

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WHATCOM COMMUNITY)	DOCKET NO. UT-050770
COLLEGE,)	
)	ORDER NO. 01
Complainant,)	
)	
v.)	PREHEARING CONFERENCE
)	ORDER; ORDER DENYING
QWEST CORPORATION,)	MOTION TO STRIKE
)	
Respondent.)	
)	
.....)	

1 **NATURE OF PROCEEDING.** Docket No. UT-050770 involves a formal complaint by Whatcom Community College (WCC or “the college” herein) against Qwest Corporation (Qwest). Complainant alleges that the respondent billed for services after the services were canceled; Qwest filed a response raising affirmative defenses and making a motion to strike portions of the complaint.

2 **CONFERENCE.** The Washington Utilities and Transportation Commission (Commission) convened a prehearing conference in this docket at Olympia, Washington on August 3, 2005, before Administrative Law Judge C. Robert Wallis.

3 **APPEARANCES.** Wendy Bohlke, Assistant Attorney General, Bellingham, Washington, represents the complainant. Douglas N. Owens, attorney, Seattle, represents the respondent. Contact information provided at the conference for the parties’ representatives is attached as Appendix A to this order.

4 **PETITIONS FOR INTERVENTION.** No party petitioned in writing or appeared at the conference seeking to intervene.

5 **DISCOVERY.** The parties asked that the discovery rules be invoked in this docket, pursuant to WAC 480-07-400. The matter is one that qualifies for discovery, and the rules are invoked.

6 **PROTECTIVE ORDER.** The parties requested that a protective order be entered in this docket. Such an order will be entered.

7 **PROCEDURAL SCHEDULE.** The Commission adopts the following procedural schedule:

Discovery	August 3 - October 3, 2005
Depositions of White, Daughty	August 29, 2005, Bellingham
Motions for summary determination, if any	October 24, 2005
Settlement conference	Week of October 24, Seattle
Responses to motions	November 7, 2005
Prefiling of direct testimony	December 19, 2005
Prefiling of answering testimony	February 13, 2006
Hearing	February 28, 2006, continuing as needed, Olympia

8 **MOTIONS TO STRIKE AND TO AMEND.** Qwest responded to the complaint with a motion to strike portions of the complaint; WCC answered and filed a motion to amend the complaint to denominate the accurate name of the respondent entity now providing service. The Company agrees to the amendment.¹ The parties asked that the motion to strike be addressed, on the basis of the pleadings, in the prehearing conference order. They agreed that if

¹ All references to Qwest Corporation, the current service provider, in this and future documents, will be deemed to include the Qwest Corporation predecessor in interest that provided service at the relevant time.

the result of the motion were to reduce complexity of the docket to enable a faster schedule, the parties would move for schedule changes.

9 **DISCUSSION AND RULINGS ON MOTION TO STRIKE.** Qwest’s motion to strike included several elements.² We will address them in the order presented. We note, in the context of a motion to strike, that the motion addresses the sufficiency of the legal contentions regarding the susceptibility of requested information to discovery and not the sufficiency of the discovery product as admissible evidence to support a claim. We expect that parties offering any evidence will be able to identify its relevance and to articulate clearly the legal theory that it is offered to support.

10 **First element** – Qwest asks³ that the Commission strike references in paragraph 3.2 of the complaint regarding an offer of partial remuneration in settlement, on the basis that offers in furtherance of settlement are barred as a matter of law and is therefore impermissible under WAC 480-07-470(1)(a)(ii)(C). The College responds that the evidence would be relevant and that the subject should not be foreclosed.

11 Qwest states that the context for the offer was a process “in the nature of a mediation.”⁴ It states,⁵

² WAC 480-07-375(2) provides in relevant part as follows:

(2) **Written motions must be filed separately.** Parties must file motions separately from any pleading or other communication with the commission. The commission will not consider motions that are merely stated in the body of a pleading or within the text of correspondence.

The reason for this rule is clear, as motions to strike may be interspersed in the gray of the text of a pleading and it thus may be difficult to identify and work with. Rather than strike the motions contained in the text, we ask for compliance in the future.

⁴ Answer, paragraph 3.10.

⁵ *Id.*

Qwest Corporation states that the material quoted in this paragraph of the complaint from the alleged WUTC staff e-mail as to an alleged offer of partial remuneration by Qwest Corporation constitutes an account of an offer in compromise of a disputed claim and the complainant's use of that matter in its allegations in this complaint is clearly improper.

Qwest provides no citation of authority for its allegation that the reference is "clearly improper." Washington statutory law on the subject has been limited, and appears to have provided for the exclusion of evidence of negotiations during mediation only in limited circumstances. *See*, WAC 480-07-710(4)(g), citing RCW 5.60.070.⁶

12 The 2005 legislature enacted Senate Bill 5173, the Uniform Mediation Act, or UMA, Chapter 172, Laws of 2005.⁷ While it provides broader protections for confidentiality in mediated disputes than afforded in RCW 5.60.070, it is also limited in its scope.⁸ It does not appear to us from the scope of the Act that the process in which the parties were engaged before the filing of this complaint constituted mediation to which confidentiality would attach. The Act does not apply to the activities in question.

⁶ The rule reads as follows: (g) The mediation process is confidential to the extent permitted by law, subject to the requirement for a written agreement as required under RCW [5.60.070](#).

⁷ It was not in effect at the time of the events in question, but we examine it for possible guidance.

⁸ The UMA provides as follows:

Sec. 3 SCOPE. (1) Except as otherwise provided in subsection (2) or (3) of this section, this chapter applies to a mediation in which:

(a) The mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(b) The mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(c) The mediation parties use as a mediator an individual who holds himself or herself out

- 13 Enactment of the UMA and supersession in part of RCW 5.60.070 could require interpretation of the applicability of WAC 480-07-710(4)(g) in some circumstances. Here, however, the rule by its terms applies only to mediations in which the Commission assigns a mediator (WAC 480-07-710(1)) after a request by parties to a negotiation that meets specific procedural requirements (WAC 480-07-710(2)). There is no indication here that the parties followed the required process. The facilitation undertaken by Commission Staff in attempting to resolve informal complaints is not shown to constitute mediation under the UMA, and is clearly not mediation within terms of the Commission rule.
- 14 Counsel acknowledges this when he states that the informal complaint process was “in the nature of mediation.” Counsel also states, in the same paragraph, that “as a matter of law such an offer [in compromise of a disputed claim] may not be a fact that may be proven or alleged in support of the existence of the underlying claim . . .” Counsel does not cite to any law supporting the contention, and the relevance of the information may involve other legal points. Consequently, we believe that the rule of confidentiality does not apply. We reject the contention that the information if offered in evidence would be inadmissible as a matter of law as privileged communications and consequently deny the motion as to this element.
- 15 **Second element** – Qwest argues that paragraph 4.1 of the complaint impermissibly includes argument rather than allegations of fact. We deny this motion as the respondent has shown no prejudice from the paragraph, and no injury results.⁹ It may respond to argument at the appropriate time and in an appropriate manner.

as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

⁹ WAC 480-07-395(4) states that the Commission will “liberally construe pleadings and motions with a view to effect justice among the parties. The commission, at every stage of any proceeding will disregard errors or defects in pleadings, motions, or other documents that do not affect the substantial rights of the parties.”

16 **Third element** – Qwest argues that paragraph 4.3 impermissibly alleges facts that have no relevance to the matter at issue. Qwest contends that the paragraph recites purported facts relating to other disputes of a similar sort, which have no bearing on the circumstances of the complaint. The College opposes the motion to strike, arguing that Qwest has previously agreed to make refunds to other consumers for charges gained for services not provided, based on records other than those available from Qwest, and that this will demonstrate that the circumstances giving rise to WCC’s complaint are not isolated. Again, we cannot say that the evidence described, if offered, would be irrelevant and inadmissible as a matter of law. Consequently, we deny the motion to strike.

17 **Fourth element** – Qwest’s fourth plea in its motion to strike is directed to Paragraph 4.5. Qwest argues that the paragraph impermissibly refers to offers of settlement to resolve contested claims for *other* parties and that “as a matter of law,” it is therefore irrelevant to whether or not the facts alleged in the complaint are true. In the absence of a citation to law that would persuade us to foreclose conclusively the admissibility of the information in question, we cannot say that, as a matter of law, the movant is entitled to an order striking the passage it deems offensive.

18 **Fifth element** – Qwest’s fifth plea is to strike paragraph 4.6 of the complaint on the basis that it consists of argument, as opposed to factual allegation. Qwest is not prejudiced to the extent that the paragraph consists of argument and it may respond to argument appropriately and at the appropriate time. This element is denied.

19 **CONCLUSION AS TO THE MOTION TO STRIKE.** We conclude that Qwest is not entitled as a matter of law to the relief that it seeks, and deny the motion. This does not constitute a ruling on the admissibility of evidence on the points in question, which will be determined (if such evidence is offered) on the basis of

the actual evidence that is offered, the theory or theories on which it is offered, the argument of the parties, and the nature of applicable law.

20 **DOCUMENT PREPARATION AND FILING REQUIREMENTS.** Parties must file with the Commission an original plus three (3) copies of all pleadings, motions, briefs, and other prefiled materials. Paper copies of these materials are required to conform to the format and publication guidelines set forth in WAC 480-07-395 and 480-07-460, and must be three-hole punched with *oversized* holes to allow easy handling. The Commission may require a party to refile any document that fails to conform to these standards.

21 **ALTERNATE DISPUTE RESOLUTION.** The parties agreed to participate in a settlement conference to be held during the week of October 24, 2005. The Commission designates Administrative Law Judges Ann Rendahl and Theodora Mace as settlement judges for settlement mediation, with a session to be convened at a time and place in Seattle to be determined. Both counsel offered their Seattle facilities and agreed to the use of the other's location. Location of the settlement mediation will be by agreement of the parties and the settlement judges.

22 **ADMINISTRATIVE REQUIREMENTS.** All filings must be mailed to the Commission Secretary, Washington Utilities and Transportation Commission, P.O. Box 47250, 1300 S. Evergreen Park Drive, S.W. Olympia, Washington 98504-7250, or delivered by hand to the Commission Secretary at the Commission's Records Center at the Washington Utilities and Transportation Commission, 1300 S. Evergreen Park Drive, S.W., Olympia, Washington, 98504. Both the post office box and street address are required to expedite deliveries by the U.S. Postal Service.

23 An electronic copy of all filings must be provided by e-mail delivery to <records@wutc.wa.gov>. Alternatively, Parties may furnish an electronic copy

by delivering with each filing a 3.5-inch IBM-formatted high-density diskette including the filed document(s). The Commission prefers that parties furnish electronic copies in .pdf (Adobe Acrobat) format, supplemented by a separate file in MS Word 6.0 (or later), or WordPerfect 5.1 (or later) format. Parties are required to organize and identify electronic files as specified in WAC 480-07-140(5).

24 **ELECTRONIC FILING.** Parties may only file documents electronically with the Commission in this proceeding with the permission of the administrative law judge. Under WAC 480-07-145(6), electronic filing of documents provides a one-day extension of the paper-filing requirement. If, at any time during this proceeding, parties are authorized to file documents with the Commission electronically under WAC 480-07-145(6), Parties must submit the document to records@wutc.wa.gov, and file an original, plus three copies, of the document with the Commission by the following business day.

25 **NOTICE TO PARTIES: Any objection to the provisions of this Order must be filed within ten (10) days after the service date of this Order, pursuant to WAC 480-07-430 and WAC 480-07-810. Absent such objection, this Order will control further proceedings in this matter, subject to Commission review or modification by the presiding judge.**

Dated at Olympia, Washington, and effective this 8th day of August, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

C. ROBERT WALLIS
Administrative Law Judge

APPENDIX A

**PARTIES' REPRESENTATIVES
DOCKET NO. UT-050770**

PARTY	REPRESENTATIVE	PHONE	FACSIMILE	E-MAIL
Whatcom Community College	Wendy K. Bohlke Senior Counsel Office of the Attorney General 103 E. Holly Street #310 Bellingham, WA 98225	(360) 676-2044	(360) 676-2049	wendyb@atg.wa.gov
Qwest Corporation	Douglas N. Owens Attorney at Law P.O. Box 25416 Seattle, WA 98165	(206) 748-0367	(206) 748-0369	dnowens@qwest.net

APPENDIX B
PROCEDURAL SCHEDULE
DOCKET NO. UT-050770

EVENT	DATE	INTERVAL
Discovery	August 3 – October 3, 2005	
Depositions of White, Daughy	August 29, 2005, Bellingham	26 days
Motions for Summary Determination, if any	October 24, 2005	56 days
Settlement Conference	Week of October 24, 2005, Seattle	0 days
Responses to Motions	November 7, 2005	14 days
Prefiling of Direct Testimony	December 19, 2005	42 days
Prefiling of Answering Testimony	February 13, 2006	56 days
Hearing	February 28, 2006, continuing as needed, Olympia	15 days