[Service Date November 2, 2004]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UG-041515
Complainant,	)	ORDER NO. 05
v.	)	
AVISTA CORPORATION, d/b/a AVISTA UTILITIES,	)	SETTLEMENT HEARING ORDER ON PROCESS; GRANTING SHORT-TERM IMPLEMENTATION OF RATES; NOTICE OF HEARING
Respondent.	)	**(Set for January 19, 2005, 9:30 a.m.)**

1 **PROCEEDING:** Docket No. UG-041515 involves a filing of Avista Corporation, d/b/a Avista Utilities, of tariffs seeking an increase in its rates and charges for providing utility service in the State of Washington.

2 **SETTLEMENT PRESENTATION HEARING:** The Commission convened a settlement presentation hearing at Olympia, Washington on October 22, 2004, before Chairwoman Marilyn Showalter, Commissioners Richard Hemstad and Patrick Oshie, and Administrative Law Judge C. Robert Wallis.

3 **APPEARANCES.** David Meyer, attorney, Spokane, represents respondent Avista Utilities. Ed Finklea, attorney, Portland, Oregon, appeared for the Northwest Industrial Gas Users ("NWIGU"). Chuck Eberdt, director, appeared for the Energy Project/The Opportunity Council. Robert Cromwell, Assistant Attorney General, Seattle, appeared on behalf of the Public Counsel section of the Attorney General Division. Gregory J Trautman, Assistant Attorney General, Olympia, appeared for Commission Staff.

4 **SETTLEMENT ORIGINS.** Counsel for Commission Staff and the Company indicated at the initial prehearing conference on September 23, 2004, that those two parties had engaged in preliminary settlement discussions, and that they appeared close to an agreement in principle subject to completion of a Commission Staff audit of Company records related to the proposed increase. They indicated a desire that, if parties agreed, rates become effective on November 1, 2004, to be in effect for the 2004-2005 heating season. All parties indicated an open mind with regard to settlement, and all consented to a temporary hiatus in the procedural schedule to permit the parties to concentrate on resolving matters. The parties scheduled a settlement conference, which was held on October 5, 2004.

5 The Commission convened a prehearing conference on October 11, 2004, for a progress report on settlement discussions and for making or confirming necessary procedural and logistical arrangements for whichever options were available. At the conference, the parties announced a settlement among three of the parties: the Company, the Commission Staff, and the Industrial Gas Users (NWIGU). The three parties agreed to a level of rates to be implemented on November 1, 2004, or in the event the rates were not allowed to become permanently effective then, the Company and Commission Staff agreed to temporary implementation of the proposed settlement rates on November 1, 2004, subject to refund to the extent that lower permanent rates were subsequently adopted.[1]

6 No party opposed the proposed settlement; Public Counsel and The Energy Project stated that they had not engaged in a review sufficient to determine whether they would support or oppose the proposal. They strongly opposed *implementation* of the settlement, however, arguing that they had not had adequate time to review the proposal. The Commission scheduled a settlement

[1] NWIGU does not oppose temporary implementation of the settlement rate while the Commission reviews its merits for permanent application.

presentation for October 22, 2004, and a public hearing on the proposal on October 28, 2004, in Spokane, within Avista's service territory. The Commission also scheduled a date for filing of the proposed settlement; for filing of testimony in support of the proposal by the settling parties; for filing of memoranda addressing the propriety of accepting the proposed settlement in this setting; and for filing of memoranda addressing whether the Commission could properly allow rates to become effective November 1, 2004, subject to refund, if the Commission determined not to implement the proposal on the requested date. The parties did file documents on the announced schedule.

7 **SETTLEMENT PRESENTATION HEARING:** The Commission convened a hearing on October 22, 2004, for a presentation of the multi-party settlement in this docket. It received testimony from Kelly Norwood, on behalf of Avista; Ken Elgin, on behalf of Commission Staff, and Paula Pyron, on behalf of NWIGU.

8 **TESTIMONY SUPPORTING SETTLEMENT.** The witnesses described the settlement proposal and their reasons for reaching and supporting it. Commission Staff noted that, for purposes of settlement, the Company agreed to the rate of return believed appropriate by Commission staff, agreed with Staff to the level of pro forma adjustments; and agreed to forego *pro forma* adjustments to its results of operations. Ms. Pyron spoke in support of the settlement proposal, citing advantages in avoiding litigation and in the concessions agreed by the Company. The result is a transparent settlement in which the basis for the calculation of rates is clear. The witnesses spoke in support of implementation of settlement rates on November 1, 2004, as a factor sought by Avista to coincide with implementation of a purchase gas rate adjustment and to coincide with the start of the winter heating season.

9 **HEARING FOR PUBLIC TESTIMONY.** The Commission convened a hearing for public testimony at Spokane, Washington, on October 28, 2004. At the hearing, three witnesses appeared. The witnesses all opposed a rate increase;

winter is a difficult time for retirees and low-income persons who are faced with increasing costs of heat and power, as well as other costs, with few opportunities for increased incomes. Mr. Eberdt also spoke to these issues at the settlement hearing. The Commission is very concerned about the effect of the proposed rates, as they are here coupled with the effect of a substantial increase in rates due to changes in costs of gas. We understand and acknowledge the burdens of increased rates on lower-income and fixed-income persons and on the agencies that serve them. In a time of rising costs and reduced tax revenue, it is a concern to many caring people. It is essential that rates be no higher than necessary.

10 **CONCLUSION FROM SETTLEMENT PRESENTATION.** The purpose of a settlement presentation hearing is to determine whether to entertain a settlement proposal and, if so, to determine the procedure for doing so. The settlement presentation allows the Commission to determine whether a proposal has a "fatal flaw" that renders it unacceptable and further consideration a needless task, or whether it may be considered for implementation wholly on the basis of the settlement presentation. Here, we find no fatal flaw, and believe that the proposal is worthy of further consideration pursuant to the process we adopt herein.

11 **IMMEDIATE APPROVAL.** The parties provided memoranda and argument on the issue of whether the Commission (if it so wished) could properly adopt the proposed settlement for effect on November 1, despite the opposition of parties who contend that they have not enjoyed a reasonable opportunity to inquire into or to oppose the proposal, if they choose to do so.

12 We conclude that the proper approach is to reserve ruling on the settlement until all parties have enjoyed the opportunity to inquire into the proposal, formulate positions, present their views, and cross-examine witnesses supporting the proposal.

13 Analogous issues have arisen in other jurisdictions and, as Public Counsel's memorandum demonstrates, the courts have consistently ruled that non-settling parties must have a meaningful opportunity to present their views.[2] The settling parties point to the speed and the ease with which Commission Staff and NWIGU audited the Company's records, and the "clean" nature of the proposal, arguing that other parties have had the opportunity necessary to formulate an opinion.

14 We find that this is not so. Public Counsel was informed of the prospect of settlement discussions and invited to participate in them, from their first mention, by Commission Staff; Public Counsel declined to participate for reasons that are not (and need not be) clear on the record. Settlement, and negotiations toward settlement, are not mandatory. No forfeiture of rights attaches to failure to participate. The Energy Project is not an "automatic" participant in such proceedings, as is the office of Public Counsel. Mr. Eberdt, however, indicated that his client anticipated little role on technical matters except to support (as far as their interests coincide) participation by Public Counsel. The Energy Project, therefore, would be disadvantaged to the same extent as Public Counsel by immediate consideration of the proposal.

15 The Commission will not consider the settlement for approval on a permanent basis until all parties have a meaningful opportunity to participate by engaging in discovery, presenting testimony, cross-examining opponents' testimony, and arguing the matter to the Commission. The schedule agreed during the settlement presentation, and set out below in this order, is a reasonable schedule that provides such a meaningful opportunity.

---

[2] Public Counsel memorandum, page 7, paragraph 16, citing *Fischer v. Public Service Commission of Missouri*, 645 S. W. 2d 39, 43 (1982). See also, *Popowsky v. Pennsylvania Public Utility Comm'n*, 805 A.2d 637, 643 (2002); *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 555 N.E. 2d 693 (1989).

16 **IMMEDIATE IMPLEMENTATION PENDING SETTLEMENT REVIEW.** The final question we address is whether to allow the proposed rates to become effective on November 1, 2004, pending review of the settlement. The question arises at an interesting moment: only two weeks ago the Commission entered an order rejecting a plea by Verizon Northwest in Docket UT-040788 for "interim" rates pending resolution of its pending general rate case. The Commission ruled that interim rates should not be allowed absent a showing of emergency need by a utility.

17 The parties briefed this issue, as well. All parties agree that Avista is facing no emergency threatening its ability to provide service. Avista and Commission Staff argue, however, that this situation is so different from that presented in the Verizon proceeding that a different result is required. Public Counsel presents the opposite view. It contends, with support from The Energy Project, that the Verizon order controls and that therefore, any implementation of rates after commencement of an adjudication, pending a final decision, is by definition an interim rate that requires an emergency circumstance for support.

18 Here, the circumstances *are* substantially different from those facing Verizon and from those in most other reported interim rate proceedings, [3] in very significant ways.

---

[3] There has been considerable discussion about the meaning of the term "interim" in this context. We acknowledge that both this docket and the Verizon docket involve the question of whether a rate increase should be allowed to become effective during the interim period until a decision is made on the merits of permanent rates. As we note above, the fully contested *Verizon* situation is the "typical" scenario considered in prior cases involving such requests, and for convenience we will use the term "interim" as a shorthand reference to such requests. "Temporary" rates may best be thought of as rates to satisfy a specific temporary need, such as recovery of a specific extraordinary expense, that have a defined termination. We will use the term "short term" for convenience to describe rates that are authorized for the period in which we consider whether or not to accept a settlement.

19 The settling parties agree not only that the proposed rates are appropriate for immediate application but also that they are appropriate for "permanent" application. They testify, supported by credible evidence, that the proposed rates are fair, just, and reasonable for implementation as permanent rates. Credible evidence thus establishes a *prima facie* case that the proposed settlement rates are fair, just, and reasonable as permanent rates of the Company. The evidence further supports a preliminary determination that the rates are fair, just, and reasonable for immediate application while the settlement faces a full review. We find that the proposed short-term rates are consistent with the public interest and conclude that they should be allowed on a temporary basis, subject to refund, pending a full review. Among the factors relevant to this conclusion are the following:

20 (1) Both of the parties joining the Company in proposing settlement audited the Company's books with reference to the proposal, and have concluded that the settlement proposal is an appropriate resolution of the issues. The settling parties agree, and present *prima facie* proof, not only that the proposed rates are appropriate for immediate application but also that they are appropriate for "permanent" application. These parties have the expertise and the skills necessary to mount a vigorous opposition to proposed rates when doing so is in their interests or, in the case of Staff, in its view of the public interest. While their view of the merits will properly be tested at hearing, their support of the settlement proposal and Staff's support for temporary implementation at this juncture provides credible evidence that allowing the proposed rates pending a settlement review would be fair, just, reasonable, and sufficient.

21 (2) The proposed settlement is transparent. A transparent settlement—one that clearly identifies its components and discloses significant trade-offs in reaching accommodations—facilitates a thorough evaluation and contributes to the assessment of credibility.

22 (3) The settling parties agree not only that the proposed rates are appropriate for immediate application but also that they are fair, just, and reasonable for "permanent" application. The Company and Commission Staff ask that the rates be implemented pending a review of the settlement proposal and, in effect, urge us collectively that the proposal has credibility.

23 The decision whether to allow any rate to become effective pending a review is within the discretion of the Commission.[4] As with circumstances involving interim rates, the Commission must exercise its judgment in every instance of a request to allow a settlement proposal to become effective on a temporary basis, pending review.

24 Here, we consider all of the factors considered above, but we rely principally on our assessment that granting the requested short-term increase is consistent with the public interest, a standard that is within our discretion under the *Puget Sound Navigation* decision. We have confidence in making a preliminary decision that the proposed rates are fair, just, reasonable, and sufficient, and that they should be implemented pending a review of the proposed settlement, for the reasons we described above.

25 Mr. Meyer points out that the issue in a typical interim proceeding is focused on need (financial emergency) because the parties have been unable to establish the reasonableness of short-term and long-term rates by traditional ratemaking measures. That was certainly true in the *Verizon* matter.[5] Here, in contrast, audits of the Company's records have been completed by two of the parties. Those two parties have determined, and have provided to the record, credible preliminary evidence that the Company's rates on settlement are fair, just,

---

[4] *Puget Sound Navigation Co. v. Department of Transportation*, 33 Wn.2d 448, 482, 206 P.2d 456 (1949).

[5] *See*, Order No. 11, Docket No. UT-040788, *WUTC v. Verizon Northwest* (October 15, 2004).

reasonable and sufficient as permanent rates. The circumstances to be considered, thus, are greatly different from those in Verizon and in most other situations involving interim rates.

26 In each situation, we must carefully view the relevant policies at issue, the credibility of the available evidence, the nature of the evidence, and the arguments of the parties. Here, we view the nature of the evidence, the credibility of the witnesses, and the arguments of the attorneys. With those factors in mind, we determine that the public interest is best served by allowing the proposed settlement rates to become effective on November 1, subject to refund.

27 Based on the substantial differences in the nature and the quality of the evidence, it is appropriate to treat the issue in this docket, implementation of a proposed settlement rate, pending review, differently from a contested request for interim rates.

28 The ultimate standard in both settings is the public interest, based on the principles of the *Puget Sound Navigation* decision. Each situation requires a review of all of the facts and circumstances that are present. Where the parties have not reviewed the merits of permanent rates, as in the typical contested general rate case with a request for interim rates, there is little available credible evidence on the propriety of any level of either interim or permanent rates. There, requiring a finding of emergency circumstances best balances the public interest factors at issue for the reasons stated in the *Verizon* decision, including the comparative ease in resolving the question of emergency in advance of a full determination of complex contested matters such as rate of return, capital structure, level of expenses, and the level of adjustment required to pro-form or restate the company's results of operations. Here, the public interest is served by our ability to make a preliminary finding that the proposed rates are fair, just, and reasonable.

29 Mr. Eberdt argued at the settlement presentation hearing that authorization of short-term rates could appear to be a prejudgment on the merits. As Commissioner Hemstad pointed out, that is not the situation. Instead, it is in the nature of a preliminary decision, for a short period, based on parties' credible evidence. It is fully subject to review and acceptance or modification and neither binds nor influences the Commission to any result. As a preliminary decision, it is fully subject to modification and it carries no more weight than similar decisions we must make in other situations, for example, to initiate a complaint or to suspend a matter for rate review.

30 **CONCLUSION.** In this decision, we weigh the credibility of support for the proposed rates.[6] We conclude that the proposed settlement rates as filed with the Commission on October 15, 2004, should be permitted to become effective on the entry of this order, pending review of the settlement proposal, subject to refund if and to the extent that a lower rate is established in this docket.

31 There are three conditions to this approval. First is that Avista agree within five days after entry of this order to the proposed schedule, which will not permit entry of an order on the settlement itself prior to the end of January. Second is that Avista agree within five days after entry of this order to a 90-day extension of the suspension date if the proposed settlement is rejected or otherwise does not become effective. Finally, the proposal minimizes (but does not eliminate) risks to consumers by providing that the increase is subject to refund to the extent that the rate eventually approved is lower than the short-term rate. We adopt this requirement as a condition for implementing the rates.

32 **OBSERVATIONS ON SETTLEMENTS.** This docket represents a settlement proposal that is offered by parties having adverse interests. It is defined as a

---

[6] The settlement proposal (Exhibit 4) included an agreed statement of rate base and results of operations as Attachment A. We attach the statement as Attachment A to this order.

multiparty settlement under our rules in WAC 480-07-730**.** While not determinative, that fact is worthy of some consideration and we find that it supports our decision in this matter.

33 State law[7] "*strongly*" encourages

> the informal settlement of matters [that] may make unnecessary more elaborate proceedings under [the Administrative Procedure Act, chapter 34.05 RCW] . . ..

It is appropriate, under this policy of state law, to consider settlements in a way that encourages behavior aimed at settling differences. [8] We note the following:

34 First, Avista has been open from the outset in its disclosure to other parties. It took the step of opening its records to examination by Staff and NWIGU auditors, obviating the need for a formal discovery process; it was exceptionally prompt in responses to Public Counsel data requests; and it agreed to open its records to an auditor from Public Counsel as well. This is behavior that favors the resolution of ratemaking issues speedily and most consistently with the public interest, and is behavior to be encouraged.

35 Second, the settling parties agree that the timing of the proposed increase is a bargained-for element and that it would be lost if rates were not allowed to become effective on November 1. Delayed implementation would mean the loss of this element and, potentially, the loss of the settlement.

---

[7] RCW 34.05.060

[8] This does not mean that settlements should be approved irrespective of their terms; we must retain our discretion under the public service laws to act in each case in the public interest and consistent with law.

36 **ACKNOWLEDGMENT OF CONCURRING OPINION**. We acknowledge the concurring opinion proposed by our esteemed colleague and chair.

37 We believe that this decision, as the *Verizon* decision before it, is based soundly on the evidence of record and pertinent principles of law. Moreover, we believe that it is not inconsistent in fundamental principle with Chairwoman Showalter's views, which acknowledge the Commission's discretion in allowing rates pending the review of a suspended proposal for "permanent" rates.

38 The essence of our current disagreement appears to be how we exercise that discretion and how we describe it. We see the continuum of the exercise of our discretion in a *Puget Sound Navigation* situation not as a smooth line demanding the identical analysis, but as a series of "differing situations" along the way. Each calls for an analysis of the supporting evidence, the argument, and the public interest that identifies the significant factors in that particular circumstance. We use terms that we believe help to describe, identify, and distinguish those circumstances.

39 It may well be that other scenarios will occur. We have no doubt that in those situations, the parties will vigorously argue points that they believe appropriate and the Commission will enter a wise decision, consistent with the law and the facts before it, that resolves the dispute before it and adds to the body of law and the soundness of the analysis in each ensuing matter.

40 **Schedule of proceedings:** further proceedings in this docket will be held on the following schedule:

Filing of Opposing testimony	December 22, 2004
Filing of Rebuttal testimony	January 12, 2005
Hearing	January 19, 2005
Simultaneous briefs	January 28, 2005

41 **ALL PARTIES PLEASE TAKE NOTICE, That a hearing will be held on Wednesday, January 19, 2005, at 9:30 a.m., in Room 206 of the Commission's headquarters, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington.**

FINDINGS AND CONCLUSIONS

42 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington and is vested with the authority to regulate the rates, rules, practices, and accounts of public service companies, including gas companies.

43 (2) Respondent Avista Corporation, doing business as Avista Utilities, is engaged in business as a gas company within the State of Washington as a public service company.

44 (3) On August 20, 2004, Avista Utilities filed proposed tariff changes to become effective on September 20, 2004. The proposal would increase the Company's rates and charges for natural gas service in the State of Washington by $8.6 million per year, or 6.2%.

45 (4) Avista, NWIGU, and Commission Staff filed a multiparty settlement agreement on October 15, 2004, including proposed tariffs that the settling parties asked the Commission to approve for effect on November 1, 2004. Avista and Commission Staff filed a motion asking that, in the event the Commission did not approve the tariffs for permanent effect on November 1, the Commission approve the filed rates for temporary effect, pending completion of a full review of the settlement.

46 (5) The proposed settlement rates are lower than the filed rates that the Commission suspended.

47 (6) Public Counsel and The Energy Project (the non-settling parties) have had the opportunity to participate in negotiations aimed at achieving a settlement agreed by all parties. They have not had the opportunity to complete contested-case discovery, to prepare opposing testimony, to cross-examine evidence in support of the proposed settlement, or to argue against the merits of the proposal. The schedule set forth in this order will provide those opportunities.

48 (7) The Company's results of operations and rate base for settlement purposes are set out in Attachment A to the Settlement Agreement. The proposed calculation is supported by the credible testimony of witnesses Kelly Norwood and Ken Elgin.

49 (8) Based on the financial results presented in Attachment A, the Company has a revenue deficiency of $5.377 million per year. The tariffs filed with the proposed settlement agreement will produce additional revenue for the company of $5.377 million per year.

50 (9) The Commission makes a preliminary finding, subject to full review and revision in the process identified in this order, that the proposed settlement rates are fair, just, and reasonable.

CONCLUSIONS OF LAW

51 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties of record herein.

52 (2) The Commission should not accept a multiparty settlement over the objections of non-settling parties unless those parties are afforded a meaningful opportunity to inquire into the proposal, to present evidence in opposition to it; to explore the evidence supporting it; and to argue the propriety of the proposal to the Commission.

53 (3) The proposed procedural schedule set out in this order affords a meaningful opportunity for all parties to inquire into the proposal, to present evidence in opposition to it; to explore the evidence supporting it; and to argue the propriety of the proposal to the Commission.

54 (4) The Commission may make a preliminary finding that rates are fair, just, and reasonable, subject to revision after opportunity for full hearing, for the purpose of approving rates for effect on a short-term basis pending review of a proposed settlement.

55 (5) The rates for natural gas service set out in the tariffs filed with the settlement proposal are fair, just, and reasonable for effect on a short-term basis, until the Commission enters a final order resolving the issues in this docket, if the rates are subject to refund to the extent that the Commission approves lower rates for permanent application.

56 (6) The Commission should approve the rates proposed in the settlement filing for short-term application, pending Commission review, subject to refund if a lower rates is approved on a permanent basis.

O R D E R

57 THE COMMISSION ORDERS That:

58 (1) The Commission denies permanent implementation on November 1, 2004, of the terms of the settlement and the rates specified therein.

59 (2) The Commission grants short-term implementation of the proposed settlement rates effective November 1, 2004, pending full review of the proposed multiparty settlement and subject to refund if the rates found appropriate as a result of a full review are lower than the rates approved in this Order.

60 (3) The approval of short-term implementation of rates shall be considered withdrawn, and the rates shall not be charged to customers, if Avista within five days after the date of this order rejects the proposed procedural schedule or refuses to extend the suspension date of its proposed tariffs by 90 days if the Commission rejects the proposed settlement or the proposed settlement otherwise fails to become effective.

DATED at Olympia, Washington and effective this 2nd day of November, 2004

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

61 MARILYN SHOWALTER, Chairwoman, concurring:

62 I agree with the majority, for the reasons it has stated, that the settlement proposal itself should not be approved at this time.

63 As for the "short-term" rates, I concur in the result reached by the majority but not in its analysis. In my view, the Commission is approving interim rates, subject to refund, pending final adjudication of the general rate case. The standard that *should* apply is whether the Commission is convinced, after balancing all relevant factors, that these interim rates are consistent with the public interest. I conclude that such a standard has been met and would therefore approve the interim rates (subject to refund).

64 I am concerned that in its effort to draw procedural and terminological distinctions between this case and the Commission's recent rejection of Verizon's request for interim rates, the majority is only further compounding its misguided approach in Verizon. It has now opened up two new cans of worms—what is an "interim" rate (versus "temporary" or "short-term" or "settlement" rates) and what is a "settlement"—that will no doubt have to pick through in future cases. These asserted distinctions are unsustainable and should not affect our standard of review in a still-contested case.

The request is for interim rates.

65 The majority protests (too much) that it is not approving a contested request for an interim rate increase, subject to refund, pending full and final adjudication of the rate case. It tries to distinguish interim rates from what it variously calls "short-term rates," "rates for temporary effect," "settlement rates," and other

similar terms.[9] These terms merely beg the question: short-term pending what? temporary pending what? settlement of what? In all cases the "what" is adjudication of the general rate case.

66 These terms fool no-one. Whatever these rates might be called, there is in front of us a contested general rate case; the company wants a rate increase, subject to refund, pending full and final adjudication of the general rate case; Staff and NWIGU concur; and Public Counsel and SNAP oppose the increase. The adjudication may or may not conclude after further process and hearing on the jointly proposed permanent rates, but that procedural step should have no bearing on the standard of review, and in any event, we must assume that the case might proceed to a fully contested hearing on the merits. Rate increases in effect pending conclusion of a rate case are "interim" rates—the interim being the period between imposition of the temporary rate and the conclusion of the rate case.

67 The reason for these semantic summersaults is to avoid the problem that occurs if the increase is labeled as what it really is: an interim rate increase. The

---

[9] See ¶8, ("settlement rates"); ¶15 ("interim rates should not be allowed absent emergency need by a utility"); ¶18 ("short-term rates" on a "temporary basis"); ¶19 ("As with circumstances involving interim rates, the Commission must exercise its judgment in every instance of a request to allow a settlement proposal to become effective on a temporary basis, pending review."); ¶20 ("short-term increase"); ¶23 ("... it is appropriate to treat the issue in this docket, implementation of a proposed settlement rate, pending review, differently from a contested request for interim rates."); ¶25 ("authorization of short-term rates"); paragraph 26 ("proposed settlement rates"); ¶27 ("increase is subject to refund to the extent that the rate eventually approved is lower than the short-term rate"); ¶ 36 ("filed rates for temporary effect, pending completion of a full review of the settlement."); ¶43 ("approving rates for effect on a short-term basis pending review of a proposed settlement") and ¶50 ("short-term implementation of the proposed settlement rates"). No matter how many attempts to distinguish these rates from interim rates, however, their true character is unavoidably revealed in ¶44 ("The rates are fair, just, and reasonable for effect on a short-term basis, until the Commission enters a final order resolving the issues in this docket, if the rates are subject to refund to the extent that the commission approves lower rates for permanent application."). In my view, that is the definition of interim rates.

problem arises because the majority has determined (in Verizon) that "interim rates" can be awarded only upon a showing of emergency need.[10] Now, confronted with an interim rate increase of a different stripe, the majority is trapped, unless it either denies Avista its interim rate increase or classifies the increase as something other than an interim rate.

68 Rather than dig a deeper hole, we should escape it--by embracing a sound, well-recognized "balance of interests" test for interim rate relief. Under such a standard, the typical PNB[11] factors (relating to financial emergency, hardship, an inequity) would be relevant, but so would other factors (which PNB itself recognized but which the majority in Verizon closed off).[12] Under such a standard, and *without the need to classify this case as a (contested) settlement*, it would be entirely appropriate to consider and give substantial weight to the thorough audit and review conducted by Staff and described in its testimony. It would be entirely appropriate to consider and give substantial weight to the testimony and support of NWIGU, as customers who would have to pay the interim rates. It would be entirely appropriate to consider and give substantial weight to the Company's harmonizing testimony, as well. All of this evidence would be convincing (and is convincing, to me) under a *common standard for interim rate relief.*

---

[10] The majority confirms this standard in the instant case, at ¶15 ("The Commission ruled that interim rates should not be allowed absent emergency need by a utility.").

[11] *WUTC v. Pacific N.W. Bell Tel. Co.,* Cause No. U-72-30 *tr*, Second Supplemental Order (October 10, 1972).

[12] One benefit of a common "interim rate" standard would be to preserve a distinction between it and an "emergency adjudicative proceeding" under RCW 34.05.479. This statute, one of the general statutes in the Administrative Procedure Act, authorizes relief to address a situation posing "an immediate threat to the public health, safety, or welfare that requires immediate action." The Commission has used this statute in the past. *See, e.g., Air Liquide v. Puget Sound Energy UE-981410, Fifth Supplemental Order Granting Complaint, Ordering Refunds and Other Relief.* In my view, it calls for a stricter standard than required for interim relief (though, of course, in some instances, evidence supporting interim relief will also support emergency relief). But emergency relief under the statute may be appropriate when interim relief is not, for example, where there is not time to prepare a full rate case.

69 At the same time, all of this evidence is preliminary and the relief it supports is temporary, and both the evidence and the relief are subject to revision as the case evolves. As I pointed out in my dissent in Verizon, such a construct is an entirely familiar one. Commissions, courts, and legislatures have long employed the concept of granting emergency, temporary, preliminary, or permanent relief based on graduating degrees of evidence and persuasion, with each step subject to the next. We should take our process for interim rate relief and fold it back into this mode. Indeed, I think that's largely where it was, at least implicitly, prior to the Verizon case.

70 The majority's proffered dichotomy between a "settlement" situation and an "interim" situation is not sustainable. At a functional level, the two situations are not mutually exclusive. Rather, as this case demonstrates there can be a settlement that proposes interim rates.

This is still a contested case.

71 The majority opinion is saturated with references to "settlement." In one part, the majority says that this fact is "not determinative."[13] But this is the very feature by which the majority employs a different standard of review from what it insisted upon in the Verizon case. (The strength of the evidence in the instant case cannot account for a different standard of review.) The majority offers the following taxonomy:

> As we note above, the fully contested *Verizon* situation is the "typical" scenario considered in prior cases involving such requests, and for convenience we will use the term "interim" as a shorthand reference to such requests. "Temporary" rates may best be thought of as rates to satisfy a specific temporary need, such as recovery of a specific extraordinary expense, that have a defined termination. We will use the

[13] ¶28.

term "short term" for convenience to describe rates that are authorized for the period in which we consider whether or not to accept a settlement.[14]

72 If "short-term" or "settlement" rates are a subset of interim rates, then the short-term rates (if contested) should be reviewed under an interim rate standard.

73 If "short-term" rates are a subset of interim rates but deserve a different standard of review, then the different standard needs to be based on something—and by definition (here) the only thing that distinguishes "short-term" rates is the fact that they are put forth in a settlement. If the settlement, then, is what makes the difference in the standard of review and removes it from an emergency standard of review, the fact of settlement becomes highly significant, perhaps determinative, depending on the weight of evidence presented.

74 If "short-term" rates are meant to be mutually exclusive of interim rates, then still, a rationale for the standard of review, must be proffered. Since all that defines the term is its settlement context, there is no other rationale. In addition, we will soon need to explain which standard applies if some but not all parties support interim rates based on financial need.

75 In my view, if the case is still contested—and it is—couching the case as a settlement offers relatively little help. First, for example, the majority invokes a statute that "strongly" encourages settlements.[15] The statute in question encourages *informal* settlements, for the purpose of avoiding the formal processes laid out in the Administrative Procedures Act. In the instant case, we are

---

[14] Footnote 4.

[15] RCW 34.05.060 reads in full:

> **RCW 34.05.060 Informal settlements.** Except to the extent precluded by another provision of law and subject to approval by agency order, informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is strongly encouraged. Agencies may establish by rule specific procedures for attempting and executing informal settlement of matters. This section does not require any party or other person to settle a matter.

already well into the formal process, and the settling parties' proposal is a formal request for a formal resolution of the case. Moreover, the proposal is still contested, so further formal process is unavoidable. I'm not opposed to settlements of any type, but this statute is not much to lean on here.

76 Second, as the majority observes in a footnote, a settlement does not absolve the Commission of its responsibility to review it under the applicable standard. So we still must determine the applicable standard. The majority apparently determines that we can employ a different standard because this is a "settlement" asking for "short-term rates." Aside from the circular reasoning, I think it is problematic to employ a special "settlement" standard where not all parties agree.

77 Third, as I just indicated, this is a "non-unanimous" settlement,[16] in that not all parties agree to it. In other words, the entire case—and the settlement itself—is still contested. It is this type of "settlement" that the majority has elevated to a higher status than it deserves, and which should not be treated in the same manner as a settlement proposed by *all* parties. As Public Counsel argues:

---

[16] Under our rule, WAC 480-07-730(3), this kind of settlement, in which some but not all parties agree on all issues, is called a "multi-party" settlement--as distinct from a "full" settlement, in which all parties agree on all issues, and as distinct from a "partial" settlement, in which all parties agree on some issues. In these latter two instances, *all of the parties* have resolved all or some of the issues—very different situations, (and ones that *do* deserve some deference,) from the situation here, where the settlement and proposed interim rates are contested. A better term than "multi-party" settlement would be the term "non-unanimous" settlement. Every settlement of any kind has at least two parties. The term "multi-party" sounds as if it might mean "more than two," but it doesn't. A settlement of two parties that is opposed by a third would qualify as a "multi-party" settlement under our rules, but a settlement of two parties in a two-party case would not. The term "non-unanimous" better captures the quality of a settlement joined by some, but not all, of the parties in a case. We should think about using this term in our next review of this rule. For clarity, I'm going to use the term here, because it is this feature that neither "settlement" nor "multi-party settlement" captures, and which is most pertinent to this case.

> Put simply, a partial settlement proposal is only a joint position of the parties that so join their interests. This Commission should give it no greater weight than the position of other parties (when they have had the chance to formulate one). It is not entitled to a presumption of validity that somehow warrants allowing a rate increase, even when it has not been approved by the Commission.[17]

78 Each party has a right to prosecute its case as it sees fit, and we should not draw any conclusions based merely on a party's agreement or disagreement with a settlement proposal. Rather, we should weigh, directly, the evidence and argument presented in support of the proposal. It may well be that a proposal supported by multiple parties is stronger than a proposal supported by one or two parties—not because of the number of parties, *per se*, but because of the breadth and depth of the issues that could be resolved by multiple parties. Thus, in a still-contested case (whether contested by all or some of the parties) our *standard of review* should not be different but the *weight of evidence* may well be more convincing if it comes jointly from parties with different interests.

79 Or it might not be. What is it that makes a "settlement" for purposes of reviewing interim rates? If a company and one party—large customers for example—reach an agreement on interim rates that is opposed by other parties, should we employ a different standard because it is put forth as a "settlement"? Is a proposal supported by a company and Public Counsel, or by a company and Staff, different in kind and therefore deserving of a *different standard of review*?

---

[17] *Response of Public Counsel to Joint Motion of Avista Corporation, paragraph 20.* The majority unfairly minimizes the advocacy of Public Counsel and the Energy Project in this case. It says, at paragraph 6 of this order, that "No party opposed the proposed settlement; Public Counsel and the Energy Project stated that they had not engaged in a review sufficient to determine whether they would support or oppose the proposal. They strongly opposed *implementation* of the settlement, however, arguing that they had not had adequate time to review the proposal." This is a distinction without a difference, since the settlement calls for increased rates on November 1, and Public Counsel and the Energy Project are opposed to any increase on November 1, whether it is by means of permanent or temporary rates.

What if there had been a sixth party in this case who had also conducted an audit and opposed the settlement. Would that fact change the standard of review for interim rates? Is a proposal for interim rates by any combination of parties to be reviewed under a different standard than a proposal by the company only?

80 To ask these questions is to answer them. All of these proposals should be treated equally at the procedural level, as a proposal by some but not all of the parties. What matters is the strength of any proposal, and the strength of any opposing evidence and argument. But now that the majority has enunciated a different standard of review for (non-unanimous) settlements, we can expect to see various proposals couched in "settlement" terms, and various arguments against such a characterization by opposing parties. These will be procedural gymnastics that will take time and resources for no meaningful reason.

81 Fourth, in the instant case, the underlying settlement has been rejected, at least for now. That is, the Commission refused to approve, as the settlement requests, permanent rates effective November 1. So it is difficult to see why the settlement, *per se*, should have much weight for purposes of deciding what to do pending full review of it.[18] Rather than asking the ratepayers to "save" the settlement by paying the interim rates, we should simply evaluate the information we have in our record on its merits—on a preliminary basis for the purpose of temporary rates. In this case, the evidence is strong, and supports the requested interim rates.

---

[18] In a certain respect, the *Verizon* history is not so very different. There, there was a proposed settlement of permanent rates, joined by Verizon and Staff and opposed by Public Counsel. Though Verizon withdrew the settlement after the Commission had subjected it to conditions, Verizon then filed a general rate case and requested interim rates nearly identical in amount and design as in the earlier settlement Thus we had in front of us a proposal virtually the same, in both amount and rate spread, as Staff had earlier agreed to (but later opposed in the general rate case). Is this kind of history pertinent to the standard of review we should employ? I don't think so. In both cases, interim rates were contested. In both cases, the same standard should apply.

82 By characterizing "temporary settlement rates" as something other than "interim rates," the majority is courting confusion in the future. What standard should apply if a company seeks interim rates using an emergency-type justification, and Staff agrees but other parties don't? Is that a "settlement" to be "strongly encouraged" or is it a request for interim rates subject to the *Verizon* standard? What happens if there is some (but not unanimous) support for interim rates but no agreement on permanent rates? This situation could arise if the company were facing an emergency, or if the company were asking for much less in interim rates than in permanent rates, or if some important element of the permanent rates were still in dispute.[19] What if the evidence demonstrates that the company is in dire but not emergency circumstances (so the Verizon test is not met) and there is no agreement by any set of parties on permanent rates (so an element of the instant case is not present) but most parties agree on an interim rate because it is substantially less than the company is requesting in permanent rates? Which standard applies—"Avista" or "Verizon"?[20] Or would yet another standard be developed?

83 In my view, all of these situations should be subjected to the same standard of review, one in which the Commission balances all relevant factors and determines if relief is consistent with the public interest. It is a standard that basically has already been upheld in *Puget Sound Navigation*, is consistent with our prior practices and with other states, and can accommodate, without

---

[19] These scenarios are similar to the Puget Sound Navigation case. *Puget Sound Navigation Co. v. Department of Transportation*, 33 Wn.2d 448, 206 P.2d 456 (1949). In that case, the Transportation Department (the Commission's predecessor) imposed interim rates, subject to refund, based on the staff's "preliminary investigation" finding that a "trend of increasing costs and decreasing revenues was continuing and justified immediate and temporary relief." *Id at 455*. The general rate case was hotly contested, however, and a major element of the company's revenue requirement—labor costs—was unknown, due to a labor dispute. The Court upheld the imposition of temporary rates, subject to refund, based only on a "fairness" standard. *Id at 483*.

[20] The easiest way to see this problem is through the eyes of a party opposed to the settlement. The opposing party will not know under which standard to argue.

confusion, the inevitably large number of variations on a theme (interim rate relief) that will face us in the future.[21]

Pre-settlement dynamics should not be a factor.

84 I agree with the part of paragraph 13 wherein the majority says "Settlement, and negotiations toward settlement, are not mandatory. No forfeiture of rights attaches to failure to participate." Why, then, does the majority go on to undermine this principle, in paragraph 29, by declaring that it is "appropriate . . . to consider settlements in a way that encourages behavior aimed at settling differences."? Why does it give weight to the fact that "Avista has been open in its disclosure to other parties," and comment that this "is behavior to be encouraged"? (Suppose Avista had *not* been initially forthcoming but had ultimately reached the identical proposal with Staff and NWIGU. Would we reject the interim rates on that ground? Would we subject them to a higher standard of review?)

85 By giving weight to pre-settlement conduct and by using a favorable standard of review of a non-unanimous (i.e., still contested) settlement, the majority is, indeed, affecting the rights of the nonparticipating parties. In other words, the Commission cannot both "encourage" non-unanimous settlements by giving them a favorable standard of review and at the same time be neutral toward the nonparticipating parties.

86 When we deliberate a proposal for interim rates, we should neither inquire into nor consider the conduct of the parties in reaching or not reaching a settlement. Doing so will bring us into a realm we should not penetrate and will frustrate the voluntary and trusting contacts that are likely to lead to successful settlements. Rather, we should simply weigh the evidence in front of us, which in this case includes strong evidence in support of the interim rate increase, and no evidence

[21] See my dissent in *Verizon*, for a longer discussion of the appropriate standard for interim rate relief.

against it, but also a demonstrated need by Public Counsel to review the full settlement proposal, and opposition by both Public Counsel and the Energy Project to imposition of a rate increase on November 1.

Conclusion

87 Some, but not all, of the parties have requested interim rates if the same parties' joint request for permanent rates is not approved. We should grant a request for interim rates if, after balancing all relevant factors, we find the request is consistent with the public interest, bearing in mind that the evidence is preliminary and that the relief is temporary—all subject to revision (and refund) after further process. This is an old, not a new, standard but it has been disrupted by the Verizon case and the majority's opinion in this case. From case to case, the relevant factors will vary, the types of evidence will vary, the alignment of parties will vary, the timing of the interim-rate request will vary, and the strength of evidence in support of the request will vary. None of these features should change the standard for relief, but they may well affect the weight and balance of evidence that is presented to meet the standard.

88 In the instant case Avista, Staff, and NWIGU have provided strong evidence that the interim rates are fair to impose pending further adjudicatory proceedings, because they have provided thorough and persuasive evidence (on a preliminary basis) that the rates are fair, just, reasonable and sufficient. That being the case, it is consistent with the public interest to approve them—subject to refund if later process demonstrates that refunds are warranted. Therefore, I concur in the result reached by the majority.

89 However, I disagree with the majority's analysis, in which is asserts that these are not interim rates, and in which it concludes that a proposal joined by some but not all parties deserves a different standard of review than a proposal put forth by a single party. In a contested proceeding of any stripe, we should use the same standard for reviewing proposed interim rates. Otherwise, we subject

future parties to needless and unfair confusion over what kind of rates are being requested ("interim," short-term," or "temporary"" and whether or not they are requested as part of a "settlement." Evidence, not terminology, under a sound standard of review should inform the public interest.

90 For these reasons, I concur in the result of, but do not join in, the majority's opinion.

MARILYN SHOWALTER, Chairwoman

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810*.