BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1354

In the Matter of QWEST CORPORATION Petition for Approval of a Price Plan Pursuant to ORS 759.255.	JOINT REPLY TO QWEST'S AND STAFF'S RESPONSES TO MOTION TO DISMISS

JOINT REPLY TO QWEST'S AND STAFF'S RESPONSES TO MOTION TO DISMISS

According to the schedule set forth in Administrative Law Judge Arlow's Conference Report, issued December 17, 2007, Covad Communications Company, Integra Telecom of Oregon, Inc., McLeodUSA Telecommunications Services, Inc., Time Warner Telecom of Oregon, LLC, and XO Oregon, Inc. ("Joint CLECs"); Telecommunications Ratepayers Association for Cost-based and Equitable Rates ("TRACER"); and Citizens' Utility Board of Oregon ("CUB") (collectively "Joint Movants") hereby submit this Joint Reply to the Responses filed by Qwest Corporation ("Qwest") and Commission Staff ("Staff"), on January 24, 2008 and January 31, 2008, respectively.

INTRODUCTION

Qwest's response to the Joint Motion to Dismiss is nothing more than sophistry, which means "a deliberately invalid argument displaying ingenuity in reasoning in the hope of deceiving someone."[1] While claiming that the Joint Movants have violated rules of statutory construction, it is Qwest that would have the Commission read into the statutes words that are not there. Qwest goes further by inserting phantom words and phrases into the Commission's Orders interpreting the statutes.

Unfortunately, the Commission Staff has followed in Qwest's wake, claiming that the "plain language" of the statutes supports Qwest's arguments. Staff, however, fails to quote *any* language from the statutes and instead offers only a series of question-begging arguments.

Boiled down to its core, Qwest makes two basic arguments in its Response. First, Qwest argues that it has the right to "opt out" of price cap regulation under ORS 759.405, *et seq.*, because the Legislature could not have intended that Qwest be "stuck" with these caps in perpetuity. Second, Qwest argues that its proposal to eliminate price caps on the vast majority of its services fits within the purview of ORS 759.255 because Qwest will file price lists and the plan has a clawback provision. These arguments entirely miss the mark.

Qwest's "opt out" arguments fail to take into account two critical facts. First, Joint Movants do not claim that the caps are "forever binding," as Qwest describes them. The Commission can exempt Qwest from the caps under ORS 759.052. Once a carrier makes an ORS 759.410 election, however, the Commission is divested of authority to modify the caps in any way, and Qwest, by its own power, cannot re-vest that authority in the Commission. Second, the legislative history shows that the Legislature understood that telecommunications is

[1] http://wordnet.princeton.edu/perl/webwn?s=sophistry.

a declining cost industry when it enacted ORS 759.400 *et seq.*. With the expectation that productivity gains would offset inflation, the Legislature reasonably presumed that the caps would remain above cost. In short, there is no reason for the Commission not to give effect to the statute as written, namely, without creating any right of the electing carrier to "opt out" where no such right is expressly or impliedly granted.

Qwest's price listing and clawback arguments are similarly without merit. Qwest's Petition proposes a scheme in which the vast majority of its services will not be price regulated at all. The price caps for the remaining services are lifted automatically after five years. This is contrary to the plain language of ORS 759.255 and ORS 759.195, which require the Commission to ensure just and reasonable prices and to set price caps, as Staff also concludes in its Reply Brief. The price listing and clawback provisions do not save the Petition, as Qwest contends.

Despite recognizing that the Petition does not satisfy the requirements of ORS 759.255, Staff recommends that the Commission deny the Joint Motion to Dismiss and allow Qwest to file an amended petition that may, or may not, cure the facial deficiencies. Staff's recommendation is improper. The Commission must decide the Joint Motion to Dismiss on the basis of the petition Qwest actually filed, one that the Commission does not have jurisdiction to approve. The Commission certainly cannot decide the Motion to Dismiss based upon unfiled amendments to Qwest's Petition.

For the reasons described and argued below, the Commission should grant Joint Movants' Motion to Dismiss. [2]

[2] As Qwest correctly concludes, the Motion to Dismiss is based upon the Commission's lack of jurisdiction to grant Qwest's Petition for the reasons stated in the Joint Motion to Dismiss and in this Reply.

ARGUMENT

I. Qwest and Staff fail to show that the Legislature intended or that the Constitution requires that Qwest's election under ORS 759.405, *et seq.*, be revocable at will.

A. The Legislature did not intend an electing carrier to have power to opt out at any time, and neither Qwest nor Staff cite any language in the statute to the contrary.

Ironically, Qwest and Staff argue that Joint Movants are attempting to assert what has been omitted while Qwest and Staff rely solely on the plain language of the statute. Notably, neither Qwest nor Staff identify any language in the statute that states that an electing carrier under ORS 759.410 has the power to opt out at any time. On the contrary, the text of the statute demonstrates the clear intent of the Legislature to make the election permanent.

When construing a statute, the text of the statute "is the starting point for interpretation and is the best evidence of the Legislature's intent." *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610 (1993). If the Legislature's intent is clear from the text and context of the statute, further inquiry is unnecessary. *Id.* at 611. ORS 759.410(1) states:

> It is the intent of the Legislative Assembly that:
>
> (a) The State of Oregon cease regulation of telecommunications carriers on a rate of return basis;
>
> (b) Telecommunications carriers subject to rate of return regulation have the ability to opt out of rate of return regulation;
>
> (c) A telecommunications carrier that opts out of rate of return regulation under this section and ORS 759.405 shall be subject to price cap regulation....

In the Legislature's own words, the purpose of ORS 759.410 is to end rate of return regulation. The Legislature intends carriers "subject to rate of return regulation" to "have the ability to opt out of rate of return regulation." Any carrier that "opts out of rate of return regulation under this section and ORS 759.405 shall be subject to price cap regulation." There is no ambiguity in these three statements.

What the Legislature expressly conferred on carriers is the power to opt out of rate of return regulation and into price cap regulation. As a result of its election, Qwest is no longer a carrier subject to rate of return regulation. While the Legislature stated unequivocally that it intended carriers subject to rate of return regulation to have the ability to opt out of that form of regulation, the Legislature did not express the same intent that carriers subject to price cap regulation shall have the ability to opt out. To borrow from Qwest's Response, the Legislature certainly knows how to express an intent to allow carriers to opt out of a form of regulation, because the Legislature expressly did so using the words "opt out" three times in ORS 759.410(1)(b), (1)(c) and (2). Had the Legislature intended that an electing carrier could opt out, it would have stated in the statute that a carrier could opt out. It did not do so.

Qwest argues that because the statute does not use the word "irrevocable," the election must be revocable. If that argument had merit, then the converse would hold equally: since the statute does not use the word "revocable," the election must be permanent. The argument is a nullity. Furthermore, Qwest relies on statutes that use the word "irrevocable" in the context of pensions, donations, retirement contributions and lottery prizes. Not one of these statutes has anything to do with telecommunications law or the authority of a telecommunications carrier to opt out of price caps imposed by the Legislature. Finally, Qwest ignores the fact that in the very statute at issue, ORS 759.410, the Legislature uses the phrase "opt out" three times. The term "revocable" is nowhere to be found.

That the Legislature intended the election to be permanent is further supported by the plain language of ORS 759.410(1)(c). The Legislature intended that any carrier that opts out of rate of return regulation under this section "shall be subject to price cap regulation," a mandate also repeated in ORS 759.410(2). The Commission is "not permitted to ignore words written by

the Legislature." *Liles v. Damon Corp.*, 210 Or App 303, 312 (2006). To avoid the unambiguous term "shall," Staff asserts that "shall be subject to price cap regulation" means shall be subject to price cap regulation *only so long as the carrier is subject to price cap regulation.*[3] *See* Staff's Reply Brief at 4. Not only is the proposed interpretation a tautology rendering the actual text meaningless, Staff is effectively urging the Commission to insert text that does not appear anywhere in the statute. *EQC v. City of Coos Bay*, 171 Or App 106, 110 (2000) ("We are required, if possible, to avoid construing statutes in a way that renders any provision meaningless."); *State v. Arnold*, 214 Or App 201, 208 (2007) ("[I]n construing a statute, we are not to 'insert what has been omitted'.") Furthermore, Staff fails to cite any legislative history or rule of statutory construction that would indicate that the Legislature meant something different than what it said.

Not only does ORS 759.410(2) repeat the mandate that an electing carrier "shall be subject to price regulation," the statute also places an important limit on the Commission's authority. An electing carrier "shall not be subject to *any other retail rate regulation*, including but not limited to any form of earnings-based, rate-based or rate of return regulation." ORS 759.410(2) (emphasis added). This language is very broad and encompasses retail rate regulation under ORS 759.195 and 759.255. Qwest and Staff ignore this provision altogether. Neither Qwest nor Staff cite any legislative history, case law or Commission decisions suggesting that the Legislature intended this provision to have a special meaning. The statue means what it says, having elected price cap regulation, the Commission has no authority to regulate that ILECs rates in *any* manner, including regulation under an ORS 759.255 price plan.

[3] Staff repeats this argument for every section of the statute relied upon by Joint Movants and also attempts to explain away on similar grounds the plain language of Commission orders discussed in Joint Movants' Motion to Dismiss.

Qwest argues, instead, that ORS 759.410 must be read in the context of ORS 756.040(1). The argument is completely without merit. First, ORS 756.040 is a statute conferring general powers on the Commission. Qwest is arguing that Qwest, not the Commission, has power to opt out of price cap regulation and not pursuant to any grant of power conferred by ORS 756.040. Second, as an entity no longer subject to rate of return regulation, Qwest's reliance on the statute is wholly misplaced. Qwest quotes only the phrase "fair and reasonable" from the statute. The full sentence reads "[r]ates are fair and reasonable for the purposes of this subsection if the rates provide adequate revenue both for operating expenses of the public utility or telecommunications utility and for capital costs of the utility, with a [sufficient] return to the equity holder."[4] Appealing to a statute addressing rate of return regulation to give context to a statute that does away with rate of return regulation hardly advances Qwest's position.

Qwest also argues that the plain meaning of the word "may" in ORS 759.405(1) confers on Qwest the power to opt out of price cap regulation. Qwest fails to quote the entire provision, which states that

> [a] telecommunications carrier may elect to be subject to this section and ORS 759.410. The telecommunications carrier shall notify, in writing, the Public Utility Commission of its election. Such election should be effective 30 days after the written notification is received by the Public Utility Commission. *A telecommunications carrier that elects to be subject to this section and ORS 759.410 shall be subject to the infrastructure investment and price cap regulation requirements of this section and ORS 759.410 and shall not be subject to any other regulation based on earnings, rates or rate of return.*

ORS 759.405(1) (emphasis added). The provision clearly authorizes a carrier to voluntarily "elect to be subject to this section and ORS 759.410," but the provision does not say that the election is revocable, that an electing carrier "may opt out" at any time, or that a carrier "may elect not to be subject to this section and ORS 759.410." Qwest is inserting words that do not

[4] Subsections (a) and (b) of ORS 756.040(1) describe the standard by which a sufficient return on equity is measured.

appear anywhere in ORS 759.405. Instead, the statute plainly states that an electing carrier "shall be subject to...price cap regulation...and shall not be subject to any other regulation." ORS 759.410(1). In other words, the same mandate that appears twice in ORS 759.410 is repeated a third time in ORS 759.405. The plain language of ORS 759.405(1), read in the context of the related provisions in ORS 759.410(1) and (2), support Joint Movants' argument that the Legislature did not intend for an electing carrier to opt out at will.

In support of a plain reading of the statutory text, Joint Movants' Motion to Dismiss also cited statements by the Commission expressly recognizing a fundamental difference between ORS 759.410 and ORS 759.255—namely, that 759.255, unlike 759.410, allows a subject carrier to return to rate of return regulation. Qwest and Staff respond merely that Qwest is not proposing to return to "rate of return" regulation. Qwest and Staff miss the point. The Commission itself recognized that the Legislature did not intend a price cap regulated entity to retain a path back to rate of return regulation. Given the express statement in ORS 759.410(1)(a) that the purpose of the statute is to end rate of return regulation, the Commission was undoubtedly correct in its conclusion. As Qwest and Staff interpret the statute, however, a price cap regulated entity can opt into ORS 759.255 at any time and from 759.255 can opt back into rate of return regulation, a path the Legislature closed off for electing carriers.

Based on the plain language of ORS 759.405(1) and ORS 759.410(1) and (2), common rules of statutory construction and prior Commission orders, the legislative intent is clear: an electing carrier may opt out of rate of return regulation, but the election is a permanent one.

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B. There is nothing absurd or unconstitutional about the imposition of permanent price caps.

Qwest argues that the Legislature could not have intended the election to be permanent because the statute does not provide Qwest or the Commission any mechanism to modify the price caps. Qwest claims that any such interpretation would make the price caps "forever binding," eventually leading to an absurd and unconstitutional restraint on Qwest's ability to earn a reasonable rate of return for its shareholders. Qwest is wrong on all three counts. First, the election is permanent, but the price caps are not "forever binding." Second, there is no evidence that the price caps are interfering with Qwest's ability to earn a reasonable rate of return, an argument that is inappropriate when made by a company not subject to rate of return regulation. Third, the Legislature considered and rejected periodic review and adjustment of price caps, knowing that Qwest could deregulate services if sufficient competition developed and that the price caps would encourage Qwest to capture efficiencies to maximize profits. The legislative intent is clear and does not lead to an absurd or unconstitutional result.

First, the price caps are not "forever binding" as Qwest contends.[5] ORS 759.410(7) expressly provides that Qwest may seek deregulation of services pursuant to ORS 759.052. The Commission may exempt from the price caps those services subject to sufficient competition, but only if Qwest files a petition and makes the proper showing. In fact, the Commission has on several occasions deregulated Qwest's price cap-regulated services pursuant to a petition under ORS 759.052. Qwest also may seek relief from the Legislature.

Second, there is no evidence that Qwest's cost of providing regulated services is rising, much less that the cost threatens to exceed the price caps already in place. In fact, Qwest is

[5] Qwest is "being saddled with inflexible price caps forever"; "the rates Qwest may charge [would be] forever capped at 2001 levels"; the election would be "forever binding." Qwest's Response at 2, 3, 6. Notably, Qwest did not raise these concerns before the Legislature in 1999, when the statutes were enacted at Qwest's urging.

careful not to allege that it is being denied a reasonable return on its investment or that costs are approaching or exceeding the price caps.[6] Any such allegation would be patently inconsistent with Qwest's assertion in its Petition that "Qwest's current rates are just and reasonable" and comparable to "Qwest's rates in other states and the rates charged by other carriers in Oregon" for similar services. Petition at 17. Furthermore, Qwest opted out of rate of return regulation when it elected price cap regulation, and, as Staff notes, Qwest is not proposing to return to rate of return regulation. Staff's Reply Brief at 7. Having voluntarily elected to be subject to permanent price caps rather than to have prices set based upon a reasonable rate of return, Qwest's repeated appeals to a "return on its investment" are misplaced and disingenuous.[7]

Third, as the Legislature understood when it enacted ORS 759.405, *et seq.*, Qwest operates in a declining cost of service industry. The Legislature reasonably assumed that competition would force prices down and eventually lead to deregulation. In the absence of deregulation, the price caps would give Qwest an incentive to increase productivity and efficiency in order to increase profits. A brief portion of an exchange between Bob Jenks, testifying on behalf of the Citizen's Utility Board ("CUB"), and Representative Bill Witt, shows that (i) the Legislature expected costs to decline, (ii) the Legislature considered whether there should be periodic review of the price caps, and (iii) the Legislature equated adjustable rather than permanent price caps as a continuation of rate of return regulation:[8]

MR. JENKS: In addition, I'm concerned that the price caps, the way that the price caps work, will over time put upward pressure on rates because they're not adjustable. The telephone industry is a declining cost industry. In addition, the demand, the usage of the telephone system, is increasing over time, which means that the per unit

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[6] Qwest contends only that over a long enough time horizon, the costs *could* approach or exceed revenues, a claim without any factual support and completely contrary to the usual trend in the industry, in which costs decline over time while productivity and efficiency increase. *See* Qwest's Response at 6.

[7] *See* Qwest's Response at 6, 7, 8.

[8] Testimony, House Comm. on Commerce, SB 622, June 1, 1999, Tape 78B at 287-392 (Testimony of Bob Jenks, Citizens Utility Board).

costs are declining. The end result of that will be that these price caps will never change over time. There's no mechanism for the Commission five years from now, ten years from now, fifteen years from now—where telephone service is still a monopoly—to say, you know this price cap we set back in the 1990s on caller ID is no longer the right price. That price should come down, because that's no longer the cost of that service. And so, there needs to be a mechanism for the price caps to be adjusted over time. That's the reality of the industry. And I'm confident that the realities of the industry will continue going down enough that I'm comfortable saying that the price caps can be adjusted upward or downward, because I believe that over time they will be downward, but there has to be a mechanism that allows price caps to be adjusted. Or the alternative is to have some sort of productivity factor figured in so adjustments are automatic without having to go to the PUC. I know utilities don't like productivity factors, so I'm willing to settle for some mechanism that allows the price caps to be revisited over time.

REP. WITT: Thank you, Mr. Chairman. Bob, it almost sounds like you're advocating for a continuation of a regulated rate of return. I mean, if you're going to start adjusting price caps up or down depending upon the economics of what it costs to provide the service, why don't you just stay with the regulated rate of return?

The concerns raised by CUB were echoed by other witnesses. MCI WorldCom's representative noted that, because the statute did not provide for review, "the rates are based on cost from a couple of years ago, and even though this is a declining cost, it will not be subject to any sort of productivity offset."[9] A representative for the American Association of Retired Persons ("AARP") worried that "[b]ecause there is no provision in this bill to adjust price caps over time, residential and rural customers will not see benefits from the declining costs of the phone system."[10] While consumer advocates complained that the lack of periodic review would allow Qwest to earn ever greater profits based on the declining cost of services, the Legislature flatly rejected the call for periodic review of the price caps.

The legislative history is clear. The Legislature understood that over time costs would decrease, not increase, and the Legislature considered and rejected calls for periodic review and

[9] Testimony, House Comm. on Commerce, SB 622, June 1, 1999, Ex. I at 2 (Statement of Gail Gary, MCI WorldCom).
[10] Testimony, House Comm. on Commerce, SB 622, June 1, 1999, Ex. L at 3 (Statement of John Glascock, AARP).

adjustment of the price caps.[11] The Legislature clearly did not share Qwest's belief that permanent price caps would lead to an absurd or unconstitutional result if the only mechanism for eliminating the price caps was deregulation under ORS 759.052.

Furthermore, Qwest's reliance solely on *Guaranty National Insurance Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990) is misplaced. In *Guaranty*, the court "struck down regulations that set insurance rates at a 'break even' level, thereby denying insurers any return whatsoever." *Morgan v. City of Chino*, 115 Cal.App.4th 1192, 1200 (2004) (discussing *Guaranty*). The case is inapposite for several reasons.

First, in order to sustain a facial challenge, Qwest must demonstrate that application of the statute "will inevitably lead to a confiscatory result." *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 294 (9th Cir. 1996). Qwest merely asserts the theoretical possibility of a confiscatory result. Second, Qwest agrees in its Petition that "Qwest's current rates are just and reasonable" and that those rates are comparable to "Qwest's rates in other states and the rates charged by other carriers in Oregon" for similar services. Petition at 17. Qwest, by its own account, has suffered no harm.[12] Finally, the Legislature imposed the caps in a declining cost industry with the understanding that the caps would allow Qwest to earn a higher rate of return under price cap regulation than it could earn under traditional rate of return regulation. Moreover, unlike the statutory scheme at issue in *Guaranty*, ORS 759.405, *et seq*. is expressly intended to replace rate of return regulation, a goal shared by other states that have adopted similar price cap regulation statutes.

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[11] *See also* Testimony, Joint Conf. Comm. on SB 622, July 2, 1999, Tape 2A at 017-059 (discussing a proposal by CUB and AARP to require periodic review of price caps).

[12] *See Federal Power Comm'n v. Hope Natural Gas,* 320 US 591, 602 (1944) ("It is the result reached and not the method employed which is controlling"); *see also Duquesne Light Co. v. Barasch*, 488 US 299, 314 (1989)("[A]n otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it.")

For the reasons stated, the Legislature's intent that the election for price cap regulation be permanent is neither absurd nor unconstitutional.

II. ORS 759.255 does not provide for the Commission authority to grant the relief Qwest seeks.

Even if Qwest could opt out of price cap regulation, ORS 759.255 does not authorize the Commission to approve the Petition filed by Qwest. Qwest essentially argues that it cannot be seeking deregulation because 759.255 does not permit deregulation, and, since the statute does not permit deregulation, the Petition under 759.255 does not really seek deregulation. Qwest's circular argument fails on its own logic and for a number of additional reasons.

A. ORS 759.255 does not authorize the Commission to approve Qwest's plan.

The proper inquiry for the Commission is whether ORS 759.255 permits the relief Qwest seeks. The text and legislative history of ORS 759.255 illustrate that the statute does not permit such relief. ORS 759.255 explicitly authorizes only a "plan under which the *commission regulates prices* charged by the utility" and exempts from rate of return regulation the "[p]rices approved" under the plan. ORS 759.255(1) (emphasis added). It does not contemplate a plan in which the Commission does *not* regulate prices.

The legislative history, including the testimony of Qwest's own representatives, confirms that the purpose of ORS 759.255 was to "authorize the Public Utility Commission to replace rate of return regulation with . . . price limit regulation."[13] ORS 759.255 authorizes a plan under which the Commission fixes or limits prices charged by the utility, i.e., in which the Commission sets price caps.

Staff also concludes that ORS 759.255 requires price caps, stating that "[p]rice caps are expressly required by [ORS 759.255] itself." Staff's Reply Brief at 11. Staff agrees that its

[13] Neither Qwest nor Staff has addressed or refuted Joint Movants' discussion of the legislative history.

conclusion "is also consistent with the legislative history that Joint Movants included with their motion as Attachments A and B." *Id.* Since it is undisputed that Qwest's proposed plan "does not include price caps for all services," Qwest's Response at 15, ORS 759.255 does not authorize the Commission to approve Qwest's plan whether or not the proposal is denominated "deregulation."

The logical result should be a recommendation by Staff to dismiss Qwest's Petition. Curiously, Staff instead suggests that Qwest should amend its Petition "to ensure that it meets the requirements of ORS 759.255." Staff's Reply Brief at 13. Staff ignores entirely the procedural posture of the case. The Commission is called upon to determine whether or not it has jurisdiction to grant the Petition that Qwest actually filed and not some hypothetically modified plan that may include the required price caps. Given Staff's own legal conclusion that price caps are required, the Commission must dismiss the Petition.

B. ORS 759.255 does not authorize the Commission to waive the requirements of ORS 759.405, et seq., including the permanent price caps.

Staff's Reply also ignores ORS 759.255(5). Qwest admits that ORS 759.255(5) limits the Commission's authority to waive regulatory requirements and that there are statutory requirements that the Commission "does not or cannot waive." Qwest's Response at 14 ("The Commission may waive some, but not all, regulatory requirements under a price plan.") The requirements that the Commission cannot waive are those provisions not listed in ORS 759.255(5). ORS 759.255(5) does not list, and the Commission therefore cannot waive, the requirements of ORS 759.405, *et seq*. Qwest does not dispute this fact. Rather, Qwest argues that, by unilaterally opting out of ORS 759.410, the restrictions in ORS 759.255(5) will no longer apply. This argument fails for a number of reasons.

First, even assuming Qwest could opt out of ORS 759.410, Qwest has not done so. As Qwest states in its Petition, "if the Commission approves Qwest's price plan in a form acceptable to Qwest, Qwest would elect out of regulation under 759.410, *effective upon commencement of Qwest's operation under the price plan.*" Petition at 23 (emphasis added). Until Qwest opts out, assuming it could do so, 759.410 controls. If the Commission authorizes a price plan under ORS 759.255 while the carrier is still subject to 759.410, the Commission would be ignoring the express limitations of ORS 759.255(5). Because the Commission lacks authority under 759.255 to waive the requirements of 759.410, Qwest's Petition should be dismissed with prejudice.

C. Qwest's proposals to price list services and to include a clawback provision do not cure the facial deficiencies of Qwest's Petition.

Qwest claims that the Petition does not impermissibly seek deregulation because the plan contemplates filing price lists and possible re-regulation under a clawback provision. Neither provision saves the plan under ORS 759.255.

The requirement that Qwest file price lists does nothing more than ensure that consumers and the Commission receive notice of price changes. The price listing proposed by Qwest would not provide the Commission any authority to regulate the prices charged, and, therefore, does not transform Qwest's Petition into a permissible plan under ORS 759.255.

The clawback provision is equally anemic and is not regulation as required by the statute. Qwest argues that the clawback provision is itself regulation. The argument is nonsense. First, the Commission can only re-regulate services after the clawback provision is invoked. Until then, there is no regulation. Second, a clawback provision is not regulation. In fact, ORS 759.052, the deregulation statute, also includes a clawback provision, allowing the Commission to re-regulate if it "determines an essential finding on which the deregulation was based no longer prevails, and re-regulation is necessary to protect the public interest." ORS 759.052(4).

The deregulation statute also authorizes the Commission to attach conditions to deregulation. ORS 759.052(1)(b); *see also* OAR 860-032-0025(6). The Commission need not go away entirely for the plan to be properly deemed "deregulation." It is deregulation when there is no limit on prices a utility may charge—precisely the relief Qwest seeks.

Furthermore, the proposed clawback is a sham. Rather than protecting consumers from Qwest, it protects Qwest from Commission oversight. Under Qwest's plan, the Commission can re-regulate the price of a particular service *only if* the Commission, which will bear the burden of proof, finds that the price was not reasonable. Having eliminated virtually all reporting of information essential to making that determination, it is unclear how the Commission would ever meet its burden. In any case, Qwest can avoid re-regulation simply by showing that there is one other provider offering a substitute service at a price within 10 percent of Qwest's price. With Qwest setting the prices in the market and others merely as price-takers, Qwest would have the ability to continually raise prices without the Commission having power to stop Qwest. Other providers need only follow Qwest's price increases; direct collusion would not be necessary.

It is clear that Qwest's proposed clawback would prevent the Commission from protecting consumers from Qwest's abuse of market power. Market power is commonly defined as the ability to profitably charge prices above the competitive level for a significant period of time.[14] Stated another way, market power is the ability to increase price above cost and to maintain that price increase. The Merger Guidelines suggest that a firm can exercise market power if the firm can impose a small but significant and non-transitory increase in price ("SSNIP"). The firm would have an incentive to do so if the increase in price would lead to higher profits.

[14] *See* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines 0.1 (1992, revised 1997) ("Merger Guidelines").

An increase in price will enhance profits if the additional revenue is greater than the additional cost. A small but significant price change is usually assumed to be 5 percent. As noted previously, Qwest is proposing that the Commission be barred from re-regulating prices if any other competitor in the market offers a substitutable service within 10 percent of the price Qwest charges. In other words, Qwest assumes it can raise its price up to 10 percent without confronting any competitive alternative. By definition, then, Qwest is proposing that it be allowed to exercise its market power by imposing a significant price increase without any threat of Commission intervention. In addition, for the first line at a residential or business location, Qwest is requesting that the Commission give it the right to increase its rates by up to $2.00 per month during the first four years and that there be no limit on price increases after the fifth year. While this request is a cap on rate increases and not a specific rate increase, it indicates that Qwest believes it may be able to increase the rate to that level. The request also indicates that Qwest believes that it may be able to increase the rate for additional lines by more than that amount. To sustain such increases, Qwest must have market power. If the market were effectively competitive, then Qwest not only would lose customers but it would also face decreases in revenues and profits associated with the rate increase.

In short, no matter how the Commission views the price listing and clawback provisions, they do not amount to the price cap regulation required under ORS 759.255 and cannot save Qwest's Petition. The Commission should dismiss Qwest's Petition with prejudice.

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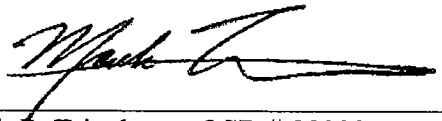
CONCLUSION

For the foregoing reasons, the Commission should dismiss Qwest's Petition under ORS 759.255 with prejudice. If Qwest believes that sufficient competition exists to justify deregulation of some or all of its services, then Qwest should file an appropriate petition pursuant to ORS 759.410(7) and ORS 759.052 in a separate docket and make the required showing.

Respectfully submitted this 7th day of February, 2008.

DAVIS WRIGHT TREMAINE LLP



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Of Attorneys for TRACER

CERTIFICATE OF SERVICE
DOCKET UM 1354

I hereby certify that I have this day served a true and correct copy of JOINT REPLY TO QWEST'S AND STAFF'S RESPONSES TO MOTION TO DISMISS upon all parties of record, electronically to all parties and by U.S. Mail to all parties who have not waived paper service.

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DATED at Portland, Oregon this 7th day of February, 2008.

Barbara Lasswell

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