

BEFORE THE PUBLIC UTILITY COMMISSION

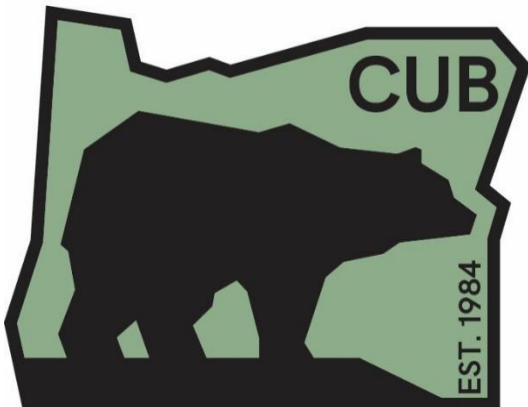
OF OREGON

UM 1897

In the Matter of)
)
Hydro One Limited,)
)
Application for Authorization to Exercise)
Substantial Influence over the Polices and)
Actions of AVISTA CORPORATION.)
_____)

**SURREBUTTAL TESTIMONY
OF THE
OREGON CITIZENS' UTILITY BOARD**

October 18th, 2018



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OF OREGON
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I. INTRODUCTION

1 **Q. Please state your name, occupation, and business address.**

2 A. My name is Bob Jenks. I am the Executive Director of by Oregon Citizens' Utility
3 Board (CUB). My name is William Gehrke. I am an Economist employed by
4 CUB. Our business address is 610 SW Broadway, Ste. 400 Portland, Oregon
5 97205.

6 **Q. Please describe your educational background and work experience.**

7 A. Our witness qualification statement is found in exhibit CUB/101.

8 **Q. What is CUB's position on this proposed merger?**

9 A. CUB opposes the proposed merger. CUB is concerned with the role of Ontario
10 politics with regards to Hydro One. CUB did not expect such a significant
11 management change at Hydro One. Prior the election, Hydro One repeatedly stated
12 that the Company was not subject to government interference. The "resignation" of
13 CEO Mayo Schmidt and Hydro One's Board was a direct result of pressure from

1 the Province of Ontario. This is concerning and highly unusual. CUB's opposition
2 to the merger stems from the Province's ownership of Hydro One.

II. NEXT STEPS IN THE REGULATORY PROCESS

3 **Q. What did Staff propose with regards to the proposed Avista Hydro One**
4 **merger?**

5 **A.** Staff recommended that the Commission take no action in this docket until more
6 information can be obtained about the new Board, as well as its executive
7 management appointments and retention.¹

8 **Q. Why did Staff take this position?**

9 **A.** Staff considers the board-level and executive leadership at Hydro One to be
10 unsettled.² Due to the present situation in Ontario, Staff has recommended that the
11 Commission take no action in this docket at this time, until more information has
12 been obtained about Hydro One's Board and executive management appointments.³
13 Staff notes that Hydro One is currently run by a temporary Acting CEO. Staff
14 would like also like to see how the Province of Ontario implements a new
15 executive compensation framework.

16 **Q. What was Hydro One's response to Staff's recommendation?**

17 **A.** Hydro One has stated that there is no need to wait for Hydro One to select its new
18 CEO because it has an acting CEO.⁴ The Company also stated that there is no
19 legitimate reason to delay approving the merger.⁵ Additionally, the Company has

¹ UM 1897 – Staff/ Muldoon/600/6.

² UM 1897 – Staff/ Muldoon/600/3-4.

³ UM 1897 – Staff/ Muldoon/600/40/Lines 4-7.

⁴ UM 1897- Hydro One/Dobson/2200/3.

⁵ UM 1897- Hydro One/Reed/2600/12.

1 stated that a delay would not serve any useful purpose because sufficient
2 information is already available and a delay of several months is unlikely to
3 provide any additional information.⁶ The Company also stated that waiting to
4 approve the merger will delay or put at risk the benefits that stakeholders will
5 receive from the merger.⁷

6 **Q. What is CUB position on delaying the approval of the proposed transaction**
7 **due to inadequate information?**

8 **A.** CUB strongly supports Staffs proposal to postpone the transaction until more
9 information is available about Hydro One's direction. CUB believes additional
10 information is necessary before the before the Commission will be able to make a
11 decision on this merger. The Company has experienced considerable turnover in
12 the past few months. Hydro One's entire Board of Directors have been replaced.
13 Ferio Pugliese, Vice President of Customer Care and Corporate Affairs has left the
14 Company.⁸ The Company is still conducting a search for a replacement chief
15 executive officer. While the acting chief executive officer and the current board of
16 directors have publicly expressed their support for the proposed transaction,
17 Provincial leadership has yet to communicate their support of the Transaction and
18 long term ownership of Avista. There are many moving parts that need to settle
19 before the Commission and stakeholders can have a clearer view of how recent
20 events have affected Hydro One.

⁶ UM 1897- Hydro One/Lopez/2500/15.

⁷ UM 1897- Hydro One/Reed/2600/28.

⁸ UM 1897- Staff/Muldoon/600/21.

1 Earlier this year, the Ontario Legislative Assembly passed the Hydro One
2 Accountability Act, 2018.⁹ This act establishes a new compensation framework for
3 Hydro One. Staff cautioned the Commission that it remains to be seen whether the
4 revised compensation framework will be adequate to attract and retain talented
5 executive management.¹⁰ The Company stated that the Province will not set pay
6 for Hydro One's executives.¹¹ However, the Company's assertions do not have the
7 final say in this matter. The Hydro One Accountability Act states that the
8 Management Board of Cabinet is able to issue directives governing the
9 compensation of Hydro One's leadership.¹² The Management Board of Cabinet is
10 a subcommittee of the Ontario cabinet. The Management Board Cabinet has the
11 ability to issue directives as it considers necessary in the performances of its
12 duties.¹³ Under the act, the Province, for example, can place a ceiling on a Hydro
13 One executive's total compensation. Therefore, contrary to the Company's
14 assertions, the Province does have a clearly delineated role in determining Hydro
15 One executive compensation. CUB believes that this new compensation
16 framework could make it difficult for Hydro One to retain and attract executive
17 leadership. If the province were to reduce the salary of Hydro Ones leadership,
18 CUB expects the leadership to leave their position. This would adversely affect the
19 operations and organizational structure of Hydro One. The uncertainty that this

⁹ UM 1897- Hydro One/Scarlett/1602

¹⁰ UM 1897- Staff/Muldoon/600/3.

¹¹ UM 1897- Hydro One/Woods/2300/12.

¹² UM 1897- Hydro One/Scarlett/1602

¹³ CUB Exhibit/301.

1 creates surrounding Hydro One's management gives CUB pause in regards to how
2 it might oversee the operations of Avista.

III. Notwithstanding Clause

3 **Q. What is the notwithstanding clause?**

4 **A.** According to the CBC news, Canada's notwithstanding clause allows provincial
5 legislatures to enact legislation to override sections of Canada's Charter of Rights
6 and Freedoms.¹⁴ Examples of rights from Canada's Charter of Rights and Freedom
7 include freedom of expression, freedom of assembly, freedom from unreasonable
8 search and seizure. This is akin to a state legislature being able to override
9 fundamental rights guaranteed by the U.S. Constitution.

10 **Q. Has the Ontario government recently threatened to use the notwithstanding**
11 **clause?**

12 **A.** Yes. The Ontario government threatened to use to use the notwithstanding clause
13 to force a reduction in the number of city councilors in the city of Toronto. This
14 would have overruled the Ontario court's decision to block a reduction in the
15 number of city councilors. Due to the Province winning the court case on appeal,
16 the notwithstanding clause was not used. From CUB's prospective, it is extremely
17 unusual for a government to change the rules of an election during the middle of an
18 election. The notwithstanding clause give additional credence to potential political
19 volatility from the province of Ontario. Not only can the government pass
20 legislation changing the governance agreement of Hydro One. The legislative

¹⁴ <https://www.cbc.ca/news/canada/canada-constitution-notwithstanding-factsheet-ford-1.4817751>

1 assembly of Ontario can invoke the notwithstanding clause if Ontario Courts found
2 it violated the property rights of Hydro One shareholders or subsidiaries.

IV. Avista under Hydro One

3 **Q. What was the condition of Avista prior to the transaction?**

4 **A.** Avista is a publicly traded American corporation based out of Washington.
5 Currently, Avista's Oregon gas system is safe and reliable with a reasonable ability
6 to gain an adequate access to capital. Importantly, the comparator in this proposed
7 transaction is that of the prudent, well-run utility of today. Avista's management is
8 accountable to Avista's shareholders and Avista's management is stable.

9 **Q. What do other parties state about Provincial politics affecting Avista's**
10 **ratepayers?**

11 **A.** AWEC believes that current and future political events pose a risk to the Hydro
12 One entity, not to Avista ratepayers. Additionally, AWEC believes that ratepayers
13 are protected by the merger commitments and Commission oversight. The
14 Company states that Avista's governance, ring-fencing and financial integrity
15 commitments, provide protections for Avista's customers.

16 **Q. Are the ring fencing agreements adequate to protect Avista from the**
17 **management of a typical utility?**

18 **A.** Yes. The proposed ring fencing agreements protect Avista from the risks of a
19 normal utility. A normal shareholder only has a financial interest its corporation.
20 A typical shareholder makes an investment to obtain a return its investment and
21 dividends. We are not dealing with a normal shareholder.

22 **Q. What about the ring fencing conditions?**

1 **A.** CUB cannot envision appropriate ring fencing provisions over Ontario's authority
2 over Hydro One. The Commission is a ratemaking agency with jurisdiction over
3 Avista's Oregon service territory. The Commission does not directly manage a
4 utility. In integrated resource planning, the Commission acknowledges an action
5 item as least cost- least risk. The Commission does not individually manage
6 decisions made by the utility.

7

8 As the owner the sole owner of Avista, the Company will have considerable
9 influence over the politics and actions of Avista. CUB cannot envision ring
10 fencing provisions that can protect against provincial interference into the
11 management of Avista. There is a distinction between the shareholder interests of
12 the Province and investors interests. Investors expect profits and healthy dividends
13 from Hydro One. Normal investors are willing to pay a premium for executive's
14 compensation and future growth. The Ontario government's politician have a
15 different motive. These politicians are concerned with being reelected. If it
16 politically popular with Ontarians, CUB believes that government may perform that
17 action. For example, the Ontario government has the ability to directly rebate the
18 government's portion of Hydro One's dividends directly to ratepayers on their
19 electricity bills. These dividends could be partially funded from Avista's
20 operations.

21

22 AWEC has enumerated several possible ripple effects from Hydro One's
23 ownership of Avista such as aggressive regulatory strategies, frequent rate cases,

1 failure to control costs and a lack of investment to support and maintain the
2 distribution system. If Hydro One acquires Avista, Avista will follow the wishes of
3 Hydro One. The frequency and filling of rate cases is a management decision.
4 The prudent cost containment of operating costs is a management decision.
5 Investing in the gas distribution system is a management decision.

6 **Q. What make Hydro One unusual?**

7 **A.** Hydro One was previously a crown corporation. Hydro One has recently become a
8 publicly traded company. It appears that Hydro One has not fully gained
9 independence from Ontario. Therefore, Ontario has an influence over Hydro One.
10 Ontario has departed from its governance agreement by removing Hydro One's
11 chief executive officer and exercised its legislative authority by passing legislation
12 to have greater control over executive compensation. Ontario has passed
13 legislation to reduce electricity rates in the province.

14
15 The wide scale removal of Hydro One's leadership during a merger is a huge
16 concern for the governance of Hydro One. The province's intrusion into the affairs
17 of a public company during a major company acquisition demonstrates a lack of
18 foresight. As a major shareholder, the government of Ontario should be committed
19 to creating an environment that opens Hydro One to new business opportunities.
20 CUB questions whether another United States utility or regulatory body will be
21 willing have a utility purchased by Hydro One under Ontario ownership. The
22 province of Ontario is concerned about Ontarian ratepayers and reelections, not
23 how the gas system in Oregon operates. Long term, the province of Ontario

1 cannot be relied upon to maintain Hydro One business strategy and Hydro One's
2 investment in Avista.

3
4 Long-term, how can Oregon be assured that Hydro One can operate as a stable
5 international utility? With each government change, will Hydro One's business
6 plan be guided in a different direction. The New Democratic Party envisions
7 Hydro One as a wholly owned subsidiary of Ontario. If Hydro One is tied up with
8 domestic political issues, how can we be assured that proper oversight of Avista
9 management will continue?

10 **Q. If the proposed transaction proceeds, who will maintain oversight over Avista?**

11 **A.** Avista will become a wholly owned subsidiary of Hydro One. Hydro One will be
12 the sole owner of the utility. As the owner the sole owner of Avista, the Company
13 will have considerable influence over the policies and actions Avista.

V. Conclusion

14 **Q. What about the ring fencing conditions?**

15 **A.** Avista has been well-run throughout its history. This prudent, well-run utility
16 provides the comparator with which to compare the proposed transaction. CUB
17 does not have enough information to foresee where Avista fits into Hydro One's
18 long term business strategy. Avista could serve a launching platform for future
19 expansion, or it could become an orphaned US subsidiary to a provincial operated
20 Hydro One. Moving forward, CUB is unsure about the future of Avista under
21 Hydro One's control. CUB continues to believe that the proposed transaction does
22 not meet the net benefits test in Oregon, and should be denied by the Commission.

1 **Q. Does this conclude your testimony?**

2 **A. Yes.**

Management Board of Cabinet Act

R.S.O. 1990, CHAPTER M.1

Historical version for the period August 20, 2007 to December 14, 2009.

Last amendment: 2006, c. 35, Sched. C, s. 64.

Definitions

1. (1) In this Act,

“Board” means the Management Board of Cabinet; (“Conseil”)

“Chair” means the member of the Executive Council appointed as Chair of the Board by the Lieutenant Governor; (“président”)

“ministry” means a ministry of the Government of Ontario and includes a board, commission, authority, corporation or other agency of the Government of Ontario; (“ministère”)

“public service” means all ministries or any part thereof; (“fonction publique”)

“secretariat” means the staff of the Board reporting to the Board through the Secretary; (“secrétariat”)

“Secretary” means the Secretary of the Board; (“secrétaire”)

“Vice-Chair” means the member of the Executive Council who by order in council is appointed the Vice-Chair of the Board. (“vice-président”) R.S.O. 1990, c. M.1, s. 1 (1).

(2) REPEALED: 1991, c. 14, s. 11.

Board continued

2. (1) The Board known in English as the Management Board of Cabinet and in French as Conseil de gestion du gouvernement is continued. R.S.O. 1990, c. M.1, s. 2 (1).

Composition

(2) The Board shall consist of the Chair, the Vice-Chair and not fewer than four and not more than six other members of the Executive Council designated from time to time by the Lieutenant Governor in Council. R.S.O. 1990, c. M.1, s. 2 (2).

Alternate members

(3) The Lieutenant Governor in Council may designate other ministers to serve as alternates in the absence of members of the Board. R.S.O. 1990, c. M.1, s. 2 (3).

Chair’s powers and duties

(4) The Chair shall preside at meetings of the Board and is responsible for the operation and administration of the Board and the secretariat. R.S.O. 1990, c. M.1, s. 2 (4).

Absence of Chair

(5) When the Chair is absent from any meeting, the Vice-Chair shall preside at the meeting and, when both the Chair and Vice-Chair are absent, the members present at a meeting shall appoint a member to preside at the meeting. R.S.O. 1990, c. M.1, s. 2 (5).

Secretary

(6) The Lieutenant Governor in Council shall appoint an officer, to be known as the Secretary of the Management Board of Cabinet, who shall perform such functions as the Board may assign to him or her, and the Secretary of the Management Board of Cabinet shall rank as and have all the powers and duties of a deputy minister of a ministry. R.S.O. 1990, c. M.1, s. 2 (6).

Officers and employees

(7) Such other officers and employees as are necessary for the proper conduct of the business of the Board shall be appointed under Part III of the *Public Service of Ontario Act, 2006*. R.S.O. 1990, c. M.1, s. 2 (7); 2006, c. 35, Sched. C, s. 64.

Procedure

(8) The Board may determine its rules and methods of procedure and shall keep a minute book in which shall be recorded the proceedings of the Board. R.S.O. 1990, c. M.1, s. 2 (8).

Quorum

(9) Three members of the Board constitute a quorum. R.S.O. 1990, c. M.1, s. 2 (9).

Duties of Board

3. (1) The Board shall be a committee of the Executive Council with the following powers and duties:

(a)-(c) REPEALED: 1991, c. 14, s. 11.

- (d) to approve organization and staff establishments in the public service;
- (e) to establish, prescribe or regulate such administrative policies and procedures as the Board considers necessary for the efficient and effective operation of the public service generally;
- (f) to initiate and supervise the development of management practices and systems for the efficient operation of the public service; and
- (g) to report to the Executive Council on any other matter concerning general administrative policy in the public service that is referred to it by the Executive Council or on which the Board considers it desirable to report to the Executive Council. R.S.O. 1990, c. M.1, s. 3 (1); 1991, c. 14, s. 11.

Board may require production of documents

(2) The Board may require from any public officer or any agent of the Crown any account, return, statement, document, report or information that the Board considers necessary for the performance of its duties. R.S.O. 1990, c. M.1, s. 3 (2).

Administrative directives

(3) The Board may issue such administrative directives as it considers necessary in the performance of its duties. R.S.O. 1990, c. M.1, s. 3 (3).

Studies

(4) The Board may undertake or order such studies and examinations of the operation and administration of any part of the public service as the Board considers necessary for the performance of the duties of the Board. R.S.O. 1990, c. M.1, s. 3 (4).

Board subject to direction of Executive Council

(5) The Board in the exercise of its powers and duties under this or any other Act is subject to the direction of the Executive Council which may amend or revoke any action of the Board. R.S.O. 1990, c. M.1, s. 3 (5).

Delegation

(6) The Board may delegate to any member of the Executive Council or to any person employed in the public service any power, duty or function of the Board, subject to such limitations and requirements as the Board may specify. 2005, c. 31, Sched. 14, s. 1.

4., 5. REPEALED: 1991, c. 14, s. 11.

Regulations

6. (1) Subject to the approval of the Lieutenant Governor in Council, the Board may make regulations,

- (a) REPEALED: 1991, c. 14, s. 11.
- (b) respecting the retention and disposal of records;
- (c) fixing the scale of allowances for travelling and living expenses to be allowed to any person employed in or in connection with any part of the public service;
- (d) for any purpose necessary for the efficient administration of the public service. R.S.O. 1990, c. M.1, s. 6; 1991, c. 14, s. 11; 1993, c. 38, s. 69 (1).

Limitation

(2) Regulations made under clause (1) (c) do not apply with respect to allowances determined under collective bargaining. 1993, c. 38, s. 69 (2).

Chair to be minister of ministry

7. For the purposes of the *Executive Council Act*, the Chair of the Board is a minister having charge of a ministry. R.S.O. 1990, c. M.1, s. 7.

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