

NO. 48982-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE WASHINGTON STATE ATTORNEY GENERAL'S OFFICE,
PUBLIC COUNSEL UNIT, Appellant,

v.

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, Respondent,

and

AVISTA CORPORATION d/b/a AVISTA UTILITIES, Intervenor-
Respondent.

ANSWER OF WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION TO AMICUS CURIAE BRIEF
OF INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

ROBERT W. FERGUSON
Attorney General

Julian H. Beattie, WSBA No. 45586
Assistant Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
360-664-1188
jbeattie@utc.wa.gov

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ANSWER TO ICNU’S AMICUS BRIEF.....1

 A. Public Counsel’s Statutory “Used and Useful” Challenge
 is Not Properly Before this Court2

 B. Nothing in RCW 80.04.250(1) Expressly Precludes
 Reliance on a Linear Regression Analysis to Forecast
 Rate Base (Assignment of Error No. 1).....3

 C. Substantial Evidence Supported the Commission’s
 Trended Rate Base Forecast (Assignment of Error
 Nos. 2 and 3).....5

 D. Taken to its Logical Conclusion, the Holding Proposed
 by ICNU and Public Counsel Would Prove Unworkable.....9

III. CONCLUSION11

TABLE OF AUTHORITIES

Cases

<i>Att’y Gen.’s Office v. Utils. & Transp. Comm’n</i> , 128 Wn. App. 818, 116 P.3d 1064 (2005).....	6
<i>Bluefield Water Works & Imp. Co. v. Public Serv. Comm’n</i> , 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923).....	10
<i>Iowa Planners Network v. Iowa State Commerce Comm.</i> , 373 N.W.2d 106 (Iowa 1985)	4
<i>King County v. Wash. State Boundary Review Bd. for King County</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	2
<i>Nat’l-Southwire Aluminum Co. v. Big Rivers Elec. Corp.</i> , 785 S.W.2d 503 (Ky. Ct. App. 1990)	4
<i>PacifiCorp v. Utils. & Transp. Comm’n</i> , 194 Wn. App. 571, 376 P.3d 389 (2016).....	5
<i>People’s Org. for Wash. Energy Res. v. Utils. & Transp. Comm’n</i> , 104 Wn.2d 798, 711 P.2d 319 (1985).....	4, 10, 11
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968).....	5

Statutes

RCW 34.05.554	2
RCW 80.04.250(1).....	1, 2, 3, 5, 9, 11
RCW 80.28.010(1).....	4

I. INTRODUCTION

In this ratemaking case, the Washington Utilities and Transportation Commission acted reasonably, and within its statutory authority, when it relied on a linear regression analysis to forecast Avista's rate base (total investment in productive assets) during the 2016 rate-effective period. A rate base valuation is "fair . . . for rate making purposes" within the meaning of RCW 80.04.250(1) if it reasonably balances investor and ratepayer interests. Like Public Counsel, amicus curiae Industrial Customers of Northwest Utilities (ICNU) cannot explain how a trended rate base forecast fails this balancing test as a matter of law. It likewise points to nothing in the record that persuasively undermines the forecast's accuracy or suitability for ratemaking purposes. It thus fails to shore up the critical deficiencies in Public Counsel's briefing.

II. ANSWER TO ICNU'S AMICUS BRIEF

ICNU was an active participant in the administrative proceeding below. AR 153. Although it is now "alarmed" by the outcome of that proceeding, it evidently lacked sufficient conviction to join Public Counsel's petition for judicial review. Amicus Br. at 3. It also failed to appeal in its own right.

ICNU now comes before this Court as amicus curiae and promises "unique insights." Amicus Br. at 4. In fact, its perspective is not unique.

Like the appellant, it seeks favorable rate treatment for a subset of Avista's customers. Amicus Br. at 2-3. Below, both ICNU and Public Counsel proposed drastic reductions to Avista's annual electric revenue. AR 368, 436, 734; Br. of Resp't at 9.

A. Public Counsel's Statutory "Used and Useful" Challenge is Not Properly Before this Court

ICNU argues that Public Counsel's overarching "used and useful" challenge was "raised in original proceedings." Amicus Br. at 9. The Commission maintains that Public Counsel's first assignment of error is not properly before this Court. Br. of Resp't at 25-28. The Commission's final order contains no discussion on whether a rate base forecast derived from a linear regression analysis comports with RCW 80.04.250(1)'s "used and useful" language. AR 686 (Order 05). The Commission never addressed this foundational question because the parties' advocacy implied that the primary dispute was factual—whether Avista met its evidentiary burden to justify an "attrition adjustment." *See* AR 725; Br. of Resp't at 27.

The Commission should have the first opportunity to rule on the pending legal question. RCW 34.05.554; *King Cnty. v. Wash. State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993) (administrative agency should have the "first opportunity to apply its expertise, exercise its discretion, and correct its errors"). In the event this

Court reaches the issue, Section II.B of this brief reiterates why the Commission's use of a trended rate base forecast was permissible under RCW 80.04.250(1).

B. Nothing in RCW 80.04.250(1) Expressly Precludes Reliance on a Linear Regression Analysis to Forecast Rate Base (Assignment of Error No. 1)

On appeal, ICNU and Public Counsel advance the circular argument that the Commission's trended rate base forecast fails to comport with RCW 80.04.250(1) because it relies on a forecast (or "projection") of the utility's total investment in productive assets during the prospective rate-effective period. Amicus Br. at 10-12; Br. of Appellant at 2-4, 8; Reply Br. of Appellant at 4, 10-11, 20. This argument fails because RCW 80.04.250(1) prescribes no method for valuing rate base. Nothing in the statute expressly precludes reliance on a linear regression analysis—or any other forecasting method, for that matter. And nothing in the statute expressly mandates that the Commission "allocat[e]" forecasted capital spending to a "specific utility facility," as ICNU suggests. Amicus Br. at 12; *see also* Br. of Appellant at 28 (arguing that rate base assets must be associated with "specific or identifiable plant").

Rather, according to the statute, the Commission may "ascertain and determine" the utility's rate base using any method that yields a "fair value *for rate making purposes.*" RCW 80.04.250(1) (emphasis added). Under the

touchstone ratemaking principle of “just, fair, reasonable and sufficient” rates (RCW 80.28.010(1)), a valuation is fair “for ratemaking purposes” if it reasonably balances investor and ratepayer interests within the limits of the evidentiary record. As our Supreme Court has made clear, ratemaking is a legislative function that is fundamentally governed by a reasonableness standard:

Following this broad standard [of “just, fair, reasonable and sufficient” rates] the WUTC must in each rate case endeavor to not only assure fair prices and service to customers, but also to assure that regulated utilities earn enough to remain in business—each of which functions is as important in the eyes of the law as the other.

People’s Org. for Wash. Energy Res. v. Utils. & Transp. Comm’n, 104 Wn.2d 798, 808, 711 P.2d 319 (1985) (*POWER 85*); *see also Iowa Planners Network v. Iowa State Commerce Comm.*, 373 N.W.2d 106, 109 (Iowa 1985) (“So long as the commission satisfies its statutory obligation to set ‘just and reasonable rates’ . . . the commission is not compelled to use any particular method to ascertain the rate base.”); *Nat’l-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 511 (Ky. Ct. App. 1990) (“A strict adherence to ‘used and useful’ is not necessary for the courts to determine if PSC rates are lawful and reasonable.”). In the words of the United States Supreme Court, a rate base valuation is lawful if the ultimate rate decision falls within a “zone of reasonableness.” *POWER 85*, 104

Wn.2d at 811 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 797, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968)).

ICNU and Public Counsel fail to explain why a trended rate base forecast *necessarily* yields an unfair or unreasonable valuation of productive assets “for rate making purposes.” RCW 80.04.250(1). They thus fail to demonstrate that the Commission’s rate base forecast violated RCW 80.04.250(1) as a matter of law.

C. Substantial Evidence Supported the Commission’s Trended Rate Base Forecast (Assignment of Error Nos. 2 and 3)

A trended rate base forecast is lawful if it is a reasonably accurate estimate of productive assets during the rate-effective period, and if it yields a revenue allowance that reasonably balances ratepayer and investor interests. RCW 80.04.250(1). ICNU alleges that the Commission’s forecast was inaccurate and, hence, inappropriate for ratemaking purposes. But it was the Commission’s prerogative, as the fact-finder, to determine that a trended forecast was a more accurate estimate of Avista’s rate base during the rate-effective period than was the estimate favored by Public Counsel, which focused too narrowly on the historical test year. Br. of Resp’t at 8, 33. As discussed below, this determination was neither arbitrary nor capricious because it was supported by substantial evidence. *See PacifiCorp v. Utils. & Transp. Comm’n*, 194 Wn. App. 571, 587, 376 P.3d 389 (2016) (“An

agency's action is arbitrary and capricious only if it 'is willful and unreasoning and taken without regard to the attending facts or circumstances.'" (quoting *Att'y Gen. 's Office v. Utils. & Transp. Comm'n*, 128 Wn. App. 818, 824, 116 P.3d 1064 (2005))).

ICNU acknowledges that Avista presented "a voluminous amount of data for the 150 capital projects proposed for 2015 and 2016." AR 6464. Indeed, multiple Avista witnesses demonstrated that an aggressive capital spending program was necessary to maintain the safety and reliability of the company's aging infrastructure:

- Avista's chief financial officer testified, "These asset management capital investments are replacing old and failing assets using a planned and systematic approach to reduce outages, control costs to benefit customers over the life of these assets, and reduce risks associated with failed equipment." AR 1519. He explained that the company's capital spending program focused on "electric generation, transmission and distribution facilities, natural gas distribution plant, new customer connects, environmental and regulatory requirements, information technology and other supporting functions, such as fleet services and facilities." AR 1516.
- Avista's senior regulatory analyst testified, "A significant factor in the growth in net plant investment or rate base is the cost of new

utility equipment today, as compared to the cost of the older facilities that are now being replaced. Some of the facilities we are replacing or upgrading were installed 40-60 years ago, or even before that time.” AR 2768.

- Avista’s director of power supply described and justified all major generation-related capital projects slated for work in 2016. AR 2179-83. For instance, he discussed the company’s efforts to “rehabilitate and modernize” the Nine Mile hydroelectric dam on the Spokane River. AR 2181.
- Avista’s director of operations described and justified all major transmission-related capital projects slated for work in 2016. AR 2307-24. He testified that the company “continuously needs to invest in its transmission system to maintain reliable customer service and meet mandatory reliability standards.” AR 2307.
- Avista’s chief information and security officer described and justified all major IS/IT capital projects slated for work in 2016. AR 2340-44. He described, for instance, the company’s plans to “advance its cyber security program and invest in security controls to prevent, detect, and respond to . . . increasingly frequent and sophisticated attacks.” AR 2343.

Avista also demonstrated that its capital spending was reasonably timed:

- Avista’s CFO explained that customers will benefit from aggressive capital spending because “[i]nterest rates remain near all-time lows” and “electric and natural gas commodity costs continue to be relatively stable.” AR 1519. The CFO explained, “Funding the additional needed capital investment projects now will result in lower overall bill impacts to customers rather than waiting until a time when retail rates are being driven higher by increasing commodity costs, construction of new capacity and energy resources, and/or higher inflation and interest rates.” AR 1519.
- The company’s senior regulatory analyst explained, “Our general practice is to attempt to replace our aging equipment before it fails, because it is not only less costly to replace this equipment on a systematic, planned basis, but it also results in a more reliable service to customers, which is expected by all utility stakeholders. If our practice were to avoid replacing utility equipment until it failed, the reliability of our system would suffer.” AR 2770.

These testimony excerpts, considered in light of the exhibits supporting them and the record as a whole, constituted substantial evidence demonstrating that Avista’s proposed rate base was comprised of capital assets that were “used and useful” within the meaning of RCW 80.04.250(1).

Since substantial evidence supported Avista's proposal, it necessarily also supported the smaller rate base escalation ultimately approved by the Commission. As the Commission explained in its response brief, the Commission's final rate base valuation excluded a portion of Avista's proposed increase because the Commission found that the company had not sufficiently justified the need for increased spending in one asset category. Resp't's Br. at 9-10, 24-25 (discussing exclusion of escalation factor for distribution plant); *see* AR 736.

D. Taken to its Logical Conclusion, the Holding Proposed by ICNU and Public Counsel Would Prove Unworkable

Following Public Counsel's lead, ICNU asks this Court to hold that rate base assets must be connected to a "specific utility facility" before they may be valued for ratemaking purposes. Amicus Br. at 12; *see* Br. of Appellant at 28 (arguing that rate base assets must be associated with "specific or identifiable plant"). This proposal begs the question: What level of specificity will pass muster under RCW 80.04.250(1)? ICNU offers no suggestion.

Taken to its logical conclusion, the "specific utility facility" standard might require a distinct evidentiary justification for each incremental capital item included in the utility's rate base proposal—e.g., each wood pole, each software license, each transformer, each maintenance

vehicle, each meter, each dollar of working capital, etc. If the utility cannot justify each item individually, to Public Counsel's and/or ICNU's satisfaction, the Commission will have no choice but to deny the asset's inclusion in rate base.

Denial might result in lower short-term rates due to undervaluation of the utility's rate base. But it could also have a devastating effect on the company's ability to attract capital on reasonable terms and, by extension, on the safety and reliability of its system. AR 1519, 2770; *see POWER 85*, 104 Wn.2d at 813 (authorized return on rate base "should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties" (quoting *Bluefield Water Works & Imp. Co. v. Public Serv. Comm'n*, 262 U.S. 679, 692, 43 S. Ct. 675, 67 L. Ed. 1176 (1923))).

ICNU worries about the ratemaking process devolving into an "expensive and time-consuming farce." Amicus Br. at 16. But its "specific utility facility" proposal is just the sort of imprecisely restrictive legal standard that could bring that reality about. Indeed, ICNU acknowledged that the Commission cannot review the merits of every capital addition within the confines of the administrative process:

While the Company presented a voluminous amount of data for the 150 capital projects proposed for 2015 and 2016, it would be impractical within the scope of the evidentiary record in this proceeding for the Commission to evaluate the merits of each and every pro forma capital project proposed by the Company.

AR 6464 (testimony of ICNU's chief witness, Brad Mullins).

Like most Commission processes, rate base valuation is governed by a reasonableness standard that requires the Commission to balance ratepayer and investor interests. To perform this balancing act, the Commission needs flexibility to select a forecasting method that meets the needs of the case at hand. *POWER 85*, 104 Wn.2d at 812 (“[W]ithin a fairly broad range, regulatory agencies exercise substantial discretion in selecting the appropriate ratemaking methodology.”). If, based on the available evidence, the Commission has confidence that a trended forecast fairly estimates the value of the utility’s productive assets during the prospective rate-effective period, then the trended forecast is appropriate “for rate making purposes.” RCW 80.04.250(1).

III. CONCLUSION

The Commission’s trended rate base forecast fairly estimated the value of the company’s productive assets during the 2016 rate-effective period. Accordingly, this Court should hold that the Commission committed

no reversible error when it relied on the forecast “for rate making purposes.”

RCW 80.04.250(1).

RESPECTFULLY SUBMITTED on August 7, 2017.

ROBERT W. FERGUSON
Attorney General



Julian H. Beattie, WSBA #45586
Assistant Attorney General
Utilities and Transportation Division
P.O. Box 40128
Olympia, WA 98504-0128
(360) 664-1225

PROOF OF SERVICE

I hereby certify that I have served a true and correct copy of WUTC's Answer to ICNU's Amicus Brief, by electronic mail and United States mail, as follows:

For Public Counsel

Lisa W. Gafken
Assistant Attorney General
Public Counsel Unit
WSBA #31549
800 Fifth Ave., Suite 2000
Seattle, WA 98104
Phone: 206-464-6595
Lisaw4@atg.wa.gov

For ICNU

Jesse E. Cowell, WSBA #50725
Davison Van Cleve, P.C.
333 S.W. Taylor St., Suite 400
Portland, OR 97204
Phone: (503) 241-7242
jec@dvclaw.com

For Avista Corporation

David J. Meyer
Kelly O. Norwood
Avista Corporation
1411 E. Mission Ave., MSC-27
Spokane, WA 99220-3727
David.meyer@avistacorp.com
Kelly.norwood@avistacorp.com

DATED this 7th day of August 2017, at Olympia, WA.



ELIZABETH M. DeMARCO
Legal Assistant

ATTORNEY GENERAL - UTC DIVISION

August 07, 2017 - 2:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 48982-1
Appellate Court Case Title: Attorney General's Public Counsel Unit, Petitioner v WA Utilities & Transportation Comm Respondents
Superior Court Case Number: 16-2-01108-7

The following documents have been uploaded:

- 5-489821_Briefs_20170807084359D2103374_2348.pdf
This File Contains:
Briefs - Answer to Amicus Curiae
The Original File Name was 48982-1-II WUTC Answer to ICNU Amicus Brief 8-7-17.pdf

A copy of the uploaded files will be sent to:

- bdemarco@utc.wa.gov
- jec@dvclaw.com
- kgross@utc.wa.gov
- lisa.gafken@atg.wa.gov
- patty.hanson@avistacorp.com

Comments:

Sender Name: Krista Gross - Email: kgross@utc.wa.gov

Filing on Behalf of: Julian Hua Beattie - Email: jbeattie@utc.wa.gov (Alternate Email:)

Address:
PO Box 40128
Olympia, WA, 98504-0128
Phone: (360) 664-1194

Note: The Filing Id is 20170807084359D2103374