

DECISION MEMORANDUM

**TO: COMMISSIONER KJELLANDER
COMMISSIONER RAPER
COMMISSIONER ANDERSON
COMMISSION SECRETARY
COMMISSION STAFF
LEGAL**

**FROM: BRANDON KARPEN
DEPUTY ATTORNEY GENERAL**

DATE: JULY 17, 2018

**SUBJECT: JOINT APPLICATION OF HYDRO ONE LIMITED AND AVISTA
CORPORATION FOR APPROVAL OF MERGER AGREEMENT;
CASE NOS. AVU-E-17-09 AND AVU-G-17-05**

On July 3, 2018, the Commission ordered the scheduling of technical hearing related to various issues raised by the public through written public comments, and at the public hearings convened by the Commission. Order 34101. The Commission set the technical hearing for July 23, 2018. After the Commission scheduled the technical hearing, the Commission granted intervention to the Avista Customer Group, which is opposed to the proposed merger.

Two additional developments have now occurred: (1) the Idaho Department of Water Resources (IDWR) has petitioned to intervene and has notified the Commission that IDWR plans to impose merger-related conditions on Avista's hydropower rights in the merger; and (2) Hydro One's CEO and board of directors have resigned. These matters are further described below.

A. *Petition to Intervene and Notice of Intent to Consider Conditions*

On July 9, 2018, the IDWR petitioned to intervene "as a matter of right due to the mandatory duty of the Commission [related to Idaho Code § 61-328(4) (to consider and include any conditions required by the IDWR Director)]." IDWR Petition at 3-4. IDWR also claimed a substantial interest in the case. Further, IDWR argued its petition was timely (for the same reasons the Avista Customer Group cited when it successfully petitioned to intervene). Alternatively, IDWR argued that good cause exists to grant late intervention. *Id.* at 4-5. In conjunction with the petition, IDWR notified the Commission that IDWR is considering appropriate conditions pursuant to Idaho Code § 42-1701(6)(a). *Id.* at 3.

Applicants Avista Corporation and Hydro One Limited oppose the IDWR's petition to intervene. In summary, Applicants argue that the Commission should deny intervention for several reasons. Primarily, the Applicant's contend IDWR lacks any authority to impose conditions related to the proposed merger because no water rights are being sold, assigned or transferred—Avista is keeping its hydropower water rights after the merger, and there will be no change in Avista's water use. Applicants also submit that the ongoing Coeur d'Alene-Spokane River Basin General Adjudication, in Idaho's Fifth Judicial District, is the correct proceeding in which to address Avista's water rights. *Id.* at 2. To that end, Applicants state it "will agree to incorporate whatever condition on water rights that are subsequently imposed in the Coeur d'Alene-Spokane River Basin Adjudication, and will amend and supplement their merger conditions accordingly...." *Id.* at 2-3. Applicants claim IDWR's intervention is untimely, without a good cause explanation, and that IDWR seeks to broaden the issues at the eleventh hour of this proceeding. *Id.*

Applicants also express concern that the IDWR has notified the Commission of its intent to consider conditions without describing how IDWR proposes to arrive at such conditions. *Id.* at 7. Applicants express further concern that allowing intervention would put the Commission in a position of making a determination on a water dispute outside its statutory change, and unduly prolong the case, or jeopardize the merger. *Id.* at 8.

B. Hydro One Management Changes

On July 11, 2018, Staff learned from media reports that the Hydro One CEO and the board had resigned. The Applicants have not filed anything related to this development, and Staff is unclear on what affect, if any, it might have on the proposed merger and the Commission's conduct of this proceeding.

COMMISSION DECISION

Does the Commission wish to grant or deny IDWR intervention?

Does the Commission wish to do anything else in light of the developments described above?


Brandon Karpen
Deputy Attorney General