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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UG 171

In the Matter of)
)
PUBLIC UTILITY COMMISSION OF) JOINT BRIEF OF STIPULATING
OREGON directing AVISTA) PARTIES
CORPORATION, dba AVISTA UTILITIES,)
)
to file tariffs establishing automatic)
adjustment clauses under the terms of SB 408)
)

I. INTRODUCTION

On January 20, 2009, Avista Corp., dba Avista Utilities (Avista), Staff of the Public Utility Commission of Oregon (Staff), the Citizens' Utility Board of Oregon (CUB), and the Northwest Industrial Gas Users (NWIGU) (hereinafter jointly referred to as the "Stipulating Parties") filed a Stipulation purporting to resolve all outstanding issues in this docket and joint testimony in support of the Stipulation. Other parties had the opportunity to object to the Stipulation by February 9, 2009. No objections were received.

On February 11, 2009, the Commission issued a Bench Request directing the Stipulating Parties to file a brief explaining how the Stipulation ". . . complies with ORS 757.268 and whether the Commission has the discretion to adopt the Stipulation in light of the mandatory language requiring a refund to customers of taxes collected but not paid to taxing authorities."

1 **II. PROCEDURAL HISTORY**

2 Pursuant to ORS 757.268 and OAR 860-022-0041, on October 15, 2008, Avista filed its
3 2007 tax report under the terms of S.B. 408 (2007 Tax Report). As filed, Avista’s 2007 Tax
4 Report would have resulted in a refund to customers of \$1.98 million, plus approximately
5 \$400,000 of interest. As part of its filing, Avista filed a claimed violation of ORS 756.040
6 pursuant to OAR 860-022-0041(10). On November 4, 2008, Administrative Law Judge Michael
7 Grant entered a procedural schedule for the docket. Pursuant to the procedural schedule (as
8 amended), on December 23, 2008, Staff and other Parties filed their initial Issues Lists with
9 respect to the 2007 Tax Report. On December 10, 2008, and January 7, 2009, the Parties held
10 settlement conferences that were duly noticed. The Stipulating Parties subsequently agreed to the
11 terms of a Stipulation and submitted the Stipulation, along with Joint Testimony in support of the
12 Stipulation, to the Commission. The Stipulating Parties requested that the Commission issue an
13 order approving the Stipulation and implementing its terms. A copy of the Stipulation was filed
14 as Exhibit 201.
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17 As noted, Avista filed a claim, pursuant to OAR 860-022-0041(10), that any refund under
18 these circumstances under S.B. 408 would violate ORS 756.040. Were Avista to make a refund
19 based upon its Tax Report, its 2007 return on equity would be slightly negative (based on the
20 \$1.98 million plus interest), and could result in confiscatory rates by violating the “fair and
21 reasonable” rate provisions of ORS 756.040. As explained at page 5 of the Joint Testimony (Exh.
22 200), “[a]lthough [the] Parties do not agree on the exact amount of Avista’s claim of return on
23 equity, the Parties do agree that a full refund of the \$1.98 million plus interest could result in
24 confiscatory rates by violating the ‘fair and reasonable’ rate provision of ORS 756.040.”
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1 **III. ABSENT THE STIPULATION, AN S.B. 408 REFUND COULD RESULT IN**
2 **CONFISCATORY RATES AND VIOLATE THE “FAIR AND REASONABLE” RATE**
3 **PROVISIONS OF ORS 756.040.**

4 Avista advised the Commission and all parties in UG 171 that it claimed that a rate
5 adjustment in connection with its tax report for 2007 would violate ORS 756.040. Consideration
6 of such a claim is expressly allowed by OAR 860-022-0041(10). Accordingly, Avista proposed
7 no refund in connection with its Tax Report for 2007.

8 OAR 860-022-0041(10) – Annual Tax Reports and Automatic Adjustment Clauses
9 (AAC) Relating to Utility Taxes, provides for relief where there has been a demonstration that
10 the AAC would violate the “fair and reasonable” rate provisions of ORS 756.040:

11 At any time, a utility may file a claim that a rate adjustment under the
12 automatic adjustment clause violates ORS 756.040 or other applicable
13 law. In making a determination regarding a potential violation of
14 ORS 756.040, the Commission will perform an earnings review using the
 utility’s results of operations report for the applicable year.

15 This position finds support in the Attorney General’s Opinion of December 27, 2005,
16 addressing several questions concerning the implementation of S.B. 408. In its Opinion, at page
17 16, the Office of Attorney General opined that “[r]egardless of the approach finally adopted by
18 the Commission, the rate ultimately allowed must be ‘fair and reasonable’ under ORS
19 756.040(1).” The Opinion noted that ORS 756.040 “essentially codifies” the constitutional
20 standard established by the United States Supreme Court for avoiding confiscatory utility rates.
21 *See Federal Power Commission v. Hope Natural Gas Pipeline (“Hope”), 320 U.S. 591, 64 S.Ct.*
22 *281, 88 L.Ed. 333 (1944).* It went on to observe, at page 16, that:

23 ORS 756.040 thus limits utilities’ exposure to rate reductions, regardless
24 of how the Commission exercises its discretion in the application of the
25 expression “properly attributed.” In other words, chapter 845 addresses the
26 tax component of rates. ORS 756.040 deals more broadly with the
27 Commission’s obligation to set rates all at or above the constitutional
28 floor. (Emphasis added)

1 Specifically, ORS 756.040 provides, in part, that rates are fair and reasonable if
2 the rates provide a return to the equity holder that is “commensurate with return on
3 investments in other enterprises having corresponding risks.”

4 ORS 756.040 General powers. (1) ... In respect thereof the commission
5 shall make use of the jurisdiction and powers of the office to protect such
6 customers, and the public generally, from unjust and unreasonable
7 exactions and practices and to obtain for them adequate service at fair and
8 reasonable rates. The commission shall balance the interests of the utility
9 investor and the consumer in establishing fair and reasonable rates. Rates
10 are fair and reasonable for the purposes of this subsection if the rates
provide adequate revenue both for operating expenses of the public utility
or telecommunications utility and for capital costs of the utility, with a
return to the equity holder that is:

11 (a) Commensurate with the return on investments in other enterprises
having corresponding risks; and

12 (b) Sufficient to ensure confidence in the financial integrity of the
13 utility, allowing the utility to maintain its credit and attract capital.

14 (2) – (3) [omitted]

15 The United States Constitution “protects utilities from being limited to a charge for their
16 property serving the public which is so ‘unjust’ as to be confiscatory.” *Duquesne Light Company*
17 *v. Barasch*, 488 U.S. 299, 307, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). If the rates authorized by
18 a Public Utility Commission “do not afford sufficient compensation, the State has taken the use
19 of utility property without paying just compensation and so violated the Fifth and the Fourteenth
20 Amendments.” *Id.* at 308. A Public Utility Commission does not need to use a specific method
21 of ratemaking in order to meet the requirements of the United States Constitution. Rather, “[i]f
22 the total effect of a rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end.”
23 *Id.*, quoting *Hope*, 320 U.S. at 602.

24 The imposition of a \$2.38 million dollar refund (\$1.98 million plus interest) could violate
25 ORS 756.040, based on an earnings review for Avista using its results of operations report for
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1 the 2007 tax year. Avista filed its calendar year 2007 results of operations report with the
2 earnings review report with the Commission on April 29, 2008. In its filing, Avista claimed that
3 its ROE for 2007 would drop to 0.32% with the accrual of the 2007 S.B. 408 refund, including
4 interest. It contended that the 0.32% ROE was well below any measure of what would be
5 considered to be a return on equity that is “commensurate with the return on investments in other
6 enterprises having corresponding risks.” The range of ROE recommendations, by all parties, in
7 general rate cases is well above this result. Indeed, Avista’s currently authorized ROE is 10.25%.

8
9 Staff and interested parties not only examined Avista’s 2007 earnings report, but
10 performed additional discovery surrounding Avista’s earnings for 2007, and Staff concluded that
11 if Avista were required to make any refund, Avista’s 2007 return on equity would actually be so
12 low as to meet any reasonable standard for confiscatory rates. NWIGU and other parties also
13 raised issues with regard to the analysis and remedies applicable to an assessment of Avista’s
14 claim of confiscatory rates resulting from this SB 408 refund. The resulting Stipulation strikes an
15 appropriate balance in the public interest for both Avista and its customers in resolving these
16 issues.
17

18 In adopting rules to implement the provisions of S.B. 408, this Commission appropriately
19 recognized that, in the final analysis, the rates produced by the application of S.B. 408 must still
20 be “fair and reasonable” under ORS 756.040(1). To do otherwise would result in confiscatory
21 rates and violate the constitutional strictures of *Hope, supra*. Accordingly, the Commission
22 established OAR 860-022-0041(10) (excerpted above) which expressly allowed a utility to assert
23 a claim that an S.B. 408 rate adjustment would violate the “fair and reasonable” provisions of
24 ORS 756.040. Upon the assertion of such a claim, the Commission would perform “an earnings
25 review” using the utility’s results of operations report for the applicable year. If calculated with
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1 2007 as the applicable year for Avista's results of operations report, the result is a return on
2 equity that is below any reasonable standard for confiscatory rates. Were this Commission to
3 now decide that it has no discretion to entertain this claim of confiscation and remedy as
4 proposed by the Stipulation, it would render meaningless its own rules, as expressed in OAR
5 860-022-0041(10). Instead, its rules providing an avenue of redress for the utility to assert a
6 violation of ORS 756.040, would become a nullity. More importantly, such a reading of S.B. 408
7 would run afoul of the constitutional safeguards against confiscatory rates, as codified in the
8 "fair and reasonable" rate provisions of ORS 756.040, as discussed above. Stated differently,
9 there is no mandatory language requiring a refund in ORS 757.268 that would "trump"
10 constitutional safeguards and the express provisions of ORS 756.040.
11

12 Indeed, even S.B. 408, as drafted, recognized the need to ultimately comport with the
13 "fair, just and reasonable" provisions of the law, in connection with the application of automatic
14 adjustment clauses in this context. It amended ORS 757.210 as follows:
15

16 **SECTION 5.** ORS 757.210 is amended to read:

17 757.210(1)(a) Whenever any public utility files with the Public Utility
18 Commission any rate or schedule of rates stating or establishing a new rate
19 or schedule of rates or increasing an existing rate or schedule of rates, the
20 commission may, either upon written complaint or upon the commission's
21 own initiative, after reasonable notice, conduct a hearing to determine *[the*
22 *propriety and reasonableness of such rate or schedule]* **whether the rate**
23 **or schedule is fair, just and reasonable.** The commission shall conduct
24 *[such a]* **the** hearing upon written complaint filed by the utility, its
25 customer or customers, or any other proper party within 60 days of the
26 utility's filing; provided that no hearing need be held if the particular rate
27 change is the result of an automatic adjustment clause. At *[such]* hearing
28 the utility shall bear the burden of showing that the rate or schedule of
rates proposed to be established or increased or changes is *[just and*
reasonable. The term] **fair, just and reasonable. The commission may**
not authorize a rate or schedule of rates that is not fair, just and
reasonable.

(b) **As used in this subsection,** "automatic adjustment clause" means
a provision of a rate schedule *[which]* **that** provides for rate increase or

1 decreases or both, without prior hearing, reflecting increases or decreases
2 or both in costs incurred, **taxes paid to units of government** or revenues
3 earned by a utility and [*which*] **that** is subject to review by the
commission at least once every two years.

4 It is important to recognize that this is not a contested case where some parties have
5 submitted evidence disputing the Stipulating Parties' claim that the S.B. 408 refund, under these
6 circumstances, could result in confiscatory rates by violating the "fair and reasonable" rate
7 provisions of ORS 756.040. As noted above, no objections to the Stipulation were received by
8 the deadline to object of February 9, 2009.

9 While the active parties have concluded that any refund in this proceeding could make
10 Avista's earnings for 2007 so low as to fail to meet any reasonable standard for confiscatory
11 rates, they have also included in the settlement a distinct benefit through a separate remedy.
12 Specifically, the active parties have agreed that for the five (5) year period beginning with the
13 2008 Tax Reporting Period and extending through the 2012 Tax Report Period, Avista will
14 absorb (*i.e.*, not pass onto Oregon ratepayers) up to the first \$500,000 of any surcharge in any
15 particular year in which it is entitled to a surcharge under S.B. 408. In no such event, however,
16 will Avista absorb, on a cumulative basis, more than \$2.0 million of surcharges over the entire
17 five year period. Accordingly, the Stipulating Parties have negotiated an uncontested settlement
18 that carefully balances the interests of all affected and does not run afoul of constitutional and
19 statutory mandates (ORS 756.040) requiring "fair and reasonable" rates.
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22 **IV. CONCLUSION**

23 In short, any language in ORS 757.268 requiring a refund to customers of taxes collected
24 but not paid to taxing authorities must be harmonized with other equally important constitutional
25 mandates to assure that the resulting rates remain "fair and reasonable." The Commission's own
26 rules (OAR 860-022-0041(10)) specifically provide for just such a review and determination in
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1 the precise context of administering S.B. 408 within the limitations of ORS 756.040. The
 2 Stipulating Parties fully participated in this prescribed process and have reached a Stipulation
 3 that comports with the law, including S.B. 408, and by its terms appropriately balances the
 4 interest of Avista and its customers.
 5

6 RESPECTFULLY SUBMITTED this ___ day of February, 2009.

7 AVISTA CORPORATION

NORTHWEST INDUSTRIAL GAS USERS

8 Dated: _____

Dated: _____

9 By: _____

By: _____

10 Print Name

Print Name

11 Signed: _____

Signed: _____

12 PUBLIC UTILITY COMMISSION STAFF

CITIZENS' UTILITY BOARD

13 Dated: _____

Dated: Feb 18, 2009

14 By: _____

By: Patricia McCracken

15 Print Name

Print Name

16 Signed: _____

Signed: 

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4 interest of Avista and its customers.

5
6 RESPECTFULLY SUBMITTED this ____ day of February, 2009.

7 AVISTA CORPORATION

NORTHWEST INDUSTRIAL GAS USERS

8 Dated: _____

Dated: _____

9 By: _____

By: _____

10 Print Name

Print Name

11 Signed: _____

Signed: _____

12 PUBLIC UTILITY COMMISSION STAFF

CITIZENS' UTILITY BOARD

13 Dated: 2/18/9

Dated: _____

14 By: Jason Jones

By: _____

15 Print Name

Print Name

16 Signed: 

Signed: _____

17
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 2 Stipulating Parties fully participated in this prescribed process and have reached a Stipulation
 3 that comports with the law, including S.B. 408, and by its terms appropriately balances the
 4 interest of Avista and its customers.

5 RESPECTFULLY SUBMITTED this 18th day of February, 2009.

7 AVISTA CORPORATION

NORTHWEST INDUSTRIAL GAS USERS

8 Dated: Feb. 18, 2009

Dated: _____

9 By: David Meyer
10 Print Name

By: _____
Print Name

11 Signed: [Signature]

Signed: _____

12 PUBLIC UTILITY COMMISSION STAFF

CITIZENS' UTILITY BOARD

13 Dated: _____

Dated: _____

14 By: _____
15 Print Name

By: _____
Print Name

16 Signed: _____

Signed: _____

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3 that comports with the law, including S.B. 408, and by its terms appropriately balances the
4 interest of Avista and its customers.

5 RESPECTFULLY SUBMITTED this ____ day of February, 2009.

6 AVISTA CORPORATION

NORTHWEST INDUSTRIAL GAS USERS

7 Dated: _____

Dated: 2/19/09

8 By: _____
9 Print Name

By: Chad Stokes
Print Name

10 Signed: _____

Signed: 

11 PUBLIC UTILITY COMMISSION STAFF

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12 Dated: _____

Dated: _____

13 By: _____
14 Print Name

By: _____
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15 Signed: _____

Signed: _____

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1 **CERTIFICATE OF SERVICE**

2 I certify that on February 19, 2009, I served the foregoing Joint Brief of Stipulating
3 Parties upon all parties of record in this proceeding by delivering a copy by electronic mail and
4 by mailing a copy by postage prepaid first class mail or by hand delivery/shuttle mail to the
5 parties accepting paper service.

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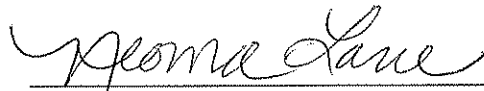
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