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January 17, 2006

Carole Washburn, Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

Re: Procedural Rules Rulemaking
Docket No. A-050802

Dear Ms. Washburn:

Thank you for the opportunity to submit comments in the Procedural Rules Rulemaking in the above-cited docket. Avista's comments are responsive to the questions contained in the Commission's December 9, 2005 *Notice of Opportunity to Submit Comments*.

1. **Please comment whether the commission should consider adopting the amendments to WAC 480-07-730 and WAC 480-07-740 proposed by Public Counsel and others.**

For reasons described herein, it would not be in the public interest to adopt the proposed rule changes contained in the Petition, dated September 21, 2005, of the Public Counsel Section of the Washington Attorney General's Office (Public Counsel) and other parties. While argued to be an improvement to existing administrative rules regarding settlements (see Petition at paragraph 3), the proposed revisions would have the opposite effect.

The Petitioners suggest that changes to the rules are needed to prevent "closed settlement negotiations" and to give "all parties to a proceeding fair notice and equal opportunity to

participate in the resolution of all issues in a contested proceeding." We believe Petitioners have had, and will continue to have, full opportunity to participate in settlement discussions.

The proposed changes to the rules create a situation that would allow settlements to move forward without litigation only if all parties agree with the end-result. This provides, in essence, a "veto" by any party. The effect of the proposed rule would essentially result in a parallel track of litigation over the underlying issues, in addition to settlement processes. This would have a dampening impact on settlements and would remove most, if not all, incentives for utilities to enter into negotiation with parties on settlement. Thus utilities may not see the benefit of entering into settlement discussions if the process will require full litigation of all issues in a case, irrespective of a "make sense" settlement.

There has been no showing that Parties are harmed under the current rules of the Commission and the Commission's implementation of these rules. In Avista's recent general rate case, the settlement meetings were scheduled in advance, following significant opportunity for discovery. Draft settlement proposals were distributed to all parties. In that case four of the six parties reached agreement. The two non-settling parties not only had sufficient opportunity to participate in settlement discussions, but were also afforded the opportunity to have their issues litigated before the commission through extensive pre-filed testimony and exhibits, hearings for cross-examination of

witnesses, and briefs. The process, under existing rules, provided full opportunity for all parties to be heard.

The current rules regarding settlements already provide sufficient safeguards: WAC 480-07-740 provides that sufficient time must be provided for the Commission to review any settlement; that "supporting documentation" must accompany the settlement, demonstrating that it is in the "public interest"; that one or more witnesses must be proferred to testify in support of the settlement; and that those opposed to the settlement have the right to cross-examine witnesses, to present their own evidence in opposition to the settlement, and to engage in further discovery on the settlement, in the presiding officer's discretion. In Avista's recent settlement, all of these safeguards were present.

The Commission should consider, however, either by rule or practice, including settlement conferences in the initial procedural schedule as a placeholder for potential settlement discussions.

2. **Please evaluate the settlement process followed in the Avista proceeding (Docket Nos. UE-050482 & UG-050483) and recent Verizon proceedings (Docket Nos. UT-050814 & UT-040788). If you believe flaws existed in the process in those dockets please a) specify what the flaws were and b) whether, why, and what rule amendments are needed to correct them.**

In response to this question, the Company will focus only on its experience in the Avista case in that we do not have first-hand knowledge of the Verizon proceedings.

The Company believes that the process followed in the recent Avista electric and natural gas general rate case (Docket Nos. UE-050482 & UG-050483) provided significant and sufficient opportunity for discovery and resulted in comprehensive analysis by both the settling parties and non-settling parties.

The settlement process in the Avista case can be objectively assessed by examining the procedural schedule. The schedule clearly provided for reasonable notice, and sufficient time for discovery and analysis. Avista filed its general rate request on March 30th. Settlement discussions were scheduled and held on July 27th, 28th and on August 3rd. (The initial Prehearing Conference schedule contemplated settlement discussions June 28-30; however, these were rescheduled to a later time to provide more time for parties to engage in discovery.) The Settlement Discussions were held four months after Avista had filed its direct case and three to four weeks before intervener testimony was due. The timing of the Settlement Discussions was such that substantial discovery should have already occurred, and that parties should have identified the major issues that they would address in their upcoming testimony.

The four settling parties filed a Settlement Agreement on August 12th. Testimony supporting the settlement agreement was filed on August 26th. At the same time, the non-settling parties (Public Counsel and ICNU) filed testimony in response to Avista's original filing. Thereafter, on September 22nd the signing parties filed rebuttal testimony, and the non-settling parties filed testimony rebutting the Settlement Agreement

testimony. A public hearing was held in Spokane on October 11th and evidentiary hearings were held October 17th through October 20th. Briefs were filed and the Commission approved the Settlement with conditions on December 21st with rates effective on January 1, 2006.

Avista responded to 613 data requests. Of these, the non-settling parties had 429 requests, 273 from Public Counsel and 156 from ICNU.

Through this process there was adequate time for discovery, extensive discovery occurred, and reasonable time was provided to engage in settlement discussions and for evidentiary hearings to address the Settlement. There were no "flaws" in the process, and no changes to the rules are necessary.

3. **Based on your actual experience, please compare and contrast Oregon's rules and practice governing voluntary settlements (OAR 860-014-0085) with the commission's rules and practice. Please identify by company, docket number, and date, any individual proceedings in Oregon in which you have been a participant in the settlement process during the past two or three years.**

Avista provides natural gas service to over 92,400 customers in Oregon. Avista's last general rate case in Oregon, Docket No. UG 153, was filed on April 10, 2003. Parties to this docket were Avista, the Northwest Industrial Gas Users, the Citizens' Utility Board of Oregon and the Oregon Commission Staff. On August 23, 2003, an all-party Stipulation was filed with supporting testimony on September 12 2003. By Order No. 03-570, the Oregon Commission approved the Stipulation on September 25, 2003.

Based on Avista's experience in Oregon, OAR 860-014-0085 (while shorter) is quite similar to WAC 480-07-730, -740, and -750 in both form and substance. The Oregon rule specifically calls for a settlement conference upon reasonable notice. The Washington rule does not specifically require a settlement conference. However, as a practical matter Avista has sought to include all parties in settlement discussions in Washington cases, and has attempted to provide for such discussions as part of the procedural schedule.

In Oregon, the stipulation is to be supported by an explanatory brief or written testimony filed concurrently. Within 20 days of the filing, any party may file written objections to the settlement or stipulation or request a hearing. The Commission or Administrative Law Judge (ALJ) may 1) set another time period for objections and request for hearing, 2) hold a hearing to receive testimony and evidence regarding the settlement, and/or 3) require evidence of facts stipulated. If a stipulation is rejected, the Commission shall provide the parties sufficient opportunity on the record to present evidence and argument on the matters contained in the settlement.

In summary, Avista believes that the only material difference between the Washington and Oregon settlement rules is the Oregon mandate requiring a settlement conference upon "reasonable prior notice." However, Avista believes this is a difference without a distinction because, in practice, formal settlement discussions are either built into the

procedural schedule or otherwise provided for by prior notice to all parties. Avista, however, would not be opposed to inclusion of language in the Washington settlement rule that would require formal settlement conferences upon reasonable notice.

4. **Please state whether the amendment to WAC 480-07-730 proposed by Public Counsel and others, if adopted, should apply only to commission staff or to all parties.**

Avista does not believe that amendments to WAC 480-07-730, proposed by Public Counsel and others, should apply to the Commission Staff or to other parties for the reasons explained in response to question 1, above. If adopted, however, these rules should apply to all parties.

5. **Please describe how the nature of the commission's proceedings differs materially from other civil litigation insofar as settlements and the settlement process is concerned, and how any differences should be reflected in the settlement rules or practice.**

The settlement process with respect to civil litigation is generally characterized by more flexibility in approach (e.g., through mediation or other alternative dispute resolution mechanisms) and less extensive involvement of the courts in the review of the process and the final results. Unlike the settlement process before the Commission, litigants in multi-party litigation before the courts are free to avail themselves of any number of settlement strategies with some or all of the parties, with or without the use of mediation/arbitration, and generally without active involvement of the courts or review of the settlement reached. While courts will provide an "Order of Dismissal" when the case is finally resolved by settlement, this does not generally involve a review of the settlement process or how the settlement comports with the "public interest"—the

litigants are generally presumed to have arrived at a settlement that is in their own best interests. (There is more extensive judicial review of settlements in connection with complex class-action litigation, where the courts will examine whether the best interests of the affected class are being protected.)

Of course, this Commission's mandate requires that any settlement reached must be in the "public interest." Maximum flexibility should be afforded to the parties, however, in how they approach the settlement process, so long as all parties are given a reasonable opportunity to meaningfully participate at some point in the process. For example, informal discussions among any two or more parties should be permitted in advance of and during any formal settlement conferences, without the need for prior notice to all concerned. (Indeed, Avista has encouraged the other parties to discuss matters among themselves, during the formal settlement process, believing that this would facilitate settlement.) At some point in the process, however, Avista does believe that all parties should participate in a formal settlement conference, with prior notice given. This will ensure that all parties will ultimately have an opportunity to participate before any final settlement is reached. The point is simply this: the same flexibility afforded parties in civil litigation to reach settlement should be given to parties in matters before the Commission, recognizing that the Commission must still make the ultimate finding of what is in the "public interest."

6. **Would it be improper under the proposed amendment to WAC 480-07-730 for a settlement judge to caucus with one or more, but not all, parties to**

resolve issues between two or more parties? Should rules restrict parties' ability to caucus with one or more other parties, but not all, during a scheduled settlement conference?

A settlement judge should be allowed to caucus with one or more, but not all, parties to resolve issues between two or more parties. Moreover, the parties themselves should be free to caucus with some but not all other participants, both before and during a scheduled settlement conference. (As noted above Avista, in its last settlement, encouraged the parties to discuss matters in the absence of Avista, believing that this would facilitate the exchange of information and the frank discussion of issues.) To do otherwise would reduce the effectiveness of the settlement process.

7. **Concerning the proposed amendments to WAC 480-07-740, do the requirements in RCW 34.05.461(3) meet the concerns of the proponents for an order addressing all material issues of fact or law? If not, please discuss why the statute does not address the concerns.**

Avista believes these concerns are already addressed by RCW 34.05.461(3).

8. **Is discovery under the proposed amendment to WAC 480-07-740 intended to be an absolute right? Would an absolute right allow abuse of the process and irrelevant discovery? Why should parties opposing a settlement have discovery rights greater than those afforded under the discovery rules during other stages of a proceeding (*i.e.,* why should the commission's discretion to control discovery, considering the needs of the case be constrained, when a settlement is filed)?**

The proposed amendment to WAC 480-07-740 would create discovery rights greater than those afforded under discovery rules used during other stages of the proceeding. This would allow for an abuse of the process resulting in undue delay, inefficient use of time and greater expense. As shown in Avista's response to Question 2, above, all parties had significant discovery opportunities. The petitioners' proposal should be rejected.

9. Should the commission change the description of the "highly confidential" designation in WAC 480-07-423(1)(b)? If so, please explain how and why.

Avista proposes no changes to the description of the "highly confidential" designation in WAC 480-07-423(1)(b).

10. Please identify circumstances that justify use restrictions for persons given access to documents designated confidential or highly confidential.

Avista believes that the use of protective orders as well as WAC 480-07-160 (Confidential information) provides adequate restrictions for use of documents designated confidential or highly confidential.

11. Please identify circumstances that justify employment restrictions for persons given access to documents designated confidential or highly confidential.

Avista believes that the use of protective orders as well as WAC 480-07-160 (Confidential information) provides adequate restrictions for use of documents designated confidential or highly confidential.

12. Please provide proposed language for WAC 480-07-160 and WAC 480-07-423 describing how confidential or highly confidential information should be marked or identified in a document.

Avista has no proposed changes to WAC 480-07-160 and WAC 480-07-423 at this time.

13. Please provide proposed language for WAC 480-07-160 and WAC 480-07-423 describing how confidential or highly confidential documents should be filed with the commission.

Avista has no proposed changes to WAC 480-07-160 and WAC 480-07-423 at this time.

14. Please comment on Public Counsel's August 26, 2005, proposal to amend WAC 480-07-310(b), concerning ex parte communication.

The amendment proposed by Public Counsel would require that the nature and content of communications between a regulated utility and one or more commissioners regarding an issue which was later set for adjudication be disclosed by the company in a filing. Avista believes the existing rules are appropriate and sufficient.

In its August 26th comments, Public Counsel states that it "believes that the Commission has an exemplary record of dealing with matters of ex parte communications and commends the Commission's sensitivity to matters that might create an impression of impropriety as well as impropriety in fact." The Company concurs that the Commission has been extremely sensitive to not only avoiding ex parte communications, but also the potential for such.

If the intent of Public Counsel's proposal is to limit communication on matters that may or may not somehow pertain to future adjudicated issues, the consequences of this would be a general reduction in the frequency and substance of commission updates by regulated companies. The public interest is not served if commissioners are not knowledgeable about the companies they regulate and if they can only receive communication on current issues in the context of a litigated case.

In addition, it is unclear how Public Counsel's proposed amendment would be implemented, and the specific information that would need to be disclosed. Each party is

obligated to be mindful of the ex-parte rules and to fully comply with the rules, and experience suggests that the parties have, in fact, honored these rules.

If the Commission were to adopt Public Counsel's ex parte communication proposal, however, then its applicability should be broadened to include any party that has communications on an issue that later is part of an adjudicated proceeding.

15. Please state your observations or concerns about any of the commission's procedural rules, and propose specific language changes to address your concerns.

The Commission should consider, perhaps as a part of a separate rulemaking devoted just to this topic, implementation of rules that would allow for the use of the so-called "modified procedures" to process filings that do not require evidentiary hearings to develop a record but can be addressed through written comments instead. This process has been in place before the Idaho Public Utilities Commission, and has worked well to efficiently process filings that may require further comment, but do not otherwise require an evidentiary hearing. At present, this Commission is often presented with only one of two choices: either approve the filing, or set the matter for hearing. The use of "modified procedures" would provide yet another way to efficiently process a filing, while still entertaining further written comments.

Thank you for the opportunity to comment on these proposed rules. Please direct any questions on this matter to Bruce Folsom at (509) 495-8706 or me at (509) 495-4267.

Sincerely,

Kelly Norwood

Kelly Norwood,
Vice-President, State and Federal Regulation