

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

AVISTA CORPORATION

Employer

And

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL 77,  
AFL-CIO

Petitioner

Case No. 19-RC-15234

POST HEARING BRIEF FOR AVISTA  
CORPORATION

**POST-HEARING BRIEF FOR AVISTA CORPORATION**

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**TABLE OF CONTENTS**

	Page
I. ISSUES PRESENTED.....	3
II. STATEMENT OF FACTS.....	3
A. Background.....	3
B. Overview of Central Dispatch.....	4
C. Overview of Dispatcher Responsibilities.....	5
1. Switching Orders.....	6
2. Trouble Calls.....	7
III. ARGUMENTS AND AUTHORITIES.....	12
A. The Petition Should Be Dismissed Because The Dispatchers Are “Supervisors” Under Section 2(11) Of The Act.....	12
1. The Board Should Follow <i>Big Rivers</i> and the dissent in <i>Mississippi Power and Light</i> .....	13
2. Recent Supreme Court and Board Decisions Confirm the Supervisory Status of Dispatchers.....	16
IV. CONCLUSION.....	21

## **POST-HEARING BRIEF FOR AVISTA**

On August 10, 2009, the International Brotherhood of Electrical Workers, Local Union 77, AFL-CIO (“the Union”) filed a RC petition, seeking a representation election for “[a]ll full time and part time central distribution dispatchers at the Avista, Spokane WA location.” As discussed below, the distribution dispatchers (“Dispatchers”) employed by Avista Corporation (“the Company” or “Avista”) are not “employees,” but instead are “supervisors,” within the meaning of Section 2(11) of the National Labor Relations Act (“Act”). Therefore, the petition should be dismissed.

### **I. ISSUES PRESENTED**

Whether the Union's petition should be dismissed because the Company's Dispatchers are supervisors under Section 2(11) of the Act and ineligible for representation by the Union because the individuals have the ability to assign work and to responsibly direct others, utilizing independent judgment?

### **II. STATEMENT OF FACTS**

#### **A. Background**

Avista Corporation generates, transmits and distributes electricity to customers in Eastern Washington and Northern Idaho. (Tr.12) Avista also distributes natural gas in Eastern Washington, Northern Idaho and parts of Oregon. (Tr.12, 13) Avista has approximately 350,000 electric customers and 310,000 gas customers. (Tr.13)

The Union and Avista have a relationship that dates back several decades. (Employer Exhibit 1, page 17) The Union and Avista have entered into a series of collective bargaining agreements. (Employer Exhibit 1, page 17) The bargaining unit includes many job classifications in various operating units, including Facilities Services, Transportation, the Kettle

Falls Generating Station, Hydro Production and Construction, Stores, Customer Service and Operations. (Employer Exhibit 1 at pages 37-38) At no time during this period has the Union ever represented or sought to represent the Company's Dispatchers.

Located throughout Avista's territory are ten (10) service centers to which the bulk of the Company's production and maintenance employees report to work. (Tr.102) The service centers range from thirty-five (35) miles to over two hundred (200) miles from Central Dispatch in Spokane, owing to distribution of gas in Oregon, and electrical services throughout Eastern Washington and Northern Idaho. (Tr.69 – listing different area offices)

#### **B. Overview Of Central Dispatch**

More than ten years ago, the Company reorganized various aspects of its operations and, as a result, established a Central Dispatch Center at its Spokane, Washington office building. (Tr.171, 218) The Dispatchers in Spokane are responsible for all service centers, for both electric and gas issues.

Mike Broemeling is the Chief Distribution Dispatcher for Avista and is responsible for operations of the Dispatchers who are in the proposed bargaining unit. (Tr.11, 19) The Dispatchers he supervises have the latitude to operate the distribution system. (Tr. 19)

The Dispatchers are under the supervision of one (1) supervisor. (Tr. 19, 64, 218) Mike Broemeling, the Distribution Dispatch Manager (listed in the proposed unit exclusions as the chief distribution engineer) has ten (10) Dispatchers reporting to him.

As a regulated utility, Avista's responsibility is to maintain service twenty-four (24) hours per day, seven (7) days per week, 365 days per year. (Tr.17, 244-45) As a result, the dispatch area is a 24/7 operation. Most of the Dispatchers work rotating 12 hour shifts, (Tr.18, 100, 219), although one Dispatcher works from 7:00 a.m. until 5:00 p.m. (Tr.18)

Mr. Broemeling normally works from 7:00 a.m. until 5:00 p.m., Monday through Friday. (Tr.19) When Mr. Broemeling is out of the office, he does not appoint a “replacement” manager to oversee the Dispatchers. Given the 24/7 operation, a manager is not present for the majority of the time. (Tr.19) Instead, Dispatchers monitor workload and staffing as needed.

On-duty dispatchers have the undisputed ability to call in additional Dispatchers in their discretion, and to stay after the end of the normal shift without needing supervisory permission. (Tr.27, 28, 157, 267-68) Like many of the duties of Dispatchers, there are no guidelines regarding calling in additional Dispatchers. (Tr.157) One result of the decision to call in additional Dispatchers is that it results in the Dispatchers being able to authorize overtime pay. (Tr.283)

### **C. Overview Of Dispatcher Responsibilities**

As discussed in greater detail below, the job duties of the Dispatchers include monitoring and directing the operation of the electrical distribution system as well as the gas distribution system. In performing such duties, the Dispatchers are required to handle a variety of functions, the most important of which are (1) monitoring, interpreting and maintaining several types of systems, including the Outage Management System (OMS) and various maps of the service territory (Tr. 20); (2) receiving trouble and outage orders via the Company's Call Centers and taking whatever actions the Dispatcher, in his or her discretion and judgment, feels is necessary to protect the integrity of the electrical distribution system; and (3) assisting with power restoration efforts.

The Dispatchers are responsible for managing the Company's distribution system, including taking corrective action when a failure occurs in the system and overseeing the restoration efforts by other personnel. The restoration efforts include analysis of the potential

issues and dispatching of various personnel to the site of the failure and the ongoing direction of their efforts to restore service in the most effective way possible. This may consist of reprioritizing incidents as more arise. (Tr.286)

Dispatchers have “total discretion” to decide where and when to send personnel as incidents occur because “they’re the ones running the show.” (Tr.33) Al Fisher, Director of Operations, manages the responders. Mr. Fisher testified that the dispatchers have the “full authority to override any of the construction manager’s general foremen or myself.” (Tr.179) Absent rare and extraordinary conditions (EOP 2 or 3), Dispatchers have the latitude to operate the system. (Tr. 19)

These critical decisions, which are inherent in maintaining the integrity of the distribution system and restoring power, are made by the Dispatchers, as the only persons in authority in the Dispatchers’ work area for the majority of the “round the clock” operation. Moreover, for the bulk of the hours of operation, which occur after regular weekday hours, there are no other dispatch supervisors on duty when these critical assignments of work must be made. (Tr.19)

### **1. Switching Orders**

During regular working hours, the Dispatchers monitor the operations of the distribution system and interpret Outage Management System notices. Additionally, thirty to forty times per year, a Dispatcher, either on day shift or night shift, will design and issue switching orders to crews in the field. (Tr.259, 280)

Switching orders provide a means for removing a piece of equipment or a section of a line from service in order to provide a safely cleared working area. (Tr.36) Most switching orders are prepared by Avista engineers. (Tr. 36, 64, 70) In designing unplanned switching

orders, the Dispatcher is responsible for reviewing SCADA<sup>1</sup>, an information tool concerning Avista's electrical system which allows certain non-Dispatch employees to remotely control devices in the field, and written requests that certain lines be taken out of service, or de-energized, in order to perform construction or maintenance, in making assignments of personnel. (Tr.22, 35, 37)

The Dispatcher exercises independent judgment in implementing the pre-scheduled switching order in order to de-energize the lines, provide a safe working environment for crews and maintain electric service to customers. When the switching orders are issued to the field, the Dispatchers are responsible for monitoring the status of the line and have sole responsibility for releasing the line or allowing crews to work on the lines. With respect to crews working on de-energized lines, the Dispatcher issues a clearance for a line; crews are required to contact the Dispatcher prior to commencing switching and are not allowed to work on lines until a clearance has been issued. (Tr.229) A Dispatcher has the discretion to stop a switching procedure (Tr. 93, 263). Additionally, a Dispatcher may modify approved switching orders (Tr. 94)

## **2. Trouble Calls**

During regular office hours, the Dispatchers are responsible for handling "trouble calls" or "outage orders" forwarded from the call centers, analyzing and assessing the circumstances surrounding these calls, determining the appropriate number and types of personnel needed to restore electrical or gas service and/or directing those personnel in the restoration of service. (Tr.22)

There is no manual or "cookbook" to explain how to manage an outage from the Dispatcher's perspective. (Tr.30) The Dispatchers handle approximately 24,000 incidents per

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<sup>1</sup> SCADA (Supervisory Control And Data Acquisition)

year, or approximately 66 per day on average. (Tr.290) Both Mr. Broemeling and Mr. Fisher testified that the primary function of Dispatchers is to manage outages. (Tr.20, 186)

When there are limited numbers of incidents there is no need to prioritize outages. However, in the presence of multiple incidents the Dispatchers need to prioritize the order of responses to the events. The bulk of the Dispatcher's functions after hours is to be prepared to address incidents and respond as quickly as possible. (Tr. 244) Dispatcher McAllister agreed that when it was busy there is some analysis necessary to determine what workers are dispatched and in what sequence. (Tr. 252)

The number of decisions that have to be made by a Dispatcher in a 12-hour shift can be "literally thousands." (Tr. 266) Dispatcher McAllister testified that in the regular course of the day, he would make between 150 and 300 work related decisions. He qualified his answer as follows: "Like an independent judgment on what to do first, I mean it happens all day, every day for everyone, not just a Dispatcher." (Tr. 293) These decisions are not without scrutiny or second-guessing. (Tr. 166, 266) Although this occurs, the fact remains that the Dispatchers are the decision makers.

After regular hours, the Dispatcher continues to monitor the operation of the distribution system, interpret and react to Outage Management System alarms, and monitor and prepare for bad weather. The importance of the judgment exercised by Dispatchers in the course of supervising the restoration of service cannot be understated. All witnesses testified as to the exercise of judgment in a weather-related event that occurred on August 21, 2009. (Tr. 23 -26) For example, Mr. Broemeling testified the prioritization a Dispatcher engages in during an event involves many factors such as how many crews to call out, prioritizing and reprioritizing the

order in which to assign responders, and determining whether the situation is getting worse or better in a fluid situation. (Tr. 31-32)

For Avista, a guideline regarding the prioritization of incidents is public safety and employee safety first, then restoring power to as many customers as quickly as possible. (Tr. 32 - 33) However, the Dispatchers have total discretion to decide when they are going to send responders and where they are going to send responders. (Tr.33). When there are multiple events occurring at one time that involve safety issues, it is up to the judgment of the Dispatcher to determine to which event or events responders shall be sent first. (Tr. 52) Simply put, a Dispatcher's job is unpredictable "because it can go from really slow to chaos in a matter of minutes." (Tr. 50).

If a customer reports an outage, the Dispatcher has the full authority to review available information, assess the situation and, using his or her independent judgment and discretion, determine whether electric service should be restored immediately on an overtime/call-out basis or whether the situation can wait until employees report for their next shift. (Tr.19, 25, 269) This function would be especially critical when a customer relying on life support reports an outage. The Dispatcher must exercise his or her independent judgment in what literally could be a profound safety issue. (Tr.138-39)

Because the majority of personnel responsible for handling the field work associated with restoring electricity are off-duty after regular business hours, the Dispatcher is responsible for determining the classifications of personnel needed to restore service quickly. The Dispatcher then activates ARCOS <sup>2</sup> to locate the necessary individuals and direct them to report to work. (Tr.26, 77) The Dispatcher exercises independent judgment in making these determinations and

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<sup>2</sup> ARCOS is a computerized system that the Dispatcher engages to automatically dial the telephone numbers of employees to respond to incidents. (Tr. 77-78)

is not required to contact any higher authority within the Company prior to calling out personnel, even if the employees are from different geographic areas. (Tr.79)

The Dispatcher typically contacts a first responder to respond to an outage incident. (Tr.33) This person could be a lineman, a gas serviceman, a foreman or a hot apprentice. (Tr.77) These responders essentially serve as the Company's trouble-shooters and are the Company's first line of defense in responding to outages. These individuals are the people on site at the incident and “really have the eyes into the exact kind of damage that exists out there.” (Tr. 122)

Dispatchers, alone, are responsible for assigning the responders to outage calls and have called in crews (Tr.40) and have had crews held over. (Tr. 262) Mr. Fisher, to whom the responders and their supervisors report, testified that Dispatchers have done this over the objection of the General Foreman and manager. (Tr.185-86)

Significantly, the Dispatcher has the authority to countermand a previous assignment given by an employee's supervisor. (Tr.49, 123, 124) The Dispatcher has the final authority to pull crews off a job to go restore service where needed. (Tr. 186, 294)

Mr. McAllister explained that Dispatchers track where line personnel are working on the distribution system at any given time during the day. The purpose for this is to keep up with who is out working and exactly where they are on the system. (Tr. 222) If the Dispatcher anticipates that an emergency situation is developing prior to the time when most personnel are relieved from duty, he or she has full authority to direct the personnel he or she believes will be needed to remain at the job until the emergency situation has abated. (Tr.262) In exercising this authority to direct personnel using independent judgment, the Dispatcher is authorizing the payment of overtime wages, which may vary from time and one-half to double-time pay. (Tr.42, 283, Employer Exhibit 1) The Dispatcher need not secure any other supervisory approval or

permission to assign responders to overtime or to call out responders from their homes in the middle of the night. (Tr.51, 117)

In the case of many trouble calls occurring simultaneously, the Dispatchers have the full authority to decide, in their independent judgment, which calls have priority and to direct personnel to address those “priority” needs first. (Tr.32-34, 44-45) No concrete preset guidance or “cookbooks” for trouble calls exist; instead, the Dispatcher must evaluate all of the information available and, based on his or her analysis, direct the appropriate personnel to restore service in the order he or she determines. (Tr.32-34, 53) In the context of safety issues, “[I]t’s up to them to decide. There’s nobody else to decide. They’re the ones that are sitting in that chair, and they’re the ones that have to decide to make the decision who is going where.” (Tr. 84)

The only situation where a responder might be justified in refusing to follow the directions of the Dispatcher would be if the Dispatcher was asking them to do something they felt was unsafe. If there was a non-safety based reason for not doing what was directed by the Dispatcher, and management learned of it, discipline would depend on the reason for the refusal. (Tr.207)

Typically, the Dispatchers are not dealing with only one trouble call at a time. (Tr.31) Instead, Dispatchers routinely address several unique situations at once, analyzing each and determining the proper method for addressing each situation. (Tr.31) The Dispatcher must rely on and exercise his or her own independent judgment to carry out his or her responsibility and the objective to “keep the lights on” in the interest of Avista and its customers.

### III. ARGUMENTS AND AUTHORITIES

Dispatchers, which is the job classification at issue herein, responsibly direct and assign work, using their independent judgment, in the interests of Avista. A finding that the Dispatchers are not “supervisors” under Section 2(11) would undermine Avista’s ability to control its operations and manage its business. Any application of Section 2(11) to the Dispatchers at issue herein, and a conclusion that they are not supervisors, would lack a reasonable basis in law.

#### A. **The Petition Should Be Dismissed Because The Dispatchers Are “Supervisors” Under Section 2(11) Of The Act**

Section 2(3) of the Act, 29 USC § 152(3) excludes any individual employed as a “supervisor” from the definition of “employee” and, consequently, from coverage under the Act. The defining criteria for supervisory status is set forth under Section 2(11) of the Act. Under Section 2(11), supervisory status exists if an individual possesses:

authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (Emphasis added)

It is well settled that Section 2(11) is to be read in the disjunctive, and that the presence of any one of the 12 listed criteria/activities establishes supervisory status. *NLRB v. Health Care & Retirement Corporation of America*, 511 U.S. 571 (1994). As the Court held in *Health Care & Retirement Corporation of America*, “[t]he Act is to be enforced according to its own terms.... Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board’s decision, not the other way round.” *Id.* at 580.

Under Section 2(11), “any individual who has the authority to use independent judgment in the execution or recommendation of any of the functions listed . . . is a supervisor.” *Monotech of Mississippi v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989). Further, supervisory status requires only the existence of any of the enumerated powers/authorities and does not turn upon the frequency of its/their exercise. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), *cert. denied*, 338 U.S. 899 (1949); *West Penn Power Company v. NLRB*, 337 F.2d 993 (3rd Cir. 1964). *Morello v. Federal Barge Lines, Inc.*, 746 F.2d 1347 (8th Cir. 1984).

**1. The Board Should Follow *Big Rivers* and the dissent in *Mississippi Power and Light***

For years the Board and the Courts of Appeal clashed over the application of Section 2(11) to those individuals who monitor the transmission and distribution of power. These individuals, known variously as distribution dispatchers, system dispatchers, system supervisors or operations coordinators, were routinely found by the courts to be supervisors under the “responsible direction” criteria. In 1983, the Board finally bowed to the weight of this established judicial precedent and found that “system supervisors” were Section 2(11) supervisors because, among other things, they responsibly directed field employees in the execution of complex switching orders. *Big Rivers Electric Corp.*, 266 NLRB 380, 383 fn. 2. (1983).

From 1983 until its decision in *Mississippi Power & Light Company*, the Board followed its policy set forth in *Big Rivers* and excluded individuals in the system supervisor/dispatcher positions from utility company bargaining units because such individuals were Section 2(11) supervisors. The Board’s decision in *Mississippi Power & Light* overturned well established precedent which had been followed by the Board and relied upon by utility companies for nearly two decades. Further, the Board’s decision in *Mississippi Power & Light* is contrary to nearly

half a century of Federal Courts of Appeal decisions and is in direct conflict with Section 2(11) of the Act.

Reviewing courts have held that the Board is obligated to maintain a consistent approach to its unit determinations. *Fiber Glass Systems v. NLRB*, 807 F.2d 461, 464 (5<sup>th</sup> Cir. 1987). Further, where the Board seeks to depart from precedent, it must prove a well-reasoned explanation for its reversal. *NLRB v. WKRG-TV*, 470 F.2d 1302, 1311 (5<sup>th</sup> Cir. 1973). The Board's decision in *Mississippi Power & Light* does not contain, or constitute, a well reasoned explanation for its reversal of *Big Rivers*.

*Mississippi Power & Light* was decided by a 3 to 2 vote majority of the Board. In their well reasoned dissent, members Hurtgen and Brame clearly demonstrate that the majority's reversal of *Big Rivers* was unwarranted and legally unsupported. As Members Hurtgen and Brame noted in their dissenting opinion in *Mississippi Power & Light*, 328 NLRB No. 146, p. 11-12 (1999), "[f]or nearly half a century, Federal courts of appeals have overwhelmingly found that individuals who monitor the transmission and distribution of power for utility companies are supervisors within the meaning of Section 2(11) of the Act."<sup>3</sup>

Board Members Hurtgen and Brame also noted the following:

Our colleagues concede that under *Big Rivers* and its progeny, as well as the preponderance of circuit court law, the instant systems dispatchers and distribution dispatchers are statutory supervisors on the basis that they responsibly direct and assign work. However, rather than adhere to *Big Rivers* and established

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<sup>3</sup> See, e.g., *Southern Indiana Gas & Electric Co. v. NLRB*, 657 F.2d 878 (7<sup>th</sup> Cir. 1981), denying enf. of 249 NLRB 252 (1980); *Maine Yankee Atomic Power Co v. NLRB* 624 F 2d 364 (1<sup>st</sup> Cir. 1980), denying enf. of 239 NLRB 1216 (1979); *Monongahela Power Co. v NLRB*, 657 F.2d 608 (4<sup>th</sup> Cir. 1981), denying enf. of 252 NLRB 715 (1980); *NLRB v. Detroit Edison Co.*, 537 F.2d 239 (6<sup>th</sup> Cir 1976), denying enf. of 216 NLRB 1022 (1975), *Arizona Public Service Co. v. NLRB*, 453 F 2d 228 (9<sup>th</sup> Cir. 1971), denying enf. of 182 NLRB 505(1970). See also *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir 1949), denying enf. of 80 NLRB 1334(1948).

precedent, the majority now abruptly changes course, overrules settled, reasoned law, and concludes that the dispatchers are not supervisors. We find that this reversal is unwarranted and that the majority's rationale is legally unsupported. Accordingly, we dissent.

Members Brame and Hurtgen also observed:

Our colleagues next assert that, in finding supervisory status, the Board, in *Big Rivers*, and the courts were improperly influenced by: (1) the severity of “the adverse consequences... that might result” from faulty assignments and directions; and (2) “the complexity of the dispatchers responsibilities.” We disagree. Although the courts have recognized the consequences of mistakes in judgments, their basic point has been that judgment is necessary. In this sense, the severity of the potential consequences is an element in determining whether an individual uses independent judgment. Concededly, there may be cases where an individual must take a rigidly prescribed course of action (e.g. throw a lever) and, if he/she fails to do that, a terrible consequence will occur. We would agree that such an individual, acting without discretion, is not a supervisor. However, as discussed above, the dispatchers here use their discretion in deciding what to do, including directing the work of employees of the Employer to take particular actions, in a myriad of situations. The scope and severity of the consequences are related to the actions that they choose to take (or not take). Thus, like the courts, I would not ignore the consequences of their actions or inaction. More particularly, the record amply demonstrates that the consequences of the dispatchers' directions and consequent assignments are great. They include such possibilities as fires, safety hazards, damage to expensive equipment, endangering field personnel and the loss of power to such critical customers as hospitals and government communication buildings. As testified to by Service Superintendent May, “The consequences could be disastrous.”

Accordingly, where, as here, the dispatchers must use such independent judgment to make complex decisions when assigning and directing work — electing among a myriad of complex factors (including, by not limited to, the availability and capabilities of complex equipment, field employee skill and availability, weather and environmental factors, and the varying power needs of the affected customers) - they clearly are exercising supervisory authority.

Avista adopts, by reference, the analysis of members Hurtgen and Brame. Accordingly, *Mississippi Power & Light* should be accorded no weight and rejected by the Board in this case. At least two Courts of Appeal have abrogated *Mississippi Power & Light*. See, e.g., *Public Service Company of Colorado v. NLRB*, 271 F.3d 1213 (10<sup>th</sup> Cir. 2001) (denying enforcement of Board order and holding dispatchers are supervisors under Section 2(11)); *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5<sup>th</sup> Cir. 2001) (same). These well-reasoned decisions further buttress the Company's position in this case that the Dispatchers are supervisors under the Act.

## **2. Recent Supreme Court and Board Decisions Confirm the Supervisory Status of Dispatchers**

Moreover, in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court criticized the Board's interpretation of the Section 2(11) term "independent judgment." As a result, the Board endeavored in its recent *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006), decision to reexamine and clarify its interpretations of the term "independent judgment" as well as the terms "assign" and "responsibly to direct," as those terms are set forth in Section 2(11). The Board proffered the following elaborations:

The Board defined "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee." The Board then defined the statutory term "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' . . . and carried out with independent judgment." The Board held that the element of "responsible" direction involved a finding of accountability, so that it must be shown that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if

necessary” and that “there is a prospect of adverse consequences for the putative supervisor” arising from his/her direction of other employees.

Finally, consistent with the Supreme Court's decision in *Kentucky River*, the Board adopted an interpretation of the term “independent judgment” that applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise.

The Board defined the statutory term “independent judgment” in relation to two concepts. First, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently “independent” under the Act. The Board further found that the degree of discretion exercised must rise above the “routine or clerical” in order to constitute “independent judgment” under the Act.

These recent clarifications by the Board confirm the supervisory status of Avista’s Dispatchers. At the hearing, Avista and the Union presented evidence relating to the supervisory nature of the Dispatcher positions at issue. The uncontradicted and substantial evidence established that Dispatchers are accountable and responsible for their actions in connection with the restoration of power in the most efficient and expedient manner possible.

In order to fulfill this responsibility, the Dispatchers must use their independent judgment in directing personnel and committing resources to accomplish the restoration of power/service, safely, efficiently and expeditiously. The Dispatchers are the only persons available (and relied upon by Avista) to direct service restoration operations and personnel and to handle emergencies doing the bulk of the work.

Courts have held that the absence of other supervision is indicative of supervisory status. *NLRB v. McCullough Environmental Services, supra*. In *Empress Casino Joliet Corporation v. NLRB*, 204 F. 3d 719 (7th Cir. 2000), the Seventh Circuit observed that the Board's ruling (that none of the captains, first mates or chief engineers of a riverboat gambling casino were supervisors) "has the curious implication that a ship with more than 1000 people aboard it has no supervisor on board at any time." The Seventh Circuit continued, holding that "the National Labor Relations Act, precisely by excluding supervisors from its protections, rejects a syndicalist (that is, worker-controlled) conception of business." Should the Regional Director conclude that Dispatchers are not supervisory, the effect would be that for large blocks of time and in emergency situations, no one is in charge of Avista's distribution system.

It is well-settled that the authority to direct employees, using independent judgment, is sufficient to confer supervisory status, regardless of how often that power is exercised. *George C. Foss Co. v. NLRB*, 752 F.2d 1407 (9th Cir. 1985); *NLRB v. Metropolitan Petroleum Co., Div. of Pittston Co.*, 506 F.2d 616 (1st Cir. 1974). Likewise, it is well settled that regardless of whether such authority is given expressly or by implication, the authority has been vested and supervisory status is thereby conferred. *NLRB v. Adco Electric, Inc.*, 6 F.3d 1110 (5th Cir. 1993).

Whether or not the Dispatcher contacts individuals using a call list provided by the Company is also irrelevant. In using the call list, the Dispatchers are acting as supervisors and using the same tool used by other supervisors when additional personnel are needed. It is untenable to argue that such use somehow diminishes or negates the Dispatcher's authority to direct employees. The Dispatcher still must exercise independent judgment to determine if individuals on the call list are needed and/or if additional personnel (beyond those on the call

list) are required. Furthermore, the call list does not diminish the Dispatcher's use of independent judgment to determine the numbers and classifications of employees necessary to best address a problem.

Section 2(11) requires that the exercise of authority not be “merely routine or clerical.” The Dispatchers are seldom involved in situations that are routine or clerical, and operate in an environment with too much activity and risk for their decisions to be deemed “routine.” Instead, the Dispatchers work under circumstances in which each problem is unique and requires its own independent analysis using independent judgment. There are no “cookbook” answers to the majority of situations the Dispatcher is required to address by responsibly directing other employees.

The Dispatcher has no alternative but to exercise independent judgment in addressing the situations and issues that arise and demand immediate attention. It would be unrealistic, if not impossible, for the Company to attempt to identify every possible situation that might arise and create a detailed “how-to” response list. Instead, the Company relies on the Dispatchers’ independent judgment in formulating a response that efficiently and safely maintains or restores service.

The Dispatchers work in an environment that, for the most part, leaves them without a supervisor in their work area. The distribution area is staffed twenty-four (24) hours a day, seven (7) days a week; however, Manager Broemeling’s normal working hours are Monday through Friday from 7:00 a.m. to 5:00 p.m. (Tr.19) Accordingly, for an area that is manned for a total of 168 hours a week, direct supervision above the Dispatcher level is available only about twenty-five percent (25%) of the time. As noted above, the Dispatcher alone has the authority to direct the work of responders in the restoration of power through complex switching orders. This sole

authority to direct work is a hallmark of supervisory status that has been confirmed by both the Court and the Board in recent cases.

Admittedly, the Dispatchers have access to information regarding the status of lines on the system and have the capability and responsibility (as necessary) to advise others of that status. The Dispatchers also have access to information through the Outage Management System. However, to categorize the dispatch area as merely an information gathering point or to suggest that Dispatchers just move people around greatly underestimates the authority and capabilities of the Dispatchers.

Access to more information does not necessarily mean that the job will be easier. Indeed, with technology upgrades and access to more information, there are more decisions to be made and more facts to analyze and consider when making decisions, forcing the Dispatcher to use more independent judgment and analysis in responding to problems.

Dispatchers are also required to use independent judgment when prioritizing the order of restoration of service. Incidents can occur in which multiple different types of customers are without electrical service. For example, it is possible that a hospital, nursing home, large industrial customer and residential areas may be affected simultaneously. When this occurs, the Dispatcher must take into account several different factors, including the “criticality” of the customer, the impact of lost service to the customer, and the Dispatcher's ability to return service to the largest number of customers as quickly as possible.

Without question, the Dispatchers play a critical role in Avista’s control of its operations and business. Accordingly, in light of the supervisory authority to “assign” and “responsibly direct” possessed by the Dispatcher (and supported by the Record) and the use of independent

judgment in carrying out that authority, the Dispatchers employed by Avista are statutory supervisors.

IV. **CONCLUSION**

For the foregoing reasons, the Union's petition should be dismissed.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of September, 2009.

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STATEMENT OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 2nd day of September, 2009, addressed to the following:

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National Labor Relations Board  
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