

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

LEGAL MEMORANDUM OF
COMMISSION STAFF
ADDRESSING THE
COMMISSION'S AUTHORITY
TO ACCEPT THE PROPOSED
SETTLEMENT AGREEMENT
BETWEEN AVISTA
CORPORATION, COMMISSION
STAFF, AND THE NORTHWEST
INDUSTRIAL GAS USERS

I. Introduction

1 On August 19, 2004, Avista Corporation ("Avista" or "the Company") filed an application for a general gas rate increase with the Washington Utilities and Transportation Commission ("the Commission"). The Company sought an overall increase of 6.2%, or \$8.6 million. The Commission, pursuant to RCW 80.04.130, suspended the filing on September 8, 2004, and set a prehearing conference for September 23, 2004, at which time the Commission took interventions, established discovery procedures and made provision for possible settlement of the case.

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Following an analysis of Avista's filing, all parties, including Public Counsel and the Energy Project, commenced discussions for purposes of resolving or narrowing the contested issues in this proceeding, culminating in a settlement conference on October 5, 2004. In addition, Commission Staff conducted and completed an audit of Avista's normalized (or "restated") annual financial reports, with Commission-basis adjustments pursuant to WAC 480-90-208(2). As a result of the parties' settlement discussions, Avista, Commission Staff and the Northwest Industrial Gas Users (NWIGU) reached a Settlement Agreement that would increase rates by 3.87%, or \$5.377 million, spread to all customer classes by a uniform percentage increase in margin. Public Counsel and the Energy Project have not joined the Settlement Agreement. However, from August 19, 2004, through October 15, 2004—nearly two months--Public Counsel conducted no discovery in this matter. Only following the parties' filing of the Settlement Agreement, on October 18, 2004, did Public Counsel send its first set of discovery requests (132 data requests) to Avista.

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The settling parties request that the Commission approve the Settlement Agreement, because it results in rates that are fair, just, reasonable, and sufficient, and is in the public interest, as demonstrated in the parties' prefiled supporting testimony. The law permits the approval of nonunanimous settlements. Moreover, approval of the present settlement is consistent with the Commission's governing

statutes, with Commission precedent, and with the requirements of due process, as set forth below.

II. RCW 80.28.010 and RCW 80.04.130 do not grant the nonsettling parties the statutory right to an adjudication prior to the Commission's approval of the proposed settlement in this matter, nor do they require that the Commission wait the entire ten-month suspension period prior to approving the proposed settlement.

4 Under the Commission's statutes, gas companies such as Avista may file tariffs proposing increases in rates upon thirty days' notice to the Commission and to customers. RCW 80.28.060. The Commission may, in its discretion, suspend proposed rates and set them for hearing. *Id*; RCW 80.04.130. However, nothing in either the Commission's statutes or rules requires that it do so. Thus, a rate increase may become effective without any formal adjudicative notice or hearing. *Accord*, Docket No. UT-020406, *AT&T Communications of the Pacific Northwest, Inc., v. Verizon Northwest, Inc.*, Sixth Supplemental Order; Order Determining to Review Settlement, p. 9, ¶ 32 (March 19, 2003). Neither Public Counsel nor intervening parties have a statutory "right" to a hearing prior to the Commission's approval of a requested rate increase.

5 Should the Commission decide to suspend a rate filing pending a hearing, RCW 80.04.130 allows a suspension period not exceeding ten months from when the proposed rates would otherwise go into effect. This is a *maximum* period that effectively protects the Company from indefinite delay in processing a rate increase

request. But it does not create any “rights” on the part of Public Counsel or any other party to demand that any or all of this period be used prior to decision. Parties do not have the right to regulatory lag, just as the regulated company does not have a right to immediate rate relief. Thus, within the statutory time constraints, the Commission should take as much time as the circumstances require to decide the reasonableness of any particular rate request. The amount of time taken, and the amount of process needed, is flexible, depending upon the relevant facts and the complexity of the issues presented.

III. The Administrative Procedure Act, Commission rules and Commission precedent all strongly favor the settlement of disputed cases.

6 RCW 34.05.060 provides:

Except to the extent precluded by another provision of law and subject to approval by agency order, informal settlement of matters that may 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.

7 The Commission’s rules also encourage settlement. WAC 480-07-700.

Moreover, in the US West “make-whole” rate case, a case in which the Company and Staff (though not Public Counsel) reached a settlement agreement that the Commission accepted, with one exception, the Commission stated:

Commission policy favors settlement and negotiation. This *does not* mean that the policy pursues settlement at any cost to a

company or to the public interest. It *does* mean that reasonable people, acting reasonably and consistently with principle, can often reach accommodations that satisfy the interests of all – and that also serve the public interest. It is our job to make the determination of public interest and to apply principles rationally and consistently to achieve results that serve the public interest.

Docket No. UT-970766, *Washington Util. and Transp. Comm'n v. US West*

Communications, Inc., Tenth Supplemental Order, p. 13 (January 16, 1998) (emphasis in original).

IV. Commission approval of the Settlement Agreement in this case is consistent with the principles of due process.

A. Procedural due process requires notice and an opportunity to be heard. The amount of process that is “due” in any case is dependent upon the facts and circumstances of that case.

8 Due process generally requires notice and an opportunity to be heard. In the case of a contested settlement, WAC 480-07-740(2)(c) provides these rights to both Public Counsel and the Energy Project, namely, the right to cross-examine witnesses supporting the proposed settlement; to present argument in opposition to the proposed settlement; and to present evidence opposing the proposed settlement and in favor of their preferred result.

9 The courts have recognized, however, that the precise amount of process “due” in any particular case is highly dependent on the particular facts and issues. In *King County Water Dist. No. 54 v. King Count Boundary Review Board*, 87 Wn.2d 536, 548-49, 544 P. 2d 1060 (1976), the State Supreme Court noted that “due

process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [It] is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." The ultimate purpose of due process is to protect the individual from arbitrary action on the part of the state. *Id.* at 549.

10 Other courts have upheld nonunanimous settlements approved by public utility commissions. In *Attorney General of the State of New Mexico*, 808 P.2d 606, 610 (N.M. 1991), the New Mexico Supreme Court held that:

[the] PSC can adopt a contested stipulation by, first, affording any non-stipulating party an opportunity to be heard on the merits of the stipulation (i.e., whether it is a fair and reasonable resolution of the controversy before the Commission) and second, by making an independent finding, supported by substantial evidence in the record, that the stipulation does indeed resolve the matters in dispute in a way that is fair, just and reasonable and in the public interest.

The court cited to a similar holding in *Mobil Oil Corporation v. Federal Power Comm'n*, 417 U.S. 283 (1974). In *United States v. Public Service Comm'n of the District of Columbia*, 465 A.2d 829 (D.C. App. 1982), the court also upheld a nonunanimous settlement which had been filed just before the following events were to have taken place: the filing of initial expert testimony, the filing of expert rebuttal testimony, and hearings to include cross-examination of all company and intervenor witnesses

on their prefiled testimony. The court disagreed with the non-settling intervenor's contention that a trial-type hearing was necessary to explore disputed issues.

11 Likewise, the Commission in the present case should approve the Settlement Agreement, without requiring the extended schedule proposed by Public Counsel or a full hearing. Such approval is justified by the particular facts and circumstances presented here, as set forth below.

B. The Commission should approve the Settlement Agreement in the present case, with an effective date of November 1, for the reasons discussed in the prefiled testimony of Commission Staff.

12 Commission Staff witness Mr. Elgin discusses several reasons why the proposed Settlement Agreement is in the public interest, and why it is not necessary to engage in a lengthy hearing process involving the full ten-month suspension period permitted by statute. As Mr. Elgin emphasizes, while this case concerns Avista's request for a gas rate increase, this case does not--unlike many other rate cases--present complex issues requiring resolution. There are no issues involving interstate cost allocations, no issues involving allocations between services, no prudence review for new resources. Most significantly, the Company is accepting Staff's recommendation for rate of return, which is a rate that Staff would present in litigation. If complex issues were involved in this case, Staff would not be advocating for the Settlement Agreement. Ex. ___ (KLE-1T) at 6.

13 Moreover, Staff has conducted and completed an audit of the Company's books, and Avista has accepted all Staff adjustments from the audit. Avista agrees to present no proforma adjustments—adjustments which nearly always result in an increase to revenue requirement. The proposed rate spread and rate design are consistent with prior Commission practice. In addition, Avista has been experiencing inadequate per book returns in its gas operations for a sustained period. Ex. ___ (KLE-1T) at 3.

14 Given all of these circumstances, Staff does not believe that a lengthy hearing process is necessary or warranted in this case, nor that it would lead to a result that would better further the public interest than the proposed Settlement Agreement. Staff requests that the settlement be approved, with an effective date of November 1, 2004, to synchronize the rate change with the Company's expected changes in its PGA filing, Docket No. UG-041786.

C. In the alternative, the Commission may implement the rates in the Settlement Agreement effective November 1, with rates subject to refund, if it concludes that additional time is necessary to evaluate Avista's prefiled case and the Settlement Agreement.

15 Avista and Commission Staff, through a joint motion filed on October 15, 2004, have requested that if the Commission were to determine that more time should be provided for Public Counsel and the Energy Project to further evaluate Avista's pre-filed case and the Settlement Agreement, that it implement rates effective November 1, 2004, subject to refund. This option would substantially

reduce the resources that Staff would need to dedicate to the case, while affording Public Counsel and the Energy Project whatever additional time the Commission deems is necessary to pursue further discovery and evaluation. It would also protect the interests of affected customers, in the event the Commission should later not approve the Settlement Agreement. The Commission has granted such temporary relief in prior utility proceedings. Docket No. UW-000253, *Tall Timbers Water Systems, LLC* (allowing extension of the Company's tariff to newly-acquired systems, subject to refund, pending review of the proposed tariffs).

DATED this 20th day of October, 2004.

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