Donald L. Howell, II

Deputy Attorney General

Idaho Public Utilities Commission

472 W. Washington

PO Box 83720

Boise, ID 83720-0074

Telephone:  (208) 334-0312

FAX:  (208) 334-3762

Attorney for Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

|  |  |  |
| --- | --- | --- |
| IN THE MATTER OF THE PETITION FROM RESIDENTS OF SWAN VALLEY, IRWIN AND PALISADES REQUEST­ING EXTENDED AREA SERVICE (EAS) TO ALL OF BONNEVILLE COUNTY, AND THE TOWNS OF RIRIE, VICTOR AND DRIGGS. | )))))) | CASE NOS.  GNR-T-96-6                      GNR-T-97-3                      GNR-T-97-8                      |
|  | ) |  |

|  |  |  |
| --- | --- | --- |
| IN THE MATTER OF THE PETITION FROM RESIDENTS OF GRAY’S LAKE, WAYAN AND FREEDOM REQUESTING INCLUSION IN THE U S WEST COMMUNICATIONS EASTERN IDAHO CALLING REGION.                                                                                             IN THE MATTER OF THE PETITION FROM RESIDENTS OF TETON COUNTY REQUEST­ING EXTENDED AREA SERVICE (EAS) TO THE GREATER IDAHO FALLS AREA.   | )))))))))))) | STAFF MOTIONTO STRIKE |

COMES NOW the Staff of the Idaho Public Utilities Commission by and through its attorney of record, Donald L. Howell, II, Deputy Attorney General, and respectfully request that the Commission strike the Affidavit of Mary S. Hobson, the exhibits accompanying the Affidavit, and certain references to the Affidavit and settlement negotiations contained in the Company’s Memorandum and Opposition to the Proposed Order and In Support of Motion for Hearing(footnote: 1) in the above referenced cases.  The Affidavit of Ms. Hobson describes in some detail the contents of settlement negotiations which have occurred:  (1) between the Commission Staff and the Company regarding the issue of compensating U S WEST for its implementation of extended area service (EAS) and (2) among the parties at the February 4, 1998 settlement conference in the above referenced cases.  The Staff vehemently opposes the introduction in the record of this Affidavit describing settlement negotiations.  The disclosure of these negotiations is a clear violation of Commission rules and Idaho law.  Consequently, the Staff urges the Commission to strike the Affidavit, its exhibits, and all references contained in the Company’s Motion which disclosed the contents of settlement negotiations.

THE DISCLOSURE OF SETTLEMENT NEGOTIATION VIOLATES

 THE COMMISSION RULES AND IDAHO CASE LAW

In its Motion for Hearing, U S WEST notes that “settlement discussions are proceeding with Staff and that the Company is optimistic that those discussions may shortly culminate in a formal settlement conference . . . .”  U S WEST Motion for Hearing at 3.  Staff acknowledges that it has been engaged with the Company in settlement negotiations regarding the issue of EAS compensation.  However, Staff asserts that disclosing the actual contents of settlement negotiations including statements, positions, and the exchange of data is wholly inappropriate.

A. Commission Rules

The Commission’s Procedural Rule 272 provides that “[s]ettlement negotiations are confidential, unless all participants to the negotiation agree to the contrary.”  IDAPA 31.01.01.272.  Prior to filing the subject Affidavit, U S WEST had not sought nor had the Staff given its consent to the disclosure of confidential settlement negotiations.  The Staff maintains that the disclosure of confidential settlement negotiations violates Rule 272.  In addition, Rule 215 provides that “[f]acts disclosed, offers made and other aspects of negotiation [or settlement] (except agreements reached) in prehearing conferences are privileged and are not part of the record.”  IDAPA 31.01.01.215.(footnote: 2)  The Commission’s Rules exhibit a clear intent and embody the common law practice that such negotiations are not to be disclosed.

B. Case Law

Disclosure of confidential settlement negotiation contrary to Idaho law.  For more than 100 years it has been the rule in Idaho that disclosure of settlement negotiations or offers are not admissible into evidence or a hearing record.  In Sebree v. Smith, 2 Idaho 359, 16 P. 915 (1888), a plaintiff in a case objected when the defense attorney took the stand and disclosed that the plaintiff’s attorney offered to return two mules if the lawsuit was dismissed.  The Court held that striking such evidence “cannot erase it from the memory of the jurors.  The evidence given in this case seems inadmissible under the established rules of practice and ought to have been stricken out.”  2 Idaho at 363, 16 P. at \_\_\_\_\_\_.

In Rojas v. Lindsay Manufacturing Company, 108 Idaho 590, 701 P.2d 210 (1985), the Idaho Supreme Court directly addressed this issue.  In that case, the Court stated:

The rule is well established that an offer made in an effort to compromise a cause of action cannot be legally admitted in evidence over the objection of the opposing party.  Likewise, all statements in the course of settlement negotiations are inadmissible.  These rules are grounded upon two theories:  (1) that the offer is of dubious relevance on the issue of liability since it may merely imply a desire for peace and not a concession of wrong-doing and (2) the policy of promoting settling of disputes would be discouraged if offers of compromise were admitted into evidence.

108 Idaho at 592, 701 P.2d at 212 (citations omitted).  Here the Staff timely and strenuously objects to the introduction of the Affidavit and other references to settlement discussions.

In Hatfield v. Max Rouse & Sons Northwest, the Idaho Supreme Court held that the introduction of a letter that “was part of a ongoing settlement negotiation” admitted into evidence at trial was in error.  100 Idaho 840, 606 P.2d 944 (1980).  At issue was the admission of a letter outlining positions and offers of a party to the settlement negotiations which ultimately failed.  In examining the different policies behind the exclusion of such evidence from a hearing, the Court noted that “[s]ettlements are favored because they reduce judicial backlog and bring disputes to a prompt conclusion.  To encourage resolution of cases by settlement, evidence gained in negotiation is excluded.”  100 Idaho at 840, 606 P.2d at 950.

The Court observed that the modern approach “is to exclude all statements made in the course of settlement negotiations.”  Id. (emphasis original).  The Court noted that this is the position adopted by and embodied in the Federal Rules of Evidence.  Id.  In particular, Rule 408 provides in particular part:

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or in validity of the claim or its amount.  Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Id. (emphasis added) citing Federal Rules of Evidence, Rule 408.(footnote: 3)  After noting that this position had been widely recommended by various legal scholars, the Court adopted the policy to exclude all statements made in the course of settlement negotiations.  Id.

Staff further objects to the admission of this Affidavit into the record because it contains mischaracterizations, misrepresentations, and statements that are clearly hearsay.(footnote: 4)  These reasons also support striking the requested materials and highlight the inherent problems of admitting the contents of “back-and-forth” settlement negotiations into the record.  Under the Commission’s Rule 272 and well settled case law, settlement negotiations should not be introduced into evidence or into the record in a Commission proceeding.  Staff does not desire to burden the Commission with a point by point rebuttal of the Affidavit thereby committing the same transgression as the Company.

Finally, Staff is at a loss as to the purpose of the Affidavit.  As previously mentioned, the Staff does not object to the disclosure that settlement negotiations have taken place.  In particular, the Staff, Silver Star Telephone Company and Teton Telecom entered into a Stipulation and Settlement following the February 4, 1998 settlement conference.  Likewise, U S WEST and the Staff have engaged in settlement discussions regarding its EAS compensation.  U S WEST Motion for Hearing at 3; Stipulated Motion for Extension of Time for Staff to File a Motion to Strike at 2.  It is the disclosure of the contents of such negotiations that is not admissible in this record.   If the Affidavit and the attached exhibits are an attempt by the Company to introduce this evidence into the record for the Commission’s consideration, then Staff is prepared to cross-examine the Affiant.

Despite U S WEST’s request that the Commission schedule a hearing to take up the matter of its EAS compensation, the Staff stands ready to continue the settlement discussions.  Given the fact that the Company has requested a prehearing conference, it may be helpful to the parties if the Commission indicate acceptable ranges of settlement pursuant to Procedural Rule 273.  IDAPA 31.01.01.273.

PRAYER

Based upon the reasons set out above, Staff strongly opposes the introduction into the record of Ms. Hobson’s Affidavit, its attached exhibits, and those references in U S WEST’s Memorandum in Opposition to Proposed Order and in Support of Motion for Hearing that disclose the contents of settlement negotiations.  The offensive material should be and must be stricken from the record.

Respectfully submitted this     30th       day of March 1998.

Donald L. Howell, II

Deputy Attorney General

bls/N-gnrt966.dh3

**FOOTNOTES**

1:

The following materials in U S WEST Memorandum should be stricken: (1) page 4,  line 5 of the full paragraph (beginning “Specifically, U S WEST . . .”) through the end of the paragraph; (2) page 4, the fifth line from the bottom of the page (beginning with “At the settlement conference, . . .”) and continuing until the section heading on page 5 entitled “Objections to the Proposed Order”; and (3) page 16, the sentence in the last full paragraph (beginning “In the absence . . .”).

2:

In its entirety Rule 215 provides that “Facts disclosed, offers made and all other aspects of negotiation (except agreements reached) in prehearing conferences are privileged and are not part of the record.  Except by agreement, facts disclosed cannot be used against participating parties, before the Commission or elsewhere, unless proved by independent evidence.  Offers made in other aspects of negotiations or settlement other than a final agreement itself are privileged.”

3:

The remaining text of Rule 408 provided “this rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.  This rule also does not require exclusion when the evidence is offered for another purpose such as proving a bias or prejudice of a witness, negating a contention of undue delay, or providing an effort to obstruct a criminal investigation or prosecution.”  Although the Commission is not bound by the technical Rules of Evidence pursuant to Idaho Code § 61-601, the Idaho Supreme Court adopted its Rules of Evidence in 1985.  Even if Rule 408 was strictly applicable, U S WEST has not indicated that an exception to the general rule of nondisclosure is present here.

4:

For example, the Affiant declares that “I am informed that one of the Staff representatives indicated to one of U S WEST’s representatives. . . .”  Affidavit at 4, ¶ 6.  This “double hearsay” is clearly inadmissible.  I.R.E. 801, 802.