

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 Policies and
Actions of AVISTA CORPORATION.

JOINT BRIEF OF HYDRO ONE, AVISTA,
STAFF, AWEC, AND OSIDCL IN SUPPORT
OF FIRST AMENDMENT TO STIPULATION
AND REVISED STIPULATED
COMMITMENTS

I. INTRODUCTION

At the Commissioner Workshop on October 22, 2018, the Commissioners, Judge Power, and the Parties¹ discussed, among other things, whether ORS 757.511 required the Province of Ontario (“Province”) to be listed as an applicant in this proceeding or, alternatively, whether an affidavit attesting that it is a passive investor in Hydro One and will not exercise any substantial influence over the policies and actions of Avista is necessary. Staff noted that certain investors had previously filed such affidavits in other ORS 757.511 proceedings.² At the close of the workshop, Judge Power directed the parties to work together to find a creative resolution to the ORS 757.511 issue that would function similarly to a passive-investor affidavit.

Through pre-filed supplemental testimony and discussions at the Commissioner Workshop, the Parties also discussed the Province’s role with Hydro One and whether that could potentially impact Avista.

To address Judge Power’s directive and to resolve concerns about the Province’s influence, the Parties worked collaboratively to develop three new commitments identified and described

¹ Parties to this proceeding are Avista Corporation (“Avista”), the Alliance of Western Energy Consumers (“AWEC”), the Oregon Citizens’ Utility Board (“CUB”), Hydro One Limited (“Hydro One”), the Oregon and Southern Idaho District Council of Laborers (“OSIDCL”), and Public Utility Commission of Oregon Staff (“Staff”). Avista, AWEC, CUB, Hydro One, and Staff attended the October 22nd workshop.

² See, e.g., Affidavit of Warren E. Buffett filed on December 23, 2005 in Docket No. UM 1209.

below. In addition, as discussed in pre-filed testimony and at the Commissioner Workshop, the Parties have revised Stipulated Commitments 4, 5, and 112.³ These new additions and revisions are set forth in the “Revised Stipulated Commitments” found in Attachment A to the First Amendment to Stipulation filed with this brief. The Signatory Parties⁴ agree that these new commitments resolve the concerns relating to ORS 757.511 (required applicant or passive investor affidavit) and Provincial influence; and that with the Revised Stipulated Commitments, Hydro One’s Application for an Order Authorizing Hydro One Limited to Exercise Substantial Influence over the Policies and Actions of Avista Corporation (“Application”) meets the requirements of ORS 757.511, provides a net benefit, and is in the public interest. The Signatory Parties respectfully request that the Public Utility Commission of Oregon (“Commission”) approve the Application.

II. EXPLANATION OF NEW COMMITMENTS

The new commitments agreed to by the Signatory Parties are designed to prevent the Province from exercising substantial influence over Avista, from both a preventive standpoint and a remedial standpoint, and thus function similarly to the passive-investor affidavits filed in prior ORS 757.511 proceedings.

First, in the event of Legislative Action⁵ in Canada that affects Avista’s operations because of its corporate relationship with Hydro One or affects Hydro One’s compliance with any of the

³ The revisions made are as follows: the amendment to Stipulated Commitment 4 gives the post-merger Avista Board sole authority to set the compensation of Avista executives and employees without approval from Hydro One or the Hydro One Board. The amendments to Stipulated Commitment 5 limit Hydro One’s authority, under certain circumstances, to replace an Independent Director on the Avista Board with an employee or executive on an interim six-month basis. The amendments to Stipulated Commitment 5 also require Avista and Hydro One to consult with each other on their Independent Director nominees and give the Avista Designees on the post-merger Avista Board sole authority to designate, remove, and replace the Avista Designees as directors of the Avista Board with or without cause or notice. Finally, the amendments to Stipulated Commitment 112 strengthen Hydro One’s and certain of its subsidiaries’ commitment to submit to the Commission’s and Oregon courts’ jurisdiction and confirm that Oregon law will apply in such proceedings.

⁴ Though CUB is a Party to the proceeding, CUB has not joined the final settlement and is not a “Signatory Party” to this brief.

⁵ “Legislative Action” is defined in Commitment 116.

commitments, new Commitment 116 provides the Commission with an opportunity to amend its
1 final order in this proceeding, including strengthening *any* of the Revised Stipulated Commitments
2 or adding new commitments. The Commission or any party to this proceeding may initiate a
3 proceeding to consider new commitments or ways to strengthen the Stipulated Commitments, and
4 neither Hydro One nor Avista will object to the filing of a petition under this commitment. New
5 Commitment 116 also requires Hydro One to report to the Commission any Legislative Action in
6 Canada that affects Avista. The full text of Commitment 116 is as follows:

7 **116. Notice and Petition**

8 In the event of the enactment or adoption of any legislation, rule, policy, or directive
9 by government at any level or by any governmental entity or official in Canada (a
10 “Legislative Action”) that affects Avista’s operations because of Avista’s corporate
11 relationship with Parent⁶, or affects Parent’s compliance with any commitment in
12 this stipulation, any of the parties to this proceeding may petition the Commission
13 at any time to consider whether the Commission should amend its final order in
14 UM 1897, including reopening and strengthening any of the Stipulated
15 Commitments (inclusive of the financial ring-fencing commitments and/or the
16 governance commitments), or requiring the addition of new commitments, and
17 neither Parent nor any of its subsidiaries, including Avista, will oppose initiation of
18 such a proceeding. Parent will report to the Commission any such Legislative
19 Action in Canada that, in Parent’s reasonable judgment, affects Avista’s operations
20 because of Avista’s corporate relationship with Parent, or affects Parent’s
21 compliance with any commitment in this stipulation, as soon as practicable after it
22 is publicly announced as being effective by the government or governmental entity
23 or official. Nothing in this Commitment 116 shall be interpreted to limit the
24 positions or arguments that Avista or Parent may take or advance in any such
25 proceeding, including the right to argue that a petition presents insufficient grounds
26 or evidence. Prior to filing a petition with the Commission under this Commitment
116, a party must provide Parent and Avista at least 30 days advance written notice
and an opportunity to meet and confer about resolutions other than filing with the
Commission under this commitment. Nothing in this commitment is intended to
restrict the rights of the parties to petition the Commission concerning its order(s)
in this docket, or to limit the authority of the Commission.

Second, new Commitment 117 addresses the possibility of the Province attempting to
exercise substantial influence over the policies and actions of Avista. It ensures that all Avista

⁶ “Parent” is defined in the Revised Stipulated Commitments as “Hydro One Limited and its subsidiaries in the post-close corporate structure between Hydro One and Avista (as those companies in between may change over time; but see commitments regarding ORS 757.511 and 757.480).”

board members (post-closing of the Proposed Transaction) are aware of the fact that the Province
1 is prohibited from attempting to exercise and exercising any substantial influence over the policies
2 and actions of Avista. Further, the commitment requires annual affidavits from each Avista board
3 member attesting that the Avista board members will notify the Commission if they have any
4 reason to believe that the Province is attempting to exercise substantial influence over the policies
5 and actions of Avista. Upon any such notice, the Commission may amend its final order,
6 strengthening the Revised Stipulated Commitments or adding new commitments to address the
7 exercise of substantial influence, and neither Hydro One nor Avista will oppose any such
8 proceeding. New Commitment 117 read as follows:

9 **117. No Substantial Provincial Influence**

- 10 a. Parent and Avista will advise each member of the Avista Board of Directors
11 prior to being seated post Proposed Transaction and annually thereafter that
12 the Province may not attempt to, directly or indirectly, acquire the power to
13 exercise any substantial influence⁷ over the policies and actions of Avista.
14 Parent and Avista will require each of their respective director designees to
15 execute a new affidavit filed annually on June 1 of each year with the
16 Commission that attests that the individual director will notify the
17 Commission immediately if they have any reason to believe that the
18 Province is directly or indirectly seeking to exercise or is exercising any
19 substantial influence over the policies and actions of Avista through the
20 Avista Board or otherwise.
- 21 b. If a member of the Avista Board of Directors provides notice to the
22 Commission pursuant to subparagraph a of this Commitment 117, the
23 Commission may initiate a proceeding to determine whether the
24 Commission should amend its final order in UM 1897, including reopening
25 and strengthening of any of the Stipulated Commitments (inclusive of the
26 financial ring-fencing commitments and/or the governance commitments),
or requiring the addition of a new commitment to address the Province’s
attempt to, directly or indirectly, exercise substantial influence over the
policies and actions of Avista, and neither Hydro One, nor any of its
subsidiaries, including Avista, will oppose the Commission’s authority to
proceed as outlined in this Commitment 117.
- c. Parent’s authority to replace an Independent Director on the Avista Board
with an employee or executive on an interim six-month basis is suspended

26 ⁷ “Substantial influence” as used in this commitment has the meaning set forth in ORS 757.511 and as interpreted by the Public Utility Commission of Oregon.

for the pendency of any proceeding initiated pursuant to subparagraph b of this Commitment 117.

Finally, new Commitment 118 goes one step further than 116 and 117 by putting in place a proactive measure to ensure that the Commission and Parties remain informed about actions by the Province to exert substantial influence or control over Hydro One (as opposed to Avista specifically). It requires a board resolution at Hydro One providing that in event the Hydro One board is informed or becomes aware of a proposal or steps being taken to amend, effectively modify, or eliminate the Governance Agreement between Hydro One and the Province, the Hydro One board will notify the Commission and provide the Commission reasonably available information. Upon notice under new Commitment 118, like in Commitments 116 and 117, the Commission may amend its final order, strengthening the Stipulated Commitments or adding new commitments, and neither Hydro One nor Avista will oppose any such proceeding. The new Commitment 118 is provided below.

118. Hydro One Governance Agreement

- a. Prior to close of the Proposed Transaction, the board of directors of Hydro One (the “Board”) shall adopt a resolution⁸ providing that in the event the Board, or any director thereon, is informed or becomes aware that there is a proposal or steps being considered or taken to amend, effectively modify, or eliminate the Governance Agreement, whether by legislation, mutual agreement of the parties thereto or otherwise, Hydro One will immediately notify the Commission and, to the extent feasible, will provide the Commission with information available to the Board regarding the proposal. The Board will confirm annually its obligations under this commitment, which confirmation will be signed by the Hydro One Chair and provided to the Commission.
- b. If Hydro One provides notice to the Commission pursuant to subparagraph a. of this Commitment 118, the Commission may initiate a proceeding to determine whether the actions described in subsection a to amend, effectively modify, or eliminate the Governance Agreement would result in the Province seeking to exercise or exercising substantial influence over the policies and actions of Avista, and if so, whether the Commission should

⁸ Under Canadian corporate law, a resolution of a company’s board of directors is evidence of an action taken at a board meeting. The board of directors has the power to bind the company, and as a result, the resolution required by Commitment 118 is evidence that the Hydro One board of directors has agreed to bind Hydro One to the obligations of Commitment 118.

1 amend its final order in UM 1897, including reopening and strengthening
2 any of the Stipulated Commitments (inclusive of the financial ring-fencing
3 commitments and/or the governance commitments), or requiring the
4 addition of new commitments to address the Province’s attempt to, directly
5 or indirectly, exercise or exercising substantial influence over the policies
6 and actions of Avista, and neither Hydro One nor any of its subsidiaries,
7 including Avista, will oppose the Commission’s authority to proceed as
8 outlined in this subparagraph b. of this Commitment 118.

- 9 c. Hydro One’s authority to replace an Independent Director on the Avista
10 Board with an employee or executive on an interim six-month basis is
11 suspended for the pendency of any proceeding initiated pursuant to
12 subparagraph b. of this Commitment 118.


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III. CONCLUSION

The Signatory Parties agree that the revised and new commitments set forth in the Revised Stipulated Commitments resolve the concerns relating to compliance with ORS 757.511 requirements and unmitigated Provincial influence over Avista. As a result, Hydro One’s Application meets the requirements of ORS 757.511, provides a net benefit, and is in the public interest. Avista, AWEC, Hydro One, OSIDCL, and Staff recommend that the Commission approve the Application.

1 **HYDRO ONE LIMITED**

AVISTA CORPORATION

2
3 By: 
4 Elizabeth Thomas, Partner, K&L Gates LLP
5 Kari Vander Stoep, Partner, K&L Gates LLP
6 On Behalf of Hydro One Limited and
Olympus Equity LLC

By: 
David J. Meyer
Chief Counsel for Regulatory and
Governmental Affairs

7 Date: _____

Date: Mar 13, 2018

8
9 **STAFF OF THE PUBLIC UTILITY
COMMISSION OF OREGON**

**ALLIANCE OF WESTERN ENERGY
CONSUMERS**

10 By: _____
11 Kaylie Klein
12 Assistant Attorney General

By: _____
Chad M. Stokes
Cable Huston LLP

13 Date: _____

Date: _____

14
15 **OREGON AND SOUTHERN IDAHO
DISTRICT COUNCIL OF LABORERS**

16 By: _____
17 David Fujimoto
18 Weinberg Roger & Rosenfeld, APC

19 Date: _____

1 **HYDRO ONE LIMITED**
2 By: _____
Elizabeth Thomas, Partner, K&L Gates LLP
3 Kari Vander Stoep, Partner, K&L Gates LLP
On Behalf of Hydro One Limited and
4 Olympus Equity LLC
5 Date: _____
6

AVISTA CORPORATION
By: _____
David J. Meyer
Chief Counsel for Regulatory and
Governmental Affairs
Date: _____

7 **STAFF OF THE PUBLIC UTILITY**
8 **COMMISSION OF OREGON**
9 By: Kaylie Klein
Kaylie Klein
10 Assistant Attorney General
11 Date: 11/13/18
12

ALLIANCE OF WESTERN ENERGY
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By: _____
Chad M. Stokes
Cable Huston LLP
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HYDRO ONE LIMITED

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Kari Vander Stoep, Partner, K&L Gates LLP
On Behalf of Hydro One Limited and
Olympus Equity LLC

Date: _____

AVISTA CORPORATION

By: _____
David J. Meyer
Chief Counsel for Regulatory and
Governmental Affairs

Date: _____

**STAFF OF THE PUBLIC UTILITY
COMMISSION OF OREGON**

By: _____
Kaylie Klein
Assistant Attorney General

Date: _____

**ALLIANCE OF WESTERN ENERGY
CONSUMERS**

By:  _____
Chad M. Stokes
Cable Huston LLP

Date: 11-12-2018

**OREGON AND SOUTHERN IDAHO
DISTRICT COUNCIL OF LABORERS**

By: _____
David Fujimoto
Weinberg Roger & Rosenfeld, APC

Date: _____


1 **HYDRO ONE LIMITED**
2 By: _____
3 Elizabeth Thomas, Partner, K&L Gates LLP
4 Kari Vander Stoep, Partner, K&L Gates LLP
5 On Behalf of Hydro One Limited and
6 Olympus Equity LLC

7 Date: _____

8 **STAFF OF THE PUBLIC UTILITY
9 COMMISSION OF OREGON**
10 By: _____
11 Kaylie Klein
12 Assistant Attorney General

13 Date: _____

14 **OREGON AND SOUTHERN IDAHO
15 DISTRICT COUNCIL OF LABORERS**

16 By:  _____
17 David Fujimoto
18 Weinberg Roger & Rosenfeld, APC

19 Date: 11/13/18

AVISTA CORPORATION
By: _____
David J. Meyer
Chief Counsel for Regulatory and
Governmental Affairs

Date: _____

**ALLIANCE OF WESTERN ENERGY
CONSUMERS**
By: _____
Chad M. Stokes
Cable Huston LLP

Date: _____

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