Before The Washington Utilities And Transportation Commission

In the Matter of: Telecommunications Companies – Chapter 480-120 WAC	Docket No. UT-990146 QWEST'S COMMENTS REGARDING POTENTIAL REMOVAL OF WAC 480-120-500(3)

Qwest Corporation ("Qwest") submits this brief in response to Staff's May 10, 2001 e-mail request for comment and legal analysis regarding the potential removal of WAC 480-120-500(3) ("Subsection 500(3)"). Subsection 500(3), which was adopted in 1993, provides:

> These rules are not intended to establish a standard of care owed by a telecommunications company to any consumer(s) or subscriber(s).

In summary, Qwest urges Staff to refrain from recommending the removal of Subsection 500(3) as its removal could lead to confusion among the public, the industry and the courts and to unnecessary, time consuming and costly litigation.

As an initial matter, Qwest is obliged to note that it finds itself in a most unusual position of replying to a legal argument that has not yet been articulated by its proponent. Aside from a desire to harmonize the telecommunications rules with the Commission's recent decision in Docket No. UW-980082 not to add similar language to the water company regulations,[1] Staff

[1] At the outset, Qwest would urge the Commission to consider that there is a significant interpretive and practical difference between an agency's failure to adopt a regulation out of whole cloth and an agency's

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

has yet to articulate either its purpose or rationale for recommending removal of Subsection 500(3). Rather, Staff's pronouncement is accompanied only by a request that interested parties defend Subsection 500(3)'s preservation. Given the unique posture of this matter, Qwest requests the opportunity and reserves the right to supplement its written comments after Staff has articulated its position or at any other appropriate time during the rulemaking process.

I. SUBSECTION 500(3) IS NECESSARY TO AVOID CONFUSION AND UNINTENDED LITIGATION

A. The Purpose of Subsection 500(3)

To fully understand why Subsection 500(3) should be retained, it is important that Staff is fully aware of the context of its original enactment. As originally proposed, the quality of service rules ultimately adopted in 1993 did not include the language of Subsection 500(3). It was added in its present form in response to concerns raised by multiple telecommunications companies.

Specifically, in its August 1992 written comments regarding the proposed quality of service rules, Ellensburg Telephone Company stated:[2]

> Finally, Ellensburg's chief concern about this entire rule making process is the question of liability. The standards that are set forth in these rules appear to have as their purpose the establishment of minimum performance standards for the offering of telecommunications service. This means that if the company deviates, even slightly, from the standards the company can be characterized as failing to meet the minimum standards applicable to the provisions of that service. For Ellensburg, the concern is that a violation of these standards would be held by a court to be negligence and could open Ellensburg up to claims by customers for damages and losses. This is an extremely difficult position for the company to be in given the litigious[ness] of today's society.
>
> To avoid these quality of service rules being held by the courts to set the standard for determining negligence in damage cases, Ellensburg suggests that a rule be added which reads as follows:
>
> > The purpose of these rules is to allow the Commission to measure the performance of local exchange companies.

---

deliberate removal of existing language. *See* Section I.C. and footnote 13 below.

[2] A true and correct copy of Ellensburg Telephone Company's full written comments dated August 26, 1992 is attached hereto at Appendix A.

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> These rules are not intended to establish a standard of care owed by a local exchange company to any customer or customers.

In its written comments, Toledo Telephone Company similarly urged the Commission to clarify that the rules are not intended to expose telecommunications companies to civil suits. It stated:[3]

> Toledo is also concerned whether or not these rules, as proposed, will create liability standards that the company will have to face. These rules should not be meant to encourage customers to sue companies for failure to meet these standards. Even if every lawsuit can be successfully defended, simply the cost [to] defend lawsuits is expensive to a company as small as Toledo. For example, it would not make sense to have these rules create a situation in which a company would be sued by a customer if the transmission loss from the central office to the subscriber exceeds minus 8.5dB at 1004 Hz (WAC 480-120-515) and claim loss of business income [due] to the transmission loss. Even if the company could prove that there is no cause and effect relationship between the transmission loss and the alleged lost income, the cost of defending such a lawsuit would be expensive. Toledo suggests that the Commission make it clear that these rules, if they are adopted, are not meant to be used for such purpose.

Upon this urging, the Commission at its September 9, 1992 open meeting adopted the recommendation of these two carriers.[4] In written comments dated September 17, 1992, U S WEST confirmed the Commission's deliberate inclusion of Subsection 500(3):[5]

> At the open meeting, Chairman Nelson directed the Attorney General's staff to prepare language for inclusion in the proposed rules clarifying that the rules do not provide new grounds for civil lawsuits. USWC supports this effort, and would encourage the Commission to further emphasize that the proposed rules do not in any way undermine or void those limitations of liability that may be applicable to telecommunications services providers.

---

[3] A true and correct copy of Toledo Telephone Company's full written comments dated August 26, 1992 is attached hereto at Appendix B.

[4] In connection with its preparation of this brief, Qwest has requested from the Commission the audiotape of the Commission's September 9, 1992 open meeting.

[5] A true and correct copy of U S WEST's full written comments dated September 17, 1992 is attached hereto at Appendix C.

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

B. Negligence Per Se and Restatement Section 286

Implied in Staff's May 10, 2001 e-mail is its apparent belief that Subsection 500(3) is redundant of the Legislature's 1986 "elimination" of the doctrine of negligence per se. Whether the Legislature effectively eliminated negligence per se remains an open question, however. Subsection 500(3) serves to clarify that, even should a court be persuaded that the negligence per se doctrine or an equivalent doctrine survives under Washington law, it does not apply in the context of a telecommunication company's alleged deviation from the service quality standards codified in Chapter 480-120. As the Commission (and not the superior court) is the appropriate enforcing agent for those standards, Subsection 500(3) must be retained to preserve the consistency and integrity of the Commission's enforcement mechanisms. This conclusion is supported by *Moore v. Pacific Northwest Bell*, 34 Wn. App. 448, 662 P.2d 398 (1998), in which the Court of Appeals clarified that courts, in the exercise of discretion and judicial restraint, will generally defer to agencies with special competence to enforce systemic rules violations if the agency is part of a pervasive regulatory scheme and has special competence over issues presented in the claim. *Id. at 452.*[6] Specifically, the Court distinguished between claims involving tortious injury unique to individual subscribers and inadequate telephone service common to the public. *Id. at 453-54.* In the latter case, the Court held that a subscriber's claim would generally be referred to the Commission for exercise of primary jurisdiction. *Id. at 452-54.* The general performance standards set out in Chapter 480-120, under the *Moore* court's analysis, are thus the province of the Commission and not a local superior court.

1. Was negligence per se actually eliminated?

Prior to 1986, under Washington common law a violation of a duty imposed by statute,

[6] In its May 10, 2001 e-mail, Staff requested briefing on the *Moore* decision. Aside from the distinction between proper jurisdiction over acts of negligence aimed at a single subscriber as opposed to general performance lapses (see above), the case does not bear on issues underlying Staff's proposed removal of Subsection 500(3). Staff implies that the *Moore* decision establishes that negligence requires a court's determination regarding a defendant's duty and thus that Subsection 500(3) serves no proper purpose. Staff's implication is incorrect. Instead, if Subsection 500(3) had not been included in the quality of services rule when adopted, the Commission's codification of those standards would have likely been deemed to have set particular duties and standards of care. *See* Sections I.A above and I.C. and II. below. Staff's implication thus supports retention of Subsection 500(3) for that very reason.

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

ordinance or regulation was deemed negligence per se. That is, the violation alone satisfied a tort plaintiff's burden to prove the existence of a duty and the defendant's breach thereof.[7] *See Portland-Seattle Auto Freight, Inc. v. Jones*, 15 Wn.2d 603, 607-08, 131 P.2d 736 (1942). In 1986, the Legislature adopted RCW 5.40.050, which provides:

> A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence; however, any breach of duty as provided by statute, ordinance, or administrative rule relating to electrical fire safety, the use of smoke alarms, or driving while under the influence of intoxicating liquor or any drug, shall be considered negligence per se.

While this statute appears on its face (as Staff states in its May 10, 2001 e-mail) to eliminate negligence per se in all but a few designated instances, subsequent appellate decisions call this conclusion into question. Relying on the four-part test set out in the Restatement (Second) of Torts Section 286 ("Restatement Section 286"),[8] Washington courts continue to treat (in some cases) a violation of a statutory or regulatory duty as a per se breach of that party's duty of ordinary care. In *Yurkovich v. Rose*, 68 Wn. App. 643, 847 P.2d 925 (1993), for example, the Court of Appeals ruled that, while it is true RCW 5.40.050 precludes negligence per se, the defendant bus driver was nevertheless negligent as a matter of law for his failure to comply with statutory and regulatory requirements regarding the proper manner to safely discharge a student from a school bus. *Id. at 654*. By reaching this conclusion, the court (albeit under the guise of

---

[7] A plaintiff in a negligence action bears the burden to prove the existence of four elements: (1) duty; (2) breach of that duty; (3) proximate cause; and (4) resultant damages. *Moore,* 34 Wn. App. at 452. In cases of negligence per se, a plaintiff is merely required to prove causation and damages.

[8] Restatement Section 286, as articulated by the Washington Supreme Court in *Hansen v. Friend,* 118 Wn.2d 476, 480-81, 824 P.2d 483 (1992), provides that a court may adopt legislative enactments as a reasonable person's standard of conduct if the purpose of the enactments is found exclusively or in part:

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

While Qwest would certainly oppose such a view, in the absence of Subsection 500(3), a litigant could arguably take the position that the technical performance standards of Chapter 480-120 satisfy this four-part test. While Qwest believes it would ultimately prevail, the costs of repeatedly defending such claims could be significant.

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Restatement Section 286) substituted the statutory and regulatory safety requirements for the defendant's duty to act with ordinary care. As this very substitution is the essence of negligence per se, it remains unclear whether RCW 5.40.050 is as conclusive as it at first appears.

2. Subsection 500(3) is clarifying.

Especially in light of courts' deference to an agency's interpretation of a statute it is charged to enforce and administer,[9] Subsection 500(3) in its present form[10] renders moot the confusion left by the confluence of RCW 5.40.050 and Restatement Section 286. Regardless of whether a statutory or regulatory duty is generally considered to establish a higher standard of care, Subsection 500(3) clarifies that the standards set out in Chapter 480-120 are not to be appropriated by a would-be plaintiff as imposing a particular standard of care on a telecommunications company. Subsection 500(3)'s removal would cause confusion over whether the highly-technical standards of the Chapter meet the four-part test set out in Restatement Section 286 (*see* footnote 8). Whether they do or do not in the view of the courts before which the issue is raised, litigation costs for all telecommunications providers could be staggering. This result runs afoul of the Commission's purpose in adopting Subsection 500(3) in 1993 (*see* Section I.A. above) and of the fact – verifiable by careful review of documents generated by the Commission at the time it initiated the quality of service rulemaking process in late 1991 and early 1992 -- that the Commission's goal in codifying quality of service standards was not simply to articulate the lowest, non-negligent standard of performance (i.e., to set a low bar below which performance should be deemed negligent), but was to assure high performance standards in the state.[11]

---

[9] *See Mahoney v. Mahoney*, 105 Wn. App. 391, 401 n.16, 20 P.3d 437 (2001).

[10] This is not to say that Subsection 500(3) is unimpeachable in its present form. For instance, Qwest would invite a clarification of the sections and subsections of Chapter 480-120 the Commission had in mind by its use of the words "these rules" in Subsection 500(3). Qwest would suggest the Commission, if inclined to alter the language of Subsection 500(3), replaces the introductory phrase "These rules" with "The standards set forth in Chapter 480-120".

[11] In an undated policy statement distributed at an open public meeting in early 1992, Staff described the purpose of the rulemaking as in part to "maintain high quality telecommunications service on a consistent basis across customer classes and throughout service territories of Washington telecommunications companies" (underline added). A true and correct copy of this undated statement of purpose is attached hereto at Appendix D.

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Accordingly, it would be improper for the Commission to remove Subsection 500(3) since doing so will invariably connote to future litigants and some courts that any lapse (even a momentary and unavoidable lapse) in meeting these performance standards constitutes negligence as a matter of law.

C. RCW 80.04.440

Outside the context of negligence or negligence per se sits RCW 80.04.440 ("Section 440"),[12] which provides:

> In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was willful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

Neither the text of Section 440 nor any case citing it defines what the Legislature meant by "act, matter or thing required to be done." Left to the statute alone, it is unclear whether for instance the technical network performance standards set forth in WAC 480-120-515 constitute acts, matters or things the failure with which to comply exposes a telecommunications company to civil liability. Should a telecommunications company be required to defend litigation by virtue of a subscriber's complaint that it lost business because the circuit noise objective on the

[12] With regard to Section 440, Staff's May 10, 2001 e-mail refers interested parties to the Supreme Court's decision in *Employco Personnel Services, Inc. v. Seattle*, 117 Wn.2d 606, 817 P.2d 1373 (1991). In *Employco*, the Supreme Court affirms a trial court's ruling that a Seattle ordinance purporting to immunize the City (and Seattle City Light) from liability for interruptions in electrical service is void. This case is irrelevant to the questions presented here. This Docket does not involve issues of sovereign immunity and Section 440 does not apply to municipal utilities. The case is thus inapposite. Furthermore, the type of duty violated by the City of Seattle leading to the *Employco* case was a specific statutory duty (imposed by Chapter 19.122, RCW) to properly identify underground electrical facilities; that type of duty is wholly distinct from the technical quality of service standards codified in Chapter 480-120. As discussed above with reference to the *Moore* decision, complaints regarding those more minute performance standards are more properly raised before the Commission, which has special competence in assuring high quality telephone service throughout the state.

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

subscriber's loop exceeds 20.0 dBrnC? Intuitively, it is unlikely that the Legislature's goal in enacting Section 440 was to permit and encourage consumers to bring costly actions against their telecommunications providers for such highly technical performance issues.

This raises the question of why the Legislature failed to exclude these technical requirements from the scope of the statute. The answer to this question is simple. While the Chapter 480-120 service quality standards were not adopted by the Commission until 1993, the Legislature adopted Section 440 in 1911 when no such particular standards existed in the Commission's rules. In conjunction with its efforts to codify for the first time specific service quality standards, the Commission wisely protected the telecommunications industry and the court system from widespread litigation by including Subsection 500(3). Should it be removed, and despite the availability of penalties and informal and formal grievance procedures available to the general public through the Commission's rules, the scope of Section 440 will become less certain and litigation will invariably ensue.

While Qwest would and will (if compelled to as a result of the Commission's removal of Subsection 500(3)) argue that Section 440 was not intended to create a private right of action for individual subscribers against telecommunications companies because of occasional lapses as measured against the Chapter's service quality standards, it is foreseeable that at least some courts may interpret Section 440 as doing exactly that. This is especially true given judicial deference to the Commission's interpretation of the telecommunications statutes and the likelihood that a court will infer that the Commission's conscious deletion of Subsection 500(3) could be motivated by and have only one purpose – to permit individuals to bring private actions against telecommunications companies based on technical performance failures. *See State v. Cleppe,* 96 Wn.2d 373, 378, 635 P.2d 435 (1981);[13] *State v. Dubois,* 58 Wn. App. 299, 303, 793

[13] In *Cleppe,* the Supreme Court was faced with interpreting whether the State's prosecution of a defendant under the criminal statute prohibiting possession of a controlled substance required proof of the defendant's guilty knowledge or intent. On its face, the statute (RCW 69.50.401(d)) is silent as to the required mens rea. The Supreme Court ruled that, even though the statute was now neutral on its face, because the prior criminal section contained an intent requirement, the Legislature clearly intended that guilty knowledge or intent was no longer an element of the crime. Specifically, the Court held: "The court notes that a precursor statute [Laws of 1923, ch. 47, sec. 3, p. 134] contained the words "with

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

P.2d 493 (1990) ("[I]t is presumed that an amendment [in the language of a statute] indicates a change in legal rights.")

Although Staff may feel that Subsection 500(3) is imprecise and that the public would be better served should it be simply extracted from the rules, Qwest respectfully disagrees. Should Subsection 500(3) be removed, telecommunications companies (large and small alike) could be forced to defend superior court litigation to run concurrently, in many cases, with Commission enforcement proceedings.

II. THE COMMISSION DOES NOT HAVE JURISDICTION TO CREATE PRIVATE CAUSES OF ACTION

Staff's May 10, 2001 e-mail requests interested parties to brief and explain what latitude, if any, the Commission has to create private rights of action for telecommunications consumers. Staff's implication is that, because the Commission admittedly lacks this authority, it also lacks the power to preclude private rights of action. And thus, Staff implies, Subsection 500(3) must be removed because it is likely beyond the scope of the Commission's jurisdiction.

Qwest would agree that the Commission has no authority to create or preclude private rights of action – that being the province of the legislative and judicial branches. However, the original adoption of Subsection 500(3) did neither. It merely maintained the status quo. Because the 1993 rule amendments for the first time contained a codification of numerous, highly-technical service quality standards not mandated by the Legislature, the Commission's inclusion of Subsection 500(3) was necessary to avoid the Commission having arguably also thereby created numerous equivalent private rights of action under Section 440. Clearly, the Commission recognized this when directing the Attorney General's staff to draft Subsection 500(3).

Further, it is Qwest's position that, for just this reason, the Commission may not remove Subsection 500(3) without simultaneously removing all the specific performance standards

---

intent", which words had been omitted from the current statute, leading conclusively to the view that '[h]ad the legislature intended to retain guilty knowledge or intent as an element of the crime of possession, it would have spelled it out as it did in the previous statute.' We are similarly compelled to that view in the cases before us." 96 Wn.2d at 378.

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

adopted in and subsequent to 1993.[14] If the Commission removes only Subsection 500(3), the net effect will be, in the view of some courts in the future, the creation of causes of action for individual subscribers based on these recently-codified standards.

III. CONCLUSION

Qwest thanks Staff for the opportunity to provide legal analysis with regard to the possible repeal of Subsection 500(3) and asks for the opportunity to supplement this brief should Staff move forward in this regard and articulate the legal and policy bases for its decision. For the reasons set forth above, Qwest urges Staff to refrain from deleting this very useful and clarifying language.

DATED this ____ day of June, 2001.

Qwest Corporation

By: _____
Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
Attorneys for Qwest

[14] These standards include, without limitation, those codified at: WAC 480-120-138(5), (8), 141(6), 505(2), 515(3)(a)-(d), 520(7)-(10), 525(2) and 530(1).

Qwest Corporation
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040