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 July 2, 2004 Notice of Opportunity to Comment in conjunction with the draft financial reporting rules.

I. INTRODUCTION

2 QC summarized the progression of Staff's rule proposal drafts and QC comments in its May 18, 2004 comments,[1] at ¶¶2-4. On July 2, 2004, the Commission Staff issued another draft set of rules and called for written comments by July 16. Staff also requested interested parties to complete Small Business Economic Impact Surveys ("SBEIS"). In the notice associated with the SBEIS, Staff noted that a "small business" is a company with fifty or fewer employees. Because QC is not a small business, as defined under RCW 19.85.020(1),[2] and because QC has

[1] For ease of reference, QC's May 18 comments are attached hereto as Exhibit 1. QC's January 18, 2004 comments are attached as Exhibit 2.

[2] A "small business" is defined by statute as "any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses and that has fifty or fewer employees.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

already submitted comments outlining (in addition to its legal and policy arguments) the practical and tangible costs to be imposed on utilities should the proposed rules be adopted,[3] QC has not completed an SBEIS.

3 Staff's July 2 draft, while improved in a couple of respects discussed below, remains deeply flawed and, in many respects, unlawful. Staff's proposals, which in many ways grew more troublesome in the current draft, attempt to expand the Commission's jurisdiction beyond the authority granted by the legislature. QC further objects to the proposed rules as they continue to conflict with other legal obligations utilities face and impose undue burdens on utilities without any corresponding benefit to consumers.

4 To avoid duplication, QC will primarily respond to the current draft by referring to QC's earlier comments, which are attached. The remainder of these comments will focus on proposed rule changes that appear for the first time in Staff's current draft. The Commission should not interpret QC's abbreviated approach as an indication that QC has grown more comfortable with the proposed rules. Quite to the contrary, QC remains wholly opposed to many of the proposals, many of which are not only imprudent and unduly burdensome, but are simply contrary to law. And, assuming the Commission adopts the rules (as proposed) and assuming they survive legal challenge, many of the rules will be difficult, if not impossible, to comply with. QC, again, urges the Commission to reject or modify the proposed rules discussed herein.

II. COMMENTS

A. Chapter 480-146 WAC

5 *See Ex. 1, ¶5; Ex. 2, ¶4.* QC remains concerned that Staff may be deleting chapter 480-146 as

[3] For example, in its May comments, QC provided the specific example of how premature disclosure of an impending securities issuance (even if disclosed only in general terms) could very realistically cost QC $20 million. *Ex. 1, ¶25.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

cover for expanding reporting requirements beyond the Commission's statutory limits.

B. WAC 480-120-015

6 *See Ex. 1, ¶¶6-7.* While this issue is relatively minor in comparison to the rules discussed below, QC reiterates that an allusion to WAC 480-07-110 (a procedural rule permitting parties to seek waiver of procedural requirements) is confusing. QC's suggested language is provided in Ex. 1, ¶7.

C. WAC 480-120-325

7 In its May comments, QC criticized the proposed definitions of "control" and "subsidiary" because those definitions contained no objective factors, but instead relied entirely on subjective evaluations of influence to determine whether a company should be deemed a "subsidiary" of a utility. *Ex. 1, ¶¶8-14.* The current proposed rule is slightly improved, in that it ensures that no company will be deemed a subsidiary of a utility if the utility owns less than five percent of the voting stock in the company. At or above five percent, an evaluation of whether the utility "controls" the company is then necessary, with the presumption being that the company is controlled by (and is thus a "subsidiary" of) the utility.

8 QC appreciates the inclusion of objective criteria, but reiterates its January comments that five percent is likely an inappropriate threshold. *See Ex. 2, ¶¶10-11.* Further, QC notes that the new definition of "control" is as ambiguous and imprecise as was the April 2004 version. The inclusion of "or any other direct or indirect means" renders the definition vague, subjective and unenforceable. Again, QC refers the Commission to its May comments. *Ex. 1, ¶¶11-14.*

D. WAC 480-120-331 (formerly WAC 480-120-X01)

9 *See Ex. 1, ¶15.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

E. WAC 480-120-365 (formerly WAC 480-120-X03)

10 *See Ex. 1, ¶¶16-32; Ex. 2, ¶¶15-35.* This proposed rule remains extremely concerning to QC, especially with regard to the five business day notice requirement.

11 QC will take the opportunity, however, to address one problematic change found in the current draft.[4] In the current draft, Staff revised the contents of the required notice due five business days before securities are issued. The current language is confusing and, as discussed at length in QC's earlier comments, seems to require the impossible and imprudent – identification of or speculation about the terms of a financing transaction five business days before such transaction closes.

12 Staff's April 2004 draft required filing of the following information.

> (1) At least five business days, as defined in WAC 480-07-120 (Office hours), before a telecommunication company subject to the provisions of chapter 80.08 RCW undertakes to issue stocks, stock certificates, other evidence of interest or ownership, bonds, notes, or other evidences of indebtedness, or assumes any obligation or liability as guarantor, the company must file with the commission:
>
> (a) A description of the proposed issuance;
>
> (b) An estimate of the anticipated proceeds from the issuance;
>
> (c) A description of the purposes for which the issuance will be made, including a certification by an officer authorized to do so, that the proceeds from any such financing is for one or more of the purposes allowed by RCW 80.08.030; and
>
> (d) A statement as to why the transaction is in the public interest.
>
> (2) Before issuance of the proposed security, the company must file with the commission the terms of financing.

[4] In addition to the problematic change to be discussed, Staff also moved away from the use of the term "undertakes to issue" as a triggering event for reporting. In its May comments, QC noted the problems with that term (*Ex. 1, ¶19*), and QC appreciates Staff's removal of the term in the current draft.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

13 In the current draft, Staff changed course. The current proposal requires filing of the following.

> (1) At least five business days, as defined in WAC 480-07-120 (Office hours), before a telecommunications 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, the company must file with the commission:
>
> (a) A description of the purposes for which the issuance will be made, including a certification by an officer authorized to do so, that the proceeds from any such financing is for one or more of the purposes allowed by RCW 80.08.030;
>
> (b) A description of the proposed issuance, ***including the estimated terms of financing***; and
>
> (c) A statement as to why the transaction is in the public interest.
>
> (2) Before issuance of the proposed security, the company must file with the commission the terms of financing.

14 From QC's perspective, subsection (1)(b) of the current draft is vague, especially in its use of the phrase "the estimated terms of financing." QC fails to understand what is being required, how it differs from what would have been required under Staff's April 2004 draft and how the information required under subsection (1)(b) differs from the information required under subsection (2).

15 QC also observes that Staff's use of "estimated terms of financing" may have been in response to a suggestion by Verizon in its May 18, 2004 comments. If so, however, Staff (perhaps inadvertently) has misapplied Verizon's recommendation. In its brief comments, Verizon recommended that *subsection (2)* be revised as follows:

> Before issuance of the proposed security, the company must file with the commission the estimated terms of financing.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

16 QC agrees with Verizon's recommendation, and notes that Staff apparently misapplied Verizon's recommendation by adding "estimated terms of financing" to subsection (1)(b), the subsection requiring notice five business days before issuance of securities. Verizon quite clearly recommended the use of that term in subsection (2), referring to the notice required (immediately) before issuance of the securities.

17 In sum, QC continues to strongly oppose adoption of this proposed rule, which exceeds the Commission's jurisdiction, is vague, is potentially in conflict with federal law and imposes impractical burdens and costs without any corresponding benefit.

F. WAC 480-120-369 (formerly WAC 480-120-X04)

18 *See Ex. 1, ¶¶33-42; Ex. 2, ¶¶36-44.* Again, QC will not repeat its prior comments, but instead requests that the Commission review and consider them in evaluating the current draft. In short, QC remains extremely opposed to this rule, as it is both unlawful and deeply flawed.

19 As it did with regard to proposed WAC 480-120-365, QC will focus in these comments solely on the aspects of this proposed rule that have changed since Staff's April draft. There appear to be three substantive changes to the proposed rule.

20 First, Staff added subsection (1)(c). While QC remains wholeheartedly opposed to this rule, QC acknowledges that (1)(c) is a step in the right direction. In its May comments, QC suggested that, as drafted, the cumulative trigger (for determining when cash transactions must be preceded by notice to the Commission) was flawed. QC noted that once the cumulative trigger is satisfied, every non-exempt cash transaction – no matter how small – would trigger a required filing. QC suggested that a second component be added to the cumulative trigger such that, once the trigger is satisfied, only large subsequent transactions require notification. *Ex. 1, ¶39.* Subsection (1)(c) appears to be aimed at that purpose. While QC appreciates Staff's recognition of QC's concern, the language of subsection (1)(c) should be clarified. It is

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

unclear why subsection (1)(c) includes a reference to subsection (1)(a), which requires notice of any cash transfer in excess of two percent of the company's prior calendar year's operating revenue. Subsection (1)(c) purports to limit the universe of subsection (1)(a) transfers that need to be filed to those exceeding one percent of the company's prior calendar year's operating revenue. QC does not understand how one could ever satisfy (1)(a) [2%] without also satisfying (1)(c) [1%]. As such, the limiting effect apparently intended by subsection (1)(c) is wholly ineffective (as drafted) vis-à-vis subsection (1)(a).

21 The second and far more troubling change reflected in the current draft is that Staff significantly lowered the bar with regard to the size of reportable transfers – dropping the requirement by 60% from 5% of operating revenue to 2%. *See proposed WAC 480-120-369(1)(a)-(b).* As is true with regard to all Staff changes and proposals, because the proposed rules are not accompanied by explanatory text, QC has no insight as to why Staff believed it was necessary to lower the bar so significantly.

22 Finally, QC notes that the cumulative trigger found in subsection (1)(b) has been significantly altered. In the March 2004 draft, the cumulative trigger required reporting of cash transfers if "such transaction, together with *all transactions with such subsidiary or affiliated interest* over the preceding twelve months, exceeds five percent of prior calendar year gross operating revenue." It appears that Staff revised the trigger to capture (and require reporting of) all transfers "if the cumulative transactions for the prior twelve months exceed a threshold of two percent." Separate and apart from the bar being lowered from 5% to 2% (as discussed above), Staff inexplicably lowered the cumulative trigger by lumping together all non-exempt cash transfers between a utility and all its subsidiaries and affiliates. This is a substantial change and one that will likely dramatically increase the number of required filings.

23 Again, QC, having no insight as to why Staff changed course so dramatically, is at a loss for

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

how to respond, other than to opine that Staff's proposals are moving rapidly in the wrong direction. They are moving in the direction of more time-consuming, impractical and purposeless reporting that will not benefit consumers to any degree more than would a rule requiring post-hoc filing or annual reporting, to the extent any reporting requirement is lawful and survives challenge in court. While QC will resist the temptation to walk through all the reasons why this proposed rule is impractical and unlawful, we urge the Commission, in summary, to review QC's earlier comments and to reject the proposed rule entirely.

G. WAC 480-120-395

24 *See Ex. 1, ¶¶43-44.*

III. CONCLUSION

25 Again, QC appreciates the opportunity to comment on the proposed rules. QC looks forward to the opportunity to discuss these rules with the Commissioners at the July 28 open meeting.

RESPECTFULLY SUBMITTED this 16th day of July, 2004.

QWEST CORPORATION

____

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
Qwest
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500
Attorneys for Qwest Corporation