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Via E-Mail and
Hand Delivery

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Re: Docket No. A-021178 - Financial Reporting Rulemaking
Qwest Corporation's Supplemental Comments

Dear Ms. Washburn:

On July 21, Qwest met individually with the Commissioners to discuss the above-referenced rulemaking docket. During one of those meetings, Chairwoman Showalter asked for additional information regarding the securities law concerns implicated by the Commission's draft securities issuance rule, WAC 480-120-365.

In response to the Chairwoman's inquiry, Qwest does not contend that this is a crystal clear, black-and-white legal issue. Federal law does not squarely resolve whether pre-filing with the Commission under draft WAC 480-120-365 violates the securities laws referenced below, although we believe that it is clear that there are no express exemptions available for compliance with state law requirements.

In Qwest's view, there are three securities law legal principles implicated by the Commission's draft securities issuance rule. They are: "gun jumping" (registered offerings); public solicitation (Private Offerings; e.g., 144A); and insider Trading and Regulation FD (all offerings). Each will be discussed in turn below.

Gun Jumping

"Gun jumping" is the term commonly used to refer to the act of making a premature or otherwise improper offer to sell securities in an offering that is registered with the SEC. The legal source for this restriction is Section 5 of the Securities Act of 1933 (the "*1933 Act*"), which generally makes it illegal for companies to make any written offers of securities other than through a prospectus that complies with the requirements of the securities laws.[1]

The SEC interprets "offers" in the broadest sense. For example, in *Carl M. Loeb, Rhoads & Co., 38 S.E.C. 843 (1959)*, the SEC held that use of a press release relating to an offering was a violation of Section 5 because it was deemed too promotional. Also, in October 1999 the SEC delayed the initial public offering of a company named Webvan Group Inc. due in part to the amount of media attention the SEC felt the company was soliciting.[2]

Qwest believes it is very possible that the SEC could take the position that the notice being provided to the Commission under the draft securities issuance rule constitutes a written offer, especially if the notice is published or is obtainable by the public and receives significant media attention. In that event, Qwest could in theory be subject to exposure from a violation of Section 5, as there is no exemption available for disclosures made pursuant to state statute or rule. The SEC could force a delay of the offering or bring an action against Qwest, and purchasers in the offering might also have actionable claims against Qwest.

Public Solicitation

Rule 144A offerings are private offerings that are not registered with the SEC, thereby allowing for greater flexibility in timing and structure of the transaction. They are made possible by reliance on an exemption from the registration requirements of Section 5 of the 1933 Act that that relates to securities transactions "not involving any public offering".[3] To ensure compliance with this exemption, a company must be careful not to engage in public solicitation that would cause a transaction to be deemed a public offering.[4] If it is deemed to engage in public solicitation, it may not be able to rely on the private offering exemption from the registration requirements of Section 5, resulting in a violation of that statute.

Public solicitation can be deemed to occur as a result of almost any type of public statement about a transaction that exceeds strict parameters provided by the SEC in Rule 135(c) under the 1933 Act. This safe harbor rule provides that a company will not be deemed to have engaged in public solicitation if any notice it provides of the transaction contains only certain limited

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1 Section 5 of the 1933 Act.

2 Carrie Lee, Heard on the Net: Webvan IPO Stirs Up Noise, But Investors Have To Wait, Wall St. J. Interactive Ed., Oct. 7, 1999.

3 Section 4(2) of the 1933 Act

4 Rule 502(c) under the 1933 Act.

information, such as the name of the company and the title, amount, timing, purpose and basic terms of the offering. Rule 135(c) provides no allowance for disclosures made pursuant to a state statute or rule.

If the Commission's rules are ever interpreted to require more than the limited information provided for in Rule 135(c), Qwest could no longer rely on the protection of the safe harbor rule and would again be exposed to claims from investors or the SEC for a violation of Section 5. This risk is only increased with any publicity of the offering that results from the Commission's inquiry**.**

Insider Trading and Regulation FD

As the Commission may be aware, advance notice of a securities issuance will in most cases constitute material, non-public information, and trading while in possession of such information is generally prohibited by Rule 10b-5 under the Securities Exchange Act of 1934. If QC is able to file the requisite information on a confidential or highly confidential basis, all those at the Commission with access to this information will become insiders under Rule 10b-5. In such a case, QC would require the Commission's cooperation in maintaining the confidentiality of the information. Qwest would also require the Commission's assistance in prohibiting all those with access to it from trading in Qwest securities until the information is made public at the time of the transaction or from communicating such information to others to avoid making those other persons insiders.

If the information is not held confidential, then Qwest would be compelled to file a press release or make an SEC filing to release the information publicly in order to ensure compliance with the requirements of Regulation FD, which requires that material inside information be disclosed to all investors concurrently.[5] This public release would only exacerbate the practical concerns previously discussed with the Commission surrounding the impact that premature public disclosure of an offering could have on the success of such offering.

Qwest is extremely cautious about maintaining compliance with federal securities laws. As a result, even a potentially remote risk of breaching these laws is cause for real concern given the scrutiny Qwest is under. Nor do we believe there can be any presumption that the SEC or the courts will defer to the Commission's rulemaking in a question of conflicting requirements that Qwest may face. As noted above, there is no exemption in the securities laws for compliance with state authorities. In fact, state laws that have the effect of regulating the types of securities transactions discussed herein are expressly preempted by the federal securities laws.[6]

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[5] Rules 100-103 under Regulation FD.

[6] Section 102 of the National Securities Market Act of 1996.

In light of the above concerns, we believe that adoption of draft WAC 480-120-365 in the form currently contemplated could place Qwest in the difficult situation of determining in future offerings whether it could safely comply with the Commission's requirements.

Copies of the authorities cited herein are attached for your reference and review.

Sincerely,

Adam L. Sherr

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