

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

PUBLIC COUNSEL'S
DUE PROCESS BRIEF

I. INTRODUCTION

1. The Public Counsel Section of the Washington State Attorney General's Office (Public Counsel) responds to the Washington Utilities and Transportation Commission's (WUTC or Commission) November 30th, 2004 *Notice of Opportunity to File Briefs Addressing Process for Consideration of Multi-Party Settlement*. It is the position of Public Counsel 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.

II. ARGUMENT

2. The most fundamental principles of due process are notice and a meaningful opportunity to be heard. Mr. Butler is correct that his client, Time Warner Telecom of Washington, LLC (TWT), possesses a right to due process before the Commission. Staff Counsel Mr. Swanson also correctly stated at the prehearing conference that the determinative question to be answered is "What process is due?"

3. The essential elements of due process are an opportunity to know the claims of an opposing party (notice), a reasonable time to prepare one's case, and an opportunity to be heard.¹ It is Public Counsel's position that 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 witnesses of the settling parties, and to present briefing to the Commission. TWT, as a non-settling party in the present proceeding, must be afforded a reasonable opportunity to: conduct discovery, present testimony that rebuts the proposed settlement, testimony filed in support of a settlement, cross-examine witnesses, and present briefing to the Commission. TWT's due process rights arise under U.S. Constitution,² Washington state law,³ and Commission precedent.

4. In this matter, once the Commission approved TWT's intervention TWT thereafter possessed due process rights in the current proceeding. While the Commission may consider the proposed Settlement now before it, the Commission must also afford TWT a meaningful opportunity to present its position to the Commission on the underlying case as well as the proposed settlement. The question now before the Commission is what process is necessary to allow TWT to present its case to the Commission for its consideration.

5. At the hearing on the proposed settlement on November 29, 2004, Mr. Butler, on behalf of TWT, made it clear that it is his client's position that there remain questions of fact at issue in addition to the question of whether the penalty proposed by the settling parties is in the public interest, or should be some greater amount. While Public Counsel continues to support the

¹ *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).

² U.S. Const. amend. 14, § 1.

³ RCW 34.05.449(2).

settlement as a reasonable resolution of this proceeding, we recognize TWT's right to additional process whose scope should be determined by the nature of the questions of fact and law still at issue.

III. CONCLUSION

6. Public Counsel respectfully requests that the Commission enter an order recognizing TWT's right to due process and adopting a procedural schedule which will afford TWT a meaningful opportunity to be heard.

RESPECTFULLY SUBMITTED this 7th day of December, 2004.

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ATTORNEY GENERAL

By: _____
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