BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of DRAFT FINANCIAL REPORTING RULES	Docket No. A-021178 QWEST CORPORATION'S COMMENTS ON PROPOSED RULES

1 Qwest Corporation ("QC") offers the following comments in response to the Commission's December 3, 2003 Notice Opportunity to File Written Comments in conjunction with the draft financial reporting rules.

I. INTRODUCTION

2 QC requests that the Commission reject or modify many of the proposed rules, as they vastly exceed the Commission's authority, run afoul of both state and federal law, impose undue burden without providing corresponding benefit and are inconsistent with the increasingly competitive nature of the telecommunications industry. With regard to the telecommunications industry, the type of financial micromanagement sought by these rules can only be achieved, if at all, by legislative fiat, and perhaps then only by an act of Congress. A state Commission rulemaking proceeding is not the appropriate forum for attempting to manage or restrict the financing activities and cash management of multi-state entities such as QC.

3 While its comments may be applicable to Chapters 480-70, 480-73, 480-90, 480-92, 480-100 and

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480-110 as well, QC's comments only address the proposed elimination of Chapter 480-146 and the proposed revisions to Chapter 480-120, regarding telecommunications companies.

II. COMMENTS

A. Chapter 480-146 WAC

4 In and of itself, the proposed deletion of WAC Chapter 480-146 and the dispersion of the centralized securities and affiliated-interest rules into the different industry chapters is not concerning to QC. However, to the extent doing so is an attempt to extend the Commission's authority by removing the restrictions that flow from the enabling statutes (specifically, RCW 80.08 and 80.16), QC is quite concerned. As will be discussed below, the legislature tightly prescribed the Commission's authority over securities issuances and affiliated interest transactions. Any attempt to loosen those restrictions by moving the related regulations into the general industry chapters would be unlawful.

B. WAC 480-120-015

5 Proposed WAC 480-120-015 provides as follows:

> **WAC 480-120-015 Exemptions from rules in chapter 480-120 WAC.**
> ~~(1) The commission may grant an exemption from the provisions of any rule in this chapter, if consistent with the public interest, the purposes underlying regulation, and applicable statutes.~~
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> ~~(2) To request a rule exemption, a person must file with the commission a written request identifying the rule for which an exemption is sought, and provide a full explanation of the reason for requesting the exemption. In addition to any other reason, parties may allege force majeure was the factor leading to the request for waiver.~~
>
> ~~(3) The commission will assign the request a docket number, if it does not arise in an existing docket, and will schedule the request for consideration at one of its regularly scheduled open meetings or, if appropriate under chapter 34.05 RCW, in an adjudication. The commission will notify the person requesting the exemption, and other interested persons, of the date of the hearing or open meeting when the commission will consider the request.~~
>
> ~~(4) In determining whether to grant the request, the commission may~~

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~~consider whether application of the rule would impose undue hardship on the requesting person, of a degree or a kind different from hardships imposed on other similarly situated persons, and whether the effect of applying the rule would be contrary to the purposes of the rule.~~

~~(5) The commission will enter an order granting or denying the request, or setting it for hearing, pursuant to chapter 480-09 WAC.~~

The commission may grant an exemption from the provisions of any rule in this chapter in accordance with WAC 480-07-110 (Exceptions from and modifications to the rules in this chapter; special rules.)

6 QC recommends leaving section -015 as currently in effect. While it appears that the proposed revision seeks to simplify the rule by replacing it with a directive that persons can seek exemptions/modifications "in accordance with WAC 480-07-110," that reference may be inadequate because WAC 480-07-110 appears on its face to provide only the opportunity to seek exemptions/modifications from the procedural rules, Chapter 480-07.[1] WAC 480-07-110 does not provide an opportunity to seek waiver of substantive rules, such as those found in Chapter 480-120.

7 If the Commission agrees with QC's comments that a simple reference to WAC 480-07-110 is inadequate to preserve the rights set out in the current WAC 480-120-015, QC would recommend leaving section -015 as currently in effect, with one exception. Existing subsection (5) should be modified to replace the reference to "chapter 480-09 WAC" with "chapter 480-07 WAC."

[1] WAC 480-07-110(1) provides, "[t]he commission may modify the application of ***these*** rules in individual cases if consistent with the public interest, the purposes underlying regulation, and applicable statutes." (emphasis added)

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C. WAC 480-120-021

8 The proposed rule seeks to add the following definition of "Subsidiary":

> **"Subsidiary"** means any company in which the Class A company owns directly or indirectly five percent or more of the voting securities.

9 QC has two concerns with the proposed definition of "Subsidiary." First, to the extent the Commission finds it necessary to define subsidiaries, the inclusion of the modifier "Class A" is misplaced. Regardless of the size of the parent (i.e., whether it has greater or fewer than 2% of the access lines in the state), a company controlled by that parent is a subsidiary under the common definition of that term. Should the Commission decide that a particular regulation affecting public service companies' subsidiaries should only apply to larger telephone companies (i.e., Class A companies), the Commission should specify that in the substantive regulation.

10 Second, and more importantly, the proposed definition of "Subsidiary" is too broad. The 5% ownership threshold casts far too wide a net in attempting to capture true parent-subsidiary transactions. For example, the Washington Corporations Act defines a subsidiary as "a domestic or foreign corporation that has ***a majority of its outstanding voting shares*** owned, directly or indirectly, by another domestic or foreign corporation."[2]

11 It appears that the proposed 5% threshold stems from the use of that threshold in the statutory definition of "affiliated interest."[3] Because the legislature did not include subsidiaries among those companies to be designated as affiliated interests, this linkage is not required and, in reality, is not logical. A parent-subsidiary relationship involves control by the parent over the subsidiary; a 5% stake in another corporation does not necessarily equate to such control.

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2 *RCW 23B.19.020(17) (emphasis added).*

3 *See RCW 80.16.010.*

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12 Based on these comments, QC recommends the following definition of "Subsidiary":

> "Subsidiary" means any company in which the ~~Class A~~ public service company owns directly or indirectly ~~five percent or more~~ a majority of the voting securities.

D. WAC 480-120-X01

13 Proposed WAC 480-120-X01 provides as follows:

> **WAC 480-120-X01 Filing information.** (1) Filing. The commission records center will accept any filing under PART VIII delivered in person or by mail, or, when procedures are in place, electronically.
>
> (2) Commission may require additional information. The commission may require information in addition to that specified by statute or in this chapter.
>
> (3) Information by reference. When any information required to support a filing is on file with the commission, it is sufficient to make specific reference to the information indicating the proceeding, report, or other filing that contains the referenced information.
>
> (4) When information is unavailable. If any required information is unavailable at the time of the filing, the filing must include the reason why the information is not available and state when it will be available.

14 QC is concerned that proposed subsection (2) seeks to grant the Commission powers in excess of its jurisdiction. That subsection provides that "[t]he commission may require information in addition to that specified by statute or in this chapter." While QC acknowledges that the Commission has broad authority to gather information from public service companies,[4] as worded, subsection (2) appears to grant the Commission powers beyond those granted by the legislature. On its face, such a grant would be unlawful, as the Commission is limited to the powers provided by statute.[5] In light of the

[4] For example, RCW 80.04.070 provides the Commission, each Commissioner and all persons employed by the Commission "the right, at any and all times, to inspect the accounts, books, papers and documents of any public service company" and the right to examine/depose any officer, agent or employee of the public service company in relation to such accounts, books, papers or documents.

[5] See footnote 7 below.

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limits on the Commission's authority, QC recommends simply deleting subsection (2) of the proposed rule.

E. WAC 480-120-X03

15 Proposed WAC 480-120-X03 provides as follows:

> **WAC 480-120-X03 Issuing securities.** (1) At least five business days before a telecommunication company subject to the provisions of chapter 80.08 RCW issues stocks, stock certificates, other evidence of interest or ownership, bonds, notes, or other evidences of indebtedness, or assumes any obligation or liability as guarantor, it must file with the commission:
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> (a) A description of the proposed issuance including the type of security, the anticipated amount of the total issuance, and the terms of the financing;
>
> (b) A statement of the specific purposes for which the issuance is made and the approximate amount anticipated to be used for each specific purpose. The statement must be accompanied by a certification by an officer authorized to do so that the proceeds from any such financing will be used for one or more of the purposes allowed by RCW 80.08.030;
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> (c) A statement as to why the issuance is in the public interest; and
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> (d) Any additional information specifically requested of the company by the commission.
>
> (2) Any company making such a filing may request from the commission a written order affirming that the company has complied with the requirements of RCW 80.08.040. The company must submit the request for a commission order, along with a completed filing, at least fifteen business days before the requested effective date.
>
> (3) An authorized representative must sign and date the filing and include a certification or declaration that the information is true and correct under penalties of perjury as set forth in RCW 9A.72. The certificate or declaration must be in substantially the following form:
>
> "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct."

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(4) Within thirty days after the issuance of any securities a company must file with the commission a verified statement:

(a) Outlining the final terms and conditions of the transaction; and

(b) Setting forth the disposition of proceeds stating the final amount to be used for each purpose.

16 QC strongly opposes adoption of this proposed rule. The proposed rule – which ostensibly seeks to replace WAC 480-146-290 through 480-146-340 – far exceeds the Commission's jurisdiction and conflicts with state and federal law. In addition, the proposed rule would prove so onerous as to likely make implementation and compliance impossible. QC will discuss each subsection in turn.

1. WAC 480-120-X03(1)

17 Three provisions of proposed subsection (1) violate state and federal law, would be practically impossible to implement and serve no apparent purpose. Those include the five-day notice requirement (set out in subsection (1)), the requirement of a specific identification of and allocation for each specific purpose (set out in subsection (1)(b)) and the broad information-gathering power granted to the Commission by the rule (set out in subsection (1)(d)). Each will be discussed.

a) Five business days notice requirement

18 The legislature imposed a requirement that a public service company undertaking an issuance of "stock, stock certificates, other evidence of interest or ownership, bonds, notes, or other evidences of indebtedness" must file ***before such issuance*** specified descriptive information.[6] Subsection (1) of the proposed rule seeks to alter this legislative requirement by requiring public service companies to provide such information (actually, more information – see below) five business days prior to issuance.

19 This proposal violates state law. The Commission is only permitted to promulgate rules when the

[6] *RCW 80.08.040.*

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legislature has explicitly authorized the Commission to do so.[7] Nowhere in Chapter 80.08 did the legislature authorize the Commission to expand on the legislative filing requirements and curtail public service companies' rights. The only rulemaking authority granted to the Commission by the legislature is found in RCW 80.08.090, which empowers the Commission to "establish such rules and regulations as it may deem reasonable and necessary to insure the disposition of such proceeds for the purpose or purposes specified ***in its order.***" The order referenced in that section relates to an order that may (but need not) be sought by a public service company under RCW 80.08.040(4). The legislature did not grant the Commission rulemaking authority except in that specific context. Given that the proposed rule does not relate only to securities issuances in which the utility has requested such an order, the proposed rule unlawfully exceeds the scope of the Commission's rulemaking authority.

20 The five day notice requirement may also run afoul of federal law in that it would present securities law concerns in connection with public and private offerings that may be undertaken by QC. In a public offering, it is generally illegal for companies to make any written offers of securities other than through a prospectus that complies with the requirements of the securities laws.[8] It is very possible that the SEC could take the position that the notice being provided to the Commission under the proposed rule constitutes a written offer, especially if the notice is published or is obtainable by the public.[9] Also, with respect to private offerings, it is possible that the SEC could take the position that the notice is a public solicitation, which is impermissible in a private offering.[10]

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[7] The Administrative Procedures Act provides that a rule is invalid if it exceeds the statutory authority of the agency. *RCW 34.05.570(2)(c).* Appellate courts in Washington have explained repeatedly that administrative agencies are creatures of the legislature without inherent or common-law powers, and that they may exercise only those powers conferred on them either expressly or by necessary implication. *See, e.g.,* WITA v. TRACER, *75 Wash. App. 356, 363, 880 P.2d 50 (1994).* In that case, the Court of Appeals explained that, if an enabling statute does not authorize either expressly or by necessary implication a particular regulation, that regulation must be declared invalid despite its practical necessity or appropriateness. *Id.*

[8] *Section 5 of the Securities Act of 1933 (the "1933 Act").*

[9] *In re Carl M. Loeb, Rhoads & Co., 38 S.E.C. 843 (1959).*

[10] *Rule 502(c) under the 1933 Act.*

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21 Furthermore, the five days notice would be extremely impractical and would severely constrain QC's financial flexibility. In most types of securities financings, the final terms of the financing are not knowable until the day of the financing, when the offering is priced in the market. As such, it is impossible to require five business days notice of the terms of the financing. Also, in certain types of securities financings, such as shelf offerings, the entire transaction, from initial decision to completion, will take place in a matter of a few days.

22 Aside from the fact that it would be effectively impossible for QC to comply with these requirements – and much more concerning – is the fact that a five business day pre-issuance disclosure requirement would have a severe chilling effect on many financial transactions. In fact, it is quite conceivable that such premature disclosure could compromise such transactions altogether. At a minimum, it would put many potential transactions in jeopardy and negatively impact the terms of the transaction from QC's perspective. For example, requiring QC to disclose the details of a proposed equity or bond transaction five business days before closing would offer speculators, hedge funds, and other market participants the opportunity to arbitrage positions at the expense of QC. Such tactics would involve or result in the price of such bonds being bid up. The resulting change in the bond prices could easily make the deal uneconomical for QC and completely undermine the contemplated transaction.

23 Similarly, investment banks that arrange equity and bond transactions and counterparties on private placement deals would very likely react negatively to early disclosure requirements. Some banks would potentially refuse to work under such conditions. This would result in QC's inability to complete some types of financial transactions and higher costs for transactions that QC is able to complete.

24 Finally, the proposed five days notice period serves no apparent purpose. The Commission does not have approval authority over securities filings. While Chapter 80.08 RCW, empowers the Commission to penalize public service companies that issue securities in violation of that chapter, the

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legislature did not give the Commission any authority to prevent, condition or delay securities issuances. Such a power, had it been granted by the Washington legislature, would likely be in violation of the 1933 Securities Act. Given the Commission's lack of authority to prevent or alter a securities issuance, requiring five business days notice serves no beneficial purpose.

b) Identification of and allocation for "specific purposes"

25 RCW 80.08.040 requires public service companies issuing securities to generally provide a description of the purposes for which the issuance is made. Subsection (1)(b) of the proposed rule seeks to take utilities' obligation a significant step further by requiring companies to approximate in their notice filings the amount of the funds raised through the securities issuance to be allocated for "each specific purpose."

26 Similar to the five days notice, this requirement constitutes an unlawful and unauthorized imposition of filing requirements not envisaged, required or permitted by the statute. The legislature permitted public service companies to provide a more general description of the purposes of the issuance. The proposed rule seeks to limit utilities' rights by imposing upon utilities onerous, unauthorized filing requirements in addition to those required by the legislature.

27 While the new rule is not absolutely clear, it appears to represent an attempt to add a layer of granularity to utility securities filings. To do so is neither permissible nor practical. For instance, when QC issues securities to raise funds to retire debt or fund capital improvements, it may not know at that moment precisely which maturities will be retired or which capital projects will be funded. Further, it may prove to be the case that none of the infrastructure projects ultimately funded with the subject cash affect Washington operations.

28 This facet of proposed subsection (1)(b) is also unlawful insofar as it constitutes an attempt to regulate the multi-state cash management of multi-state public service companies such as QC. QC finances its entire 14 state operation centrally; it does not issue securities to raise funds simply to finance its

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Washington operations. Not only would the vague and broad language of this proposed subsection potentially require QC to provide minute forecasts of specific construction and other expenditures, it ostensibly requires such description for expenditures that bear no relationship to Washington state. Any attempt by the Commission to regulate multi-state cash management activities of QC and its family of companies would violate Title 80 RCW,[11] and the commerce clause of the United States Constitution.[12]

29 Further, commissions and courts throughout the nation have repeatedly concluded that public service commissions may not interfere with a regulated utility's management prerogatives. When imposing requirements upon utilities, the Commission must be mindful that management of the public service company belongs to the company.[13] The Commission is not a "super board of directors" for the company.[14] Indeed, the U.S. Supreme Court has cautioned that "it must never be forgotten that while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and it is not clothed with the general power of management incident to ownership."[15] Consequently, the Commission lacks the authority to impose its own judgments on QC's cash management, and when the Commission's actions are in excess of statutory standards, its actions are unlawful, arbitrary and capricious.[16]

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[11] RCW 80.01.040 (General powers and duties of commission) empowers the Commission to regulate in the public interest, ***as provided by the public service laws***, the rates, services, facilities, and practices of all persons engaging ***within this state*** in the business of supplying utility service. *RCW 80.01.040(3)*.

[12] The commerce clause grants Congress the power to regulate interstate commerce. *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126 (1982). The courts have long recognized that the commerce clause correspondingly imposes limits on the powers of the states to regulate interstate commerce. *South-Central Timber Development v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237 (1984). That principle, commonly referred to as the dormant or negative commerce clause, "grew out of the notion that the Constitution implicitly established a national free market" from which private trade would be free from state interference. *Wyoming v. Oklahoma*, 502 U.S. 437, 469, 112 S.Ct. 789 (1992). Although incidental burdens on interstate commerce are allowable where the state's interest is of legitimate local concern, the state violates the commerce clause where "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844 (1970) (setting out the "undue burden" test).

[13] *See, e.g., Public Service Co v. Public Utilities Comm'n*, 653 P.2d 1117, 1123 (Colo. 1982).

[14] *Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Commission*, 333 Pa. 265, 267, 5 A.2d 133 (1939)

[15] *Southwestern Bell Tel. Co. v. Public Serv. Comm'n*., 262 U.S. 276, 289, 43 S.Ct. 544, 67 L.Ed. 981 (1923).

[16] *RCW 34.05.570(3), (4)(c)*.

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c) "Any additional information specifically requested by the Commission"

30 Proposed subsection (1)(d) requires public service companies undertaking securities issuances to file "any additional information specifically requested of the company by the commission." This mandate is extremely broad and vague. Rather than repeating its arguments, QC refers the Commission to and incorporates its concerns regarding proposed WAC 480-120-X01, discussed above.

2. WAC 480-120-X03(2)

31 Proposed subsection (2) stems from RCW 80.08.040, which permits a public service company undertaking the issuance of securities to "***at any time*** of such filing [sic] request the commission to enter a written order that such company has complied with the requirements of [RCW 80.08.040]." The proposed rule appears to alter a utility's opportunity to obtain such a written order by requiring that the request be submitted, "along with a completed filing, at least ***fifteen business days*** before the requested effective date."

32 The use of "the requested effective date" is vague. If the proposed rule is referring to the requested effective date of a written order certifying conformance, then the rule should be clarified by adding "of the written order" after the words "the requested effective date." The current rule makes clear that a public service company seeking a written order of conformance must do so "fifteen working days prior to the requested effective date ***for a commission order.***"[17]

33 If, instead, the proposed rule is referring to the effective date of the securities issuance, QC urges rejection of proposed subsection (2). A fifteen business days advance filing requirement finds no support in the statute, as the legislature explicitly permitted utilities to request a written order of conformance "at any time." Furthermore, as discussed above with regard to the five day notice requirement in proposed subsection (1), the fifteen business days requirement serves no ostensible

[17] *WAC 480-146-320*.

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purpose, as the Commission can not prevent, alter or condition a public service company's securities issuance.

3. WAC 480-120-X03(4)

34 Subsection (4) seeks to mandate that, for each securities issuance, a public service company provide an accounting outlining the final terms of the transaction and setting forth the disposition of proceeds "stating the final amount to be used for each purpose." Once again, this proposed rule seeks to impose onerous reporting requirements not authorized or permitted by the legislature. The legislature specifically empowered the Commission to require an accounting in those cases in which the utility requests and receives a written order of conformance pursuant to RCW 80.08.040(4).[18] It provided no such authority generally. As such, the proposed accounting requirements would be unlawful.

35 In addition, the proposed rule would prove very difficult to implement. QC is not likely to know within 30 days of the issuance the precise use of each dollar raised through the securities issuance for long-term financing. As discussed above, QC may raise funds for allowed purposes through a securities issuance without knowing the precise maturities or capital projects for which it will use the funds. Thus, QC would likely not be able to comply with the proposed rule.

F. WAC 480-120-X04

36 Proposed WAC 480-120-X04 provides as follows:

> **WAC 480-120-X04 Transferring cash or assuming obligation.** (1) At least five business days before a Class A company, or any subsidiary of such a company, transfers cash to any of its affiliates or subsidiaries or assumes an obligation or liability of any of its affiliates or any of its subsidiaries, the company must report the amount and the terms of the transaction to the commission if:
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> (a) A single transaction amount exceeds five percent of prior calendar

[18] *RCW 80.08.090.*

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year gross operating revenue; or

(b) Cumulative transactions with all subsidiaries and affiliates, including the anticipated transactions, for the prior twelve months exceed five percent of prior calendar year gross operating revenue.

(2) The reporting requirement in this section does not include payments for:

(a) Federal income taxes;

(b) Goods, services, or commodities; or

(c) Transactions previously approved by the commission.

(3) This section does not apply to companies classified as competitive pursuant to RCW 80.36.320.

37 This proposed rule is the most distressing and troublesome, from QC's perspective. It far exceeds the Commission's statutory authority. Whereas the legislature required pre-filing for securities issuances (RCW 80.08) and affiliated interest transactions (RCW 80.16) and pre-approval for transfers of property (RCW 80.12), the legislature did not impose (or authorize the Commission to impose) pre-filing requirements for cash transfers. Lacking such authority, the proposed rule is simply *ultra vires*.

38 To the extent that such authority is claimed to exist under the affiliated interest statute (RCW 80.16), this proposed rule goes well beyond that statute's purview for a number of reasons. First, it seeks to regulate cash transfers, which have never been considered to constitute affiliated interest transactions in the past, and do not fit within the definition of such transactions under RCW 80.16.020.

39 Second, the proposed rule seeks to capture transfers between utilities and their subsidiaries despite the fact that RCW 80.16.010 does not cover transactions between public service companies and their subsidiaries.[19]

[19] That a subsidiary is not an affiliate under the public utilities statutes is confirmed by the proposed definition changes contained in proposed WAC 480-120-021. That section proposes to define affiliates and subsidiaries separately and does not include subsidiaries within the definition of an affiliate.

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40 Third, even more removed from any statutory authority is the language of proposed subsection (1) that requires filing notice of cash transfers made between a public service company's subsidiary and the subsidiary's affiliates or subsidiaries. Thus, the proposed rule would impose onerous filing requirements even in situations in which the public service company (the only company over which this Commission has jurisdiction) has no involvement in the cash transfer.

41 Fourth, the rule would appear to capture the dividending of cash from a public service company to its parent. This activity has never required Commission notification, and the statutes provide no support for imposition of such a requirement by the Commission. Absent express authority, commissions may not set conditions on dividends.[20] Corporate management must be able to retain its prerogative to design a dividend policy that is responsive to changes in circumstances. Without such management flexibility, corporations would be limited in their ability to raise capital, and would be unable to satisfy their obligations to shareholders.[21] Where commissions are allowed to interfere with a company's dividend policy, it has been under the express statutory authority and only for limited purposes.[22] If the legislature had intended the Commission to have authority in this area, it would have made a specific grant of such authority. However, it has not done so, perhaps recognizing that dividends are a matter that must be left to the company's business judgment and discretion.

42 Fifth, the rule appears to be an attempt to permit the Commission engage in regulating the multi-state cash management of utilities and their affiliates and subsidiaries. Such interference is not permitted. See section II.E.1(b) above.

43 In addition to the proposed rule being beyond the Commission's jurisdiction, its requirements would

[20] *See Utah Power & Light Co. v. Public Service Commission,* 107 Utah 155, 152 P.2d 542 (1944) (commission has no plenary authority to govern dividends).

[21] *See Federal Power Commission v. Hope Natural Gas Compan*y, 320 U.S. 591, 605 (1942) (commissions must "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.").

[22] *See Ohio Central Telephone Corp. v. Public Utilities Commission of Ohio,* 189 N.E. 650, 127 Ohio St. 556 (1934) (commission has statutory authority to prohibit dividends only where payments will cause deterioration of properties and impairment of services).

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prove extremely impractical and, more likely, impossible to implement. As written, the rule captures nearly all (if not all) of QC's cash transfers. QC has approximately $12 billion in gross revenues, 5% of which equates to approximately $600 million. QC has net income greater than $600 million. It dividends all of its net income to its parent company, Qwest Services Corporation ("QSC"). As a result, QC will always be above the 5% cumulative threshold unless an exclusion for dividends is added to the proposed rule. With QC perpetually above the 5% threshold, QC's operational cash balancing transfers between QC and QSC would likely constitute reportable cash transfers under the broad proposed rule. QC moves cash to and from money market accounts at QSC on a daily or intra-daily basis with the objective of having sufficient cash available to provide liquidity for timely payments to vendors, payroll, taxing entities, etc., while having excess cash reserves invested in money markets. Compliance with the five business day pre-notice requirement would be for all practical purposes impossible in the centralized cash management environment. It would also appear to be without benefit as well, as the Commission has (by statute) and claims (under the proposed rule) no right or power to prevent or restrict such inter-company cash transfers.

44 For all these reasons, QC urges the Commission to reject the proposed rule.

G. WAC 480-120-X05

45 Proposed WAC 480-120-X05 provides as follows:

> **WAC 480-120-X05 Affiliated interests—Contracts or arrangements.** ***At least five business days before the effective date*** of any contract or arrangement described in RCW 80.16.020, each telecommunications company subject to the provisions of chapter 80.16 RCW must file a verified copy or a verified summary, if unwritten, of contracts or arrangements with any affiliated interest. ***At least five business days before the effective date*** of any modification or amendment, the company must file verified copies of the modifications or amendments to the contracts or arrangements. If the contract or arrangement is unwritten, the company must file a verified summary of any modification or amendment. The commission may institute an investigation and disapprove the contract or arrangement if the commission

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finds the company has failed to prove that it is reasonable and consistent with the public interest. (emphasis added)

46 QC requests the Commission to remove the five business days notice requirements contained in the proposed rule. For the reasons discussed above with regard to the proposal to require five business days (or greater) filing requirements for securities issuances, this proposed rule is likewise inconsistent with state statute, which simply requires filing prior to the effective date of an affiliated interest transaction.[23]

47 In addition, as discussed above, the imposition of a five days notice requirement would prove extremely onerous for utilities attempting to comply. It would also serve no ostensible purpose given that the legislature did not empower the Commission to prevent, alter or condition affiliated interest transactions. Even should the Commission determine that a proposed affiliated interest transaction is unreasonable or inconsistent with the public interest, its sole recourse is to disapprove the contract or arrangement in a subsequent rate case.[24] Given its lack of authority to interfere with such a transaction, the proposed five days notice requirement offers no benefit to justify the burdens placed on utilities. QC recommends modifying the proposed rule to harmonize it with RCW 80.16.020 by requiring filing any time prior to the effective date of the subject affiliated interest transaction.

H. WAC 480-120-X06

48 Proposed WAC 480-120-X06 provides as follows:

WAC 480-120-X06 Transfers of property. Before selling, leasing, or assigning ***any of its property or facilities***, or before acquiring property or facilities of another public utility, a telecommunications company subject to the provisions of chapter 80.12 RCW must obtain from the commission an order authorizing such transaction in accordance with chapters 80.12 RCW (Transfers of property) and 480-143 WAC (Commission General—

[23] *RCW 80.16.020.*

[24] *RCW 80.16.020; proposed WAC 480-120-X05.*

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Transfers of Property). (emphasis added)

49 As drafted, the proposed rule exceeds the Commission's statutory purview by requiring pre-approval of all asset dispositions, regardless of whether the subject assets are necessary or useful in the performance of the utility's duties to the public. It is therefore unlawful.[25]

50 RCW 80.12.020 requires pre-approval (of the type contemplated by this proposed rule) when a public service company intends to sell, lease, assign or otherwise dispose of its franchises, properties or facilities ***if*** such franchises, properties or facilities are "necessary or useful in the performance of its duties."[26] Pre-approval is also required when a public service company acquires any franchises, properties, facilities, capital stock or bonds of another public service company, regardless of whether the properties, etc. are "necessary or useful."[27] The attempt to roll both pre-approval requirements into a single rule is thus problematic given that the breadth of the Commission's oversight differs between the two types of transactions. QC would recommend breaking this proposed rule into two separate rules worded in a manner consistent with the respective statutory schemes.

I. WAC 480-120-X07

51 Proposed WAC 480-120-X07 provides as follows:

> **WAC 480-120-X07 Securities report.** Each telecommunications company subject to the provisions of chapter 80.08 RCW that has issued securities during the prior year, must file with the commission by April 1 of each year an annual securities transaction report. At a minimum, the report must contain:
>
> (1) A detailed description of the final agreements;
>
> (2) A description of the use of proceeds stating the amounts used for each purpose;

[25] RCW 80.12.050 empowers the Commission only to "promulgate rules and regulations to make effective the provisions of [chapter 80.12]." The legislature did not provide the Commission the power to impose more broader pre-approval requirements on public service companies.

[26] The Commission's rules clarify that, for purposes of RCW 80.12.020, property is not "necessary or useful" if it is excluded from the public service company's rate base, by order or otherwise. *WAC 480-143-180(4).*

[27] *RCW 80.12.040.*

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(3) The level of expenses for each of the securities transactions for the year ending December 31;

(4) Information to determine the individual and collective impact on capital structure; and

(5) The pro forma cost of money for the securities transactions.

52 QC notes that this proposed rule largely carries forward the annual reporting requirements of WAC 480-146-340. The one exception is that it expands the reporting requirements with regard to the description of the use of proceeds. Under the current rule, a utility is required to provide a "description of the use of proceeds." Consistent with proposed WAC 480-120-X03, the proposed WAC 480-120-X07 stretches that reporting requirement and adds that utilities must specifically describe and allocate the use of the funds for each specific purpose. As discussed above with regard to proposed WAC 480-120-X03, this new paradigm of requiring hyper-specific forecasting and reporting is not mandated by the statute and bears no relationship with how businesses such as QC manage cash and investments. Implementation of such a rule would be near impossible, setting companies up to fail from the outset. QC recommends that the Commission carry forward the language of WAC 480-146-340(2)(b) and continue to require that annual securities reports simply describe the use of proceeds.

J. WAC 480-120-X08

53 Proposed WAC 480-120-X08 provides as follows:

WAC 480-120-X08 Affiliated interest and subsidiary transactions report. (1) By June 1 of each year, each telecommunications company subject to the provisions of chapter 80.16 RCW must file a report summarizing all transactions that occurred between the company and its affiliates, and the company and its subsidiaries, during the period January 1 through December 31 of the preceding year.

(2) The information required in this subsection must be for total company and for state of Washington. The report must include a corporate organization chart of the company and its affiliates and subsidiaries and a

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balance sheet and income statement for each affiliate. In addition, the report must contain the following information for each affiliate and each subsidiary that had transactions with the company during the preceding year:

(a) A description of the products or services to or by the company and its affiliates, and the company and its subsidiaries;

(b) A description of the pricing basis or costing method, and procedures for allocating costs for such products or services, and the amount and accounts charged during the year;

(c) A description of the terms of any loans between the company and its affiliates and the company and its subsidiaries and a listing of the year-end loan amounts and maximum loan amounts outstanding during the year;

(d) A description of the terms and maximum amount of any obligation or liability assumed by the company for any affiliate or subsidiary;

(e) A description of the terms of cash transfers between the company and its affiliates and its subsidiaries including the total amounts transferred from the company to its affiliates or subsidiaries and from the affiliates or subsidiaries to the company;

(f) A description of the activities of the affiliates and subsidiaries with which the company has transactions; and

(g) A list of all common officers and directors between the affiliate and subsidiary companies and the telecommunications company along with their titles in each organization.

(3) The report required in this section will supersede the reporting requirements contained in previous commission orders authorizing affiliated interest transactions pursuant to chapter 80.16 RCW.

(4) The company is obligated to file verified copies of affiliated interest contracts and arrangements as stated in WAC 480-120-X05 (Affiliated interests—Contracts or arrangements).

54 With a couple of important exceptions, this proposed rule carries forward the annual reporting requirements found in current WAC 480-146-360. Those two exceptions, however, merit discussion. First, subsidiary transactions would now need to be reported in the annual report. As discussed above, the enabling statute (RCW 80.16) does not permit the Commission to regulate subsidiary transactions. As such, the Commission lacks the authority to adopt a rule requiring

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subsidiary reporting.

55 Second, subsection (2)(e) imposes annual reporting regarding cash transfers. For the reasons discussed above, the Commission is not permitted to regulate inter-company, multi-state cash management of utilities and their family of companies. Not only is this new requirement without statutory support, it would prove incredibly onerous. Whereas it appears that a limiting standard (albeit not one meaningful in the case of QC) was included in proposed WAC 480-120-X04 (5% of gross operating revenue), no such limiting standard is proposed in this rule. As a result, this new provision would require reporting of scores of cash transfer transactions. Especially in light of the fact that the Commission has no authority to take action against a public utility in connection with its cash management, such an unmanageable and overly burdensome requirement would appear to serve no beneficial purpose. The Commission should remove subsection (2)(e) from the proposed rule.

III. CONCLUSION

56 QC appreciates the opportunity to comment on the proposed rules. QC has an excellent record of abiding by this Commission's asset transfer, affiliated interest and securities issuance filing requirements, and in many cases, of going beyond those requirements to proactively offer information to the Commission.

57 QC acknowledges that the Commission has an interest in monitoring the financial activities of the companies it regulates. QC urges the Commission, however, to be mindful of the legal and practical limitations on its authority and on the ability of this state's utilities to comply with onerous reporting requirements.

RESPECTFULLY SUBMITTED this 16th day of January, 2004.

QWEST

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ATTACHMENT A

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