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	JOINT CLECS' POST-HEARING RESPONSE BRIEF **PUBLIC VERSION**

XO Communications Services, Inc., Time Warner Telecom of Oregon, LLC, Oregon Telecom, Inc., and Integra Telecom of Oregon, Inc. (collectively "Joint CLECs"), respectfully submit this post-hearing response brief. As discussed in detail below, the Commission should deny Qwest's petition to deregulate its retail switched business services because Qwest has failed to prove that such deregulation is warranted. In the alternative, the Commission should impose conditions on the approval of the petition to minimize Qwest's ability to undermine development of a competitive market.

I. INTRODUCTION

On June 21, 2004, Qwest filed a petition seeking to exempt from regulation all rates, terms, and conditions associated with its retail switched business services in Oregon.[1] Qwest claims that it has provided "a wealth of evidence" to support its petition. But Qwest's case amounts to nothing more than speculative assertions and opinions, unsupported by substantive

[1] The procedural history of this docket is described in detail in Qwest's Opening Post-Hearing Brief, filed December 9, 2005.

evidence. In fact, the evidence contradicts Qwest's assertions and proves that deregulation of Qwest's switched business services is premature.

Two principles should guide the Commission's consideration of Qwest's petition. First, Qwest bears the burden of proof in this proceeding. Bearing the burden of proof means something more than merely making unsupported assertions. Qwest must produce substantial evidence that is sufficient to demonstrate that it has satisfied the statutory criteria. In other words, Qwest must use evidence to show that there is meaningful competition for each service in each geographic market for which Qwest seeks deregulation. Qwest has not done this. Instead of producing substantial evidence to prove that Qwest has satisfied the statutory standards for deregulation for each service in each market, Qwest has simply said "there is competition, in some form or another, for some or all of the requested services, throughout the state." There is no analysis of the type or extent of competition or the availability of each service from other providers. Rather than meeting its burdens of proof or production, Qwest has attempted to shift these burdens to Staff and the intervenors to prove that Qwest's general propositions are *not* true.

Second, the statutory criteria must be applied in a disciplined manner.[2] This Commission should not accept Qwest's arguments, which ignore the statutory criteria and apply a standard that is more akin to "you'll know it when you see it." Qwest claims that price and service competition exist for its retail switched business services, and therefore the Commission must deregulate those services, but Qwest never applies a coherent standard for determining the existence of competition. Qwest confuses the potential for competition with

[2] *See* TRACER/100, Cabe/7-8.

the existence of competition. But the standard is not whether price and service competition *could* exist at some future time. The standard is whether price and service competition *currently* exist. Competition cannot replace regulation as a constraint on Qwest's ability to raise prices if it exists only in theory.

Nor can competing providers offer consumers viable alternatives to Qwest business services without access to necessary high capacity facilities at cost-based rates. Fewer such facilities will be available as unbundled network elements ("UNEs") in the wake of the latest Federal Communications Commission ("FCC") order, yet Qwest's petition entirely ignores that fact. If the Commission were to grant Qwest's petition in whole or in part – which it should not – the Commission should ensure that facilities-based competitors can continue to obtain the interoffice transport and "last mile" facilities they need from Qwest by requiring Qwest to reduce its intrastate special access rates to cost-based levels. Only then could the Commission have any reasonable assurance that the market could impose discipline on Qwest's pricing of business services.

II. APPLICABLE LAW

Sections 759.030 of the Oregon Revised Statutes and 860-032-0025 of the Oregon Administrative Rules govern petitions for deregulation of telecommunications services. Section 759.030(2) provides:

> Upon petition by any interested party and following notice and investigation, the commission may exempt in whole or in part from regulation those telecommunications services for which the commission finds that price or service competition exists, or that such services can be demonstrated by the petitioner or the commission to be subject to competition, or that the public interest no longer requires full regulation thereof. The commission may attach reasonable conditions to such

> exemption and may amend or revoke any such order as provided in ORS 756.568.[3]

Section 759.030(3) provides that the Commission shall exempt a telecommunications service from regulation if price *and* service competition exist. *See also* OAR 860-032-0025(1). The factors that the Commission must consider in determining whether deregulation is warranted are set forth in section 759.030(4):

> Prior to making the findings required by subsections (2) and (3) 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, terms and conditions.
>
> (c) Existing economic or regulatory barriers to entry.
>
> (d) Any other factors deemed relevant by the commission.[4]

In previous deregulation dockets, "other factors deemed relevant by the commission" have included Qwest's market power,[5] the potential for price discrimination or predatory pricing,[6] and the public interest.[7]

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[3] *See also* OAR 860-032-0025(2). The administrative code provision reiterates the statutory standard.

[4] *See also* OAR 860-032-0025(3).

[5] *See In the Matter of Qwest Corporation Petition to Exempt from Regulation Directory Assistance and Related Services*, OPUC Docket No. UX 27, Order Denying in Part and Granting in Part the Application, June 13, 2003, at 14 ("UX 27 Order").

[6] *See In the Matter of the Petition of U S West to Exempt from Regulation U S West's Centrex PRIME Service*, OPUC Docket No. UX 23, Order Granting Petition with Conditions (Order No. 00-228), April 28, 2000, at 3 ("UX 23 Order") at 4.

[7] *See* UX 27 Order at 14; *see also In the Matter of Qwest Corporation's Petition to Exempt from regulation Qwest's IntraLATA Toll Service, Operator Service Charges, and 800 Service Line Option*, OPUC Docket No. UX 28, Order Adopting Stipulation and Denying Petition to Deregulate Operator Services, October 16, 2003, at 17 ("UX 28 Order").

III. ARGUMENT

A. Qwest Has Failed to Justify Deregulation of Its Switched Business Services

Qwest bears the burden of proving that deregulation of its switched business services is justified under the statutory criteria in sections 759.030(2) or (3). In determining whether these criteria have been met, the Commission generally first considers whether deregulation is required under section 759.030(3) because both price and service competition exist.[8] If only one or neither type of competition exists, the Commission then considers whether to deregulate the services per the discretionary criteria in section 759.030(2).[9] For either analysis, the Commission must first consider the factors set forth in ORS section 759.030(4). Qwest has failed to provide evidence to support its contention that application of these factors leads to the conclusion that deregulation is warranted. Accordingly, deregulation is inappropriate under either the discretionary criteria of 759.030(2) or the mandatory criteria of 759.030(3).

1. The Extent to Which the Services are Available from Alternative Providers in the Relevant Market

The first factor is "[t]he extent to which services are available from alternative providers in the relevant market."[10] The initial step in considering this factor is defining the market, which has two components: the geographic market and the product market.[11] Qwest claims that the relevant product market should be all retail switched business services and the

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[8] *See* UX 23 Order at 3; UX 27 Order at 16; UX 28 Order at 15. All parties in this docket appear to agree that, to be considered effective competition, the competition must be sufficient to constrain Qwest's ability to raise prices. Qwest/1, Brigham/17-19, 38; Staff.100, Chriss/44, TRACER/100, Eschelon/1, Denney/5.

[9] *See* UX 23 Order at 3; UX 27 Order at 16; UX 28 Order at 15.

[10] ORS § 759.030(4)(a).

[11] *See* UX 27 Order at 16; UX 28 Order at 15.

relevant geographic market should be every Qwest wire center in Oregon. [12] Qwest's proposed definitions are over-inclusive, resulting in a geographic market that includes areas where, without question, competition does not exist and a product market that includes services that are clearly not substitutable for one another.[13]

a) The Relevant Geographic Market

Qwest states that "the entire state is sufficiently competitive and . . . the Commission should grant Qwest's petition to deregulate all switched business services in all Qwest wire centers in the state."[14] Throughout this docket, Qwest has presented a moving target with its definition of the geographic market, and has yet to define it in a meaningful way.[15] Even in its Opening Post-Hearing Brief, Qwest states that the geographic market "can be defined in whatever manner the Commission . . . believes is the most appropriate under the circumstances of this proceeding."[16] Qwest's failure to provide a coherent description of the appropriate geographic market is perhaps the most egregious example of Qwest's undisciplined approach to applying statutory criteria.

Although it is true that Qwest did provide data on a more granular level, Qwest's analysis is limited to broad statements about the status of competition in the state as a whole.

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[12] Qwest claims that it never intended to define Qwest's service territory in Oregon as one geographic market. This contention, however, is not well-taken given Qwest's clear testimony that "the Commission should define the relevant geographic market for retail business services to include all Oregon wire centers that Qwest serves." Qwest/1, Brigham/15, lines 7-8. As Staff and some intervenors stated during cross-examination, their analysis would have been significantly different if Qwest has proposed a smaler geographic market. *See, e.g.,* Tr. at 290 (Chriss cross-examination); Tr. at 220-221 (Cabe re-direct).

[13] *See* TRACER/100, Cabe/16.

[14] Qwest Opening Post-Hearing Brief at 16.

[15] *See* Qwest/1, Brigham/15, Qwest/25, Brigham/27, Qwest/51, Fitzsimmons/13-14; Tr. at 24-29 (Brigham cross-examination).

[16] Qwest Opening Post-Hearing Brief at 17.

These statements are directly contradicted by the evidence. For example, Qwest claims that there is competition in each and every wire center in the state, despite the fact that this includes wire centers such as Mapleton, where there are only * * * BEGIN CONFIDENTIAL X END CONFIDENTIAL * * * CLEC lines (compared to Qwest's BEGIN CONFIDENTIAL XX END CONFIDENTIAL * * * lines), and Westport, where there * * * BEGIN CONFIDENTIAL XXXXXXXXX END CONFIDENTIAL * * * CLEC line (compared to Qwest's * * * BEGIN CONFIDENTIAL XX END CONFIDENTIAL * * * lines). Qwest's definition of the geographic market is clearly over-inclusive and does not allow for a meaningful analysis of the extent of competition.[17]

b) The Relevant Product Market

Qwest defines the relevant product market as all of Qwest's retail switched business services, which includes over 4000 services. Although Qwest cites the correct standard for determining whether services should be included in the same relevant product market – whether, after considering the quality and price of two services, significant numbers of customers consider them to be reasonable substitutes[18] – Qwest does not actually apply this standard. Rather, Qwest merely asserts that *some* customers *might* consider *some* of Qwest's services to be substitutable for one another. Qwest provides absolutely no quantitative data proving that significant numbers of customers consider these services to be reasonable substitutes.

In defining the relevant product market, Qwest uses a simple approach based primarily on casual observation. This approach may have a certain common-sense appeal, but it is not

[17] *See* TRACER/100, Cabe/21-24; Staff/100, Chriss/21-22.

[18] Qwest Opening Post-Hearing Brief at 12; Qwest/51, Fitzsimmons/5-7.

enough to meet Qwest's statutory burden.[19] Qwest is required to submit quantitative evidence supporting its claims, which it has completely failed to do.

c) *Whether the Services are Available from Alternative Providers in the Relevant Market*

Qwest seeks deregulation of over 4000 services throughout its service territory in Oregon. Given Qwest's overly broad definitions of the relevant product and geographic market, it is virtually impossible to analyze the availability of these services from alternative providers in the relevant market. This is particularly true given the fact that Qwest provided virtually no data about the availability of services from alternative providers on a granular level, despite the fact that it is Qwest's burden to produce such evidence.[20] Qwest's approach to considering this factor is another example of Qwest's refusal to apply the statute in a disciplined manner. Rather than showing that X number of CLECs provide Y services in Z wire centers, Qwest provides "evidence" such as the number of "active" CLECs and the number of interconnection agreements that Qwest currently has with CLECs.[21] Qwest did not address whether these "active" CLECs serve business customers, ignoring the fact that 11 of these CLECs stated that they do not provide business services in response to the CLEC survey issued by this Commission.[22] Qwest also did not address whether CLECs are actually obtaining services or facilities from Qwest via all of the interconnection agreements. Qwest

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[19] *See* TRACER/100, Cabe/7-8, 15-21; Tr. at 224-226 ("I wouldn't expect evidence in the form of [a] price elasticity study, although that would be the very best evidence. A solid, well-reasoned argument in the disciplines, systematic context of how you define relevant markets would be just fine.")

[20] Qwest may argue that requiring it to provide such an analysis for all 4000 services would be an impossible burden. But this is a burden of Qwest's own choosing because Qwest decided the scope of its deregulation petition.

[21] Qwest Opening Post-Hearing Brief at 18.

[22] Staff/100, Chriss/35.

apparently wants this Commission to treat the theoretical possibility of competition as evidence that price and service competition currently exist.

Qwest also points to line counts and CLEC market share as indications that the services for which Qwest seeks deregulation are available from alternative providers in the relevant market. There are several problems with Qwest's approach. First, Qwest is comparing line counts to services and assuming that CLECs are offering "functionally equivalent or substitute services" over those lines. This assumption may or may not be true for any given line, and Qwest provided no data or analysis to support its assumptions. Second, Qwest assumes that every single UNE-L line is used for business services.[23] This is not a reasonable assumption, even if Qwest is correct that the "vast majority" of UNE-L is used to provide business services. Qwest should have at least attempted to estimate the number of UNE-L lines used for residential service and adjust its numbers accordingly. Third, Qwest assumes (but fails to prove) a causal relationship between a decrease in Qwest's business lines and increased competition. Although competition may be one cause for Qwest's loss of business lines, this loss could also be result of other factors, such as a declining economy.[24] Finally, in some instances Qwest calculates CLEC lines using "voice grade equivalents" and compares those numbers to Qwest lines without similarly adjusting the calculation of Qwest's lines to account for "voice grade equivalents."[25] This leads to inaccurate measurements of market share.

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[23] Qwest/1, Brigham/23; *see also* Tr. at 12-13 (Brigham cross-examination).

[24] Qwest's assertions regarding losses in business lines may be inconsistent with Qwest's financial report for the second quarter 2005. In that report, Qwest stated that Qwest experienced "year-over-year growth in . . . business revenues" and "[s]mall-business access lines grew both sequentially and year-over-year." Eschelon/1, Denney/31.

[25] Qwest/43, Brigham/1-3; *see also* Tr. at 52-57 (Brigham cross-examination).

Furthermore, Qwest includes wireless carriers and Voice over Internet Protocol ("VoIP") providers as "alternative providers." Qwest claims that ILECs and CLECs are facing "increasing and already significant competition from intermodal competitors."[26] In support of this assertion, Qwest does not provide any evidence that business customers in Oregon are substituting wireless or VoIP for traditional wireline business services. Rather, Qwest relies on national surveys, as well as a study conducted in Colorado. These surveys, however, do not show that a "significant" number of business customers are abandoning their wireline service for wireless or VoIP. In fact, one of the primary studies relied upon by Qwest finds that only "3.7% of small businesses report expenditures for wireless telecommunication services and report no expenditures for telephone services."[27] VoIP, moreover, is merely a switching application, not a stand-alone service. VoIP requires a broadband connection to the business premises, which means that like circuit switched services, VoIP providers either must build their own network facilities or rely on Qwest for "last mile" connections to customers.[28]

2. The Extent to Which the Services of Alternative Providers are Functionally Equivalent or Substitutable at Comparable Rates, Terms, and Conditions

Qwest provides minimal evidence to support its contention that functionally equivalent or substitutable services are available from alternative providers at comparable rates, terms, and conditions. Qwest devotes significant time to discussing (without evidentiary support) whether its own business services are substitutable for one another and therefore belong in the

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[26] Qwest Opening Post-Hearing Brief at 27.

[27] Tr. at 61; TRACER/105.

[28] Eschelon/1, Denney/24-25.

same relevant product market, Qwest offers virtually no evidence and spends little time discussing whether alternative providers are offering functionally equivalent or substitutable services.[29] Qwest does provide one chart showing some of the services provided by alternative providers, but this chart shows a very limited number of competitors and services.[30] Given the scope of Qwest's petition, such evidence is inadequate.

3. Existing Economic or Regulatory Barriers to Entry

Qwest claims that there are no economic or regulatory barriers to entry because: (1) the Telecommunications Act of 1996 ("Act") eliminated such barriers; (2) Qwest is required to provide services under certain conditions (e.g., UNEs at cost-based rates, cost-based reciprocal interconnection charges); (3) there are no state regulatory requirements that impede entry; (4) CLECs do not need to build their own facilities to compete; (5) UNE-P phase-out is not a barrier to entry; and (6) there are multiple CLECs in every wire center but one.[31] The primary problem with Qwest's approach to analyzing the presence of barriers to entry is Qwest's complete ignorance of the fact that the protections afforded to CLECs in the Act are the reason the current level of competition exists.[32] The majority of the "competition" that Qwest relies upon is UNE-based. But the FCC has moved away from the policies that have supported the development of the UNE-based competition that is now in place.[33] Diminished access to UNEs will likely have a detrimental impact on existing CLECs' ability to effectively

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[29] Qwest/1, Brigham/39-40; Qwest/9, Brigham/1-10; Qwest Opening Post-Hearing Brief at 30-32.

[30] Qwest/9, Brigham/1-10.

[31] Qwest Opening Post-Hearing Brief at 32-34.

[32] *See* TRACER/100, Cabe/24-27; Tr. at 187 (Cabe cross-examination).

[33] *See In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order On Remand, FCC Order 04-290, February 4, 2005 ("TRRO"); *see also* TRACER/100, Cabe/35.

compete and new CLECs' ability to enter the market. Without continued regulatory intervention, many CLECs would face significant barriers to entry.

4. Other Factors Deemed Relevant by the Commission

a) The Commission Should Reject Qwest's Argument that "Parity" Among Providers is Relevant to the Commission's Analysis

Throughout its Opening Post-Hearing Brief, Qwest claims that, because it is the only carrier that is still subject to some form of price regulation by this Commission, there is no "parity" between Qwest and other providers, which means that Qwest cannot effectively compete. Qwest has previously raised this argument in deregulation dockets, and this Commission has rejected it:[34]

> As to Qwest's parity argument, until very recently Qwest was the monopoly provider of local exchange telecommunications services throughout its service territory. . . . Until we see price competition in the . . . market segment for which Qwest requests deregulation, our understanding of our role is to keep prices close to cost through regulation.[35]

As discussed above, there is no evidence of price competition for the services Qwest seeks to have deregulated. This Commission's role has not changed – until there is price competition, the Commission should keep prices close to cost through regulation.[36]

b) The Commission Should Reject Qwest's Argument that Decisions in Other States are Relevant to the Commission's Analysis

Qwest relies heavily on deregulation decisions in other states to supports its argument that the Commission should deregulate its switched business services.[37] As this Commission

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[34] *See, e.g,* UX 28 Order at 16.

[35] *Id.*

[36] In addition, for price-capped services, Qwest already has the ability to lower prices in response to competitive pressure without Commission approval. Qwest simply needs to notify the Commission of the price change within 30 days *after* it becomes effective. ORS § 759.410.

has recognized, however, "we make decisions based on the record in each case before us. What other states have done . . . does not influence our decision on this record."[38] As discussed above, the record in the case before this Commission simply does not support deregulation of Qwest's switched business services. The fact that commissions in other states have come to a different conclusion based on different evidence (and perhaps different statutory standards) is irrelevant.

c) Legislative Policy does not Support Deregulation in this Case

The Oregon Legislature set forth three goals for telecommunications regulation in section 759.015: "(1) high quality universal service; (2) just and reasonable rates; and (3) the encouragement of innovation."[39] The Commission achieves these goals through a *balance of regulation and competition.*[40] Qwest incorrectly claims that competition, and not regulation, is recognized as "*the* appropriate means" to encourage investment and innovation.[41] While competition is one way to promote investment and innovation, both the Act and Oregon law recognize that, because of the ILECs former monopoly status, a balance between regulation and competition is necessary.[42] In fact, regulation is largely responsible for the level of

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[37] Qwest Opening Post-Hearing Brief at 47-51.

[38] UX 28 Order at 16.

[39] *Id.* at 17.

[40] *Id.*

[41] Qwest Opening Post-Hearing Brief at 51.

[42] *See* UX 28 Order at 17 ("The statute sets three goals for telecommunications: (1) high quality universal service; (2) just and reasonable rates; and (3) the encouragement of innovation. The Commission is to achieve these goals through a balance of regulation and competition."); *see also* UX 28 Order at 16; *In the Matter of Verizon Northwest Inc. Petition to Price List IntraLATA Toll Operator and Directory Services*, OPUC Docket No. UD 13, Order Denying Petition for Price Listing Operator and Directory Assistance Services, Order No. 05-1241 at 10 ("UD 13 Order").

competition that currently exists.[43] Deregulating Qwest prematurely could reduce future competitive alternatives for consumers and increase prices, undermining legislative and Commission policy goals.

d) The Commission Should Reject Qwest's Argument that the Ability to Re-regulate Qwest's Switched Business Services is Relevant to the Commission's Analysis

Qwest argues that the Commission's ability to re-regulate Qwest's retail switched business services if "an essential finding on which the deregulation was based no longer prevails, and reregulation is necessary to protect the public interest."[44] The ability to re-regulate is not appropriately considered as a factor in determining whether to deregulate in the first instance for several reasons. First, re-regulation would require another extensive and time-consuming proceeding similar to this docket. As part of that proceeding, the Commission would bear the burden of demonstrating that changed circumstances warrant re-regulation.

Second, substantial damage to consumers and CLECs can occur in the interim between deregulation and re-regulation. The need for re-regulation will only become apparent after some harm to competition has occurred. The consequences of premature deregulation include price increases and the possible exercise of market power causing harm to customers and the development of further competition.[45] The lag between the discovery of the need for re-regulation and the successful completion of a Commission proceeding to re-regulate will only exacerbate this harm. In contrast, the consequences of maintaining regulation for longer than

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[43] *See supra* n.33 and accompanying text.

[44] Qwest Opening Post-Hearing Brief at 52, quoting ORS § 759.030(3)(b).

[45] TRACER/100, Cabe/48-49.

may be necessary are relatively minor for Qwest and include some continuing administrative and regulatory costs, as well as the inability to raise prices without Commission approval.[46] This Commission should err on the side of protecting customers from potential harm by requiring Qwest to prove that deregulation is justified.

Finally, this Commission's ability to re-regulate Qwest's switched business services is not a substitute for a thorough, comprehensive review of Qwest's petition for deregulation and does not compensate for the fact that Qwest has completely failed to prove that its proposed deregulation of switched business services meets the statutory criteria.

5. Based on the Factors in Section 759.030(3), Qwest's Petition Should Be Denied

As discussed in detail above, an analysis of the factors set forth in section 759.030(4) leads to the conclusion that Qwest's petition to deregulate its retail switched business services is premature at best. This Commission should reject Qwest's petition because Qwest has failed to demonstrate that it has satisfied the statutory criteria, and because rejection would protect consumers and encourage the continued growth of competitive alternatives in Oregon.

B. Alternatively, if the Commission Grants Qwest's Petition, it Should Impose Appropriate Conditions

If the Commission determines that Qwest's petition should be granted in whole or in part – which it should not – the Commission should impose conditions that ensure a competitive market. CLECs rely on Qwest's facilities to provide competitive alternatives to business customers, and the Commission should impose conditions to ensure that CLECs will have access to these facilities at cost-based levels. Otherwise, competitive alternatives will diminish and customers will be negatively impacted. The only reliable way to ensure the

[46] *Id.* at 48.

continued availability of these facilities is to require Qwest to establish wholesale intrastate Special Access rates at cost-based levels.

CLECs rely on Qwest facilities to provide competing local service for at least two reasons.[47] First, no company has the resources to duplicate the network that Qwest has constructed over dozens of years as a monopoly provider enjoying a virtually guaranteed rate of return. There will likely always be a large number of customer locations to which Qwest alone has constructed facilities. CLECs generally will not build facilities into a particular building unless they can expect sufficient revenues from providing service to customers in that building to justify the costs of construction. Where economic constraints preclude CLECs from constructing their own facilities to particular buildings, CLECs must lease Qwest facilities to serve customers in those locations.[48]

Second, building access restrictions constrain CLECs' ability to construct the facilities necessary to connect customer locations to their networks. Qwest has access to virtually every building within its service territory. In contrast, building owners deny CLECs access to their buildings or make such access uneconomic by imposing high fees and onerous conditions.[49] Qwest claims that there is no evidence to support this contention, but even the FCC has recognized that this is a problem encountered by many CLECs.[50]

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[47] XO/1, Knowles/3-4.

[48] *Id.*

[49] *Id.; see also* TRACER/100, Cabe/27.

[50] *See In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, FCC 00-366 at ¶ 11, Rel. October 25, 2000.

The FCC's recent decision in the TRRO significantly limits CLECs' access to high capacity and dark fiber loops and dedicated transport circuits.[51] Pursuant to the TRRO, ILECs will no longer need to provide DS1 loops in wire centers that serve more than 60,000 business lines and in which there are at least four fiber-based collocators. ILECs will also no longer be required to provide a CLEC with more than 10 DS1 loops in any one building. In addition, ILECS will not be required to unbundled DS3 loops in any building served by a wire center with at least 38,000 business lines and four fiber-based collocators and would no longer be required to provide more than one DS3 per building.[52]

Because the FCC is moving away from policies that have supported the growth of the UNE-based competition that is at the core of Qwest's petition for deregulation,[53] and because CLECs have relied (and will continue to rely) on Qwest's facilities to provide competitive alternatives to business customers,[54] it is incumbent upon this Commission to minimize Qwest's ability to undermine the continued development of a competitive market. The Commission should condition any approval of Qwest's petition for deregulation on providing intrastate special access facilities to CLECs at cost-based rates.

Qwest argues that this proposed condition would violate the FCC's TRRO.[55] This contention is without merit. Qwest confuses a finding of no impairment without access to UNEs with a finding that price and service competition exist. The two inquiries are not the

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[51] XO/1. Knowles/2-3, 5.

[52] TRRO, ¶ 5.

[53] *See supra* n.33 and accompanying text.

[54] XO/1, Knowles/3-4.

[55] Qwest Opening Post-Hearing Brief at 57.

same and should not be treated interchangeably.[56] Indeed, Qwest concedes that Qwest, not the FCC, made the determination that high capacity UNEs would no longer be available in certain Oregon wire centers. The FCC did not even consider evidence on the level of competition in Oregon or in any other state. Rather, the FCC simply established generic wire center "nonimpairment" standards based on access line count and number of collocators. The FCC used similar criteria to grant Qwest pricing flexibility for its interstate special access services, and Qwest's response has been to repeatedly increase the prices for those services. Qwest's own conduct should tell the Commission all it needs to know about the extent to which implementation of the FCC's standards recognize the existence of price-constraining competition. They have not at the federal level, and they do not in Oregon.

Qwest's argument that the Joint CLECs' proposed condition would be an "end-run" around the TRRO by imposing new unbundling obligations similarly is not well taken. The Commission would not be creating any new unbundling obligation, but would simply be establishing rates for services that have long been subject to Commission authority. Requiring Qwest to reduce its intrastate special access rates would permit the Commission to begin to decrease its reliance on the FCC and Congress for the development of local exchange competition in Oregon. This Commission should take the steps necessary to encourage local exchange competition in this state by establishing reasonable, cost-based rates for the high capacity circuits that facilities-based CLECs need to offer an effective alternative to Qwest.[57]

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[56] In determining whether a CLEC is impaired without access to UNEs, the FCC considers "whether lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." TRRO at ¶21. Unlike the current proceeding, which examines whether price and service competition *currently exist*, the possibility of future competition is relevant to the impairment inquiry. *Id.* at ¶ 22.

[57] *See* XO/1, Knowles/10.

Qwest also argues that this Commission does not have jurisdiction to adjust Qwest's intrastate special access prices because they are deregulated or subject to price cap regulation.[58] Qwest ignores this Commission's broad powers to regulate telecommunications utilities and protect the public interest. As Qwest readily admits, this Commission has the ability to re-regulate services that have previously been deregulated. The Commission can also investigate and adjust any proposed price decreases in Qwest's price-capped services.[59] Further, the Commission has the authority to impose conditions on the approval of a petition for deregulation. Given these broad powers, it is illogical to conclude that the Commission does not have the power to impose the proposed condition.

IV. CONCLUSION

For the forgoing reasons, the Commission should deny Qwest's petition for deregulation of its retail switched business services or, in the alternative, impose conditions on approval that ensure a competitive market.

Respectfully submitted this 25th day of January, 2006.

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[58] *Id.*

[59] ORS § 759.410.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the JOINT CLECS' POST-HEARING RESPONSE BRIEF was served via electronic mail and U.S. Mail (unless otherwise specified below) on the following parties on January 25, 2006:

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