BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET UG-041515
	)	RESPONSE OF PUBLIC COUNSEL TO JOINT MOTION OF AVISTA CORPORATION, AND THE STAFF OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION FOR EARLY IMPLEMENTATION OF SETTLEMENT RATES
Complainant,	)	
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) deny the Joint Motion of Avista Corporation (Avista) and the Commission Staff (Joint Motion) which seeks early implementation of the rates proposed in their 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 increase in rates (6.2%).[1] The Commission decided to suspend the proposed tariff changes on September 8, 2004, and set the matter for hearing.[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. The counsel for Commission Staff requested that ALJ Wallis set a formal settlement conference date, another prehearing conference, a settlement presentation hearing date, and a public hearing on the settlement so that the amount of increase agreed to between the Company and Commission Staff could go into effect by November 1; coincident with the anticipated rate increase resulting from Avista's purchased gas adjustment mechanism.[3]

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 Avista's 12% Purchased Gas Adjustment (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.[4]

5. The Joint Motion filed with the Commission on October 15, 2004, requests that the rates set forth in the proposed Settlement Agreement be allowed to go into effect on November 1,

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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] Transcript (Tr.) at 12-13.
[4] *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."

2004, subject to refund, until such time as the Commission acts upon the Settlement.[5] Public Counsel opposes the request.

III. ARGUMENT

6. The request in the Joint Motion is nothing other than a request for interim rate relief, yet a request that asks for such relief without any recognizable legal, factual, or policy basis. Avista has filed no petition for interim relief, and provided no supporting testimony or evidence. Neither Avista in its initial filing, nor the moving parties in their motion, have made any effort to present the request in the framework which this Commission has consistently employed for granting interim relief. The moving parties allege no financial emergency, no imminent harm to shareholders or ratepayers, no gross hardship or inequity. They offer no supporting facts that would suggest interim relief is warranted on such a basis. Interim rate relief, as this Commission has consistently found, is to be granted sparingly, as a form of extraordinary relief, only when the Commission determines, after careful consideration of an evidentiary record and an adequate hearing, that it is in the public interest.

A. The Moving Parties Have Not Presented A Proper Request for Interim Rate Relief.

7. Avista and the Commission Staff have not alleged that an interim rate increase is necessary to maintain the Company's financial health pending a final rate decision, or nor have they offered any evidence in the record to support a granting of emergency rate relief within the framework of the *PNB* factors,[6] or any other framework. Their motion makes no mention of financial need or emergency.

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[5] *Joint Motion* at 3.

[6] *WUTC v. Pacific N.W. Bell Tel. Co.*, Docket No. U-72-30, Second Supp. Order (Oct. 10, 1972)("PNB").

8. The paucity of support for the request is highlighted by contrasting this request with Avista's request for interim relief in 2001.[7] In that case the Company provided detailed testimony and evidence to the Commission of the severity of its financial condition. Ultimately, after a hearing on that evidence, the Commission was persuaded that a grant of interim or temporary relief was "made necessary by extraordinary circumstances,"[8] finding that "in the economic and other circumstances Avista currently faces, the Company's financial health is continuing to decline very swiftly....the denial of temporary relief would cause clear jeopardy to the utility and detriment to its ratepayers and stockholders."[9] No such showing is even attempted here.

9. The Commission has just issued an order denying interim relief to another regulated Company -- Verizon.[10] The Commission's decision was based on an exhaustive examination of the criteria for interim relief, as applied to Verizon's claims of serious financial jeopardy, gross hardship, and inequity. Verizon presented extensive testimony and evidence, discovery was conducted, evidentiary hearings held, and briefs filed, all on an expedited schedule. In the end, the Commission held that Verizon had not carried its burden of proof, finding:

> We have reviewed the Company's needs, and find no evidence that the Company will face financial difficulty maintaining existing operations during the period until the Commission can resolve issues in the general rate proceeding….*In other words failure to grant the requested interim increase will have no substantial adverse effect on the Company, on its intrastate operations, or on the public*. There is no financial emergency to be staved off. According to the evidence of record, disaster has neither struck the intrastate operations, nor is it imminent, nor is difficulty meeting financial or service requirements of the intrastate operations over the interim period an objective possibility.[11]

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[7] *In Re Avista Corporation*, Sixth Supplemental Order, Docket No. UE-010395 (2001)("Avista Interim Order").

[8] *Id.*, ¶ 5.

[9] *Id.*, ¶ 60.

[10] *WUTC v. Verizon Northwest Inc.*, Docket No. UT-040788, Order Denying Request for Interim Rates, Order No. 11, (October 15, 2004)("Verizon Interim Order").

[11] *Id.*, ¶153 (emphasis added).

In denying the request for interim relief, the Commission recognized the special nature of interim relief, stating:

> The issue in this phase of the docket is easily framed. Has the Company established that the Commission should take the unusual—extraordinary--- step of granting interim relief at the expense of ratepayers, until concluding a general rate proceeding in which the Company's operations will be thoroughly analyzed and its proper level of overall rates determined?[12]

The Commission also reaffirmed that the *PNB* factors provide a viable framework for analysis of interim requests which offer "regulatory predictability" to industry and stakeholders,[13] and applied the factors to Verizon's request.

10. The contrast between the Verizon interim petition and this request could not be more stark. Here, the moving parties offer no support for their request for interim relief other than the notion that the commission may have the discretion to award it and that they wish it to be so. The Joint Movants do not even attempt to justify the request under *any* set of criteria discussed in the Verizon order.

B. Movants Have Not Shown Any Legal Basis for Implementing Interim Rates As Requested.

11. The Commission's enabling statute, RCW Title 80, contains no express authority for the Commission to grant interim or emergency rate relief. While the implicit authority to allow such relief has been judicially recognized,[14] granting of such relief has been limited to extraordinary situations where there has been a showing of some kind of impending financial emergency or compelling need that could not await the conclusion of the full rate review contemplated by the

[12] *Id*., ¶ 17.
[13] *Id*., ¶¶23,24.
[14] *Puget Sound Navigation Co. v. Department of Transportation*, 33 Wn.2d 448, 482, 206 P.2d 456 (1949)

express statutory scheme. Most recently, as noted above, this issue was extensively briefed by the parties and carefully considered by the Commission in the Verizon decision.[15]

12. The Joint Movants have not pointed the Commission to any prior case in Washington where interim relief was requested with such cursory support, let alone granted, nor to any case where rates were increased on such a basis outside of a request for interim relief. It is simply impossible to reconcile the approach to interim rates in the Joint Motion with that taken in the Verizon case by the Company, opposing parties, including Staff, or the Commission.

13. Part of the implicit rationale for the Joint Motion appears to be, "we expect this settlement to be approved in the end, so there's no need to hold up the Company's rate increase while we afford some kind of additional process to non-settling parties." It bears remembering that the process for review of the underlying case itself has yet to be established. As Public Counsel argues in its separate due process memorandum filed today, the process proposed by the settling parties fails to meet due process and statutory requirements and cannot be adopted. Joint Movants, however, seek to build on top of this shaky and flawed case process, and if anything even more poorly supported request for interim relief.

14. The due process and statutory concerns outlined in Public Counsel's due process memorandum are equally applicable to the request for interim relief. *Inter alia*, it can hardly be argued that the one day hearing currently set for review of the settlement constitutes a hearing on the issue of whether interim relief is warranted,[16] particularly given the absence of any testimony or evidence in support of interim relief, the absence of any notice that the issue will be heard on

[15] Verizon Interim Order, ¶¶ 29-36.

[16] Again, review of the Avista Interim Order is instructive. The Commission carefully reviews the adequacy of the hearing procedures, noting the days of hearing, the significant number of witnesses, exhibits, and transcript pages and concluding that "the Commission has exercised care to ensure that it has a full record for

October 22, and the resulting absence of any ability to present evidence in opposition to such relief.[17] Allowing interim relief in this context would simply compound the legal infirmities of the settling parties' entire approach to the case.[18]

C. The Record is Insufficient to Increase Rates at this Time.

15. The record now before the Commission is insufficient to allow the Commission to conclude that the rates proposed in the Settlement Agreement would be fair, just, reasonable, and sufficient; and should be allowed on an interim basis. Without a sufficient factual basis this Commission cannot reach the conclusion the joint movants seek. 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.

16. The movants also seek to rely upon testimony to be provided at the October 22nd hearing in support of this motion, which is wholly inconsistent with both Commission practice and the rules of civil procedure.[19] It is improper for the Commission to allow evidence in support of a motion into the record *after* the date by which responsive pleadings are due.[20] Accordingly the Joint Movants cannot properly rely on such evidence for purposes of this motion.

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decision *and that the due process rights of all Parties have been protected*." Avista Interim Order, ¶31 (emphasis added). *See also*, Verizon Interim Order, ¶¶ 37-41 (adequate hearing).

[17] Public Counsel has only recently retained experts in this case and just this week sent out its initial data requests in this matter.

[18] Footnote 3 to the Joint Motion sets out the "review" process engaged in by Staff and NWIGU, and other procedural history with respect to the settlement, as if to suggest that the process to date should be more than adequate to satisfy any party's desire for participation. Public Counsel's concurrent due process filing addresses these issues in more detail. However, even a cursory comparison of the procedural rights afforded in the Avista and Verizon interim proceedings or under schedules in other proceedings involving interim relief or contested settlements, shows how abbreviated and truncated the process in this case has been. It also seems unlikely that the Commission Staff would be satisfied with this type of process in any case where it had not signed a settlement.

[19] Civil Rule 56(c).

[20] *WUTC v. Avista*, Docket No. UG-041515, Order No. 4 at ¶¶ 8 and 10 (Oct. 12, 2004).

D. The Proposal for Interim Rates Does Not Fairly Balance Company And Ratepayer Interests.

17. The Joint Movants justify their request by stating: "Moreover, in exchange for an earlier implementation of the rates proposed in the settlement, Avista is foregoing its opportunity to advocate for the rates under suspension in this docket."[21] Public Counsel understands this to be essentially an argument that Avista is incurring some sacrifice, and that Company and ratepayer interests are fairly balanced if the interim relief is granted. This is not the case. Under the scenario proposed by the Joint Movants where interim rates take effect November 11, 2004 and the settlement is ultimately approved, Avista is better off monetarily and ratepayers are worse off until at least August 2006, by comparison with an ordinary rate case proceeding.[22] This is the case even if one does not take into account the value to Avista of receiving funds earlier, or the fact that it receives a disproportionate share of its revenues from gas rates during the heating season. This is a conservative estimate because it assumes Avista would receive full relief after a full general rate case proceeding. Were the Commission to ultimately award less than the full request the Company would remain better off beyond August of 2006.

18. In addition to this imbalance, its important to recall that Avista has the ability and legal authority to file for another rate increase any time it wishes prior to August 2006. Avista has not offered to forgo any gas rate increase until August 2006 as part of this settlement. The reality for the customers is that they are unlikely to ever reach the point where they "catch up" and the benefits of the "smaller rate increase" of the settlement are equal to the "sacrifice" of the

[21] Joint Motion, ¶ 5.

[22] Basis of calculation: Assume monthly interim revenue of $447,000 beginning November 2004, compared with $717,000 monthly revenue beginning July 2005 after conclusion of contested GRC and grant of entire request.

Company in taking less "up front." Avista has chosen to seek settlement. It cannot claim to be disadvantaged by seeking a settlement on terms it is clearly willing to accept.

E. The Availability of Refunds Does Not Cure The Problems With The Request.

19. The Joint Movants offer ratepayers the alleged comfort of a subject to refund clause, should the Commission ultimately reject the terms of the settlement. The Joint Movants included no subject to refund condition in the tariffs they have filed and offer no details in support of their subject to refund condition. The Commission should not be tempted to take refuge in such a condition. Taking the customers' money now harms those customers now. The potential for refunds will be little comfort to the customer who, facing the onset of the heating season, must choose between heat and other services, or the small business that must cut other costs in order to pay the higher rates.[23] As the Commission observed in its recent Verizon order:

> We recognize the concerns raised by public witnesses – an interim rate subject to refund *is not a neutral remedy*. Ratepayers are required to pay a higher price (which might be unwarranted) for an essential service, and with the concern that overpayments might never be returned to some ratepayers. Verizon Order, ¶ 139 (emphasis added).

[23] Verizon Interim Order, ¶139.

IV. CONCLUSION

20. Put simply, a partial settlement proposal is only a joint position of the parties that so join their interests. This Commission should give it no greater weight than the position of other parties (when they have had the chance to formulate one). It is not entitled to a presumption of validity that somehow warrants allowing a rate increase, even when it has not been approved by the Commission. The Joint Motion now before the Commission lacks statutory justification, factual foundation, or any Commission precedent to support the request for interim rates.

21. Public Counsel respectfully requests that the Commission enter an order rejecting the Joint Motion which seeks an interim rate increase pending the Commission's decision in this docket.

RESPECTFULLY SUBMITTED this 20th day of October, 2004.

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