

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Petitioners,

v.

ADVANCED TELECOM GROUP, INC.,
et al.,

Respondents.

DOCKET NO. UT-033011

COMMISSION STAFF'S BRIEF
ON SETTLEMENT
PROCEDURES

I. INTRODUCTION

1 On November 30, 2004, the Commission issued a Notice of Opportunity to File Briefs Addressing Process for Consideration of Multi-Party Settlement. The notice requested that the parties address in their briefs the issues of whether Time Warner, as intervenor, has the same status as other parties in this proceeding, and what process Time Warner is entitled to in both a later phase of this proceeding or in a separate proceeding initiated by Time Warner.

II. TIME WARNER'S STATUS IS LIMITED

2 Time Warner's Status in this proceeding is limited to the scope of its intervention. In Time Warner Telecom of Washington LLC's Petition to Intervene (Petition to Intervene), Time Warner sought to intervene to take advantage of the terms of certain unfiled agreements and to ensure it is not discriminated against. Petition to Intervene, page 3. Time Warner also stated that "TWTC's intervention will not broaden the issues to be addressed or delay this proceeding". *Id.* In Order No. 01 Time Warner's petition was granted. Order No. 1, paragraph 4.

3 Time Warner, on several occasions, has argued that it has a right to credits as a remedy in this proceeding. On December 15, 2003, it filed Time Warner's Telecom's Response to Qwest's Motion to Dismiss and for Summary Determination requesting that the Commission fashion a remedy providing discounts on all services purchased Time Warner and other carriers. The Commission deferred consideration of this issue until later in the proceeding. Order No. 5, paragraph 129. On September 14, 2004, Time Warner filed testimony seeking discounts or credits for previous discounts offered to Eschelon and McLeodUSA.

4 On October 4, 2004, Qwest brought a motion to strike Time Warner's testimony, in part, because Time Warner sought such discounts or credits and the Commission could not grant the relief sought by Time Warner based on the

complaint. Time Warner and Staff responded. Qwest's motion was partially granted in Order No. 15, paragraph 112. The Commission stated:

The portion of Mr. Gates' testimony related to a claim or request for reparations or credits to Time Warner Telecom of Washington, LLC, and other CLECs, while responsive to Staff's direct testimony concerning remedies and possible harm, proposes remedies that are not within the scope of the Amended Complaint, and raises claims that have not been properly pleaded or raised in this proceeding.

5 Time Warner did not request reconsideration of this decision. Thus, Time Warner was unsuccessful in bringing the issue of credits into this proceeding. The essence of due process is notice and opportunity to be heard. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050, cert. denied, 513 U.S. 1056 (1994). Time Warner has already been provided notice and opportunity to be heard on its right to seek credits in this docket. Time Warner should not be permitted to relitigate this issue either directly or indirectly through opposition to the settlement.

6 Time Warner attempts to argue in its opposition to the settlement that it has a right to findings of the Commission that are binding and have full precedential effect. Time Warner Telecom of Washington LLC's Opposition to Proposed Settlement Between Qwest, Staff and Public Counsel (Opposition to Proposed Settlement), paragraphs 21 and 22. This appears to be an indirect way to seek the credits which the Commission has already determined are not at issue in this docket. Time Warner's interest as an intervenor in this docket does not extend to

this collateral interest in seeking findings it may use later.¹ The scope of Time Warner's intervention has been limited (by Order No. 15) to advocating for the appropriateness of the remedies the parties have settled on and that the Commission is authorized to grant in this docket. Time Warner has done so in its Opposition to Proposed Settlement and at the November 29, 2004, hearing.

III. TIME WARNER'S DUE PROCESS RIGHTS IN A MULTIPARTY SETTLEMENT

7 "Due process, unlike some legal rules, is not a technical conception with a fixed context unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976), quoting *Cafeteria Workers v. McElroy*, 3678 US 886 (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).

Therefore, the extent of process required depends on the particular circumstances at

¹ Furthermore, it is unclear whether any settlement agreement approved by the Commission could be cited as precedent in a future proceeding. Settlement agreements, including nonunanimous settlement agreements, have generally not been construed as precedential for purposes of future proceedings because allowing settlements to become precedential deters future settlements. See consolidated cases of *WUTC v. Puget Sound Power & Light Company*, dockets U-89-2688-T and U-89-2955-T, Third Supplemental Order, page 20 (1990) ("Puget is fully aware of the non-precedential nature of the settlement process. Settlements do not provide the commission with the record upon which to make an industry-wide policy setting decision. If the Commission were to begin using settlements in such a fashion it is unlikely that another settlement would ever be presented for consideration."), *Pederson v. Potter*, 108 Wn. App. 62, 69 (2000) (Collateral estoppel requires that a party receive a full and fair opportunity to present its case and an "adjudication". Therefore, a "consent judgment" cannot be used to establish the identical issue in a subsequent case.) All that being said, it should be realized that the specific terms of the Settlement Agreement dictate the scope of precedential value of the settlement (if any) and the extent to which it can be relied upon. Additionally, it should be realized that the Commission Order making findings as a result of the settlement is, by necessity, as precedential as any other commission order.

hand.² As stated above, due process essentially requires notice and opportunity to be heard. *Soundgarden*, 123 Wn.2d at 768. The process Time Warner is entitled to in this proceeding is that process required by the Administrative Procedure Act (APA), Chapter 34.05 RCW, and Commission rules.

8

RCW 34.05.422 provides that a company has a right to a full adjudication if an application for a rate change is denied. Therefore, a utility has a right to an adjudication in a rate case. Likewise, Constitutional due process requires an adjudication in a penalty case against a company because a property interest is at issue. *See* footnote 2. RCW 34.05.443 and the commission rules provide for agency discretion to permit intervention, and modify such intervention. However, neither the APA nor the US Constitution provide an intervenor the unqualified right to a full adjudication of a case.³ *See* RCW 34.05.413(2).

² In order for Constitutional due process to attach a protected liberty or property interest must be at issue. *Mathews*, 424 U.S. at 331 (“Procedural due process imposes constraints on government decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process clause of the Fifth or Fourteenth Amendment”). Time Warner has not asserted that such an interest exists here and it would be difficult to construe such an interest. Therefore, the “balancing test” to determine the process required employed in *Mathews v. Eldridge* does not strictly apply to this proceeding, but may be useful as an analogy for the concept that the amount of process required lessens as the nature of the private interest is less significant. Here, Time Warner’s interest is extremely limited.

³ The Commission requested that the parties contrast their status with Time Warner’s status. Qwest is subject to a penalty and therefore has a due process right to a full adjudication if it so chooses. Staff’s role and status is unique in this proceeding because it prosecuting the case on behalf of the Commission. WAC 480-07-340(2)(b). Therefore, the complaint could not be pursued without Staff (at least at present).

9

RCW 34.05.413(1) provides *discretion* to the agency to conduct an adjudicative proceeding and RCW 34.05.060 provides authority for agencies to “establish by rule specific procedures for attempting and executing informal settlement of matters.” The Commission has exercised its authority under the APA and Commission authority, RCW 80.01.040 and 80.04.060, to issue rules for consideration of multiparty settlements, including hearings on a proposed settlement. Time Warner, as an intervenor in this proceeding, is subject to the Commission settlement consideration rules. Furthermore, because the scope of its intervention and interests are limited, a more abbreviated hearing is permissible and appropriate.

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By definition, the only type of settlement where rights of an opponent arise are nonunanimous settlements or “multiparty settlements” as the commission calls them. The Commission has approved such settlements in the face of an objection as long as due process is provided to the objecting party. In the consolidated cases of *WUTC v. Pacific Northwest Telephone Company, d/b/a US West Communications and In re the petition of PNBT Company d/b/a US West Communications*, dockets U-89-2698-F and U-89-3245-P, Fourth Supplemental Order, pages 21 - 23 (1990), in approving a nonunanimous settlement, the Commission stated the following:

There is no requirement that all potentially interested parties who may wish to intervene in a given matter be involved in settlement negotiations between a regulated utility and commission staff.

Such a requirement would not be workable and might be counterproductive. The intervenors were not harmed or prejudiced. The procedure afforded the parties' due process. Reasonable discovery was allowed, full cross-examination of Staff and Company witnesses was exercised and all intervenors were given the opportunity to present testimony on the complaint settlement issues . . .

11 The current due process protections for opponents of a proposed settlement are contained in rule. WAC 480-07-730 is titled "Settlement". It states "a settlement is an agreement among two or more parties to a proceeding that is filed with the commission as a proposed resolution of one or more issues." Three types of settlement are provided for: "full settlement", "partial settlement", and "multiparty settlement". The only one of three settlement types which has opposition by a party is a "multiparty settlement" since in the other two types *all* parties agree. *See* WAC 480-07-730.

12 Therefore, WAC 480-07-740(2)(c), "rights of opponents of a proposed settlement" applies only when a multiparty settlement is at issue (and applies to this case). Subsection (2)(c) of the rule relating to settlement consideration provides that "each party to a settlement agreement must offer to present one or more *witnesses to testify in support of the proposal* [emphasis added]". WAC 480-07-740(2)(c) does not grant an opponent of a settlement the right to cross-examine every substantive witness in the case. Instead it grants to an opponent "*the right to cross-examine witnesses supporting the settlement*". The rule also provides "the right to

present evidence opposing the proposal; the right to present argument in opposition to the proposal; and the right to present evidence, or in the commission's discretion, an offer of proof, in support of the opposing party's preferred result."⁴ WAC 480-07-740(2)(c).

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The scope of Time Warner's intervention in this case is limited to the appropriateness of the amount of penalty. Time Warner has been permitted the opportunity to present testimony and evidence in favor of its preferred result. *See* Notice of Opportunity to Respond to Settlement Agreement. Time Warner has been permitted to present argument and testimony in favor of the preferred result (Time Warner's Opposition to Proposed Settlement and the November 29, 2004 settlement presentation hearing), and cross-examine the witnesses supporting the settlement (the November 29, 2004 settlement presentation hearing). Therefore, all requirements of WAC 480-07-740(2)(c) have been complied with and a more formal hearing is not required.⁵

⁴ Time Warner cited *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 555 N.E. 2d 693 (1989) for the proposition that nonunanimous settlements are not permissible. This decision was based on an *Illinois* enabling statute and is inconsistent with U.S. Supreme Court and other authority permitting nonunanimous settlements. *See Mobil Oil v. Federal Power Commission*, 417 U.S. 283, 312–313 (1974), *Attorney General of the State of New Mexico v. New Mexico Public Service Commission*, 808 P.2d 606, 610 (N.M. 1991), *ARIPPA v. Pennsylvania P.U. C.*, 79 A.2d 636, 650-54 (2002), *Corpus Christy v. PUC*, 51 S.W.3d 231, 263-264 (Tex. 2001). Furthermore, this decision relates to a rate case, a case in which the interests are of a different character than a Commission initiated penalty case in which the Commission is operating in its role as prosecutor. *See* RCW 34.05.422. Similar arguments relating to nonunanimous settlements were made by Public Counsel and rejected by the Commission in Docket No. UG-041515, Order No. 05, 06.

⁵ The Commission may judge whether it needs a hearing on the issues Time Warner presented as part of its Opposition to Proposed Settlement and December 29, 2004 presentation.

IV. TIME WARNER'S RIGHTS IN A LATER PHASE OF THIS PROCEEDING OR IN A SEPARATE PROCEEDING

A. Later Phase.

14 In answer to the Chairwoman's question relating to the possibility of settling some parties out while leaving other parties in the case, Commission Staff responded that there is some precedent for allowing parties to maintain their actions in a *separate action* even if the main action fails or deferring issues until a subsequent action. Transcript, Volume VI, page 301, 304. Staff cited *State v. Port Peninsula*, 89 Wn.2d 764, 767 (1978) and *WUTC v. Washington Water Power Company*, Docket UE-900093, Second Supplemental Order, page 2 (1990).⁶ Although it is true that Time Warner could initiate its own complaint and litigate its claims or issues, the Settlement Agreement in this case provides that this docket must be fully and finally resolved and closed. Settlement Agreement, paragraph 16. Permitting Time Warner to remain a party to this docket in any way will have the likely effect of a party exercising its rights to terminate under paragraph 15 of the Settlement Agreement.

⁶ The Washington Power case is distinguishable from this case because it involved the deferral of examination of executive wage and bonus issues, issues that were properly in the rate case to begin with. In contrast, Time Warner's objections to the settlement relate to issues either not in the case (credits) or which must be resolved by the settlement (the scope of the penalty as it relates to harm to the market). Similarly, the Port Peninsula case merely states a general proposition that an intervenor's suit may be maintained as a separate action even if the main action fails. Again, this case is distinguishable from Time Warner's claims because credits are not at issue in the present case and Time Warner's interest in the appropriateness of the amount of penalties.

B. Separate Proceeding.

15 Staff is dubious about the merits of Time Warner’s claims for credits in a subsequent proceeding in front of the Commission. *See* Staff Response to Qwest Motion to Strike Testimony of Time Warner, paragraph 8. However, Time Warner certainly retains the right to file such a complaint. *See* Settlement Agreement, paragraph 17. If such a complaint is filed either in front of the Commission or in a federal or state court, the process rights of Time Warner would be consistent with the rules of the Commission or the court as applicable. This settlement does not modify or prejudice these rights. Certainly in such a situation, Time Warner status would be greater as complainant seeking redress than its status here as an intervenor in a Commission initiated penalty case.

V. Conclusion

16 Time Warner’s status as an intervenor in this particular proceeding is limited due to nature of its intervention. The APA and Commission rules provide Time Warner the opportunity to present argument and evidence in favor of its preferred

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result and cross-examine the witnesses supporting the settlement. Time Warner has been provided all these rights. Therefore, no more process is required.

DATED this 7th day of December, 2004.

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