E5105397

ASSOCIATION OF US WEST RETIREES

1500 S. Macon St. Aurora, CO 80012

January 13, 2004

#705

William H. Donaldson
Chairman
U.S. Securities and Exchange Commission
450 Fifth Street, NW,
Washington, DC 20549-0609

Re: File No. S7-19-03
Security Holder Director Nominations

Dear Mr. Donaldson:

I am writing to you on behalf of the Association of U.S. West Retirees, an organization of more than 23,000 dues-paying retirees of Qwest, US West, Mountain Bell, Pacific Northwest Bell and Northwestern Bell.

Our members are small shareholders who actively vote their shares. Our retiree association (AUSWR) has itself been very active in promoting corporate accountability and governance reform at Qwest Communications, an experience that informs the position we take here. Our officers have sponsored a number of shareholder proposals at Qwest over the past several years, including two related to executive compensation (one excluding pension credits in calculations of performance pay, the other requiring shareholder ratification of executive severance agreements) that were initially opposed by the company – but which last month received over 96 percent of the shareholder vote after negotiations (and a likely majority vote in favor) led the Board and CEO to endorse them.

We wish to commend the Commission for proposing these historic new rules. This market-based reform could be by far the most important investor reforms adopted in decades *if* the Commission gives shareowners (and not just a handful of the very largest institutional investors) meaningful access to the company's proxy materials to nominate directors in competition with management's slate of directors. Therefore, although we *generally* support the Commission's proposal, we believe the proposed barriers and triggers are unreasonably discriminatory against the vast majority of American stock owners and unnecessary. We urge the Commission to modify the proposed rule – along the lines proposed by the CalPERS – to achieve a better balance between the rights of company owners and the legitimate concern that the annual election process not become too unwieldy, costly or contentious.

Most importantly, we believe that *if* a majority vote for a shareholder resolution proposing security holder nominations is maintained as a triggering event, then **the ownership requirement for an access resolution should be consistent with the current Rule 14a-8 standards that apply to other governance resolutions**. If a majority of shares are voted in favor of a shareholder access proposal, the size of the proponent's ownership stake is simply irrelevant. What matters most is whether the owners of the company vote to allow shareholder nominations and contested elections. It is their company, not management's. And if the Commission does adopt a higher ownership threshold for a *binding* proxy access resolution, it should certainly **make it clear that management under Rule 14a-8 cannot omit non-binding, advisory resolutions.**

Before describing the other modifications to the proposed rule supported by our retiree association, we would like to urge the Commission to keep several considerations in mind as they seek to strike the proper balance between shareowner access to the proxy and other considerations:

First, **companies are the property of the shareowners.** Obvious as this point may be, we have been greatly disturbed to see comments filed in opposition to the Commission's proposal by corporations, by management trade associations (viz., the Business Roundtable and Chamber of Commerce) and by their paid agents (viz., Wall Street law firms and consultancies). The Commission should radically discount the views of the *employees* of shareowners. The question for the Commission is how best to organize governance for the benefit of *owners* – and the American economy – not for the benefit of the employees (executives, lawyers or otherwise). Because it is the accountability of these agents to owners that is at issue, self-interested support of the status quo should be considered of little if any value to this inquiry.

Second, **it is the SEC and not state law that prevents shareholders from nominating directors on the proxy ballot**. Shareholders of most companies (based on the laws of their state of incorporation, including Delaware) have the right to nominate directors. We agree with the state treasurer of Connecticut, Denise Nappier, who notes in her comments in this proceeding (Dec. 22, 2003) that listing shareholder nominees in company proxy materials is "*not* a new right for shareholders to nominate directors, but rather merely a question of how to move this process onto the company's proxy card in a cost-effective way." While state laws are generally neutral with respect to proxy access for director nominations, the SEC's Rule 14a-8 does not even allow shareholders to express an opinion about proxy access for director nominations, as it permits managements to omit shareholder proposals related in any way to the election of directors. As the Social Investment Forum notes in its comments (Dec. 22, 2003), Congressional intent suggests that the SEC should facilitate "fair corporate suffrage" for every security holder to the greatest extent feasible.

Third, **effective corporate governance is a type of "public good" – both to**

shareholders and to the economy. Recent corporate scandals suggest a systemic failure of effective board oversight and accountability to shareholders. This should not surprise, since the regulatory system maintains powerful *disincentives* for owners to effectively manage their property. So long as a single shareholder, or group of shareholders, must bear the full cost of challenging incumbent directors *and* compete with management's ability to spend an unlimited amount of shareholder wealth to fight them (while receiving only a pro rata share of any increase in shareholder value as a result), there will be few if any challenges to under-performing directors. A more level playing field is not likely to result in a large number of shareholder nominations – but it will introduce a potent *deterrent* to behavior that would motivate shareowners to take remedial action.

Finally, **the very largest institutional shareholders cannot and should not be relied upon to represent all equity owners**. Absent a compelling justification – borne out by documented abuse – the SEC should not make small holders "second class citizens" when it comes to corporate governance. The 5 percent ownership threshold proposed by the Commission would limit the ability to nominate a director at the average S&P 500 company to investors holding over $900 million in common stock. And even sponsoring a shareholder resolution to trigger the ability of 5 percent owners to nominate would require, to be binding, the long-term ownership of stock valued at $180 million. This would absolutely exclude all but the very largest institutional investors; and, as documented in comments filed by the AFL-CIO (Dec. 19, 2003), at large U.S. companies the only plausible candidates for this role are money managers, bank trust departments and mutual funds who frequently have conflicting financial interests – and who in any case are hardly representative of small individual investors.

While the Commission's proposal is certainly a step in the right direction, we strongly believe that this governance reform will be meaningful, fair and effective *only if* it is modified to lower the barriers to both shareholder nominations and to shareholder resolutions concerning board elections. We therefore respectfully propose the following modifications:

Triggering Events

1. **Ownership requirements for shareholder-sponsored proxy access resolution should be consistent with current Rule 14a-8 requirements**.

If a shareowner proposal must be passed by a majority vote to trigger the nominating procedure, then the ownership stake of the resolution's sponsor is completely irrelevant. The government's only legitimate concern is whether the resolution wins a majority of shares voted. The only obvious effect of this restriction is to prevent shareholders from deciding for themselves whether to allow qualified shareholders to access the company's proxy to nominate director candidates. While there may be a rationale for restricting the actual ability to nominate directors to 3 or 5 percent holders, there is no legitimate rationale for singling out this particular governance reform as one that the federal government will forbid shareholders from debating and deciding for themselves.

As documented in the comments filed by 38 public employee retirement systems (Dec. 22, 2003) and by the AFL-CIO (Dec. 19, 2003), the SEC's proposed 1 percent ownership requirement for a binding resolution amounts to long-term ownership of stock valued at over $180 million at the average S&P 500 company. This unreasonably discriminates against individual investors and other small holders. At Qwest – where shareholder have suffered more than a 90 percent erosion in stock value, serious governance problems and an ongoing SEC investigation – merely sponsoring a proxy access proposal under the SEC's proposal would require the support of investors with $75 million in long-term holdings! And then they would still need to win a majority vote, no easy feat considering that the company's founder for former chairman (Phillip Anschutz) owns over 17% of the common equity. In short, a majority vote of shareowners should be the only requirement to trigger a binding proxy access mechanism.

2. **If a more restrictive ownership requirement applies to binding proxy access resolutions, then the Commission should clarify that *non-binding*, advisory resolutions cannot be excluded by management.**

Even if the Commission seeks to limit the ability of shareholders to trigger a *binding* resolution, it should clarify the rule permits *precatory* resolutions that request a company's board of directors to adopt a proxy access policy voluntarily. If the SEC believes that *mandating* proxy access for contested director elections is a good policy under certain circumstances, then it should at least allow shareowners an opportunity to demonstrate the degree of support for this mechanism short of a binding process. While the SEC's rule, as proposed, is likely to lead to very few mandatory nominations – most likely limited to obviously troubled companies – advisory proposals can permit a far greater degree of feedback about investor satisfaction with board performance without triggering contested elections.

3. **The withhold vote threshold should be lowered from 35 to 20 percent of the votes cast**.

The Commission's proposed 35 percent threshold is far too high if it is intended to be a measure of dissatisfaction by shareowners. One reason is that unlike a proxy access resolution, withhold votes occur absent any explicit issue, advocate or persuasive information in the proxy. The affirmative withholding of votes from a particular director reflect virtually spontaneous eruptions of shareholder discontent, typically based on information reported in the media. As the then-chairman of the Business Roundtable's corporate governance task force told a Senate hearing on October 17, 1991, "If 20 percent of the votes of the given company for the board were withhold ... it would be an open indication to all kinds of people that the board was vulnerable to an effort to mount an alternative slate." It would certainly be an indication that the particular director should have some competition the next time around!

Qwest shareholders face this situation right now. At last month's annual meeting (delayed six months due to the accounting scandal and SEC-supervised restatement of earnings), 20 percent of the voted shares withheld support for the reelection of Phillip Anschutz, who until last year served as board chairman. As noted, this is a significant level of discontent considering Anschutz owns 17 percent of Qwest and that three other investment companies own another 20 percent. There is little question that a substantial number of Qwest shareowners want the chance to elect more independent and effective directors – and to require that owners of 35 percent need to understand and take the affirmative step of withholding support in order to trigger shareholder access to merely nominate candidates for director strikes us as unreasonably restrictive.

4. **A trigger should be added based on non-implementation of shareholder resolutions winning a majority of shares voted.**

The failure of a corporate board to implement a policy adopted by a majority vote of shareholders is perhaps the most clear-cut example of a failure in corporate accountability. This is particularly true since Rule 14a-8 (and especially it's "ordinary business" exclusion) so greatly restricts the ability of company owners to express their views on corporate policy. If this trigger is adopted, the SEC should anticipate the need to settle disputes, as it currently does in reaction to Rule 14a-8 no-action requests, concerning whether a shareholder resolution adopted by a majority of votes cast has been "substantially implemented."

Other Issues

5. **The ownership requirement to nominate a single director candidate in the proxy should be lowered from 5 to no more than 1 percent.**
Because of the degree of support that would be evidenced by the triggering event itself, there appears to be no justification to restrict the ability to nominate to holders of 5 or even 3 percent of the company. We agree that shareholders nominations through the company proxy should be limited in number, so that no more than a minority of the board could be elected by this mechanism at any one time. But given the choice between allowing a 5 percent group to nominate two or three directors – and allowing two or three different groups of smaller investors to nominate a single director – we urge the SEC to accommodate the latter scenario. As noted, at large companies even a 1 percent threshold requires aggregating the support of investors with more than $100 million in stock, a hurdle that would be as effective in practice as a 5 percent threshold while being less discriminatory against smaller investors. Thus, where there is a triggering event, we urge the SEC to design the rule so that as many different groups of shareholders – and not merely the largest – is given reasonable

access to nominate a director candidate through the company proxy.

6. **The requirement that shareholder nominees must be independent of nominating shareholders should be eliminated.**

A single standard of independence should apply to board candidates, whether they are nominated by management or by shareholders. Such a limitation would arbitrarily exclude many qualified individuals, including analysts for investment management firms that have invested in closely monitoring a company precisely because they have a substantial investment at stake. This is another example – similar to the unnecessary 1 percent threshold for proposing a binding proxy access resolution – where the government should allow the election process and the will of shareholders to determine the result. Full and enhanced disclosure requirements should be sufficient to inform voters. In addition, management and the incumbent board will have every incentive – and opportunity – to make any relationships and their implications known to shareholders prior to the vote.

7. **Shareholder nominees should receive equal space and position in the company proxy materials, and management should not be allowed to expend shareholder wealth to solicit against them**.

We believe shareowners should be permitted, as they are with policy resolutions submitted under Rule 14a-8, to include supporting statements of at least 500 words regardless of whether companies include supporting statements for their own nominees or slate. And if companies devote more than 500 words to supporting a candidate, or to opposing shareowners' candidates, then shareowner nominees should be given equal space. More critically, the final rule should prohibit companies from presenting management candidates as a slate, or allowing shareholders to vote for the board-nominated candidates with a single vote. In contested elections triggered under this rule, shareholders should cast a separate vote on each candidate to ensure an unbiased selection process.

Conclusion

We strongly support the adoption of this long overdue rule granting shareholders access to the proxy to nominate directors. We thank the Commission for this opportunity to comment and welcome any additional inquiries about our experiences or positions. You can contact me directly at 303-743-7928 or by email at nbphelps@worldnet.att.net.

Sincerely,

N B Phelps

Nelson Phelps
President and Executive Director
Association of US West Retirees