ORDER NO. 06-399

ENTERED 07/12/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UX 29

In the Matter of	)	
	)	
QWEST CORPORATION	)	ORDER
	)	
Petition to Exempt from Regulation	)	
Qwest's Switched Business Services.	)	

DISPOSITION: PETITION GRANTED IN PART AND DENIED IN PART; DOCKET CLOSED

EXECUTIVE SUMMARY

Under ORS 759.052(1), the Commission may deregulate a telecommunications service if price or service competition exists, if the service is found to be subject to competition or if the public interest no longer requires full regulation of the service. ORS 759.052(2) provides that the Commission must exempt a service from regulation if both price and service competition are found to exist. In making such findings, ORS 759.052(3) requires the Commission to consider the extent to which services are available from alternative providers in the relevant market, the extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions, and existing economic or regulatory barriers to entry, as well as any other factors deemed relevant by the Commission.

Qwest petitioned the Commission to remove price cap regulation and reporting requirements for all of its 4,000+ business service offerings statewide. The Commission gathered business service data and considered Qwest's Petition, grouping those service offerings into the following ten categories, 4 "basic" and 6 "non-basic":

1. Basic Business Service – Analog (flat or measured)
2. Basic Business Service – Digital (flat or measured)
3. PBX Trunks – Analog
4. PBX Trunks – Digital
5. 800 Service/OutWATS
6. Analog Centrex Services
7. Integrated Services Digital Network – Basic Rate Interface (ISDN – BRI)
8. Integrated Services Digital Network – Primary Rate Interface (ISDN – PRI)
9. Frame Relay
10. Asynchronous Transfer Mode (ATM Service).

The Commission Staff conducted a confidential survey of the number and type of services and service providers in each Qwest wire center throughout the state. These ten service categories were then analyzed by rate center and subjected to multiple tests for market concentration: market share, CR4 and Herfindahl-Hirschman Index. Although the data was incomplete, it was sufficient to show that Qwest clearly dominated the telecommunications market for all business services outside of the Portland and Clackamas rate centers, especially when only CLEC facilities-based services and those CLEC services that only utilized Qwest's loops (which Qwest must still make available on an unbundled basis) were considered.

In Portland and Clackamas, Qwest's dominance of the market, while considerable, was less than elsewhere in the state. Counting only UNE loops and facilities-based CLEC competition, Qwest has a 61 percent share of the business line market in Portland and an 88 percent share in Clackamas; when combined, Qwest has a 65 percent share of the business lines in the Portland and Clackamas rate centers. There is greater market concentration in the Portland/Clackamas PBX-Centrex-ISDN market. Even if it were assumed that all CLEC-offered PBX-Centrex-ISDN services statewide were actually located in Portland, Qwest would still have more than a 75 percent market share.

The Commission examined Qwest's market behavior as well as the markets themselves. Qwest has had for many years the ability to unilaterally reduce its prices, but with few exceptions, Qwest's business services are all still being offered at their maximum allowable prices. On its business services website, Qwest offers fixed prices for basic business services to "Small Business Customers," limited to three lines or fewer; Qwest has no listed fixed prices for "Large Business Customers," who are not subject to the three line maximum. Three services—Frame Relay, Asynchronous Transfer Mode (ATM) and 800/OutWATS—are available under federal as well as state tariffs.

Qwest claimed all business services should be deregulated, relying on the fact that there were licensed CLEC competitors in every wire center and that Qwest had allegedly lost in excess of 30 percent market share. A major customer group, TRACER, opposed the Qwest petition, believing that prices would rise because there was insufficient competition. Competitors were most concerned not about a rise in Qwest's retail business service prices, but in the availability of wholesale unbundled network elements at reasonable and stable prices. They were concerned that Qwest could control their ability to compete using parts of the Qwest network because Qwest was no longer required by federal law to make many segments of its network available on an unbundled basis.

The Commission rejects Qwest's assertion that there is a single, statewide market for all services. Qwest also failed to meet its burden to show that price and service competition both exist with respect to all customer, service and geographic markets outside of the Portland/Clackamas area. Within Portland and Clackamas, Qwest basic business services provided to customers who have four or more lines are subject to both price and service competition. Basic business services for customers with fewer than four lines are not subject to effective price and service competition. PBX-Centrex-ISDN services are still not subject to price or service competition sufficient to permit deregulation, even in the

Portland/Clackamas market. ATM, Frame Relay and 800/OutWATS services have very few lines under the state tariff and are available under federal tariffs; the public interest no longer requires state regulation.

Services deregulated pursuant to ORS 759.052(1):

- 800 Service/OutWATS, all rate centers
- Frame Relay, all rate centers
- Asynchronous Transfer Mode (ATM Service), all rate centers

Services deregulated pursuant to ORS 759.052(2):

- Basic Business Service and associated features – Analog (flat or measured)—4 lines or more, Portland and Clackamas rate centers only
- Basic Business Service and associated features – Digital (flat or measured)—4 lines or more, Portland and Clackamas rate centers only

Services remaining subject to Commission regulation and oversight:

- Basic Business Service – Analog (flat or measured)—3 lines or fewer, Portland and Clackamas rate centers, all lines in all other rate centers
- Basic Business Service – Digital (flat or measured)—3 lines or fewer, Portland and Clackamas rate centers, all lines in all other rate centers
- PBX Trunks – Analog, all rate centers
- PBX Trunks – Digital, all rate centers
- Analog Centrex Services, all rate centers
- Integrated Services Digital Network – Basic Rate Interface (ISDN – BRI), all rate centers
- Integrated Services Digital Network – Primary Rate Interface (ISDN – PRI)

DECISION

Procedural History. On June 21, 2004, pursuant to ORS 759.052 and OAR 860-032-0025, Qwest Corporation (Qwest) filed a Petition to Exempt from Regulation Qwest's Switched Business Services (Petition) and a motion seeking a Protective Order. The Petition covered all exchanges in Qwest's ILEC service territory in Oregon. The services subject to the Petition fell into three general categories: (1) "...services that provide access to the network, such as flat-rated and measured lines, private branch exchange (PBX) trunks and Centrex services, including feature packages;" (2) "…discretionary business features which are software enhancements available as access line or trunk options" and (3) "…Frame Relay and Asynchronous Transfer Mode (ATM) services (packet-switched services in Qwest's Advanced Communications Services Tariff)."[1]

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[1] *Petition*, p. 1. The numerous services encompassed by the Petition are set forth in and with references to the Qwest Tariff PUC Oregon No. 29: Exchange and Network Services, Sections 5, 7, 9, 10, 14, 15, 105, 107, 109 and 115; Qwest Exchange and Network Services Price List, Sections 5 and 105 and Qwest Advanced

AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Oregon (collectively AT&T); Advanced Telcom Group (ATG); Integra Telecom of Oregon, Inc. (Integra); the Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER); Covad Communications Company (Covad); Time-Warner Telecom (TWT); Rio Communications; XO Communications (XO) and Oregon Telecom (OT) intervened in the proceeding. AT&T withdrew from the proceedings shortly thereafter. The Intervenors filed a joint motion to dismiss, which was denied by ruling of the Administrative Law Judge on October 20, 2004.

Over the course of the following 12 months, considerable time and effort were expended in an attempt to obtain as much information as possible with respect to the characteristics of the market for business retail switched telecommunications services in Oregon. A bench request regarding characteristics of Qwest wire centers was issued by the ALJ to Qwest on January 20, 2005, to which Qwest responded on February 2, 2005. The parties and the Commission Staff subsequently labored over the content, format, scope, degree of granularity and means of preserving the confidentiality of information that would be requested not only from parties to the proceeding but from non-party CLECs as well.

A preliminary CLEC Survey Report was circulated by Staff in July 2005, and parties filed direct and responsive testimony, much of it designated as highly confidential, in August and September 2005. Rebuttal testimony was filed in October, 2005. Hearings were held on October 18 and 20, 2005. Qwest filed its post-hearing opening brief on December 9, 2005, and Intervenors filed responsive briefs on January 25, 2006. Qwest filed a reply brief on February 21, 2006.

Developing the Factual Record in the Case. In order to obtain market information, the parties agreed to have the ALJ issue a ruling requiring CLECs, party and non-party alike, to respond to a survey questionnaire (CLEC Survey). The survey grouped Qwest's business services into ten "integrated service offerings" as follows:

<u>Basic Telephone Services</u>:

- Basic Business Service – Analog (flat or measured)
- Basic Business Service – Digital (flat or measured)
- PBX Trunks – Analog
- PBX Trunks – Digital

<u>Non-Basic Telephone Services</u>:

- 800 Service/OutWATS
- Analog Centrex Services
- Integrated Services Digital Network – Basic Rate Interface (ISDN – BRI)
- Integrated Services Digital Network – Primary Rate Interface (ISDN – PRI)
- Frame Relay
- Asynchronous Transfer Mode (ATM Service)

Communications Services Tariff, PUC Oregon No. 27, Sections 5 and 107, Exhibits Qwest/1, Brigham/14, and Qwest/2, Brigham/1-3.

Gathering and organizing the data utilized by the parties for asserting their positions in this case was extremely difficult. First, much of the data sought was within the sole knowledge of non-party CLECs, most of whom were highly reluctant survey respondents. Many non-party CLECs, some of whom had a significant presence in the state, refused to respond at all. Thus, as Qwest noted "the reported CLEC line counts contained in Attachments 2 and 3 of the Survey Results Report are, in aggregate, understated." To preserve anonymity, the report also redacted CLEC line data for rate centers and/or services that had fewer than four participating CLECs.[2]

Second, survey respondents often interpreted the survey differently from each other.

Third, in order to ensure the confidentiality of the information offered by the survey respondents, Staff aggregated the data sufficiently to mask one market participant's data from every other market participant. Detailed market share information was thus unavailable to the parties in preparing their analyses and arguments.

Finally, data from providers of services that might arguably be functionally equivalent substitutes for retail business services—cable company providers of cable modems for DSL and non-LEC providers of VoIP for interexchange voice services—were beyond the regulatory span of the Commission's authority. Only Qwest and CLEC data was available for analysis.

The aggregated CLEC data, as well as some Qwest data, although available to the parties for preparation of their analyses and argument, has been protected as highly confidential and is withheld from public view, including employees and agents of the parties not signatories to the Protective Order's confidentiality agreement. Consequently, a confidential appendix associated with this Order shall be referred to in setting forth our findings of fact and conclusions of law.

The Current Status of Qwest's Basic Business Exchange Services. The services subject to the Qwest Petition are listed in its Exchange and Network Services tariff, PUC Oregon No. 29 (Tariff 29); Advanced Communications Services tariff, PUC Oregon No. 27 (Tariff 27) and its Exchange and Network Services Price List—Oregon (Price List). There are over 4,000 of these basic and non-basic services or separately priced service elements, and we take notice of and incorporate by reference Tariff 27, Tariff 29 and the Price List. We adopt Staff's summary[3] and briefly describe the service groupings as follows:

Category 1: Services that provide access to the network, including basic and non-basic telephone services and service offering-related feature packages:

[2] Qwest/1, Brigham/5, ll. 11-15.
[3] Staff/200, Sloan/2-4.

A. Basic Services: Flat Rate Local Exchange Service; Measured Rate Local Exchange Service; Flat Rate Private Branch Exchange (PBX) Service; and Measured Rate PBX Service.

B. Non-Basic Services: Centrex Service; Private Line Service; Extended Area Service (EAS).

Category 2: Discretionary Business Services, including Caller Identification, Call Forwarding, Call Waiting and Speed Dialing.[4]

Category 3: Packet-Switched Services, including Frame Relay and Asynchronous Transfer Mode (ATM), packet-switched services included in Qwest's Advanced Communications Services tariff.[5]

All of the over 4,000 service offerings encompassed by Tariffs 27 and 29 and the Price List have associated prices. None of those 4,000+ services or service elements is subject to rate-of-return regulation. Instead, the price for each service is subject either to direct Commission control (basic services) or to price caps (non-basic services). Qwest has downward pricing flexibility for both basic and non-basic services; i.e., Qwest does not need Commission approval before it lowers prices. With the exception of ISDN Primary Rate Service special contracts, all of Qwest's petition services are priced at the maximum allowable level.[6] Granting the Qwest petition would have only a single practical effect on the marketplace: it would permit Qwest to raise prices for services currently constrained.

FINDINGS OF FACT

DETERMINING THE EXISTENCE OF PRICE AND SERVICE MARKET COMPETITION

Establishing Market Definitions

Qwest Actions as an Indicator of Perceptions of Market Definition. During Calendar Years 2000 through 2004, Qwest alleges that it lost 36 percent of its business lines to competition.[7] Qwest has statewide downward pricing flexibility for all services. Except for rates for ISDN Primary Rate Service special contracts, Qwest did not lower any of the prices set forth in the Tariffs and Price List applicable statewide.[8] Most reductions in published prices have been the result of mandates in the UT 125 rate case order.[9] Qwest's current business service prices remain at their maximum permissible levels, with the exception noted above.

[4] These are grouped as non-basic telephone services pursuant to OAR 860-032-0190 and ORS 459.410, *et seq.*
[5] These are grouped as non-basic telephone services pursuant to OAR 860-032-0190.
[6] Staff/100, Chriss/45, ll. 10-11.
[7] Qwest/1, Brigham/20, l. 16.
[8] Staff/100, Chriss/45, l. 23-46, l. 3.
[9] Staff/100, Chriss/45, ll. 22-23, and Confidential Staff/111.

Defining Market by Customer Demographic. In prior proceedings, we have grouped business customers by their capacity demands for telecommunications services.[10] According to a recent study submitted by TRACER,[11] Small Businesses (defined as those with fewer than 500 employees), average fewer than nine employees and spend on average $543.17 per month for telecommunications services. Firms with fewer employees spend disproportionately more for telecommunications services than firms with more employees.[12] Nationwide, CLECs have a 29 percent share of the small business market in metropolitan areas and an 11 percent share in non-metropolitan areas.[13]

No evidence was offered either by Qwest, Intervenors or Staff providing any data with respect to the market for telecommunications services in Oregon as defined by customer size segmentation, and thus we have no Oregon-specific data regarding market share by customer size. However, we take official notice of the Qwest website with respect to the way that Qwest defines "small business" and "large business" customers. Qwest's Small Business web pages offer Voice Solutions packages of Qwest Choice Business ™ and Qwest Choice Business Plus™, which bundle a voice line with a choice of either three or fifteen calling features. With either service, the customer may purchase the Add-a-Line feature for up to two additional lines; i.e., a total of three local voice lines.[14] Furthermore, while the Qwest Small Business web pages provide specific pricing information, the Qwest Large Business web pages do not.[15]

Defining Market by "Integrated Service Offerings." Although Qwest offers more than 4,000 services under tariffs and price lists, as noted above, the Survey sought data assigning those services into ten integrated service offerings. Staff asserts: "It is appropriate to analyze Qwest's Petition at this highly integrated level of service offering…if the Commission determines that the integrated service offering…is competitive within a particular wire center or group of wire centers, it is reasonable to assume that each service offering or individual service under the …integrated service offering as listed in the table of contents of Qwest's applicable tariffs and price list, is competitive within that territory."[16]

Defining Market by Geography. In this proceeding, data was gathered by rate centers (which cover fixed geographic areas). Staff used the data relative to each rate

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[10] The Commission opened an investigation into whether a CLECs' ability to compete in serving "enterprise customers" in Oregon markets is impaired without access to unbundled switching provisioned by ILECs. "Enterprise customers" were those businesses that utilized DS1 and above high-capacity circuits. *See In the Matter of the Investigation to Determine, Pursuant to Order of the Federal Communications Commission, Whether Impairment Exists in Particular Markets if Local Circuit Switching for Mass Market Customers is No Longer Available as an Unbundled Network Element*, PUC Docket UM 1100.

[11] *A Survey of Small Businesses' Telecommunications Use and Spending*, TeleNomic Research LLC, released March, 2004, TRACER Hearing, Exhibit 5, p. 4.

[12] *Id.*, p. 5. Firms with 4 or fewer employees spend $82.81 per employee; firms with 5-9 employees spend $50.18 per employee and firms with 10-499 employees spend $20.99 per employee.

[13] *Id.*

[14] *See* http://pcat.qwest.com/pcat/productDetail.do?salesChannel=SmallBusiness&offerId=6683.

[15] *See, e.g.* http://www.qwest.com/pcat/large_business/product/1,1016,954_4_25,00.html (large business voice lines) and http://www.qwest.com/smallbusiness/productsandservices/local/index.html (small business voice lines).

[16] Staff/200, Sloan/5.

center to place the rate centers into groups based upon the number of competitors in each rate center. Each rate center was examined for market share based on the number of lines served by each market participant and the types of services that each offered in that rate center.[17]

Defining "Functional Equivalence" or "Substitutability" at "Comparable Rates, Terms and Conditions." Qwest asserts that products are substitutable in a relevant market if "they are viewed to provide a reasonable alternative for at least a subset of customers. If there are enough customers that would respond to a price increase in one service (or changes in features or functionality) by migrating to the other service, the services are clearly effective substitutes."[18] Staff rejects this standard as an "unreasonably low benchmark," citing Brigham testimony to the effect that a migration of 1 percent of the customer base in response to a significant price increase "very well could" mean that the different service is a substitute for the first service.[19] Staff also rejects evidence of substitutability provided by Qwest as "merely presented as its assertions."[20]

However, assertions by an expert witness on matters that are generally understood within the industry may have probative value without being rigorously quantified and may be reasonably adopted, as, for example, Mr. Brigham's assertion that "anyone involved in the telecommunications industry knows that PBX and Centrex are now, and always have been, seen as competitive substitutes by many customers, and these services have been marketed as such."[21] Qwest witness Brigham also offered comparisons of service offerings from its own website with respect to ISDN Single Line Service, PBX Analog Trunks, Centrex Plus, Digital Switched Service, ISDN Primary Rate Service and Centrex Prime,[22] XO's website descriptions of its Centrex and XOptions Flex services[23] and MCI's ATM and Frame Relay, Virtual Private networks and MCI Advantage.[24] Staff asserts that this non-quantified data "is not sufficient to establish the Petition services are in fact substitutable for one another...."[25] While Staff also acknowledged that wireless and VoIP services may be substitutable, it claims that Qwest has failed to provide sufficient evidence to meet its statutory burden.[26]

"Barriers to Entry." Staff testified that there are three barriers to entry in the switched business services market in Oregon: the cost of building facilities, lack of building access and different means of franchise fee calculation. Although lacking CLEC-specific cost data, Staff notes that Qwest's capital outlay to replace a loop is approximately $658. No quantifiable data was entered into the record with respect to the number or percentage of

[17] Staff intended to analyze the data by wire center; however, some CLEC's were unable to respond at the wire center level and provided data by rate center. Therefore, staff's analysis was undertaken at the rate center level.
[18] Qwest/25, Brigham/13.
[19] Staff Reply Brief, p. 8, citing Tr. 40.
[20] *Id.*
[21] Qwest/25, Brigham/8.
[22] Qwest/27-28, 31-33, Brigham/1.
[23] Qwest/29, Brigham/34; Qwest/36, Brigham/1-6.
[24] Qwest/34, Brigham/1-4.
[25] Staff Reply Brief, p. 11.
[26] *Id.*

buildings to which Qwest had exclusive access agreements.[27] Franchise fees vary between Qwest and CLECs. In Portland, a CLEC is charged a minimum amount equal to 5 percent of its gross revenue; Qwest is charged the greater of the minimum annual franchise fee or $2.63 per linear foot of Qwest's facilities in the streets.[28]

Analysis of Survey Data

Testimony in the record analyzed the data submitted by the parties and via the CLEC survey utilizing the CR4 ratio[29] and the Herfindahl-Hirschman Index (HHI).[30]

We take official notice of the following statement by the Antitrust Division of the U.S. Department of Justice with respect to the HHI:

> The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.
>
> Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated."[31]

Basic Business Services (Analog and Digital, Both Measured and Flat Rate). For basic business service, of those CLECs responding to the survey, 15 provide service in Clackamas, 14 provide service in Portland, 12 provide service in Bend, 12 provide service in Salem and 11 provide service in Eugene. At the other end of the spectrum the rate centers in Siletz, Falls City, Blue River, Marcola and Westport reported no CLECs providing basic business service.[32] When considering all of the services subject to the Petition and not just basic business service, seven rate centers had ten or more CLECs providing services:

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[27] Staff/100, Chriss/51-52. Staff excludes QPP and other Qwest-discretionary wholesale offerings in it analysis.
[28] *Id.*, p. 52-53.
[29] "CR4 [is] the proportion of the market taken up by the four largest firms expressed as a percentage of the market as a whole. CR4 does not take into account the number of firms in a market nor does it take into account the size differences in the firms." Staff/102, Chriss/1. Thus, a market in which the top firm had 84 percent market share and the next three firms each had a 2 percent market share would have the same CR4 (90) as a market with four firms each having a 22.5 percent market share.
[30] The HHI is "a measure of market concentration which takes into account both the number of firms in a market and their size differences. The HHI has a range of 0-10,000 and is calculated by summing the squares of every firm's market share." Staff/102, Chriss/1. Thus, a market with two firms, each of which had 50 percent of the market, would have an HHI of 5,000.
[31] *See* http://www.usdoj.gov/atr/public/testimony/hhi.htm.
[32] Staff/100, Chriss/27, citing Staff/103, Chriss/1.

Albany, Bend, Clackamas, Eugene, Medford, Portland and Salem. Two rate centers—Roseburg and Redmond—each had nine CLECs providing any of the Petition services.[33]

Two of Qwest's Portland rate centers within the Portland rate center had at least ***confidential*** [a] fiber-based collocators, and in the Portland Capitol rate center, CLEC competitors utilized ***confidential*** [b] Qwest retail business access lines, public access lines, UNE loops and UNE platform lines.[34]

Of all rate centers, only Portland had an HHI for all provisioned basic business services that was less than the statewide average of 3,787, a number for which the size of the Portland market was largely responsible. Even utilizing the CR4, which does not account for differences in the sizes of the four largest competitors, the Portland rate center had the lowest number except for one other, far smaller, rate center. When only UNE-L and Facilities Based Basic Business Services were calculated, only the Portland rate center had an HHI of less than 5,000 and a CR4 of less than 99 percent.[35] When only facilities-based competitors for Basic Business Services were considered, the Portland HHI was approximately half the HHI in other Oregon rate centers.[36]

Staff also calculated the total CLEC basic business line market share versus Qwest's market share in each rate center. When only UNE-L and Facilities Based Basic Business Services were calculated, Qwest had a ***confidential*** [c] share of the Portland rate center lines. In the contiguous Clackamas rate center, Qwest had a ***confidential*** [d] market share when only CLEC UNE-L and Facilities Based Basic Business Services were included. Combining the figures for the two contiguous rate centers gave Qwest a ***confidential*** [e] market share.[37]

Similar recalculations of the data using only UNE-L and facilities-based lines were prepared by Eschelon /ATG witness Douglas Denney. According to witness Denney, CLECs had a statewide effective market share of ***confidential*** [f] and Qwest had a ***confidential*** [g] market share. In the Portland rate center, the CLEC effective market share was ***confidential*** [h] and the Qwest market share was ***confidential*** [i]. In the Clackamas rate center, the CLEC effective market share was ***confidential*** [j] and the Qwest market share was ***confidential.*** [k].[38]

Substitutable Services: Basic: Analog PBX, Digital PBX; Non-Basic: Centrex, ISDN Basic and ISDN Primary. Staff tabulated the survey results separately for each of the five services at each rate center. A highlights summary of the results follow:

There was virtually no competition in the provision of analog PBX services outside of the Portland rate center. In Portland, there were ***confidential*** [l] CLEC lines and

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[33] *Id*, p. 28.
[34] BCH-01-001, 2, Confidential Attachment A.
[35] Staff/103, Chriss/4-5, Attachment 2, confidential pages 2-1 and 2-2.
[36] Staff/103, Chriss/6, Attachment 2, confidential page 2-3.
[37] Staff/103, Chriss/5, Attachment 2, confidential page 2-2.
[38] Confidential testimony of Douglas Denny, September 9, 2005, p. 21.

confidential [m] Qwest lines, yielding a CR4 value of ***confidential*** [n] and an HHI of ***confidential*** [o].[39]

Using all possible means of provisioning, there were ***confidential*** [p] CLECs providing digital PBX services to ***confidential*** [q] customer lines in the Clackamas rate center and ***confidential*** [r] CLECs providing digital PBX services to ***confidential*** [s] customer lines in the Portland rate center. ***Confidential*** [t] CLECs were providing digital PBX services to ***confidential*** [u] customer lines in the balance of the state. Qwest provided digital PBX services to ***confidential*** [v] customer lines in Clackamas, Portland and the remainder of the state, respectively, resulting in the respective CR4s and HHIs of ***confidential*** [w]. Viewed on a statewide basis, ***confidential*** [x] CLECs had ***confidential*** [y] digital PBX lines, and Qwest had ***confidential*** [z] lines, yielding a CR4 of ***confidential*** [aa] and an HHI of ***confidential*** [bb].[40] However, when only UNE-Loop and facilities-based provisioning was taken into account, the number of CLECs offering digital PBX services anywhere in Oregon dropped to ***confidential*** [cc] serving only ***confidential*** [dd] lines and the CR4 and HHI rose to ***confidential*** [ee], respectively.[41]

Using all possible means of provisioning, there were ***confidential*** [ff] CLECs providing Centrex services in Eugene, Medford, Portland/Clackamas, Salem/Albany, Newport/Corvallis and the remainder of the state. Even when viewed on a statewide basis, there were only ***confidential*** [gg] CLECs providing ***confidential*** [hh] lines, while Qwest served ***confidential*** [ii] lines, giving it a ***confidential*** [jj] market share and yielding a CR4 and HHI of ***confidential*** [kk], respectively.[42] When only UNE-Loop and facilities-based provisioning was taken into account, the number of CLECs offering Centrex services dropped to ***confidential*** [ll]. Under the circumstances, it was not possible for the Staff to mask data from the competitors, and it was therefore not offered into the record and CR4 and HHI values were not calculated.[43]

Only ***confidential*** [mm] CLECs offered ISDN basic services, and it was therefore not possible for the Staff to mask the CLEC data. Qwest provided ***confidential*** [nn] lines of basic ISDN services throughout the state, of which ***confidential*** [oo] were in Portland.[44]

Using all possible means of provisioning, ***confidential*** [pp] lines of ISDN Primary service were offered by ***confidential*** [qq] CLECs in Clackamas, ***confidential*** [rr] lines by ***confidential*** [ss] CLECs in Portland and ***confidential*** [tt] lines by ***confidential*** [uu] CLECs in the balance of the state. Qwest had ***confidential*** [vv] lines of ISDN Primary Service in Clackamas, Portland and the balance of the state, respectively. This yielded respective CR4s and HHIs for Clackamas, Portland and the remainder of the state as follows: ***confidential*** [ww]. There were ***confidential*** [xx] total unique CLECs statewide providing

[39] Staff/103, Chriss/7, Attachment 2, confidential page 2-4.
[40] Staff/103, Chriss/10, Attachment 2, confidential page 2-7.
[41] Staff/103, Chriss/11, Attachment 2, confidential page 2-8.
[42] Staff/103, Chriss/13, Attachment 2, confidential page 2-10.
[43] Staff/103, Chriss/14, Attachment 2, confidential page 2-11.
[44] Staff/103, Chriss/19, Attachment 2, confidential page 2-16.

confidential [yy] lines of ISDN Primary services compared to Qwest's ***confidential*** [zz] total lines. Thus, there was a statewide CR4 of ***confidential*** [aaa] and a statewide HHI of ***confidential*** [bbb]. When only UNE-L and facilities-based ISDN primary services were considered, it was necessary to mask data on other than a statewide level. Statewide, there were ***confidential*** [ccc] CLECs offering ***confidential*** [ddd] lines of ISDN primary service compared to Qwest's ***confidential*** [eee] lines, yielding a Qwest statewide market share of ***confidential*** [fff] a CR4 of ***confidential*** [ggg] and an HHI of ***confidential*** [hhh].[45]

Due to the agreement to mask highly confidential information so that even signatories to the protective order could not view the raw data, it is not possible to develop market share, CR4 and HHI numbers utilizing only UNE-L and facilities-based lines on a combined basis for all services within particular geographic markets.

"Unmasked" information is available on a statewide basis that would enable us to analyze the five integrated service offerings as a single market in a manner most favorable to Qwest's Petition if we assume the following:

1. CLEC Digital PBX and ISDN Primary *statewide* services that are UNE-L and facilities self-provisioned[46] are considered to all be located within the Portland rate center.

2. CLEC Analog PBX, Centrex and ISDN Basic services[47] *statewide, however provisioned,* are considered to all be located within the Portland rate center.

3. Only Qwest's Portland rate center Analog PBX, Digital PBX, Centrex, ISDN Basic and ISDN Primary lines are counted.

For these five services under the conditions described above, according to the survey data, CLECs provide ***confidential*** [iii] lines statewide and Qwest provides ***confidential*** [jjj] lines in the Portland rate center,[48] for a total of ***confidential*** [kkk] combined service lines. Thus, under the assumption that all of these services offered by CLECs are concentrated entirely in the Portland rate center, Qwest has a 76.0 percent market share. Clearly, Qwest's market share is greater than 76.0 percent, but given the permissible level of detail in our analysis, we do not know how much greater the actual Qwest market share is.

<u>Services Available Under Federal Tariffs</u>

Asynchronous Transfer Mode (ATM), Frame Relay and 800 Service/ OutWATS are available through federal tariff, F.C.C No. 1, for interstate service. ATM

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[45] Staff/103, Chriss/22, Attachment 2, confidential page 2-19.
[46] Source: Staff/103, Chriss/11; Staff/103, Chriss/22, *supra*.
[47] Source: Staff/103, Chriss/7; Staff/103, Chriss/13; Staff/103, Chriss/19, *supra*. According to the survey, the number of CLEC ISDN basic lines statewide is zero.
[48] Source: Staff/100, Chriss/30.

and Frame Relay are set forth in Section 8 of the tariff. 800 Service/OutWATS are located in Section 6 of the tariff. [49]

800 Service/OutWATS. The 800 Service/OutWATS market is quite small. Even with all forms of provisioning, only one CLEC in the Bend rate center and one CLEC in the Woodburn rate center provide the service. Qwest has only ***confidential*** [lll] lines of 800 Service/OutWATS statewide.[50]

Frame Relay and ATM. These are packet-switched services included in Qwest's Advanced Communications Services tariff. The Frame Relay and ATM markets are both quite small. Statewide, only ***confidential*** [mmm] CLECs offer Frame Relay service, and those lines are not provisioned by UNE-L or CLEC facilities.[51] Qwest has ***confidential*** [nnn] lines of Frame Relay service statewide[52] and ***confidential*** [ooo] lines of Frame Relay service in the Portland rate center.[53] The ATM market is extremely small. No CLECs offer the service and there are only ***confidential*** [ppp] Qwest ATM lines statewide and none in the Portland rate center.[54]

CONCLUSIONS OF LAW

The Applicable Law. ORS 759.052(1)(a) provides that, following notice and investigation:

> …the Public Utility Commission *may* exempt in whole or in part from regulation those telecommunications services for which the commission finds that:
> (A) Price or service competition exists;
> (B) Telecommunications services can be demonstrated by the petitioner or the commission to be subject to competition; *or*
> (C) The public interest no longer requires full regulation of the telecommunications services. (Emphasis added.)

ORS 759.052(2) provides that, "after notice and hearing, the commission *shall* exempt a telecommunications service from regulation if the commission finds that price and service competition exists." (Emphasis added.)

[49] We take official notice of the federal tariff offerings and note that the tariff sheets are quite detailed and comprehensive. The ATM tariff is 24 pages in length, and the Frame Relay tariff exceeds 200 pages. The federal tariff for 800 Service/OutWATS is approximately 65 pages in length.
[50] Staff/103, Chriss/16.
[51] Staff/103, Chriss/24.
[52] *Id.*
[53] Staff/100, Chriss/30.
[54] Staff/103, Chriss/28.

ORS 759.052(3) provides as follows:

Prior to making the findings required by subsection (1) or (2) of this section, the commission shall consider:
(a) The extent to which services are available from alternative providers in the relevant market.
(b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates and under comparable terms and conditions.
(c) Existing economic or regulatory barriers to entry.
(d) Any other factors deemed relevant by the commission.

The language in OAR 860-032-0025 Subsections (1)-(3) tracks the statutory language above. Subsection (4) describes the petitioner's procedural requirements.

DISCUSSION

In drafting the requirements of ORS 759.052(3), the Legislature specifically granted the Commission broad discretion under Subsection (d) to examine "any other factors deemed relevant" in determining whether price and service competition exist. We find that the relevant factors to be examined from the evidence presented in this proceeding include how the relevant markets are defined and which of those markets are subject to price-constraining price and service competition sufficient to overcome Qwest's market power to set and maintain prices. We also find that the HHI and CR4 analysis set forth above is germane to our examination.

A market may be defined by any one or combination of several parameters within or among such general categories as geography, customer demographic or the product or service being offered.

Qwest's Market Definition. In this proceeding, Qwest asserts that there is but one relevant market—all retail switched business services in all of the service territories encompassed by Qwest's Oregon wire centers.[55] Qwest contends that it "is now experiencing a high level of competition for its retail switched business services throughout its Oregon service territory" because "business service competition is not limited to large metropolitan areas…but extends also to the smaller Oregon communities" and that "business customers are currently purchasing competitive local exchange services in all of Qwest's Oregon wire centers." Qwest therefore asserts that the Commission should define the relevant geographic market for retail business services to include all Oregon wire centers that Qwest serves.[56] According to Qwest, during Calendar Years 2000 through 2004, Qwest lost 36 percent of its business lines to competition.[57]

[55] Qwest/1, Brigham 15-17.
[56] Qwest/1, Brigham/15.
[57] Qwest/1, Brigham/20, l. 16.

Customers' Market Definition. TRACER contends that such a statewide, all-service definition of the market is overbroad and not supported. "For this definition to be correct would require that every provider in Qwest's service territory be able to offer its service in every other part of Qwest's serving territory 'rapidly' and 'without incurring significant sunk costs.' This is clearly not true."[58]

Behavior of Market Participants as Indicators of Perceptions of Market Definition. Qwest cites its loss of overall market share as the primary evidence of the existence of price and service competition. However, loss of market share is not a *per se* indicator of effective competition, but must instead be viewed in the context of market participant behavior; i.e., how Qwest has responded to market competition. We cannot attribute the loss of Qwest's market share to any lack of statewide downward pricing flexibility. Qwest's failure to lower prices uniformly across a range of services and broad geographic areas is simply a business choice not to do so.

If there were but that single, uniform, relevant market, Qwest would have lowered its tariff and price list rates across the board. According to Staff, "[t]his lack of action by Qwest could be very consistent with profit maximizing behavior…. Qwest has not lowered its prices for customers in general…. This is most telling for basic business service, which makes up the largest portion of Qwest's business lines."[59]

A rational market participant acting in the role of vendor and seeking to maximize profits, will not reduce prices as long as price reductions do not entice sufficient increases in demand (or reductions of losses) to offset the reduction in price. Qwest's loss of market share despite its ability to lower its prices is consistent with a desire to maximize profit. This behavior must form an essential element of our analysis of the existence of price and service competition.

We also note that, in a competitive marketplace where one market participant vendor is constrained in its ability to freely price to the market by regulation, it would be expected that its competitors would prefer to have such constraints remain, thus inhibiting that competitor from freely changing its prices. Similarly, in a competitive marketplace with a constrained competitor, it would be expected that customers, the beneficiaries of robust competition, would prefer to have such constraints lifted so that all providers would compete for their business.

In this proceeding, however, for some of the CLECs and for a major customer group, the reverse is true: CLEC intervenors XO, TWT and Integra "do not take a position on the regulatory treatment for Qwest's retail services," but instead focus their concern on the availability of wholesale offerings to CLECs.[60] TRACER, a consortium of Oregon businesses and educational institutions that advocate on behalf of large telecommunications customers, opposes the Qwest Petition and asserts that "the main exemptions from regulation

[58] TRACER /100, Cabe/24.
[59] Staff/100, Chriss/46, ll. 3-4, ll. 13-17.
[60] XO/1, Knowles/2, ll. 16-17.

Qwest seeks in this proceeding are: (1) the authority to raise prices without the Commission's review, and (2) the waiver of certain filing requirements."[61] It is thus the implicit opinion of Qwest's competitors and customers that price-constraining competition does not yet exist. Their positions on the Qwest Petition imply that, should Qwest's Petition be granted to any degree, prices for switched business services will rise because competition is not holding prices in check or exerting downward pricing pressure.

Defining the Relevant Market. Given Qwest's actions in light of its current regulatory latitude to lower its prices uniformly and simultaneously throughout the state, Staff testimony would lead us to conclude that the relevant markets for various business services must be subsets of the entire customer demographic, geographic and product market in Qwest's Oregon service territories.[62] Some of these market subsets might be constrained by price competition if Qwest's Petition is granted. However, others appear to be constrained to their present price levels solely by price caps (in the case of non-basic services) or Commission authority (for basic services). These customer size/service offering/geographic subsets are thus separate markets subject to separate analysis and evaluation.

For those markets currently constrained by price caps or Commission authority, Qwest appears to have no price-constraining competitors. If price constraints are removed, prices would rise until an equilibrium was reached via the entry of price-constraining competitors. Other factors may be customer preference for dealing with a "known quantity" even though prices may be higher than those of competitors or that the customer is a tenant in a building that has an exclusive telecommunications contract with Qwest.[63] All of these factors contribute to market power.

Defining Market by Customer Demographic. According to the websites through which Qwest markets its business services, Qwest appears to currently offer pricing flexibility—i.e., no published, set price for basic business voice-grade service—only to businesses that fall into their "Large Business" category. Small businesses are limited in the feature packages and number of lines to specific offerings at specific prices. Large businesses are not restricted to service offerings of one, two or three voice grade service lines and prices are subject to negotiation. We therefore find that, by Qwest's own public representations, price competition is not present for voice grade line integrated service offerings for customers with three or fewer lines.

Defining Market by "Integrated Service Offerings." We adopt Staff's approach to analyze Qwest's Petition at the level of integrated service offering, particularly in light of Qwest's marketing of bundled services described above. If an integrated service offering is competitive within a particular rate center or group of rate centers, it is reasonable

[61] TRACER/100, Cabe/4, ll. 3-5, and Cabe/5, ll. 23-24.
[62] "Superficially, there is price competition for basic business and analog PBX services, but Qwest's actions suggest that price competition does not exist for all customers; for the remaining petition services, it is uncertain whether price competition exists." Staff/100, Chriss/59, ll. 5-9.
[63] *Id.*, Chriss/47, ll. 12-21.

to assume that each service offering or individual service component is competitive within that territory.

Defining Market by Geography. As noted above, we found that all of Qwest's rate centers cannot be viewed as a single market. Furthermore, we adopt Staff's method for grouping rate centers because combining disparately sized rate centers effectively masks the true market structure. For example, in Portland, Qwest has basic ***confidential*** [qqq] business service lines and a ***confidential*** [rrr] market share and the competing CLECs have ***confidential*** [sss] basic business lines, while in Westport, a rate center with ***confidential*** [ttt] business lines, Qwest has ***confidential*** [uuu] business lines and ***confidential*** [vvv] market share and the number of competing CLECs is ***confidential*** [www]. If the two rate centers were combined into a single market, it would appear that the Qwest market share in the smaller market would be only ***confidential*** [xxx].

Defining "Functional Equivalence" or "Substitutability" at "Comparable Rates, Terms and Conditions." In determining the level of competition in a particular market, we find that certain services may serve as economic substitutes for one another and should be considered together in a competitive market analysis.[64] Furthermore, we believe that the decline in Qwest's market share and the representations by CLECs to potential customers with respect to the comparability of their service offerings is significant. It creates a showing of functional equivalence or substitutability of the competing and available CLEC telecommunications service products at comparable rates, terms and conditions in at least some markets. For example, Qwest demonstrated that as analog and DSS PBX trunks declined over the 1997-2005 time period, the number of ISDN-PRI (DS0) trunks rapidly grew and noted that migratory trends among Centrex (both analog and digital), PBX and ISDN have been quantified. [65]

However, we adopt Staff's view that UNE-P lines that have been phased out and replaced with QPP should not be counted in our calculations. UNE-P was originally tariff-priced and available to CLECs by federal and state mandate. The *USTA II* decision deprived CLECs of that regulated offering. In its place, Qwest offers a contractual package of service elements unconstrained by any regulatory authority, requiring CLECs to negotiate an agreement with a competitor who is also their sole source of supply for the competitive facilities. In such circumstances, the imbalance of negotiating power is profound. Similarly, we are of the view that those services that, also thanks to *USTA II*, Qwest has advised CLECs it is no longer required to provide in certain wire centers—DS1, DS3, dark fiber loops and dedicated transport—should also be excluded from market share calculations.[66] Likewise, we find that packet switched services such as Frame Relay and ATM, as well as

[64] We concur in Staff's view with respect to excluding consideration of wireless and VoIP services primarily because we have no way to quantify how non-CLEC wireless and VoIP services affect Qwest market share. Such services could impede both Qwest's and CLECs' service growth and take customers from both Qwest and CLECs. Conversely, they could well be an adjunct that could stimulate wireline growth as well as be an alternative to it. The record did not have data that would indicate what impact the services might have.
[65] Qwest/25, Brigham/19, 21.
[66] Staff/109.

800/OutWATS services, which are available off federal tariffs, to be worthy of separate treatment.

Qwest's assertions that it will continue to negotiate QPP agreements cannot be factored into the market analysis because there are no assurances that the resulting pricing levels will be economic for CLECs. We therefore limit our analysis to CLEC businesses provided only by UNE-L and facilities-based provisioning. Thus, with respect to basic business services on a statewide basis, the Qwest retail business lines and CLEC UNE-L and Full Facilities-based lines are respectively ***confidential*** [yyy] and ***confidential*** [zzz] and their respective market shares are ***confidential*** [aaaa].[67]

We conclude that applying market concentration analyses to each integrated service offering within each rate center group is the most rational way to develop a numerical representation of the level of competition. We further find that, while the CR4 ratio has probative value in limited circumstances, the HHI methodology provides the more consistent representation of market concentration.

Barriers to Entry. Staff contends that the cost of building facilities constitutes the first barrier, especially to small CLECs lacking the backing of a large parent company. A CLEC might be able to compete, but only in a low-cost area, whereas Qwest can average its costs. This effectively limits competition.[68] The second barrier is building access; incumbent LECs are often granted exclusive access to the tenants in the building, denying tenants of the ability to choose an alternative provider. A third barrier is the difference in the way that franchise fees are calculated by many cities for incumbent LECs and CLECs.

Survey Data Conclusions. Staff Exhibit/103 demonstrates that the diversity in the level of competition in markets for business services correlates well with the population and business density in different areas of the state, with CLECs being more numerous and with greater market shares in more densely populated markets.

Qwest filed its Petition to deregulate all switched business services statewide during a period of great uncertainty with respect to the federal regulatory framework and during a period of great technological and market changes. As shown by the data garnered from the survey, many of Qwest's CLEC competitors have relied heavily upon Qwest to provision the components—the UNEs—of the service they use to compete with Qwest and gain market share at Qwest's expense. Yet the very right mandated by the FCC to obtain many of these UNEs, especially UNE-P, no longer exists. In its place are contractual arrangements available at Qwest's pleasure. Both Qwest and its CLEC competitors face new market entrants—wireless and VoIP—with no track records of success, sustainability or cross-elasticity with existing service offerings. We have no market data in the record specific to Qwest's Oregon rate centers for these new entrants.

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[67] Staff/100, Chriss/36, confidential Table 4.1, citing Table A (Qwest/1, Brigham/32), and Table B (Qwest/1, Brigham/33). The ***confidential*** [bbbb] QPP lines are excluded from the above figures in calculating the respective lines and market shares.
[68] *Id.*, pages 51-52.

Certain facts do stand out. First, Qwest currently offers services subject to its tariffs and price lists at the maximum allowable price for thousands of services. It has the freedom to lower any of these prices at any time as far as it wishes, so long as the rate does not fall below the service's statutory price floor. This leads to a second salient fact: despite this downward pricing flexibility, over a number of years, Qwest has not responded to its ostensibly competitive environment by lowering any of the thousands of listed prices in its tariffs and price lists, with the single exception of the ISDN service noted earlier.

Price and service competition cannot be deemed to exist where the largest competitor has not responded to competitive market entry by lowering price or changing the qualities of a product or service. We concur with Staff that Qwest's actions are consistent with profit-maximizing behavior; i.e., it is more profitable to relinquish market share than to lower prices. The clear implication is Qwest's belief, probably well-founded, that the vast majority of customers will continue to pay the maximum allowable price and may well be willing to pay more if Qwest has the freedom to increase its service rates. We therefore must conclude that if we regarded the market as Qwest has asked us to do—all business services offered by Qwest statewide—as a single unified market, that Qwest has not met the standards set forth in ORS 759.052(2). The statewide HHIs for the various service offerings noted above provide striking objective support for this conclusion. Had the Qwest Petition contained a request that the Commission consider it on a "take it or leave it" basis, we would be obliged to deny the Petition.

Competition in the Market for Basic Business Services. If we define markets geographically and, within geographic market areas by types of service offerings, the HHI values disperse significantly from the statewide average. The dispersion is even greater when only the UNE-L and facilities-based services are considered. Portland, and to a lesser extent Clackamas, rate centers have significantly lower HHIs for most services than other rate centers. Within these two rate centers, market concentration, as expressed by the HHI, is still very high although lower than elsewhere in the state. With respect to Basic Business Service, Qwest had a 61 percent market share in the Portland rate center when only UNE-L and facilities-based lines were considered. When combined with the contiguous Clackamas rate center, where Qwest had an 88 percent market share, Qwest had an overall 64.6 percent market share, still less than two-thirds of all business lines. By any measure, this is still a highly concentrated market. However, given the far lower market share, when all means of competition are considered and the pricing flexibility Qwest affords to customers seeking four or more lines, we believe that a sufficient showing of price and service competition exists in the Portland and Clackamas rate centers with respect to Basic Business Service to satisfy ORS 759.052(2). Accordingly, the prices for analog and digital basic business services and their associated features should be deregulated for customers whose accounts include four or more lines.

Competition in the Market for Substitutable Services: Basic: Analog PBX, Digital PBX; Non-Basic: Centrex, ISDN Basic and ISDN Primary. Of the ten integrated business services, we find that Qwest has met its burden to show that the five offerings—Analog PBX and Digital PBX, Centrex, ISDN Basic and ISDN Primary—may in various pairings be viewed as substitutable services in some geographic markets for customers with comparable needs criteria.

However, although we found that Basic Business Services in Portland were subject to price and service competition for customers with more than three lines, we cannot make a similar finding with respect to Analog PBX, Digital PBX, Centrex, ISDN Basic and ISDN Primary services in Portland. Even being so generous as to treat all CLEC statewide lines as if they were in the Portland rate center, when just UNE-L and facilities-based lines are counted, Qwest retains a market share greater than 75 percent. As noted earlier, we find that *only UNE-L and facilities-based services as a means to deliver these substitutable business services should be considered in determining whether the market is competitive because all other means of provisioning could be withdrawn or modified by Qwest at its discretion.* Such a level of market concentration a decade after the Telecommunications Act of 1996 and several decades of a market open to competitors, coupled with a marketing strategy that has kept prices for those services at their maximum permissible levels, fails to meet even the most minimal level of proof of price and service competition. We find that Qwest has not met its burden with respect to these services.

Services Available Under Federal Tariffs. ATM, Frame Relay and 800 Service/OutWATS constitute very small markets. Furthermore, these services may be purchased by customers from federal tariffs. As a consequence, even if we remove these services from state regulation, Qwest would still lack the power to unilaterally raise the rates at which customers may purchase these services. Although there is no measurable market in these services, we are of the view that regulatory oversight on the state level may be removed without harm to the public interest.

ORDER

IT IS ORDERED that:

1. The Qwest Corporation Petition to Exempt from Regulation Qwest's Switched Business Basic Exchange Services is GRANTED to the extent indicated herein and DENIED in all other respects; and

2. Qwest Corporation shall file such revisions to its tariffs and price lists as shall be necessary to conform with the terms of this Order within 30 days of the date of this Order.

Made, entered, and effective JUL 12 2006.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.