

HARDY MYERS  
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**DEPARTMENT OF JUSTICE**  
GENERAL COUNSEL DIVISION

March 9, 2005

Public Utility Commission of Oregon  
Attn: Filing Center  
550 Capitol Street, NE  
Suite 215  
PO Box 2148  
Salem, Oregon 97308-2148

Re: UX 29

Filing Center:

Enclosed for filing please find comments of the Public Utility Commission Staff regarding the CLEC Survey in UX 29. These comments are for Administrative Law Arlow's consideration prior to the March 9, 2005 prehearing conference in this docket.

Thank you for your attention

Sincerely,

Stephanie S. Andrus  
Assistant Attorney General  
Regulated Utility & Business Section

Enc.

c. Service List  
ALJ Arlow

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UX 29**

In the Matter of

QWEST CORPORATION

Petition to Exempt from Regulation Qwest's  
Switched Business Services

STAFF COMMENTS RE: SURVEY

At the parties' informal teleconference regarding the composition UX 29 OPUC Bench Request to CLECs Business Retail Switched Services in Qwest's Oregon Territory ("CLEC Survey") on March 3, 2005, it became apparent the parties would likely not agree on each component of the CLEC Survey. Accordingly, the parties agreed that to the extent they had differing positions on the composition of the CLEC Survey; they would submit those positions to the administrative law judge and request that he make the final decision on the composition of the CLEC Survey.<sup>1</sup> Staff of the Public Utility Commission (staff) has only a few objections to the CLEC Survey in the form currently proposed by Qwest, and they are as follows:

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<sup>1</sup> At the parties' informal conference telephone conference, counsel for staff initially suggested that all comments regarding the CLEC survey be filed by noon on Tuesday, March 08, 2005. Counsel for Qwest later suggested close of business on March 7, 2005, and counsel for staff did not object to Qwest's proposed change to the due date for comments. However, as staff was preparing its comments for submission on March 7, 2005, it became clear that commenting on Qwest's proposal for the CLEC survey would be difficult because it was not clear what Qwest's final proposal would be. Accordingly, in the early afternoon of March 7, 2005, counsel for staff informed counsel for Qwest by voicemail that staff would not file comments by the close of business on that day. Counsel for staff asked Qwest to file its final proposal by the close of business on March 7, and stated that staff would file comments on the proposal by noon on March 8, 2005. Counsel for Qwest did not respond to staff's proposal prior to the close of business on March 7, 2005, but noted in a voicemail left at approximately 7:45 p.m. that he objected to staff's proposal. Qwest will have opportunity to respond to staff's comments at the pre-hearing conference on March 9, 2005, and should not be prejudiced by staff's filing of comments at noon today. Further, because it is much more efficient for staff to file comments on what is now a final proposal, rather than to provide alternative comments based on what Qwest might have filed, Staff asks that the ALJ overrule Qwest's objection to staff's comments.

## **1. Objections to CLEC Survey.**

First, the Federal Communications Commission (FCC) recently ruled that Incumbent LECs have no obligation to provide competitive LECS with unbundled access to mass market local switching (UNE-P). (FCC Order No. 04-290.) Qwest has provided to staff no information indicating that Qwest will voluntarily provide UNE-P access notwithstanding the FCC's order. In fact, staff understands that Qwest will discontinue UNE-P access at the conclusion of the FCC-mandated transition period for its ruling terminating ILECs obligations to provide UNE-P access.

In light of the FCC's ruling and the actions that Qwest intends to take in response to that ruling, staff believes that portions of the CLEC Survey relating to the CLECs use of UNE-P are not pertinent. Accordingly, staff requests that the administrative law judge omit portions of the proposed survey regarding access to UNE-P. These portions include all of Question 1 on page 1 of the CLEC Survey and Attachment A, which would require CLECs to provide information for access lines for listed service categories that the CLECs provide via UNE-Platform Services provided as of December 31, 2004, as well as information relating to whether CLECs accept requests for services from new customers for services based on UNE-P.

In its comments, Qwest notes that it is appropriate to focus its inquiry on "what CLECs are doing today," and that therefore, questions regarding current UNE-P line counts (or line counts current in December 2004) are appropriate even though Qwest will not be providing UNE-P access in the future. Qwest explains that obtaining information regarding UNE-P is pertinent because it is possible that CLECs relying on UNE-P in December 31, 2004, may have transitioned to "Qwest Platform Plus" (QPP), or may soon do so in the future. In other words, although Qwest asserts that it is appropriate for this Commission to examine what CLECs "are doing today," Qwest asks the Commission to collect information regarding access to UNE-P to serve as a predicate for speculating as to what CLECs may do in the future.

As already noted, the recent FCC order ends the requirement that utilities like Qwest provide UNE-P. It is also clear that Qwest will not offer UNE-P access in the future. While it is appropriate for the Commission to focus on the state of the market today, the Commission is authorized under ORS 759.030(4) to consider “any \* \* \* factor deemed relevant by the commission,” before finding that price and service competition exist for a particular service, or that the public interest no longer requires full regulation of a particular service. Meaning, it is well within the Commission’s authority under ORS 759.030 to conclude that it will not consider competition based a service that Qwest, is not required to provide, and will not be providing in the future in its final determination of whether exemption of regulation is appropriate for the services at issue in Qwest’s petition.

To the extent that Qwest argues that information regarding UNE-P access in December 2004, is relevant because it provides a basis for speculating as to whether CLECs will provide similar services using QPP’s in the future, staff disagrees. While parties and the Commission can be sure that Qwest will not be providing UNE-P in the future, they cannot be sure that CLECs currently using UNE-P to provide services will at some time in the future decide it is economic to provide the same services using QPP. Accordingly, this proposed reason for collecting UNE-P information should be rejected.<sup>2</sup>

Finally, Qwest’s argument that staff’s objections to information re: UNE-P access go to the weight the Commission should give that information in its final determination rather than to its discoverability, ignores the burden that the CLEC Survey will place on CLECs. The information sought by the CLEC survey is sensitive confidential information that will be time-consuming and burdensome for the CLECs to provide. In light of the burden that is placed on the CLECs in providing the information at issue, it is appropriate for the ALJ to conclude at this

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<sup>2</sup> Staff does not object to the portions of the CLEC survey that request information regarding services provided via QPP.

stage of the proceeding that the information lacks sufficient probative value to warrant its discovery.

**2. Response to COVAD objection regarding information related to VoIP.**

COVAD argues that it is without the Commission's jurisdiction to inquire into the CLECs provision of service using Voice Over Internet Protocol (VoIP), noting that regulation of VoIP falls without the Commission's regulatory purview, and thus, cannot be the subject of a request for information under ORS 756.105. While regulation of VoIP is outside the Commission's purview, the petition presented by Qwest requesting exemption from regulation for certain services is not. The Commission is requesting that CLECs provide data regarding VoIP to carry out the Commission's obligation to investigate Qwest's petition for exemption from regulation for certain services. This, the Commission is authorized to do under ORS 756.105.

Staff disagrees with COVAD that the information obtained regarding VoIP will not be probative because it will be incomplete. Although COVAD is correct that the Commission will not have information regarding all VoIP services provided in Oregon, it is not clear that the absence of complete data will render useless the information obtained from the CLEC survey. In absence of this clarity, staff recommends that the CLEC Survey include questions regarding services provided via VoIP.

DATED this \_\_\_\_\_ day of March 2005.

Respectfully submitted,

HARDY MYERS  
Attorney General

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Stephanie S. Andrus, #92512  
Assistant Attorney General  
Of Attorneys for Staff of Public Utility  
Commission of Oregon

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of March 2005, I served the within STAFF

COMMENTS RE: SURVEY upon the parties listed below by electronic mail and by then depositing in the United States Post Office at Salem, Oregon, a full, true and correct copy thereof addressed to:

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and prepaying the postage thereon.

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