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

WASHINGTON UTILITIES AND)	DOCKET NO. UG-041515
TRANSPORATION COMMISSION.)	
)	
Complainant,)	
)	Memorandum of Authorities of Avista
v.)	Corporation
)	
AVISTA CORPORATION, d/b/a)	
AVISTA UTILITIES,)	
)	
Respondent.)	
.....)	

INTRODUCTION

1. In the Pre-hearing Conference Order No. 04, dated October 12, 2004, the Commission invited the parties to submit legal memoranda “limited to the question of the Commission’s authority to accept a proposed settlement under the circumstances presented in this docket.” (§ 10) Avista Corporation ("Avista" or "Company") respectfully submits this memorandum of legal authorities addressing that issue. Avista explains herein why the Commission is not legally obligated to conduct a prolonged contested rate case prior to acting upon the Settlement. In the final analysis, the

adequacy of “due process” depends on the “circumstances” of each case. As discussed below, the “circumstances” of the Settlement, together with the opportunity to comment on it at hearings scheduled for October 22 and 28, should alleviate concerns over “due process.”

SUMMARY OF THE PROCEEDINGS

2. Avista Corporation filed revised natural gas rates with the Commission on August 20, 2004. Avista filed supporting testimony and workpapers with its proposed rates, which justified an overall general rate increase of 6.2% or \$8.6 million. On September 8, 2004, the Commission ordered Avista's rates suspended and ordered an investigation into Avista's proposal. The Northwest Industrial Gas Users ("NWIGU") and the Energy Project/Opportunity Counsel ("Energy Project") were granted permission by the Commission on September 23, 2004, to intervene and participate along with Staff and Public Counsel. Following the September 23 pre-hearing conference, the WUTC Commission Staff conducted an on-site audit of the Company's books and records and notified all other parties to the case of its audit completion by October 1, 2004. In addition to the opportunity for formal discovery, “Avista's willingness to respond to informal requests facilitated the parties' discussions and analysis,” as noted in the pre-filed testimony of NWIGU witness Pyron in support of the Settlement. (p. 2)
3. All parties, including Public Counsel and the Energy Project, participated in discussions for purposes of understanding the issues in the case, and resolving or narrowing the contested issues, culminating in a settlement conference on October 5, 2004. At the October 11 Pre-hearing Conference, the Company, Staff and NWIGU indicated that they had reached a settlement agreement in principle. A Settlement

Agreement was subsequently filed on October 15, 2004, between the Company, Commission Staff and NWIGU. The Company and Staff also filed a joint motion, on the same date, proposing that rates go into effect on November 1, 2004, subject to refund, if the Commission should decide not to act on the Settlement until it has allowed time for additional process. The proposed Settlement reflects a \$5.4 million annual revenue requirement, as opposed to the \$8.6 million annual increase in revenue requirement that was originally requested by the Company. The settlement calculation is based on "commission-basis adjustments" which depict a utility's financial performance based upon normalized operating conditions. *See*, WAC 480-90-208 (2).

4. Hearings on the Settlement have been scheduled for October 22 and 28, and pre-filed testimony has been filed by the Company, Staff and NWIGU in support of the Settlement. Parties opposed to the Settlement will have the opportunity, on October 22, to present testimony or oral argument in opposition.

5. Should the Commission find, however, that additional process is warranted before approving the Settlement, the Company and Staff, in their joint motion, have outlined a procedure whereby settlement rates are put into effect on November 1, subject to refund, pending further deliberations. In this manner, the interests of settling and non-settling parties are further protected.

DISCUSSION

1. The Commission is not obligated by the law or its regulations to conduct a full contested-case type proceeding on the Settlement.

6. The fixing of utility rates is a legislative power, and the legislature has delegated this power to the Commission. Therefore, the Commission is guided by legislative

enactments in determining the extent of its authority. *See Power v. W.U.T.C.*, 711 P.2d 319 (1985); *State Ex Re. P.S.N. Co. v. Dept. Tr.*, 33 Wn.2d 448, 493 (1949) *citing St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38. The primary statutory mandate to the WUTC applicable in this proceeding is to set fair, reasonable and sufficient rates. RCW 80.28.010 - .020. The legislature has also directed that public service companies may increase rates upon 30 days' notice to the Commission and to customers, subject to the power of the Commission to suspend the proposed rates. RCW 80.28.060. The Commission has the power to suspend the operation of a rate for no more than ten months and set for hearing the request for a rate increase. RCW 80.04.130. However there is no statutory requirement that the Commission suspend the rates or set a matter for a trial-type hearing; indeed, it could have allowed the rates to go into effect without any suspension of the tariffs. Although Commission proceedings are often lengthy and may follow a pattern similar to a lengthy civil law case, no law requires that the Commission's administrative actions follow such a pattern.

7. In this case the Commission elected to suspend the rate filing and order an investigation. *See* Order No. 1. However, nothing in Order No. 1, or subsequent orders, prohibits the Commission from, in effect, vacating its earlier suspension of the rate and approving a lesser increase in rate as proposed in the Settlement Agreement. Mr. Elgin, in his pre-filed testimony at pages 5 and 6, correctly observes that the Commission regularly exercises its authority, under RCW Chapter 80.28, to put rates into effect, without a full evidentiary hearing:

Pursuant to Chapter 80.28 RCW, the Commission regularly reviews rate applications for water companies without a full evidentiary hearing. These cases are often processed without a full hearing schedule, and the Commission takes substantially less than the entire ten months

provided by the legislature to process a request to change rates. The Commission has considerable discretion to exercise its authority when determining how to evaluate any rate request, but in no circumstance may it take more than ten months to fully adjudicate any general rate request. The ten-month suspension period is a maximum, not a minimum allowable time to review requests to modify tariffs.

8. In fact, the maximum ten-month suspension period is for the protection of the filing utility, not intervenors or other parties to the proceedings.

2. There are no due process rights that require an extended procedural calendar.

9. No due process rights will be infringed if the Commission adopts the Settlement Agreement at this time. All parties have had an opportunity to participate early on in the review of the case. During the period of time since the Company filed its rate increase nearly two months ago, Commission Staff and NWIGU availed themselves of the opportunity to investigate the filing, participate in settlement discussions, and develop and endorse the proposed Settlement. Therefore, the actions of Staff and NWIGU demonstrate that, as a result of the process that has already occurred, sufficient time has been afforded the parties to understand the nature of the case, conduct discovery, and arrive at a settlement position.

10. The U.S. Supreme Court has held that held that, "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

11. In the final analysis, due process concerns are governed by what is fair and practical under the circumstances. The Washington Supreme Court has summarized the practical nature of due process requirements as follows:

The specific procedures required by due process depend upon many factors including the precise nature of the citizen's interest, the manner in which it is affected, the reasons for doing so, and the available alternatives to the procedure that was followed. *Olympic Forest Prods., Inc. v. Chaussee Corp.*, *supra* at 423-24. At bottom, the application of the due process clause is an intensely practical matter. *Goss v. Lopez*, 419 U.S. 565, 578, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975). (Emphasis added.)

King County Water Dist. v. Review Bd., 87 Wn.2d 536, 548-49 (1976). The court in *King County*, *supra*, at 87 Wn.2d 548-49, quoted from *Olympic Forest Prod's, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 423, 511 P.2d 1102 (1973) wherein it was recognized 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 inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. *Joint Anti-Fascist Refugee Comm. V. McGrath*, 341 U.S. 123, 162, 95 L.Ed. 817, 71 S.Ct. 624 (1951).

12. In this case, the Commission should evaluate the Settlement Agreement in the context in which it is presented and approve the Settlement rates at this time. The following excerpt from Staff Witness Elgin’s pre-filed testimony (pp. 3 and 4) summarizes the “circumstances” of this case:

- ⊖ The Company has been experiencing inadequate per book returns in its gas operations for a sustained period;
- ⊖ Staff performed an audit of the Company’s books;
- ⊖ Avista accepted all Staff adjustments from the audit;

- ⊃ Avista agrees to present no *pro forma* adjustments;
- ⊃ Avista accepts a rate of return that Staff would present in litigation;
- ⊃ The proposed rate spread and rate design are consistent with prior practice;
- ⊃ The lack of complex issues in the case needing resolution; and
- ⊃ The resolution of this general rate case synchronizes the rate change with the Company's proposed changes in its PGA filing, Docket No. UG-041786.

13. Moreover, under the “circumstances” of this Settlement, it is essential to recognize that the foundation of the Settlement rests on an agreement to use “commission basis” adjustments only (no *pro forma* adjustments). As stated in WAC 480-90-208(2), the “intent of the “commission basis” report is to depict the gas operations of a utility under normal temperature and gas supply conditions during the reporting period.” Accordingly, the commission basis report includes booked results of gas operations and rate base, and all the necessary adjustments as accepted by the Commission in the utility’s most recent general rate case or subsequent orders, adjusted for out-of-period, non-operating, non-recurring, and extraordinary items, and which reflect operations under normal temperature conditions. “Commission basis” reports do not include adjustments that otherwise “annualize price, wage, or other cost changes during a reporting period, or new theories or approaches that have not been previously addressed and resolved by the Commission.” *Id.*

14. Accordingly, among the “circumstances” of this case was Avista’s willingness to accept a reduced level of rate relief based only on “commission basis” adjustments using methodologies that have been previously accepted by this Commission. In addition, Avista has accepted Staff’s litigation position on cost of capital for purposes of settlement, doing so as a “trade-off” for early implementation of the rates on November 1, 2004.

15. In short, the “circumstances” of the Settlement, together with the opportunity for discovery and comment already afforded the parties and availed of by the Staff and NWIGU, support the sufficiency of “due process” provided the parties.

3. This Commission has determined that there is no due process right to a contested case.

16. In *AT&T Communications of the Pacific Northwest, Inc. v. Verizon Northwest, Inc.*, the Commission addressed the disposition of a non-unanimous settlement proposal. Public Counsel objected to the stipulation's provisions for public notice and comment on the proposal because it argued that they were insufficient to satisfy due process requirements and fell short of what should be afforded ratepayers in a general rate proceeding. The Commission held that due process did not require a general rate proceeding.

Public Counsel objects to the Stipulation's provisions for public notice and comment on the proposal because, he argues, they are insufficient to satisfy due process requirements. Public Counsel asserts that allowing public comment on a Stipulation the Commission has already decided to adopt is a sham. He argues that the procedural protections contained in the Stipulation fall far short of those that should be afforded ratepayers in what constitutes a general rate proceeding.

First, the Commission emphasizes that it has not approved the Stipulation. In this Order, the Commission merely determines that there are no procedural flaws that prevent the Commission from considering the

proposal in an open process with opportunity for participation by persons affected.

Telecommunications companies may increase rates upon 30 days' notice to the Commission and to customers. RCW 80.36.110. The Commission has the discretion to suspend and set for hearing any public service company's request for a rate increase, but is not required to do so. RCW 80.04.130. The Commission provides weekly notice of the openings and closings filings in a weekly report that is sent to subscribers, and posted on the Commission's web site. The Commission may, in its discretion, suspend proposed rates, but nothing in the statutes or the Commission's rules requires the Commission to suspend a proposal and set it for hearing. Under these statutory provisions, a rate increase request may become effective without any formal adjudicative notice or hearing. After providing the notice proposed in the Stipulation, Verizon will have provided 30 days' notice to its customers and the Commission. The Commission is convening a prehearing conference to consider any other procedural matters that may be raised. In these circumstances, the Commission clearly has the discretion to consider and to allow or reject the Stipulation and the proposed rate increase that it contains.

(Emphasis added.) *AT&T Communications of the Pacific Northwest, Inc. v. Verizon Northwest, Inc.*, Docket No. UT-020406, 6th Suppl. Order (WUTC, March 19, 2003, ¶¶ 30-32.)

17. As recently as October 15, 2004, Chairwoman Showalter, in *WUTC v. Verizon Northwest, Inc.*, Docket No. UT-040788 (¶ 186), noted numerous proceedings in which the Commission had authorized temporary rates at its open meeting without extensive evidentiary hearings:

For example, in numerous proceedings the Commission has authorized temporary rates at its open meeting, without the process and the expense now associated with requests for interim relief. These are illustrated by *WUTC v. Olympic Van Tours, First Supplemental Order*, Docket No. TC-980299 (March 25, 1998), action taken to avoid putting company in an overall loss position; and *Northwest Waste Industries, Inc.*, Docket No. TG-000726 (June 28, 2000), action taken to facilitate adoption of deferred commodity recycling revenues and avoid a later increase. The Commission has granted temporary relief in utility proceedings, as well, including *Tall Timbers Water Systems, LLC*, Docket No. UW-000253 (to allow extension of company tariff to newly-acquired systems, subject to refund, pending review of the proposed tariffs).

18. In this case, the Company, Staff and NWIGU have reached settlement, not just in the context of an open meeting, but after an opportunity for discovery and formal negotiations. Accordingly, there is justification for putting rates into effect on November 1, 2004, as part of this Settlement, even without the opportunity for extensive additional proceedings.

4. Other jurisdictions have determined that there is no automatic due process right to a full contested case proceeding in cases involving non-unanimous settlements.

19. While each case depends upon its own set of facts, the following are some examples of Commission action on settlements without extended hearings:

20. A Pennsylvania court determined that there was no denial of due process based on the facts of the case when written comments were required by the commission within forty-two hours after a non-unanimous settlement of critical issues had been presented. *ARIPPA v. Pennsylvania P.U.C.*, 792 A.2d 636, 650-54 (Pa. Commw 2-21-2002).

21. In *Corpus Christi v. PUC*, 51 S.W.3d 231 (Tex. 2001), intervening cities argued that the Texas Commission denied them due process by: (1) not allowing adequate time to prepare for the contested case hearing on a financing order; (2) unduly restricting their opportunity to cross-examine witnesses; and (3) issuing a financing order that adopted a non-unanimous stipulation without first holding a separate hearing. The Texas Supreme Court concluded that the cities were not denied due process when the Texas commission did not provide the non-settling parties an evidentiary hearing following the non-unanimous stipulation. *Id. at* 263-64.

22. The New Hampshire Public Utilities Commission has held that Commission acceptance of a non-unanimous stipulation entered between a utility and commission staff did not violate the due process rights of the New Hampshire Office of Consumer Advocate where acceptance of the settlement followed an open hearing. *Re Southern New Hampshire Water Company, Inc.*, 75 N.H. P.U.C. 282 (DR 89-224, Order Non. 19826 (N.H. P.U.C. May 14, 1990).

CONCLUSION

23. "Due process" does not require that the Commission conduct a full contested case proceeding before it acts upon the Settlement. To require a full contested case hearing merely to satisfy a party's desire to have more time to prepare a case, would be unfair and prejudicial to the settling parties' right to have the Settlement reviewed and acted upon. Under the governing law which requires an examination of "circumstances" of the case, no "due process" rights will have been prejudiced by the adoption of the Settlement at this time.

Respectfully submitted this 20th day of October, 2004.

By: _____
David J. Meyer
Vice President and Chief Counsel for
Regulatory and Governmental Affairs
Avista Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of October, 2004, I caused to be served a true and correct copy of AVISTA CORPORATION'S MEMORANDUM OF AUTHORITIES, via e-mail and by mailing a copy thereof, postage prepaid to the following:

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Dated at Spokane, Washington this 20th day of October, 2004.

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