Qwest
1600 7th Avenue, Room 3206
Seattle, Washington 98191
Phone: (206) 398-2507
Facsimile (206) 343-4040

Adam L. Sherr
Senior Attorney
Regulatory Law

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Via E-Mail and
Overnight Mail

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
Supplemental Comments on Proposed Rules

Dear Ms. Washburn:

Qwest submitted written comments in the above-referenced rulemaking on January 19, 2005. In the course of preparing for the February 1, 2005 adoption hearing, counsel for Qwest has come across two additional authorities that deserve mention. They relate, respectively, to proposed WAC 480-120-325 and proposed WAC 480-120-365.

Proposed WAC 480-120-325

In reviewing Qwest's January 19 comments, counsel for Qwest discovered that one case cited in Qwest's comments – *Pinecrest Homeowners Ass'n v. Cloninger & Assocs*., 115 Wn. App. 611 (2003) – has recently been reversed by the Washington Supreme Court. *Pinecrest Homeowners Ass'n v. Cloninger & Assocs., 151 Wn.2d 279 (2004).* The *Pinecrest* decision (see Qwest's comments, page 4, fn 1) was cited by Qwest for the proposition that vague statutes and rules are void as a matter of law. Qwest cited *Pinecrest* as a result of its concern that the proposed definitions of "subsidiary" and "control" – especially in light of the proposed reporting requirements for "subsidiaries" – are unconstitutionally inexact.

In reversing the *Pinecrest* decision, the Supreme Court did not in any way back away from the legal principle that vague regulations are void. There are myriad other cases supporting Qwest's position that vague rules are invalid. For example, the Court of Appeals, relying on United States Supreme Court precedent, stated that a "statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential due process of

law." *Anderson v. City of Issaquah, 70 Wn. App. 64 (1993) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).*

Thus, while Qwest believes it is of course necessary and appropriate to advise the Commission that a case it cited has been reversed, Qwest also believes that the principle for which the case was cited remains intact and must be adhered to by the Commission.

Proposed WAC 480-120-365

In the course of preparing for the February 1 adoption hearing, the undersigned also become aware of the Washington Supreme Court's decision in *State ex rel. Public Disclosure Commission v. Rains, 87 Wn.2d 626 (1976).* This decision bears directly on Qwest's argument (as discussed in paragraphs 18-20 of Qwest's January 19 comments) that this Commission lacks the statutory authority to augment or add to the pre-issuance filing requirements prescribed by the legislature in RCW 80.08.040. *Rains* considered a statute which required (without specifying a specific time frame) individuals to disclose certain expenditures supporting or opposing a candidate or ballot proposition. *87 Wn.2d at 627-28.* The statute was held to be unconstitutionally vague, but the most critical discussion for purposes of the instant rulemaking was the Supreme Court's criticism of the Public Disclosure Commission's ("PDC") rule (promulgated allegedly to implement the disclosure statute) that added specific filing deadlines for the disclosure required under the relevant statute. *Id. at 628-33.*

Consistent with the arguments raised repeatedly by Qwest in this rulemaking, the Court stated that the PDC was:

> without the general power to modify or establish time periods for reporting under the statute. Consequently, the Commission's regulation, in effect, attempted to amend the legislation. It is well settled that agency rules and regulations cannot amend or change legislative enactments.

Id. at 631. The Court stated that the Commission's general rulemaking powers "do not extend to setting time limits for reporting under" the disclosure statute. *Id.* Similar to Qwest's arguments in this rulemaking, the Court paid great attention to the fact that, while the PDC was given the authority to designate additional timeframes for reporting in reference to an unrelated disclosure requirement, the disclosure statute at issue in the case offered no such grant of authority. *Id. at 632-33.*

In many respects, the *Rains* decisions directly supports Qwest's argument that this Commission lacks the statutory authority to require securities filings five business days prior to issuance, as

proposed for non-investment grade public service companies in proposed WAC 480-120-365. Qwest urges the Commission to give the Supreme Court's decision careful consideration.

Sincerely,

Adam L. Sherr

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