BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

1 The Public Counsel Section of the Washington State Attorney General's Office ("Public Counsel") asks the Washington Utilities and Transportation Commission ("the Commission") to reconsider its order granting short-term implementation of rates, while reserving ruling on the settlement proposal until all parties have had the opportunity to inquire into the proposal, to present evidence in opposition to it, to explore and cross-examine the evidence supporting it, and to argue the propriety of

the proposal to the Commission.[1] In the alternative, Public Counsel requests reconsideration of the refund conditions and procedural schedule; reconsideration of what it contends is the "shifting of the burden of proof" to the non-settling parties; and reconsideration of certain language concerning Public Counsel's participation in the settlement process. Commission Staff responds to Public Counsel's contentions and request for reconsideration as set forth below.

A. The Commission's Order Granting Short-Term Implementation of Rates Pending a Full Hearing on the Settlement Proposal is Consistent With the Legal Standards Governing Such Relief, Is Supported by Strong, Credible Evidence, and Is Distinguishable from the Emergency Relief Situation Presented in *WUTC v. Verizon*.

2 Contrary to Public Counsel's contentions, the Commission's Order granting short-term implementation of rates is consistent with both case law and the Commission's prior decisions. The Commission has broad powers to award interim, temporary or short-term rates. As the State Supreme Court held in *State ex. rel. Puget Sound Navigation Co. v. Department of Transp.*, 33 Wn.2d 448, 482, 206 P. 2d 456 (1949) (*citing* 51 C.J. 48, § 91):

> A public utility commission having power to regulate rates may, when it deems it justified, fix a temporary rate to be charged by a utility pending a valuation of the utility's property and the determination of a reasonable permanent rate.

[1] Docket No. UG-041515, *WUTC v. Avista Corporation*, Order No. 05, Settlement Hearing on Process; Granting Short-Term Implementation of Rates; Notice of Hearing (November 2, 2004).

The Court noted that the department, "in the exercise of its discretion," allowed temporary rates to go into effect, and the Court further found:

> 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.

Id. at 482.

3 In its recent decision in *WUTC v. Verizon*,[2] the Commission pointed out that the so-called "PNB factors"[3] that have been relied upon in certain past decisions involving interim rate relief are "neither a formula for interim relief, nor are they the only factors that the Commission may properly consider in its decision." *Id.* at ¶ 22. The Commission continued: "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." *Id.* at ¶ 24.

4 Contrary to Public Counsel's contentions, this case does present circumstances significantly different from the *Verizon* case. There, the utility brought a unilateral request for an immediate interim rate increase, and the sole question presented was whether Verizon had made a sufficient showing of financial emergency to justify interim

[2] *Washington Util. and Transp. Comm'n v. Verizon Northwest, Inc.*, Docket No. UT-040788, Order No. 11, Order Denying Request For Interim Rates; Rejecting Response to Bench Request, (October 15, 2004).
[3] *See Washington Util. and Transp. Comm'n v. Pacific N.W. Bell Tel. Co.*, Cause No. U-72-30 tr, Second Supplemental Order (October 10. 1972).

rates. None of the parties had assessed the ultimate merits of the rates requested, either on a short-term or permanent basis. As the Commission pointed out:

> [T]he 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. This was certainly true in the *Verizon* matter. Here, in contrast, audits of the Company's records have been completed by two of the parties. These two parties have determined, and have provided to the record, credible preliminary evidence that the Company's rates on settlement are fair, just, 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.

Id. at ¶ 25.

5 The Commission's decision here was not based on "the bare request of the settling parties," or the "convenience of parties to a non-unanimous settlement," as Public Counsel alleges. (Petition for Reconsideration at ¶¶ 2-3.) At the settlement hearing, Commission Staff, NWIGU, and Avista all provided written and oral expert testimony that both described the nature of the proposed settlement and provided "credible evidence" establishing a *prima facie* case that the proposed rates are fair, just, reasonable, and sufficient as permanent rates. Both Staff and NWIGU audited the Company's books with reference to the proposal. The settling parties presented a transparent settlement that "clearly identifies its components and discloses significant trade-offs in reaching

accommodations—[which] facilitates a thorough evaluation and contributes to the assessment of credibility." *Id.* at ¶¶ 19-22. The settling parties also set out Avista's results of operations and rate base for settlement purposes in Attachment A to the settlement, with a "proposed calculation [that] is supported by the credible testimony of witnesses Kelly Norwood and Ken Elgin." *Id.* at ¶ 48. Chairwoman Showalter, in a concurring opinion, agreed that:

> In the instant 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.

Id. at ¶ 88.

6 The "ultimate standard" for approval of interim or short-term rate relief is, as the Commission noted, "the public interest, based on the principles of the *Puget Sound Navigation* decision." The settling parties' request for implementation of rates effective November 2, 2004, in the instant case meets this standard, and the Commission's decision granting such relief was correct.

B. The Commission's Procedural Schedule in This Proceeding is Reasonable.

7 Public Counsel requests that the Commission "allow non-settling parties the full suspension period to develop and present their case." (Petition for Reconsideration at ¶ 9.) The full ten-month suspension period provided for in RCW 80.04.130 is not a "right" of parties challenging a proposed rate increase; rather, it is the maximum period of time that the Commission may take to issue a decision following the suspension of rates.[4] The appropriate time schedule for any particular case depends upon the particular facts and issues presented. The Commission has recognized this as well. As Judge Wallis noted at the settlement hearing, responding to Mr. Cromwell's request for a schedule having hearings in April 2005 and briefing in May 2005 (*See* TR 35, 116):

> I understand that's your preference. However, that is really the functional equivalent of the schedule in the case that we've just been discussing with the Verizon case, which has a multiplicity of the issues and total lack of unanimity on most of them. This appears, according to the testimony of the witnesses that we had today, to be either simpler, or in the words of one of them, cleaner, and should not require that length of time.

TR 116. Public Counsel has not shown that the issues presented in the proposed settlement agreement cannot be addressed through discovery, testimony, and hearings

[4] RCW 80.04.130(1) provides that "the commission *may* suspend the operation of such rate, charge, rental, or toll for a period not exceeding ten months from the time the same would otherwise go into effect." (Emphasis added.)

within the timeframe that the Commission has adopted.[5] Mr. Cromwell indicated at the settlement hearing that he could hypothesize that a filing date in December 2004 would be sufficient. TR 116-118.

8 The Commission's procedural schedule in this case is reasonable and affords Public Counsel sufficient time to develop and present its case concerning the settlement. In addition, Staff notes that the Company agreed, as a condition to the Commission's approval of short-term rate relief, to extend the suspension period by ninety days, if the settlement agreement is ultimately rejected or otherwise does not become effective. (*WUTC v. Avista,* Order No. 5 at ¶ 60; Avista Letter of November 2, 2004.) This will allow ample time for processing a full rate case, if that were to become necessary.

C. The Commission Has Not Shifted the Burden of Proof to the Non-Settling Parties.

9 Staff believes that Public Counsel has misconstrued the Commission's decision in contending that the Commission has shifted the burden of proof to the non-settling parties in this case, and required them to "disprove a Commission conclusion." Petition for Reconsideration at ¶ 10-12. First, the Commission made clear that it was not ruling on the settlement itself at this time: "We conclude that the proper approach is to reserve ruling on the settlement until all parties have enjoyed the opportunity to inquire into the

[5] As Public Counsel has acknowledged and the Commission has found, Avista has been forthcoming and timely in providing responses to Public Counsel's data requests. TR 116; *WUTC v. Avista,* Order No. 5, at ¶34.

proposal, formulate positions, present their views, and cross-examine witnesses supporting the proposal." Order No. 05, at ¶ 12. Public Counsel is, thus, incorrect when it says that the "practical reality" is that "the Commission has approved the non-unanimous settlement." (See Petition for Reconsideration at ¶ 11). Second, the Commission emphasized that authorization of short-term rates is not a "prejudgment on the merits," but rather:

> [I]t 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 make in other situations, for example, to initiate a complaint or to suspend a matter for rate review.

Order No. 05, at ¶ 29.

10 Third, at the settlement hearing Commissioner Hemstad made clear his understanding that the burden of proof was not being shifted to the non-settling parties. In response to Mr. Eberdt's stated concern that "if you set an interim rate, then it sort of bears on us [Public Counsel and the Energy Project] to prove that it's wrong," Commissioner Hemstad responded:

> [U]ltimately, that doesn't seem to me to shift the burden of proof. What it's saying is, is there additional evidence that can be put in front of us that would lead us to a conclusion

that the burden is not met by the company.

TR 101.

11 RCW 80.04.130(4) provides that at any hearing involving a requested increase in rates, the burden of proof to show that such increase is just and reasonable shall be upon the public service company. The Commission's decision approving implementation of short-term rate relief, and deferring its ultimate decision on the settlement proposal, did not shift or alter this burden. After Public Counsel has developed and presented its case, the Commission will determine whether Avista and the other settling parties have demonstrated that the proposed settlement is just, fair, reasonable, and sufficient.

D. The Commission's Decision Accurately Reflects the Settlement Discussions in this Case. In Any Event, However, the Commission Made Clear that Its Decision Was Not Determined by the Extent of Public Counsel's Participation In Those Discussions.

12 Public Counsel expressed concern with the statement in the Commission's decision that says: "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." Order No. 05, at ¶ 14. Staff continues to believe that this is an accurate statement, as it pertains to the overall settlement discussions between the parties. *See* TR 75-76, 79-80. We add that Public Counsel did participate in the October 5, 2004

settlement conference.

13 In any event, however, the Commission made clear that its decision in this case was not determined by the extent of Public Counsel's participation: "Settlement, and negotiations toward settlement, are not mandatory. No forfeiture of rights attaches to failure to participate." Order No. 05, at ¶ 14. The Commission's decision was determined based upon the evidence brought before it, which supports the implementation of short-term rate relief.

E. Conclusion

14 For the foregoing reasons, the Commission should affirm its Order No. 05, Granting Short-Term Implementation of Rates, and deny Public Counsel's Petition for Reconsideration.

DATED this 22nd day of November, 2004.

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