BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UX 29

In the Matter of the Petition of Qwest Corporation to Exempt from Regulation Qwest's Business Basic Exchange Services	QWEST'S MOTION TO CERTIFY A QUESTION TO THE COMMISSION REGARDING THE SCOPE OF DISCOVERY, SUBMISSION OF TESTIMONY AND THE WEIGHT TO BE GIVEN TO CERTAIN UNEs FROM THE ALJ'S OCTOBER 20, 2004 RULING

Petitioner Qwest Corporation ("Qwest") hereby files this motion to certify a question to the full Commission for consideration and disposition pursuant to OAR 860-014-0035(1)(i) and OAR 860-014-0091 regarding several conclusions and Ruling No. 2 in Administrative Law Judge Allan Arlow's October 20, 2004 Ruling ("ALJ Ruling" or "Ruling").[1]

Specifically, this motion to certify is with respect to the ALJ's conclusions ("ALJ conclusions") in the Ruling regarding "[t]he legal environment and the scope of the evidence in this proceeding," and particularly, that "in reviewing the evidentiary record, *no weight* should be given [by the Commission] to the presence of UNE-P, UNE transport and UNE high-capacity loops in the assessment of the state of competition in the business market for telecommunications services." (Ruling, p. 5 (emphasis added).) The motion to certify also pertains to the ruling ("Ruling No. 2") that "[t]he *scope of discovery* and *submission of testimony* in this proceeding shall be in accordance with the conclusions noted above." (Ruling, p. 6 (emphasis added).)

[1] Preliminarily, Qwest notes that there are no specific rules for reconsideration of ALJ rulings, as the Commission's rehearing and reconsideration rule pertains to rehearing or reconsideration of Commission *orders*. See OAR 860-014-0095. Thus, it appears the only relief from an ALJ ruling is a motion to certify pursuant to OAR 860-014-0035(1)(i) and OAR 860-014-0091. Accordingly, Qwest has brought this motion as a motion to certify. Nevertheless, if the ALJ determines that he has the authority to reconsider Ruling No. 2 and the ALJ conclusions without having to certify the question to the full Commission, and thereafter grants the substantive relief that Qwest seeks here, Qwest would agree there would be no need for the question to be certified to the full Commission. Finally, to the extent the ALJ finds the reconsideration requirements in OAR 860-014-0095 to be instructive, Qwest respectfully submits there has been "an error of law or fact in the [Ruling No. 2 and the ALJ conclusions] which is essential to the decision" and/or there is "good cause for further examination of a matter essential to the decision."

For the reasons set forth below, Qwest respectfully submits that Ruling No. 2 and the ALJ conclusions are not procedurally proper because they address issues that were not even presented by any party, and they are essentially substantive exclusions of evidence and limitations of the scope of discovery in response to a *procedural motion*. Further, Ruling No. 2 and the ALJ conclusions *prejudge* the evidence before the evidence has even been submitted, and thus they are premature and speculative. For example, Ruling No. 2 and the ALJ conclusions do not even consider that the evidence will show there are, and will continue to be, alternatives to the subject UNEs.

Accordingly, Qwest respectfully requests that the ALJ certify the question at issue to the full Commission for consideration and disposition, and further, that the Commission modify the ruling by deleting Ruling No. 2 (regarding the scope of discovery and submission of testimony) and the section entitled "[t]he legal environment and the scope of the evidence in this proceeding." At a minimum, Qwest respectfully requests that the Commission delete Ruling No. 2, as well as the last two paragraphs of page 5, and add the following language, or similar language, to the end of the first paragraph of page 5: "Accordingly, the status of competition regarding these issues at the time of the submission of the evidence in this proceeding may be a factor that the Commission will consider, with the totality of the evidence, when weighing all of the evidence submitted."

PERTINENT PROCEDURAL BACKGROUND

A. Qwest's petition for exemption from regulation

On June 21, 2004, Qwest filed a petition to exempt from regulation Qwest's switched business services pursuant to ORS 759.030 and OAR 860-032-0025. Qwest seeks exemption from regulation in all exchanges in its service territory where it is the incumbent local exchange

carrier.[2] Qwest contends there is sufficient price and service competition for Qwest's switched business services such that it is entitled to exemption from regulation for those services, and it has provided the Commission with data, both public and confidential, in support of its petition.

The Commission suspended the petition for further investigation on August 17, 2004, and thereafter docketed the petition as docket UX 29. In addition, a number of competitive providers (CLECs) and an association of large business services customers (TRACER) petitioned to intervene in the docket, and were granted full party status.

B. The intervenors' motion to dismiss

Thereafter, on September 13, 2004, all intervenors filed a joint motion to dismiss the petition. The intervenors primarily argued there is "legal uncertainty" regarding the future availability of unbundled network elements (UNEs) at Commission-approved Total Element Long Run Incremental Cost (TELRIC) prices.[3] Nowhere in the motion, however, did the intervenors move the Commission or ALJ to rule that no evidentiary weight should be given to the presence of UNE-P, UNE transport and UNE high-capacity loops in the evidentiary record. Nor did the intervenors move for a ruling that the ALJ or Commission should narrow the scope of discovery in any way, or exclude any particular evidence or testimony.

On September 28, 2004, Staff filed a response in support of the motion to dismiss. Staff made several arguments, the primary of which was that any Commission deregulation decision

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[2] The services that Qwest proposes to have exempted from regulation fall into three general categories. The first includes 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. The second category includes discretionary business features—software enhancements available as access line or trunk options. The last category consists of Frame Relay and Asynchronous Transfer Mote (ATM) services (i.e., packet switched services in Qwest's Advanced Communications Services Tariff).

[3] The intervenors further asserted that the costs of participating in this proceeding would be financially burdensome. They further contended that any Commission decision to deregulate Qwest's business services would be based on a TELRIC UNE environment which they contended is now in doubt because of recent judicial and federal agency activity (including a petition for writ of mandamus that Qwest recently filed with the D.C. Circuit).

based on current levels of competition would likely not be relevant to the level of competition that may exist in the future.[4] Staff's response also did not move the Commission or ALJ to rule that no evidentiary weight should be given to the presence of these UNEs. Nor did Staff ask for a ruling to narrow the scope of discovery in any way, or to exclude any particular evidence or testimony.

C. Qwest's response to the motion to dismiss

On October 1, 2004, Qwest filed a timely response to the motion to dismiss, and Staff's response, and raised several arguments in opposition to the motion.[5] However, Qwest did not address any arguments about the evidentiary weight to be given to, or probative value of, UNE-P, UNE transport and UNE high-capacity loops, precisely because neither the intervenors nor Staff raised that as an issue.[6] Nor did Qwest address any arguments about the narrowing of the scope of discovery or the exclusion of any particular evidence, again because these issues were never raised.

D. The ALJ Ruling and ALJ conclusions

On October 20, 2004, Administrative Law Judge Allan Arlow issued the Ruling, which denied the intervenors' motion to dismiss. In the Ruling, the ALJ discussed the pertinent

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[4] Staff further argued that if there is competition for the services at issue in Qwest's petition, it is largely from CLECs that use UNEs and UNE-P at TELRIC prices. Staff further argued that although regulatory uncertainty is not uncommon, it was the actions that the courts and the FCC have already taken that it believes makes the *status quo ante* (present levels of competition) unlikely to continue. Thus, Staff contended that it would be premature for the Commission to decide whether to deregulate the services at issue in Qwest's petition. As stated, however, nowhere in Staff's response did Staff ask the Commission or ALJ to rule that no evidentiary weight should be given to the presence of UNE-P, UNE transport and UNE high-capacity loops in the evidentiary record, or to limit the scope of discovery or exclude any particular evidence or testimony.

[5] Qwest argued that the motion was untimely and that it violated the intervenors' representations that their participation would not "*unreasonably delay the proceeding.*" Qwest also argued that the Commission lacks the authority to *dismiss* a petition, without notice and hearing, once it begins a further investigation (although it could *deny* the petition (after notice and hearing) *if* Qwest had not met its burden of proof). Qwest further argued that pursuant to ORS 759.030(3)(b), the Commission can *re-regulate* any services, after notice and hearing (if the Commission determines that "an essential finding on which the deregulation was based no longer prevails, and re-regulation is necessary to protect the public interest"). Further still, Qwest argued that alleged "market uncertainty" or speculation about the future regulatory environment are insufficient reasons for dismissing the petition. Finally, Qwest argued that the intervenors' "resources" arguments had no merit, especially in light of the lack of major activity in other telecommunications dockets and the Commission's duty to provide Qwest with the opportunity to be heard.

[6] The intervenors also filed a reply on October 12, 2004, followed by letters from Qwest and the intervenors on October 13 and 14, 2004, respectively.

background, the motion to dismiss and Qwest's response, and then discussed the procedural issues. (Ruling, pp. 1-3.) First, the ALJ rejected Qwest's first procedural argument (that the CLECs' motion was untimely and unreasonably delayed the proceeding contrary to OAR 860-013-0021(2)). (Ruling, o. 4.) The ALJ then ruled that "the public interest will be better served by examining the issues raised by the Qwest Petition in accordance with the procedures and scope set out below, rather than by dismissal without prejudice." (Id.) The ALJ therefore did not address Qwest's additional arguments (about whether the Commission has the authority to dismiss the petition without notice and hearing, or about procedural options that may be available to the Commission in the future). (Ruling, pp. 4-5.)

Thereafter, the ALJ concluded as follows:

> **The Legal Environment and the Scope of the Evidence in this Proceeding.** The competitive status of the telecommunications marketplace has been in an even greater state of turmoil than usual since the United States Court of Appeals for the District of Columbia Circuit (D.C. Court or Court) struck down large portions of the Triennial Review Order (TRO). [Footnote omitted.] Under Interim Rules adopted by the FCC) [footnote omitted], (which the Court has allowed to remain in effect until the end of the year), [footnote omitted], prices will increase for UNE-P, UNE transport and UNE high-capacity loops. There has also been some indication that the future of UNE-P is in doubt. [Footnote omitted.]
>
> It is difficult to imagine that an investigation of the state of competition in Oregon based on a market that developed prior to these immense changes would have sufficient probative value to enable the Commission to make the findings required by ORS 759.030(2) and OAR 860-032-0025. Unfortunately, there is no way for us to calculate, short of wild speculation, the price elasticity of demand for CLEC services as the prices rise above TELRIC. Information regarding UNEs offered prior to the *USTA II* decision is likely to have little to no probative value. *I therefore conclude that, in reviewing the evidentiary record, no weight should be given to the presence of UNE-P, UNE transport and UNE high-capacity loops in the assessment of the state of competition in the business market for telecommunications services.* (Emphasis added.)
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> Even if information with respect to CLEC utilization of UNE-P, UNE transport and UNE high-capacity loops is excluded, there is a wealth of data that remains useful and upon which Qwest might well attempt to prove its case. It is therefore up to Qwest to decide whether it wishes to prove its case at this time and under these circumstances. However, if Qwest does decide to proceed, the parties may wish to reconsider the scope of questions to be included in the competitive survey. (Ruling, p. 5.)

The ALJ then issued two rulings. The first denied the intervenors' motion to dismiss, which ruling Qwest does not challenge. (Ruling, p. 6.) The second ruling, however, ruled:

> 2. The *scope of discovery* and *submission of testimony* in this proceeding shall be in *accordance with the conclusions* noted above. (Ruling, p. 6 (emphasis added).)

QUESTION FOR CERTIFICATION

As stated, Qwest requests that the ALJ certify a question to the full Commission for consideration and disposition pursuant to OAR 860-014-0035(1)(i) and OAR 860-014-0091, and that the Commission modify these rulings as described above. The question for certification is:

> In a deregulation proceeding pursuant to ORS 759.030 and OAR 860-032-0025, is it appropriate for the Administrative Law Judge to determine, in the absence of a motion or of any evidence presented, that the Commission will not give any weight in the evidentiary record to the presence of certain methods of competition (UNE-P, UNE transport and UNE high-capacity loops) in the Commission's consideration of the state of competition in the business market for telecommunications services, or that the scope of discovery and submission of testimony in the proceeding shall be in accordance with the conclusions about such lack of weight in the evidentiary record?

RELIEF REQUESTED

Qwest respectfully requests the ALJ to certify the question above to the full Commission for consideration and disposition pursuant to OAR 860-014-0035(1)(i) and OAR 860-014-0091, and further, Qwest respectfully submits that the Commission should delete Ruling No. 2 (regarding the scope of discovery and submission of testimony) and the section entitled "[t]he legal environment and the scope of the evidence in this proceeding." At a minimum, Qwest respectfully submits that the Commission should delete Ruling No. 2, as well as the last two paragraphs of page 5, and add the following language, or similar language, to the end of the first paragraph at page 5: "Accordingly, the status of competition regarding these issues at the time of the submission of the evidence in this proceeding may be a factor that the Commission will consider, with the totality of the evidence, when weighing all of the evidence submitted."

ARGUMENT

I. Standards for motions to certify

OAR 860-014-0035(1)(i) and OAR 860-014-0091 are the pertinent administrative rules for an ALJ motion to certify a question to the Commission. Specifically, OAR 860-014-0035(1)(i) authorizes ALJs to "certify a question to the Commission for consideration and disposition." In addition, OAR 860-014-0091 provides as follows:

> **Appeals to the Commission from Rulings of Administrative Law Judges**
> (1) A ruling of the Administrative Law Judge (ALJ) may not be appealed during the proceeding except where the ALJ certifies the question to the Commission pursuant to OAR 860-012-0035(1)(i), upon a finding that the ruling:
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> (a) May result in substantial detriment to the public interest or *undue prejudice to any party*; or
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> (b) Denies or terminates any person's participation.
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> (2) A request for certification of a ruling of the ALJ must be filed within *ten days* of the date of service of the ruling, or the date of the oral ruling. (Emphasis added.)[7]

For the reasons set forth below, Qwest respectfully submits that Ruling No. 2 and the ALJ conclusions result in *undue prejudice* to Qwest, and thus that the ALJ should certify the question to the Commission, and that the Commission should grant the relief Qwest seeks here.

II. Ruling No. 2 and the ALJ conclusions are not procedurally proper

First, Ruling No. 2 and the ALJ conclusions are not procedurally proper. This is so because they address issues that were *not even presented by any party*. In addition, they are essentially substantive *exclusions of evidence* and of *discovery* in response to a *procedural* motion.

A. Ruling No. 2 and the ALJ conclusions address issues that were not presented

As stated, Ruling No. 2 and the ALJ conclusions address issues that were not even presented or briefed by any party. That is, the intervenors filed a motion to *dismiss* the proceeding *outright*.

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[7] Qwest's motion to certify is timely, as the ALJ Ruling was issued on October 20, 2004.

Nowhere in their motion did they request the Commission or ALJ to rule that no weight should be given in the evidentiary record to the presence of UNE-P, UNE transport and UNE high-capacity loops if the ALJ or Commission denied the motion. Nor did they request the Commission or ALJ to exclude any particular evidence or testimony, or to limit any scope of discovery. Thus, Qwest had no opportunity to address these issues in its response, and it has been unduly prejudiced as a result.

Oregon tribunals recognize that they should not rule on issues that are not presented before them. See, e.g., *State v. Stroup*, 290 Or. 185, 197, fn.10, 620 P.2d 1359 (1980) (declining to address a question that had not been raised or argued); *Henderson v. Commission*, 1 Or. Tax 390, 409 (1963) (same); see also *Sandford v. Chevrolet Div.of Gen. Motors*, 292 Or. 590, 617, 642 P.2d 624 (1982) (Peterson, J., concurring) ("All questions, especially important questions, are best decided when the parties raise them, brief them, and argue them"). Accordingly, Qwest respectfully submits that the ALJ's *sua sponte* Ruling No. 2 and the ALJ conclusions about the legal environment and the scope of the evidence in this proceeding (and especially the lack of weight to be given in the evidence to the presence of certain UNEs) are improper. As such, Ruling No. 2 and the ALJ conclusions result in undue prejudice to Qwest, and thus the ALJ should certify the question to the Commission.

B. Ruling No. 2 and the ALJ conclusions are essentially substantive exclusions of evidence and limitations of discovery in response to a procedural motion

In addition, the motion to dismiss was a *procedural* motion. Nevertheless, Ruling No. 2 essentially *excludes substantive evidence* to be presented in the future, and further limits the scope of discovery in this docket. This results in undue prejudice to Qwest. In fact, Ruling No. 2 specifically rules that the "scope of discovery" and the "submission of testimony" shall be in accordance with the ALJ conclusions about the legal environment and the scope of evidence, including the lack of weight to be given by the Commission to the presence of these UNEs, and

thus this is an exclusion of evidence and a limitation of discovery.[8] This ruling was also made without the benefit of the ALJ or the Commission even having considered the evidence that was excluded (since it has not yet been submitted).[9]

Further, Qwest respectfully submits that a substantive ruling about the ultimate *weight* or probative value that will be given to the evidence is for the *Commission*, as the ultimate decision-maker, to make. Here, it was the ALJ, and not the full Commission, who made the ruling regarding the substantive weight to be given to the evidence at issue. However, since the Commission ultimately makes the decision regarding Qwest's deregulation petition, Qwest respectfully submits it is the *Commission*, and not the ALJ, that should determine the substantive weight or probative value to be given to the evidence presented.

Accordingly, for these procedural reasons alone, Qwest respectfully submits that Ruling No. 2 and the ALJ conclusions are not procedurally proper, and thus these rulings result in undue prejudice to Qwest such that the ALJ should certify the question to the Commission pursuant to OAR 860-014-0035(1)(i) and OAR 860-014-0091. Thus, Qwest respectfully requests that the ALJ certify the question to the Commission, and that the Commission modify the ruling by (1) deleting Ruling No. 2 and (2) by deleting or substantially modifying the ALJ conclusions about the lack of weight to be given to UNE-P, UNE transport and UNE high-capacity loops as described above.

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[8] See also the heading to the section at issue on page 5 of the Ruling: "The Legal Environment and the *Scope of Evidence* in this Proceeding." (Emphasis added.) See also the Ruling reference to "information [regarding these UNEs] is *excluded*." (Ruling, p. 5.)

[9] Ruling No. 2 is therefore akin to a granting of a *motion in limine* or a *motion to strike* (as to the exclusion of evidence about these UNEs) and a *motion for a protective order* (as to the limitation on the scope of discovery). However, there was never a motion *in limine* or a motion to strike, or a motion for a protective order, made by the moving parties. Further, in considering a motion *in limine* or a motion to strike, a judge actually considers the evidence that is sought to be excluded, and allows the responding party to make an "offer of proof" regarding that disputed evidence. OAR 860-014-0045(4) allows offers of proof, and further, allows the receiving of excluded evidence in like manner as other evidence, marked and designated as evidence offered, excluded, and to which exception has been taken. This has not occurred here, as the ALJ has not had an opportunity to review the evidence that he has already stricken, nor has Qwest been given the opportunity to make an offer of proof on those issues.

III. The rulings at issue prejudge the evidence, and thus are premature and speculative

Further still, Ruling No. 2 and the ALJ conclusions prejudge the evidence before the evidence has even been submitted, and thus they are premature and speculative. They are also premature because they do not even consider that the evidence will show that there are, and will continue to be, alternatives to the subject UNEs. Qwest respectfully submits that this prejudging of the evidence is not appropriate, or good policy, and that it results in undue prejudice to Qwest.

A. The rulings at issue prejudge the evidence before it has even been submitted

The motion to dismiss that the intervenors filed was simply that, a *motion,* based on *argument*, and *not on evidence*. Clearly, the evidence has not yet been submitted, as the procedural schedule currently provides for evidence to be submitted in the form of prefiled testimony no earlier than this December (and in light of these rulings, and this motion to certify, and other delays regarding the CLEC survey, prefiled testimony will likely not be filed until sometime in 2005). Thus, not only is there no data regarding the current state of competition (including competition based on the subject UNEs and competition based on other methods) pending before the Commission or ALJ at this time, but there is also no evidence about alternatives to the subject UNEs, or about what will happen (or has happened) to the number of CLEC access lines that were served through the use of the subject UNEs. Qwest respectfully submits that it would be unduly prejudicial for the Commission or ALJ to prejudge a segment of the competitive landscape, in *October 2004, without having reviewed any evidence* at this time, and without giving itself the opportunity to consider the evidence of the state of competition as it exists at the time of the submission of evidence (based largely on competitive data provided directly to the Commission by Oregon CLECs) in 2005.

As Qwest noted in its response to the motion to dismiss, if the Commission decides the petition requires further investigation, it can later deny the petition (*if* it concludes, *after notice and hearing*, that there is no price and service competition, or that Qwest has not met the discretionary requirements of ORS 759.030(2) and OAR 860-032-0025(2)). However, the Commission certainly cannot do so based on speculation as to what may happen in the future, and certainly cannot do so at this stage when Qwest has not yet even had an opportunity to present all of its evidence on these issues.

Accordingly, Qwest respectfully submits that the Commission cannot determine at this early stage that any form of competition will, or will not, have any weight or probative value in the ultimate decision that it will make based on all of the evidence. If, at the time of the submission of evidence, the Commission as the trier-of-fact determines there is little or no probative value or weight to any aspect of the evidence, or any particular evidence is speculative or not competent, it can certainly make that determination then, based on the totality of the circumstances and all of the evidence submitted. However, the time for that determination is clearly not now, in the absence of any evidence submitted.[10]

Finally, Qwest notes that Staff's August 2, 2004 memorandum recommending that the Commission suspend Qwest's petition and conduct a further investigation stated Staff's belief that "the discontinuation of UNE-P *may* affect the level and scope of competition," and thus that "Staff intends to *analyze the potential effects on competition* and Qwest's analysis if UNE-P is discontinued." (Staff memo, p. 4 (emphasis added).) Clearly, this is what this docket is for -- the

[10] Further still, Qwest notes that the pertinent statute (ORS 759.030) provides that the Commission may deregulate services in whole or *in part*. Qwest respectfully submits that the Commission cannot do so if it has not had an opportunity to analyze all of the evidence in order to determine whether Qwest's petition should be granted in whole. Clearly, the only way for the Commission to determine the level of competition is to analyze *all* of the evidence in order to determine if at least part of the petition should be granted.

analysis of Qwest's petition, including what effect, *if any*, the discontinuation of UNE-P at TELRIC prices has on the petition.[11] However, the Commission cannot make that analysis now, and it cannot even do so later if it does not consider any of the excluded evidence at all.

In short, the Commission should *weigh and judge all of the evidence*, based on competent and admissible evidence on the level of UNE-P competition vis-à-vis other forms of competition, and the effect of pricing uncertainty (*if any*) on the petition, in rendering its decision in this docket. Qwest's petition will ultimately be judged on the *totality of the circumstances*, including competent evidence about all forms of competition, and the different characteristics of same. However, it would be premature, and would result in undue prejudice to Qwest, for the ALJ to make that determination *now*, without the Commission's evaluation of all competent evidence and argument on the issues. The time to make that determination is *after* the hearing and briefing (i.e., after the evidence has been submitted and rebutted, and the witnesses have been cross-examined).

B. Ruling No. 2 and the ALJ conclusions are also speculative

Further still, Ruling No. 2 and the ALJ conclusions are also based on *speculation* that "information regarding UNEs offered prior to the *USTA II* decision is likely to have *little to no probative value*." (Ruling, p. 5 (emphasis added).) However, such a decision is necessarily speculative because it is virtually impossible to determine with any reasonable certainty, *without the evidence presented*, whether any evidence to be presented in the future will or will not have probative value.[12] Qwest also notes that the ALJ Ruling inaccurately suggests that the interim

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[11] Qwest also notes that at least eight Oregon CLECs, including MCI, Z-Tel and others, have already publicly announced that they have signed contracts to obtain Qwest Platform Plus ("QPP"), the replacement wholesale service for UNE-P, and clearly intend to continue to compete through that service platform in Oregon.

[12] Further, as Qwest mentioned in its response to the motion to dismiss, speculation about *future events* is not a legal basis to deny Qwest's petition, much less determine that any particular evidence should be excluded or given no weight. It is undisputed that ORS 759.030 is based on the *present*, and not what "may" happen, "could" happen, or even is "likely" to happen (which is, of course, all speculative). That is, ORS 759.030 either mandates deregulation (if price and service competition *exist* (present tense)) or allows the Commission discretion to

rules have resulted in a price increase for UNE-P, UNE transport, and UNE high-capacity loops. Thus, this inappropriate speculation results in undue prejudice to Qwest.

C. The rulings are premature because they do not consider that the evidence will show there are, and will continue to be, alternatives to the subject UNEs

As stated, Ruling No. 2 and the ALJ conclusions are premature. As an example, they do not consider that the evidence will show there are, and will continue to be, alternatives to the subject UNEs. Rather, these rulings essentially make clear that, regardless of such alternatives, the ALJ has already determined that the Commission will not consider the relationship between the UNEs and the alternatives. Qwest respectfully submits that such determination is not appropriate.

1. The result of the *USTA II* and FCC determinations

First, it is significant that the D.C. Circuit has determined that there has been no showing that competitors are "impaired" by the elimination of UNE-P at TELRIC prices. Thus, absent a valid FCC impairment determination that passes D.C. Circuit muster, the court has necessarily determined, as a *matter of law*, that UNE-P at TELRIC prices is not necessary in order for CLECs to effectively compete in the telecommunications market.

Accordingly, to the extent the FCC eliminates the availability of a particular UNE, it will be based on a finding that CLECs are not impaired in the market in the absence of that UNE. Obviously, if the FCC can demonstrate that competitors are impaired without access to certain UNEs in certain areas of Oregon, UNEs will continue to be available there as they are today. If, however, the FCC demonstrates competition can continue to exist without mandatory access to UNEs, that finding will speak for itself, and competition in those areas will then be based on other

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deregulate (if price or service competition *exist*, or the service *is* subject to competition, or the public interest *no longer requires* full regulation (all in the present tense)). This is not surprising, as no one can accurately predict the future. Furthermore, predictions and speculation have no place when it comes to the Commission's statutory duty to consider a telecommunications utility's deregulation petition under ORS 759.030, and thus Qwest respectfully submits that it has no place for the *exclusion of substantive evidence* even before the evidence has been submitted.

available options (such as commercial agreements like Qwest's QPP agreement, special access circuits, facility overbuilds, etc.). Thus, the potential future elimination of UNE-P, or any other UNEs, as a result of FCC or D.C. Circuit action should not be a basis to essentially exclude substantive evidence (or limit the scope of discovery) on such issues now. In other words, it would be error to conclude that such elimination would in fact result in less competition than exists today. Finally, the FCC has made it clear that there will be a transition period for any de-listed UNE for which CLECs will continue to have access to the UNE at a slightly higher price.

2. <u>There are viable substitutes or alternatives to UNE-P and other UNEs</u>

In addition, as Qwest has stated, even if UNE-P and other UNEs are eliminated, there are viable substitutes or alternatives. For example, as the Commission knows, Qwest has offered a replacement service for UNE-P called the Qwest Platform Plus™ (QPP), at just and reasonable rates under section 202 of the Act, to the CLEC community. In fact, Qwest has entered into the QPP agreement with a number of CLECs in Oregon and throughout its 14-state region, including MCI, Z-Tel and (now) *six* other Oregon CLECs. Qwest has also offered the QPP to any CLEC who assumes the terms and conditions that MCI and others have assumed.[13] These CLECs will continue to have access to a mass market voice product.[14]

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[13] Qwest has provided copies of the QPP agreements to Commission Staff for informational purposes, but has not formally filed them for approval because it does not believe there is any filing requirement. (The issues about any filing requirement are currently at issue in docket ARB 6.) Qwest has also filed the QPP with the FCC under section 211 of the Act.

[14] Thus, although the ALJ concluded that "there is no way for us to calculate, short of wild speculation, the price elasticity of demand for CLEC services as the prices rise above TELRIC," this conclusion does not discuss how little or how much such prices may or will raise above TELRIC. This is precisely so because the evidence is not before the Commission at this time. Obviously, if the evidence shows, for example, that the prices for Qwest's QPP are only *slightly higher* than the prices of UNE-P, such evidence certainly would be *very probative* of CLEC migration from UNE-P to QPP. However, the ALJ conclusion essentially predetermines that result, without the benefit of any evidence, and based solely on speculation as to what *may* occur to prices (and thus competition) with the elimination of UNE-P. In short, there has been no evidence submitted that CLECs will not be able to continue offering competitive services if their margins are slightly reduced (although the CLECs are certainly free to try to make that case). Finally, Qwest also notes that the evidence would show that CLECs can also purchase wholesale elements from other CLECs, as AT&T recently announced it is doing by purchasing wholesale elements from McLeod.

Accordingly, Qwest will continue to offer a package of elements to CLECs choosing not to deploy their own switches and/or loops. It is not as if these CLEC access lines and customers served by UNE-P and other UNEs will simply disappear; clearly, these lines and customers will be served by some other mode of competition. Thus, excluding consideration of CLEC access lines served by such UNEs would vastly understate the true nature and scope of the competitive landscape for business services in Oregon.

Moreover, the rates for QPP are not significantly higher than UNE-P, especially because the increases are implemented through gradual adjustments over the three-year life of the contract. In addition, there is a separate schedule for residential and business lines. The total increase over the term of the contract for residential lines is *less than $2*, and for business lines, the increase is *less than $4*. As stated, these prices are based on the just and reasonable rates requirements in section 202 of the Act. Clearly, these sophisticated CLECs, including one of the largest in the country, evidently believe that the QPP is a viable alternative, and thus have been willing to enter into such agreements voluntarily, and are moving forward with their competitive business strategies in a post-*USTA II* world.

Further, even though the QPP Commercial Agreement is a new agreement developed only this past summer (and thus more CLECs will likely soon be purchasing QPP services), Qwest showed in its response to the motion to dismiss that CLECs who had purchased at least 28% of UNE-P lines (as of March 31, 2004) have now entered into the QPP.[15] This clearly shows that UNE-P providers that do not want to convert to other forms of competition (e.g., UNE loops, resale, facilities-based or special access) will now have QPP services available to

[15] Moreover, these "QPP providers" had more than 30% of the UNE-P lines in 12 wire centers in Oregon at that time. In fact, these UNE-P providers had more than 35% of all UNE-P lines in the Eastern and Central Oregon geographic areas, based on Qwest's analysis of the data that it recently provided in response to a Staff data request.

them, and that they can take, and *have taken*, advantage of the QPP to continue serving customers with a UNE-P-like service. These rulings, however, effectively exclude this relevant and probative evidence.

The same holds true with respect to other UNEs, such as UNE transport and UNE high-capacity loops. There are also substitutes or alternatives, such as special access circuits, for these UNEs, again at just and reasonable rates under section 202.[16] In fact, UNE high-capacity loops will actually *remain* in place, at TELRIC rates, for CLECs to use wherever the FCC finds impairment to exist without them. Thus, in Oregon, if the FCC finds impairment in rural areas, UNE high-capacity loops will still be available. If the FCC, however, determines there is no impairment in those areas, that can only mean that the FCC has concluded that sufficient competitive alternatives exist in such areas.

Finally, as Qwest has stated, *USTA II* found that special access services are another form of facilities-based competition, and thus should be considered under an impairment analysis. The evidence will show that special access services will continue to be available for CLECs to use in competition against any competitor, and that they can be substitutes for UNE transport and/or UNE high-capacity loops.[17] As *USTA II* ruled in overturning the TRO on special access services:

> We therefore hold that the Commission's [FCC's] impairment analysis must consider the availability of ILEC special access services when determining whether would-be entrants are impaired, and vacate ¶¶ 102-03 of the Order.[18]

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[16] Further, as to UNE high-capacity loops, Qwest also notes that four of the five FCC commissioners have stated publicly that they intend to *continue requiring the unbundling of DS1(high-capacity) loops.*

[17] CLECs can and do use special access services to compete against ILECs for a variety of services, including private line, toll and local exchange services. Qwest will show there are more special access services available than high-capacity DS1 and DS3 UNEs. Since CLECs are using special access services successfully to compete, Qwest's evidence will show that high-capacity DS1 and DS3 UNEs (while still widely available) are not even essential for CLECs to effectively compete.

[18] In other words, *USTA II* held that special access must be considered to be a viable alternative to UNE high-capacity loops. If the FCC, in response to the *USTA II* decision, rules that unbundling of UNE high-capacity loops is no longer required, current UNE high-capacity loops would be transitioned to special access. The issue is not

Accordingly, the fact remains that there will be functionally equivalent or substitutable offerings, like Qwest's QPP and special access circuits, at just and reasonable rates, in place of UNE-P and other UNEs. Certainly, the CLEC access lines and customers served by UNE-P and other UNEs will not simply disappear, and thus Ruling No. 2, limiting the scope of discovery and excluding the submission of evidence, and the ALJ's conclusion that no weight should be given by the Commission to the presence of these modes of competition, will vastly understate the true nature and scope of competition for business services in Oregon.

For these reasons, Qwest respectfully submits that there is no basis for Ruling No. 2 and the ALJ conclusions that the Commission should give no weight to the presence of UNE-P, UNE transport and UNE high-capacity loops in considering the evidence in this proceeding, and that the scope of discovery and submission of testimony shall be in accordance with those conclusions. These rulings result in undue prejudice to Qwest, and thus a motion to certify this question to the Commission is appropriate. Thus, because Ruling No. 2 and the ALJ conclusions prejudge the evidence before the evidence has been submitted, and are speculative, and result in undue prejudice to Qwest, Qwest respectfully requests that the ALJ certify the question to the Commission. Qwest further respectfully requests that the Commission modify the ALJ Ruling by (1) deleting Ruling No. 2 and (2) deleting or substantially modifying the ALJ conclusions at page 5 about the legal environment and the scope of the evidence in this proceeding as described above.

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that UNE high-capacity loops currently in service would simply disappear; rather, it is that they would then be converted to special access. Thus, Qwest believes evidence about UNE high-capacity loops is relevant and necessary.

CONCLUSION

Accordingly, for the set forth reasons above, Qwest respectfully submits that the ALJ should certify the question at issue to the Commission pursuant to OAR 860-014-0091 and OAR 860-014-0035(1)(i). Qwest further respectfully submits that the Commission should modify the ALJ Ruling by (1) deleting Ruling No. 2 and (2) deleting or substantially modifying the ALJ conclusions about the legal environment and the scope of the evidence in this proceeding, and the lack of weight to the presence of UNE-P, UNE transport and UNE high-capacity loops, as described above.

DATED: October 29, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

UX-29

I hereby certify that on the 29th day of October, 2004, I served the foregoing **QWEST'S MOTION TO CERTIFY A QUESTION TO THE COMMISSION REGARDING THE SCOPE OF DISCOVERY, SUBMISSION OF TESTIMONY AND THE WEIGHT TO BE GIVEN TO CERTAIN UNEs FROM OCTOBER 20, 2004 ALJ RULING** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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