

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

3 UM 1354

4 In the Matter of

5 QWEST CORPORATION

6 Petition for Approval of Price Plan Pursuant to  
7 ORS 759.255.

STAFF'S REPLY BRIEF

8 On December 10, 2007, Covad Communications Company, Integra Telecom of Oregon,  
9 Inc., McLeadUSA Telecommunications, Inc., Time Warner Telecom of Oregon, LLC, XO  
10 Oregon, Inc., Telecommunications Ratepayers Association for Cost-based and Equitable Rates,  
11 and Citizens Utility Board of Oregon (collectively "Joint Movants") filed a Joint Motion to  
12 Dismiss ("Motion to Dismiss"). On December 24, 2007, Qwest Corporation ("Qwest") filed a  
13 response to the joint motion to dismiss ("Qwest Response"). Pursuant to Administrative Law  
14 Allan Arlow's Prehearing Conference Report dated December 17, 2007, the Public Utility  
15 Commission of Oregon Staff ("Staff") respectfully submits these responsive comments.

16 INTRODUCTION

17 The Motion to Dismiss first argues that the Public Utility Commission of Oregon  
18 ("Commission") lacks legal authority to grant Qwest's Petition for Approval of a Price Plan  
19 pursuant to ORS 759.255 ("Qwest's Petition") because Qwest's election for price cap regulation  
20 under SB 622, now codified as ORS 759.400 *et seq.*, is permanent. As support for their  
21 argument that Qwest's price cap regulation is unchangeable, Joint Movants rely upon statutory  
22 language and past Commission Orders. In response, Qwest generally argues that the Joint  
23 Movants are incorrect based upon rules of statutory construction and that it is entitled to opt out  
24 of price cap regulation as a matter of constitutional right.

25 Joint Movants then argue, assuming Qwest may move from its current form of regulation  
26 to the "alternative form of regulation" (AFOR) set forth in ORS 759.255, Qwest's Petition

1 should be dismissed because its plan would deregulate certain services, a circumstance not  
2 allowed under ORS 759.255.

3 For the following reasons, staff concludes that Qwest may move from its current form of  
4 regulation provided under ORS 759.410 to the price plan delineated in ORS 759.255. Staff  
5 further concludes that Qwest’s Petition does not on its face clearly deregulate any service.  
6 Accordingly, the Commission should deny Joint Movants’ Motion to Dismiss.

7 ARGUMENT

8 **I. Qwest has the authority to opt out of price cap regulation under ORS 759.410 if the**  
9 **Commission approves another price plan under ORS 759.255.**

10 **A. A plain reading of ORS 759.405 et seq. allows Qwest to opt out of price cap**  
11 **regulation under ORS 759.410 if the Commission approves another price plan**  
12 **under ORS 759.255.**

13 Joint Movants assert that the statutory language prohibits an electing telecommunications  
14 carrier to opt out of price cap regulation under ORS 759.410. *See* Motion to Dismiss at 6. As  
15 statutory support, the Joint Movants rely on the word “shall” in several places within ORS  
16 759.405-410. Specifically, Joint Movants cite to the following portions of the statute:<sup>1</sup>

17 A telecommunications carrier may elect to be subject to this section and ORS  
18 759.410 . . . . A telecommunications carrier that elects to be subject to this section  
19 and ORS 759.410 shall be subject to the infrastructure investment and price  
20 regulation requirements of this section and ORS 759.410 and shall not be subject  
21 to any other regulation based on earnings, rates or rate of return.

22 *See* ORS 759.405(1).

23 A telecommunications carrier that opts out of rate of return regulation under this  
24 section and ORS 759.405 shall be subject to price cap regulation and the carrier  
25 under price cap regulation shall continue to meet service quality requirements.

26 *See* ORS 759.410(1)(c).

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24 <sup>1</sup> While these are the portions of the statutes that Joint Movants cite, the “shall” language is  
25 found in other places as well. For example, ORS 759.405 provides that carriers subject to these  
26 sections shall establish in its accounts a Telecommunications Infrastructure Account (among  
other mandatory requirements). ORS 759.405(3)(a) provides that a carrier subject to these  
sections shall expend moneys . . . . No party in this docket has argued that Qwest has not fulfilled  
these obligations once it opted into price cap regulation under these statutes.

1 A telecommunications carrier that elects to be subject to this section and ORS  
2 759.405 shall be subject to price regulation as provided in this section and shall  
3 not be subject to any other retail rate regulation, including but not limited to any  
4 form of earnings-based, rate-based or rate of return regulation.

5 *See* ORS 759.410(2).

6 Joint Movants employ this statutory “shall” language to argue that the Oregon Legislature  
7 expressed a clear intention that an electing carrier thereafter shall be required to comply with the  
8 provisions in ORS 759.405 and 759.410 without the ability to ever opt out. *See* Motion to  
9 Dismiss at 9. Joint Movants specifically point to the language of ORS 759.410(2), quoted above,  
10 to argue that once a carrier elects price cap regulation under ORS 759.405 *et seq.* it cannot be  
11 subject to any other rate regulation, including a price plan under ORS 759.255. *See* *Id.*

12 The first step in determining the meaning of statutes is to examine the text and context of  
13 the statutes, giving words their plain, natural, and ordinary meaning. *See PGE v. Bureau of*  
14 *Labor and Industries*, 317 Or 606 (1993). In addition, the court will not insert what has been  
15 omitted or omit what has been inserted. *See* *Id.*; ORS 174.010.

16 The plain meaning of these statutes provides that a carrier who elects to be subject to  
17 these sections shall be subject to such things as the specified infrastructure investment, price cap  
18 regulation as specified in ORS 759.410, service quality standards, and shall not be subject to  
19 other forms of retail rate regulation. Thus, the plain meaning of ORS 759.405 *et seq.* is that,  
20 once a carrier elects under the statute, it is subject to certain mandatory requirements and is not  
21 subject to other forms of retail rate regulation.

22 The statutes are silent as to whether a carrier that has elected and fulfilled the specified  
23 mandatory requirements (e.g. infrastructure investment) can opt out of price cap regulation under  
24 ORS 759.410. The Joint Movants argue that no exception exists in that statutory scheme to  
25 allow a carrier to opt out after having made the election and, as a result, allowing Qwest to opt  
26 out would be inserting what has been omitted. *See* Motion to Dismiss at 9. However, it is the  
Joint Movants’ position that inserts what has been omitted. Simply stated, the Joint Movants  
attempt to insert a provision into the statutory scheme that states that once a carrier elects for

1 price cap regulation under ORS 759.410, it can never opt out. The statutes only provide that  
2 once Qwest elected for price cap regulation under ORS 759.410, it was subject to other  
3 provisions of that same statutory scheme. Inserting a provision making that election  
4 unchangeable would unlawfully insert terms that are not included.<sup>2</sup>

5 The Joint Movants also rely on ORS 759.410(7) to argue that deregulation pursuant to  
6 ORS 759.052 is the sole manner in which Qwest can eliminate the price cap provisions of ORS  
7 759.410. *See* Motion to Dismiss at 10. ORS 759.410(7) provides that:

8 Nothing in this section or ORS 759.405 is intended to limit the ability of a  
9 telecommunications carrier to seek deregulation of telecommunications services  
under ORS 759.052.

10 The plain meaning of the text of this subsection is that a carrier that elects for price cap  
11 regulation under ORS 759.405 *et seq.* may still seek deregulation of telecommunications services  
12 under ORS 759.052. While Joint Movants attempt to construct their argument in terms of a  
13 specific statute ORS 759.410(7) controlling a general statute (presumably ORS 759.255), the  
14 issue is resolved by the unambiguous terms of the subsection.

15 ORS 759.410(7) plainly permits Qwest to seek deregulation of services price capped  
16 under ORS 759.410. However, absolutely nothing in the language of ORS 759.410(7) implies or  
17 suggests that Qwest cannot opt out of regulation under ORS 759.405 *et seq.* into a new  
18 Commission-approved price plan under ORS 759.255. Instead, ORS 759.410(7) provides that an  
19 electing carrier (i.e. a carrier that is subject to ORS 759.405 and ORS 759.410) may only  
20 eliminate price caps under ORS 759.410 pursuant to deregulation under ORS 759.052.  
21 ORS 759.410(7) does not speak to whether an electing carrier can opt out of ORS 759.405 *et seq.*  
22 into a Commission approved price plan under ORS 759.255. The Joint Movants' argument again  
23 incorrectly inserts limitations into the statute that do not exist.

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26 <sup>2</sup> As Qwest notes, the Legislature has demonstrated that it realizes how to make an election  
irrevocable. *See* Qwest Response at 5. This fact lends further support to the conclusion that the  
Legislature did not intend to forbid an electing carrier from opting out at a future date.

1           **B. The past Commission Orders cited by the Joint Movants are consistent with the**  
2           **plain meaning of ORS 759.400 et seq.**

3           The Joint Movants contend that certain statements within past Commission Orders  
4 support their argument that Qwest cannot opt out of price cap regulation under ORS 759.410 if  
5 the Commission approves a new price plan under ORS 759.255. *See* Motion to Dismiss at 6-7,  
6 9-10. The Commission Orders are consistent with the plain meaning of ORS 759.400 *et seq.*

7           The Joint Movants first rely on language from Order No. 01-810 that states that ORS  
8 759.400 *et seq.* ‘introduced a permanent price cap regulation option to replace rate of return  
9 regulation for telecommunications utilities that elect that option’ and that the current rate case  
10 offered ‘the Commission’s only opportunity to adjust Qwest’s price caps.’ *See* Motion to  
11 Dismiss at 6, *citing In re the Application of Qwest Corporation for an Increase in Revenues*,  
12 Order No. 01-810 at 3. As the Joint Movants correctly note, the initial price caps under ORS  
13 759.400 *et seq.* were the rates in place when Qwest elected price cap regulation in 1999.  
14 However, the pending rate case provided the only Commission opportunity to alter Qwest’s price  
15 caps for a carrier that elected for regulation under ORS 759.400 *et seq.* *See* ORS 759.415(1).

16           In the proper context, it is correct that the price caps adopted by the Commission in Order  
17 No. 01-810 are, and remain, the permanent price caps for a carrier that is subject to ORS 759.400  
18 *et seq.* In addition, election into ORS 759.400 *et seq.* did replace rate of return regulation with  
19 these price caps. Nonetheless, these facts have no bearing on whether the plain language of the  
20 statutes allow an electing carrier to opt out of ORS 759.400 *et seq.* into a Commission approved  
21 price plan under ORS 759.255. Specifically, these permanent price caps only apply to a carrier  
22 that is subject to ORS 759.400 *et seq.*

23           As discussed above in Section A, the plain language of the statutes permits a carrier to  
24 opt out of regulation under ORS 750.400 *et seq.*, which means that the carrier is no longer  
25 subject to those statutes. As such, the permanent price caps established for purposes of  
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1 regulation under ORS 759.410 are inapplicable to carriers that are no longer subject to regulation  
2 under ORS 759.400 *et seq.*<sup>3</sup>

3 The Joint Movants also rely on Order No. 06-515 for the proposition that Qwest cannot  
4 opt out of regulation under ORS 759.400 *et seq.* if the Commission approves a price plan under  
5 ORS 759.255. *See* Motion to Dismiss at 7. In Order No. 06-515, the Commission considered  
6 whether Qwest could raise its price caps for residential Caller ID to offset lower rates for public  
7 access rates. Obviously, that case was very different from the current request.

8 In that proceeding, Qwest was seeking to change its price caps within ORS 759.400 *et*  
9 *seq.* As discussed above, the price caps under ORS 759.410 cannot be altered so long as a  
10 carrier is subject to ORS 759.400 *et seq.* In the current request, Qwest is seeking to opt out of  
11 ORS 759.400 *et seq.* and into a price plan under ORS 759.255. Therefore, Qwest will no longer  
12 be subject to the price caps under ORS 759.410 as it was when it requested alteration of the price  
13 caps for residential Caller ID.

14 The Joint Movants also rely on Order No. 02-886. *See* Motion to Dismiss at 9.  
15 Specifically, Joint Movants argue that price cap companies subject to ORS 759.405 were  
16 exempted from cost allocation manual requirements while companies subject to ORS 759.255  
17 were not, because ‘these companies could return to rate of return regulation.’ *See Id., citing In re*  
18 *Allocation of Cost Rules for Telecommunications Utilities and Cooperatives*, Order No. 02-886  
19 at 13. The Joint Movants then attempt to bootstrap this statement about rate of return regulation  
20 to make ORS 759.410(2) mean more than it does. *See* Motion to Dismiss 9-10.

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23 <sup>3</sup> The issue of whether a carrier that elects under ORS 759.400 *et seq.* can later opt out was never  
24 an issue directly presented to the Commission in any of the Commission Orders cited by Joint  
25 Movants. When the Commission entered these Orders it is possible that it did not contemplate  
26 that Qwest may desire to opt out of price cap regulation under ORS 759.410 at some future time.  
Even assuming for the sake of argument that the Commission Order language suggests that  
Qwest is forbidden from opting out of regulation pursuant to ORS 759.400 *et seq.*, the  
Commission should not, and legally cannot, interpret language in past Commission Orders - that  
did not directly present the current issue - in a way that is inconsistent with the statutes  
unambiguous meaning.

1 First, Qwest is not proposing to return to rate of return regulation, but rather to a price  
2 plan under ORS 759.255. Regardless, it is certainly possible that the Commission and other  
3 parties to that rulemaking proceeding did not contemplate that Qwest may one day want to opt  
4 out of regulation under ORS 759.400 *et seq.*, into another form of regulation. In fact, the  
5 Commission and parties to Docket No. UM 1354 very well may want to consider whether the  
6 exemptions from certain rules remain appropriate if Qwest moves to a price plan under ORS  
7 759.255. A statement made in a past Commission decision where the current issue was not  
8 presented cannot be employed to alter the plain language of ORS 759.400 *et seq.* See fn. 3,  
9 *supra*.

10 The Joint Movants rely on Order No. 02-886 for the proposition that Qwest cannot return  
11 to rate of return regulation.<sup>4</sup> They then argue that ORS 759.410(2) would be rendered ineffective  
12 because Qwest could, in theory, move to a price plan under ORS 759.255 and then back into rate  
13 of return regulation. See Motion to Dismiss at 10. The Joint Movants again misinterpret ORS  
14 759.410(2).

15 ORS 759.410(2) only provides that a carrier that elects to be subject to ORS 759.405 and  
16 759.410 shall be subject to the price regulations outlined in those statutes and shall not be subject  
17 to other retail rate regulation. ORS 759.410(2) is silent on what type of retail rate regulation a  
18 telecommunication carrier may be subject to if it is not subject to ORS 759.405 and 759.410  
19 because it opts out of such regulation.

20 **C. While it is unnecessary to consider Qwest’s constitutional arguments, they**  
21 **provide additional support for Staff interpretation of ORS 759.400 *et seq.***

22 Qwest asserts that it is entitled to opt out of ORS 759.410 as a matter of constitutional  
23 right. See Qwest Response at 8. While Qwest claims that an interpretation that did not permit  
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25 <sup>4</sup> Because Qwest is not proposing to return to rate of return regulation, it is unnecessary to  
26 determine whether it could return to rate of return regulation. Based upon Staff’s interpretation  
of the statutory language and conclusion that Qwest can opt out of price caps under ORS  
759.410, Staff currently believes that Qwest could return to rate of return regulation.

1 them to opt out of ORS 759.410 would be unconstitutional on its face, it makes no factual claims  
2 that rates under ORS 759.410 are or would be unconstitutional.<sup>5</sup> *See Id.*

3 Because Staff concludes that the text and context of ORS 759.400 *et seq.* permits Qwest  
4 to opt out of price cap regulation under ORS 759.410 if the Commission approves a price plan  
5 under ORS 759.255, it is unnecessary to consider Qwest’s constitutional claims. However, it is  
6 correct that statutes should be interpreted, when possible, to avoid constitutional infirmities. *See*  
7 *State v. Sauer*, 205 Or App, 428, 432 (2006), *quoting State v. Duggan*, 290 Or 369, 373 (1981).  
8 If the Commission were to interpret ORS 759.400 *et seq.* as never allowing an elected carrier to  
9 opt out, it could potentially raise constitutional concerns. As a result, Qwest constitutional  
10 claims could be considered additional support for Staff’s interpretation that the plain meaning of  
11 the statutes allows Qwest to opt out of price cap regulation under ORS 759.410 if the  
12 Commission approves a price plan under ORS 759.255.

## 13 **II. The Meaning and Application of ORS 759.255**

14 In presenting their second primary argument, Joint Movants first assume Qwest may  
15 lawfully move from its current ORS 759.410 AFOR to the AFOR set forth in ORS 759.255. The  
16 Joint Movants then present two assertions concerning the application of the statute. First, the  
17 Joint Movants argue that ORS 759.255 is not a “deregulation” statute<sup>6</sup> and that any part of  
18 Qwest’s Plan that results in the deregulation of a service is not permitted under ORS 759.255.  
19 *See generally* Motion to Dismiss at 11, 13-14. Second, Joint Movants argue, relying on  
20 legislative history, that ORS 759.255 requires “price caps.”<sup>7</sup> From this base, Joint Movants

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22 <sup>5</sup> Qwest seems to agree that earnings-based or rate of return regulation does not apply to carriers  
23 that elect price cap regulation under ORS 759.410. However, it argues that if it were not allowed  
24 to opt out of price cap regulation under ORS 759.410, there would be a constitutional infirmity  
25 because it would ignore earnings-based or rate of return regulation under ORS 756.040.

26 <sup>6</sup> “Deregulation” is placed in quotes in the text because the relevant statute, ORS 759.052, speaks  
in terms of a service being “exempt from regulation.” For the purposes of this response, the two  
terms may be used interchangeably.

<sup>7</sup> The Joint Movants do not explain what they mean by the phrase “price cap.” Staff assumes  
they use the term to mean a maximum rate level. *See, e.g.* ORS 759.195(5).



1 assert that any service that is not subject to a price cap under Qwest’s Petition constitutes a form  
2 of deregulation which is not allowed under ORS 759.255. *See generally* Motion to Dismiss at  
3 12-16.

4 As to Joint Movant’s first assertion, Qwest seems to agree with Joint Movants that ORS  
5 759.255 is not a statute that permits the deregulation of services. But, Qwest asserts, it is not  
6 seeking deregulation of any existing services with its Plan and that it intends to file an amended  
7 petition requesting that all new services be price listed. *See* Qwest Response at 13, footnote 7  
8 (and accompanying text).

9 As to Joint Movant’s second assertion, Qwest concedes that some of its services under  
10 the Plan would not be price capped. But, says Qwest, nothing in ORS 759.255 requires price  
11 caps and, even if Joint Movant’s legislative history correctly suggests that such caps are inherent  
12 to the statute, it is a matter that is “better addressed on the merits in considering Qwest’s price  
13 plan, and do[es] not provide a basis for dismissing the Petition outright.” Qwest Response at 15-  
14 16.

15 Staff addresses these two main issues, and provides further insight into the application of  
16 ORS 759.255, as follows.

17 **A. All parties agree that ORS 759.255 is not a deregulation statute. Whether**  
18 **Qwest’s Plan results in the deregulation of some services is a matter best**  
19 **resolved on the merits within the docket, not by a motion to dismiss.**

20 There appears to be agreement between Joint Movants and Qwest that ORS 759.255 does  
21 not allow the petitioner to deregulate services by means of an ORS 759.255 AFOR. Staff agrees  
22 for the reasons stated in Joint Movant’s Motion to Dismiss. Deregulation of a service may only  
23 occur pursuant to ORS 759.052. If a particular service would be unlawfully deregulated under  
24 the Plan, then Qwest would have to withdraw its Plan or amend it accordingly.

25 Joint Movants and Qwest disagree whether Qwest’s Petition would result in the  
26 deregulation of several of its services. In responding, staff observes that reasonable persons may  
disagree “in theory” about what constitutes deregulation of a service. This is further complicated

1 by the fact that there can be a “range of regulation,” as illustrated by ORS 759.052(1)(“...the  
2 Public Utility Commission may exempt *in whole or in part* from regulation those  
3 telecommunication services for which the commission finds...”)(emphasis added).<sup>8</sup>

4 For example, staff observes that Qwest’s Petition contains a so-called “claw-back”  
5 provision that allows the Commission to re-regulate a service that was subject to less-than-full  
6 regulation, or exempted from regulatory oversight after a period of time. Without necessarily  
7 endorsing the specific provision presented in Qwest’s Petition, staff notes that the notion of a  
8 claw-back provision may, or may not, constitute “regulation” of a service. It all depends on the  
9 details of the specific provision. However, it seems that a broad, open-ended general claw-back  
10 provision probably crosses the line into impermissible deregulation of the service. This is  
11 illustrated by ORS 759.052(4) and OAR 860-032-0025(6), both of which represent a broad type  
12 of claw-back provision attached to a service that is nonetheless considered “exempt from  
13 regulation” under each law.<sup>9</sup>

14 Staff suggests that this is a matter best addressed on the merits as the parties examine in  
15 detail the regulatory attributes attached to any disputed service. Indeed, a more meaningful  
16 discussion may focus on the nature and purpose of the proposed less-than-full regulation for a  
17 particular service, rather than on whether the proposal crosses a hotly-disputed line into  
18 impermissible deregulation. This approach makes even more sense in light of the fact that Qwest

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21 <sup>8</sup> OAR 860-032-0001(4) defines an “Exempt service” to mean “a telecommunications service for  
22 which all revenues from, costs of, and assets dedicated to providing the service are excepted  
23 from the Commission’s regulatory authority pursuant to ORS 759.030(2) or (3). (ORS 759.030  
has been renumbered as ORS 759.052.)

24 <sup>9</sup> ORS 759.052(4) provides as follows: “A service that is deregulated under subsection (2) of this  
25 section may be reregulated, after notice and hearing, if the commission determines an essential  
26 finding on which the deregulation was based no longer prevails, and reregulation is necessary to  
protect the public interest.” OAR 860-032-0025(6) provides: “...[U]pon a finding that the  
circumstances under which the service was exempted no longer exists or the public interest  
requires reregulation of the service, the Commission may reregulate a service which has been  
exempted under this rule.”

1 states in its Response that it will be amending its Plan to make sure that newly-provided services  
2 will not be exempt from regulation.<sup>10</sup> Qwest Response at 13, footnote 7.

3 **B. ORS 759.255 incorporates ORS 759.195's use of price caps and certain other**  
4 **aspects of the statute.**

5 The Joint Movants rely upon legislative history to support their proposition that ORS  
6 759.255 requires all price listed services be subject to a price cap. Motion to Dismiss at 15-16.  
7 Staff agrees that ORS 759.255 includes the price cap restriction but for a more direct reason than  
8 presented that by the Joint Movants: Price caps are expressly required by the statute itself.

9 ORS 759.255(1) provides, in relevant part:  
10 *In addition to powers vested in the Public Utility Commission under ORS*  
11 *759.195, and subject to the limitations contained in subsections (2) to (4) of this*  
*section, upon petition of a telecommunications utility...the commission may*  
*approve a plan...(emphasis added).*

12 In other words, ORS 759.255(1) expressly provides that the Commission has the powers vested  
13 in it by ORS 759.195 [subject to ORS 759.255(2) to (4)] when reviewing a price plan presented  
14 by a utility under ORS 759.255.

15 The ORS 759.195 AFOR expressly vests powers in the Commission to require price caps  
16 as follows:

17 Upon its own motion the commission may fix maximum rate levels and terms of  
18 service for price listed services and for toll services on noncompetitive routes.  
19 Upon request of any affected person, the commission shall fix maximum rate  
levels and terms of service for price listed services not subject to competition and  
for toll services on noncompetitive routes.

20 ORS 759.195(5).

21 Thus, there is no question the Commission is authorized to set price caps under ORS 759.255 in  
22 the manner prescribed in ORS 759.195(5). This conclusion is also consistent with the legislative  
23 history that Joint Movants included with their motion as Attachments A and B.<sup>11</sup>

24 <sup>10</sup> And, in any event, Staff disagrees with Joint Movants' assertion that a petition under ORS  
25 759.255 that does not contain price caps for certain services equates to deregulation of those  
services. See Footnote 11.

26 <sup>11</sup> ORS 759.255, incorporating the Commission's powers under ORS 759.195, does not require  
the petitioning utility to include price caps in the plan it files with the Commission, but, as stated  
in the text, the Commission has the power to require such caps at the time it approves the plan or

1           There are other aspects of ORS 759.195 that represent a “power vested with the  
2 Commission” as that phrase is used in ORS 759.255(1). For example, the Commission may  
3 prescribe conditions when authorizing the price list. *See* ORS 759.195(1). Also, the  
4 Commission may require the utility to appear and justify the price listed rates at any time, or  
5 upon a complaint under ORS 756.500. *See* ORS 759.195(6).

6           More problematic is whether the notion of “essential services” under ORS 759.195 is  
7 carried forward into ORS 759.255.<sup>12</sup> To briefly explain, except for essential services, ORS  
8 759.195(1) allows the Commission to authorize the utility to set rates for toll and other  
9 telecommunications services by means of a price list. ORS 759.195(1) further provides that  
10 essential services cannot be price listed but, pursuant to ORS 759.195(6), must have rates set  
11 under ORS 759.180 to 759.190. So, an argument can be made that ORS 759.255 carries forward  
12 the prohibition against price listing essential services found in ORS 759.195(1).

13           But, a strong counter-argument can be made against such a conclusion. First, and  
14 importantly, the idea of essential services does not seem to be so much a “power vested in the  
15 Commission” as it is a key part of the ORS 759.195 AFOR paradigm. In other words, if a utility  
16 wants an AFOR under ORS 759.195, that AFOR cannot price list essential services. Such  
17 services must have rates set pursuant to ORS 759.180 to 759.190. But that is the nature of the  
18 ORS 759.195 AFOR; it is not really a “power vested in the Commission.”

19           Further, ORS 759.180 to 759.190 are the statutes that underlie the traditional “rate of  
20 return” form of regulation. *See, e.g.,* ORS 759.410(1). However, a key feature of ORS 759.255  
21 is that it expressly states that prices under that form of AFOR are set “without regard to the  
22 return on the investment of the utility.” ORS 759.255(1). Consistent with this prohibition

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24 at a later time, or upon a request filed by an affected person. For this reason, staff disagrees with  
25 Joint Movants’ assertion that the lack of price caps in Qwest’s Petition constitutes impermissible  
deregulation.

26 <sup>12</sup> ORS 759.195(6) requires the Commission to designate the local exchanges services that it  
deems “essential” and the Commission has done so in OAR 860-032-0200(6).

1 against the use of rate of return, ORS 759.255(1) expressly prohibits the use of ORS 759.180 to  
2 759.190 when setting prices under ORS 759.255. But, contrary to the prohibition against the use  
3 of ORS 759.180 to 759.190 to set prices under that statute, ORS 759.195, as stated, expressly  
4 *requires* that the prices for essential services be set pursuant to ORS 759.180 to 759.190.

5 Because of these inconsistencies when blending ORS 759.195 with ORS 759.255, and  
6 the view that the concept of essential services does not constitute a “power” per se, staff  
7 concludes that the concept of “essential services” found in ORS 759.195 is not a required part of  
8 a plan created under ORS 759.255.

9 CONCLUSION

10 For the reasons stated, the Commission should not dismiss Qwest’s Petition. However,  
11 Qwest should carefully review its submitted plan as it considers amending it to ensure it meets  
12 the requirements of ORS 759.255, including the incorporated powers from ORS 759.195, and  
13 that no service is deregulated as a result of the plan’s adoption.

14 DATED this 31<sup>st</sup> day of January 2008.

15 Respectfully submitted,

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22 Of Attorneys for the Public Utility Commission  
23 of Oregon  
24  
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26

1 **CERTIFICATE OF SERVICE**

2 I certify that on January 31, 2008, I served the foregoing upon all parties of record in this  
3 proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid  
4 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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