

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UG 171(1)

In the Matter of

AVISTA CORPORATION, dba AVISTA
UTILITIES,

SB 408 Tax Report for Calendar Year 2007.

ORDER

DISPOSITION: STIPULATION REJECTED; AUTOMATIC
ADJUSTMENT CLAUSE ESTABLISHED

I. INTRODUCTION

In this order, the Public Utility Commission of Oregon (Commission) rejects a stipulation that purports to resolve all issues relating to the tax report for calendar year 2007 filed by Avista Corporation, dba Avista Utilities (Avista), in compliance with Senate Bill 408 (SB 408). Instead, we order Avista to file tariffs establishing an automatic adjustment clause implementing a refund to customers of \$1.98 million in federal, state, and local taxes, plus interest.

SB 408, primarily codified at ORS 757.268, requires utilities to true-up any differences between income taxes authorized to be collected in rates from customers and income taxes actually paid to units of government that are “properly attributed” to utilities’ regulated operations.¹ Utilities must make annual tax filings reporting these amounts on October 15 of each year. If amounts collected and amounts paid differ by \$100,000 or more, then the Commission must order the utility to establish an automatic adjustment clause to account for the difference, with a rate adjustment effective June 1 of each year.²

II. PROCEDURAL HISTORY

On October 15, 2008, Avista filed its 2007 Tax Report as required by ORS 757.268.³ As filed, Avista’s Tax Report results in a refund to customers of \$1.98 million plus approximately \$400,000 in interest. In the Tax Report, Avista asserted a claim under OAR 860-022-0041(10), arguing that the refund would result in confiscatory rates, thereby violating the “fair and reasonable” rate standard in ORS 756.040.⁴

¹ ORS 757.268(4).

² See ORS 757.268(4), (6)(a); OAR 860-022-0041(8).

³ Official notice is taken of the highly confidential information contained in Avista’s 2007 Tax Report. Any party may object within 15 days of this order. OAR 860-014-0050(2).

⁴ OAR 860-022-0041(10) provides:

Commission Staff (Staff) filed its initial findings regarding Avista's Tax Report on December 23, 2008. Staff recommended some changes to Avista's calculations that would increase the refund to customers. Staff stated that it needed additional time to perform an earnings review to determine whether the refund would result in confiscatory rates. Staff planned to discuss the results of its earnings review in testimony, but reached a settlement with Avista before testimony was filed.

The Northwest Industrial Gas Users (NWIGU) filed an issues list on December 23, 2008, and participated in settlement negotiations. The Citizens' Utility Board of Oregon (CUB) did not file any substantive pleadings in this docket, but participated in settlement negotiations. Ken Lewis and the Utility Reform Project submitted a joint issues list on December 23, 2008, but otherwise did not participate in these proceedings.

Avista, Staff, CUB, and NWIGU (collectively the "Stipulating Parties") submitted a Stipulation and Joint Testimony in Support of Stipulation (Joint Testimony) on January 20, 2009. The Stipulation and supporting testimony are admitted into evidence pursuant to OAR 860-014-0085.

The Stipulation purports to resolve all issues related to Avista's 2007 Tax Report. Due to concerns that requiring a refund would result in confiscatory rates in violation of ORS 756.040, the Stipulating Parties agreed to forego the refund, but also allow for the possibility of future refunds by requiring Avista to forego up to \$500,000 per year of any surcharges required by SB 408 from 2008 through 2012.

On February 10, 2009, the Administrative Law Judge issued a Bench Request asking the Stipulating Parties to submit a brief explaining: (1) how the Stipulation complies with ORS 757.268; and (2) 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. The Stipulating Parties filed their Joint Brief responding to the Bench Request on February 19, 2009.

III. DISCUSSION

Under ORS 757.268, if the amount of utility income taxes collected in customer rates differs from the amount the utility pays to taxing authorities by \$100,000 or more in a given year, then the Commission "shall require" that the utility establish an automatic adjustment clause to either refund to customers the amount collected in rates that exceeds the amount paid to taxing authorities, or to permit the utility to collect additional funds because the amount of taxes paid exceeds the amount collected in rates.⁵ In this docket, the Stipulating Parties propose to allow Avista to forego a refund to customers based on the Stipulating Parties' concern that requiring the refund may result in confiscatory rates. Thus, the only question for our resolution is whether this Commission has the discretion

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

⁵ ORS 757.268(4).

under ORS 757.268 to allow Avista to forego the refund in the absence of a finding that a refund *would* result in confiscatory rates or otherwise have a “material adverse effect on customers.”⁶

A. Parties’ Positions

Avista first raised the confiscatory rate issue in its Tax Report, arguing that requiring a refund in this case would result in a return on equity (ROE) “well below any measure” of an ROE that could be considered “commensurate with the return on investments in other enterprises having corresponding risks.”⁷ Avista provided the following comparison chart:

Based on 2007 Earnings Report Filed with the PUC

Authorized ROE	10.25%
Actual 2007 ROE (Excluding 2007 SB 408 refund)	3.93%
Actual ROE with 2007 SB 408 refund accrued	0.32% ⁸

Because the Stipulating Parties reached a settlement relatively early in these proceedings, Staff, CUB, and NWIGU did not file testimony, and therefore there is no evidence in the record analyzing or disputing Avista’s ROE calculations.

The Stipulating Parties agreed to the refund amount as calculated by Avista (\$1.98 million plus interest) and did not include the additional amounts recommended by Staff in its initial comments. The Stipulating Parties “acknowledged concerns” that a refund in this case would result in confiscatory rates. To address these concerns, the Stipulating Parties agreed that no refund should be made to customers. To allow for the possibility of providing a partial refund in future years, the Stipulating Parties agreed that, in the event Avista is required to surcharge customers under SB 408 in any of the next five years, Avista would forego up to \$500,000 of the surcharge each year (not to exceed \$2 million for the entire five-year period).

The Stipulation does not include an agreement on the ROE that would result if a refund were required because the Stipulating Parties were not able to agree “on the exact amount of Avista’s claim of return on equity.”⁹ The Stipulating Parties state that Avista’s ROE could be slightly negative if a refund was required. Although the Stipulating Parties do not conclude that requiring a refund *would* result in confiscatory rates, the Stipulating Parties indicate that they agreed to the Stipulation because they concluded that the ROE resulting after a refund *could* be too low to meet any measure of a “fair and reasonable” rate under ORS 756.040.¹⁰

⁶ ORS 757.268(9).

⁷ Cover letter to 2007 Tax Report at 3, quoting ORS 756.040.

⁸ *Id.*

⁹ Joint Testimony at 5.

¹⁰ Joint Brief at 2.

In their Joint Brief, the Stipulating Parties did not fully address the specific questions in the Bench Request, instead focusing on the Commission authority to forego a refund under ORS 757.268 if such a refund would result in confiscatory rates.

B. Resolution

ORS 757.268(4) provides, in pertinent part:

If the commission determines that the amount of taxes assumed in rates or otherwise collected from ratepayers for any of the three preceding years differed by \$100,000 or more from the amount of taxes paid to units of government by the public utility, or by the affiliated group and properly attributed to the regulated operations of the utility, the commission *shall require* the utility to establish an automatic adjustment clause, as defined in ORS 757.210, within 30 days following the date of the commission's determinations under this section, or by a later date that the commission may by rule prescribe for establishing an automatic adjustment clause that does not exceed 60 days following the date of the commission's determinations under this section. (Emphasis added.)

We believe that the language of ORS 757.268(4) is clear and unambiguous. If we determine after reviewing a utility's tax report that the amount of taxes collected from customers differed by \$100,000 or more from the amount of taxes paid to taxing authorities, then we *must* order the utility to establish an automatic adjustment clause to account for the difference. ORS 757.268 does not include any exceptions to this requirement. The Stipulation, however, permits Avista to forego establishing an automatic adjustment clause to refund to customers \$1.98 million plus interest in taxes collected, but not paid to taxing authorities, based solely on the concern that the refund "could" result in confiscatory rates. We find that, under the clear and unambiguous terms of ORS 757.268(4), we cannot approve the Stipulation.

Our conclusion does not mean that we do not have the authority to address Avista's confiscatory rate claim. ORS 757.268(9) and (10) provide a process for parties to request that the Commission terminate an automatic adjustment clause if allowing the clause to become effective would have a "material adverse effect on customers of the public utility."¹¹ We find that a similar process is appropriate for a utility's claim that an SB 408 rate adjustment would result in confiscatory rates, and therefore a constitutional violation. After an automatic adjustment clause implementing the rate adjustment is approved, and the utility files tariffs establishing the clause, the utility may file a request that the Commission terminate the automatic adjustment clause because allowing the clause to become effective would result in a violation of the utility's constitutional rights.

We therefore order Avista to file tariffs establishing an automatic adjustment clause to refund \$1.98 million plus interest to its customers, effective June 1, 2009. At any time after filing the tariffs, Avista or any other person may file a request that the Commission

¹¹ ORS 757.268(9).

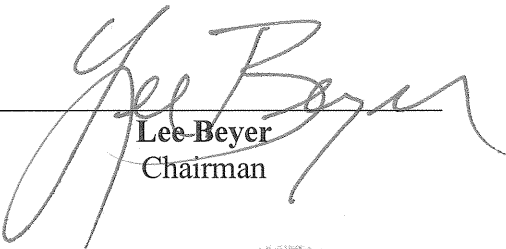
terminate the automatic adjustment clause because allowing the clause to become effective would result in a violation of the utility's constitutional rights.

We therefore order Avista to file tariffs establishing an automatic adjustment clause to refund \$1.98 million plus interest to its customers, effective June 1, 2009. At any time after filing the tariffs, Avista or any other person may file a request that the Commission terminate or modify the automatic adjustment clause because allowing it to become effective would have a material adverse effect on Avista's customers or would result in a constitutional violation. The Commission would then conduct a hearing to address the issue.

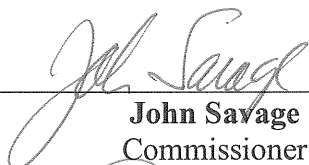
IV. ORDER

IT IS ORDERED that Avista Corporation, dba Avista Utilities, must file tariff sheets establishing an automatic adjustment clause to refund to its customers \$1.98 million, plus interest, effective June 1, 2009.


Made, entered, and effective APR 10 2009.



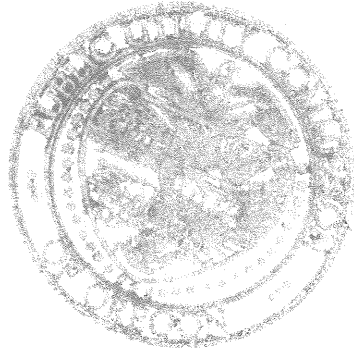
Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.