

Qwest

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May 27, 2005

***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 of Qwest Corporation

Dear Ms. Washburn:

These supplemental comments are offered in response to the Commission's May 6, 2005 Opportunity to Submit Written Comments on Proposed Rules in the above-referenced docket. Upon additional reflection, Qwest believes it is necessary to raise two initial concerns regarding proposed WAC 480-120-365. Both concerns relate to whether the rule, as proposed, exceeds the Commission's authority.

Short-term notes. If read literally, proposed WAC 480-120-365 purports to require a public service company to file notice of *all* promissory notes, regardless of the length of the underlying obligation. This would be in direct conflict with RCW 80.08.043, which exempts from the filing obligations of RCW 80.08.040 the issuance of "notes, except demand notes * * * payable at periods of not more than twelve months after the date of issuance." As Qwest has pointed out numerous times during the course of this rulemaking, the Commission is only permitted to promulgate rules when the legislature has explicitly authorized the Commission to do so.¹ The legislature did not empower the Commission to expand the scope of reportable securities issuances, and in fact specified that short-term (less than twelve month) notes need not be reported. The Commission should modify the proposal to clarify that it is not the Commission's intention to undermine RCW 80.08.043 through the promulgation of WAC 480-120-365.

¹ The Administrative Procedures Act provides that a rule is invalid if it exceeds the statutory authority of the agency. *RCW 34.05.570(2)(c)*. Appellate courts in Washington have explained repeatedly that administrative agencies are creatures of the legislature without inherent or common-law powers, and that they may exercise only those powers conferred on them either expressly or by necessary implication. *See, e.g., WITA v. TRACER*, 75 Wash. App. 356, 363, 880 P.2d 50 (1994). In that case, the Court of Appeals explained that, if an enabling statute does not authorize either expressly or by necessary implication a particular regulation, that regulation must be declared invalid despite its practical necessity or appropriateness. *Id.*

Guaranty obligations. Similarly, the proposed rule appears on its face to expand the universe of reportable guarantor transactions. As drafted, the proposed rule requires the pre-filing of “any [telecommunications company] obligation or liability as guarantor.” Again, read literally, the proposed rule contradicts the legislature’s narrower filing requirements.

Qwest assumes that the Commission’s basis for requiring reporting of guarantor transactions is RCW 80.08.130. Unlike the proposed rule, that statute does not require the filing of all guarantor transactions. Instead, the statute requires filing only when a public service company “assumes any obligation as guarantor, indorser, surety or otherwise *in respect to the securities of any other person, firm or corporation, when such securities are payable at periods of more than twelve months after the date thereof.*” Thus, to be reportable, the guaranty must be executed in connection with the issuance of securities and the securities must be payable at periods exceeding a year. Under the statute, a guaranty of a lease would not be reportable; neither would a guaranty of a short-term note. The proposed rule should be modified to reflect these legislative limitations on reporting.

Tying together its May 25 comments and these comments, Qwest recommends proposed WAC 480-120-365 and 480-120-389 be modified as follows:

WAC 480-120-365 Issuing securities. For the purpose of this section:

"Securities" means stocks, stock certificates, other evidence of interest or ownership, bonds, notes other than those exempted from reporting under RCW 80.08.043, or other evidence of indebtedness, or any obligation or liability as guarantor subject to reporting under RCW 80.08.130.

(1) Before a telecommunications company subject to the provisions of chapter 80.08 RCW issues a security, it 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 terms of financing; and

(c) A statement as to why the transaction is in the public interest.

(2) A commission order is not required for such a filing. The company may request a written order affirming that the company has complied with the requirements of RCW 80.08.040. The company must submit the request for a commission order, along with the information required in subsection (1) of this section, at least fifteen business

days before the requested effective date for the order. Requests for supplemental orders may be exempt from the fifteen business day requirement.

(3) Filing a Registration Statement with the Securities and Exchange Commission using a shelf registration process does not constitute issuance of a security, and therefore a filing with the commission is not required under the provisions of RCW 80.08.040. A shelf registration filing is defined under the General Rules and Regulations promulgated under the Securities Act of 1933, Rule 415 - Delayed or Continuous Offering and Sale of Securities.

(4) An authorized representative must sign and date the filing and include a certification or declaration that the information is true and correct under penalty of perjury as set forth in chapter 9A.72 RCW. The certificate or declaration must be in substantially the following form:

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct."

(5) Filings under this section may be submitted with portions designated confidential pursuant to WAC 480-07-160 (Confidential information).

(6) Within sixty days after the issuance of any securities, except for dividend reinvestment and employee benefit plans, a company must file with the commission a verified statement:

(a) Outlining the final terms and conditions of the transaction; and

(b) Setting forth actual proceeds from the issuance and, if known, the disposition of proceeds stating the final amount to be used for each purpose allowed by RCW 80.08.030.

WAC 480-120-389 Securities report. (1) Each telecommunications company subject to the provisions of chapter 80.08 RCW that has issued securities during the prior year, must file with the commission by April 1 of each year an annual securities transaction report for the period January 1 through December 31 of the preceding year. At a minimum, the report must contain:

(a) A description of the final agreements;

(b) A description of the use of proceeds stating, if known, the amounts used for each purpose allowed by RCW 80.08.030;

(c) The level of expenses for each of the securities transactions;

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(d) Information to determine the individual and collective impact on capital structure; and

(e) The pro forma cost of money for the securities transactions.

(2) The company may provide by reference the information required in subsection (1)(a), (b), and (c) of this section if the information has previously been filed with the commission.

Sincerely,

Adam L. Sherr
ALS/llw