

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**

3 UM 1354

4 In the Matter of  
5 **QWEST CORPORATION**  
6  
7 Petition for Approval of Price Plan  
Pursuant to ORS 759.255

**QWEST CORPORATION'S RESPONSE TO  
JOINT MOTION TO DISMISS**

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9 Pursuant to Administrative Law Judge Allan Arlow's Prehearing Conference Report of  
10 December 17, 2007, petitioner Qwest Corporation ("Qwest") respectfully responds to the Joint  
11 Motion to Dismiss that intervenors Covad Communications Company, Integra Telecom of  
12 Oregon, Inc., McLeodUSA Telecommunications Services, Inc., Time Warner Telecom of  
13 Oregon, LLC, XO Oregon, Inc., Telecommunications Ratepayers Association for Cost-based and  
14 Equitable Rates, and the Citizens' Utility Board (collectively "Intervenors") filed on January 10,  
15 2008 (the "Motion").

16 **INTRODUCTION**

17 Although styled as a motion to dismiss, the Intervenors' Motion is really nothing more  
18 than an attempt to confuse the issues by raising several irrelevant points, such as Qwest's  
19 deregulation efforts in the past. They also invoke statutory construction rules, but ultimately  
20 violate them by inserting words into statutes that are simply not there. That is, the Intervenors  
21 conjure up words like "permanent election" to price cap regulation, or "permanent price caps," in  
22 arguing that Qwest's election to price cap regulation under ORS 759.410 is somehow irrevocable  
23 and permanent. They also mischaracterize Qwest's Petition, arguing that it really seeks  
24 deregulation of services.

25 As Qwest shows in this response, not only must the Intervenors' arguments fail because  
26 the statutes do not say what the Intervenors claim, but adopting the Intervenors' arguments would

1 lead to extreme and absurd results, such as Qwest's being saddled with inflexible price caps  
2 forever. Qwest plainly has the right to opt out of ORS 759.410 and to seek a price plan under  
3 ORS 759.255, and the Commission plainly has jurisdiction to consider and to grant Qwest's  
4 Petition. Moreover, Qwest's Petition does not seek deregulation of any existing services.  
5 Rather, it seeks precisely the type of pricing flexibility that is available under ORS 759.255.

6 Further, although the Intervenor raise a number of policy arguments about why the  
7 Commission should reject Qwest's Petition, they do so without any legal basis and fail to meet  
8 their substantial burden under the appropriate motion to dismiss standards of ORCP 21 A(8).  
9 The Intervenor fail to establish any legal basis for dismissal, because they do not show that  
10 Qwest's Petition fails to state ultimate facts sufficient to constitute a claim. At best, the  
11 Intervenor's policy-based arguments may be addressed on the merits during the pendency of this  
12 docket, and not in a motion to dismiss under ORCP 21 A(8).

13 Accordingly, the Commission should disregard the Intervenor's policy arguments and  
14 their irrelevant arguments about deregulation efforts in the past.<sup>1</sup> Under Oregon pleading rules,  
15 as well as Oregon statutory interpretation and construction rules, the Intervenor fail to meet  
16 their burden to prevail on a motion to dismiss and the Commission should deny the Motion.

## 17 ARGUMENT

### 18 I. The Standard for Deciding a Motion to Dismiss

19 The Intervenor do not articulate *any* standard the Commission should apply in deciding  
20 their motion to dismiss, so Qwest and the Commission are left to guess about the basis for the  
21 Motion. As the Commission knows, a motion to dismiss in Oregon is governed by ORCP 21 A;

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23 <sup>1</sup> The lengthy "introduction" to Intervenor's Motion (Motion, pp. 2-6) discusses Qwest's past  
24 experience with alternative forms of regulation. It also dwells on Qwest's past efforts to obtain  
25 deregulation of services, including its support of proposed legislation in the 2007 session, as prelude to  
26 Intervenor's argument that what Qwest really seeks in its Petition is deregulation. Qwest will not respond  
to those points, which largely advance irrelevant issues, other than to show that Qwest's Petition does not  
seek deregulation. In response to Intervenor's characterization of Qwest's efforts to obtain price relief as  
bordering on desperation, Qwest must mention that this Commission actually *supported* Qwest's  
deregulation legislation during the 2007 legislative session.

1 *see also* OAR 860-011-0000(3) (the Oregon Rules of Civil Procedure govern in all cases before  
2 the Commission). Intervenors seem to argue that the Commission lacks jurisdiction to hear  
3 Qwest's Petition, which would be asserted under ORCP 21 A(1), because they argue that the  
4 Commission "lacks authority to grant Qwest's Petition." (*See, e.g.*, Motion, p. 6.) Such an  
5 argument cannot withstand even minimal scrutiny, because it cannot be seriously asserted that  
6 the Commission lacks jurisdiction to consider a petition under ORS 759.255.

7 The only other subsection of ORCP 21 A that could possibly apply to this Motion is  
8 ORCP 21 A(8), which provides that the Commission may dismiss Qwest's Petition for failure to  
9 state ultimate facts sufficient to constitute a claim. Intervenors, however, fail to address their  
10 substantial burden in making such a motion, because they cannot meet it. Parties must satisfy a  
11 heavy burden in order to have a claim dismissed at the pleading stage. "In determining the  
12 sufficiency of [a] plaintiff's complaint, we accept as true all well-pleaded allegations in the  
13 complaint and give plaintiff the benefit of all favorable inferences that may be drawn from the  
14 facts alleged." *Granewich v. Harding*, 329 Or. 47, 51, 985 P.2d 788 (1999).

15 **II. Qwest's 1999 Election of Price Cap Regulation Under ORS 759.410 Is Not**  
16 **"Permanent"**

17 The Intervenors first argue that the Commission should dismiss Qwest's Petition because  
18 Qwest is permanently locked into price cap regulation under ORS 759.405-.410 *et seq.* (unless  
19 otherwise noted, "ORS 759.410"). They argue that since Qwest elected to be subject to price cap  
20 regulation in 1999, Qwest is permanently bound to such regulation, and stuck with the existing  
21 price caps, and may not petition the Commission for a price plan under ORS 759.255. The  
22 Intervenors' argument is based on the false premise that a telecommunications utility's election to  
23 be regulated under ORS 759.410 is somehow permanent and irrevocable.

24 The Intervenors' argument relies on statutory language that simply does not exist. Their  
25 argument would also lead to an absurd and unconstitutional result, under which the rates Qwest  
26 may charge are forever capped at 2001 levels. Applying well-established principles of statutory

1 construction, the Commission should rule that Qwest may elect to no longer be subject to  
2 regulation under ORS 759.410 and may seek a price plan under ORS 759.255.

3 **A. Qwest may opt out of price cap regulation as a matter of statutory**  
4 **interpretation**

5 The Intervenors argue that the "unambiguous statutory language" of ORS 759.410 "does  
6 not provide Qwest with the right to opt out of price cap regulation once an election has been  
7 made." (Motion, p. 8.) However, they fail to cite to any such language, because there is none.  
8 The Intervenors' argument inserts the words "permanent election" or "irrevocable election" in  
9 ORS 759.410, but such words simply are not present.

10 The issue that the Intervenors raise is one of statutory interpretation and construction. As  
11 the Commission knows, in Oregon, statutory interpretation first requires an examination of the  
12 text and context of a statute to discern the intent of the legislature. ORS 174.020; *Portland*  
13 *General Electric Company v. Bureau of Labor and Industries*, 317 Or. 606, 610 (1993) ("*PGE*").  
14 Certain rules of construction, including those mandated by statute or adopted by case law, are to  
15 be used to discern legislative intent. *Id.* at 610-11. Four such rules are pertinent to the  
16 interpretation of ORS 759.405, and the application of each underscores the legislature's intent to  
17 permit a carrier to opt out of a price cap program.

18 **1. Do not insert terms that have been omitted**

19 First, to properly construe a statute, a court or agency in Oregon is to ascertain and  
20 declare what is, in terms or in substance, contained in the statute, and is not to "insert what has  
21 been omitted, or to omit what has been inserted . . ." ORS 174.010. ORS 759.405(1) states, in  
22 pertinent part: "A telecommunications carrier may elect to be subject to this section and ORS  
23 759.410." The statute does not state that such an election is "irrevocable," nor does it use any  
24 other words that would support such a conclusion.

25 The legislature did not intend for a telecommunications utility that voluntarily elected to  
26 be governed by price cap regulation to be permanently locked into the program. There is nothing

1 in ORS 759.410 that provides that once a utility opts in or elects regulation under that statute, it  
2 cannot "unelect" or "opt out" of the statute, or that the election is irrevocable. Nor is there  
3 anything in ORS 759.410 that provides that a telecommunications utility subject to that statute is  
4 barred from seeking regulation under ORS 759.255. Conversely, there is nothing in ORS  
5 759.255 that provides that a telecommunications utility subject to ORS 759.410 is prohibited  
6 from seeking regulation under ORS 759.255. To read the statutes otherwise would be to insert  
7 into the statutory text a provision that a carrier's voluntary election is irrevocable.

8 Moreover, Qwest notes that in a wide range of other statutes, the legislature has been  
9 perfectly clear when it intends for a party's voluntary election under a statute to be irrevocable.  
10 In other words, the legislature certainly knows how to make an election irrevocable, and it has  
11 done so in the past.<sup>2</sup> Here, there is no such express condition of irrevocability, nor does the  
12 statute in any other way provide notice that a carrier's election is irrevocable. To read  
13 irrevocability into the statute would contravene ORS 174.010 and the legislature's intent.

## 14 2. Give words of common usage their plain meaning

15 A second rule of statutory construction in Oregon is that "words of common usage  
16 typically should be given their plain, natural, and ordinary meaning." *PGE*, 317 Or. at 611,  
17 citing *State v. Langley*, 314 Or. 247, 256 (1992) (illustrating rule); *Perez v. State Farm Mutual*  
18 *Ins. Co.*, 289 Or. 295, 299 (1980) (same). ORS 759.405(1) provides that a carrier "may" elect to  
19 be subject to a price cap program. The plain, natural, and ordinary meaning of the word "may" is  
20 the "permission or the authority to do something." *Nibler v. Oregon Department of*  
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22 <sup>2</sup> See, e.g., ORS 238A.100 (providing that a person elected or appointed to an office with a fixed  
23 term may elect to not become a member of the pension program, and such election is "irrevocable"); ORS  
24 305.792 (providing that a taxpayer may elect to donate a surplus refund payment to public schools, and  
25 such election is "irrevocable"); ORS 118.016 (providing that a surviving spouse's election to qualify  
26 property as special marital property is "irrevocable"); ORS 238.227 (providing that for purpose of  
computing employer contributions related to employee retirement, any public employer may elect to be  
grouped with the state and treated as a single employer, and such election is "irrevocable"). State  
administrative rules also provide clear notice where a voluntary election is "irrevocable." See, e.g., OAR  
177-099-0090 (providing that a winner of a lottery prize has the option to receive a lump sum payment  
instead of annuitized prize payments, and the election is "irrevocable").

1 *Transportation*, 338 Or. 19, 26-27 (2005). Carriers have the permission and authority to  
2 voluntarily and unilaterally opt into a price cap program and, absent clear notice to the contrary,  
3 have the permission and authority to opt out of such a program.

4 **3. Do not construe statute to produce an absurd result**

5 A third rule of statutory construction in Oregon is that a statute should not be construed  
6 "so as to ascribe to the legislature the intent to produce an unreasonable or absurd result." *State*  
7 *v. Galligan*, 312 Or 35, 39 (1991), *citing State v. Linthwaite*, 295 Or. 162, 170 (1983). Price cap  
8 regulation under ORS 759.410 restricts a carrier from raising its rates for non-basic services  
9 above the price caps, which were the rates established in 2001 in Docket UT 125. ORS 759.410  
10 does not provide any mechanism for the Commission to raise the price caps. Over time, a  
11 carrier's costs will likely approach or even exceed its revenues, which will impede the carrier's  
12 ability to recover its costs and to earn a reasonable return on its investment. Thus, the legislature  
13 necessarily must have intended that a carrier would have the ability to opt out of the price cap  
14 program and become subject to another form of regulation. To construe the statute otherwise  
15 would produce an unreasonable or absurd result, such as forever binding Qwest to its voluntary  
16 election under ORS 759.410 and the price caps established thereunder.<sup>3</sup>

17 **4. Construe statute in context**

18 Finally, to determine legislative intent in Oregon, it is critical to consider the context of  
19 the statutory provision at issue, which includes other provisions of the same statute and related  
20 statutes. *PGE*, 317 Or. at 611, *citing Southern Pacific Trans. Co. v. Dept. of Rev.*, 316 Or. 495,  
21 498 (1993); *Sanders v. Oregon Pacific States Ins. Co.*, 314 Or. 521, 527 (1992).

22 ORS 756.040(1) sets forth a fundamental principle, that a telecommunications utility and  
23 its customers are entitled to rates that are "fair and reasonable." The Commission is required to  
24 balance the interests of utility investors and customers in establishing fair and reasonable rates,

25 \_\_\_\_\_  
26 <sup>3</sup> As discussed below, interpreting ORS 759.410 to permit a utility to opt out of price cap  
regulation is also essential to interpret those sections in a manner that is consistent with related statutes  
and that avoids a constitutional infirmity.

1 and must ensure that rates provide adequate revenue to recover the utility's operating expenses,  
2 as well as a reasonable return to the utility's shareholders. *Id.* ORS 759.035 sets forth the similar  
3 principle, that a telecommunications utility's charges must be "reasonable and just."<sup>4</sup>

4 As discussed above, if Qwest were limited to charging rates subject to the existing price  
5 caps of ORS 759.410 forever, over time, Qwest would almost certainly be deprived of rates that  
6 are fair and reasonable and Qwest's shareholders would be deprived of the opportunity to earn a  
7 reasonable return on their investment. A statute must be interpreted to give effect to all related  
8 sections. *Daniel v. Board of County Commissioners for Josephine County*, 212 Or. App. 76, 81  
9 (2007) (court's "task is to interpret statutes so as to give effect to their plain meaning and, where  
10 possible, to interpret statutes on the same subject (each of which is context for the other)  
11 harmoniously."). If the Commission were to interpret ORS 759.410 to prevent a utility that has  
12 made an election under those sections from ever revoking that election, that interpretation would  
13 contradict the important statutory principle that a utility is entitled to have fair and reasonable  
14 rates. The only way to avoid such a conflict would be for the Commission to interpret ORS  
15 759.410 to permit a utility to withdraw its election of price cap regulation.

16 Moreover, ORS Chapter 759 sets forth several alternative schemes under which  
17 telecommunications utilities' rates may be established, including traditional regulation, price  
18 listing (under several different programs), and price plans. Each of the programs that is an  
19 alternative to traditional regulation is available to a "telecommunications utility" without further  
20 qualification or restriction. There is nothing in ORS 759.054, 759.056, 759.195, or 759.255 that  
21 requires a telecommunications utility to be under traditional rate-of-return regulation when it  
22 files a petition, or that prohibits a telecommunications utility that is currently subject to price  
23 caps under ORS 759.410 from entering into such a regulatory program. The continued  
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25 <sup>4</sup> Neither ORS 756.040 nor 759.035 requires that a telecommunications utility's rates be based on  
26 its operating expenses plus a reasonable return on investment; indeed, ORS 759.255(1) expressly provides  
that rates in a price plan are set "without regard to the return on investment." ORS 756.040 only  
establishes a minimum threshold, consistent with constitutional due process requirements.

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1 availability of these alternative regulatory programs underscores the point that a carrier is not  
2 forever bound to its election of price cap regulation under ORS 759.410, and thus may seek to be  
3 regulated under an alternative or new program.<sup>5</sup>

4 **B. Qwest is entitled to opt out of ORS 759.410 as a matter of constitutional**  
5 **right.**

6 The standard for fair and reasonable rates set forth in ORS 756.040(1) codifies in Oregon  
7 law the well-established constitutional right of a utility to have its rates set at a level providing it  
8 with the opportunity to recover its costs and for its shareholders to earn a reasonable return on  
9 their investment. If the Commission were to interpret ORS 759.410 to forever bar a  
10 telecommunications utility from raising its prices above the existing caps, the statute would be  
11 unconstitutional on its face; however, the legislature intends its statutes to be interpreted in a  
12 manner that preserves their validity. *State v. Duggan*, 290 Or. 369, 373 (1981) (in construing a  
13 statute and in choosing between alternative interpretations of an ambiguous statute, the court  
14 must choose the interpretation which will avoid any serious constitutional difficulty).

15 For example, in *Guaranty National Insurance Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990),  
16 the Ninth Circuit considered a constitutional challenge to a Nevada statute that mandated a roll-  
17 back and freeze of insurance rates. The statute at issue allowed an insurer to seek relief if it was  
18 "substantially threatened with insolvency," but did not expressly provide any mechanism under  
19 which insurers could obtain relief to ensure that the rates they charge provide for "a  
20 constitutionally required fair and reasonable return." *Id.* at 512. The Ninth Circuit found that  
21 statute to be unconstitutional on its face because it did not include a mechanism under which  
22 insurers could obtain rate adjustments to ensure that their rates were not confiscatory. *Id.* at 514-

23 \_\_\_\_\_  
24 <sup>5</sup> In attempting to make a case that Qwest is legally prohibited from opting out of ORS 759.410,  
25 the Intervenor argue that the statutory language of ORS 759.410 "prohibits an electing  
26 telecommunications carrier to opt out *at will*." (Motion, p. 6 (emphasis added).) Not only are there no  
such words in the statute to support such an extreme argument, but the Intervenor apparently choose to  
ignore that even if there were any such requirement, it can hardly be said that Qwest would be doing so  
"at will." They also ignore that Qwest made infrastructure investments of about \$120 million to opt in to  
ORS 759.410.



1 15. Similarly, ORS 759.410 does not include any mechanism pursuant to which an electing  
2 carrier may seek relief from price caps if such price caps no longer allow fair and reasonable  
3 rates. Thus, in order to preserve the constitutionality of those sections, they must be interpreted  
4 to permit an electing carrier to opt out of price cap regulation; otherwise, those sections would be  
5 facially invalid.

6 **C. Deregulation or legislation are not the only means for Qwest to transition**  
7 **from price cap regulation.**

8 Intervenor's argue that the only means for Qwest to obtain relief from its current price  
9 caps is through a petition under ORS 759.052 to exempt services from regulation or to obtain  
10 relief from the legislature (Motion, p. 5). Intervenor's cite ORS 759.410(7) in support of their  
11 argument that a petition for exemption from regulation under ORS 759.052 is the only existing  
12 mechanism pursuant to which a telecommunications utility subject to ORS 759.410 may  
13 eliminate price caps (Motion, p. 10). That section, however, simply clarifies that a utility  
14 electing price cap regulation under ORS 759.410 retains the right to petition for deregulation  
15 ("Nothing in this section or ORS 759.405 is intended to limit the ability of a telecommunications  
16 carrier to seek deregulation of telecommunications services under ORS 759.052."). That section  
17 cannot be read to provide that the *only* remaining option for a carrier that has elected regulation  
18 under ORS 759.410 is to obtain deregulation; nor can it be read to prohibit Qwest from opting  
19 out of ORS 759.410 altogether.

20 Intervenor's also argue that the only way Qwest could transition to another form of price  
21 regulation is through future legislation (Motion, p. 10). However, if the legislature had intended  
22 for Qwest's election to be irrevocable and to require further legislative action to un-do, the  
23 legislature would have so specified. The legislature's silence on these points leads to the  
24 unavoidable conclusion that any carrier that elects to be subject to price cap regulation under  
25 ORS 759.410 may elect to no longer be subject to such regulation and to have its prices regulated  
26

1 under another available method. Any other conclusion would render the statute unreasonable  
2 and likely unconstitutional.

3 For all of these reasons, it is beyond dispute that a carrier that has made an election under  
4 ORS 759.410 may withdraw that election and choose to be subject to an alternative regulatory  
5 program under ORS Chapter 759. Since the Intervenors have failed to meet their burden under  
6 ORCP 21 A(8), the Commission should deny their motion to dismiss.

7 **III. Permanent Price Caps Exist Only While Qwest Is Subject to ORS 759.410.**

8 The Intervenors also argue that "there is no question that the price caps are permanent,"  
9 so that Qwest may not petition for a price plan under ORS 759.255. (Motion, p. 6.) This  
10 argument adds nothing to their first, unfounded argument. However, Intervenors attempt to  
11 support this argument with citations to various Commission orders that characterize the price  
12 caps for Qwest under ORS 759.410 as "permanent." The flaw in their argument, however, is that  
13 these price caps exist and are unchangeable *only so long as Qwest is subject to ORS 759.410*.  
14 The price caps do not apply, however, if Qwest is *no longer subject to such regulation*. In other  
15 words, the Intervenors confuse, and attempt to equate, "permanent price caps" (*while a*  
16 *telecommunications utility is subject to ORS 759.410*) with the notion that a telecommunications  
17 utility's "*election*" or "*opting in*" to regulation under ORS 759.410 is somehow "permanent"  
18 (which Qwest has addressed above). The Commission orders Intervenors cite all addressed the  
19 current situation in which Qwest is subject to price cap regulation under ORS 759.410. In none  
20 of these orders did the Commission address the question Intervenors' Motion now poses: having  
21 elected price cap regulation under ORS 759.410, is Qwest forever bound to that election and the  
22 price caps established therein, or may Qwest seek a price plan under ORS 759.255?

23 For example, the Intervenors cite to the background discussion in Commission Order No.  
24 01-810 in Docket UT 125 -- the rate design order in Qwest's last general rate case -- in which the  
25 Commission stated that ORS 759.410 "introduced a permanent price cap regulation option to  
26 replace rate of return regulation for telecommunications utilities that elect that option." Order

1 No. 01-810 at 3 (Motion, p. 6). They also cite to a later order in the same proceeding in which  
2 the Commission again referred to the prices approved in Order No. 01-810 as establishing  
3 "permanent price caps under [ORS 759.410]." (Motion, p. 7, citing Order No. 06-515.) All that  
4 the Commission noted in these orders is that ORS 759.410 introduced a regulatory scheme in  
5 which a telecommunications utility that elects to opt out of rate-of-return regulation in favor of  
6 price cap regulation under ORS 759.410 is subject to price caps under that regulatory scheme,  
7 and that such caps may not be raised by the Commission. Qwest does not dispute that the price  
8 caps established under ORS 759.410 are in place and may not be raised *so long as a carrier is*  
9 *subject to that statute*. Nothing in these orders, however, states that having once elected to be  
10 subject to price cap regulation, Qwest is somehow forever locked into that regulation and the  
11 existing price caps. Indeed, that question has never been raised in any Commission proceeding  
12 before the Motion.<sup>6</sup>

13 Similarly, Intervenor's arguments based on the use of the word "shall" in ORS 759.410 do  
14 not establish that Qwest is forever locked into its election of price cap regulation and that the  
15 price caps established under that statute may never be changed. (Motion, pp. 8-9.) In stating  
16 that a carrier electing to be regulated under ORS 759.410 "shall be subject to price regulation as  
17 provided in this section," the legislature did nothing more than establish the price regulation that  
18 applies when a carrier is subject to ORS 759.410. These words do not provide that a carrier  
19 electing price cap regulation is *forever* subject to such regulation, and it would be absurd, not to  
20 mention unconstitutional, to interpret the statute in such a restrictive manner. Many other price  
21 regulation sections in ORS Chapter 759 use the word "shall" to indicate the mandatory nature of  
22 the price regulation *provided in those sections* (see, e.g., ORS 759.054(2), 759.056(2),  
23 759.195(1), and 759.255(1), each stating that prices approved thereunder "shall become

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24  
25 <sup>6</sup> The Intervenor's also cite Staff's brief in Docket UT 125 (Motion, at 7, n.10). Statements in  
26 Staff's briefs have no precedential authority. In any event, Staff's argument is consistent with the  
Commission's ruling that the Commission cannot raise non-basic service rates *while Qwest is operating*  
*under ORS 759.410*; the brief does not address the question presented here.

1 effective"). Use of the word "shall" in these statutes does not establish that the rates approved  
2 thereunder are in place forever any more than use of that word in ORS 759.410 establishes that  
3 Qwest's election to price cap regulation is binding forever.

4 In addition, there is no merit to the Intervenor's argument that Order No. 02-886 in  
5 Docket AR 438 – a rulemaking proceeding regarding cost allocation manual requirements for  
6 telecommunications utilities and cooperatives – has any effect here (Motion, p. 9). In that  
7 proceeding, Staff recommended that the Commission exempt carriers subject to ORS 759.410  
8 from the rule's requirements, but did not recommend a similar exemption for carriers subject to  
9 ORS 759.255, because those carriers "could return to rate of return regulation." Order No. 02-  
10 886 at 2. The Commission adopted those recommendations. *Id.* at 3. At most, this decision  
11 stands for the proposition that carriers who have elected regulation under ORS 759.410 may not  
12 return to rate-of-return regulation. Qwest does not seek to return to rate-of-return regulation. In  
13 fact, prices charged under an ORS 759.255 price plan are "without regard to the return on  
14 investment of the utility." ORS 759.255(1). Order No. 02-886 does not stand for the different  
15 and far broader proposition that carriers who have elected regulation under ORS 759.410 may  
16 *never* be subject to *any* other form of price regulation, such as a price plan under ORS 759.255.  
17 In any event, it would be unreasonable to rely on this order as establishing such a sweeping  
18 holding because the issue Intervenor now present was not before the Commission. Indeed,  
19 Qwest did not even submit any comments in that proceeding. Order No. 02-886 at 1.

20 Accordingly, because the price caps under ORS 759.410 are permanent only so long as  
21 Qwest is operating under that statute, and because Qwest retains the right to opt out of such price  
22 cap regulation, Commission should deny the Intervenor's motion to dismiss.

#### 23 **IV. The Intervenor's "Waiver of Requirements" Argument Is Without Merit**

24 The Intervenor also argue that ORS 759.255(5) -- which authorizes the Commission to  
25 waive compliance with certain statutory requirements in approving a price plan -- does not allow  
26 the Commission to waive Qwest's compliance with ORS 759.410 (ostensibly because ORS

1 759.410 is not enumerated in ORS 759.255(5)), so the Commission may not provide Qwest relief  
2 from existing price caps even if it approves the Petition. Intervenors' argument is misplaced and  
3 based on a faulty understanding of Qwest's Petition.

4 As stated in section IV.H. of Qwest's Petition (Petition, p. 23), if the Commission  
5 approves Qwest's price plan in a form acceptable to Qwest, Qwest would elect out of regulation  
6 under 759.410, effective upon commencement of Qwest's operation under the price plan. At that  
7 point, ORS 759.410 would no longer apply to Qwest, so there would be no statutory  
8 requirements of ORS 759.410 that the Commission would need to waive under ORS 759.255(5).  
9 Accordingly, the omission of ORS 759.410 from ORS 759.255(5) is no barrier to the  
10 Commission's considering Qwest's Petition.

11 **V. The Price Plan That Qwest Seeks Is Available Under ORS 759.255**

12 The Intervenors' final argument is that the Commission should dismiss Qwest's Petition  
13 because the Petition is "effectively seeking deregulation" which is not available under ORS  
14 759.255 (Motion, p. 11). The Intervenors argue that the deregulation statute, ORS 759.052, is  
15 the only vehicle for Qwest to achieve the relief it seeks. Try as they might to divert the  
16 Commission's attention, Qwest is not seeking deregulation of any existing services.<sup>7</sup>

17 Intervenors also argue that the legislative history of ORS 759.255 shows that the  
18 legislature intended this statute to provide for price cap regulation, not deregulation. Again, this  
19 argument is irrelevant because Qwest is not seeking deregulation of any services in its Petition.  
20 Moreover, to the extent Intervenors argue that the Commission should dismiss Qwest's Petition  
21 because Qwest's proposed price plan does not include price caps for all services, that is no basis  
22 to dismiss the Petition. Rather, the Intervenors may argue against any specific aspect of Qwest's  
23 Petition during the pendency of this docket.

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24 <sup>7</sup> Qwest's original Petition does propose that any new services introduced after the effective date  
25 of the price plan would be exempt from regulation (Petition, p. 10). Following a discussion with the other  
26 parties and upon further review, Qwest intends to file an amended petition requesting that new services be  
price-listed and not exempt from regulation. In any event, even under the original Petition, Qwest is not  
requesting deregulation of any *existing* services.

1           **A.     The price plan that Qwest seeks is not deregulation.**

2           Intervenors' argument is premised on their simplistic notion that because Qwest's  
3 proposed price plan would eliminate some price caps, Qwest's Petition is really a petition for  
4 exemption from regulation under ORS 759.052 (Motion, p. 11). However, Qwest's Petition does  
5 not seek deregulation. To the contrary, it is a petition for a price plan as an alternate form of  
6 regulation under ORS 759.255, which allows for pricing flexibility, under which the  
7 Commission regulates a telecommunications utility's prices without regard to rate of return.

8           Under Qwest's proposed price plan, the rates for several important services would be  
9 price-capped; the rates for other services would not be capped, but would be subject to a price  
10 floor. The rates for price-capped services would be set forth in tariffs filed with the Commission  
11 and the rates for other services would be set forth in price lists filed with the Commission. The  
12 Commission would retain pricing authority over all services. The Commission would retain the  
13 ability to review rate increases, including imposing price caps if appropriate (often referred to as  
14 the "clawback" provision). The Commission would also have the ability to evaluate market  
15 conditions and to make appropriate modifications to the plan. The Commission would also  
16 retain authority regarding service quality over all services in the price plan, as well as complaint  
17 authority.

18           The Commission *may* waive some, but not all, regulatory requirements under a price  
19 plan. *See, e.g.*, ORS 759.255(5). Qwest would still be subject to all regulatory requirements that  
20 the Commission does not or cannot waive, including pricing requirements such as price floors  
21 and discrimination statutes, as well as wholesale obligations.

22           These are all significant aspects of Commission regulatory authority that would continue  
23 to exist under Qwest's price plan. None of these would exist if Qwest's services were  
24 deregulated. If Qwest obtained full deregulation of these services, the Commission would not  
25 retain *any regulatory oversight* for such deregulated services, including pricing, review of rate  
26 increases, review of service quality, and accounting and financial reporting requirements. Nor

1 would Qwest be required to file tariffs or price lists for deregulated services. The Intervenor's  
2 argument that Qwest is really seeking deregulation cannot withstand even minimal scrutiny. In  
3 short, Qwest's Petition for a price plan under ORS 759.255 is not a petition for deregulation. The  
4 mere fact that some services are subject to price caps which may increase modestly over time,  
5 and that other price caps may be eliminated, does not mean Qwest is seeking deregulation.  
6 Petitioners seem to equate rates that are established without regard to return of investment, as  
7 required under ORS 759.255, with deregulation; however, these are plainly different things.  
8 Thus, the Commission should deny the Intervenor's motion to dismiss.

9 **B. Because Qwest does not seek deregulation, legislative intent regarding ORS**  
10 **759.255 is irrelevant.**

11 The Intervenor's also argue that the legislature never intended ORS 759.255 to be used for  
12 deregulation. The Intervenor's arguments, however, are not well-taken because Qwest's Petition  
13 does not seek deregulation for the reasons discussed above. Thus, the Intervenor's argument and  
14 the legislative testimony they cite are irrelevant.

15 Intervenor's also argue that ORS 759.255 authorizes only price plans that are based on  
16 price caps, and offer legislative testimony to support that argument (Motion, pp. 15-16). Thus,  
17 Intervenor's argue that because Qwest's proposed price plan does not include price caps for all  
18 services, it seeks something that is not authorized by ORS 759.255 (which, they argue, must  
19 therefore be deregulation). However, the language of ORS 759.255 is clear, and there is nothing  
20 in that statute that requires that price plans be based on price caps, so there is no need to resort to  
21 legislative history to interpret the statute, pursuant to well-established principles of statutory  
22 construction. In any event, the primary focus of the 1995 testimony was the movement from  
23 rate-of-return regulation to an alternate form of regulation, and not the form of price plans  
24 authorized by the statute.

25 Even if the Commission were to accord any weight to the legislative testimony, there is  
26 still no reason to dismiss Qwest's Petition. Rather, such arguments about the form of Qwest's

1 price plan are better addressed on the merits in considering Qwest's price plan, and do not  
2 provide a basis for dismissing the Petition outright.

3 **CONCLUSION**

4 For the foregoing reasons, Qwest respectfully requests that the Commission deny the  
5 Intervenor's motion to dismiss.

6 DATED: January 24, 2008

**QWEST CORPORATION**

7  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 24th day of January, 2008, served the foregoing **QWEST CORPORATION'S RESPONSE TO JOINT MOTION TO DISMISS** upon all parties of record in this proceeding by causing a copy to be sent by electronic mail and/or U.S. mail to the following as indicated:

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