

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **DOCKET UX 29**

4 In the Matter of the Petition of Qwest
5 Corporation to Exempt from Regulation
6 Qwest’s Business Basic Exchange Services

STAFF REPLY TO QWEST'S RESPONSE TO
STAFF'S OBJECTIONS TO QWEST'S
REQUEST FOR FACILITIES-BASED CLEC
ACCESS LINE INFORMATION

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8 Qwest’s response to staff’s objections to Qwest’s request for facilities-based CLEC
9 access line information appears to misunderstand some of staff’s arguments made in opposition
10 to Qwest’s request. First, as noted in the staff response to Qwest’s request for access line
11 information, staff believed that it was the general understanding of the parties that the only
12 instance in which a party might request to see the disaggregated data would be to test the
13 integrity of the data. However, staff does not argue that this understanding was memorialized in
14 the protective order or other documents associated with the CLEC survey. Staff believed the
15 understanding between the parties as to the circumstances in which parties would seek discovery,
16 and the mechanism by which they may use to seek discovery, were separate matters.

17 Second, staff does not argue that Qwest did not *intend* to draft a protective order that
18 would allow UX 29 parties access to confidential and highly confidential information. However,
19 staff notes that the actual modified protective order, as drafted by Qwest, does not appear to
20 allow any person, other than Commission employees, access to confidential or highly
21 confidential information. For purposes of data requests made to non-UX 29 parties, the
22 distinction between what Qwest intended the modified protective order to say, and what it
23 actually says, is important. The only information that vast majority of the CLECs that responded
24 to the survey have regarding the confidentiality of their responses to the CLEC Request for
25 Production is the information provided in connection with the Request for Production, which

1 includes the modified protective order and ALJ Arlow’s introductory letter. That information
2 does not make clear that any person, other than Commissioners, the administrative law judge,
3 staff or Commission consultants, could have access to any confidential information the CLECs
4 might provide in response to the survey.¹

5 Qwest also appears to misunderstand staff’s arguments regarding the harm that may stem
6 from disclosure of the information and the lack of any real benefit to Qwest. Essentially, staff
7 asks the administrative law judge to weigh the harm to the ten CLECs whose data is at issue
8 against the benefit to Qwest of obtaining the data. Staff argues that obtaining the disaggregated
9 data of only some of the CLECs that provide facilities-based service in Qwest territory would not
10 be probative of the state of competition in Oregon because the limited data would not paint a
11 complete picture. Thus, disclosure of the disaggregated data of the ten CLECs is of limited
12 benefit to Qwest. In contrast, the potential harm to the ten CLECs is significant.

13 Qwest juxtaposes this argument with staff’s opposition to Qwest’s request to the
14 administrative law judge to issue a subpoena to a major facilities-based provider that did not
15 respond to the CLEC Request for Production, and argues that staff has made a “heads I win, tails
16 you lose” argument. (Qwest Response at 5.) Staff’s argument is not based on a desire to
17 disadvantage Qwest or to “win,” but on its desire to maintain the confidentiality of data obtained
18 from CLECs.

19 Staff agrees that if the Commission obtained responses from additional CLECs providing
20 facilities-based access line information, this additional information could increase the benefit to
21 Qwest that would be obtained from disclosure of the disaggregated data. However, because the
22 UX 29 parties have already been provided an aggregation of the data provided by all CLECs, it is
23 not possible to add data obtained from *one* additional CLEC while masking that data. For *this*
24

25 ¹ Of the ten CLECs that responded to the CLEC Request for Information, which is a minority of
26 the CLECs overall that responded, only 8 are parties to UX 29.

1 reason, and not for the purpose of disadvantaging Qwest, staff opposes issuing a subpoena to the
2 one major facilities-based provider identified by Qwest.

3 Qwest also argues that staff's arguments regarding harm to CLEC's from disclosure of
4 trade secret information cannot be taken seriously because of the protections provided by the
5 modified protective order. In fact, the administrative law judge has already taken staff's
6 arguments seriously. Assuming *arguendo* that Qwest and any other UX 29 party is entitled
7 under the modified protective order to see information that has been designated by a CLEC as
8 confidential or highly confidential, the administrative law judge may still preclude disclosure of
9 that information if the CLEC identifies harm that will come from the disclosure, notwithstanding
10 the protections specified in the modified protective order. . If staff's arguments regarding
11 potential harm from disclosure are not to be taken seriously, then this mechanism would not
12 exist.

13 Furthermore, staff's concerns regarding disclosure of information provided by the CLECs
14 are based in large part on the uniqueness of the circumstances presented by discovery in this
15 case. Normally, when a party seeks discovery in a Commission docket, it seeks discovery from
16 another entity that has willingly become a party to the case and thus, willingly opened itself to
17 requests such as the CLEC Request for Production. Here, eight of the ten CLECs that provided
18 facilities-based access line information are not parties to UX 29, and did not voluntarily subject
19 themselves to this sort of discovery request.

20 Finally, Qwest offers a compromise procedure that would obviate the need for the
21 administrative law judge to rule on Qwest's request for disaggregated facilities-based data.
22 While staff appreciates Qwest's effort in finding a compromise position, staff cannot agree to
23 Qwest's proposal. The request must be considered in light of Attachment Three of the CLEC
24 Survey Report. If Qwest is given the number of facilities-based access lines in each wire center
25 or rate center, Qwest will know both the number of facilities-based access lines and the number

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1 of facilities-based CLECs in each wire center or rate center, as those data were reported in the
2 CLEC Survey Report. Especially in wire or rate centers for which only one or two CLECs
3 provided data, the compromise position could, and most likely would, reveal confidential CLEC
4 information.

5 DATED this 26th day of August 2005.

6 Respectfully submitted,

7 HARDY MYERS
8 Attorney General

9 /s/Stephanie S. Andrus
10 Stephanie S. Andrus, #92512
11 Assistant Attorney General
12 Of Attorneys for staff of the Public
13 Utility Commission of Oregon
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August 2005, I served the foregoing upon the parties, hereto by the method/s indicated below:

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