

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET NO. UG-041515
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	ORDER NO. 06
)	
v.)	
)	
AVISTA CORPORATION, d/b/a)	ORDER ON REVIEW DENYING
AVISTA UTILITIES,)	SUSPENSION OF RATES;
)	MODIFYING ORDER
Respondent.)	
.....)	

1 **SYNOPSIS:** *The Commission considers a petition for interlocutory review. It denies the request to reverse its decision allowing rates, subject to refund, pending review of a proposed multiparty settlement. It denies a request to specify conditions of refund, denies a request to modify the proposed procedural schedule, and grants in part a motion to modify the order’s discussion of the parties’ settlement process. Chairwoman Marilyn Showalter concurs by separate opinion.*

2 **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.

3 **SETTLEMENT PRESENTATION ORDER:** The Commission entered an order on November 2, 2004, reserving ruling on a proposed multiparty settlement but granting a motion to allow the proposed settlement rates to become effective immediately, pending review of the settlement proposal, subject to refund if the rate ultimately adopted is lower than the proposal.

4 **MOTION FOR INTERLOCUTORY REVIEW:** Public Counsel petitioned for interlocutory review of the order, asking review of the Commission's decision to permit the rates to become effective subject to refund; to clarify potential refund provisions; to adjust the schedule adopted at the settlement review presentation; and to modify the order's discussion of the parties' settlement discussions.

5 **APPEARANCES REGARDING THE PETITION.** Robert Cromwell, Assistant Attorney General, Seattle, appeared on behalf of the Public Counsel section of the Attorney General Division. David Meyer, attorney, Spokane, represents respondent Avista Utilities. Gregory J. Trautman, Assistant Attorney General, Olympia, appeared for Commission Staff. Other parties in the proceeding did not file pleadings related to the petition for interlocutory review.

I. DISCUSSION

6 **BACKGROUND.** Avista Corporation, d/b/a Avista Utilities (henceforth "Avista" or "the Company" in this order) filed a general rate case on August 20, 2004, seeking an increase in its rates of \$8.6 million, or 6.2 per cent, to be effective on September 20, 2004. The Commission convened a prehearing conference on September 23, 2004. There, counsel for Avista and Commission Staff indicated that the parties had been discussing the possibility of settlement. They asked that a schedule be established for settlement discussions and asked that the Commission defer establishing a contested adjudicative schedule, pending conclusion of settlement discussions. All parties professed open minds on the topic of settlement.

7 A procedural order entered on September 30, 2004, granted the request. At a subsequent prehearing conference, three of the five parties to the litigation joined

in announcing that they had reached, in principle, a “multiparty” settlement.¹ They asked that a settlement presentation hearing be scheduled to consider the proposal, and the Company indicated that it would be filing a motion to implement the proposed settlement rates pending review of the settlement if the Commission did not accept the settlement outright.

- 8 The proposed multiparty settlement was filed, as was a joint petition of Avista and Commission Staff for immediate implementation of the proposed rates. NWIGU, a group of industrial gas users that joined the proposed settlement, did not join the request for immediate implementation but did not oppose it. Parties briefed the Commission’s authority to accept a settlement opposed by some parties and briefed the Commission’s authority to authorize rates pending review of a settlement. Parties also identified an acceptable hearing schedule for review of the settlement.
- 9 The Commission entered an order on November 2, 2004, that denied Avista’s request to accept the settlement. Instead it confirmed the schedule for the settlement review, granted the motion for immediate implementation and, after stating its resolution of the issues, noted that the result was consistent with provisions of the Administrative Procedure Act that “strongly encourage” the informal settlement of disputes before agencies.²
- 10 Public Counsel seeks interlocutory review of the order. He addresses three separate issues: the propriety of allowing rates to become effective pending review of the settlement; a lack of specific details to define refunds, if refunds are ordered; and concerns relating to the order’s discussion of settlement discussions.

¹ WAC 480-07-730(3) defines a multiparty settlement as a settlement by some but not all parties to litigation of all of their issues.

² RCW 34.05.060

II. “INTERIM” RATES

- 11 Public Counsel makes four arguments in opposing the grant of rates pending review of the settlement proposal.
- 12 **Variation from Precedent.** Public Counsel argues that approving the grant is counter to precedent, and that there is no rational means to distinguish it from the Commission’s decision in a recent Commission order denying interim relief.³ In that order, the Commission denied Verizon’s request for interim rates. The order ruled that Verizon was not entitled to interim relief because it failed to demonstrate that it was facing an emergency requiring the approval of interim rates to stave off a real threat of damage to its ability to provide service. Public Counsel notes that in Verizon, as here, the company sought rates subject to refund, to be effective only until the Commission decided the Company’s request for “permanent” rates. He contends that both requests are for interim rates and therefore, the same standard—an emergency threatening service—must apply.
- 13 Commission Staff responds that the Commission order is consistent with case law and prior decisions and well within the range of authority defined in the *Puget Sound Navigation*⁴ case. Staff points out that the Verizon order noted that the PNB factors are not a formula, and that the Commission would remain open to consider unique circumstances or evolution in the factors. Staff argues that the circumstances in this docket are significantly different from those in the Verizon proceeding. As the challenged Avista order pointed out, Staff notes, parties in the Verizon proceeding were unable to establish the reasonableness of short- and long-term rates by traditional measures, while in this docket two parties have

³ Docket No. UT-040788, Order No. 11, served October 15, 2004.

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

presented credible preliminary evidence that the proposed rates on settlement are acceptable as permanent rates. The Commission noted in its decision that the ultimate standard for a grant of interim rates is the public interest, and Staff argues that the order in this docket meets that test.

- 14 Avista also opposes Public counsel's petition. Avista cites text in the Verizon order that the Commission continued to expect flexibility and openness in application of the factors in deciding requests for interim rates. Avista also notes that Public Counsel did not challenge the Commission's legal authority to give temporary effect to Avista's rates. Avista points out that the Commission order granting Avista's request identified its discretion in such matters as a continuum of differing situations that should be properly analyzed to determine the result in each that is most consistent with the public interest. Avista argues that the Commission clearly explained its exercise of discretion in granting Avista's request. In addition, it contrasted the proceeding with the setting of the Verizon order, where no party credibly established Verizon's need for interim or permanent rates.
- 15 The Commission rejects Public Counsel's argument. The facts and circumstances we face here are radically different from those in the Verizon proceeding. Here, they demonstrate to our satisfaction that allowing rates to become effective is in the public interest. The Commission order granting Avista's request clearly stated its basis in the evidence and clearly distinguished the circumstances from those facing Verizon. The Verizon decision is not persuasive here because of those differences.⁵

⁵ As Order No. 5 stated, in paragraph 29, page 12:

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.

- 16 **Insufficient evidentiary support.** Public Counsel argues that there is insufficient basis in the Avista record to determine that the proposed rates are fair, just, and reasonable for any purpose, and thus appropriate for interim application subject to refund. He argues that the finding of adequacy in the rates is inherently inconsistent with declining to accept the settlement. Public Counsel contends that none of the three factors cited by the Commission in support of granting interim rates (audits, transparency, and suitability) are supported by the record, which consists of the bare testimony of three witnesses. Public Counsel argues that the Commission did not probe into the testimony sufficiently to form an opinion.⁶
- 17 Staff disputes Public Counsel's contention that the Avista decision was based on parties' mere requests, arguing that three parties in this docket presented oral and written evidence that was subject to cross examination and that the Commissioners inquired into it. Commission Staff points out that the Commission clearly based its decision on evidence of record, that the order identifies the testimony and the documentary evidence on which it is based, and that the evidence cited is amply sufficient to support the result.
- 18 Avista notes that in determining to grant the request for temporary rates, the Commission cited evidence presented by Avista, Commission Staff, and NWIGU that supports its decision. Avista notes further that the Commission is the judge of the credibility of evidence in matters before it. Avista observes that the Commission cites several specific evidentiary bases for its result, including information that Staff and NWIGU had conducted audits that verified the need for the requested rates; that the settlement and its supporting evidence were sufficiently transparent to facilitate an evaluation, contributing to the Commission's ability to assess credibility of the supporting evidence; and that

⁶ Public Counsel did not cross examine the witnesses about the settlement proposal, the audits, or other aspects of the presentation.

the results of operations, rate base, and revenue deficiency were presented in the form of a proposed calculation supported by credible testimony of the Staff and Company witnesses.

19 The Commission reaffirms the findings on which it based its decision to grant the petition for immediate rate implementation. The testimony and documentary evidence presented by the witnesses contained adequate information, coupled with the witnesses' credible testimony,⁷ to support the requisite findings.

20 **Burden of proof.** Public Counsel complains that by deeming the proposed rates to be fair, just and reasonable, the Commission has shifted the burden of proof to Public Counsel to disprove the propriety of the settlement and the rates contained therein.

21 Avista responds that the Commission made it clear that this was a preliminary decision, for purposes only of the short-term rates, and that it carries no more weight than a decision to institute a complaint or suspend a matter for rate review. Avista notes that Public Counsel now has full opportunity to complete its investigation, cross examine witnesses, present its own evidence, and the Commission will then be faced with deciding whether the proposed rates will be fair, just, and reasonable, with the burden on the Company.

22 Commission Staff notes that the Commission cannot change the statutory burden of proof, which remains at all times on the Company under RCW 80.04.130. Staff argues that the order did not change the burden of proof.

⁷ Credibility of evidence is within the purview of presiding officers at hearings. *RCW 34.05.461(3)*.

- 23 The Commission rejects Public Counsel's argument. The order makes clear the preliminary nature of the finding, which is appropriate given the nature of the Commission's discretion.⁸ The Commission did not and cannot change the burden of proof in a rate approval proceeding, as Staff has identified.
- 24 It is true that once any *prima facie* case has been presented, other parties must come forward to discredit or refute it through examination or opposing evidence. In any rate proceeding, other parties risk that if they do nothing—do not cross examine it or present responding evidence—the Company's evidence will prevail. That does not change the ultimate burden of proof. Public Counsel and The Energy Project will be presenting evidence and cross examining the Company's evidence. The Commission order made clear the preliminary nature of the finding and its lack of effect on later aspects of the proceeding. The ultimate burden of proof, when the Commission considers all of the evidence, remains by statute on the Company and there is nothing in the Commission's order that is inconsistent with placement of the burden of proof.

III. SCHEDULE

- 25 Public Counsel asks that, if reconsideration is denied, the Commission adjust the procedural schedule. He contends that no party would be adversely affected by the extension of time. He makes no specific request, and he cites no hardship or difficulty in case preparation that he did not anticipate when the proposed schedule was discussed and adopted.

⁸ The order stated, in paragraph 29 at page 10.

[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 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.

26 Commission Staff noted that the dates selected for events in the calendar for review of the settlement proposal were either proposed by or acceptable to Public Counsel. Staff notes that the full suspension period is inappropriate for a proceeding with (as yet) limited issues.

27 The Commission denies Public Counsel's scheduling request. Public Counsel made no statement of unexpected circumstances supporting any specific proposed schedule change. The result of the settlement review hearing may be a) rejection of the proposal; b) direction to modify the proposal, which might not be accepted; or c) approval of the proposed settlement. In either of the former events, the result could be failure of the proposed settlement entirely and a return to a full rate case, with parties presenting their original positions. Avista has agreed to waive the original suspension period for 90 days, but the Commission may still need to schedule a complete rate case into the remaining time. Any extension of time for the settlement review would also require integration with the other matters already on (or that may be added to) the hearing calendar.⁹

IV. SETTLEMENT DISCUSSIONS

28 Public Counsel asks that the Commission delete certain portions of its order relating to settlement negotiations, arguing that it is unnecessary, that it discredits Public Counsel's participation, and that it decides the matter on the basis of that participation.

29 Commission Staff notes that the order's discussion accurately reflects the record, and that the order made it clear that the Commission's decision was not determined in any way by the extent of Public Counsel's participation.

⁹ The Commission routinely considers requests for schedule adjustment that are proposed by agreement of parties or to meet unexpected exigencies.

30 Avista argues that the order by any fair reading was careful to avoid any inferences based on Public counsel's participation. The Company argues that the facts are not in dispute: all parties attended a settlement conference on October 5, 2004, and no settlement was reached by the participating parties until after this conference.

31 This disagreement is of concern to the Commission. The order did make clear that participation in settlement negotiations is not mandatory and that no weight whatever attached to any party's participation or lack of participation.¹⁰

32 The chief area of contention appears to be the order's recognition of passages in the record disclosing that Public Counsel received notice of the earliest discussions between Staff and the Company, and did not participate in them. Although the *content* of settlement discussions is privileged, the *extent* of participation in settlement discussions is *not* privileged under WAC 480-07-700(4)(b) nor under RCW 5.60.070. Even if it were, the privilege would belong to Public Counsel, and the discussion on the record would constitute waiver. Nonetheless, we find it better to delete the specific sentence identifying participation, to emphasize that the extent and nature of any party's participation in settlement discussions had no bearing on the result of the order.¹¹

V. CONCLUSION

33 The Commission considers the petition for interlocutory review. It grants Public counsel's motion to modify the order, as noted, and denies the remainder of the relief requested.

¹⁰ "Settlement, and negotiations toward settlement, are not mandatory. No forfeiture of rights attaches to failure to participate." *Order No. 05, paragraph 14 at page 5.*

¹¹ Specifically, we delete the sentence beginning with "Public Counsel" and ending with "on the record," in paragraph 14, at page 5 of the order.

VI. ORDER

34 THE COMMISSION ORDERS That:

35 The Commission grants Public Counsel's motion to modify the Commission's
Order No. 05, as noted in the body of this order. In other regards, the
Commission denies Public Counsel's petition for interlocutory review.

DATED at Olympia, Washington and effective this 7th day of December, 2004

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

36 MARILYN SHOWALTER, Chairwoman, concurring:

37 I did not join in the original order that Pubic Counsel is requesting us to
reconsider. I agree with the result of the majority's order regarding
reconsideration. However, I think the majority continues to confuse the facts and
circumstances of a case with the standard that should apply to them. The facts in

this case are indeed very different from the facts in Verizon, but those differences do not justify applying different standards—or different labels—for relief.

MARILYN SHOWALTER, Chairwoman

NOTICE TO PARTIES: This is an Order on review of an Interlocutory Order of the Commission. No further review of the issues resolved in this order is available from the Commission.