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## ARTICLE

# Preserving the Public Interest Through the Use of Alternative Dispute Resolution in Utility Retail Rate Cases

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### I. INTRODUCTION

Utility general rate cases are lengthy, expensive and often-contentious proceedings, litigated over a period of nearly a year. Several dozen issues are typically in dispute, ranging from the allowed overall rate of return—which can be worth tens of millions of dollars—to minor operating expenses such as the recoverability in rates of a utility's decision to have its chief executive fly to a meeting on a chartered flight instead of a commercial flight. While this may be worth only a few hundred dollars to ratepayers, it can often be of greater value to the opponents of a rate increase in shaping public opinion. Given the

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hundreds of thousands of dollars that can be devoted by the utility to litigating these cases—which is likely recoverable in rates of utility customers as legitimate operating expenses of the utility—and the hundreds of thousands of dollars of public resources that similarly are spent in scrutinizing and challenging the utility’s case by the advocacy staff of the public utility commissions, there is a strong interest amongst state public utility commissions (PUCs) and litigants in encouraging settlement of these cases. In particular, if these cases can be resolved in the early stages of the process, substantial litigation costs can be avoided. Moreover, the litigants (and their constituents) can benefit from the certainty of a settled (versus litigated) outcome and the improved relationships among the litigating parties associated with an outcome achieved through settlement.

This article will explore the measures that PUCs can take to encourage settlement of utility rate proceedings. To provide a context for this examination, we will discuss the schedule and process typically followed in the utility retail rate-setting process. We will consider the formal steps a regulatory agency can take to create an environment that will promote settlement of utility rate-setting proceedings, such as the adoption of procedural rules governing the settlement process. Just as importantly, the regulatory agency can take less formal steps to promote settlement, such as making a settlement judge or a mediation process available to the litigants, or including a settlement conference as part of the procedural schedule. We will then examine some of the practical considerations of the settlement process, such as the most opportune time for scheduling a settlement conference in the procedural schedule. We will also consider some of the fairness considerations of the settlement process, such as ensuring that any non-settling parties have an adequate opportunity to challenge a settlement and present a case in opposition to a proposed settlement. Finally, we will examine how these concepts and practices may be applied more broadly to proceedings other than the utility rate-setting process.

## II. UTILITY RETAIL RATE PROCEEDINGS

Utility retail rate cases are proceedings in which a regulated, investor-owned utility (electric, natural gas, water, or

telecommunications) files for a proposed rate change, and the state PUC conducts an investigation over several months<sup>1</sup> to determine whether all or a portion of the rate request should be approved. The initial utility filing includes pre-filed direct testimony and accompanying exhibits in which the utility explains the basis for its requested rate relief and justifies the various elements of its filing, including operating expenses, proposed capital investments, and the level of equity return it is seeking. The initial filing must also include work papers that provide detailed numerical calculations supporting the rate request and any cost or economic studies necessary to follow the derivation of the various elements of the rate filing. The filing also includes proposed tariff sheets that reflect the specific rate changes that the utility seeks to make.

For the several months following the initial filing, the PUC trial advocacy staff (Staff) and other intervenors in the proceeding (typically customer groups representing industrial, residential, and small commercial customers; individual large customers; environmental and public interest consumer groups) conduct extensive discovery regarding the utility's filing. This discovery process allows parties to explore the basis for the utility's rate request and gather the necessary data and information to challenge portions of the utility's filing or propose positions on issues other than those offered by the utility through the issuance of data requests, interrogatory requests or requests for production (among other things). Discovery can also include the deposition of witnesses filing testimony on behalf of the utility. Some PUCs provide for an informal discovery process achieved through technical conference or informal discovery conferences where the utility's witnesses can be questioned informally and off-the-record by the other parties in the proceeding.

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1. The period over which the utility rate case must be processed is determined by the applicable statutory suspension period in each state. In New York, for example, the New York Public Service Commission must issue a final order determining the outcome of a general rate filing no later than six months after the utility submits its initial filing. N.Y. PUB. SERV. LAW § 66(12)(f) (McKinney 2009). Washington also has an eleven-month suspension period. WASH. REV. CODE. § 80.04.110(3) (2009). In contrast Oregon has a ten-month suspension period. OR. REV. STAT. § 757.215(1) (2009).

Following discovery of the utility's initial filing, Staff and other intervenors submit opposing cases.<sup>2</sup> Staff is generally charged with representing the public interest and files a case that takes a position on most of the issues raised in the utility's filing. The other intervenor groups generally file more limited testimony that addresses only those issues of particular interest to that party. After the filing of the opposing cases, the utility is given an opportunity to conduct discovery on the cases filed by PUC Staff and the intervenors. Thereafter, the utility files rebuttal testimony that addresses and responds to the issues raised in both the Staff and intervenor testimony. Depending upon the number of issues raised in the opposing testimony, the utility's rebuttal case may be even more extensive than its direct case. The filing of the utility's rebuttal case is followed by a sufficient period for the opposing parties to conduct necessary discovery, which is followed by an evidentiary hearing.

The hearing is conducted before the commissioners or an Administrative Law Judge (ALJ), at the PUC. During the hearings, the witnesses who offered pre-filed testimony are cross-examined under oath and the testimony and exhibits are

2. See, e.g., Wash. Util. & Transp. Comm'n v. Puget Sound Energy, Inc., No. UE-090704, UG-090705, Order No. 04, Prehearing Conference Order (Wash. Util. & Transp. Comm'n June 24, 2009) (consolidated), *available at* <http://www.wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/938e6f122cd8b915882575df006f44e1!OpenDocument>. This order illustrates the timing of different phases of the process:

Event	Date	Interval (Days)
Issue Discussion / Settlement Conference	October 23, 2009	
Public Comment Hearing	TBD	
Staff, Public Counsel & Intervenor Response Testimony & Exhibits	November 17, 2009	193
Company Rebuttal Testimony & Exhibits; Staff, Public Counsel and Intervenor Cross-Answering Testimony & Exhibits	December 17, 2009	30
Settlement Conference between Parties	January 5-6, 2010	
Evidentiary Hearing	January 19-22 & 25, 2010	33
Initial Briefs	February 19, 2010	25
Reply Briefs	March 2, 2010	11
Suspension Date	April 7, 2010	36

admitted into the evidentiary record. Depending upon the number of issues remaining in dispute at the hearing stage and the extent of cross-examination, the evidentiary hearings may take two to three weeks. The hearing is followed by initial and reply briefs. Several weeks are typically allowed in the procedural schedule to accommodate deliberation by the commissioners, as well as preparation of the final order. Dozens of issues may remain in dispute after the conclusion of the hearings, and each disputed issue must be resolved by the PUC on the basis of the evidence, the parties' arguments, the applicable legal standards, and PUC precedent. The deliberations can be very time consuming and may need to be conducted in open session if required by the state's open meeting law.

After deliberation and consideration of the parties' briefs and the evidentiary record,<sup>3</sup> the PUC issues its order granting, granting in part, or denying the utility's rate request. Thereafter, the utility makes a compliance filing in which it submits tariff sheets reflecting the amount of rate relief granted by the PUC. Post-order remedies include seeking reconsideration by the PUC of its order, as well as judicial review to state courts. As a general matter, it is relatively difficult to overturn a PUC decision on judicial review. Substantial deference is afforded to the administrative agency with expertise on the complexities of the ratemaking process and the standards of review typically require reversal only when the PUC findings are: (1) arbitrary and capricious;<sup>4</sup> or (2) not supported by substantial evidence.<sup>5</sup>

A fully litigated case, one in which few (if any) of the issues are resolved through settlement, is thus a very expensive and time-consuming process. Depending upon the number of issues

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3. In some states, an initial decision (or recommended decision) is rendered by an ALJ and parties file a round of briefs to the commissioners on "exceptions" in which they "except" to those determinations of the ALJ with which they disagree. This additional round of briefing is required to occur within the statutory suspension period, which results in the earlier stages of the procedural schedule occurring earlier than in those jurisdictions in which an initial decision by an ALJ is not used.

4. *See, e.g.*, WASH. REV. CODE § 34.05.570(3)(i) (2009) (relating to Washington State Administrative Procedures).

5. *See, e.g., id.* § 34.05.570(3)(e) (relating to Washington State Administrative Procedures).

involved, utility representation will typically require between three and five attorneys. If the utility is represented by an outside law firm, rather than staffing the case with in-house counsel, the fees paid by energy utilities for representation in a general rate proceeding can easily reach a range of one to two million dollars. In addition, the utility will incur expert witness fees, usually for a cost of capital witness and occasionally for complex ratemaking issues such as cost of service and rate design. PUC Staff will be required to devote several lawyers and accountants, engineers and economists to the effort, and will also generally incur expert witness fees for cost of capital issues. The costs incurred by intervenor parties depend upon the extent of their case and the number of issues they choose to address through testimony. A limited intervenor case with one to two lawyers and two to three expert witnesses can be expected to cost between a half-million to a million dollars. In addition to these expenses, there is substantial personnel time devoted to the effort, particularly preparing responses to discovery requests, witness preparation for the hearings, the weeks spent in the hearing room, and the drafting of briefs.

The expense can be substantially reduced if the number of issues litigated can be reduced through settlement. Moreover, the time can be shortened considerably if the entire case can be resolved through settlement, which can result in an abbreviated schedule and an earlier decision date by the PUC. Narrowing or resolving all issues through settlement also reduces the uncertainty associated with having the case resolved by the PUC and can promote better working relationships among the parties. Given the advantages associated with settlements in utility rate cases, PUCs may wish to consider taking a number of steps to promote settlement, or at least to create an environment in which settlements can occur. These steps can include both formal actions, such as enacting or amending procedural rules to include rules that specifically address alternative dispute resolution and informal actions, such as including settlement hearings in the procedural schedule and making settlement judges available to the parties to facilitate settlement. The next two sections of the article address these items.

### III. FORMAL AGENCY ACTIONS TO ENCOURAGE SETTLEMENT

To create a structure in which settlement may occur, an administrative agency will need to ensure that its procedural rules address the process for resolving proceedings through alternative dispute resolution (ADR). Generally, ADR is defined very broadly to include any mechanism to resolve disagreements without resorting to contested hearings. ADR includes mediations, collaborations, settlement conferences, and any combination of these processes. Ideally, the agency's procedural rules should address the various options available for resolving disputes through ADR, and include some parameters for parties seeking to use these processes.

#### A. The Process Followed in Washington State

In 1997, the Governor of Washington, Gary Locke, mandated regulatory improvement by state agencies "to improve the effectiveness and fairness of [the state's] regulatory processes."<sup>6</sup> In doing so, the Governor recognized the importance of stakeholder involvement, inter-agency cooperation, and fairness of procedure.<sup>7</sup> The rulemaking process was to be achieved through public involvement, specifically recognizing the need to partner with non-profit organizations, environmental groups, municipalities, and businesses.<sup>8</sup> Creating alternative processes to increase efficiency and effectiveness while achieving the same regulatory objectives were to be considered in amending the rules, as well as analyzing costs and benefits.<sup>9</sup> In response to this executive order, the Washington Utilities and Transportation Commission (WUTC) reformed the agency's procedural rules

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6. Wash. Exec. Order No. 97-02 (Mar. 25, 1997), *available at* [http://www.governor.wa.gov/execorders/eoarchive/eo\\_97-02.htm](http://www.governor.wa.gov/execorders/eoarchive/eo_97-02.htm).

7. *Id.* The other major goals of the regulatory amendments were clarifying procedural rules through structural changes and creating a more efficient process.

8. *Id.*

9. *Id.*



regarding the use of ADR.<sup>10</sup> These provisions will be discussed within the specific context of rate-filing procedures.

The public interest is advanced by the Commission's encouragement of settlements in the rate-setting process not only through the result of a speedier and less-costly process,<sup>11</sup> but also because an agreed-upon settlement, by its very nature, satisfies more parties than a win-lose adjudicatory decision. The public (represented by the Attorney General's Office), the utility, and the intervenors have a better chance of being satisfied when cases are settled as opposed to litigated, because the outcome is determined by the parties as opposed to a decision-making body (in this case, the three commissioners of the WUTC).

In May 2001, the WUTC initiated a rulemaking process to completely revise its procedural rules.<sup>12</sup> The Administrative Law Department had already begun to discuss necessary modifications in the procedural process with private practitioners who appeared before the Commission, State Attorneys General who represented the Commission in proceedings, and other attorneys in the state.<sup>13</sup> By the time the rulemaking process was formally commenced, the decision-makers and staff members at the WUTC<sup>14</sup> were also consulted for their suggestions regarding the revisions. The rulemaking process occurred over a two-and-a-half year period, resulting in a revised set of WUTC procedural

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10. WASH. UTIL. & TRANSP. COMM'N, GEN. ORDER NO. R-510 at 3 (Dec. 3, 2003), *available at* <http://www.wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/ad83266f59cebb3088256df1005862d0!OpenDocument> (noting that other procedural aspects were amended, repealed and adopted in compliance with the Executive Order; however, only the ADR rules are relevant to this article). Specifically, §§ 480-09-460–467 were repealed and Part III, governing adjudicative proceedings, was adopted, including Subpart D on Alternative Dispute Resolution.

11. *See infra* Part I.

12. WASH. UTIL. & TRANSP. COMM'N, RULEMAKING: CHAPTER 480-09 WAC—PROCEDURE, No. A-010648 (May 30, 2001), *available at* <http://www.wutc.wa.gov/rms2.nsf/vw2005OpenDocket/BFCFBA529122F48708256B80000F735D>.

13. *Id.* at 1.

14. Decision-makers at the WUTC at the time included Chairwoman Marilyn Showalter and Commissioners Richard Hemstad and Patrick Oshie. Administrative Law Judge Dennis J. Moss, who was the “agency lead” on the project, convened the workshops and also served as primary author of the proposed rules.

rules, which became effective in 2004.<sup>15</sup> The WUTC convened two rulemaking workshops during the process<sup>16</sup> as well as informal meetings between the Staff and practitioners who regularly appeared before the agency.<sup>17</sup> Representatives of companies and consumer advocate groups also attended these gatherings,<sup>18</sup> which permitted off-the-record interaction before formally issuing the proposed procedural rules for formal comment. In addition, the WUTC addressed ADR and settlement issues in periodic “bench and bar” conferences, which facilitated informal exchanges between practitioners and agency decision-makers (commissioners and ALJs). These informal discussions included, among other topics, the suggestion that at least one settlement conference should be scheduled during rate proceedings.<sup>19</sup>

### **B. The Resulting Procedural Rules in Washington State**

The revised procedural rules became effective on January 1, 2004.<sup>20</sup> In the process of restructuring the procedural rules, the WUTC dedicated a subpart of the procedural rules to ADR. The procedural rules enacted by the WUTC provide an excellent model for PUCs to follow in creating a structure within which settlement through ADR may occur. The Washington Administrative Code (WAC) provides procedural guidelines for the WUTC.<sup>21</sup> Chapter 480-07 WAC covers the WUTC’s procedural rules, and encompasses general provisions, rule-making proceedings, adjudicative proceedings, and other commission proceedings. In the adjudicative proceedings section,<sup>22</sup> the subpart entitled “Alternative Dispute Resolution”<sup>23</sup>

15. RULEMAKING, *supra* note 12. It is likely the entire process would have taken less time but for other pressing business then before the Commission. During this time, there were several electric utility rate proceedings associated with the impacts of the Western energy crisis being handled by the WUTC.

16. GEN. ORDER NO. R-510, *supra* note 10, at 11 (providing information on dates of meetings).

17. *Id.*

18. *Id.*

19. James Van Nostrand attended the bench-and-bar conferences.

20. GEN. ORDER NO. R-510, *supra* note 10, at 20.

21. WASH. ADMIN. CODE § 480-07 (2009).

22. *Id.* §§ 480-07-300 to 07-885.

23. *Id.* §§ 480-07-700 to 07-750.

contains definitions of the various forms of ADR encompassed in the statute, limitations on authority, the voluntary nature of participation, inclusion of parties, confidentiality, procedural requirements, the consideration process followed by the Commission in review of the outcomes, and separate sections for the three main categories of ADR encouraged: mediation, collaboratives, and settlement. The focus of this article is on the third process.

#### **IV. INFORMAL AGENCY ACTIONS TO ENCOURAGE SETTLEMENT**

In addition to the formal actions that an agency can take to create an environment conducive to settlement, an agency can informally incorporate certain practices that will promote settlement. For example, the ALJ assigned to an adjudicative proceeding can encourage settlement at the initial pre-hearing conference, or scheduling conference, in each adjudicative proceeding. To do this, the ALJ can make a statement regarding the availability of a settlement judge to assist the parties in pursuing settlement, and can outline the specific steps to be followed to invoke that process. A settlement judge can play an instrumental role in assisting the parties to a contested case in pursuing settlement. For example, an experienced judge who is well-versed with the agency precedent can provide the parties with some glimpse of how their arguments will fare if litigated before the PUC.

The likely outcome in litigating a particular issue is a key determinant in shaping a position for purposes of settlement, and a settlement judge can be influential in “handicapping” a party’s position on a particular issue. Naturally, the effectiveness of a settlement judge depends on the reputation and experience of the judge assigned to the case. A judge who is not deeply familiar with the agency’s precedent on a particular issue, or who lacks substantial experience with the agency, may not be accorded much deference by the parties, and that judge’s “handicapping” of a particular issue will be less effective. Apart from familiarity with agency precedent, a settlement judge can bring particularized mediation and settlement skills to bear on the issues. Some judges have formal training in ADR, equipping them with skills that can be valuable in working with parties

whose positions may become polarized through a series of contentious proceedings.<sup>24</sup>

It is essential that the PUC provide ground rules that will preserve the integrity of the settlement process and create an environment in which parties can negotiate openly and candidly. These ground rules should include a requirement that the settlement judge is not the same judge who is presiding over the proceeding, and will not otherwise participate in the proceeding. The parties participating in a settlement process need to be able to offer compromises of their litigation position in candid settlement discussions; parties will not do so if there is a chance the same judge guiding the settlement discussions will be ruling on the issues on which the parties are offering compromises.<sup>25</sup> A second ground rule encouraging open and candid discussions is the stipulation that the substance of the settlement discussions is confidential and any statements made in the context of settlement discussions will not be admissible or otherwise used against a party in any subsequent proceedings. A party must be able to offer a compromise of its litigation position in the interests of settlement without fear that any concession will be later used against it in a subsequent proceeding.<sup>26</sup>

Another informal practice that can promote settlements in rate proceedings is the inclusion of a settlement conference as part of the procedural schedule. Including a settlement conference as an element in the procedural schedule sends a strong signal to the parties that the agency wants to provide an opportunity for the parties to settle all or some issues without

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24. *Id.* § 480-07-700(2) (“[t]he Commission may assign commission staff trained in ADR principles and techniques to serve as neutral third parties (e.g., mediator or facilitator) to assist the parties.”).

25. *Id.* § 480-07-700(4)(e) (“[a]ny mediator, facilitator or settlement judge who assists the participants in an ADR process will *not* participate in any adjudication, arbitration, or approval process for the same proceeding, unless all parties participate in writing.” (emphasis added)).

26. The Washington rule, for example, provides that “[n]o statement, admission, or offer of settlement made during negotiations is admissible in evidence in any formal hearing before the commission without the consent of the participants or unless necessary to address the process of the negotiations.” WASH. ADMIN. CODE § 480-07-700(4)(b) (2009). The Washington rule further provides that “[p]arties may agree that information exchanged exclusively within the context of settlement negotiation will be treated as confidential.” *Id.* § 480-07-700(4)(c).

resorting to litigation. Similarly, failure to include a settlement conference as part of a procedural schedule suggests the agency is interested in having the issues addressed through litigation and decided by the agency decision-makers rather than by the parties through settlement. Whether or not a settlement conference is included in the formal procedural schedule, parties are free to engage in settlement discussions on their own. However, such *ad hoc* settlement discussions will likely not include all the parties, and may exclude some of the issues being raised by some intervenor parties. As a practical matter, settlement discussions are much more likely to occur if the agency prescribes a date for an initial settlement conference. By including it as part of the procedural schedule, *all* parties are put on notice and invited to attend, which is an essential dynamic of the settlement process, as discussed below.

Experience with three separate utility commissions illustrates the different practices with respect to the scheduling of settlement conferences. The Public Utility Commission of Oregon (Oregon PUC) had a longstanding practice of including a settlement conference as part of the scheduling order in contested utility rate proceedings before the agency. Although not formally included as a requirement in the Oregon PUC's procedural rules, within the Office of Administrative Hearings, the presiding ALJ specified a date for the parties to convene a settlement conference as a matter of practice. This conference was typically scheduled to occur about one month prior to the filing of Staff and intervenor testimony in proceedings. Inclusion in the scheduling order had the effect of providing notice to all parties of the conference; the Oregon rules provide that notice must be provided for any subsequent settlement discussions to ensure that all parties have an opportunity to participate. By including the conference at a point in time after parties had a chance to complete their discovery on the utility's direct case and to form preliminary positions regarding the issues, the parties were generally prepared to engage in substantive settlement discussions. PUC Staff in particular was in a position to identify its litigation position on the issues, and to offer settlement positions on these issues. Other parties, too, were expected to identify the issues on which they were taking a position and state their litigation position on such issues in order to be able to

engage in substantive settlement discussions. This practice created an environment which led to the settlement of at least some issues, if not all, in many contested utility rate cases.

A similar practice is followed by the Federal Energy Regulatory Commission (FERC), which routinely includes a date for an initial settlement conference in the procedural scheduling order issued by the presiding ALJ. As with the Oregon PUC, this conference was typically scheduled on a date after FERC trial staff and other intervenors had an opportunity to complete their discovery on the utility's direct case, but before opposing testimony had been prepared by FERC trial staff and intervenors. Prior to the settlement conference, FERC trial staff would circulate "top sheets" which summarized the trial staff's litigation position on the issues in the case, and included a recommended revenue requirement. During the settlement conference, FERC trial staff would typically offer a settlement position that represented a compromise from the litigation position set forth in the "top sheets." The FERC rules do not expressly provide for the inclusion of a settlement conference as part of the procedural order; rather, this policy developed as a matter of practice. Rule 602 of the FERC Rules of Practice and Procedure<sup>27</sup> details the process for filing an Offer of Settlement that may arise from the settlement conference process.

Prior to 2001, the WUTC had not established a policy or practice of including a settlement conference as part of the procedural schedule in contested case proceedings. The presiding ALJ in contested cases would typically advise the parties at the pre-hearing conference that they were free to engage in settlement discussions among themselves at any time, but the practice was not to specify a date for any conference as part of the procedural schedule. During the development of the revised procedural rules between June 2001 and December 2003, however, the settlement process was the principal subject of at least one bench and bar conference at the WUTC, and the Commission convened a well-attended workshop in which there was extensive discussion about creating a requirement that the parties schedule at least one settlement conference during rate proceedings.

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27. 18 C.F.R. § 385.602 (2009).

The presiding ALJ began to include a discussion about the scheduling of an initial settlement meeting during pre-hearing conferences. At the outset, the settlement conference began to appear in scheduling orders as an informal “advisory” date that was not binding upon the parties, and could easily be rescheduled or entirely abandoned. In later proceedings, however, the settlement conference began to be included routinely as part of the pre-hearing conference order, beginning with a Northwest Natural Gas Co. case in 2003.<sup>28</sup> Although the revised procedural rules adopted in December 2003 did not include a requirement that a settlement conference be scheduled in the pre-hearing conference order, the standard practice at the WUTC evolved to include at least one settlement conference in the order. Subsequently, the WUTC’s procedural rule was revised to provide that “[t]he commission will set in the procedural schedule for each adjudicative proceeding the date for an initial settlement conference,” and that conference could be rescheduled only after seeking “modification of the schedule by the presiding officer upon notice to all other parties.”<sup>29</sup>

## V. PRACTICAL CONSIDERATIONS OF THE SETTLEMENT PROCESS

A number of practical considerations come into play with respect to whether the settlement process will be successful. One such consideration is the timing of the settlement conference. At what point in the procedural schedule does it make the most sense to insert a settlement conference? A second consideration is the standard of review to be applied by the agency in reviewing settlements. How can the agency send a signal through its

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28. Wash. Util. & Transp. Comm’n v. Nw. Natural Gas Co., No. UG-031885, Order No. 2, Prehearing Conference Order (Wash. Util. & Transp. Comm’n Jan. 14, 2004), *available at* <http://www.wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/0d04f16ae9c4a39088256e1b0075ed54!OpenDocument> (see the section entitled “Optional Settlement Discussions”); Kimberly-Clark Tissue Co. v. Puget Sound Energy, Inc., No. UG-990619, First Supplemental Order on the Prehearing Conference (Wash. Util. & Transp. Comm’n July 9, 1999), *available at* <http://wutc.wa.gov/webdocs.nsf/b8757c38fe81320e8825707c007f1556/c087a92bd09b55b4882567a900567f27!OpenDocument> (this is the first Supplemental Order on the Prehearing Conference (citing WASH. ADMIN. CODE §§ 480-09-465-466 (2009) (the predecessors to the current Subpart D))).

29. WASH. ADMIN. CODE § 480-07-700(3)(a) (2009).

deliberations and decisions that settlements are encouraged? A third consideration is ensuring that settlements are durable by providing an orderly process for their review and action by the agency. What process should the agency follow when it reviews settlements to ensure fairness and preserve the integrity of the decision-making process? These considerations are discussed briefly in the following sections.

#### **A.    Timing of the Settlement Conference**

The schedule in a typical utility general rate proceeding presents a dynamic shifting of workload as the parties work through the milestones in the schedule. In the analogy of a tennis ball during a tennis match, the ball—the obligation to take the initiative in the rate case process—may bounce from the court of the utility, to the court of Staff and intervenors and back to the utility during the course of processing the rate case filing. In the first several months following the utility’s filing of its initial case and direct testimony, the ball is in the court of Staff and intervenors. These parties have the burden of conducting discovery on that case and identifying the issues that they wish to explore and challenge. The utility responds to discovery requests propounded by the opposing parties, but the bulk of the obligation to proceed during this time is placed in the hands of Staff and intervenors. Following the filing of the opposing testimony by Staff and intervenors, the ball moves to the utility’s side of the court; it must conduct discovery on the testimony submitted by Staff and intervenors, and then prepare rebuttal testimony during what is typically only a short period of time. After the filing of the utility’s rebuttal testimony, the ball moves back to the Staff and intervenor side of the court, and they must read, process, and understand the utility’s rebuttal positions and have a brief opportunity to conduct discovery on that case. In the weeks immediately preceding the evidentiary hearings, it is probably accurate to say that the ball is in neither court, as both sides are busy in their preparations for the evidentiary hearing.

Understanding this dynamic is essential to discussing the issue of the opportune time in which to schedule a settlement conference. Depending upon the point in the process which the settlement conference is scheduled, the parties will likely differ in their positions on the desirability of a settlement conference, and



their ability to prepare for and staff it adequately and competently. From the perspective of Staff and intervenors, the utility is in the strongest position throughout the case. The utility had months to prepare its filing, had the ability to choose to make the filing at a strategic time to the utility's advantage, and possesses all the information and data that the other parties need in order both to understand the utility's case and to support the positions or arguments to be advanced by Staff and intervenors in their opposing testimony. For the opposing parties, the months immediately following the utility's filing are very important to conduct the necessary discovery and to prepare the opposing cases. The ball is clearly in their court, and Staff and intervenors can be expected to oppose the scheduling of a settlement conference during the valuable period prior to the filing of the Staff and intervenor testimony.

Similarly, when the ball moves to the utility's court for the preparation and filing of rebuttal testimony, the utility is hard-pressed to be able to accommodate a settlement conference. During a limited period of three to four weeks, the utility must conduct discovery on the opposing testimony, and prepare the rebuttal testimony necessary to address and respond to the dozens of issues raised by Staff and intervenors in their opposing testimony. At the end of the day, the utility has the burden of proof to sustain its request for rate relief. Its rebuttal case is essential to sustaining that burden, so the utility is not likely to favor the suggestion that a settlement conference be scheduled during this stage.

Once the rebuttal testimony is filed, Staff and the intervenors have a limited time to conduct discovery on the rebuttal testimony prior to the evidentiary hearings. For the most part, all the parties are heavily involved in extensive preparations for the evidentiary hearings which involve preparing witnesses, compiling exhibits to be included in the record, and last-minute fine tuning of each party's respective presentation. This period may provide an opportune time for settlement discussions that is least prejudicial to either side. However, as discussed below, settlement at this stage in the proceeding provides the least opportunity for avoiding effort and expense and capturing the intangible benefits of resolving disputes through settlement.

From the lead author's perspective, the most opportune time to schedule a settlement conference in a utility rate proceeding is three to four weeks prior to the filing of Staff and intervenor testimony.<sup>30</sup> A number of considerations support this recommendation. First, scheduling the settlement conference at this time—which typically would be several months after the utility has filed its direct case—permits the opposing parties to complete their discovery on the utility's direct case and develop preliminary positions on the issues in the utility's case that will be challenged. By this time, these parties will have retained their expert witnesses to advise them on the complex issues and will also have outlined their positions on the issues that will be taken in opposing testimony. Second, it is likely these parties will not have spent much time actually drafting the pre-filed testimony that they will submit. In other words, enough work will have been done to identify the issues and develop positions, but a lot of the effort and expense associated with fully developing the position and explaining it in written testimony will not have been expended.

Third, it is this effort in developing and refining testimony that tends to motivate a litigant and harden its litigation position. In other words, the litigant starts to believe in its case more as the case is articulated and strengthened through the preparation of pre-filed testimony. What may start out as a preliminary soft position taken for negotiating purposes starts to strengthen in the eyes of the litigant upon repetition and refinement throughout the testimony drafting process. It becomes more difficult for a party to compromise that position through settlement once it has been put into writing.

Fourth, at this stage of the proceeding, nothing will have been filed with the PUC with respect to the positions of Staff and intervenors on the merits of the utility's case. Once the opposing testimony is filed, the positions become a matter of public record, and it becomes much more difficult for a party to retreat from its

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30. It should be noted that while in private practice for twenty-two years with private law firms in the Pacific Northwest, the author, Mr. Van Nostrand, primarily represented the side of investor-owned utilities in general rate proceedings and, thus, as a matter of strategy, would tend to favor a tactic that would schedule a settlement conference during a period in the procedural schedule when the workload burden was on Staff and intervenors.

litigation position. This is particularly true when opposing parties issue press releases setting forth their position in rate cases to assure their constituency that they are fulfilling their duty in protecting their respective interests. Once these litigation positions have been shared with the public, these parties will have the difficulty of explaining why they may have settled for something far less extreme in an all-party settlement in later pronouncements, creating another disincentive for settling.

Finally, settling at this stage of the proceeding may allow the settlement to take effect before the end of the statutory suspension period. Inasmuch as the utility is always interested in obtaining rate relief sooner rather than later, the timing of the rate relief is often used as a bargaining chip. The utility can be expected to compromise on issues in exchange for rate relief that is effective earlier as a result of a partial or complete settlement. Moreover, there could be other elements of the case that benefit the public through earlier implementation.

Pursuing settlement at this point in the procedural schedule provides the most potential for avoiding litigation expenses. Staff will not have to devote the time of its lawyers, engineers, accountants, and economists to preparing testimony and exhibits. Both Staff and intervenors will avoid the expense associated with the time of their expert witnesses in preparing testimony. To the extent intervenors rely on outside counsel for representation in the proceeding, the fees associated with their preparation of testimony, and participating in the later stages of the proceeding can be avoided or substantially reduced. From the utility's perspective, if the case can be settled prior to the filing of opposing testimony, the utility will avoid the costs of the associated discovery, preparation of rebuttal testimony (including the accompanying expert witness fees), and the extensive costs associated with litigating all the issues in the hearing room (witness preparation costs, lawyers preparing cross-examination of opposing witnesses and drafting post-hearing briefs). If the utility relies on outside counsel for representation, the associated legal fees can be reduced dramatically through settlement given

the end-loading of legal work in a typical rate case proceeding.<sup>31</sup> In addition to the tangible savings achieved through reduction of litigation expenses, settlement at this stage is the most likely to lead to furthering productive, cooperative relationships among the settling parties. The litigation positions will not have hardened, and the need to preserve a litigation position for purposes of public consumption will not have materialized.

Other points in the procedural schedule also present opportunities for settlement, but, in the lead author's view, settlement at other times does not present the same advantages for avoidance of litigation expenses and maximizing the intangible benefits of settlement. Another opportunity for settlement logically occurs immediately after the filing of the Staff and intervenor testimony. At this point, the official litigation positions of all the parties are known, and these litigation positions provide a logical boundary for substantive settlement discussions. Moreover, the positions of Staff and intervenors will be fully developed and probably capable of being explored more thoroughly. However, Staff and intervenors will have incurred the expenses and effort associated with drafting, refining, and filing the pre-filed testimony and exhibits, and the appeal of minimizing costs through early settlement is lost. As previously noted, completing this process is likely to harden the positions of Staff and intervenors, making settlement less likely.

An additional opportunity for settlement arises just prior to the hearing, after the utility has filed its rebuttal testimony. An advantage of convening a settlement conference at this point is that the utility may have softened its opening position in response to the opposing testimony, and may have elected to abandon pursuit of certain issues. In other words, a logical narrowing of the issues may have occurred, and the parameters for pursuing settlement may similarly be narrower. However, pursuing settlement at this point in the procedural schedule is not ideal inasmuch as the utility will have incurred the expenses associated with conducting discovery on the opposing testimony, preparing rebuttal testimony, and engaging additional expert

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31. The work of counsel during a rate case occurs primarily towards the end of a general rate proceeding, when the lawyer is preparing for hearings, assisting in preparing the utility witnesses to testify, drafting cross-examination of the opposing testimony, and drafting post-hearing briefs.

witnesses (as necessary) to supplement the utility's rebuttal case. In addition to the cost, this process is likely to have hardened the utility's position against settlement, as the utility has been forced to defend itself against a likely multitude of serious allegations, including imprudence, mismanagement, and disregard for the customers' welfare. The only costs that can be avoided at this point are those associated with hearing preparations and post-hearing briefing.

### **B. Standard of Review for Evaluating Proposed Settlements**

An agency can also set a tone that encourages settlements by the standard of review it applies when reviewing a settlement. The opportunity to set this tone typically comes into play in two contexts: (1) the questions asked from the bench in settlement hearings; and (2) the analysis of the settlement in the agency's order when it rules on the settlement by either adopting or rejecting it.

Typically, settlements are presented to the decision-makers in a settlement hearing where testimony is offered by the settling parties in support of the settlement, and any opposing parties have an opportunity to offer testimony against the settlement. The hearings officer and the commissioners will have an opportunity to question the witnesses about the terms of the settlement. In utility rate proceedings, the settling parties will invariably settle certain issues on different terms than how the issues may have been resolved by the decision-makers in a non-settled outcome. It is a necessary part of the give-and-take of settlement negotiations that an outcome on one issue may have an indirect impact on the resolution of another issue. For example, what may seem to be an unfavorable outcome for utility customers on one particular issue may be explained by a favorable outcome for customers on another issue. The parties to settlement negotiations have different priorities regarding what they hope to achieve in settlement and in order to achieve a consensus, these competing interests must be accommodated. Although the overall result may be reasonable, the settled outcome of individual issues may be difficult to explain and justify.

By according substantial deference to the settling parties, an agency sets a tone that encourages settlement. In order to satisfy their statutory requirement (in the case of setting utility rates, ensuring that the resulting rates are just, fair, reasonable and sufficient),<sup>32</sup> the decision-makers will have to ensure that the overall outcome of the settlement is reasonable. It may be unwise to probe the parties extensively about how the resolution of a particular issue was reached. Some issues may have been hotly contested in the settlement negotiations, and the final resolution represents a fragile compromise of a number of parties' competing positions. Extensive questioning from the bench runs the risk of upsetting that delicate balance, because when pressed, parties tend to fall back on their litigation positions. An explanation may also lead to an unhelpful discussion of the interplay of how the various issues were resolved to accommodate the settling parties' competing interests. Although the decision-makers need to get some idea of the parties' competing positions in order to satisfy themselves that the issues were thoroughly explored and the overall settlement is reasonable, extensive questioning and skepticism about the terms of a settlement may send a message that discourages settlements.

The second opportunity for the agency to set a tone that encourages settlement is in its orders, which accept or reject settlements. For example, the agency can enunciate a standard of review that grants considerable deference to the settling parties in fashioning the terms of a settlement proposal (subject to the agency's statutory authority to ensure that the overall end result is reasonable and produces just, fair, reasonable, and sufficient rates). In this regard, the WUTC in recent years has consistently followed a standard of review that encourages settlements. The Commission follows a three-part inquiry in examining the individual components of a settlement agreement: (1) whether any aspect of the proposal is contrary to law; (2) whether any aspect of the proposal offends public policy; and (3) whether the evidence supports the proposed elements of the settlement agreement as a reasonable solution of the issues at hand.<sup>33</sup> The first two elements of this three-part inquiry set a

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32. WASH. REV. CODE § 80.28.010(1) (2009).

33. Wash. Util. & Transp. Comm'n v. PacifiCorp, No. UG-032065, Order No. 06, Approving & Adopting Settlement Agreement Subject to Conditions;

rather low threshold for approval of a settlement; rarely would settling parties propose a solution that violates the law or offends public policy. With respect to the third element, as previously noted, settling parties are required under the WUTC's rules to file testimony in support of a settlement proposal that provides a sufficient basis in the evidentiary record for approving the settlement.<sup>34</sup> This is also a relatively easy and straight-forward requirement to satisfy.

Apart from enunciating this particular standard of review, the WUTC's precedent includes other rulings that tend to encourage settlement. In one case, for example, non-settling parties opposed a proposed settlement on the grounds that it was a black box settlement. The settling parties proposed an overall revenue requirement without itemizing how many of the individual contested issues were resolved. As previously discussed, utility rate proceedings typically involve dozens of issues, and intervenors may propose numerous adjustments to the utility's requested revenue requirement in addition to the adjustments that are included in the Staff's case. In this particular case, the non-settling parties were basing their case for opposing the settlement on the failure of the settlement agreement to address or include the various adjustments offered by the non-settling parties. The WUTC observed that it was clear from the settlement agreement and from the testimony at the settlement hearing that "the settling parties were mindful of, and did not take into account the adjustments proposed by all parties."<sup>35</sup>

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Rejecting Tariff Sheets; Authorizing & Requiring Compliance Filing (Wash. Util. Transp. Comm'n, Oct 27, 2004) [hereinafter *PacifiCorp*], available at <http://www.wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/aa24c09c6ba9277088256f3a007f67c1!OpenDocument>.

34. WASH. ADMIN. CODE § 480-07-740(2) (2009) (requires the settling parties to "file supporting documentation sufficient to demonstrate to the commission that the proposal is consistent with law and the public interest and that it is appropriate for adoption"). This documentation typically includes a narrative statement, which outlines "the scope of the underlying dispute; the scope of the settlement and its principal aspects; a statement of parties' views about why the proposal satisfies both their interests and the public interest; and a summary of legal points that bear on the proposed settlement." *Id.* § 480-07-740(2)(a). The documentation also includes testimony in support of the settlement and "sufficient evidence to support its adoption under the standards that apply to its acceptance." *Id.* § 480-07-740(2)(b).

35. *PacifiCorp*, *supra* note 33, at 26.

In rejecting this argument, the WUTC stated that “[t]his implied criticism ignores the fact that all settlements have a so-called black box quality to one degree or another—they are by nature compromises of more extreme positions that are supported by evidence and advocacy.”<sup>36</sup> The WUTC in its order also noted the disclaimer frequently included in settlement agreements whereby the settling parties stipulate that their execution of the settlement agreement does not evince their approval of particular facts, principles, methods, or theories employed in arriving at the settlement terms.<sup>37</sup> The WUTC concluded that “close scrutiny of the individual adjustments is not required . . . except to the extent they help us understand the compromise nature of the parties’ agreement to an overall revenue requirement, and to give us insight into things the settling parties considered in arriving at their compromise.”<sup>38</sup>

Upon presentation of a settlement proposal to the WUTC, the focus turns to the reasonableness of that settlement and whether the terms of that proposed settlement meet “all pertinent legal and policy standards.”<sup>39</sup> The WUTC’s “overarching concern . . . is with the end results produced under the settlement,” in accordance with the “end results” test enunciated in *Federal Power Commission v. Hope Natural Gas Company*.<sup>40</sup> It will not be sufficient for parties opposing the settlement to claim that a settlement is deficient insofar as it fails to address the various

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36. *Id.* at 27.

37. *Id.*

38. *Id.*

39. Wash. Util. & Transp. Comm’n v. Puget Sound Energy, Inc., No. PG-060215, Order No. 02, Final Order Accepting Agreement on Condition 7 (Wash. Util. & Transp. Comm’n Apr. 3, 2008). *available at* <http://www.wutc.wa.gov/rms2.nsf/177d98baa5918c7388256a550064a61e/b2a40f5879d11a198825742000677c5f?OpenDocument>.

40. *PacifiCorp*, *supra* note 33, at 20; *see also* Fed. Power Comm’n v. Hope Nat. Gas Co., 320 U.S. 591, 603 (1944) (discussing the “end results” test). The U.S. Supreme Court stated the following with respect to the standard of judicial review of rate proceedings for setting “just and reasonable rates” under the Natural Gas Act:

It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

*Id.* at 602.



adjustments or arguments proposed by the non-settling parties. As stated by the WUTC in one decision,

[While the non-settling parties] would have us make different adjustments, or assign different values to certain of the adjustments made in the Settlement Agreement, we are confident in our judgment, made on the basis of the record before us, that the overall result in terms of revenue requirement is reasonable and well supported by the evidence.<sup>41</sup>

In reaching this result, the WUTC observed that “[r]atemaking is not an exact science,”<sup>42</sup> and that “[t]he economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result.”<sup>43</sup>

This deferential standard in reviewing settlements creates an environment that should promote settlements in contested case rate proceedings. The WUTC’s reference to the *Hope Natural Gas* standard reinforces the point that the range of reasonableness within which a settlement, or even a PUC determined outcome may fall is indeed somewhat broad. This standard puts the settlement process in the context of a ratemaking process in which there is no single, correct result. While a proposed settlement may resolve an issue differently than how the decision-makers may have resolved it in a contested case, the “end results” standard accommodates a range of possible outcomes, and provides a fairly wide comfort zone within which decision-makers can be confident in accepting a proposed settlement.

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41. *PacifiCorp*, *supra* note 33, at 27.

42. *Id.*

43. *Id.* (citing *U.S. West v. Wash. Util. & Transp. Comm’n*, 949 P.2d 1321, (1997) (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989)). *See also* *Fed. Power Comm’n v. Conway Corp.*, 426 U.S. 271, 278 (1976) (“[T]here is no single cost-recovering rate, but a zone of reasonableness: ‘Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.’” (citing *Montana-Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951))).

### C. An Orderly Process for Agency Consideration of Settlements

Another aspect of encouraging settlements is to provide an orderly process to ensure that agency decisions approving a settlement are durable and will withstand judicial review in the event a non-settling party (or other party adversely affected by the decision) appeals the decision. An orderly process also promotes administrative efficiency and confidence in the integrity of the agency's decision-making process.

Three elements are essential to establishing an orderly process for agency consideration of settlements. First, the agency should provide a process for gathering information about the settlement and allowing parties to comment on the settlement, preferably by convening a settlement hearing. Second, the agency must ensure that a sufficient evidentiary record is developed to support the agency's decision in the event the settlement is adopted. Third, the agency must be mindful of the due process rights of the non-settling parties, and afford them a reasonable opportunity to present a case in opposition to the settlement.

The decision-makers must be provided with the necessary information to allow them to understand the settlement terms and to reach a judgment about the reasonableness of a proposed settlement. This information is typically included in the documentation that is filed to support the settlement. In Washington, for example, the WUTC's rules require that a proposed settlement agreement be accompanied by "supporting documentation sufficient to demonstrate to the commission that the proposal is consistent with law and the public interest and that it is appropriate for adoption."<sup>44</sup> This documentation must include a narrative statement which essentially provides the background information regarding the issues in dispute, and an explanation of the terms of the proposed settlement.<sup>45</sup> Another

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44. WASH. ADMIN. CODE § 480-07-740(2) (2009).

45. *Id.* § 480-07-740(2)(a). This section states that:

[s]upporting documentation should include a narrative outlining the scope of the underlying dispute; the scope of the settlement and its principal aspects; a statement of parties' views about why the proposal

means of gaining the necessary understanding about the terms of a proposed settlement is to convene a settlement hearing, where the decision-makers have an opportunity to ask questions of the settling parties. On this point, Washington's rules state that "[e]ach party to a settlement agreement must offer to present one or more witnesses to testify in support of the proposal and answer questions concerning the settlement agreement's details, and its costs and benefits."<sup>46</sup> As discussed above, the settlement hearing provides an opportunity for the decision-makers to set a tone with respect to their policy towards settlement.

An agency decision—including the adoption of a settlement agreement—must be supported by substantial evidence. The durability of settlements thus requires that a sufficient evidentiary record be developed to support an agency's decision to adopt a settlement. The information described in the preceding paragraph—the narrative statement and the transcript from testimony at the settlement hearing—would help satisfy this evidentiary requirement. Counsel for the settling parties must ensure that the substantial evidence standard is met. On this point, the Washington rule requires that "[p]roponents of a proposed settlement . . . present sufficient evidence to support its adoption under the standards that apply to its acceptance."<sup>47</sup> As previously noted, that standard requires that the settlement be lawful, consistent with the public interest, and "supported by an appropriate record."<sup>48</sup>

An integral requirement in agency consideration of a settlement is the right of non-settling parties to have an opportunity to challenge the settlement. An agency's interest in promoting settlement should not be at the expense of the integrity of the decision-making process; parties declining to join in a settlement should, as a matter of fairness, be provided an opportunity to make their case in opposition to the settlement. While it may be argued that these rights must be accorded as a matter of due process, some courts have found that because ratemaking is a legislative function, procedural requirements are

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satisfies both their interests and the public interest; and a summary of legal points that bear on the proposed settlement.

46. *Id.* § 480-07-740(2)(b).

47. *Id.* § 480-07-740(2)(b).

48. *Id.* § 480-07-750(1).

not imposed on ratemaking decisions.<sup>49</sup> Nonetheless, the decision-making process is likely enhanced by affording non-settling parties an opportunity to challenge the settlement, as it allows the terms of the settlement to be tested by the rigors of the adversarial process. A meaningful opportunity to challenge a settlement likely consists of the following elements: (1) the right to present argument and evidence in opposition to the settlement proposal; and (2) the right to cross-examine witnesses supporting the proposal. The non-settling parties could also be provided with an opportunity to present an alternative, preferred outcome advocated by the non-settling parties. Given that the focus of the process is on the reasonableness of the settlement proposal being considered by the decision-makers, such an alternative proposal should be considered as an offer of proof rather than a competing proposal. In addition, at the decision-makers' discretion, and depending upon the complexity of the settlement proposal, the non-settling parties could be provided with an opportunity to conduct discovery on the terms of the proposed settlement.<sup>50</sup>

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49. In *Attorney General's Office, Public Counsel Section v. Wash. Util. & Transp. Comm'n*, two non-settling parties to a WUTC rate proceeding claimed their due process rights were violated by the process followed by the WUTC. *Wash. Attorney Gen. Office v. Wash. Util. & Transp. Comm'n*, 116 P.3d 1064 (Wash. Ct. App. 2005). The Washington Court of Appeals ruled that "[t]he function of ratemaking is legislative in character," and "[i]n reviewing ratemaking decisions of legislative bodies," the Washington courts "have looked only to whether the rates were fair (i.e., reasonable, non-discriminatory, not arbitrary or capricious." *Id.* at 1071. As a result, because the Commission's ratemaking is a legislative act, the "only due process right is in non-arbitrary rates." *Id.*

50. The governing rule in Washington is provides that:

Parties opposed to the commission's adoption of a proposed settlement retain the following rights: The right to cross-examine witnesses supporting the proposal; 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 party's preferred result. The presiding officer may allow discovery on the proposed settlement in the presiding officer's discretion.

WASH. ADMIN. CODE § 480-07-740(2)(c) (2009).

## VI. BROADER IMPLICATIONS AND CONCLUSIONS

Although the focus of this article concerns settlement in retail utility rate proceedings, many of the concepts can be applied more broadly to agencies other than PUCs. Any agency seeking to encourage settlement of contested case proceedings will need to take a combination of formal and informal measures to achieve that objective. With respect to formal actions, the agency's procedural rules must address ADR and identify various options available for resolving disputes other than litigating them, including mediation, collaboration, settlement conferences, or any combination of these processes. Ideally, the agency's procedural rules will devote an entire chapter to ADR, so that parties can easily ascertain the options available to them and can gain some understanding of the elements of each ADR technique. Formal ADR rules provide a necessary foundation for an agency to create an environment in which negotiated settlements are encouraged.

Apart from the formal incorporation of ADR through the rulemaking process, an agency can promote settlement through its adjudication process. How an agency conducts settlement hearings and the standard of review it applies in evaluating settlement proposals can send a very strong signal about the agency's attitude toward resolving disputes through settlement. Another effective means of encouraging settlement is the inclusion of a settlement conference in the procedural schedule of each contested case proceeding. Such a measure has the effect of not only specifying a milestone for purposes of parties' processing of the case, but also removes any potential stigma associated with an individual party making the first move towards suggesting settlement rather than litigation. It is also likely to result in participation by all parties to the proceeding, and is preferable to the *ad hoc* settlement discussions that may occur among only some parties in the absence of a formally scheduled settlement conference. The opportune time to schedule a settlement conference during the course of the proceedings will vary depending upon the nature of the proceeding. In the case of retail utility rate cases, the recommendation in this article is to schedule a settlement conference three to four weeks prior to the filing of Staff and intervenor testimony. More broadly, once a proceeding has progressed to the point that the parties have had

an opportunity to conduct sufficient discovery to inform their cases and to develop preliminary positions on the issues, the driving factors in setting a strategic date for a settlement conference are: (1) avoiding the effort and expense through early settlement of the issues; and (2) preventing the hardening of positions that can occur through more complete development of a litigant's case.

An agency must also implement an orderly process for consideration of settlements which promotes confidence in the integrity of the decision-making process and also increases the likelihood that agency decisions approving a settlement are durable. An agency should develop a process that is fair to all litigants—both settling and non-settling parties—and ensures that sufficient evidence is provided to the decision-makers to enable an informed decision, and to satisfy the statutory legal standard to support the decision on judicial review.

Given the substantial benefits that can potentially be achieved through reducing litigation and administrative costs, agencies should strongly consider whether they are doing enough—through both their formal rules and their informal practices and policies—to promote ADR in resolving contested case proceedings. Apart from reducing the time and expense associated with a fully litigated case, early settlement of all or some of the issues minimizes uncertainty inasmuch as the involved parties are able to fashion a thorough and informed resolution of an issue rather than leave it in the hands of the agency decision-makers. Moreover, the process of achieving an outcome through settlement rather than through litigation can result in improved relationships among the parties. The recommendations and insights offered in this article should provide some helpful guidance to administrative agencies seeking to encourage settlement of their contested case proceedings.