[Service Date September 13, 2005]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WHATCOM COMMUNITY COLLEGE,	)	DOCKET NO. UT-050770
Complainant,	)	ORDER NO. 03
v.	)	ORDER MODIFYING PREHEARING CONFERENCE ORDER
QWEST CORPORATION,	)	
Respondent.	)	
. . . . .	)	

1 **NATURE OF PROCEEDING.** Docket No. UT-050770 involves a formal complaint by Whatcom Community College (WCC) against Qwest Corporation (Qwest). Complainant alleges that the respondent billed for services after the services were canceled and facilities to provide the services were removed; 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. The Administrative Law Judge entered Order No. 01 in the docket on August 8, 2005, stating the results of the conference and denying a multi-part motion by Qwest to strike portions of the complaint.

3 **QWEST'S MOTION TO STRIKE.** In its answer to the complaint, Qwest also moved to strike portions of the answer.[1] Inter alia, it sought to strike reference in the complaint to an offer Qwest made during Commission Staff attempts to resolve an informal complaint that the College raised on the billing issue.

4 **OBJECTIONS TO ORDER.** On August 10, 2005, Qwest, by its counsel Douglas N. Owens, filed objections to the portion of the ruling on Qwest's motion to strike that denied its motion to strike the recitation of fact that Qwest made an offer of settlement.[2] Wendy Bohlke, senior assistant attorney general, answered on August 25, 2005, on behalf of Whatcom Community College.

5 **Foundation for the motion.** Qwest argues that the motion was decided in relevant part on a basis other than the basis on which it was argued. Qwest contends first, that its motion was based "explicitly" on ER 402, a rule of evidence for superior court. We find no explicit or implicit reference to the rule in question in the document that contained the motion. There, it was based on Qwest's statement that the recited fact is inadmissible "as a matter of law."[3] The order ruled that Qwest had not demonstrated that the recited fact was inadmissible and consequently found that the motion should be denied.

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[1] Commission rules require such motions to be separately stated, and not made in the text of other pleadings. The order on the motion noted the rule, but did not reject the motion on procedural grounds.

[2] Qwest's objection also notes that the order's paragraph citation to the motion is in error. Qwest is correct, and the reference at Paragraph 10 of Order No. 01 is deemed corrected to read, Paragraphs 3.10 and 4.5.

[3] Qwest did cite the rule and did make its other arguments in its response to the reply to the answer to the complaint. Qwest's motion to strike and its argument in support of the motion are difficult to follow because, as Order No. 01 notes and the College argues, Qwest failed to follow WAC 480-07-375(2), which requires motions to be filed separately from all other pleadings. As a result, its motion and the argument thereon were interspersed in numerous places with its answer to the complaint and the bases for its motion were not articulated until a later pleading. In its answer to the objection to the order, Whatcom College challenges Qwest's failure to comply with the rule. However, the time for challenging an asserted procedural flaw in a pleading ends five days after service of the pleading, WAC 480-07-375(4). The time has expired.

6 Qwest did, in its reply to the response to the answer to the complaint, state that the motion to strike was based on a rule of evidence for superior court, ER 408, which provides that evidence of prior offers of settlement are not generally admissible and which has been incorporated into Commission rules.[4] In its motion, Qwest also relies on the Commission rule.

7 Qwest also bases its argument in part on the Commission's ADR rules, WAC 480-07-700 *et seq*. Qwest notes that ADR is broadly defined in WAC 480-07-700 to include any mechanism to resolve disputes without a formal hearing. Qwest relied, it says, on WAC 480-07-910(3)[5] for the proposition that staff efforts to settle informal complaints constitute ADR, and on WAC 480-07-700(4)(b) for the proposition that an offer of settlement in informal complaints is inadmissible

8 **Response to the motion.** The college responds that the evidentiary rule is not mandatory in application to Commission proceedings. It notes that the rule applies only in superior court proceedings. It notes that evidentiary rulings are discretionary with the presiding officer if the evidence is of a sort relied on by reasonably prudent persons in the conduct of their affairs, citing RCW 34.05.452. It also notes that the same statue provides that the rules of evidence for superior court are discretionary in application with the administrative body and that the Commission rule requires consideration of the evidentiary rule, but not its application.[6]

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[4] WAC 480-07-700(4)(b).

[5] WAC 480-07-910(3) reads in part as follows: "Commission employees assigned to assist consumers may discuss an informal complaint with the affected persons, by correspondence or otherwise. The commission will try to assist the parties to resolve the informal complaint by agreement without the need for a formal complaint, hearing, and order."

[6] See, WAC 480-07-495(1), reading in part, "The presiding officer will consider, but is not required to follow, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts when ruling on the admissibility of evidence." *See also*, RCW 34.05.452(1) and (2).

9 **Discussion and decision.** We respectfully disagree with the logic of Qwest's analysis and the conclusions it makes, based upon the citations and the reasoning that it now offers.

10 Qwest argues that ER 408, a rule of evidence for superior court, mandates that the recited offer is inadmissible. That rule provides that offers in furtherance of settlement are inadmissible in superior court proceedings, and it acknowledges certain exceptions to the rule. Qwest contends that the proper theory to address is the one that it advanced:[7]

> Qwest simply contends that, as a failed attempt to settle this very dispute, that offer in compromise may not be used against Qwest in this contested proceeding by the Complainant under ER 408.

11 The college is correct in its observation that the Commission is not bound to apply ER 408. Whether the Commission will apply the principle of the rule if evidence of the recited fact is offered is not determined as a matter of law by the rule, and must await the offer, the objection, and argument on specific bases that the parties have yet to present. Moreover, the rule and its comment acknowledge the existence of situations n which the rule may not bar certain evidence. ER 408 does not support Qwest's contention that the fact it identifies is inadmissible as a matter of law under ER 408.

12 Qwest also argues[8] that WAC 480-07-700(4)(b)[9] renders the fact of an offer of settlement inadmissible as a matter of law. We disagree.

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[7] Qwest's objection to the prehearing order, paragraph 3.
[8] Objection, paragraph 2.
[9] WAC 480-07-700(4) ADR guidelines. In any negotiation, the following apply unless all participants agree otherwise:
(a) The parties, as their first joint act, will consider the commission's guidelines for negotiations, set out in a policy statement adopted pursuant to RCW 34.05.230, and determine the ground rules governing the negotiation;
(b) No statement, admission, or offer of settlement made during negotiations is admissible in

13 A broad definition of ADR, which WAC 480-07-700 does accomplish,[10] does not carry with it the conclusion that every process within that broad definition constitutes either mediation or negotiation, and the definition does not therefore automatically bring with it the application of WAC 480-07-700(4)(b).

14 WAC 480-07-700 establishes a hierarchy of process, ranging from unspecified efforts to avoid a formal hearing, to negotiation, mediation, and arbitration, each containing some structure and each structure more formal than the prior. As to each, the process is identified and formalized in the rule.

15 Qwest is correct that informal complaint resolution falls within the Commission's definition of ADR, but Qwest is not correct in its conclusion that informal resolution efforts constitute negotiation within the terms of WAC 480-07-700(4).

16 WAC 480-07-700(4) sets out the rules that apply in "negotiations," which begin with the parties' discussion of ground rules for negotiation, unless the parties agree otherwise. Here, there is no indication that the parties engaged in a negotiation beginning with a discussion of ground rules, or that they knowingly waived the right to such a discussion. Instead, efforts in support of the resolution of informal complaints is undertaken informally by Commission Staff in a pragmatic approach to assist parties at the most informal and least structured step in the staircase of broadly-defined ADR. [11] No asserted facts are shown to elevate the informal discussions to the status of a negotiation subject to

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evidence in any formal hearing before the commission without the consent of the participants or unless necessary to address the process of the negotiations; * * *.

[10] "Alternative dispute resolution (ADR) includes any mechanism to resolve disagreements, in whole or in part, without contested hearings." *WAC 480-07-700.*

[11] *See,* WAC 480-07-910(3) reads in part: Commission employees assigned to assist consumers may discuss an informal complaint with the affected persons, by correspondence or otherwise. The commission will try to assist the parties to resolve the informal complaint by agreement without the need for a formal complaint, hearing, and order.

WAC 480-07-700(4). That subsection is not intended to and does not apply to the resolution of informal complaints, which have not escalated to the point where a more-formal dispute resolution process is either required or appropriate.

17 Qwest argues in its response to the reply to the answer to the complaint that "WAC 480-07-370(1)(a)(ii)(c) would not permit the fact of an offer in compromise to be proven in this case." That rule merely states that facts supporting a complaint must be stated in the complaint. It is not an exclusionary rule and does not render inadmissible any fact. The rule does not support Qwest's contention.

18 As noted above, the basis stated in the motion was merely that the particular fact was inadmissible as a matter of law, and the prehearing conference order concludes that the basis was not demonstrated. After considering the objection to the prehearing conference order and the answer thereto, we conclude (1) that ER 408 is not subject to mandatory application in Commission proceedings and does not render the challenged fact inadmissible as a matter of law and (2) that WAC 480-07-400(4)(b) is not by its terms applicable to efforts in furtherance of a settlement of informal complaints, and therefore does not render the challenged fact inadmissible as a matter of law. Therefore, we conclude that Qwest's objection should not be sustained.

19 **Incorrect theory for analysis and decision.** Qwest argues that the order on the motion applied an incorrect theory, different from that which Qwest advanced, to resolve the motion. Qwest argues,[12]

> Order No. 1 analyzed the motion to strike based on a determination that what occurred during the informal complaint process was not mediation as defined in WAC 480-07-710 and that therefore the offer in compromise was not *confidential* pursuant to the Uniform

[12] Objection to prehearing order, paragraph 3.

> Mediation Act or WAC 480-07-710(4)(g). The confidentiality of the offer in compromise is not an issue that Qwest ever raised in its motion or response to the Complainant's reply to that motion. (Emphasis in original.)

20 In determining whether to deny the motion, the order reviewed RCW 5.60.070, which reads, in part,

> If there is a . . . written agreement between the parties to mediate, . . then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding except [and exceptions are listed].

21 The statute relates to confidentiality, privilege, and admissibility. There being no indication that the parties had entered such an agreement, the order found that the provision did not render the challenged fact inadmissible as a matter of law. There is no error in the order relating to the cited statute.

22 Qwest also argues that the order relies on the Uniform Mediation Act for its result, when the order itself states that the UMA does not apply to the events in this proceeding.

23 The ruling in the order was clear that "Qwest is not entitled as a matter of law to the relief that it seeks," and it did not decide issues of confidentiality apart from Qwest's entitlement to rejection of the evidence as a matter of law. That was the issue Qwest posed, and it is the one that the order resolved.

24 We reaffirm the result of the prehearing order denying the motion and deny the objection. Qwest has not demonstrated that the acts that are the subject of this disagreement are inadmissible as a matter of law.[13]

25 As noted in the prehearing conference order, this ruling does not address the admissibility of the proffered fact at hearing except to state that Qwest did not demonstrate that the fact in question is inadmissible as a matter of law. A ruling on admissibility must await the decision to offer the fact, an objection, and the argument of the parties.

Dated at Olympia, Washington, and effective this 13th day of September, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

C. ROBERT WALLIS
Administrative Law Judge

[13] It should be clear from the discussion in the prehearing conference order and in this order that in settlement negotiations that are conducted pursuant to WAC 480-07-700(4) and RCW 5.60.070, the recited facts would be inadmissible to prove the existence of a claim.