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UTILITIES COMMISSION

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

July 18, 2018

*Transmitted Via Hand Delivery and E-mail*

Diane Hanian, Commission Secretary  
Idaho Public Utilities Commission  
472 W. Washington St.  
Boise, Idaho 83702  
[diane.holt@puc.idaho.gov](mailto:diane.holt@puc.idaho.gov)

Re: Case Nos. AVU-E-17-09 and AVU-G-17-05

Dear Ms. Hanian,

Enclosed for filing with the Commission is the original and 7 copies of *Reply to Motion in Opposition to IDWR's Petition to Intervene*.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "G. Baxter".

Garrick L. Baxter  
Deputy Attorney General

Enclosures

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UTILITIES COMMISSION

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*Attorneys for the Idaho Department of  
Water Resources*

**BEFORE THE IDAHO PUBLIC UTILITY COMMISSION**

IN THE MATTER OF THE JOINT  
APPLICATION OF HYDRO ONE  
LIMITED AND AVISTA CORPORATION  
FOR APPROVAL OF MERGER  
AGREEMENT

CASE NOS. AVU-E-17-09  
AVU-G-17-05

**REPLY TO MOTION IN  
OPPOSITION TO IDWR'S  
PETITION TO INTERVENE**

COMES NOW, the Idaho Department of Water Resources ("IDWR") by and through its undersigned attorneys of record, and hereby submits this REPLY TO MOTION IN OPPOSITION TO IDWR'S PETITION TO INTERVENE.

On July 9, 2018, Petitioner IDWR filed a petition with the Commission for an order granting intervention to IDWR to become a party ("Petition to Intervene") pursuant to the

**REPLY TO MOTION IN OPPOSITION TO IDWR'S PETITION TO INTERVENE –**

Commission's Rules of Procedure ("ROP"), IDAPA 37.01.01.071-075, so that IDWR may participate in the upcoming formal technical hearing currently scheduled for July 23, 2018.

On July 16, 2018, Avista Corporation ("Avista") and Hydro One Limited ("Hydro One") (hereinafter referred to as "Applicants") filed a Motion in Opposition to IDWR's Petition to Intervene ("Motion in Opposition"). This reply responds to arguments made by the Applicants in their Motion in Opposition.

### ARGUMENT

The Applicants argue that IDWR seeks to unduly broaden the issues in this matter. *Motion in Opposition* at 3. This is incorrect and contrary to the record in this matter. Numerous comments have raised the issue of water and water rights. *See* Comment from Deanna Bramblett, Clerk of Benewah County Board of Commissioners, dated June 27, 2018 ("Benewah County is concerned about the impact that the proposed Hydro One/Avista merger will have on the ownership and control of Avista's dams, particularly the Post Falls dam, lake and river levels, *water rights* and all of the associated economies.") (emphasis added); *see also* Comment from Andrew Scott, dated June 12, 2018 (Expressing concern about the government of Ontario exercising control over Idaho's water and losing control over Idaho's water.) Moreover, there has been public testimony related to water rights. *See* oral testimony of Norman Semanko on behalf of Avista Customer Group at the public hearing in Coeur d'Alene on June 14, 2018. The issue of water and water rights has been raised in this proceeding and thus IDWR's participation would not unduly broaden the scope of issues.

The Applicants also argue that IDWR failed to articulate "good cause" for intervention. *Motion in Opposition* at 3. IDWR does not concede that its petition is untimely, but even if the Idaho Public Utilities Commission ("PUC") concludes it is untimely, IDWR has articulated

“good cause” for the delay in intervention. *See Petition to Intervene* at 5. IDWR was only recently made aware of this proceeding by PUC staff. Once IDWR became aware of this issue, it quickly moved to intervene.

The Applicants also make a number of arguments that do not address IDWR’s Petition to Intervene but attempt to get the PUC to move forward with deciding this matter without input from the Director of IDWR. They argue this proceeding is not the “appropriate forum” for addressing the public’s interest in Avista’s hydropower water rights as it relates to the transaction between Avista and Hydro One and that IDWR “has no jurisdictional basis” for imposing conditions. *Motion in Opposition* at 2,4.

The Idaho Legislature has made it clear that the PUC is required to impose conditions mandated by the Director and if the Applicants disagree with the conditions mandated by the Director, their remedy is to appeal the Director’s decision to Idaho courts, not challenge it before the PUC.

Idaho Code § 61-328(1) requires authorization by the PUC before an electric public utility owning, controlling or operating any property located in Idaho used in the generation, transmission, distribution or supply of electric power and energy to the public may merge, sell, lease, assign or transfer, directly or indirectly, in any manner whatsoever, such property, or the operation or management or control thereof. Subsection four of Idaho Code § 61-328 draws IDWR and water right issues into the PUC’s process. Idaho Code § 61-328(4), states, in relevant part:

The [PUC] shall include in any authorization or order the conditions required by the director of [IDWR] under section 42-1701(6), Idaho Code. The [PUC] may attach to its authorization and order such other terms and conditions as in its judgment the public convenience and necessity may require.

As quoted above, the PUC “shall include” in any authorization or order the conditions required by the Director of IDWR pursuant to Idaho Code § 42-1701(6). The term “shall” when used in a statute is considered mandatory. *Paolini v. Albertson’s, Inc.*, 143 Idaho 547, 149 P.3d 822, 482 F.3d 1149 (2006). Accordingly, if the Director of IDWR concludes that a condition should be imposed on the approval pursuant to Idaho Code § 42-1701(6) and if the PUC approves the transaction, the PUC is required to include the condition in its authorization or order. It is not a discretionary decision for the PUC.

The Idaho Legislature has also made it clear that if someone disagrees with the Director’s final decision or order imposing conditions, their remedy is to appeal the Director’s decision to district court, not to argue the issue before the PUC. Idaho Code § 42-1701(6)(a) states:

Any such conditions [imposed by the Director] shall ensure that the public interest, as it pertains to the use of water under the hydropower water rights, will not be adversely affected. Conditions, if any, imposed by the director shall be subject to review under section 42-1701A(4), Idaho Code.

Idaho Code § 42-1701A(4) provides that:

Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

Pursuant to the plain language of Idaho Code § 42-1701A(4), if the Applicants disagree with the Director’s determination, their remedy is seek “judicial review” of the order pursuant to the Idaho APA. If the Applicants believe the Director lacks jurisdiction to impose conditions, that argument must be raised to district court not to the PUC.

**CONCLUSION**

For the reasons set forth above and in IDWR's Petition to Intervene, the PUC should grant IDWR's request to intervene in this matter.

DATED this 18<sup>th</sup> day of July 2018.

LAWRENCE G. WASDEN  
Attorney General

DARRELL G. EARLY  
Deputy Attorney General  
Chief, Natural Resources Division



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GARRICK L. BAXTER  
Deputy Attorney General  
Idaho Department of Water Resources

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18<sup>th</sup> day of July 2018, I served a true and correct copy of the foregoing document on the following by the method(s) indicated.

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