BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. GRASSHOPPER GROUP, LLC, Respondent.	DOCKET UT-132153 RESPONSE OF COMMISSION STAFF TO RESPONDENT'S MOTION FOR DISMISSAL

I. BRIEF STATEMENT OF FACTS

1 The Washington Utilities and Transportation Commission (UTC or Commission) brought a complaint (Complaint) against Grasshopper Group LLC (Grasshopper or Company) on April 16, 2014, seeking penalties for failure to file an accurate and timely 2012 Annual Report as required under RCW 80.04.080 and WAC 480-120-382. In the Complaint, UTC Staff (Commission Staff or Staff) principally alleges that Grasshopper filed an inaccurate report and paid incorrect regulatory fees on April 30, 2013, and the Company did not file a revised report until August 9, 2013. Grasshopper filed an answer to the Commission's complaint as well as a motion to dismiss for failure to state a claim. The present document represents Commission Staff's response to Grasshopper's dispositive motion.

II. DISPOSITIVE MOTIONS

2 Under WAC 480-07-380(1), a party may file a motion to dismiss for failure to state a claim upon which the Commission may grant relief. In considering the motion, the Commission will consider standards applicable to civil court proceedings under CR 12(b)(6)

and 12(c). *Id.* The Commission must accept as true both the complainant's allegations and any reasonable inferences to be drawn from those allegations. *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998). Dismissal is only appropriate if the facts alleged in the complaint could not result in sanctions. *Id.* at 336.

3 If a company files a motion for dismissal and includes supporting materials, the Commission will concurrently treat the motion for dismissal as a motion for summary determination. WAC 480-07-380(1)(a). In considering a motion for summary determination, the Commission will consider standards applicable to civil court proceedings under CR 56. *Id.* Summary determination is appropriate where there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. WAC 480-07-380(2)(a).

III. SUMMARY OF STAFF'S POSITION

4 The Commission's complaint represents an appropriate interpretation of RCW 80.04.080 and WAC 480-120-382, and the Commission has authority under RCW 80.04.380 to issue penalties for any violation of applicable statute or Commission rules. Therefore, the complaint is valid under statute and the Commission should reject Grasshopper's dispositive motion.

5 Grasshopper principally relies on two types of argument in support for its motion to dismiss or, in the alternative, its motion for summary determination. First, the Company incorrectly interprets the Commission's reporting statutes and rules to exclude a requirement for accuracy. Previous Commission language, the Commission's regulatory function, and the legal principle to avoid absurd results each contradict Grasshopper's position. Second, Grasshopper makes factual arguments as to its good faith efforts, reasonableness, and the

immateriality of its mistake. Commission Staff disputes these factual assertions and has not stipulated to any of the Company's positions.[1] Grasshopper's factual arguments are properly viewed as factual arguments to mitigate any potential penalty, and the proper forum for such arguments is an evidentiary hearing. Therefore, the Company's positions in its dispositive motion do not support a motion to dismiss a statutorily valid claim nor a motion for summary determination.

6 In an effort to promote legibility and cogency, Staff has largely attempted to respond to each of Grasshopper's arguments in the order in which those arguments were presented in the Company's motion.

IV. RELIEF REQUESTED

7 Commission Staff requests the Commission deny Grasshopper's motion to dismiss and allow the parties to continue to an evidentiary hearing.

V. ARGUMENT

A. WUTC Lacks Jurisdiction over Grasshopper's Traffic.

1. Voluntary Submission to Commission Jurisdiction

8 Grasshopper voluntarily submitted itself to the Commission's regulatory jurisdiction as it relates to reporting obligations; to hold otherwise would allow registered companies themselves to pick and choose which Commission regulations apply and when compliance is required. Such an interpretation would result in absurd consequences and place significant administrative burdens on the Commission.

[1] Staff's investigation report disputes several of the Company's statements in its answer and motion such as Grasshopper's delayed responses to requests and the materiality of a misstatement of gross revenue in an annual report. Staff's position is that a misstatement of gross revenue and financial performance is inherently a material inaccuracy.

9 Neither party disputes that Grasshopper voluntarily registered with the UTC in December 2009. The Commission granted Grasshopper's registration and promptly notified the Company of its reporting obligations as a competitively classified exchange carrier.[2] Under RCW 480-120-382, all competitively classified telecommunications companies must file annual reports and pay regulatory fees by May 1 of each year. Grasshopper presumably accepted the benefits of the Commission's imprimatur and thus accepted the limited corresponding obligations.

10 The Company's motion effectively argues that the Commission has the jurisdiction to allow state-registration, but the federal regulatory regime preempts any state-level jurisdiction to impose even minimal reporting obligations and related penalties. Such an interpretation would lead to an absurd result in permitting companies to register and then determine themselves whether it is necessary to comply with state statutes and Commission reporting rules. Each registered company would then be able to file or not file any documents it chooses at any time it chooses, thus subjecting the Commission to varying interpretations and increased administrative costs. Erratic and inaccurate filings serve no regulatory purpose and directly inhibit the Commission's ability to fulfill its regulatory functions as well as its responsibility as a store of public information.[3]

11 Once VoIP providers voluntarily register with the UTC, those companies submit to the Commission's jurisdiction as it relates to annual reporting requirements.[4] Therefore, because the Company voluntarily registered, this matter is narrowly focused solely on Grasshopper's 2012 Annual Report and whether the Company filed that report accurately

[2] See Appendix A, letter from Dave Danner, executive director.
[3] Public Records Act requires all state agencies, including UTC, to effectively retain and manage records so as to make them available for public inspection and requests. *See generally* RCW 42.56.
[4] Reporting obligations apply as long as the company remains registered.

and in a timely fashion. The Company's jurisdictional arguments are not applicable and do not support a dispositive motion.

2. At Minimum, Grasshopper's Jurisdictional Arguments and Subsequent Deregistration should be Determined in a Separate Filing

12 UTC Regulatory Services Staff handle jurisdictional and deregistration filings. The subject of the current complaint is a basic annual reporting requirement set out in RCW 80.04.080 and WAC 480-120-382, and the investigation derived entirely from the Commission's Consumer Affairs Division. A determination of the Commission's jurisdiction and a company's potential deregistration requires a detailed analysis; such an analysis should take place over an appropriate time period rather than in a response to a motion to dismiss and should include the appropriate regulatory staff with experience and expertise in making such a determination.

13 The present motion, with its associated time limits and lack of regulatory staff involvement, does not represent an appropriate forum to litigate the very complex issues surrounding federal and state jurisdictional limitations as they relate to VoIP providers. If Grasshopper intends to pursue deregistration on the basis that the Commission lacks jurisdiction, the Commission should require the Company to pursue its goal in a separate filing independent of this complaint.

B. WAC 480-120-382 and RCW 80.04.080 Include an Accuracy Requirement and do not Violate Due Process.

14 The requirement for accuracy inherent in RCW 80.04.080 and WAC 480-120-382 passes the common intelligence test[5] and does not violate due process. Under WAC 480-

[5] As Grasshopper accurately discussed in its motion for dismissal, due process requires that a statute or rule give fair notice of what is required. Washington employs the common intelligence test, which simply asks whether a person of common intelligence would understand a statute's or rule's requirements. *Gibson v. City of Auburn*, 748 P.2d 673 (Wash. App. 1988).

120-382, competitively classified telecommunications companies must file annual reports by May 1 of each year. RCW 80.04.080 requires public service companies to provide annual reports, answering all questions "propounded by the Commission." Furthermore, the annual report form requires a certification from a company representative that the information included in the report is a true and correct reflection of the company's business.[6] Annual reports must also include the company's annual revenues.[7] The specificity and demand for responses to the Commission's questions strongly support the common sense proposition that reporting obligations include an accuracy requirement. Previous Commission orders as well as the potential for absurd results in light of the Commission's regulatory function further demonstrate that the rule and the statute require filings to be accurate.

15 First, an interpretation that RCW 80.04.080 and WAC 480-120-382 allow inaccurate filings would necessarily lead to absurd results. Washington Courts interpret statutes so as to avoid absurd consequences. *E.g.*, *Upjohn v. Russell*, 658 P.2d 27 (Wash. Ct. App. 1983); *State v. Contreras*, 880 P.2d 1000 (Wash. 1994). If RCW 80.04.080 and WAC 480-120-382 did not include an accuracy requirement, companies would literally be able to file almost any documentation or figures without regard to accuracy.[8] Inaccurate annual reports have no use to the Commission or the public. Inaccurate reporting also contravenes the Commission's fundamental regulatory function to serve in the public interest. The Commission would be unable to analyze companies and markets or effectively respond to public inquiries if it could not rely on the accuracy of reports filed by regulated entities. As Grasshopper acknowledges in its motion, the Commission simply does not have the

[6] Grasshopper's certification as part of its 2012 Revised Annual Report is included as Appendix B.
[7] RCW 80.04.080 requires companies' annual reports to respond to all questions from the Commission, but the statute also expressly lists earnings from all sources as an item "such annual reports shall show."
[8] For example, absent an accuracy requirement, regulated companies could file financial documentation from a subsidiary or even a completely non-related company and still be in compliance with Commission rules.

resources to audit all financial data from regulated companies and must rely on the public service companies to provide accurate information.[9] In addition to the Commission's need for accuracy, other state agencies also rely on the accuracy of reports filed with the UTC, further strengthening Staff's position that reporting obligations fundamentally require accuracy. *See Diamond Point Water Co. v. Linda Owings S. RosenBurgh, Clallam County Assessor*, Board of Tax Appeals, 1998 WL 1166940.

16 Second, previous Commission orders further support an accuracy requirement. In a previous order accepting a settlement agreement, the Commission expressly noted that the parties agreed that the annual reporting statutes and rules require accurate financial records.[10] *Washington Utilities and Transportation Comm'n. v. Qwest Corp*, 2004 WL 3159259 (Wash. U.T.C.).[11] The Commission has also granted extensions for various regulated companies to file annual reports on the grounds that the companies needed more time to ensure the report would be accurate. *E.g.*, *MasterCall Communications Inc.*, 2010 WL 1545083 (Wash. U.T.C.); *Roche Harbor Water System, Inc.*, 2009 WL 1384073 (Wash. U.T.C.). The Commission's prior language provides additional notice of the requirement for company reports to be accurate, and various companies' actions demonstrate that an individual of common intelligence already perceives the Commission's reporting obligations to include an accuracy requirement.

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[9] Memorandum of Law in Support of Motion to Dismiss of Grasshopper Group, LLC, p. 16, ¶37.

[10] The full statement reads: "The parties also note that, while the statutes and laws require accurate financial records and reporting, not all matters requiring correction are intentional or extraordinary, as corrections to reports are anticipated and even required by law." The settlement agreement between Staff and the Company goes on to state that not every mistake is a "per se violation." Although a settlement agreement is not binding in the current matter, Staff's position is that the intent and the materiality of an inaccuracy are necessarily factual determinations for mitigating a potential penalty but do not remove the accuracy requirement in companies' reporting obligations.

[11] Docket UT-032162, Final Order ("Order No. 03").

17 Given past Commission language and the absurdity of any interpretation that would allow regulated entities to file inaccurate information, an individual of common intelligence would recognize the accuracy requirement included with reporting obligations under RCW 80.04.080 and WAC 480-120-382.[12] The fact that several regulated companies have sought extensions to file reports on the basis that they needed more time to verify a report's accuracy provides additional evidence that persons of common intelligence already understand UTC reporting obligations to include an accuracy requirement. Therefore, company reports filed under RCW 80.04.080 and WAC 480-120-382 must be accurate, and the accuracy requirement does not fail the common intelligence test nor violate due process.

18 Grasshopper's arguments rely on a misinterpretation of RCW 80.04.080 and WAC 480-120-382 and an inaccurate application of Washington State's common intelligence test. Therefore, Grasshopper is not entitled to judgment as a matter of law and, the Commission should reject the Company's position and its dispositive motion.

C. Grasshopper's Arguments that Commission Staff is Unfairly Singling the Company out Despite Good Faith Compliance Efforts are not Relevant Support for a Dispositive Motion.

19 Arguments relating to unfairness or good faith efforts are disputed factual assertions that go to mitigating a potential penalty but do not support a motion for summary determination. Grasshopper's argument for summary determination necessarily relies on disputed facts such as materiality, its own good faith, and promptness in responding to the Commission. Disputed factual assertions to mitigate penalties should be brought forward at

[12] As Grasshopper accurately discussed in its motion for dismissal, due process requires that a statute or rule give fair notice of what is required. Washington employs the common intelligence test, which simply asks whether a person of common intelligence would understand a statute's or rule's meaning. *Gibson v. City of Auburn*, 748 P.2d 673 (Wash. App. 1988).

the evidentiary hearing, but are not sufficient to support a motion for summary determination.

20 Additionally, a complaint authorized by statute is not subject to a motion to dismiss for failure to state a claim. Commission Staff has authority to pursue violations of RCW Title 80 and Commission rules. Under RCW 80.04.380, the Commission may pursue penalties up to $1,000 for every violation of an applicable statute or Commission rules. Each day's continuance of a violation represents a separate and distinct violation. *Id.* Statutorily authorized penalties and complaints alleging a violation of applicable laws and rules are valid and not subject to dismissal for failure to state a claim.

21 In the present matter, Commission Staff is pursuing a reporting violation and a penalty within the amount and terms proscribed by RCW 80.04.380. Therefore, Staff is acting within its legitimate and statutorily-defined regulatory role. The Company's arguments of unfairness and being singled out do not support any form of dispositive motion.

22 The Company incorrectly relies on several past cases to argue that the Commission is acting unfairly or in contrast to precedent. Each of the cases cited in Section D of the Company's Memorandum of Law can be distinguished or shown to be irrelevant.[13] *In State ex rel. Clear Lake Lumber Co. v. Kuykendall*, the public works department refused to allow the regulated entity to correct an error that resulted in tariff rates which the local government knew were unreasonable. 228 P. 853 (Wash 1924). The Supreme Court ruled that the agency's action was arbitrary. In the present case, Staff itself notified Grasshopper of the inaccuracies and required the Company to correct its filings. Staff is not attempting to force Grasshopper to operate at a loss, accept reduced tariff rates, or preventing the Company

[13] Memorandum of Law in Support of Motion to Dismiss of Grasshopper Group, LLC, pp. 15-20.

from correcting its mistakes. Staff is requiring the Company to file accurate and timely documents and seeking penalties allowed under statute for Grasshopper's failure to do so. Staff's adherence to the statute and Commission rules distinguish this case from the arbitrary action that occurred in *Clear Lake Lumber.*

23 Similarly, Grasshopper incorrectly cites to a Commission order from Docket UT-120959, *In the Matter of a Penalty Assessment against Big River Telephone Company, LLC*, in support of its motion to dismiss. 2012 WL 5378138 (Wash. U.T.C.). The *Big River* case actually provides additional support for the Commission to reject Grasshopper's dispositive motion because Big River's factual arguments went to mitigation of a penalty and not dismissal or summary determination. The claim was valid and a mitigation hearing served as the proper forum for the company's factual assertions.[14] Big River's good faith efforts mitigated the penalty but did not render it invalid or support summary determination and, therefore, could not be used to support a dispositive motion in the present case.

24 Grasshopper also incorrectly relies on a settlement agreement involving Commission Staff and Qwest Corporation. *Washington Utilities and Transportation Commission v. Qwest Corp.*, 2004 WL 3159259 (Wash. U.T.C.).[15] Again, the distinctions Grasshopper is making between itself and the violations in the Qwest settlement agreement are disputable factual arguments that would potentially support penalty mitigation. Arguments as to the simplicity and intent behind the inaccuracy in this complaint as compared to systemic accounting deficiencies present in *Qwest* do not render the complaint in this matter invalid

[14] The filing company in the *Big River* case did not file required financial documents with its annual report and then sought to mitigate its penalty. 2012 WL 5378138 (Wash. U.T.C.). The Commission agreed to the mitigation after a hearing based on Big River's good faith efforts, but did not dismiss the complaint. *Id.* The Commission did not deem the complaint and initial penalty invalid. *Id.*

or indicate an absence of disputable material facts. Commission Staff's complaint remains valid under statute and Commission rules.

25 Moreover, an argument in any form as to materiality of the inaccuracy, its innocence, or the Company's reasonable efforts goes to the degree of the violation and appropriate penalty. The Company's claims of its reasonableness and corporate citizenship do not remove the necessity for accuracy inherent in the reporting statutes and rules. Consequently, Grasshopper's argument that it acted in good faith and the error was unintentional is a factual argument in favor of mitigation. Likewise, statements as to the punitive nature of Commission Staff's proposed penalty also go to mitigation rather than providing adequate support for a dispositive motion. The Company's factual assertions necessarily 1) indicate disputes of material fact, and 2) do not support the proposition that the statute and rule do not require accuracy.

D. The Factors Staff Considered in its Investigation Report Support a Probable Cause Finding to Issue a Complaint and were not Arbitrary and Capricious.

26 Commission Staff's penalty recommendation in its investigation report is not arbitrary and capricious. An arbitrary and capricious standard generally only applies to a binding action of the Commission itself, not an investigation report from Staff. *See* RCW 34.05.570.

27 Staff's Investigation Report documented a series of factors it relied on in reaching an initial penalty recommendation. The factors provide a guideline to support an investigator's recommendation, and substantively reflect the priorities the Commission has stated in previous orders. *See WUTC v. Advanced Telecom Group, Inc. et. al.*, 2005 WL 613391

[15] Docket UT-032162, Final Order (Order No. 03).

(Wash. U.T.C.);[16] *MCIMetro Access Transmission Servs. Inc. v U.S. West Communications, Inc.*, Docket UT-971063, Final Order, ¶158.[17] The 2003 Commission order on the subject reiterated the general nature of the analysis necessary to support a penalty.[18] 2005 WL 613391.

28 Grasshopper's arguments relating to Staff's Investigation Report and penalty recommendation are either inaccurate interpretations of statute or disputed factual assertions that do not support a dispositive motion. For the reasons discussed above, the Company's arguments that WAC 480-120-382 and RCW 80.04.080 do not contain an accuracy requirement are incorrect. Therefore, the applicable statute expressly permits Staff to pursue penalties up to $1,000 for each and every violation of Title 80 or any Commission rule. RCW 80.04.380. Again, to the extent the Company's list of answers on page 21 of its motion focus on the nature of the mistake, its good faith efforts, or the materiality of any inaccuracy, Grasshopper's positions should be brought forward in the evidentiary hearing but are not relevant support for a motion for summary determination. Consequently, the Company's argument for dismissal on the basis of criteria for assessing a penalty necessarily includes disputable facts and inaccurate statutory interpretations.

E. FCC Precedent is Unnecessary and Irrelevant to the Current Matter Dispute under RCW 80.04.080 and WAC 480-120-382.

29 RCW 80.04.080 and WAC 480-120-382 are sufficiently clear and it is not necessary or relevant to look to varying FCC rules and interpretations. First, as noted above, Staff's interpretation of an accuracy requirement inherent in the relevant statute and rule passes the

[16] Docket UT-033011, Settlement Order (Order No. 21), ¶62.
[17] There appears to be a linking error in the electronic database, so Staff is citing to the Commission's own records.
[18] The Commission stated, "...it is appropriate to consider a number of factors in evaluating whether a penalty is appropriate, including general factors such as deterrence, rehabilitation, and justice, and specific factors such as the extent of harm as a result of Qwest's actions, remedial actions taken by Qwest, and parity with penalties imposed on other carriers." 2005 WL 613391 or Docket UT-033011, Settlement Order (Order No. 21), ¶62.

state common intelligence test and adheres to due process. The Commission need not look further than its state-based regulatory regime to reject Grasshopper's dispositive motion. Second, the FCC regulates across several industries that are not useful in assessing the UTC's regulatory function. In any event, the FCC requires accurate reporting and may impose penalty sanctions against companies who willfully or repeatedly fail to comply. 47 C.F.R. § 1.17(a)(b); 47 U.S.C. 503(b)(1)(B). Although the FCC may have made the policy decision to use this power sparingly, the federal agency has issued penalties for a reporting company's failure to provide accurate information. *In the Matter of Vermont Telephone Company, Inc.*, 26 F.C.C.R. 14130 (2011).

VI. CONCLUSION

30 Commission Staff has supported a valid complaint authorized under statute and Commission rules. RCW 80.04.080 and WAC 480-120-382 require registered telecommunications companies to file accurate and timely reports by May 1 of each year. Staff is also pursuing a penalty within the permissible statutory limits under RCW 80.04.380 and employing the Commission's general principles and guidelines in determining the amount of a potential penalty. Therefore, the complaint in this matter is valid and not subject to a motion to dismiss for failure to state claim. Similarly, the remaining factual disputes regarding Grasshopper's efforts, intentions, and the materiality of the inaccuracy displace the Company's arguments for summary determination.

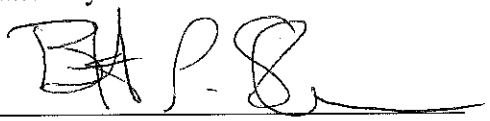
31 For the reasons set forth above, the Commission should reject Grasshopper's dispositive motion on all grounds and allow this matter to proceed to evidentiary hearing on June 17, 2014. While we recognize that Grasshopper wishes to put forth factual arguments in favor of mitigating a potential complaint, those arguments should be brought forward in

the proper hearing forum with appropriate support and thorough examination by the parties. The Company's motion misinterprets Commission rules and thwarts the Commission's hearing process. Therefore, the Company's motion should be denied.

DATED this 23rd day of May 2014.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General



BRETT P. SHEARER
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff

Appendix A

Appendix A

November 16, 2009

Siamak Taghaddos, Chief Executive Officer
Grasshopper Group, LLC
197 1st Avenue, Suite 200
Needham, Massachusetts 02494

Dear Mr. Taghaddos:

Effective December 12, 2009, the Utilities and Transportation Commission grants Grasshopper Group, LLC, registration in Docket UT-091779 as a competitive telecommunications company. Enclosed is a certificate providing evidence that Grasshopper Group, LLC, is authorized to provide telecommunication services in the state of Washington. As a registered telecommunications company, Grasshopper Group, LLC, must comply with the statutes and rules governing telecommunications companies including RCW Title 80, WAC 480-80, WAC 480-120, and WAC 480-121. WAC 480-121-063 identifies regulatory requirements that are waived for competitively classified telecommunication companies.

In accordance with WAC 480-120-303, Grasshopper Group, LLC, must submit to the commission an annual report form and pay regulatory fees no later than May 1 of each year.

Sincerely,

DAVID W. DANNER
Executive Director and Secretary

NOTICE TO PARTIES: This is an order delegated to the Secretary for decision. In addition to serving you a copy of the decision, the Commission will post on its Internet Web site for at least 14 days a listing of all matters delegated to the Secretary for decision. You may seek Commission review of this decision. You must file a request for Commission review of this order no later than fourteen (14) days after the date the decision is posted on the Commission's Web site. The Commission will schedule your request for review for consideration at a regularly scheduled open meeting. The Commission will notify you of the time and place of the open meeting at which the Commission will review the order.

The Commission will grant a late-filed request for review only on a showing of good cause, including a satisfactory explanation of why the person did not timely file the request. A form for late-filed requests is available on the Commission's Web site.

This notice and review process is pursuant to the provisions of RCW 80.01.030 and WAC 480-07-904(1)(k).

Appendix B

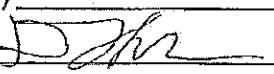
Appendix B

Washington Unified Business Identifier (UBI) No.: 602955460
(If you do not know your UBI No. please contact Business Licensing Service at 1-800-451-7985 or BLS@dor.wa.gov)

Annual Report Certification

I certify that I, Dominic Schiavone, the responsible account officer for Grasshopper Group LLC have examined the foregoing report; that, to the best of my knowledge, information and belief, all statements of fact contained in said report are true and said report is a correct statement of the business and affairs of the above-named respondent in respect to each and every matter set forth therein during the period from January 1, 2012, to December 31, 2012, inclusive.

Name (Printed) Dominic Schiavone Title Chief Operating Officer

Signature  Date August 6, 2013

Online Annual Report Certification

I acknowledge that the foregoing Annual Report has been submitted electronically; that, to the best of my knowledge, information and belief, all statements of fact contained in all attached schedules are true and said report is a correct statement of the business and affairs of the above-named respondent in respect to each and every matter set forth therein during the period from January 1, 2012, to December 31, 2012, inclusive. I agree that my name typed in lieu of my handwritten signature shall be sufficient to deem the report complete.

Authorized By: _____
Please Type Full Name Here

Authorized Date: _____
Please Type Full Date Here