BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET UG-041515
	)	
Complainant,	)	BRIEF OF PUBLIC COUNSEL ON DUE PROCESS ISSUES
	)	
v.	)	
	)	
Avista Corp. d/b/a Avista Utilities,	)	
	)	
Respondent.	)	
. . . .	)	

I. INTRODUCTION

1. The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) requests that the Washington Utilities and Transportation Commission (WUTC or Commission) affirm that all parties have a right to due process of law in matters that come before the Commission where the Commission has suspended and set a matter for hearing. In the matter now before the Commission such rights include notice and a meaningful opportunity to be heard. Public Counsel, and any other non-settling party in the present proceeding must be afforded a reasonable opportunity to: conduct discovery, present testimony that rebuts the Company's direct case as well as any settlement, and any testimony filed in support of a settlement, cross-examine witnesses, and present briefing to the Commission. For these reasons

Public Counsel objects to the process proposed by the settling parties for having the Commission review and implement the proposed Settlement Agreement.

II. BACKGROUND

2. This matter was initiated on August 20, 2004 when Avista Corporation (Avista or Company) filed proposed tariff revisions and supporting testimony that would effect an $8.6 million (6.2 %) increase in rates.[1] The Commission decided to suspend the proposed tariff changes for investigation on September 8, 2004.[2]

3. An initial prehearing conference was held before Administrative Law Judge Wallis on September 23, 2004. At that prehearing conference Public Counsel appeared, the Northwest Industrial Gas Users (NWIGU) and the Energy Project/Opportunity Counsel moved to intervene and their interventions were granted. The Citizen's Utility Alliance (CUA) requested interested party status. At that time the Company and Commission Staff made it clear that a settlement in principle had been reached between the Company and Commission Staff some time before. Commission Staff requested, and the Commission has granted, a procedural schedule for consideration of the settlement as follows: formal settlement conference (October 5), second prehearing conference (October 11), settlement presentation hearing date (October 22), public comment hearing on settlement (October 28).[3] The goal of the proposed procedural schedule is to have the agreed rate increase take effect by November 1, 2004; coincident with the anticipated rate increase resulting from Avista's purchased gas adjustment mechanism.[4]

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[1] *WUTC v. Avista*, Order No. 1 at 2, Docket No. UG-041515 (September 8, 2004).
[2] *Id.* at 12, 13.
[3] *WUTC v. Avista*, Order No. 4, Docket No. UG-041515 (October 12, 2004).
[4] Transcript (Tr.) at 12-13.

4. The Settlement proposal filed with the Commission on October 15, 2004 would raise base rates by $5.377 million, or roughly 3.87%. When combined with the 12% PGA filing the settling parties propose that Avista's natural gas customers receive just under a 16% rate increase on the eve of the heating season.[5]

5. Public Counsel has retained two consultants to date and may retain one or more additional witnesses. We have begun the process of discovery. Public Counsel requested a procedural schedule at the prehearing conference which would comport with due process.[6] The settling parties propose no more process than that already scheduled by the Commission.

III. ARGUMENT

6. The process proposed by the settling parties materially impairs Public Counsel's and any other non-settling party's due process rights and should be rejected by the Commission. The most fundamental principles of due process are notice and a meaningful opportunity to be heard. In the context of a general rate case before the Commission the process proposed by the settling parties would allow non-settling parties only one month from the invocation of the discovery rule to the hearing, less than seven weeks from suspension, to develop their case, conduct discovery, attempt to rebut the filed case as well as a proposed settlement, provide their own testimony and briefing, and prepare for hearing. This is clearly not a "meaningful opportunity to be heard."

7. In matters which the Commission has suspended and initiated a rate case proceeding,[7] where a settlement has been reached by some but not all parties, due process requires a meaningful opportunity to conduct discovery, present responsive testimony, cross-examine the

[5] *WUTC v. Avista*, Order No. 4 at 7; *Settlement Agreement* at 3. Collectively Avista, Commission Staff, and NWIGU will be referred to as the "settling parties."

[6] *Id.* at ¶¶ 11-12.

witnesses of the settling parties, and to present briefing to the Commission. In this matter, once the Commission took Public Counsel's appearance and granted the intervention of the Energy Project/Opportunity Council, both of these non-settling parties possessed due process rights in the current proceeding. The parties due process rights arise under U.S. Constitution, Washington state law, and Commission precedent.

A. The Proposed Process is Not Consistent with Constitutional or Statutory Due Process.

8. The U.S. Constitution establishes the fundamental right of due process.[8] The essential elements of due process are notice, an opportunity to be heard, and an opportunity to know the claims of an opposing party, and a reasonable time to prepare one's case.[9] The United States Supreme Court has also observed that "[t]he right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies this opportunity; otherwise the right may be but a barren one."[10] The Court has also required that process be more than a mere sham. As the court stated in *Mullane v. Central Hanover Bank & Trust Co.*, "But when notice is a person's due, process which is a mere gesture is not due process."[11]

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[7] General rate proceedings are adjudications under the Commission's rules and the APA. WAC 480-07-300(1), (2)(b).

[8] U.S. Const. amend. 14, § 1.

[9] *Armstrong v. Manzo*, 380 U.S. 545, 549, 85 S.Ct. 1187, 14 L.Ed. 62 (1965); see also, *Rudy v. Hollis*, 81 Wn. 2d 88, 93, 500 P.2d 97 (1972).

[10] *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 776 (1938).

[11] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 657 (1950).

9. Having appeared in this proceeding and become a party, Public Counsel, as well as other intervenors, have procedural due process rights.[12] Public Counsel has the duty under RCW 80.04.510 "to represent and appear for the people of the State of Washington."

10. The specific statutory due process rights applicable to these proceedings are found in both RCW Title 80 and the Washington state Administrative Procedure Act (APA). The APA establishes those due process rights which the Washington state Legislature has chosen to codify for parties in adjudicative proceedings before state agencies, boards, and commissions.[13] Unless specifically exempted from their application, the Commission's conduct in an adjudicative proceeding must comply with the Washington APA.

11. The Washington APA addresses the broader question of procedures at administrative hearings and states "…the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order." RCW 34.05.449(2). Nothing in Title 80 supersedes those rights. The process proposed by the settling parties does not comport with these requirements and must be rejected on this basis.

12. The APA provides that the Commission may dispose of a contested case by *agreed* settlement of the parties. Specifically, RCW 34.05.060 encourages informal settlements, but specifically preserves the rights of a party not to join:

> [I]nformal settlement of matters that would make unnecessary more elaborate proceedings under this chapter is strongly encouraged. Agencies may establish by rule specific procedures for attempting and executing informal settlement of matters. *This section does not require any party or other person to settle a matter.* (emphasis added.)

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[12] *See, e.g., Moses Lake Homes v. Grant County*, 49 Wn. 2d 182, 185, 299 P. 2d 840 (1956); *State ex rel. Spire v. Northwest Bell*, 445 N.W. 2d 284, 297 (1989).

[13] Chp. 34.05 RCW

The key point here is that the agreement between Staff and Avista is simply an agreement as to take a common position as to issues in the case. It does not, and should not, have the effect of terminating other parties rights in the case, as the foregoing statute underlines.

13. Pursuant to RCW Title 80, the Commission has been delegated the authority to regulate rates.[14] As a general matter, the Commission is required to make its determination after a hearing.[15] The Commission has the statutory authority to "enter upon a hearing concerning such proposed changes and the reasonableness and justness thereof" and may make such an order "after a full hearing."[16] The Commission's statutory authority thus specifically contemplates a "full hearing" once a matter has been suspended which will consider the justness and reasonableness of the proposed change in rates. The settling parties' proposal would not allow a "full hearing" on that issue, but a truncated proceeding examining only the merits of the partial settlement.

14. The overall structure of the Commission's procedural rules themselves, adopted to flesh out the statutory ratemaking process, are consistent with the provision of strong due process protections for parties to Commission rate case adjudications.[17] It is clear that the content and intent of the Commission's own rules regarding the adjudication of general rate cases is not satisfied by the settling parties' proposed procedure. It is also worth noting that the Commission's rules provide for abbreviated and specialized forms of adjudicative proceedings.[18] The rules themselves do not suggest by their terms that they would be appropriate or permissible

[14] RCW 80.01.040.
[15] RCW 80.04.110, 80.04.120.
[16] RCW 80.04.130.
[17] WAC 480-07-300 to 550.
[18] WAC 480-07-600 to 660.

for rate case adjudication.[19] In any event, the settling parties have not invoked any of the procedures suggested in these rules.

B. The Opportunity to Be Heard Must Be Meaningful.

15. While there do not appear to be any reported decisions in Washington State directly on point, a number of courts in other jurisdictions have addressed very similar questions and have preserved due process protections where partial settlements are presented in the regulatory context.

16. In *Fischer v. Public Service Commission of Missouri*, the Missouri PSC *sua sponte* initiated a rate design investigation of a gas company.[20] All parties filed testimony and exhibits prior to scheduled hearings, after which a settlement was reached by all parties except the Missouri Public Counsel. On the date set for hearing, the Public Counsel appeared, prepared to present his case and was informed that the Commission had adopted a "limited hearing procedure" as recommended by the settlement stipulation.[21] The court held that "[o]ne component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner."[22] In *Fischer* the parties received substantially more process from the Missouri Public Service Commission than is contemplated by the settling parties here; and yet the court concluded "… the hearing process adopted in this case was a violation of the due process which should have been accorded to Public Counsel in his capacity as a representative of the public."[23] The court went on to say "… [T]he hearing process in this

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[19] *See, e.g.* WAC 480-07-610(1), and (2) ("Matters suitable for brief adjudication").
[20] *Fischer v. Public Service Commission of Missouri*, 645 S. W. 2d 39, 43 (1982).
[21] *Id.* at 41.
[22] *Fischer v. Public Service Comm'n of Missouri*, 645 S.W.2d 39, 43 (1982).
[23] *Id.*

case violated due process of law by denying Public Counsel a fair and meaningful opportunity to be heard."[24]

17. The courts of Pennsylvania have reached a similar conclusion, holding that a Commission's review of a partial settlement must be consistent with the processes and standards for deciding a contested case.[25] In *Popowsky v. Pennsylvania Public Utility Commission*, a case involving the Pennsylvania consumer advocate, the court found that "[t]he allowance by the Commission to submit comments without an opportunity to present evidence or cross-examination witnesses did not constitute a meaningful opportunity to be heard[.]"[26]

18. Evidentiary hearings can only be dispensed with by a regulatory commission when there are no disputed questions of fact.[27] In *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, a decision of the ICC approving a non-unanimous settlement of an electric utility rate case was challenged by several intervenors on the grounds that it constituted an illegal settlement or rate bargain between the utility and the ICC.[28] The settlement was presented after extensive hearings had been conducted, and was approved over the objections of intervenors. The Illinois Supreme Court ruled that the ICC was required to base its decision exclusively on the record, as required by state law, and not on the settlement. The settlement was not a decision on the merits.[29] The court held that "[i]n order for the commission to dispose of a case by settlement, however, all of the parties and intervenors must agree to the

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[24] *Id.* at 44.

[25] *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Comm'n*, 763 A.2d 440, 459 (2000) citing to *Pennsylvania Public Utility Comm'n v. PECO Energy Co.*, 1997 Pa. PUC, Lexis 51, at *18 (1997).

[26] *Popowsky v. Pennsylvania Public Utility Comm'n*, 805 A.2d 637, 643 (2002).

[27] *Dee-Dee Cab, Inc. v. Penn. Public Utility Comm'n*, 817 A.2d 593, 598 (2003).

[28] *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 555 N.E. 2d 693 (1989).

[29] *Id.*, at 704.

settlement."[30] Here the Commission cannot conclude that no material questions of fact exist as there has been an insufficient opportunity for potentially opposing parties to conduct discovery or present evidence; and the record before the Commission is strikingly incomplete.

19. The settling parties may argue that ratemaking is inherently a legislative function and that no due process rights attach. It is more correct to state that the rate regulating *decision* is quasi-legislative, but that the *process* by which that decision is reached at the Commission is quasi-judicial; and constitutes an adjudicative proceeding during which the due process rights of parties must be protected.[31] The Washington APA and the Commission's procedural rules reinforce this point, as do Commission precedent and practice. Generally speaking, a less than unanimous settlement proposal should be treated no differently than a common position of the sponsoring parties and given no greater weight than the positions of the other parties. While the Commission may consider the Settlement Agreement now before it, the Commission may not bar the other parties from having a meaningful opportunity to present their position to the Commission on the underlying rate case as well as the proposed settlement.

C. Under Commission Precedent Non-Settling Parties Are Allowed An Opportunity to Present A Case.

20. In matters where a non-unanimous settlement has occurred, this Commission has afforded the non-settling parties an opportunity to conduct discovery, present testimony, cross-examine opposing witnesses, and provide briefing. A few examples are illustrative. Most recently, in the Qwest "Dex" directory asset transfer proceeding the Commission Staff was the non-settling party and was afforded a full opportunity to present its case in opposition to the

[30] *Id.,* at 700-701.

[31] As noted, the Commission's own rules recognize the adjudicative nature of a general rate case. WAC 480-07-300; *State ex rel Corbin v. Arizona Corporation Comm'n*, 143 Ariz. 219, 224, 693 P.2d 362, 367 (1984).

settlement.[32] This included an opportunity to conduct discovery, file rebuttal testimony to the settlement, conduct cross-examination of the settling parties' witnesses and provide briefing *after many months had passed*.[33] Likewise, in the U.S. West 1997 "make whole" case the Commission provided a hearing process and procedural rights, albeit shortened by comparison with a normal rate case timeline, for non-parties to present their case.[34] In the PacifiCorp-Scottish Power merger, one party's early willingness to settle the matter with the company did not result in an immediate hearing, and the Commission allowed other parties time to continue to develop their case, and ultimately to reach a settlement.[35] Public Counsel is not aware of a prior Commission rate case proceeding in which no procedural rights have been afforded to non-settling parties and the rate case concluded based solely on a partial settlement. As the cited examples show, even under circumstances where prior proceedings had exhaustively reviewed the company's books and the later proceeding was limited, the Commission afforded non-settling parties in that later proceeding some period of time to conduct discovery, draft and file testimony, cross-examine witnesses and present briefing.[36] No such opportunity is provided under the schedule proposed here.

D. Hearings Before the Commission Must Appear to be Fair.

21. The appearance of fairness doctrine "requires that hearings and decisions appear to be fair as well as being fair in fact."[37] Foreclosure of the right of Public Counsel and other

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[32] *In the Matter of the Application of QWEST CORPORATION Regarding the Sale and Transfer of Qwest Dex to Dex Holdings, LLC, a non-affiliate*, Docket No. UT-021120. *See generally* the testimony, exhibits, and briefing of Commission Staff and the case scheduling orders of the Commission.

[33] *Id.*, 10th Supp. Order at ¶¶ 8, 9, 34-39.

[34] *WUTC v. US West Communications Inc.,* 1st, 3rd, and 10th Supp. Orders, Docket No. UT-970766 ("make whole" case).

[35] *In the Matter of the Application of PacifiCorp and Scottish Power PLC*, 3rd and 5th Supp. Orders, Docket No. UE-981627 (PacifiCorp merger).

[36] *WUTC v. US West, Id.*

[37] *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 Wash. L. Rev. 533 at 534 (1986).

intervenors to fully present their case violates this doctrine. The Washington Supreme Court in applying the appearance of fairness doctrine has opined that the basic test of fairness is whether a fair-minded person could say that everyone had been heard who should have been heard and that the decision making body gave reasonable consideration to all matters presented.[38] An unfortunate result of the type of process proposed here could be a decreased public confidence in the Commission's review of company rate requests.[39]

E. The Rate Review Procedure Advocated by the Staff Raises Important Policy Issues.

22. The Commission Staff appears to have decided to take a different approach to this general rate case for reasons set forth in the testimony of Kenneth L. Elgin.[40] To the extent that the approach taken by Commission Staff in this proceeding reflects a policy decision at the Staff level to establish some form of "streamlined" rate review, in response to workload or other pressures, Public Counsel has serious concerns. The process as envisioned by Staff (and Avista) clearly has substantial benefits for companies that seek to increase rates, but few if any for their customers, whether residential, small business, or large industrial customers. As Commission Staff ably pointed out in its Verizon pleadings, the company controls the timing of its filings.[41] This allows the company to stay out when earnings exceed allowed returns, in return, the company accepts a statutorily-limited amount of regulatory lag when it does seek to raise rates.[42]

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[38] *Smith v. Skagit* County, 75 Wn. 2d 715, 453, P. 2d 832 (1969).

[39] Scheduling of the only hearing for the public on the settlement for October 28, one business day before the proposed rates are to take effect, further undermines the appearance of fairness.

[40] *Testimony of Kenneth L. Elgin*, Ex. ____(KLE-1T) at 4-5 (Oct. 15, 2004).

[41] Brief of Commission Staff regarding Verizon NW's request for interim rate relief, para 35-36, pp11-12. WUTC v. Verizon, UT-040788

[42] The only potential benefits for consumers from the process proposed here would be in a hypothetical where consumers (or the Commission) complained against a utility's rates, and then sought an immediate reduction of rates based on a settlement amongst less than all parties, not including the company. The settling parties now before the Commission would likely find such a situation (or "shoe") less than a comfortable fit.

23. While the Staff may enter into a partial settlement with a regulated company if it desires, the fact of that agreement cannot legally deprive other parties of their statutory rights to be heard, nor the Commission's authority and responsibility under Title 80 to regulate in the public interest, and to decide contested cases on the record, after a fair hearing process. Any decision by the Commission to adopt such an approach (i.e. allowing a Staff/company settlement to effectively terminate the rate case process) would need to be carefully reviewed for its consistency with the Commission's statutory authority, including a determination about whether legislative action is necessary to authorize such an approach. A major policy decision of this type should only occur after an open process in which all parties with interests regulated by the Commission have an opportunity to voice their views. At a minimum, all parties with interests before the Commission will need to know, in advance rather than after the fact, which "approach" a given case will use. All parties before the Commission benefit from regulatory predictability. Both companies and consumer advocates will be disadvantaged by an ad-hoc approach to processing rate cases and for this reason it should not be entertained in this proceeding.

IV. CONCLUSION

24. Public Counsel respectfully requests that the Commission enter an order finding that the procedural schedule proposed by the settling parties does not comport with due process and fails to provide a meaningful opportunity to be heard to the non-settling parties. Public Counsel further requests that the Commission adopt the procedural schedule which it requested at the prehearing conference.[43]

RESPECTFULLY SUBMITTED this 20th day of October, 2004.

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By: ___________________________
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[43] *WUTC v. Avista*, Order No. 4 at ¶¶ 11-12.