BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	
Complainant,	)	
v.	)	DOCKET UG-041515
Avista Corp. d/b/a Avista Utilities,	)	PUBLIC COUNSEL'S PETITION FOR RECONSIDERATION
Respondent.	)	
. . . . .	)	

I. INTRODUCTION

1. The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) petitions the Washington Utilities and Transportation Commission (Commission) for an order on reconsideration pursuant to WAC 480-07-850. Public Counsel requests reconsideration of the granting of interim rates on the basis that the Commission's decision cannot be reconciled with the Commission's thirty years of precedent on interim relief requests, expressed most recently in its order in the Verizon general rate case, and that granting interim rates is unsupported by the evidence. In the alternative, if the Commission does not reconsider its grant of interim rates, Public Counsel seeks reconsideration and clarification of the subject to refund conditions and the procedural schedule. Public Counsel also requests reconsideration of the Commission's apparent shifting of the burden of persuasion to non-moving parties and its commentary upon Public Counsel's participation in the settlement process. For the reasons set

forth below Public Counsel respectfully petitions for reconsideration of the Commission's final order in this docket.[1]

II. ARGUMENT

A. The Commission Should Reconsider Granting Interim Rates.

1. Granting Interim Relief to Avista Cannot be Reconciled with the Commission's Long-Standing Precedent and its Order in Verizon.

2. The Commission has granted interim rates, subject to refund, pending further review.[2] This interim relief is based on a non-unanimous, unapproved settlement, on a slim record, and without any showing by Avista that it meets any previously known factual or legal basis for such relief. Public Counsel reiterates the arguments set forth in its prior pleading opposing the granting of interim rates and hereby incorporates them by reference.[3] Briefly, the Commission has no basis for granting interim rates other than the bare request of the settling parties that it do so, and it has provided no rational basis for distinguishing its granting of interim rates in this proceeding from its denial of such relief in the on-going Verizon general rate case.[4] The Commission has failed to adequately distinguish its analysis in this proceeding from its very different conclusion in the Verizon case, where its decision on interim relief was predicated upon a significant factual record not to be found in this docket. It is particularly troubling that the distinction relied upon by the Commission creates a type of interim relief, termed "temporary relief," for which, as a practical matter, no meaningful prior hearing or substantive evidentiary basis is required, a marked contrast with the history of interim relief before the Commission, or as set out in the Verizon case.

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[1] *WUTC v. Avista Corporation*, Settlement Hearing Order on Process; Granting Short-Term Implementation of Rates; Notice of Hearing – Order No. 5, Docket No. UG-041515 (November 2, 2004) (Order No. 5).

[2] *Id.* at ¶ 19.

[3] *Response of Public Counsel to Joint Motion*.

[4] *Order No. 5* at ¶¶ 65-70.

3. The Commission's decision to grant interim rates also impairs the certainty upon which parties rely. As the Commission stated in the Verizon decision, "[r]egulating in the public interest means regulating consistently with laws, rules, and pertinent prior decisions. Doing so provides certainty, consistency, and fairness to both utility companies and their customers." [5] The abrupt departure in Order No. 5 from the recent and very carefully considered decision in Verizon has the opposite effect. The significance and the institutional benefits of the Verizon decision are inevitably eroded, perhaps irretrievably by allowing this order to stand. If interim rates are available in this procedural context, absent any showing of need other than the convenience of parties to a non-unanimous settlement, then it is difficult to conceive of any request for interim relief that could ever be denied under such a standard.

4. Public Counsel respectfully requests that the Commission therefore reconsider the decision to allow interim rates here.

2. The Commission Lacks Sufficient Evidence to Determine that the Rates Proposed are Fair, Just, Reasonable, and Sufficient.

5. In Order No. 5 of this proceeding the Commission explicitly declined to adopt the settlement and end the proceeding.[6] Having put aside the settlement, the Commission then uses its existence to conclude that it has evidence sufficient to implement interim rates.[7] The Commission has made no specific findings regarding Avista's financial condition. There are no specific findings of fact regarding Avista's revenues, rate base, expenses, cost of capital, rate of return, or any other component of its financial condition. What statements exist are conclusory and cite no evidence in the record. Indeed, such findings are not possible here. They would be inconsistent with the Commission's decision to allow non-settling parties to put on their own case. There is a fundamental inconsistency between expressly declining to adopt the settlement and allowing further evidentiary proceedings, on the one hand, and then relying on that same

[5] *WUTC v. Verizon Northwest Inc.*, Docket No. UT-040788, Order Denying Request for Interim Rates, Order No. 11 at ¶ 140 (October 15, 2004) ("Verizon Interim Order").

[6] *Order No. 5* at ¶ 12.

[7] *Id.* at ¶ 19.

non-approved "settlement", and the assertions of some parties to support interim rates on the other.

6. To distinguish this request for interim relief from the Commission's own thirty-year precedent and its most recent order on point, the Commission relies upon three characteristics – that there was an audit; that the settlement is "transparent"; and that the interim rates are suitable (according to the settling parties) for permanent application.[8] However, none of these factors has any grounding in the facts of the case. The Commission inquires little, if at all, into the nature of the audit. The Commission probes little into the "transparency" asserted by settling parties. The Commission appears to rely upon the testimony of the settlement panel to support its conclusions that interim rates would be suitable for permanent adoption. This Commission has no assurance other than the statements of the settling parties upon which it can reasonably rely. "At the very least, an agency will require a clear showing that the temporary rate increase prior to full hearing is required to meet an unusual financial need that demands immediate correction."[9] As previously argued, there is no clear showing of an unusual financial need and the granting of interim rates should be reconsidered.[10]

3. If the Commission Declines to Reconsider Interim Rates It should Reconsider and Clarify the Refund Provisions.

7. While the Commission has ordered interim rates subject to refund, it has not clearly defined the circumstances under which refunds will be ordered, nor the obligation of the Company to ensure that customers are not harmed in such a circumstance.[11] While Public Counsel opposes the granting of interim rates, should they remain in place we ask the Commission to reconsider and clarify its subject to refund requirement and Avista's obligations in the event of a refund. In past cases the Commission and the parties which practice before it

[8] *Id.* at ¶ 20 -22.
[9] Leonard Saul Goodman, *The Process of Ratemaking* at 95 (1998) (Goodman).
[10] *Response of Public Counsel to Joint Motion of Avista Corporation, and the Staff of the Washington Utilities and Transportation Commission for Early Implementation of Settlement Rates* filed on October 20, 2004 in this docket.
[11] *Order No. 5* at ¶¶ 19, 26, 31.

have learned valuable lessons about the implementation of refund conditions. Expectations should be very clear, so that any implementation goes as smoothly as possible, and customers truly receive the benefits of any refund protections that come into effect.

8. Public Counsel reads Order No. 5 to suggest the Commission would require a refund at the conclusion of this proceeding if the interim rate is ultimately higher than the rate finally ordered to be paid by any individual customer.[12] The Company affirmatively accepted the Commission's impositions of a subject to refund condition.[13] Public Counsel requests that the Commission reconsider its subject to refund language and order Avista to track its refund obligation to each customer should refunds be ordered at a later date. This will require, at a minimum, tracking of each individual customer's rates and bills while the subject to refund condition is in place with a degree of specificity sufficient enough to return any overcharge to each individual customer. The Commission has recognized these concerns and clarified them in a previous order granting interim relief to Avista.[14] In this instance, we request the Commission reconsider its granting of interim rates, or in the alternative, reconsider its subject to refund language and clarify that the refund obligation is tied to each customer's rates. Further, that if a refund is ordered, the Company has the duty to ensure that all customers receive the money to which they are entitled.

4. If Interim relief Remains in Place, the Commission's Procedural Schedule is Unnecessarily Abbreviated.

9. The Commission has concluded that Public Counsel and the Energy Project possess due process rights requiring protection and has declined to adopt the settlement proposed by Staff,

[12] *Id.* at ¶¶ 30-31. Note - It is possible that some rates would be higher, and some lower, as a result of completing the case. Such a result could come from, for example, simply using a different rate spread than the settlement.

[13] *Letter to Carole Washburn from David J. Meyer on behalf of Avista Corp.*, Re: Acceptance of Conditions Relating to the Grant of Short-term Implementation of Rates (November 3, 2004).

[14] *In re the Matter of Avista Corporation d/b/a Avista Utilities*, Docket No. UE-010395, Eight Supplemental Order Granting and Denying Petitions for Clarification; Denying Petition for Consideration, ¶¶ 10 and 11 (October 17, 2001).

Avista, and NWIGU at this time.[15] The Commission has granted the Company interim relief, subject to refund, until the conclusion of the case, and adopted an abbreviated schedule.[16] If the Commission affirms its grant of interim rates subject to refund no settling party is harmed by a more reasonable procedural schedule. The Commission should allow non-settling parties a more reasonable period of time to develop and present their case. Public Counsel and the Energy Project/Opportunity Council are now at a considerable disadvantage. Not only must their clients pay higher rates, but they must prepare their case in haste. If the Commission does not reconsider its decision to implement interim rates, it should reconsider the procedural schedule it has adopted. The Commission should allow non-settling parties the full suspension period to develop and present their case. Public Counsel continues to support the procedural schedule requested at the second prehearing conference.[17]

B. The Commission May Not Shift the Burden of Proof to Non-Settling Parties.

10. The Commission's Order No. 5 stated, "Credible evidence thus establishes a *prima facie* case that the proposed settlement rates are fair, just, and reasonable as permanent rates of the Company."[18] This would normally be interpreted in a civil proceeding as an indication that opposing parties now bear the burden of persuasion; in effect, a requirement to answer or present rebutting evidence or face default.[19] This would constitute an improper shifting of the burden of

[15] *Order No. 5* at ¶¶ 12-13.
[16] *Id.* at ¶ 19.
[17] Transcript at 35.
[18] *Order No. 5* at ¶ 19.
[19] *Bennerstrom v. Department of Labor & Industries*, 120 Wash. App. 853, 857, 86 P.3d 826, 828 (Wash. App. Div. 1 Mar 29, 2004) (NO. 52168-3-I); *DePhelps v. Safeco Ins. Co. of America*, 116 Wash. App. 441, 448, 65 P.3d 1234, 1238 (Wash. App. Div. 3 Apr 08, 2003) (NO. 21029-4-III); *McDonald v. Department of Labor and Industries*, 104 Wash. App. 617, 622, 17 P.3d 1195, 1197 (Wash. App. Div. 2 Jan 05, 2001) (NO. 24602-3-II); *Fischer-McReynolds v. Quasim*, 101 Wash. App. 801, 808, 6 P.3d 30, 34 (Wash. App. Div. 2 Jul 07, 2000) (NO. 24821-2-II); *Vasquez v. State, Dept. of Social and Health Services*, 94 Wash. App. 976, 985, 974 P.2d 348, 353 (Wash. App. Div. 3 Apr 06, 1999) (NO. 16767-4-III).

proof in a rate proceeding before the Commission where the company retains the burden to demonstrate that the proposed rates just and reasonable.[20] As Goodman states,

> Once the burden of proof attaches to the regulated company, which has proposed a change in rates, and a hearing process has begun, the burden does not shift to the ratepayer merely because the rate was not suspended or because the suspension period expired, that is, the regulated company retains at least some of "the risk of in-completeness in the record."[21]

and

> Perhaps it is unnecessary to add that the agency's ultimate findings and conclusions should comport with the placement of the burden of proof.[22]

11. The practical reality of this case, from the ratepayer perspective, is that the Commission has approved the non-unanimous settlement, implemented the rates, and told the non-settling parties it is they who must disprove the validity of the settlement and its rates. The Commission does not posses statutory authority to shift of a burden of proof in this manner. The Commission must make a reasoned decision based on the record that the rates are fair, just, reasonable, and sufficient. This finding does not depend ultimately on the nature or extent of opposing testimony, or on procedural circumstances.[23] As noted above, it would be premature for the Commission to do that because it has not yet heard evidence from opposing parties.

12. Public Counsel and the Energy Project/Opportunity Counsel are now placed in the position of attempting to disprove a Commission conclusion. This is not a proper manner by which the Commission should consider a proposed settlement. The non-settling parties are, in effect, forced to choose between adopting a settlement before they have employed their due process rights to evaluate it, or being saddled with the burden of proof. Further, as a policy matter, such an approach will improperly interfere with the settlement process by creating undesirable dynamics and pressures on parties to settle when it is not otherwise in their interest.

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[20] RCW 80.04.130(4).

[21] Goodman at 51, citing to *Commonwealth of Puerto Rico v. F.M.C.*, 468 F.2d 872, 881-82 (D.C. Cir. 1972).

[22] Goodman at 60.

[23] For example, the Commission could not approve suspended rates as fair, just, and reasonable, solely on the basis that an opposing party had not appeared at the hearing.

For these reasons, the Commission should reconsider paragraph 19 of Order No. 5 that relate to the granting of interim rates and state that the company retains the burden of proof.

C. The Commission's Commentary on Settlement Discussions is Unnecessary.

13. Public Counsel is concerned that by commenting upon the settlement process the Commission has inadvertently created an inaccurate record of this proceeding and may potentially chill the prospect for settlements in future cases. The Commission states,

> 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.[24]

14. As the Chairwoman notes in her concurrence, such a statement risks exposing the confidential nature of settlement discussions, and in so doing ultimately frustrating those efforts,

> 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.[25]

15. We agree. In this case, Public Counsel took great pains in its advocacy in briefing both the proposed settlement and the proposed implementation of interim rates *not* to argue about *the manner in which the settlement was negotiated*. Instead, we focused our objections on the *merits of the settlement and its proposed implementation*, essentially concluding that (1) the proposed implementation of the settlement deprived us of the ability to meaningfully evaluate the terms of the settlement; and (2) implementing the settlement rates in the absence of approving the settlement was entirely unsupported by the record and contrary to the Commission's long standing, and recently affirmed, standard for interim relief.[26]

[24] *Order No. 5* at ¶ 14.
[25] *Id.* concurrence at ¶ 86.
[26] *Verizon Interim Order* at ¶¶ 17-140.

16. By including the second sentence in paragraph 14, the Commission has forced us to broaden the scope of our advocacy to defend our prosecution of this case against what we perceive to be at least implied criticism of our approach to settlement and the decision not to settle, at least in this case. We remain hesitant to do so. It is precisely this discussion which we consciously avoided in briefing the case and in our counsel's colloquy with Commissioner Hemstad.[27] Nonetheless, the statement now sits in a Commission order, and it cannot be allowed to remain unaddressed, given its factual inaccuracies.

17. The statement quoted above, that "Public Counsel was informed of the prospect of settlement discussions and invited to participate in them, from their first mention, by Commission Staff" is not accurate. The first time Public Counsel was informed of settlement discussions of any kind was when Public Counsel was informed that Staff and the Company had already reached a settlement in principle (subject to a pending audit by the Commission Staff) on September 10th at or about 1:00 p.m. This was not an invitation to participate in the formulation of a settlement, nor a statement that there was "the prospect of settlement discussions." Rather it was a communication that informed Public Counsel of a settlement that had been reached by the Commission Staff and the Company (subject to the pending audit). We were informed that discussions had reached a point of significant common resolution. We had subsequent communications with Commission Staff where the details of the settlement were shared.[28] When we were invited to participate in a settlement conference (as were all parties), we did so. In so doing, we tested the strength of the common resolution, and found that it was not to be meaningfully altered through negotiation. We concluded that we were unable to evaluate the merits of the proposal at that time, and thus chose not to support it. We further determined that early implementation would be prejudicial to our clients' interests and their due process rights, and we therefore advocated for those rights and against that implementation.

[27] Transcript at 75-76.

[28] As we did on the record, we continue to express our appreciation for Commission Staff's willingness to keep Public Counsel informed of their actions. Transcript at 80.

18. We are troubled about having to seek reconsideration on this point. We have engaged in settlement negotiations with virtually every electric, gas, and telecommunications provider regulated by the Commission, in virtually all of the significant cases this Commission has had before it for more than two decades. While we remain strongly committed to seeking settlements supported by all parties (on some or all of the issues), we recognize there will be times when some parties choose to settle or reach common cause and other times when they cannot. We remain firmly committed to the principle that all negotiations should at least commence with all parties present. Doing so signals to all that the case is moving in a new direction and thereby avoids later recriminations among the parties. Even more importantly it ultimately increases the chances for a broadly supported settlement which addresses all stakeholder interests in a balanced way. Such settlements are more likely to be in the public interest. Such settlements are also more manageable for the Commission to review than a non-unanimous agreement, and avoids compromising the due process rights of non-settling parties. It is for these reasons that Public Counsel has advocated adoption of this principle in the Commission's procedural rules.[29]

19. Sometimes such negotiations succeed and sometimes they fail. Often the result hinges on not simply the merits, but the strength of the relationships between the parties. Those relationships ebb and flow, but they are predicated on trust and confidentiality, and they can be damaged when disputes arise regarding conduct in settlement. The Commission can minimize that damage here. Public Counsel made every effort to avoid this issue and hope not to have to address such questions in the future. We urge the Commission to reconsider its order by striking the second sentence of the 14th paragraph of Order No. 5.

III. CONCLUSION

20. For the foregoing reasons Public Counsel Petitions the Commission for an order on reconsideration reversing the granting of interim relief subject to refund on the basis that doing so is unsupported by the evidence and that its decision cannot be reconciled with the

[29] *See* Public Counsel's comments in Docket No. A-010648.

Commission's recent decision in the Verizon general rate case. In the event the Commission confirms its granting of interim rates, Public Counsel asks the Commission to reconsider its refund provisions and the procedural schedule currently ordered. Public Counsel also requests reconsideration of the Commission's apparent shifting of the burden of proof to non-settling parties and its commentary upon Public Counsel's participation in the settlement process.

Dated this 12th day of November, 2004.

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