testified that it would be a “high bar to change the entire board and yet an even higher bar to bring back another yet fully independent Board of Directors.”⁷

5 Chair Danner asked, “Is there any scenario under which the Province of Ontario could undo the privatization of Hydro One or take over basically its – either its direction, its board of directors, or its management?”⁸ Hydro One’s General Counsel, Jaime Scarlett responded, “The simple answer is: absent a government passing new legislation to undo a lot of what’s being done, the short answer is no.”⁹ Indeed, Mr. Scarlett stated that changes to the Board would be difficult and that “[i]t would have to be something dramatic.”¹⁰

6 Mr. Scarlett also testified as follows: “And the noise – if there is noise in Ontario, it shouldn’t have a big impact down here.” The recent elections indeed caused “noise” and resulted in significant changes to Hydro One’s management and corporate governance. Both Mr. Schmidt and Mr. Scarlett expressed extreme confidence in Ontario’s political developments and

³ Schmidt, TR. at 310:2-6.

⁴ Schmidt, TR. at 312:23 – 314:11.

⁵ Schmidt, TR. at 313:23 – 314:6.

⁶ Schmidt, TR. at 314:24-25.

⁷ Schmidt, TR. at 317:6-9.

⁸ Chair Danner, TR. at 323:9-13.

⁹ Scarlett, TR. at 323:18-20.

¹⁰ Scarlett, TR. at 324:25 – 325:6.

their impact on Hydro One. Yet, Mr. Schmidt was a casualty of these developments. Without knowing who will fill the new Board or serve as Hydro One's new CEO, we do not know how Hydro One will approach the proposed transaction. Likewise, we also do not know what further impact political developments will have on Hydro One. Before entering its order in this matter, the Commission should determine whether the "noise" in fact has no meaningful impact in Washington, despite the dramatic turn of events.

7 Indeed, the strength of the merger seemed to be influenced by the particular executives at the helm. During the May 22nd hearing, Avista's CEO, Scott Morris testified about the particular role Mr. Schmidt played with respect to the merger agreement between the two companies. Mr. Morris stated, "Mayo and I talked a lot about what his best practices were happening in Toronto versus what we're doing in Spokane."¹¹ Because many of the assumptions regarding synergies were based on sharing best practices,¹² the Commission should inquire about whether those assumptions hold true given the sudden management changes.

8 Also during the hearing, Mr. Morris spoke about the intricate role Mr. Schmidt played in contemplating post-merger operations and governance. In particular, Mr. Morris described how Mr. Schmidt helped design Avista's post-merger Board of Directors, offering Avista independence in its operations after the merger closed.¹³ Mr. Morris also explained that Mr. Schmidt would be one of two people from Hydro One to sit on Avista's post-merger Board of Directors.¹⁴ Presumably, Hydro One's new CEO will take Mr. Schmidt's place on Avista's Board, if the transaction is approved. However, because Mr. Schmidt seemed to have significant prominence in the deal, questioning the new CEO on his or her commitment to Avista is

¹¹ Morris, TR. at 270:6-8.

¹² Morris, TR. at 269:10-16, 270:6-25.

¹³ Morris, TR. at 270:6 – 271:19.

¹⁴ Morris, TR. at 272:11-13.

sensible.

9 We do not know what philosophies and priorities the new CEO and Board of Directors will bring to Hydro One. Under the merger agreement, Hydro One intends to become Avista's parent corporation. The proposed transaction is precisely the type of strategic acquisition that is a key focus of utility CEOs and Boards.¹⁵ The new CEO and Board is inheriting the Avista deal, which is the first of its kind in the United States for Hydro One.¹⁶ As a result, the Commission needs to gain further clarity regarding how Avista fits into the new management's vision for the future. The Commission may want to understand the new CEO and Board's vision regarding what Hydro One should focus on. For example, their vision may be to focus more on Hydro One's Canadian operations rather than expanding into the United States. The Commission may also inquire about the new CEO and Board's view regarding whether investors will receive better value from completing the merger with Avista or incurring the \$103 million termination fee. It may be that the new management's visions and answers will be satisfactory; however, the questions must be asked and the answers understood before Hydro One may acquire Avista.

10 According to news reports, Hydro One's new Board of Directors will be seated by August 15,¹⁷ the day after the August 14 statutory deadline for an order in this docket. Presumably, the new Board will select a CEO shortly after it is installed. Hydro One's change in management provides good cause under RCW 80.12.030(2) to extend the deadline for a Commission order in this matter. Because there is no opportunity to hear directly from Hydro One's new management to gain a better understanding of its vision for Avista before the August 14th deadline, the Commission should extend the deadline by four months, as permitted under

¹⁵ Woolridge, Exh. JRW-1T at 4:3 – 5:12.

¹⁶ Woolridge, Exh. JRW-1T at 22:19-20.

¹⁷ [https://www.bloomberg.com/news/articles/2018-07-11/hydro-one-ceo-to-retire-as-ontario-s-ford-shakes-](https://www.bloomberg.com/news/articles/2018-07-11/hydro-one-ceo-to-retire-as-ontario-s-ford-shakes-up-utility)

RCW 80.12.030(2).

11 Public Counsel recommends that the Commission require Avista and Hydro One to file additional testimony regarding the unexpected changes in Hydro One's management. The Commission should afford Parties the opportunity to respond to the additional testimony, and the Commission could conduct further hearings to question the Applicants and the Parties regarding the effect of the management changes. Public Counsel advocates for careful consideration of these new circumstances, but does not take a position regarding the effect of the new circumstances at this time.

12 Possibly, additional time may be needed to hear from Hydro One's new CEO, particularly if the new CEO is not appointed quickly after the Board is created. Under RCW 80.12.030(1), any transaction requiring Commission approval shall be void absent Commission approval. To allow adequate time for information to be presented to the Commission, it may be practical for the Applicants to allow additional time for the Commission to consider this matter to avoid a de facto rejection under the statute. Public Counsel only suggests this as a possibility in the event additional time is needed beyond a four-month extension.

13 From Public Counsel's perspective, we are deeply concerned about the changes in Hydro One's management and their genesis. Public Counsel believes the Settlement Stipulation is a strong settlement under the conditions it was negotiated, and we are not changing our position on the settlement. However, Mr. Schmidt's retirement and the Board's resignation is a dramatic consequence of an election. Public Counsel is concerned about the impact on Hydro One and, more importantly, on Avista and its ratepayers.

14 The Commission and Parties must be confident that the changes to Hydro One's governing Board and CEO will not negatively affect Avista and its ratepayers before the

proposed transaction may be approved. The Parties, especially the Applicants, must provide the Commission with adequate information, including submitting to questioning by the Commission regarding the impact of Hydro One's management changes.

15 Public Counsel appreciates the Applicants' communications to date regarding the situation and looks forward to engaging in the further process.

Dated this 18th day of July 2018.

ROBERT W. FERGUSON
Attorney General



LISA W. GAFKEN, WSBA No. 31549
Assistant Attorney General
Public Counsel Unit Chief
Lisa.Gafken@ATG.WA.GOV