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TRANSCRIPTION OF DOCKET A-021178

Item D1, Docket A-021178

Chairwoman Showalter: This is continuation of our open meeting from last week, and we're here on a non open meeting item, which is a proposed rulemaking, and as we all know, this has been through a long path thus far, and we've had many workshops and hearings, but in particular, we did narrow the scope of the proposed rule the last time round and asked for further comments and we've gotten some. So, I'm sure people are not interested in repeating every argument they've ever made or we'd be here a long time, but I think the issues that you feel are still pertinent and important or recent comments filings that you've done and you want to emphasize, use your judgment, but we're here to kind of digest the latest significant information from the way that you see it.

And, I'm not sure what order to go in, but why don't we begin with Adam Sherr with Qwest.

Adam Sherr: Chairwoman Showalter…Commissioners… good afternoon…Adam Sherr for Qwest Corporation. With me today are Pete Cummings, the Finance Director for Qwest in Washington and Richard Boehmer. Mr. Boehmer is an attorney in Los Angeles at O'Melveny & Myers. He's a transactional attorney who specializes in corporate securities, corporate governance, and general corporate law.

In this last notice, and the previous notice, the Commission asked for the input of expert bond counsel, and on behalf of Qwest, comments were filed in the earlier round and also this last time, Mr. Boehmer filed comments from

O'Melveny in Los Angeles… and he is here today to provide some additional information and to answer any questions you might have. The areas in which he is prepared to discuss today relate of course to proposed, WAC 480-120-365, the securities issuance rule…the securities law implications of that rule and also the practical implications, and I believe he is available for questions as well.

As you know, Qwest has been quite active in this rulemaking process. We remain strongly opposed to many of the proposed rules. You'll be happy to know that I don't intend to restate the comments we filed several times during the…this proceeding. We filed comments at the Commission's request on January 19th, aggregating, summarizing, and updating of the comments that we've filed, and the arguments we've made at previous oral arguments. We supplemented those comments yesterday. I hope you were able to receive that. I e-mailed that around noon yesterday.

It's not my…as I said, not my intention to walk through arguments I've made already…that Qwest has made already…but I'm certainly available should you have any questions.

Chairwoman Showalter: Well…as long as you're up, it seems that one of the issues that you raised yesterday, is a matter of Washington law, not securities law.

Adam Sherr: Yes.

Chairwoman Showalter: And, maybe you could cover that point…

Adam Sherr: Sure.

Chairwoman Showalter: You provided us a case, and how does the case relate to the issue that we have in front of us?

Adam Sherr: I'd be happy to…and do you have copies of the case.

Chairwoman Showalter: I do…

Adam Sherr: I can provide copies if that will be helpful.

Chairwoman Showalter: Yes, we do.

Adam Sherr: Okay…The case you are referring to is State (inaudible) Public Disclosure Commission vs. Raines…a case of 1976. Qwest believes that…that case is directly on point on the question of whether the UTC can alter or add to the statutory securities filing requirement. We believe the Supreme Court held pretty squarely in that case, and would hold again in the context of this rulemaking that it can't.

Briefly, to summarize for those who haven't seen the case, the facts are as follows. The Washington Legislature enacted a special filing requirement under the Public Disclosure Law that required a special report to be filed if a person spent more than $100 opposing or advocating a particular candidate or ballot proposition. What the legislature didn't do is specify when such a report should be filed. The Public Disclosure Commission via a rule attempted to…sort of…jump into that breach and added a two-tier filing requirement that imposed different timing specifications depending upon whether the…depending upon the amount that someone…that someone has expended. If someone had spent $100 and $500, the reporting requirement was a particular time period. It was a…there was a later time filing requirement if they spent more than that…actually an earlier one.

The trial court threw out that statute at issue, and stated that the rule…

Chairwoman Showalter: Statute or the rule?

Adam Sherr: Actually both…the individual who had expended the money in opposition to property levies…I think…challenged the statute and rule, claiming that the statute was impermissibly vague, because it didn't state when the filing had to be made and challenged the rule as well…because it said…he said that the Commission…the Public Disclosure Commission…lacked the authority to promulgate the specific timelines as they did. The Supreme Court threw out the

statute and stated that the rule was invalid as well, and the Supreme Court affirmed that.

As I read this case, quite frankly for the first time on Sunday, I noted that the similarity was pretty striking between the statutory scheme being described there and RCW 80-08, which, of course, is the securities statute. These are comments or some of the statements made by the Supreme Court. They stated that the Public Disclosure Commission is not allowed to augment or to amend legislation. That…they pointed to its general…the general regulatory and rulemaking provisions that empowered the Public Disclosure Commission to implement Public Disclosure laws and said that those were not enough…that a specific grant of authority to promulgate rules setting forth filing deadlines was required and was absent.

Much like RCW 80.08 today, that the statutory chapter 42.17 at issue in the public disclosure case, afforded the Commission rulemaking authority to set deadlines in the context of a different report…but did not…the statute didn't provide such authority in the statute in question. It's very similar to RCW 80.08. As we've noted repeatedly in our written comments, the legislature granted this Commission specific rulemaking authority in 80.08.090, but did not grant any authority…Qwest argues…specifically to the issue of the timing of pre-issuance filings.

Commissioner Hemstad: Counsel…

Adam Sherr: Yes…

Commissioner Hemstad: I have read the case…not carefully…of course there are a couple of differences aren't there…at the first…the statute didn't describe any time at all…and it was…as I understand it…correct me if I'm wrong…it was thrown out because…for that reason…for…because of vagueness?

Adam Sherr: That's true…that was the argument against the statute.

Commissioner Hemstad: Alright…and then threw the statute out. Of course, that would carry with it any regulation that was implementing it. But…and I realize the majority opinion talks about the regulation. The statute that we have in front of us or that we are addressing here does describe the time for filing. In that sense, it is not vague. So, I assume you would agree our statute would not be thrown out on the same grounds for vagueness?

Adam Sherr: I would absolutely agree that 80.08.040…if I'm citing the right statute…does contain the time requirement…and that is Qwest's…that has been Qwest's point throughout, which as it specifies…

Commissioner Hemstad: …In that sense…our statute is quite different from the statute that was in front of the court.

Adam Sherr: Absolutely.

Commissioner Hemstad: And then the further question is, does the Commission inherent or statutory authority to give definition to what the term "before" means?

Adam Sherr: Let me first agree with you that on that ground, 80.08.040 is distinct…I can't remember the section of 42.17 that was at issue in the Raines case…and it's not Qwest's position or the…or Qwest's motivation to imply that 80.08.040 would be invalid…that it would be viewed ambiguous for that reason.

In terms of whether this Commission has the authority…has been vested with the legislature with the authority to interpret what "before" means…again…I would say no. I think "before" means "before." Qwest obviously interprets that as meaning it has the ability to file any time up to the time frame. The Commission…the legislature did not grant this Commission any specific authority to augment or make more specific…if that's one way of talking about it…in that particular requirement.

Commissioner Hemstad: We've had this discussion before…but then…before it….earlier.

Chairwoman Showalter: Five days ago…

Commissioner Hemstad: Then the issue becomes, is the "before" simply a meaningless requirement…or is there to…with respect to which there is no purpose? Or, let me phrase it the other way. What is your view then as to what the purpose of the statute is?

Adam Sherr: To be fair…I believe you asked me that question in July and I think…

Commissioner Hemstad: I don't recall your answer.

Adam Sherr: You know…I probably looked as dumbfounded today…then as I do today…

Commissioner Hemstad: I do recall your answer…you didn't know.

Adam Sherr: Yeah…and I have to admit that I still don't know…my understanding of the purpose of 80.08 and 80.12 and 80.16, as that those issues or the statutes are creating mechanisms to assist the Commission in its ratemaking authority and…

Commissioner Hemstad: Of course…to assist us in our ratemaking authority, we could then receive the information after the fact.

Adam Sherr: I certainly agree. Qwest wouldn't argue with that…

Chairwoman Showalter: Well…on that point…I mean it seems to me that originally, the purpose of "before" was to allow the Commission to approve the issuance. So, "before"...for that purpose…might have meant something…I don't know how long that was…but we no longer have that authority, so now you need to read "before" in the context of the statute that is left and the rest of our statutes that are there…and I'm not sure where that leads…but, it does seem to

me that "before" when it was first written, was written in a different context then it remains today.

Adam Sherr: That's true…and you refresh my recollection that the Commission used to have actual approval power prior to issuance of a security…and I think that is probably where…why the word was in there originally.

Why it remains…I don't know that I can tell you…but…from Qwest's perspective… if the legislature intended that a utility…a public service company should file a notice…in advance of an issuance…in sufficient enough…in a sufficient amount of time to allow this Commission to act, then it would have specified that.

By removing the power to approve or disapprove a transaction…securities issuance…as Qwest has noted in its comments…from Qwest's perspective…it does not follow that…that the statute should be interpreted to require us to file something five business days in advance…and Mr. Boehmer will…has addressed this in his written comments, and I'm sure will be able to address it today as well…but there are very serious practical implications…and possibly legal implications that stem…and I certainly don't want to go to deep into whose waters because I'm frankly not qualified to.

But, given the…given the risks and the possible harm to utilities and to their ratepayers, the statutory scheme as it exists today certainly implies to me that it does not…it does not lend itself to the requirement to file so far in advance.

Commissioner Hemstad: Changing the subject but…you also argue that the provisions on the rule itself, is ultimately unconstitutional for vagueness…if I take your comments accurately.

Adam Sherr: Can I ask a question? Are you meaning…

Commissioner Hemstad: Well…in so…where I'm going with this is…as the language have evolved…the language now is either identical to or the substantial equivalent of the language used by the SEC. Do you agree with that?

Adam Sherr: I believe you might now be speaking about proposed WAC 480-120-325, the definition of subsidiary.

Commissioner Hemstad: Okay…

Adam Sherr: That's…just to make it clear…Qwest has not taken the position that…that the securities issuance rule is vague.

Commissioner Hemstad: Okay.

Adam Sherr: We had a concern about the…the definition of "control" and definition of "subsidiary." That depends upon the definition of "control."

Commissioner Hemstad: Do I understand you correctly that you are not arguing it is unconsciously vague.

Adam Sherr: No, we are arguing that it's vague and we wouldn't know how to…because the definition of "subsidiary"…let me take a step back… This particular definition has had a lot of different forms during the course of this rulemaking, and I think to the Commission's credit, it's attempted to adjust consistent with the comments that have been filed. At one point, the definition didn't have any sort of objective threshold to it at all. It simply said that a company that is controlled by a public service company is a subsidiary. To the Commission's credit, one measure of objectivity was added to that definition…so as I read it, a company that is not at least owned…5 percent of which is owned by a public service company, can't be a subsidiary. So, that certainly provides some…some objective floor when looking at potential companies that might be subsidiaries. But the definition of subsidiary still, in my view, is still vague and probably unenforceable.

Commissioner Hemstad: Now, that's what I'm trying to get to.

Adam Sherr: Sure…

Commissioner Hemstad: Correct me if I'm wrong. But, isn't the language that we are now using in this regard, the substantial equivalent of the language used by the SEC?

Adam Sherr: I believe I've seen discussion of that in…if I'm correct…if I'm incorrect, I'm sure you'll correct me…in the PacifiCorp comments, that's not a comment…an area that Qwest is…has commented on, and quite frankly I'm not…I'm not sure.

What is concerning to Qwest about the definition of a "subsidiary," and more really the definition of "control" is that, it rests on…and I don't unfortunately have it in front of me at this moment, but it rests on exercises of power by voting shares, by contract or otherwise…and it's those last two categories that seem so…so broad and unclear…that because of the subsidiary reporting requirements which Qwest separately objects to because we don't believe the Commission has authority over subsidiary reporting. But, because there are reporting requirements that are connected to knowing whether company X is a subsidiary are not, we're really concerned with the definition of "control" and "subsidiary."

Chairwoman Showalter: Okay, are we ready to move on to Mr. Boemer.

Adam Sherr: Absolutely. Thank you. If you have any further questions, I'm happy to step up again.

Chairwoman Showalter: Thank you.

Adam Sherr: Thank you for your time.

Richard Boehmer: Good afternoon…and thanks for the opportunity to appear before you today. As suggested…

Chairwoman Showalter: You need to say your name for the record.

Richard Boehmer: I'm sorry…Richard Boemer with O'Melveny & Myers. As suggested, I won't go into detail on the submissions that have been made by Qwest. But, I just want to summarize the three main areas on concern under the securities laws that are raised by this rule and then I'll be happy to answer any questions that you have, either now or later in the proceedings, as you see fit.

First, the public disclosure of the terms of a proposed offering may be deemed to be an improper prospectus in…if it's done in the context of a public offering. Or, it may be deemed to be a general solicitation if it's done in the context of a private placement.

Chairwoman Showalter: But by the general terms just those…in I think your filings and others, there's a distinction between the fact that there is this offering and the more precise terms that…the interest rate or other numbers in it…and so, some have made the argument that even these…even the fact of an offering is sensitive…so, I want to make sure I know what you are talking about at the time. When you say general terms, do you mean, including all of the details?

Richard Boehmer: The SEC has left open, I think on purpose, how much…well…there is a rule that says as long as you do not disclose any more than certain specified items, and you make some additional required disclosure, that won't be deemed to be a prospectus. But if you go beyond that, then there is an open question as to whether that would be deemed to be a prospectus if you're dealing in a registered offering or a general solicitation if you're dealing in a private offering.

Commissioner Hemstad: Now if I can break in, does our proposed rule, in your view, slip it over into the category of a prospectus or it is of the general terms that you just described?

Richard Boehmer: I think if the…if the entire filing was made public, I think it would be beyond the scope of the specific rule.

Commissioner Hemstad: Okay, then let's say it's not that, but it meets the description that you have just provided…of that of which is not a prospectus.
Richard Boehmer: Then, within the rule…again if there was limited disclosure about it, consistent with the rules, then there would not be an issue under the…under the federal securities laws from a disclosure standpoint.
Chairwoman Showalter: I'd like to pursue that…I don't know what that SEC line is…but let's say its dollar amounts and rates and time periods or something like that. So, supposing our rule makes clear that, that's not required or the company can exclude that information from the public. Now, of course, there is also the Public Disclosure law at issue.

If you assume that the filing did not cross that line itself or the public information in the filing did not cross that line itself, then what I would like to hear about, is what is the information about the filing that could get either the company or someone else in "hot water?" I'm unclear…is it simply that data and no more that's the problem or is it something else…some…
Richard Boehmer: Well, the fact that an offering is being done. Let's assume that you comply with the federal securities rules on this. The fact that it's done, does have an economic impact as well, and I think that's been set forth in some of the materials provided to you by the Bond Market Association.
Chairwoman Showalter: Right…that's…but that's a financial argument not a legal one, and so I'm interested in this other "mill ground" which I thought I heard you say, but maybe not. That…if we…let's say we get this information in and we want to do something about it. So, it terms of confidential to the extent that the SEC is satisfied.
Richard Boehmer: Uh huh…
Chairwoman Showalter: But we want to take some type of action or hold a hearing…I'm…you know, I don't know, but I'm just trying to posit some time of

activity going on about the filing. Then, is there a problem with talking about the filing as long as we don't mention those terms…legally…not financially?

Richard Boehmer: Again, what the SEC is looking at is whether the disclosure in whatever form…is…could be seen as…as an attempt to solicit an offer…and that's what they're looking at…and they have purposely left it very broad as to what that…what those activities can be. So, the question would be, if you took steps going forward and there was significant public disclosure about a potential transaction, the SEC could either hold up the offering, if it was a public offering or question whether a general solicitation was made.

That occurred several times recently in connection with transactions where there's been significant public disclosure in the newspapers, etc., where they have held up offerings.

Commissioner Hemstad: Are there any examples of that where a regulatory Commission at the state level has made an inquiry?

Richard Boehmer: I'm not aware of any off hand. No sir.

Chairwoman Showalter: Can you give an example where that has happened, just so we have a sense of what the SEC has been concerned about.

Richard Boehmer: Yes, there was a recent transaction where there was significant public disclosure in the newspapers talking about an initial public offering, and the SEC caused that transaction to be held up for several days after the press releases or the news stories came out in order to allow a "cooling off" period, so that any taint from that disclosure would have dissipated by the time they allowed the offering to go forward…and they've done that on several instances.

Chairwoman Showalter: Okay…so…just…I'm trying to…there are three categories so far. There is the precise terms and conditions, some of which the SEC may say as may not be disclosed without violating their rules or causing an

upset. And then, on the other end, there's the financial impact of simply knowing…

Richard Boehmer: Correct…

Chairwoman Showalter: But that's a financial judgment, not a legal one.

Richard Boehmer: Uh huh…

Chairwoman Showalter: But, I suppose they're somewhat related because the FCC will also deem a basis for holding an issuance up if a certain amount of information…which may or may not include additional facts…to those most specific ones…I'm not sure. If they get…if they have the idea that this is half "out of the bag," then they have the authority to hold up an issuance…and that's more a judgment call on their part.

Richard Boehmer: And I think you're correct on that. If there was a limited amount of disclosure, not only the SEC but the company would be concerned that there is either selective disclosure or there is a material omission in the information out there at that point. So, counsel and the company would be making a determination whether enough information has gone out that the record has to be completed before the transaction goes forward. That would again…

Commissioner Hemstad: But all of this would translate into a legal conclusion that the disclosure requires something…it becomes the equivalent of a flawed prospectus?

Richard Boehmer: Correct. Yes, it is a legal conclusion that counsel and the company are going to have to make as this transaction is going forward. The risk on the other side is if it is considered…or it's argued to be an improper prospectus or general solicitation by a plaintiff, and they succeed in that, the remedy is rescission. So, the holders of the bonds have a "put" right of those

bonds back to the company…and so people are very careful going in to make sure that we don't put clients into that position.

Commissioner Hemstad: Why wouldn't the buyer be on notice that they need to look at the prospectus itself?

Richard Boehmer: Again, even if it's proceeded by an improper prospectus or in the case of a private offering where there is a disclosure document there, if in fact this is deemed to be a general solicitation, there is a violation of Section 5 of the Securities Act, and it doesn't…the failure to register the transaction…is a violation even if all the disclosure was proper.

Chairwoman Showalter: In other words, regardless of the day the prospectus comes out, which is the official word, if prior to that, some bit…or more than bits of information has come out…that's deemed to be a prospectus that is flawed.

Richard Boehmer: Right, because their…the position under the Securities Act would be that you are soliciting an offer through a prospectus that does not comply with Section 10 of the Securities Act. That is a violation of Section 5, whether or not there is subsequent proper disclosure.

Commissioner Hemstad: As an attorney, do you have a view as to whether in making such a determination…the fact that a state regulatory Commission were acting…I realize this is a disputed point…pursuant to authority of state law in carrying out it's responsibilities…whether that would be taken into account by the SEC?

Richard Boehmer: It may be an issue. Although, I'm not aware of any instance where they've ruled on this, and the SEC would say, you know…if you are in a situation where you have crossed the line your obligation is basically to hold off on the offering.

Commissioner Hemstad: Are you aware of any state regulatory Commissions that do, receive information prior to issuance?

Richard Boehmer: I don't do that much regulatory work, so I'm not sure I'm qualified to speak on that question.

Commissioner Oshie: Mr. Boehmer…I…just a little bit different twist on this. In the context, let's say of, an ongoing bankruptcy proceeding where there is a requirement for financing of some kind or perhaps it's in a plan that there is going to be financing required or the issuance of other securities, perhaps to complete the "re-org" plan. How does the SEC treat that filing? Because, it would seem to me in that context, that there'd be a requirement both to disclose to the trustee, to the bankruptcy court itself, who has to approve the plan and approve any new financing, but maybe to the creditors as well. So, that's a…it seems in that situation…I mean the bankruptcy court is ultimately…it's not regulating the business, but it is in effect, managing the business as a result of the filing to protect the creditors of the corporation.

Richard Boehmer: There is an exemption under the securities laws for securities issuances, which are controlled by other agencies, if you will, and it covers bankruptcy as well. So, it's an exemption, you don't need to register securities that are being issued out of bankruptcy.

Commissioner Oshie: By other agencies, is there a definition of that under the law…the bankruptcy included…

Richard Bohemer: For example…in the case of savings and loans…the Federal Loan Home Bank Board would have to authorize the issuance of securities by savings and loan. That issuance of securities is not subject to the SEC's review because it's being controlled, if you will, by another authorized agency.

Chairwoman Showalter: I might be mixing up things, but…and some of the filings in front of us…there was a discussion of…I can't remember if it's a two day or three day period…this is under the SEC laws I believe…but…our proposed rule right now says five days, and my question is, if it were something

other than five days, but not "before." If it were two days or three days, does that…does any time period change your legal analysis under the SEC rules?

Richard Boehmer: The…there is a what's called "T + 3." You need to settle…you have a trade date where the sale is made and then you close or settle three business days later. Is that what…

Chairwoman Showalter: Yeah…that was the issue. So, if we were…if our reporting requirement were within that time period, does that change your legal analysis?

Richard Boehmer: Well, at that point, the transaction has been priced, the sale has occurred, if you will, subject to closing. So, the issues of an improper prospectus or "gun jumping" wouldn't be there. The problem would be uncertainty about the ability to close the transaction.

Chairwoman Showalter: Okay, and I guess…does…is the agreement three days before…is that a type of binding agreement or is it not really going forward until it actually happens?

Richard Boehmer: It's usually on the trade day, you sign an agreement with the underwriters that says, we will sell you the stock and you will pay for it three business days from now subject to a series of conditions; delivery of opinions, certificates, other additions like that.

Commissioner Hemstad: Those are essentially administerial acts?

Richard Boehmer: Usually yes…

Commissioner Hemstad: So the trade date is a contract.

Richard Boehmer: Yes…

Commissioner Hemstad: I would analogize it to what I…buyer sell a security. There's a trade date, but then there's a settlement date that's five days later.

Richard Boehmer: Exactly right.

Chairwoman Showalter: So, does that…but…does that mean that our five day time period in the proposed rule is actually only two days before that trade date or is it the five days…I'm getting mixed up on what…what the marker date is?

Richard Boehmer: Again, I'm not sure what the statute provides with respect with what "issuance" is…

Chairwoman Showalter: Of…I guess…

Richard Boehmer: Issuance I think is then construed in the materials that I've seen as closing.

Chairwoman Showalter: Okay, so it seems to me is that the five days is two days before the trade date in that (inaudible)…

Richard Boehmer: In that scenario…yes ma'am.

Chairwoman Showalter: Thanks.

Commissioner Hemstad: I think you had three points...that was point one.

Richard Boehmer: The second too, I think we touched on a little bit. One is the economic issue that even if the disclosure is proper, public disclosure ahead of time of a proposed offering is…it can be detrimental to the success of that offering. Just because of the knowledge of it coming out and the fact the other securities seem to trade down. The third…

Chairwoman Showalter: But can we stop on that…I just want to get a better feel for this. Let's suppose that Qwest plans to…to do some kind of issuance and they give us five days notice and the specific terms are not public, but under our public disclosure law, if that is what applies, let's just say it is public. So, it is publicly known, at least, should anybody contact our office, that an issuance is going to occur, but without the knowledge of what the terms and conditions are. In that scenario, can you describe what it is that would be adverse?

Richard Boehmer: Well, it raises two questions. One we touched on a second ago, that if there is a disclosure out there that an offering is coming, that can be

material information, and if it's only being disclosed to those who happen to come and look at your records, that's selective disclosure in that case. So, I would be quite concerned if that information was technically, publicly available, that is was only selectively disclosed and therefore, others might not know about it. So, it would be a real issue as to whether or not that would force the company into making a public disclosure to avoid the selective disclosure issue.

Chairwoman Showalter: Even though…even though the precise terms would not be disclosed. You're saying that there's another zone of obligation to disclose widely those non-specific terms?

Richard Boehmer: I think if there's knowledge out there that a company is about to make a public offering. That can be a material fact to the traders in those securities, and as noted in a Bond Market Association materials, it is not uncommon for the other bonds to trade down, which effectively will cause the price for the new bonds…or the yield on the new bonds to go up. So, if that is true…as that is a material issue to certain people, you would be very concerned that some would know it, but others would not.

Chairwoman Showalter: So, therefore, Qwest…let's say we have this rule…and it's in operation…you're saying, you would feel obligated to broadcast to the general world that you were going to go ahead in five more days, because you were first obligated to tell us and would want a selective disclosure?

Richard Boehmer: Very likely, and therefore, we'd have to make the disclosure consistent with the securities laws, depending upon the type of offering.

Chairwoman Showalter: And so if you did make that wide broadcast…that is what you are saying…then the market would have five days to adjust to that fact.

Richard Boehmer: Begin to impact the price and, therefore, the yield on the bonds which would result in it costing more for Qwest to issue the notes than it would have under other circumstances.

Chairwoman Showalter: So, that was point two…that was the fiscal.

Richard Boehmer: Point three I think is sort of the reality of the capital markets right now. Transactions are being completed in a very short period of time, and windows of opportunity are opening very quickly. I have done transactions recently where…I have received a day's notice that a transaction is about to occur, even as company counsel. And, a five business day advance notice would significantly inhibit the ability to take advantage of those market opportunities.

I think even in situations where you know an offering is coming, the terms of those offerings may change significantly on the day of pricing. I had a transaction last year where they announced an offering at 7:30 a.m., in the morning for $500 million and because of significant market demand, that transaction went to a billion by 4:00 p.m., in the afternoon.

Again, to give a notice that would be sufficiently broad to cover that possibility, doesn't give the Commission any real information other than an offering is going to occur. Conversely, I've seen transactions, you know, that deduced in size or the maturity has changed. So, again it will inhibit the ability of a company to meet but may be very favorable market conditions for that company that only exist for a relatively short period of time. Those were the three.

Chairwoman Showalter: Any other questions or comments? Just to be clear, you were addressing just now with your three points securities, not cash transfers?

Richard Boehmer: Correct…correct.

Chairwoman Showalter: I think we're done unless anyone wants to…from Qwest…that is, wants to address any other aspect. Anything else?

Richard Boehmer: Thank you very much.

Chairwoman Showalter: Thank you. Let's stay with the telecom side for the time being. Mr. Potter.

Richard Potter: Good afternoon Chairwoman, Commissioners, Richard Potter for Verizon. Just very briefly, I wanted to emphasize the two points you made in our filing, but also wanted to make a general statement. You may have noticed in our comments over the last few months, we've not gotten into a lot of these legal issues and so on, because they've been so well covered by the other parties. But we do think there are a lot of serious important points that are raised on the issue of the Commission's authority and whether it extends to subsidiaries and so on, so we want to support the other parties to the extent that their comments raised those issues for serious consideration.

With regard to the current draft of the rules, I just wanted to make one request with regard to this one we've just been talking about, 480-120-365. My company finds itself in the position of being an investment grade company, so the current draft of the rule would require us to make a filing five business days after a transaction, and our finance department explained to me that the normal course of closing books and so on, it takes into about the middle of the month after the transactions and they would very much appreciate it if this new requirement could be dropped into the normal flow rather than to have a special exercise that they'd have to do. So, therefore, we propose in our…in our comments to extend the five days out, so that we can make this a business as usual type reporting requirement rather than a special "drill."

Commissioner Hemstad: And what time frame would that be.

Richard Potter: We propose…let me see…get it just right here…within 30 days after the end of the month in which the…the issuance occurred. We have specific language in our comments that we suggest.

Chairwoman Showalter: I have a question on this one because I…maybe I miss forgetting something…but how does any…under our proposed rule for issuances…the statute says "before." So what is it that is being required before or if nothing's being required before, how it is complying with the statute?

Richard Potter: Does the staff want to take that on…

Chairwoman Showalter: I think I'm forgetting what is required before.

Fred Ottavelli: Excuse me Chairwoman. In the proposed rules, for investment grade companies, there are not requirements before, and the ability to do that is the result of the statute 80.08.047, the Commission may exempt certain issuances.

Chairwoman Showalter: Oh…that's right. Okay, thank you. That answered it.

Richard Potter: My last point is the one about our subsidiary, West Coast…Verizon West Coast Inc., and we did propose some language to put in the rule that would not create a new unnecessary reporting requirement for that very small, wouldn't say insignificant, because it's significant to the customers, but in the great scheme of the financial situation of Verizon Northwest, it's an extremely small operations, and it's just an accident of history that it's a California corporation rather than just a division like our Oregon and Idaho operations.

Chairwoman Showalter: Thanks.

(inaudible as tape was being turned over)

Lisa Rice: …part of my work involves in assisting in debt and equity issuances for the company. And so, I am here today, really not to repeat the written comments that we provided the Commission, but to make myself available to answer any questions that you might have of a practitioner on the issues of timing and confidentiality.

Chairwoman Showalter: Well…would you just like to say as a practitioner…as a practitioner…what are your…in a "thumbnail"…what are your concerns?

Lisa Rice: Well, our concerns, which we have stated in the letter is that with the five days notice, though we are an investment grade company right now, we are borderline, and events could occur that bring us below investment grade, and as such, would have to comply with the proposed rules.

With the five days notice, our concerns are very much along the concerns voiced about the market and opportunities that can be lost. When we issue debt, we go and get board authority when we are ready to go, and we transact the next day. We want to make sure that what we have determined is the best course of action, is going to be the terms that we get, and time works against you, you can't predict even what could happen in a, you know, 48-hour period. In terms of debt, somebody…you know…another utility could come in and temporarily "sap up" demand in the market for your type of paper…

Commissioner Hemstad: Let me ask a question. Taking that scenario, where you want to make use of market opportunity, say the next day, don't you have to have had documents prepared in…well in advance of…so you could go to the market the next day.

Lisa Rice: Yes…yes you do have to have some things in advance, of course. You have your "shelf," that's there from an SEC standpoint. We have our mortgage indentures which are in place, and we usually will have a supplement available, so that from, the securities standpoint, it is ready to be documented. But, from a transacting standpoint, which you really only need to do is determine price, and then you have three days to get through your documentation.

Commissioner Hemstad: And I was going to ask this question earlier, but I'll ask it of you. It's typically…commonly at least, "shelf" filings are used…and as I understand what they are…is where the company has filed in advance and intention in some point, to do to the market…

Lisa Rice: Uh huh…

Commissioner Hemstad: So you have signaled to the world that you are a potential player at some point in the future?

Lisa Rice: That would be…that would correct. But, a "shelf"…and I'm not an SEC expert…a "shelf" is something a company puts in place to really give it flexibility to get into the capital markets in time transactions.

Commissioner Hemstad: Than my question is…under this rule, why wouldn't a "shelf" filing meet the requirements of the rule?

Lisa Rice: Because a "shelf"…a "shelf" is very broad. You can have a "shelf" for an amount that you think you will use over the next one to two years. So, last year we filed "shelf" for $500 million and we said that we wanted the ability under the "shelf" to issue both debt and equity. Now, if at the end of two years, we've done nothing, there is no penalty to us. So, it's not a huge signal. Most companies will have a "shelf" out there.

Commissioner Hemstad: Well okay then…what if…I'm asking this…maybe staff or counsel may have comment on it…what if the "shelf" filing, which presumably describes what you may do over the next year or two…and I assume contains some description of the purpose for the use of the money?

Lisa Rice: I'm not sure what it…if it contains purpose because…that would be a legal question…I know you have to put purpose in your prospectus. The "shelf" will say that we can issue like, in our case, up to $500 million of equity or $500 million of secured notes. Other "shelf's" might say…we had a "shelf" a (inaudible) shelf before that, that said we could issue equities, secured debt, unsecured preferred stock. So, it's not really a signal…nobody could really try to trade and make a profit off of the information that's provided in a "shelf."

Commissioner Hemstad: I realize you're not a lawyer, which is probably a good thing, but the…do you have a view of whether the "shelf" filing meets the requirements of the rule?

Lisa Rice: I don't have an opinion on that.

Commissioner Oshie: Ms. Rice, when you go to the…when management goes to the board of directors for its approval of a security, either equity or debt…the issuance of that…what a…maybe we could walk through the steps. I'm assuming that there is one or more board…committees of the board of directors…that the management would report to in proposing either the issuance of a security or…of a debt security or an equity security. Now, is that brought to one committee of the board or is that brought to separate committees.

Lisa Rice: We have one committee. Our board has to approve the "shelf" that goes in place and then it delegates authority to what we call our security pricing committee that's made up of…I believe there are three board members plus Steve Reynolds and Burt Baldmon. And, that allows us to convene them by telephone, and so typically, when we've made an internal decision that this is what we want to do, this is the time to do it, we quickly put together a summary…get it out…in the cases that I've been involved in…the very next day…have held a telephone conference with them, and they will approve what we have asked for and then because we won't be going to the market until the day after that, they give us a range of pricing…so that they'll be comfortable if…when you issue debt, you talk about your spread and so, if you think your total spread going to be 100 basis points, they might say between 90 and 105 or something like that…kind of set a range that they would be comfortable with us going ahead if it's not where we thought when we were speaking to them that day. And then the next day, we go to the market, and we price the transaction.

Chairwoman Showalter: So, from what I understand, you send your memo less than 48-hours before you're in the market?

Lisa Rice: Yeah, it could be 48-hours. When we've done equity, that's a little bit different, I'm not as close to the equity issuances that we've done. But, I know

that we have…in the one that we did last year…we had already agreed with Franklin, kind of where their price point was, and our stock wasn't there to make a transaction happen. And so, literally, one afternoon, Don Gaines looked at where out stock closed and said, that's above their price point…called up the person at Franklin and said, did you see where our stock closed. Do you want to go ahead and do this? And, from that point, the deal closed. So, there wasn't really any…it happened basically overnight…that transaction, and had we had to wait five days, I think actually the stock did come right down after that. They wouldn't have gone ahead because they had to have a certain price going into the transaction in order to it.

Chairwoman Showalter: Thank you. Mr. Van Nostrand.

James Van Nostrand: Thank you Madam Chair. James Van Nostrand, with Stoel Rives on behalf of PacifiCorp. We've been participating in this rulemaking for…since September of '02, when it began. I think there was actually a little proceeding prior to that where we looked at amending the statutes. And, I guess, sort of a mixed blessing if this rule actually gets issued and this docket's closed. Because we have enjoyed working with Mr. Ottavelli and we fear that if this rule is actually issued, that Fred may actually be able to retire.

Chairwoman Showalter: Again…

James Van Nostrand: Again…As you suggested, our comments will be limited to the new developments, and since we were last here, and that was this recognition of the distinction between investment grade and non-investment grade. It was indicated in our comments there is a statute 80.08.047, which allows the Commission to make the distinction and to group utilities by investment grade versus non-investment grade. The fact, as we indicate, there's a similar statute in Utah and Wyoming, that has been used by those Commissions to exempt entirely from the securities approval and securities

mode of process, issuances from investment rated utilities, and it would be our hope that at some point, we could get to that with respect to the filings at this Commission.

I'm here to answer questions on anything else that have in our rules.

Commissioner Hemstad: I asked this questions earlier so…those other states you have referenced for non-investment grade utilities. Then, do they require approval before issuance or do they just simply require notification. Do you know?

James Van Nostrand: I didn't look at that particular piece of it, because it doesn't apply to us.

Commissioner Hemstad: Are you aware of the interplay between, at least prior notification, and the SEC issues about potential classification prospectus and so on, that was earlier discussed.

James Van Nostrand: I'm not going to purport to weigh in on the securities laws…because we have an expert in the crowd…I did…we did file comments on the issue where the Commission picked up on the definition of "control" from the SEC rules, and that was one of my homework assignments from October, was to slice it out a little more and I think we still have concerns that incorporate in this definition of "control" from the SEC rules…while it may be an SEC rule, it's still vague and arguably unenforceable.

Commissioner Hemstad: Constitutionally vague?

James VanNostrand: I didn't whenever say constitutionally vague. Our October 14th, I believe comments, I mean…I actually had to dig into the securities law and look through a treatise and an excerpt of the ten pages of that treatise discussing that particular SEC rule and the fact that, that rule is, the notion of control is illusive, and I'm not sure that's the precedent that, that we want to have to wade

into in deciding how to implement and enforce this rule. Other than that, I am available to answer any questions of any other aspect of our comments.

Chairwoman Showalter: Any questions. Thanks. I think that's everyone signed up. Is there anyone else who would like to comment? Well, thank you all for coming. You continue to educate us and probably yourselves as well, and we appreciate it.

This is just a hearing. We don't make a decision now, but we'll take all of this into account before we made a decision. Thank you…and the hearing is adjourned.