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BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION.	)	DOCKET NO. UG-041515
Complainant,	)	
v.	)	AVISTA CORPORATION'S ANSWER TO PETITION FOR RECONSIDERATION
AVISTA CORPORATION, d/b/a AVISTA UTILITIES,	)	
Respondent.	)	

1. On November 12, 2004, Public Counsel filed with the Commission a Petition for Reconsideration of the Commission's Order No. 05 in the above matter. The Commission invited answers to this Petition, pursuant to its Notice dated November 12, 2004.

I.

PUBLIC COUNSEL IS MISTAKEN IN ITS BELIEF THAT THE COMMISSION'S ORDER CANNOT BE RECONCILED WITH PRECEDENT AND THE VERIZON CASE

2. Public Counsel simply "reiterates the arguments set forth in its prior pleading" which oppose the granting of rates effective on November 2, 2004. (Petition, ¶2.)

Accordingly, Public Counsel raises no arguments that have not been made previously to the Commission prior to the entering of its Order. Public Counsel asserts that the decision to grant the immediate implementation of the rates somehow "impairs the certainty upon which the parties rely," given what it perceives as prior precedent. In fact, in the Verizon Order, dated October 15, 2004, this Commission recently reminded the parties that the so-called "PNB factors" are not the only factors that the Commission may properly consider, and should not be viewed as "standards" per se:

> Most subsequent decisions discuss the "PNB factors" when considering whether to award interim relief. As the Commission has pointed out in recent Orders, these factors are neither a formula for interim relief, nor are they the only factors that the Commission may properly consider in its decision . . .. We acknowledge that the PNB factors are not standards and that the Commission should remain open to consider unique circumstances or evolution in the factors.

(Emphasis supplied). (WUTC v. Verizon Northwest, Inc., "Order Denying Request for Interim Rates; Rejecting Response to Bench Request" (Docket No. UT-040788), at ¶¶22 and 24.)

3. Nor does Public Counsel, in its Petition, otherwise challenge the Commission's legal authority to exercise its discretion and put Avista's rates into effect, subject to refund. This Commission has previously noted that its legal authority to authorize immediate rate relief, subject to refund or other conditions, "is a power necessarily incident to the exercise of the Commission's express statutory authority to regulate the rates of jurisdictional utilities." (In the Matter of Avista Corporation, Sixth Supplemental Order (Docket No. UE-010395), at page 8; citing, State ex. rel. Puget Sound Navigation Co. v. Dept. of Transportation, 33 Wn.2d 448, 206 P.2d 456 (1949)). The Chairwoman,

in her Concurrence with Order No. 05 in this docket, discussed the Puget Sound Navigation case, and observed that the "Court upheld the imposition of temporary rates, subject to refund, based only on a 'fairness' standard." (fn. 19, p. 25) It should be recalled that, in the Puget Sound Navigation case, temporary rates were approved and put into effect without any demonstration of financial exigency; rather, Staff's "preliminary investigation" and recommendation was based on a finding of increasing costs and decreasing revenues which justified immediate relief.[1]

4. In the instant case, the Commission appropriately acknowledged that the exercise of the discretion it has to immediately implement rates depends on the facts and circumstances of each case, all governed by what is ultimately in the "public interest:"

> 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.

(¶38) The Commission went on to observe that the "ultimate standard" is the "public interest"; each situation requires a review of "all of the facts and circumstances that are present." (¶28) Accordingly, the ultimate question is whether or not the immediate implementation of rate relief, subject to refund, is consistent with the "public interest"

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[1] In Puget Sound Navigation, supra, the Court held:

> The power vested in the department to refuse to allow the new tariff filed by appellant to become effective, necessarily implies the power to allow the tariff to become immediately effective, pursuant to reasonable conditions or limitations.

33 Wn.2d at 482.

standard. How the Commission exercises its discretion, under the public interest standard, is necessarily based on the facts and circumstances of each case.

5. In its Order in this case, the Commission explained why it exercised its discretion in the manner it did, when approving immediate rate relief. The Commission noted that the audits of the Company's records have been completed by both Staff and NWIGU, and that those parties have provided "credible preliminary evidence that the Company's rates on settlement are fair, just, reasonable and sufficient as permanent rates." (¶25) Indeed, the very purpose of the Settlement Hearing was to entertain testimony either in support of, or in opposition to, the Settlement, in order to allow the Commission to assess the credibility of the evidence. Staff, NWIGU and the Company provided expert testimony at the Settlement Hearing describing not only the nature of the proposed Settlement, but the evidence supporting the proposed rate relief. Chairwoman Showalter, in her concurrence, noted that:

> 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.

(¶88) Indeed, the very crux of the Commission's responsibility, in an adjudicatory proceeding, is to assess the credibility of the evidence presented. The Commission has done so in this case.

6. Furthermore, the Commission in its Order contrasted this case with one where there has been no attempt to review and assess the ultimate merits of permanent rates. It

notes that in the typically 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." (¶28) This case, however, does not involve the unilateral request of a utility for emergency rate relief, separate and apart from any analysis of the ultimate merits of the need for permanent relief. The Commission appropriately noted that credible evidence has been presented going to the very merits of the need for permanent rate relief, based on the audit work performed. Therefore, the Commission appropriately exercised its discretion in putting the rates into effect immediately, subject to refund.

7. Public Counsel also contends that if interim rates are available in this 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." (Emphasis added) (Petition, ¶3) Framing the argument in this way, Public Counsel simply sets up a "straw man" based on the "convenience of parties." Nowhere, in fact, does the Commission, in its Order, discuss the "convenience of the parties" as a factor in approving the rates for immediate implementation. Instead, the Commission appropriately focused on the factors discussed above, which recognize the extent of analysis of the merits of the need for rate relief, predicated on an audit of the Company's books and records. There has been no suggestion that any and all requests for interim rate relief must be approved.

8. Public Counsel asserts that the Commission "lacks sufficient evidence" to allow rates to become effective subject to refund, and bemoans the lack of "specific findings"

in support of its decision. (Petition, ¶3) By way of summary, here is what the Commission found, based on its assessment of credible evidence:

- That after an audit on the merits of the Company's request for relief, Staff and NWIGU believed the settlement rates were fair, just and reasonable and appropriate as permanent rates. (¶19)

- That "credible evidence" established a prima facie case that the rates were fair, just and reasonable. (Id.)

- That putting the rates into effect immediately was consistent with the "public interest." (Id.)

- That the proposed settlement was "transparent;" it was one that "clearly identifies its components and discloses significant trade-offs in reaching accommodations – [it] facilitates a thorough evaluation and contributes to the assessment of credibility." (¶21)

- That the Company's results of operations and rate base for settlement purposes, as set forth in Attachment A to the Settlement Agreement, are in the form of a proposed calculation that "is supported by credible testimony of witnesses Kelly Norwood and Ken Elgin." (¶48)

- That the timing of the proposed increase, for implementation in November, 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."[2] (¶35)

9. In conclusion, by allowing the rates to go into effect on November 2, 2004, subject to refund, and scheduling additional hearings for the purpose of entertaining testimony by those opposed to the Settlement, this Commission has provided additional procedural safeguards. The Commission, after all, could have (1) approved the Settlement, effective in November, without any further hearings; or (2) allowed the rates to become effective in November, subject to later modification upon completion of the hearing process, but without any obligation to refund; or (3) allowed the rates to go into effect in November, but subject to refund, and afford non-settling parties the opportunity to present their case in subsequent hearings. It was the third alternative selected by the Commission – one which balanced the interests of all parties and still preserved the possibility of settlement. That determination should not be disturbed on reconsideration.

II.

PUBLIC COUNSEL'S REQUEST TO CLARIFY THE REFUND MECHANISM TO TRACK EACH CUSTOMER ON AN INDIVIDUAL BASIS

10. Public Counsel would have the Commission order Avista to track its refund obligation to each customer, should refunds be ordered at a later date. As envisioned by Public Counsel, this would entail the tracking of each individual customer's rates and bills while the subject to refund condition is in place. (¶8)

[2] At the settlement hearing, Public Counsel did not seek to cross-examine any of the witnesses on the panel, in order to challenge the scope or extent of the audit work or the validity of their conclusions; nor did Public Counsel otherwise present a witness in opposition to the Settlement at the time of the hearing.

11. Any clarification concerning the mechanics of a refund should await the final decision of the Commission on the Settlement Agreement itself. At that time the parties will know whether a refund is owing and the level of any such refund. The Commission can then determine, under the circumstances, the manner in which any refund will be handled, whether it be tracked on an individual customer basis or through some other means, such as through the PGA process.

III.

PUBLIC COUNSEL'S CONCERNS OVER THE PROCEDURAL SCHEDULE ARE UNFOUNDED

12. Public Counsel asserts that the Commission should allow non-settling parties "a more reasonable period of time to develop and present their case." (Petition, ¶9) It argues that Public Counsel and the Energy Project/Opportunity Council "must prepare their case in haste." (Id.) Accordingly, it asserts that the Commission should allow the non-settling parties "the full suspension period" to present their case. (Id.)

13. Interestingly enough, at the time of the October 22 Settlement Hearing, Judge Wallis inquired of Public Counsel as to how much time it would need to prepare and pre-file its direct case. It was Public Counsel that suggested a pre-filing date of late-December for its direct case. Mr. Cromwell, on behalf of Public Counsel, in response to Judge Wallis observed that:

> I think that if we had the opportunity to do discovery until roughly the end of December, the holiday period, have our responsive testimony filed at that time, I can hypothesize that that might be sufficient.

(Tr. p. 116, ll. 22 – p. 117, l. 1.) Judge Wallis again re-confirmed the pre-filing date with Mr. Cromwell in a subsequent exchange:

> Judge Wallis: Did I hear you say that a filing might reasonably be expected in December?
>
> Mr. Cromwell: I would hope that would be possible, yes. I was thinking just before the holidays.

(Tr. p. 118, ll. 11-15.) It will not do for Public Counsel to now complain about a date of its own choosing.

14. Nor should the Commission accede to Public Counsel's request to allow non-settling parties "the full suspension period" to develop and present their case. The use of the "full suspension period" is not a procedural entitlement of any party; rather, the suspension period is statutorily imposed for the benefit of the filing utility, in order to assure that its rate requests are not indefinitely delayed. More importantly, this Commission has attempted to efficiently process cases before it, consistent with the requirements of due process. The practice of this Commission is not to automatically use the entirety of the suspension period, when cases can be processed more expeditiously.

IV.

PUBLIC COUNSEL MISUNDERSTANDS THE REASONING OF THE COMMISSION REGARDING BURDEN OF PROOF

15. Beginning at paragraph 10 of its Petition, Public Counsel asserts that the Commission has improperly shifted the burden of proof to non-settling parties. Public Counsel asserts that the Commission has, in effect, "told the non-settling parties it is they who must disprove the validity of the settlement and its rates." (Petition, ¶11) It goes on

to assert that they are "now placed in a position of attempting to disprove a Commission conclusion." (¶12)

16. First of all, the Commission, in its Order, has made it quite clear that it has not yet accepted the Settlement; that determination must await the conclusion of these proceedings:

> 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 for 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.

(¶29) Quite emphatically then, the Public Counsel is <u>not</u> placed in the position of "disproving" a Commission conclusion.

17. Public Counsel now has the opportunity to complete its discovery and to present testimony which responds to the direct case of the Company. Procedurally, this is no different than occurs in any contested proceeding where Public Counsel is given an opportunity to submit answering testimony, responding to the direct case of the Company. The Commission still will have to determine whether the Settlement results in rates that are fair, just, reasonable and sufficient. In the final analysis, Public Counsel is no more prejudiced here than it would be in the context of any contested settlement; in

fact, it has been given additional time, not always afforded non-settling parties, to further develop its case. [3]

V.

PUBLIC COUNSEL'S DISCUSSION OF ITS OPPORTUNITY TO PARTICIPATE IN THE SETTLEMENT PROCESS

18. Public Counsel questions some of the language in the Order that discusses Public Counsel's participation in the settlement process. In fact, the Order, by any fair reading, was quite careful to not reach any inferences based on whether Public Counsel did, or did not, actively participate in the settlement process. The Commission, in its Order, simply noted that "Public Counsel declined to participate for reasons that are not (and need not be) clear on the record." (¶14) In other words, there was no obligation on the part of Public Counsel to explain why it did or did not participate in settlement discussions. Moreover, the Commission went on to observe: "Settlement, and negotiations towards settlement, are not mandatory. No forfeiture of rights attaches to failure to participate." (Id.)

19. In the final analysis, however, these facts are not in dispute: a settlement conference was scheduled by the Administrative Law Judge on October 5, 2004. All parties attended. No settlement was reached until after this conference which, in fact, resulted in further modifications to the settlement proposal. These are the usual and customary steps taken during the settlement process.

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[3] Indeed, in the context of many other Settlement Agreements previously presented to the Commission, no additional time has been allowed for contesting parties to file subsequent testimony; here they have been given that additional opportunity.

VI.

CONCLUSION

20. The Petition for Reconsideration of Public Counsel should be denied, for the foregoing reasons. This Commission has appropriately balanced the interests of the settling and non-settling parties. It has done so in a way that would preserve the potential benefits of the Settlement (should it ultimately be approved), while affording additional due process to the contesting parties. Permitting the rates to go into effect, subject to refund, is well within the discretion of the Commission, based on the facts and circumstances of this case, and comports with the public interest standard.

RESPECTFULLY SUBMITTED this 22nd day of November, 2004.

AVISTA CORPORATION

By: _____
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