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July 28, 2009

**VIA ELECTRONIC FILING
& FIRST CLASS MAIL**

Oregon Public Utility Commission
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Salem, Oregon 97308-2148

E-mail: PUC.FilingCenter@state.or.us

Re: In the Matter of the PUBLIC UTILITY COMMISSION OF OREGON directing AVISTA CORPORATION, dba AVISTA UTILITIES to file tariffs establishing automatic adjustment clauses under the terms of SB 408 (**Docket No. UG-171**)

Dear Filing Center:

Enclosed please find the original and five (5) copies of the Opening Testimony of the Citizens' Utility Board of Oregon and the Northwest Industrial Gas Users filed electronically today in the above referenced OPUC docket.

Should you have any questions regarding this filing, please call.

Very truly yours,



Chad M. Stokes

CMS:wc
Enclosures

cc: UG-171 Service List

**PUBLIC UTILITY COMMISSION
OF OREGON**

**UG 171(1)
PHASE II**

**OPENING TESTIMONY OF THE
CITIZENS' UTILITY BOARD OF OREGON AND
THE NORTHWEST INDUSTRIAL GAS USERS**

**BOB JENKS
PAULA PYRON**

IN THE MATTER OF AVISTA'S SB 408 2007 TAX REPORT

July 28, 2009

1 **Q. PLEASE STATE YOUR NAMES, OCCUPATIONS, BUSINESS ADDRESSES**
2 **AND QUALIFICATIONS.**

3 **A.** My name is Bob Jenks. I am the Executive Director of the Citizens' Utility Board of
4 Oregon ("CUB"). My business address is 610 SW Broadway, Suite 308, Portland,
5 Oregon 97205. I am a graduate of Willamette University with a Bachelor of Science
6 Degree in Economics. I have provided testimony and comments in a variety of PUC
7 dockets, including this docket. Between 1982 and 1991, I worked for the Oregon State
8 Public Interest Research Group, the Massachusetts Public Interest Group and the Fund
9 for Public Interest Research on a variety of public policy issues. As Executive Director,
10 my responsibilities include the review of all filings in Oregon and to represent the
11 customers' concerns that have arisen from this Docket.

12 My name is Paula E. Pyron. I am an experienced energy law attorney serving the last
13 eight years as the Executive Director of the Northwest Industrial Gas Users ("NWIGU").
14 In addition to my 26 years of energy law experience, I have a Bachelor of Science in
15 Economics from the University of Texas at Dallas. My business address is 4113 Wolf
16 Berry Court, Lake Oswego, Oregon 97035-1827. NWIGU is a non-profit trade
17 association of 38 industrial-sized natural gas end users who have facilities in the states of
18 Oregon, Washington and Idaho. NWIGU provides information to its members on natural
19 gas issues that impact their facilities and represents its members' interests in proceedings
20 before the Federal Energy Regulatory Commission and the Pacific Northwest state utility
21 commissions, including the PUC of Oregon. As Executive Director, my responsibilities
22 include the review of all filings made by local distribution companies in Oregon as well
23 as the representation of the industrial customers' issues in connection with this Docket.

24 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

25 **A.** We are testifying jointly in this proceeding on behalf of CUB and NWIGU to represent
26 the collective interests of all of Avista's customers in the return of the \$1.98 million, plus
interest, in overpaid taxes – money that customers provided to Avista for such payment

1 pursuant to ORS 757.205, 757.267 and 757.268 - that Avista now owes to customers
2 pursuant to ORS 757.268. It must be noted that this dispute over these customer monies
3 is playing out during the worst recession since the Great Depression, a recession that is
4 particularly hard hitting in Avista's southern Oregon service territory. These hard-earned
5 customer dollars were collected by Avista in its rates, in excess of the income taxes
6 actually paid by Avista to the government during Avista's 2007 tax year, under the terms
7 of SB 408.

8 CUB and NWIGU hereby urge the Commission to deny Avista's refund termination
9 request in this docket (UG 171) at this time or, alternatively, to hold this proceeding in
10 abeyance until Avista's request can be determined following, or in conjunction with, the
11 Commission's decision on the pending UG 186 General Rate Case increase sought by
12 Avista. We anticipate that NWIGU, CUB and other parties will file a joint motion to
13 consolidate UG 171 and UG 186, shortly.

14 **Q. WHAT IS THE HISTORY OF THIS PROCEEDING?**

15 **A.** Pursuant to ORS 757.268 and OAR 860-022-0041, on October 15, 2008, Avista filed its
16 2007 tax report under the terms of SB 408 ("2007 Tax Report") showing taxes paid to be
17 less than taxes collected by \$1.98 million plus interest. At the same time Avista filed a
18 claim, pursuant to OAR 860-022-0041(10), that any refund under SB 408 would violate
19 ORS 756.040. Avista asserted that such a refund would be confiscatory and violate the
20 "fair and reasonable" standard provided under OPUC rules. Following investigation of
21 the issues, the active parties, including CUB and NWIGU, presented a settlement based
22 upon a structure of future potential surcharge offsets, which was rejected by the
23 Commission in its Order No. 09-125 on April 10, 2009. In compliance with that order,
24 Avista filed tariff sheets establishing an automatic adjustment clause to refund its
25 2007 Tax Report obligation. The tariff was to be effective on June 1, 2009. Then on
26 May 5, 2009, citing the same reasons as before, Avista again renewed its claim to

1 terminate the automatic adjustment clause. The automatic adjustment clause established
2 in the tariffs has now been suspended for six months pursuant to Order No. 09-167.

3 **Q. ARE THERE ANY DIFFERENCES IN THIS PROCEEDING IN THIS SECOND**
4 **PHASE FROM YOUR PERSPECTIVE?**

5 A. Yes, there are two differences in this proceeding in this second phase from our
6 perspective. First is the Commission's adoption of a temporary rule in its Order No. 09-
7 135 on April 14, 2009 in Docket AR 536. That rule changes the time period, used for the
8 earnings review to evaluate the fair and reasonable standard, from the applicable
9 historical tax year to the period during which the automatic adjustment clause would be
10 in effect. This new temporary rule change establishes the applicable administrative rule
11 for Avista's termination request in OAR 860-022-0041 (10) and effects consistency on
12 this issue between the Commission's rule and the law. Any evaluations of the financial
13 impact to Avista, based on a historical 2007 tax year under the prior version of OAR 860-
14 022-0041 (10), are no longer relevant to Avista's request, which in essence is to use
15 unpaid taxes to prop up forward-looking shareholder earnings. Concerns that any party
16 might have about this change to the use of a prospective evaluation are more
17 appropriately reviewed by the Commission in Docket AR 537 (proposing to make the
18 temporary change permanent).

19 The second difference from the first phase of this case is Avista's filing for a \$14.2
20 million rate increase in Docket UG 186 – the General Rate Case. Six weeks after its
21 May 5, 2009 filing asking the Commission “to terminate the automatic adjustment clause
22 based on a claimed violation of its constitutional rights, insofar as the resulting rates
23 would be confiscatory,”¹ Avista filed its General Rate Case designed to address its
24 forward-looking earnings. In order to evaluate Avista's claim that the refund of these
25 customer monies from the overpayment of 2007 taxes would result in confiscatory rates
26

¹ UG 171/Avista/300/Norwood/3.

1 the Commission must now apply a prospective earnings review in the context of the
2 newly filed and large rate case.

3 **Q. DO YOU AGREE WITH MR. NORWOOD'S CONCLUSION IN HIS PHASE II**
4 **INITIAL TESTIMONY IN THIS DOCKET (UG 171/AVISTA/300/NORWOOD/8)**
5 **THAT ANY REFUND FROM THE 2007 TAX REPORT WOULD BE**
6 **CONFISCATORY WHETHER THE COMMISSION CONSIDERS THE**
7 **FINANCIAL IMPACT ON AVISTA FROM THE 2007 TAX YEAR OR FROM**
8 **THE PROSPECTIVE YEAR WHEN THE AUTOMATIC ADJUSTMENT**
9 **CLAUSE WOULD BE IN EFFECT?**

10 **A.** No, we do not agree with Mr. Norwood's conclusion that any refund from the 2007 tax
11 report would be confiscatory whether the Commission considers the financial impact on
12 Avista from the 2007 tax year or from the prospective year when the automatic
13 adjustment would be in effect. The financial impact on Avista from an earnings review
14 based on a 2007 historical time frame is now wholly irrelevant. Prospectively there is too
15 much uncertainty for the Commission to evaluate Avista's confiscatory claim without
16 first deciding Avista's newly filed General Rate Case -UG 186. Notwithstanding this
17 uncertainty Avista has attempted to evaluate its confiscatory claim – see Avista's initial
18 Phase II testimony, Pluth. In that testimony Ms. Pluth models whole sets of assumptions
19 (UG 171/Avista/500/Pluth). We do not dispute the outcomes shown in Ms. Pluth's
20 modeling work (Exhibit 502) in which Ms. Pluth has calculated various implied returns
21 on equity ranging from 3.78 % to 5.94 % if Avista's full UG 186 rate increase is granted.
22 We do dispute that anyone currently knows with certainty what assumptions to make. In
23 our opinion such modeling is premature at best, at this time.

24 **Q. WHY IS THE EARNINGS ANALYSIS SET FORTH BY AVISTA IN ITS INITIAL**
25 **TESTIMONY NOT RELIABLE AT THIS TIME?**

26 **A.** The earnings test set forth by Avista in its initial testimony is not reliable at this time
because a whole host of factors other than those modeled by Avista can make it equally

1 true that the implied return on equity for Avista in this prospective year would be greater
2 than that illustrated in Exhibit 502. Simple facts like the timing of the rate case decision
3 could totally change the results. So too could adjustments made in the rate case that, for
4 example, eliminate cost forecasts that were found to be inflated or improperly allocated to
5 Oregon customers. In addition, Avista has other “tools” that it could deploy during the
6 prospective year that would impact its degree of under-earning, including effective
7 management, regulatory deferrals, interim rate relief, and earnings from the new
8 purchased gas adjustment sharing mechanism effective November 1, 2009 (from which
9 Avista projects it will earn \$475,177 just from June 1, 2009 to October 31, 2009 under
10 last year’s mechanism as set forth in Ms. Pluth’s testimony, UG171/Avista/500/Pluth at
11 page 7, lines 1-6).

12 **Q. DO CUB AND NWIGU, AS PARTIES TO THE REJECTED STIPULATION,**
13 **NOW VIEW THE REFUND, AND AVISTA’S CLAIM OF CONSTITUTIONAL**
14 **TAKINGS, DIFFERENTLY THAN WHEN THEY SUPPORTED THAT**
15 **STIPULATION WITH TESTIMONY BEFORE THE COMMISSION?**

16 **A.** Yes, CUB and NWIGU now view the refund and Avista’s constitutional takings claim
17 differently than they did when the prior stipulation was filed. As previously discussed in
18 our testimony, earlier this year the PUC issued a new temporary rule which changes the
19 examination of Avista’s earnings from a historic period to a future period. This legal
20 change fundamentally alters how CUB and NWIGU view the refund and Avista’s claim
21 of constitutional takings if the refund is returned to customers as required by SB 408.
22 The historic period limited Avista’s ability to address its earnings other than withholding
23 the SB 408 refund from customers and facilitated a factual determination of Avista’s
24 earnings. The forward-looking period creates a number of options for Avista to address
25 its earnings and makes a determination of earnings more difficult, unless and until the
26 Commission is allowed to first analyze the Company’s forecasts set forth in, and as part
of, its General Rate Case.

1 **Q. WHY DO CUB AND NWIGU NOW ADVOCATE A POLICY IN THIS DOCKET**
2 **FOR PROSPECTIVELY ANALYZING AVISTA'S CONFISCATORY RATE**
3 **CLAIM ONLY IF THAT ANALYSIS INCORPORATES ACTUAL**
4 **DETERMINATIONS MADE BY THE COMMISSION FROM THE UG 186 RATE**
5 **CASE?**

6 **A.** CUB and NWIGU now advocate a policy in this docket for prospectively analyzing
7 Avista's confiscatory rate claim only if that analysis incorporates actual determinations
8 made by the commission in the UG 186 rate case because:

9 First, the change by the Commission with the temporary rule moves the period of
10 time we are examining from one in which we know the actual earnings of the
11 company to one in which we do not know the actual earnings of the company.
12 Projecting a utility's earnings on a forward-looking basis is not a simple task. A
13 general rate case is a utility's chance to demonstrate its forecast of its earnings. We
14 now have the forecast filed by Avista in the UG 186 docket. The fact that few if any
15 General Rate Cases are accepted by the Commission without significant adjustments
16 to the filed Company forecast shows that a utility's own forecast of its costs and
17 revenues is not a straightforward projection of its earnings.

18 Second, Avista misrepresents the effect of the Commission reducing a utility's
19 requested rate increase. Mr. Norwood makes the claim that if the Commission
20 awards less than the Company requested in the General Rate Case that this will
21 further lower the implied ROE.² But it should be noted that if the Commission does
22 reduce the rate increase by cutting the requested ROE, while this does reduce the
23 ROE, it does so only because the Commission has found that a reduced ROE is what
24 is just and reasonable. When the Commission cuts other forecasted costs, this does
25 not reduce ROE, it simply reflects the Commission's judgment that the Company has
26

² UG 171/Avista/300/Norwood/8.

1 failed to show that those costs are prudently incurred costs associated with the serving
2 of Oregon customers.

3 Third, if a utility's forecast projects costs to be so far out of line with revenues
4 that a refund under SB 408 is a violation of its constitutional rights, it has a host of
5 remedies besides asking the Commission to withhold the refund. It can file a general
6 rate case (as Avista has done in UG 186), which is the traditional way that the
7 Commission resets rates to line up costs, revenues and create earnings opportunities
8 that are just and reasonable. If its rates are so low during the time period that it takes
9 to review the rate case that they represent a constitutionally-prohibited taking, the
10 utility can ask that the Commission implement some or the entire rate hike on an
11 interim and subject to refund basis. While Avista has not done this yet, it can seek
12 such relief if appropriate. The utility can also file a deferral for particular discrete
13 costs that have risen above the current costs in rates.

14 Fourth, without knowing what tools a utility will use, it is impossible to project its
15 earnings. We do not know whether the Company will request that some or all of its
16 rate increase in UG 186 be allowed to go into effect on an interim basis. We do not
17 know whether the Company will file any deferrals.

18 Fifth, even if we know the tools that the Company will use to address its earnings,
19 most importantly we do not know the outcome or timing of those proceedings at this
20 time. Avista's last rate case, UG 181 was filed in November of 2007 and the Final
21 Commission Order was entered in March, 2008, five months later.³ Avista's next to
22 the last rate case, UG 153, also was finished in five months. The Company filed that
23 case in April of 2003, and the Commission Order was entered in September, 2003.⁴

24 Most importantly here, because the Company has filed a rate case, we can be assured
25
26

³ OPUC Order No. 08-185, page 1.

⁴ OPUC Order No. 03-570, page 1.

1 that its under-earning situation will be resolved. What we can't know yet is how long
2 it will take to resolve the General Rate Case.

3 Sixth, even if we knew how long the General rate Case would take to resolve, we
4 don't know what the Company's earnings will be. There are a host of factors that can
5 influence a gas utility's earnings prospectively including weather, economic activity,
6 natural gas prices, and hedging strategies. In a general rate case we can normalize
7 these variables to forecast a reasonable earnings opportunity, but we can also be
8 assured that any particular year will not be normal. If the Commission eliminated a
9 refund that is required under Oregon law because it believed that the Company's
10 earnings would be too low constitutionally to allow the refund, but in reality the
11 Company's earnings were higher and the refund should have been authorized, how
12 could the Commission have possibly achieved just, fair and reasonable rates?

13 Seventh, and finally, even if we knew the timing of the General Rate Case and
14 how any and all other factors might impact earnings, we do not agree that a temporary
15 period of under-earning necessarily creates a constitutional violation. In the end, we
16 may be in a situation where the refund is in effect for a matter of a short period of
17 time before new rates go into effect at the conclusion of the General Rate Case. The
18 earnings of natural gas utilities are very seasonal. We should avoid creating a new
19 policy where under-earning for a few weeks or months is deemed to violate the rights
20 of a gas utility. An earnings level that might be unreasonable if the Commission were
21 to implement it as the forecasted, forward-looking earnings, is not necessarily
22 unreasonable if it exists for a few weeks or months. After considering these points,
23 CUB and NWIGU have concluded that it makes more sense to deal with Avista's
24 under-earning through the thorough vetting of a general rate case, than it does to
25 eliminate this refund without incorporating that review.

26 ///

1 **Q. WHAT RELEVANT ISSUES DO CUB AND NWIGU VIEW AS UNDISPUTED**
2 **FROM THEIR PERSPECTIVE IN THIS DOCKET?**

3 A. Essentially there are but two relevant issues that CUB and NWIGU view as undisputed
4 from our perspective in this docket, at this point in time:

5 First is the amount of the refund obligation for the 2007 Tax Report; and, second,
6 the legal standard for excusing Avista from returning all or some of these funds. In
7 order to protect customers from being overcharged by utilities for taxes, the
8 legislature passed SB 408 which requires utilities to true-up any differences between
9 income taxes authorized to be collected through rates from customers and the income
10 taxes actually paid to units of the government that are properly attributed to the
11 utilities' regulated functions.⁵ In this docket it is not disputed that under SB 408,
12 Avista should be refunding \$1.98 million dollars plus interest (amounting to
13 approximately \$400,000) to customers, as found by the Commission in its Order No.
14 09-125.

15 CUB and NWIGU acknowledge that it is equally undisputed that Oregon law as
16 set forth in ORS 757.268 (9) and (10) provides a process for parties to request that the
17 Commission terminate an automatic adjustment clause if allowing the clause to
18 become effective would have a "material adverse effect on customers of the public
19 utility." CUB and NWIGU do not believe requiring the utility to refund money that
20 was previously overpaid by customers will have a "material adverse effect on
21 customers." As we stated earlier, this is a difficult time economically in Avista's
22 Oregon service territory. This refund could in fact have a "material *positive* effect on
23 customers." Because the General Rate Case will allow Avista's earnings to be
24 reestablished at a reasonable level within a matter of months, any adverse effect on
25 the utility will be temporary.
26

⁵ ORS 757.268.

1 While SB 408 only addresses an adverse effect on customers, the PUC's rules for
2 implementing SB 408 allow for a utility to make the claim that a SB 408 rate
3 adjustment would result in confiscatory rates, and therefore a constitutional
4 violation.⁶ In evaluating Avista's confiscatory claim, the Commission is required to
5 balance the interests of the utility investors and the consumers in establishing fair and
6 reasonable rates:

7 Rates are fair and reasonable for the purposes of this subsection if
8 the rates provide adequate revenue both for operating expenses of
9 the public utility or telecommunications utility and for capital costs
10 of the utility, with a return to the equity holder that is:
11 (a) Commensurate with the return on investments in other
12 enterprises having corresponding risks; and
13 (b) Sufficient to ensure confidence in the financial integrity of the
14 utility, allowing the utility to maintain its credit and attract capital.⁷

15 When this general regulatory requirement was passed by the legislature in 2001, it
16 was billed as codification of the Hope test, which is the constitutional takings
17 standard established by the United States Supreme Court in order to avoid a
18 confiscatory taking under the 5th amendment.⁸ Avista's filing asserts that providing
19 the refund required under SB 408, even as the Commission considers its request to
20 raise rates significantly in UG 186, would violate this Oregon law (and its associated
21 federal constitutional rights as described in the Hope decision). This claim, in the
22 current circumstances, seems disingenuous at best.

23 **Q. HOW DO CUB AND NWIGU DISAGREE WITH AVISTA ON WHAT POLICIES**
24 **APPLY?**

25 **A.** We believe that SB 408 requires the Commission to order a refund in this case. While we
26 will save our discussion of the application of the Hope decision and the legal issues
associated with this case for our legal brief, we believe the sound policy considerations

⁶ OAR 866-022-0041(10)

⁷ ORS 756.040(1)

⁸ *Federal Power Commission v. Hope Natural Gas Pipeline*, 320 U.S. 591 (1944)

1 for the appropriate balance of the interests of the consumers and utility in this context
2 require that the Commission's evaluation of the Company's projections of earnings
3 follow or be made in conjunction with the Commission's completion of its pending rate
4 case review.

5 **Q. WHY DO NWIGU AND CUB BELIEVE THAT UG 186 COMPLETION IS**
6 **APPROPRIATE POLICY?**

7 **A.** CUB and NWIGU believe that the Commission's evaluation of the confiscatory rates
8 issue should take place following, or in conjunction with, the General Rate Case because
9 among the factors that the Commission has to consider, on a policy level, are the equity
10 and control of rate case timing, which as we all know is controlled by the utility. The
11 utility could have filed its UG 186 rate case when it first realized that its forward-looking
12 earnings would be low, but it did not. The under-earning the Company is experiencing
13 on a forward-looking basis is not caused by SB 408 or the Commission's adoption of an
14 "unconstitutionally confiscatory" approach to regulation, but by the Company's approach
15 to, and control of, the timing of its rate case. With the General Rate Case filed, the
16 Company's low forecasted earnings can now be addressed.

17 CUB and NWIGU also believe that the Company's claims about its earnings projections
18 set forth in its General Rate Case filing and its attempt to justify the refund obligation as
19 confiscatory, are dubious—we don't know how long the rate case will take. Moreover
20 what we do know is that upon completion of the rate case, the rates that are established
21 should be enough to get the company to a reasonable earnings level opportunity. The
22 Commission can then make a meaningful and much more appropriate assessment of
23 Avista's confiscatory claim on its customers' 2007 refunds.

24 **Q. DOES THIS CONCLUDE YOUR TESTIMONY AT THIS TIME?**

25 **A.** Yes, thank you.
26

1 **CERTIFICATE OF SERVICE**

2 I CERTIFY that I have on this day served the foregoing document upon all parties of
3 record in this proceeding via electronic mail and/or by mailing a copy properly addressed with
4 first class postage prepaid.

5 **SERVICE LIST**

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6 Dated in Portland, Oregon, this 28th day of July, 2009.

7 

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