**Qwest**
421 Southwest Oak Street
Suite 810
Portland, Oregon 97204
Telephone: 503-242-5420
Facsimile: 503-242-8589
e-mail: carla.butler@qwest.com

**Carla M. Butler**
Sr. Paralegal

December 9, 2005

Frances Nichols Anglin
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: UX-29

Dear Ms. Nichols Anglin:

Enclosed for filing in the above entitled matter please find an original and (5) copies of Qwest Corporation's Opening Post-Hearing Brief, along with a certificate of service.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

Carla

Carla M. Butler

CMB:
Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DOCKET NO. UX 29

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| In the Matter of the Petition of Qwest Corporation to Exempt from Regulation Qwest's Switched Business Services | QWEST'S OPENING POST-HEARING BRIEF |

Petitioner Qwest Corporation ("Qwest") respectfully submits its opening post-hearing brief pursuant to Administrative Law Judge Allan Arlow's November 30, 2005 Ruling.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Almost a year and a half ago, Qwest filed its petition for exemption from regulation (deregulation) of its switched business services in Oregon pursuant to ORS 759.030(2)-(4) and OAR 860-032-0025(2)-(4), based on substantial evidence that there exists both price and service competition for all of its switched business services throughout the state of Oregon. Although there were several delays in the case, in part due to difficulties encountered in obtaining CLEC responses to the Commission's Survey of Competition ("CLEC Survey"), the case proceeded with prefiled testimony and ultimately a two-day hearing in October. Qwest presented a wealth of evidence to demonstrate that the criteria for deregulation outlined in ORS 759.030(4) have been met, since Oregon business customers have meaningful competitive options to Qwest switched business services throughout Oregon and there are no significant barriers to entry.

Although the intervenors' resistance to Qwest's petition is not surprising given their own economic self-interests, Commission Staff's recommendation is surprising in terms of its narrowness. Staff recommended only deregulation of basic flat-rated business (1FB) services with associated features and packages in the Portland rate center (a subset of the entire Portland metropolitan area), in addition to deregulation of Asynchronous Transfer Mode ("ATM") and 800 services in all rate centers Oregon. Staff made its very limited deregulation recommendation





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despite the fact that business customers throughout Oregon have multiple competitive alternatives, and competitors are actively providing a full range of switched business services today in *all* of Qwest's Oregon rate centers. The evidence put forward in this case supports the deregulation of all switched business services throughout Qwest's Oregon serving territory—not just 1FB in the Portland rate center. In large part, Staff's unduly restrictive recommendation results from its overly narrow definition of the relevant product and geographic markets, and its exclusive reliance on the incomplete data contained in the Commission's CLEC Survey.

Qwest has demonstrated that Staff's narrow *product* market definition—which presents each service as a separate product market—fails to account for (1) the demonstrated substitutability of traditional switched business services (i.e., basic exchange 1FB service, analog PBX, digital PBX and Centrex) for each other by Oregon business customers and (2) the significant evidence that Oregon switched business service customers may substitute intermodal services—such as wireless and VoIP—for Qwest switched business services. As discussed below, the relevant product market must include all traditional wireline switched business services, since these services serve as substitutes for each other, as well as intermodal alternatives [1]. In addition, from a geographic perspective, Staff's recommendation ignores the fact that competitive alternatives—both intramodal and intermodal—exist throughout Oregon. As discussed below, Staff's narrow product and geographic market focus leads to a distorted

[1] As Qwest demonstrated, in evaluating the substitutability of services, it is helpful to look at the services on a continuum, from those that serve small businesses to those that serve medium and large businesses. There is a significant level of overlap as to what services small, medium and large business customers can purchase to meet their needs, and virtually every business customer has several switched service alternatives. Although not every business service may provide a practical substitute for every business customer, it is clear that every business customer does have competitive service alternatives—even if the customer limits its purchase to Qwest services. Of course, any of these customers might also choose service from a CLEC, or opt for a VoIP-based solution to meet their local exchange telecommunications needs. (Exhibit ("Ex.") Qwest/25, Brigham/12.)

The point is that each customer needing access to the local exchange network will choose among several service offerings from Qwest and its competitors, and will choose the appropriate option based on an evaluation of the value proposition offered by each service. The customer will also look at the relative benefits of a package or


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view of the switched business services market in Oregon, and understates the competitive alternatives available to business customers throughout the state.

Staff's overly data-centric focus based exclusively on the CLEC Survey also leads to inappropriate conclusions that in some cases defy common sense. Although quantitative data is important to this case, it cannot be blindly used and must be considered in the context of all the evidence available. To illustrate, Staff determined that only 1FB service should be deregulated in the Portland rate center because the CLEC Survey showed a significant CLEC market share for 1FB service. Staff, however, did not recommend the deregulation of analog PBX, digital PBX (DSS trunks) or Centrex services in the Portland rate center because the CLEC Survey results provided insufficient quantitative data on these specific services. Thus, even though Qwest has demonstrated that there is significant competition for 1FB, analog PBX, digital PBX and Centrex, and has demonstrated that business customers can and do substitute these services for one another, the Staff has recommended the deregulation of *only* 1FB service—solely based on a lack of "Survey data" for the other services. This limited view of the market data in this case is inappropriate, and leads to the flawed conclusion that only 1FB is competitive.

Staff's overly data-centric approach also leads to an over-reliance on wireline market share and market concentration data. First, due to its sole reliance on Survey data, Staff largely ignores Qwest's CLEC access line (e.g., UNE-L, QPP) and wireline market share data, which is based on robust (and unrefuted) Qwest billing data. Second, Staff largely ignores the clear and unchallenged evidence that Qwest provided in this case that intermodal (e.g., wireless and VoIP-based) competition now is thriving throughout Oregon. Instead of focusing on all of the competitive data offered as evidence in this case, Staff simply focused on the limited data

bundle of services, such as Qwest Choice Business, or a package provided by a competitor. The services may not represent "perfect substitutes," but they are effective substitutes nonetheless. (Qwest/25, Brigham/12-13.)

provided in the CLEC Survey, and the resulting market shares and market concentration measures (like HHI and CR4), even though these are not criteria under ORS 759.030 or OAR 860-032-0025, and based its conclusions on this limited data.

Staff's "Portland rate center-only" recommendation, if accepted, would make it difficult to limit and differentiate marketing or advertising of services and packages to geographic areas outside the Portland rate center, such as, for example, in Clackamas. Further, acceptance of Staff's recommendation to deregulate only 1FB, and not other analog or digital switched business services, would make it very difficult from a real-world practical perspective to draw a precise line between services that are deregulated and those that are not (especially for service packages and bundles). In sum, Staff's analysis is problematic due to its narrow relevant market definitions and its sole reliance on the incomplete and limited data in the CLEC Survey, without regard to other evidence demonstrating competition.

An objective look at the wealth of evidence that Qwest presented in this proceeding leads inexorably to the conclusion that Qwest's petition meets all of the statutory and administrative criteria for the deregulation of *all of these services*, throughout *all rate centers* in the state. This evidence proves that both price and service competition are well established throughout Oregon, with a wide array of alternative wireline business service providers (as well as intermodal providers like wireless carriers and VoIP providers) offering functionally equivalent and substitutable switched business services at extremely competitive prices, terms and conditions. There are also no economic or regulatory barriers to CLEC entry, and the public interest no longer requires Qwest's switched business services to continue to be regulated.

Finally, the overwhelming evidence demonstrates that Qwest is the only switched business services provider among its competitors that remains regulated (despite that its competitors' services are comparable, functionally equivalent and substitutable to Qwest's


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services). Not surprisingly, numerous states in Qwest's region, including Oregon's neighbor to the north, Washington, have either deregulated such services or found such services to be subject to competition on substantially similar criteria and evidence.

Accordingly, Qwest respectfully submits this overwhelming evidence is a prima facie showing to support deregulation of all of these services, in all rate centers, in Oregon. Qwest respectfully requests that the Commission grant Qwest's petition *in its entirety*.

## SUMMARY OF PERTINENT PROCEDURAL HISTORY

Qwest filed its petition to deregulate its switched business services on June 21, 2004. Staff then filed an August 13, 2004 report for the August 17, 2004 public meeting recommending the Commission suspend the petition and initiate a further investigation, which the Commission did. Thereafter, numerous parties intervened, and Administrative Law Judge (ALJ) Allan Arlow issued the first of numerous procedural schedules on August 20, 2004, setting prefiled testimony in September through November 2004, and an evidentiary hearing in December 2004.

On September 13, 2004, a number of intervenors filed a motion to dismiss the docket. The motion was primarily based on grounds that the FCC's *Triennial Review Remand Order* (TRRO) had eliminated the UNE Platform (UNE-P) as a required unbundled network element (UNE) that Qwest would be obligated to provide to its wholesale customers (CLECs) after March 2006. Qwest opposed the motion on October 1, 2004, and the motion was denied on October 20, 2004. However, because that ruling also stated that neither the Commission nor the ALJ would permit any testimony or give any weight to any UNE-P evidence, Qwest filed a motion to certify the question to the Commission on November 18, 2004. Ultimately, that portion of the October 20, 2004 ALJ Ruling dealing with the scope, testimony and weight of UNE-P was withdrawn, thereby rendering moot Qwest's motion to certify.

Meanwhile, the parties jointly negotiated a comprehensive and confidential survey of questions regarding various types of competition for business services in Oregon for submission to more than 60 CLECs. Staff decided, however, that in order to retain CLEC confidentiality, it alone would be entitled to see the CLEC responses, and it would then summarize the *aggregated results*, by wire center, in a report to the parties.[2] ALJ Arlow then issued the CLEC Survey, along with a modified protective order, as a Commission Request for Information (or bench request) on March 16, 2005, with a response date of April 15, 2005. Unfortunately, however, numerous CLECs did not respond by April 15, and responses were submitted throughout April, May and June 2005. This required both ALJ Arlow and Staff to follow up with many CLECs, therefore also causing further delays in the proceedings.[3]

Staff completed its CLEC Survey Report on July 27, 2005. However, the usefulness of the Survey Report was diminished because it did not include data for all CLECs operating in Oregon, and included no access line data for rate centers with less than four CLECs. Further, the Survey Report did not contain any meaningful pricing information. Thus, on August 5, 2005, Qwest moved to obtain, pursuant to both the specific provisions of the Commission Request for Information and the modified protective order, certain access line information for 10 facilities-based CLECs, and requested that the Commission issue a subpoena for data from one major facilities-based CLEC that never responded to the Survey. Staff and several intervenors opposed

[2] However, Staff also decided that to protect confidentiality of any CLEC's particular access line data, it would not report aggregated data for any wire center or rate center that had less than *four* CLECs at the wire center or rate center. (Staff/100, Chriss/12-13; Qwest/1, Brigham/33-34; Qwest/25, Brigham/3, 42; Transcript ("Tr."), p. 278.) As will be shown, the CLEC Survey only provided aggregated wire center information for facilities-based access lines in two rate centers (Portland and Clackamas).

[3] Even then, only 54 of 67 CLECs responded, and therefore 13 CLECs (or about 20% of those surveyed) did not respond. Indeed, Staff admitted that "the survey can be considered incomplete." (Staff/100, Chriss/10; Tr., pp. 282, 288 (Chriss).) There was also at least one major facilities-based CLEC (of which Qwest is aware) that did not respond at all. (Qwest/25, Brigham/3.)



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Qwest's motion to obtain this facilities-based line data, and eventually Qwest's motion was denied on September 20, 2005.

In the meantime, Qwest filed the direct testimony of Qwest employee Robert Brigham on August 5, 2005. Staff and several intervenors, including TRACER and four CLECs, filed their response testimony on September 9, 2005. Qwest filed its rebuttal testimony on October 7, 2005, including the rebuttal testimony of an economist, Dr. William Fitzsimmons. On October 14, 2005, ALJ Arlow denied an intervenor motion to strike Qwest's rebuttal testimony, or in the alternative, to modify the procedural schedule, and thus the matter proceeded to hearing on October 18 and 20, 2005. The parties then agreed to a briefing schedule at the hearing, which was modified on November 30, 2005, with Qwest's opening post-hearing brief due December 9, 2005, any potential motion to reopen the docket due on December 19, 2005, Staff and intervenor response briefs due January 18, 2006, and Qwest's reply brief due February 9, 2006.

## APPLICABLE LAW

### I. The statutory requirements of ORS 759.030

In Oregon, the statute for deregulation of a telecommunications service is ORS 759.030. The pertinent subsections are ORS 759.030(2), ORS 759.030(3) and ORS 759.030(4).

ORS 759.030(2) provides that the Commission, upon receiving a petition and following notice and investigation, *may* exempt from regulation telecommunications services for which the Commission finds (1) price competition exists, *or* (2) service competition exists, *or* (3) those services which the petitioner or the Commission demonstrates are subject to competition, *or* (4) the public interest no longer requires full regulation of these services. (Emphasis added.)

ORS 759.030(3)(a) requires that, upon petition by any telecommunications utility, and after notice and hearing, the Commission *shall* exempt a telecommunications service from regulation if price and service competition exist. (Emphasis added.)



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Further, ORS 759.030(4) provides that prior to exempting a service from regulation under the conditions noted above, 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.

## II. **<u>The administrative criteria of OAR 860-032-0025</u>**

In addition, consistent with ORS 759.030(3)(a), the Commission's administrative rule, OAR 860-032-0025(1), provides that a telecommunications utility *may* petition the Commission to exempt a service from regulation and the Commission *shall* grant that petition if it finds that price and service competition exists. (Emphasis added.) Moreover, consistent with ORS 759.030(2), OAR 860-032-0025(2) also provides that the Commission *may* exempt a service from regulation upon receipt of a petition if the Commission finds the statutory criteria have been met. Further, OAR 860-032-0025(3) provides that prior to making a finding under the conditions described above, the Commission shall consider the same factors in ORS 759.030(4).

## **<u>SUMMARY OF QWEST'S PETITION AND PERTINENT FACTORS</u>**

## I. **<u>Brief description of Qwest's petition and the business services at issue in Oregon</u>**

Qwest's petition seeks to exempt from regulation all rates, terms and conditions associated with its retail switched business services in Oregon. If the Commission grants the petition, Qwest would no longer be required to file tariffs and price lists for these services, thus providing parity with its competitors and allowing the competitive market to determine service


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pricing and terms. (Qwest/1, Brigham/10; see also Tr., pp. 99-100, 119, 368-371 (Sloan).)[4] Such deregulation would also remove the regulatory and time-consuming burdens of Qwest's "special contract" and promotion/special offer filing requirements. (Qwest/1, Brigham/13; see also Tr., pp. 19-22, 370-371 (Sloan); see also Tr., p. 211 (CLECs enter into contracts, with different prices and in different geographic areas, that need not be filed with the Commission).)

The switched business services which Qwest seeks to deregulate fall into three primary categories: (1) services providing access to the telecommunications network (including flat-rated (1FB) and measured basic lines, private branch exchange (PBX) and Centrex services, including features packages); (2) discretionary business features (software enhancements available as access line or trunk options); and (3) Frame Relay Service (FRS) and Asynchronous Transfer Mode (ATM), which are packet-switched services. (Qwest/1, Brigham/13-14.)[5]

In its petition, testimony and exhibits, Qwest provided comprehensive and detailed data demonstrating that there is a significant level of service and price competition for all petition services throughout Oregon. This competition arises from traditional intramodal (i.e., wireline) competitors and intermodal (e.g., wireless, VoIP) competitors. While the deregulation criteria outlined in the Oregon statute does not contain a "market share test," the high level of competition is nonetheless demonstrated by the significant losses in Qwest access lines (and market share) that have occurred in this state.[6] Because much of the data in Qwest's original petition is somewhat dated due to all of the procedural delays since Qwest filed its petition in

[4] Deregulation of the retail services at issue would not relieve Qwest of its wholesale obligations under sections 251, 252 and 271 of the 1996 Telecommunications Act, or existing legal requirements regarding fair competition (such as prohibitions against predatory pricing), or existing service quality rules. Finally, although Qwest has no current plans to abandon any service, Qwest will continue to abide by the Commission's notification requirements in the event of the abandonment of any service. (Qwest/1, Brigham/11-12; Tr., pp. 22-23, 100-104.)

[5] The retail switched business services at issue in this petition are found and described in the following tariffs and price lists: (1) Qwest Exchange and Network Services Tariff, PUC Oregon No. 29, §§ 5, 7, 9, 10, 15, 105, 109, 115; (2) Qwest Exchange and Network Services Price List, §§ 5, 105; and (3) Qwest Advanced Communications Service Tariff, PUC Oregon No. 27, §§ 5, 107. (Qwest/1, Brigham/14; Qwest Petition, Exhibit B.)

June 2004, Qwest relies primarily on the updated evidence and data provided in its prefiled testimony and exhibits, and its oral testimony. Further, while the Staff's CLEC Survey Report is both incomplete (due to the failure of many CLECs to provide data) and aggregated to the point of diminished value, the total number of full facilities-based lines self-reported by those CLECs that *did* respond to the survey nevertheless demonstrates that there are a significant number of Oregon business customers served via CLEC lines that completely bypass the Qwest network. Indeed, the evidence presented in Qwest's testimony and exhibits, which incorporates, to the extent possible, the full facilities-based lines included in the Staff's CLEC Survey Report, shows much higher CLEC market shares throughout the rate centers at issue than does the initial petition.[7] On a statewide basis, there was a *15% increase* in total estimated CLEC business lines in the one-year timeframe that elapsed between Qwest's filing of its initial petition and its filing of testimony in this case. (Compare Petition, p. 10, Table C, column A and Confidential ("Conf.") Ex. Qwest/40, p. 3, column F.)[8]

## II. <u>Statutory and administrative factors for the Commission to consider</u>

As stated, the Commission must consider the statutory and administrative criteria set forth in ORS 759.030(4) and OAR 860-032-0025 in evaluating Qwest's deregulation petition. Before Qwest addresses the statutory criteria that it must prove for the granting of its petition under ORS 759.030(2) or ORS 759.030(3) in the Argument section of this brief, Qwest will briefly summarize the evidence that the Commission is to consider in evaluating the petition.

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[6] There was no dispute that market share alone is not indicative of whether a market is competitive or whether barriers to entry exist. (Qwest/25, Brigham/52-53; Qwest/51, Fitzsimmons/19, 38.; Tr., p. 129 (Denney).)

[7] Qwest's initial petition estimated total CLEC lines to be [**Confidential**- **XXXXXX**, representing a **XX%** market share]. (See Qwest's Petition, Table C, p. 10.) This was based on Qwest's March 2004 wholesale records and an estimate of full facilities-based lines from March 2004 white pages directory listings. By the time Qwest filed testimony in this proceeding, however, the estimated CLEC lines had increased to [**Confidential**- **XXXXXX**, representing a **XX%** market share]. (See Qwest/40, p. 3, columns F and I.) This updated estimate was based on Qwest's May 2005 wholesale records and the CLECs' self-reported full facilities-based lines as of February 2005.



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## A. The extent to which the services are available from alternative providers in the relevant market

The first statutory and administrative factor that the Commission must consider is the extent to which the services at issue are available from alternative providers in the relevant market. ORS 759-030(4)(a); OAR 860-032-025(3)(a). The evidence shows that Qwest has met these criteria. However, before addressing the number and availability of alternative providers, Qwest will discuss the relevant product market and the relevant geographic market.

### 1. The relevant market

There was much discussion at the hearing regarding how the relevant product and geographic market should be defined. (See e.g., Tr., pp. 24-29, 194-196, 218-221, 228-229, 229-237, 289-290.)[9] For example, it appears that, although Qwest believes it was clear regarding what it advocated in terms of the relevant market, some of the parties may have misunderstood or been unclear on this issue. The parties agreed that to the extent possible, Qwest would attempt to further elaborate its position about the relevant market in its opening post-hearing brief. (See e.g., Tr., pp. 376-389.)

#### a. The relevant product market

The relevant product market should be defined to include *all* switched business services, as defined in Qwest's Petition. The evidence shows that there is significant overlap between various switched business services and service packages, and customers often substitute one switched business service for another, blurring the lines between various services and combinations of services and packages. (Qwest/1, Brigham/16-17; Qwest/25, Brigham/7-8.)

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[8] This includes an 18% growth in total CLEC facilities-based lines (UNE-L and full facilities-based lines) and a 9% increase in total platform-based lines (UNE-P and QPP lines). (Compare Petition, p. 8, Table A, and pp. 9-10 with Qwest/40, p. 3, columns A, C, D and F.)

[9] The relevant market is important because, although there is no specific requirement in ORS 759.030(2) or (3) for the petitioner to define the relevant market, one of the factors under ORS 759.030(4) that the Commission is to consider in evaluating a deregulation petition is "the extent to which services are available from alternative providers in the relevant market." (Qwest/25, Brigham/4.)

The relevant product market should not be defined in too narrow a fashion (i.e., by specific service) and must be defined in a broad enough manner to include all services that may be substituted for each other. (Qwest/25, Brigham/5, 7; see also TRACER/100, Cabe/16-17.) The relevant product market should be broad enough and sufficiently encompassing to recognize that customers substitute PBX and Centrex for 1FB, digital PBX for analog PBX, ISDN-PRI for digital PBX, and that PBX and Centrex services are substitutes. Indeed, anyone involved in the telecommunications industry knows that PBX and Centrex are now, and always have been, seen as competitive substitutes by many customers, and these services have been marketed as such. (Qwest/25, Brigham/7-8; Exs. Qwest/27 - Qwest/34 (website pages regarding Qwest and selected CLEC ISDN, PBX trunk, Centrex, DSS, ATM, Frame Relay and other advanced services); see also Tr., pp. 37-40; 187-193 (Cabe), 366-368 (Sloan).) Indeed, as Mr. Sloan of Staff stated, "what is important is whether Qwest's business customers consider the services to be substitutable." (Staff/200, Sloan/7; see also Qwest/51, Fitzsimmons/6.) Further, as Dr. Fitzsimmons stated, if, after considering the quality and prices of two services, significant numbers of customers consider them to be reasonable substitutes, then the services are economic alternatives to each other. (Qwest/51, Fitzsimmons/6.)[10]

For example, a small business customer may opt to purchase one or several 1FBs, or could purchase Centrex 21, ISDN-BRI, PBX trunks or VoIP-based services to meet its local exchange needs. (Qwest/25, Brigham/13.) Qwest demonstrated that Centrex 21 is targeted to small businesses with two to fifty lines, and provides services that are similar to basic 1FB service, but with additional features and functionality, thus making it a very reasonable substitute for 1FB customers (especially those who purchase the Qwest Choice Business package, which

[10] Other relevant considerations include examining if the services are marketed in the same channels, whether competitors market their services as substitutes, and whether providers are viewed as competitors. (Qwest/51, Fitzsimmons/6.)

combines a 1FB with features). (Qwest/25, Brigham/13-14.)[11] A 200-employee business in an office building might seek a particular service solution that would meet its telecommunications needs, including various features and functionalities, such as by purchasing an analog PBX (with analog PBX trunks) or a digital PBX (with DSS trunks or ISDN-PRI circuits), or by ordering a central-office based solution such as Centrex Prime, or through a VoIP-based PBX service.

Qwest demonstrated that these services are not in different markets from the business customer's perspective. Rather, these services represent effective substitutes for each other, and thus the customer would evaluate each service option's costs and benefits, and choose the best service match (based on a variety of factors, including the particular service's relative price, reliability, quality, feature availability and/or other criteria). In other words, as Qwest demonstrated, services do not need to be identical to serve as effective substitutes for each other. This is true in non-telecommunications markets also. For example, consumers view satellite TV and cable TV to be close substitutes, even though they are not identical services (and use different technologies). Consumers will base their purchasing decision on the relative value proposition that each service option offers. (Qwest/25, Brigham/10; see also Qwest/51, Fitzsimmons/7-10 (for services to be in the same product market, it is not necessary for them to be identical, or even be reasonably interchangeable, or even have similar prices or quality).)

Qwest also proved that it is not necessary for "all customers" to view "all services" as substitutes for each other in order for these switched business services to be considered part of one relevant product market. (See e.g., Qwest/1, Brigham/16-17; Qwest/25, Brigham/10-13, 15, 24, and generally, pp. 5-13, 26; Qwest/51, Fitzsimmons/10, and generally, pp. 5-13; see also Tr.,

[11] A small business customer could also use ISDN-BRI or PBX (analog PBX or digital PBX) services as substitutes for 1FB services. (Qwest/25, Brigham/14-15.) In short, 1FB, analog PBX, digital PBX, Centrex and ISDN-BRI are all in the same relevant market . (Qwest/25, Brigham/15-16, 16-21; Exs. Qwest/27 - Qwest/34 (website pages regarding Qwest and selected CLEC ISDN, PBX trunk, Centrex, DSS, ATM, Frame Relay and other advanced services); Tr., pp. 39-41, 42-44.)


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pp. 187-188, 190-192, 367-369; Ex. Qwest/60 (Staff response to Qwest data request nos. 1-07 and 1-08).) Thus, although not every business service may provide a practical substitute for every customer, the evidence showed that every business customer has numerous competitive service alternatives. (Qwest/25, Brigham/11-13.) So long as some customers view another service as substitute for a Qwest switched business service, Qwest's pricing of the service is constrained. (Qwest/1, Brigham/38, 63-64, 66, 82, 88; Qwest/25, Brigham/11-13, 15, 24.)

For example, although Qwest showed that a very small single-line business customer would not likely view a PBX or Centrex Prime system as a substitute for 1FB service, there was no dispute that a somewhat larger business would in most cases view PBX and Centrex services as substitutes for 1FB lines. Thus, a conclusion that 1FB, PBX and Centrex are not in the same "relevant market," simply because some small (one or two-line) businesses would not view the services as substitutes, is not warranted. Qwest demonstrated that for many customers, these services are indeed substitutes, and therefore, the services should be included in the same relevant market. (Qwest/25, Brigham/11.)[12]

In evaluating substitutability, Qwest switched business services should be considered on a continuum, from those that serve small businesses to those that serve medium and large businesses. The evidence proved there is a significant level of overlap as to what services small, medium and large business customers can purchase to meet their needs, and virtually every business customer has several switched service alternatives. (Qwest/25, Brigham/11-12, 22-23; Tr., pp. 37-38.)

[12] Qwest also proved VoIP and wireless services could be and are substitutes for many business customers, as well as ATM (for which Staff recommends deregulation in all rate centers in the state) and Frame Relay services, and thus they are all in the same relevant product market. The mere fact that ATM and Frame Relay are often viewed as "data" services does not mean there are two separate markets. (Qwest/25, Brigham/21-26, 40-41, 44-47.)


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Part of the problem with Staff's analysis is that it improperly defined the relevant product market too narrowly. For example, Mr. Chriss argued that analog PBX was not competitive because "there are only five responding CLECs who have analog PBX lines in service, and even then the five CLECs only have slightly more than four percent of the market." (Staff/100, Chriss/38.) However, he failed to acknowledge that digital PBX and ISDN-PRI are replacing analog PBX, especially since all providers market digital solutions, not outdated analog solutions. Thus, although it is not surprising there are not large quantities of competitor analog PBX lines, it does not mean they are in separate relevant markets, just as it is not appropriate to argue that floppy diskettes and compact discs are in separate markets, or that because floppy diskettes are no longer being sold in large quantities, it must mean there is no competition in the floppy diskette market. The same holds true for the Centrex market, in which analog Centrex services (such as Centrex-Plus) have been declining since these services are being replaced by *digital* Centrex services and other advanced offerings. (Qwest/25, Brigham/20-21.)

Finally, it is also not necessary to perform costly and time-consuming cross-elasticity or other quantitative studies to prove that one service is substitutable for another service in the same relevant product market. (Qwest/25, Brigham/7-9; Qwest/51, Fitzsimmons/11-13 (historical data used for elasticity studies do not reflect current relationships in a dynamic environment like telecommunications, and such studies are far from an exact science); Tr., pp. 193 (Cabe), 277-278, 294-295, 333 (Chriss), 367 (Sloan).) Indeed, no witness provided evidence of any deregulation proceeding in any other state that required, or even had in its record, formal cross-elasticity or other quantitative studies to prove that one service is substitutable for another service in the same relevant product market. (Tr., pp.193 (Cabe), 278 (Chriss), 367 (Sloan); Ex. Qwest/26 (Staff data response).) In fact, the witnesses all admitted that such studies are not needed to prove substitutability. (Tr., pp. 193 (Cabe), 277-278 (Chriss), 366 (Sloan).)

### b. <u>The relevant geographic market</u>

There was also much discussion at the hearing about the relevant geographic market, and in the end, it appears that the parties may have genuinely misunderstood each other about this issue. While Qwest believes that the Oregon retail telecommunications market can be evaluated based on several geographic market definitions (e.g., region, rate center, wire center), Qwest maintains that the entire state is sufficiently competitive and that the Commission should grant Qwest's petition to deregulate all switched business services in all Qwest wire centers in the state. (See e.g. Qwest/1, Brigham/15; Qwest/25, Brigham/26-27; Tr., pp. 24-29.) Staff and other parties, however, understood this to mean that Qwest was advocating "one single, integrated market" (that is, the entire state as one, integrated market). (See e.g., Tr., pp. 138-144, 194-196, 218-221, 228-229, 229-237.) In essence, despite the fact that Qwest discussed the relevant geographic market to include *all* "wire centers" in the state, and provided numerous exhibits with granular data broken down by wire center, rate center, exchange, and region, Staff and the other parties evidently believed that Qwest was essentially arguing there was "uniform competition" throughout the state (e.g., that a business customer in Westport would have the same competitive options as a business customer in Portland). (See e.g., Staff/100, Chriss/21-22; TRACER/100, Cabe/23-24; Tr., pp. 195, 228-229 (Cabe), 292-294 (Chriss).)

However, that is *not* Qwest's advocacy, which is why Qwest provided extensive granular data broken down by wire center, rate center, exchange and region. (See e.g., Qwest/25, Brigham/27; Qwest/51, Fitzsimmons/13-15; Confidential Exs. Qwest/4 (CLEC fiber map), Qwest/5 (CLEC switches), Qwest/6 (LIS trunks), Qwest/8 (CLEC market shares), Qwest/38 (QPP lines), Qwest/40 (CLEC market shares), Qwest/41 (CLEC lines), Qwest/42 (UNE-L loops), Qwest/43 (CLEC market shares); see also Tr., pp. 25-27.) This is also why, to the extent necessary, Qwest attempted to clarify its position at the hearing. (Tr., pp. 25-29 (Brigham).)



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In any event, the parties agreed at the end of the evidentiary hearing that Qwest would attempt to further elaborate on the relevant geographic market in its opening post-hearing brief. Thereafter, the parties, particularly TRACER, would review that discussion, and if they deemed it necessary, they could possibly request that the evidence be reopened for the limited purpose of analyzing the competitive data on a more granular basis. (Tr., pp. 376-389.)

It is Qwest's position that the relevant geographic market can be defined in whatever manner the Commission, based on its judgment, believes is the most appropriate under the circumstances in this proceeding. However the geographic market is defined, the evidence in this case supports the deregulation of petition services in all of Qwest's wire centers, rate centers, exchanges or regions. The Washington Utilities and Transportation Commission perhaps summed it up best in its order deregulating Qwest's analog business services in that state when it discussed the relevant market in these terms: "Thus we find that the geographic scope of the relevant market in this case is Qwest's statewide service territory, *examined at more granular levels*, such as by exchange, region, zone, or other informative subdivision." (See Ex. Qwest/59 (official notice), p. 30, ¶ 78 (Order No. 17, Order Granting Competitive Classification (December 22, 2003), docket UT-030614) (emphasis added).)

Having said that, however, Qwest recognizes that the parties, and particularly TRACER, have requested that Qwest set forth in its brief a more specific relevant geographic market proposal so that they could analyze and comment on such a proposal. (See Tr., pp. 376-389.) Accordingly, although Qwest believes that the Commission can analyze the relevant geographic market issue at any geographic level it deems appropriate, Qwest would not object to having the relevant geographic market analyzed at the rate center level. Indeed, the granular data that Qwest presented in its evidence was broken down by rate centers. (See e.g., Confidential Exs. Qwest/8, Qwest/40, Qwest/42, Qwest/43 (CLEC market shares).) Moreover, Qwest understands that Staff's recommendation to deregulate Qwest's basic business (1FB) services and associated features and packages in Portland is limited to the Portland *rate center*. (See e.g., Staff/100, Chriss/60-61.) Accordingly, Qwest believes the rate center level can be used to analyze the petition, but that all rate centers in Oregon meet the criteria for deregulation.

**2. <u>Number and types of alternative providers and types of competition</u>**

There are numerous alternative providers throughout the state who provide services to business customers that compete against Qwest's switched business services. Competition in the local business market has increased dramatically over the past few years, and nearly all Oregon business customers in all Oregon rate centers have competitive alternatives to Qwest's retail business services. These alternative providers include both traditional wireline carriers and intermodal competitors, including wireless carriers and Voice over Internet Protocol ("VoIP") providers. (Qwest/1, Brigham/17-18, 22-39; see also Qwest/1, Brigham 47-60, 60-80.)

**a. <u>Wireline competitors and types of wireline competition</u>**

Preliminarily, there are at least 50 "active" wireline CLECs (including 48 CLECs purchasing wholesale services from Qwest) who compete against Qwest in Oregon. (Qwest/1, Brigham/5-6, 22, 46, 87-88; Ex. Qwest/3 (CLECs providing service in Oregon).) These CLECs include both national and regional companies, many of which primarily or exclusively serve business customers via their own facilities (full facilities bypass) and/or the purchase of wholesale services (UNE loops, Qwest Platform Plus™ (QPP), resale).[13] These carriers all offer retail switched business services that compete directly against Qwest's business services in Oregon. (Qwest/1, Brigham/22, 22-39.) Today, wireline-based CLECs provide business retail

[13] In its annual report on telecommunications competition in Oregon, this Commission noted that the number of competitive carriers operating in Oregon increased from **101** to **118** CLECs from December 2002 to December 2003, and that **49** of them offered switched (dial tone) service. See *The Status of Competition and Regulation in the Telecommunications Industry*, Oregon Public Utility Commission, January 2005, Executive Summary, p. 1. Qwest also has entered into **164** interconnection agreements with CLECs in Oregon, the vast majority of which cover the entire state. (Qwest/1, Brigham/18-19.)

switched services in all 77 of Qwest's Oregon wire centers, and in fact, there are multiple CLECs in all but one wire center, and at least three CLECs in at least 70 of Qwest's 77 wire centers. (Qwest/1, Brigham/15-16; Qwest/25, Brigham/28, 100; Conf. Ex. Qwest/40, column F; Highly Conf. Ex. Qwest/35 (data response re CLECs serving in wire centers); Tr., pp. 104-107, 121.)

#### 1) <u>**Facilities-based competition (UNE loop and full bypass)**</u>

First, a traditional wireline CLEC may engage in facilities-based competition. This competition includes *switch facilities-based competition* (i.e., those CLECs who provide their own switching and purchase unbundled loops ("UNE loop" or "UNE-L") from Qwest). It also includes *full facilities-based competition,* in which the CLEC utilizes its own loop, switching and transport, but does not purchase any unbundled network elements (e.g., loop, switching and transport) from Qwest.

For example, with respect to UNE loops, as of May 2005, there were **[Confidential- XX]** CLECs purchasing **[Confidential- XXXXX]** UNE loops from Qwest, which is a **[Confidential- XX%]** increase from December 2002. (Qwest/1, Brigham/23; Conf. Ex. Qwest/8, Brigham/4, column A; Conf. Ex. Qwest/40, Brigham/4, column A.)[14] The UNE-L quantities in Exhibit Qwest/40 include Basic/DS0, DS1 and DS3 UNE-L, EEL and LMC loops. If the DS1 and DS3 loops are stated as "voice-grade equivalent loops, the loop count increases from [**Confidential- XXXXX**] loops to [**XXXXXX**] loops. (Qwest/25, Brigham/55; Conf. Ex. Qwest/42.)[15]

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[14] This UNE loop total amount includes many UNE loops in various rate centers, including: [**Confidential- XXXXX** in Portland**,** **XXXX** in Eugene, **XXXX** in Salem, **XXXX** in Clackamas, **XXXX** in Roseburg, **XXXX** in Hermiston, **XXXX** in Bend, **XXXX** in Medford]. (Conf. Ex. Qwest/8, column A; Conf. Ex. Qwest/40, column A.)

In addition, the CLEC line counts in Confidential Exhibit Qwest/40 are slightly different, and slightly higher, than in Exhibit Qwest/8 for some columns. This is so because Qwest updated Qwest/8 to include Enhanced Extended Link ("EEL") loops and Loop Mux Combination ("LMC") loops ([**Confidential**- **XXXX**]) in Exhibit Qwest/40. (Qwest/25, Brigham/54.) This results in no material changes in the market share percentages. (Id.) Qwest also updated its Tables A, B, C, D and E from the Direct Testimony of Robert Brigham (Ex. Qwest/1, Brigham/33-38) in Confidential Exhibit Qwest/41. (Id.)

[15] There were [**Confidential- XXXX**] DS1 loops and [**Confidential- XX**] DS3 loops statewide. (Qwest/25, Brigham/55; Conf. Ex. Qwest/42.)

In any event, CLECs use these UNE loops with their own switching in order to provide local exchange service to their business customers. Although Qwest does not know whether a particular UNE loop is used to serve a residential or business customer, the CLECs that purchase the vast majority of UNE loops from Qwest are focused almost exclusively on the business market. (Qwest/1, Brigham/23; Qwest/25, Brigham/49-51; Exs. Qwest/53, Qwest/54 (CLEC data responses re only serving business customers/no residential customers); Ex. Qwest/58 (CLEC website re only serving business customers); Tr., pp. 312-313 (stipulation re three CLECs who exclusively serve business customers and who purchase 75% of all UNE loops); Tr., pp. 135-136, 252 (CLEC admissions re only serve business customers).)[16]

When a CLEC is fully facilities-based, it provides services to end-user customers utilizing its own loops, switching and transport, and thus such a CLEC need not purchase any UNEs from Qwest. These CLECs therefore completely *bypass* Qwest's network. Qwest cannot know for certain the number of access lines that full facilities-based CLECs have in Oregon, or precisely where (i.e., in which Oregon rate centers) these lines exist. However, according to the CLEC Survey Report, there were **[Confidential- XXXXX]** full facilities-based lines in Oregon as of February 2005. This total, however, is conservative because it does not include lines for CLECs that did not respond to the survey, or full facilities-based service provided by intermodal competitors. (Qwest/1, Brigham/25.) Nevertheless, even this conservative total shows that, at a minimum, almost [**Confidential- xxxxxxxxx**] of the CLEC lines in Oregon are full facilities-based. (Qwest/1, Brigham/23-24; Qwest/40 (CLEC market shares).)

Several CLECs, including ELI and Time Warner (and cable providers such as Comcast), utilize their own loop facilities to serve business customers, allowing them to serve customers

[16] Finally, another way to measure the level of facilities-based competition is through Local Interconnection Services ("LIS") trunks, which indicate facilities competition in a particular rate center. Qwest's data shows there



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directly while completely bypassing Qwest's network. (See e.g., Conf. Ex. Qwest/4 (maps of competitive fiber routes in the Portland and Eugene areas).)[17] Where competitive fiber is in place, Qwest's competitors can offer high-bandwidth access to their own switches, to other CLEC switches, and to customers, thus completely bypassing Qwest's network. These competitive fiber facilities can be used to provide a wide range of switched business services, from basic voice services (such as local flat-rated (1FB) business and Centrex-type services) to sophisticated high-bandwidth services (like Frame Relay). (Qwest/1, Brigham/24.)

### 2) QPP and UNE-P competition

Qwest also faces competition from CLECs using the Qwest Platform Plus™ ("QPP") and/or QPP's predecessor product, the UNE Platform ("UNE-P"). CLECs competing against Qwest using QPP or UNE-P purchase these "platforms" that include the loop, switching and shared transport to provide local service to the CLECs' end-user customers. CLECs using QPP or UNE-P do not need to self-provision any facilities, and existing Qwest customers can usually migrate to a CLEC with no physical installation work required. (Qwest/1, Brigham/26.)

As of July 2005, Qwest had negotiated 36 QPP agreements with CLECs in Oregon, encompassing 97% of the combined UNE-P/QPP lines in the state. (Qwest/1, Brigham/28; Ex. Qwest/7 (list of QPP CLECs).) Further, as of the end of May 2005, 25 CLECs were purchasing [**Confidential- XXXXX**] QPP lines from Qwest to serve business customers (while only [**Confidential- XXXX**] UNE-P lines remained). (Qwest/1, Brigham/28; Qwest/25, Brigham/51; Conf. Ex. Qwest/8, columns C and B; Conf. Ex. Qwest/40, columns D and C; see also Conf. Ex.

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were [**Confidential**- **XXXXXX**] LIS trunks in Oregon, which indicates significant levels of facilities-based competition in Oregon. (Qwest/1, Brigham/25-26; Conf. Ex. Qwest/6 (LIS trunks in Oregon).)

[17] Confidential Exhibit Qwest/4 provides the best information available to Qwest, based on an outside vendor's research. Other CLECs may have deployed additional facilities in these cities, and elsewhere in Oregon. However, CLECs hold this information closely; thus, it is not generally available. (Qwest/1, Brigham/24, fn. 16; see also Tr., pp. 74-75.)

Qwest/38 (QPP by service).)[18] More importantly, as Confidential Exhibit Qwest/40 shows, QPP lines exist in *all 77 Qwest wire centers* (and thus all rate centers) in Oregon. (Conf. Ex. Qwest/40, column D; Qwest/25, Brigham/28, 100 (CLECs serve business customers in all 77 wire centers and there are multiple CLECs in all but one wire center.)

Finally, as Qwest demonstrated, the elimination of UNE-P and the addition of QPP has not had any negative impact on platform-based competition in Oregon; to the contrary, the number of these platform lines (which are primarily now QPP) as of May 31, 2005 was almost [**Confidential- XX%**] higher than in March 2004 (prior to QPP), and about [**Confidential- about XX%**] higher than in December 2002. (Qwest/1, Brigham/28-29; Tr., p. 6 (errata); see also Qwest/51, Fitzsimmons/20-22 (FCC determined UNE-P was not necessary to compete and QPP is a functional substitute to UNE-P, with a small price difference); and see generally, pp. 20-25.)[19] The evidence has shown that CLECs can be successful in the local market by using QPP instead of UNE-P. (Qwest/1, Brigham/30.)[20]

**3) <u>Resale</u>**

A final mode of wireline competition is resale, in which a CLEC purchases Qwest retail services at a Commission-approved wholesale discount (generally 17% to 22%), and then resells

[18] This total business service QPP line count includes QPP lines in the following rate centers: [**Confidential**- **XXXX** in Portland**,** **XXXX** in Bend, **XXXX** in Eugene, **XXXX** in Salem, **XXXX** in Medford, **XXXX** in Clackamas, **XXXX** in Grants Pass, **XXXX** in Klamath Falls, **XXXX** in Redmond, **XXXX** in Pendleton, **XXXX** in Ashland, **XXXX** in Roseburg, **XXXX** in Woodburn and **XXXX** in Newport]. (See Conf. Ex. Qwest/8, column C; Conf. Ex. Qwest/40, column D.)

[19] CLECs using UNE-P will continue to have that option until March 2006, but the contracts for QPP do not expire until July 2008. Of course, CLECs can serve customers through resale, UNE loops or full facilities-based (bypass) competition. (Qwest/1, Brigham/27.)

[20] Qwest also demonstrated that (1) Qwest is "required" to provide QPP until 2008, (2) no one knows what the telecommunications market will look like in 2008, (3) QPP is a negotiated commercial agreement between Qwest and CLECs, (4) QPP is subject to just and reasonable rates, (5) QPP acts as a price constraint on Qwest's switched business services, (6) the reason that UNE-P is no longer required (after March 2006) is because CLECs are not "impaired" without UNE-P, (7) CLECs purchasing QPP are not simply "distribution channels" for Qwest, (8) it was not likely that unbundled switching and UNE-P would remain available in the long term, (9) the phase-out of UNE-P is causing many CLECs to turn to facilities-based alternatives, which benefit CLECs, and therefore, (10) the Commission should consider QPP access lines in its analysis. (Qwest/25, Brigham/30-37; Qwest/51, Fitzsimmons/20-25; Tr., pp. 58, 115-118.)

the finished service to its own end-user customers, thereby avoiding the self-provisioning of any facilities. As of May 2005, 26 CLECs were purchasing [**Confidential- XXXX**] business lines at the wholesale discount. (Qwest/1, Brigham/30-31.) The wholesale discount for resale competition would not be impacted by the Commission's approval of this petition. (Id.)[21]

#### 4) Summary of wireline business competition in Oregon

In total, Qwest demonstrated that even its most conservative estimates reflected significant wireline CLEC competition throughout all rate centers in the state, and that virtually all Oregon business customers have intramodal wireline and intermodal (wireless, VoIP) competitive switched services options. This competition has the effect of constraining Qwest's switched business service pricing. (Qwest/1, Brigham/4, 38, 63-64, 66, 80, 82, 88; Qwest/25, Brigham/47-48, 52-53; Qwest/51, Fitzsimmons/15-16 (growth in communication and in providers, and the decline in demand for Qwest's switched business services in Oregon, have constrained Qwest's prices); see also Tr., pp. 41-42.)

In this proceeding, numerous parties, including Staff, have focused very heavily on market share and market concentration data (such as the HHI and CR4), and relied almost exclusively on this data in developing their recommendations. This singular focus on market share and market concentration is unwarranted, and the problem is compounded when the analysis is restricted to an analysis of the incomplete data in the CLEC Survey Report. Nowhere in the criteria listed in ORS 759.030(4) is market share or measures of concentration mentioned, and the statute clearly does not include a market share or market concentration test. Quite simply, there is no statutory basis to argue that a certain level of market share must be lost by Qwest, or a certain level of HHI or CR4 achieved, before a market can be deregulated. In fact,

[21] Staff agreed that the Commission should consider resale-based competition. (See Staff/100, Chriss/31; Qwest/25, Brigham/37.) Resale does act as a price constraint, or pricing discipline, on Qwest's switched business service prices. (Qwest/25, Brigham/37-39.)



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421 SW Oak Street, Suite 810
Portland, OR 97204

each of the criteria listed in ORS 759.030(4) can be met even if Qwest has lost very little, if any, market share and/or the market remains concentrated. That is, a high Qwest market share or a high HHI or CR4 is *not* determinative that price and service competition do not exist, and is *not* determinative that the criteria in ORS 759.030(4) have not been met. (See e.g., Qwest/51, Fitzsimmons/16-20 (providing numerous reasons why market concentration measures like HHI and CR4 calculations are poor indicators of market power).)

On the other hand, market share data can be used to demonstrate that the criteria in ORS 759.030(4) *have* been met. The loss of market share to competitors demonstrates that competitors have successfully entered the market, and that there are no significant barriers to entry. It makes no sense to argue that there are not "services available from alternative providers in the relevant market" (ORS 759.030(4)(a)), or that there are not services of alternative providers that are "functionally equivalent or substitutable at comparable rates, terms and conditions" (ORS 759.030(4)(b)) when Qwest has lost market share. Similarly, the loss of market share to CLECs provides proof that entry barriers do not exist. ORS 759.030(4)(c). Thus, the loss of market share is a sufficient, but not necessary, condition for meeting the criteria in ORS 759.030(4).

Moreover, if market share is to be considered in a meaningful manner, it must consider the entire relevant market. Therefore, the calculation of market share should include all switched business services, and also intermodal services such as wireless and VoIP. For the most part, the market share data considered in this case does *not* include intermodal lines; therefore, the market shares for CLECs are *very* conservative, and should be used with caution.

Qwest has demonstrated that even where Qwest currently has a significant market share, there nevertheless exists price and service competition, with competitively priced substitutes available and no barriers to entry. (See sections B. and C., *infra*.) Moreover, even though



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market share is not a necessary condition for deregulation, the high CLEC market shares that do exist in Qwest's rate centers is yet further proof that the switched business services market in Oregon is competitive and that Qwest's services are price constrained. (See e.g., Qwest/1, Brigham/27-39, 82; Qwest/25, Brigham/52-58; Conf. Ex. Qwest/40, columns F and I).)

According to the FCC's latest study on telephone competition, the level of local exchange competition using traditional technology in *Oregon* (i.e., not including VoIP or wireless, but including cable) has grown significantly. Specifically, from December 2000 to December 2004, CLEC end-user switched access lines that were reported in Oregon increased from 99,326 to 317,675 (more than 200%). (Qwest/1, Brigham/19-20 (citing FCC study).)[22] Over the same four-year period, ILEC access lines in Oregon declined from 2,109,510 to 1,697,357 (an almost 20% decrease). (Id.) More importantly, however, as CLEC market share has grown, Qwest in Oregon has experienced a significant decline in access lines. During the four-year period discussed above (December 2000 to December 2004), Qwest access lines in Oregon declined from 1,384,224 to 1,057,249, more than *23%* in only *four years*. Even more significantly, Qwest *business lines* declined from 396,911 to 251,818 over that four-year period, or more than *36%*. (Qwest/1, Brigham/20.)

Confidential Exhibit Qwest/40, Brigham/3 shows that there are at least [**Confidential-XXXXXX** CLEC business lines in Qwest's Oregon serving territory, comprising [**Confidential-XX%**] of total Oregon business lines (traditional wireline only). Not surprisingly, six of the largest cities and rate centers in the state (Portland, Eugene, Salem, Bend, Clackamas and Medford) had significant numbers of CLEC lines and significant CLEC wireline market shares. More specifically, these rate centers had the following CLEC line totals and "minimum" market

[22] However, these FCC numbers are *conservative* because the FCC does not require reporting for carriers with fewer than 10,000 lines. There are, of course, numerous CLECs in Oregon with fewer than 10,000 lines. (Qwest/1, Brigham/19, fn. 11.)



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shares: [**Confidential-** Portland (**XXXXX**, **XX%**), Eugene (**XXXXX**, **XX%**), Salem (**XXXXX**, **XX%**), Bend (**XXXX, XX%**), Clackamas [part of Portland metro] (**XXXX**, **XX%**), and Medford (**XXXX**, **XX%)**]. (Conf. Ex. Qwest/40, columns F and I.) In addition, mid-sized cities also had significant CLEC line counts and minimum market shares: [**Confidential-** Albany (**XXXX**, **XX%**), Grants Pass (**XXXX**, **XX%**), Klamath Falls (**XXXX**, **XX%**), Corvallis (**XXXX**, **XX%**) and Redmond (**XXXX, XX%**).] (Id.)[23] The same holds true with smaller cities: [**Confidential**- Ashland (**XXXX**, **XX%**), Pendleton (**XXXX**, **XX%**), Dallas (**XXXX**, **XX%**), Woodburn (**XXXX, XX%**), and Newport (**XXXX, XX%**).] (Id.) Indeed, even some of the smallest communities in the state, while not having high aggregate CLEC counts (because there are very low numbers of lines altogether), had significant CLEC wireline market shares, such as Baker [**Confidential**- **XX%**], Black Butte [**Confidential- XX%]** and Prineville

[23] Two other mid-sized communities (Roseburg and Hermiston) have very high CLEC activity and deserve special discussion. Indeed, given the presence of one CLEC in each city, there was much discussion and argument about those two rate centers and the two local CLECs that have provided significant UNE loop and facilities-based bypass competition there. (See Tr., pp. 146-156, 158-161.)

Confidential Exhibit Qwest/40 attributed [**Confidential- XXXX**] access lines and a [**Confidential- XX%**] CLEC market share in the Roseburg rate center and [**Confidential- XXXX**] access lines and a [**Confidential- XX%**] CLEC market share in Hermiston. These calculations were based in large part, but not exclusively, on the UNE loops the two CLECs there purchase, but also included QPP and resale lines (though they did not include the significant facilities-based bypass access lines these two CLECs provide). (See Tr., pp. 162-163, 165-168, 387-389 (ALJ to keep record open for receipt of CLEC data responses); Ex. Qwest/63 (Roseburg CLEC's data response).) At the hearing, TRACER argued that both CLECs use a large percentage of their UNE loops to serve residential customers, and not just business customers (unlike most CLECs purchasing UNE-L in Oregon). (Tr., pp. 145-156.)

However, for the reasons set forth in more detail in fn. 32, *infra*, TRACER's arguments are much ado about nothing. This is especially so because these two CLECs are "outliers" in terms of using UNE loops for residential customers, and they collectively purchase less than [**Confidential**- **X%**, or a total of **XXXX** (**XXXX + XXXX**) out of **XXXXX**] of the UNE loops purchased from Qwest. (See e.g., Conf. Exs. Qwest/8 and Qwest/40, column A.) Further, as Qwest demonstrated, just three CLECs purchase [**Confidential-XX%]** of the UNE loops in Oregon, and *all three serve only business customers*. (See Tr., pp. 312-313 (stipulation at hearing), and fn. 32 see also Tr., p. 252 (XO), 135-136 (Eschelon).) Finally, now that Qwest has obtained additional data through one of these CLECs' data responses (in the Roseburg rate center only), Qwest has recalculated the market share for this rate center. This calculation, with a market share of [**XX%]** in Roseburg, continues to show there is significant *business service* CLEC competition in that rate center, even *without* reflecting the CLEC's full facilities-based CLEC lines. (See Ex. Qwest/63 (CLEC data response pursuant to the ALJ allowing the record to remain open for entry of Hermiston and Roseburg CLEC data responses); see e.g., Tr., pp. 386-389.)

Unfortunately, however, although the Commission issued data requests to the two CLECs who were willing to discuss their UNE-L business/residential customer split with Dr. Cabe, and permitted Dr. Cabe to testify about those discussions (Tr., pp. 146-172), the Hermiston CLEC refused to provide a response to the data request. Accordingly, Qwest respectfully submits that the Commission should **strike** all of Dr. Cabe's testimony (Tr., pp. 146-152, 156, 158-167, 169-172) regarding the Hermiston rate center, and give the testimony no weight.



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[**Confidential- XX%**]. (Id.)[24] Finally, as stated, the CLEC market shares are even higher when one calculates voice-grade equivalents for the use of high-capacity DS1 and DS3 UNE loops. (Conf. Ex. Qwest/43, column I; Qwest/25, Brigham/55-56; Tr., pp. 51-54; and p. 19, nd fn. 15, *supra*.)

In short, these current CLEC line counts and "minimum" wireline CLEC market shares, coupled with the steep declines in Qwest's switched business access lines over the past few years, clearly show there is wireline service competition throughout *all rate centers* in Oregon.

**b. <u>Intermodal competition</u>**

In addition, recent trends in the telecommunications industry, both nationally and in Oregon, indicate that traditional wireline telecommunications providers, ILECs and CLECs alike, face increasing and already significant competition from intermodal competitors who employ other technologies, like wireless, Voice over Internet Protocol ("VoIP") and cable telephony, in order to compete for the business customer's telecommunications needs. Although neither Qwest nor the Commission (which does not regulate wireless or VoIP) can determine the precise extent of such intermodal competition, it is sufficiently clear that intermodal competition, which is often provisioned by large, sophisticated companies (including CLECs who already have large wireline telephony offerings), has had a significant impact in the switched business services market in Oregon and throughout the country. (Qwest/1, Brigham/60; see also Qwest/1, Brigham/60-66, 66-80; Qwest/25, Brigham/39-44, 44-49.)

[24] In fact, Confidential Exhibit Qwest/40 shows the vast majority of switched business lines [**Confidential-XX%**] are in rate centers with minimum CLEC market shares of 30 percent or more, and that only [**Confidential-X%**] of switched business lines are in rate centers with less than CLEC market shares of 30 percent (and only [**Confidential- less than X%**] of lines are in rate centers with CLEC shares of 10 percent or less). This is strong evidence that that CLECs are highly successful in addressing the vast majority of business customers in Qwest's service area, and thus that Qwest does not have market power. (Qwest/51, Fitzsimmons/28; Tr., p. 123 (errata).)

### 1. <u>Wireless competition</u>

For example, wireless subscribership grew more than 69% in four years from December 2000 to December 2004, to more than 2 million "lines" today in Oregon alone. Indeed, over this time period, in which total ILEC access lines decreased 20%, Qwest's access lines decreased 23% and Qwest's business access lines decreased 36%, the number of wireless "lines" surpassed the number of wired lines in Oregon. Although much of this growth has been in the residential market, wireless service has nevertheless impacted the business market, especially for small businesses, and has now become a generally-accepted means of making and receiving calls for many business customers. Moreover, although not all business customers may view wireless service as a complete substitute for traditional wireline service, it is an increasingly meaningful competitive alternative for business customers (whether as a complete substitute for all wired lines, or as a substitute for secondary lines). This is especially so for certain "on-the-go" businesses like landscapers, construction managers, real estate professionals, and the like. In fact, wireless service subscribers can now even port their wireline telephone numbers to their wireless service. Qwest presented unrefuted evidence that some business customers are substituting wireless service for wireline service. Qwest also showed, again without dispute, that numerous wireless carriers, including Cingular, Verizon Wireless, T-Mobile, Sprint, Nextel, Edge Wireless and Cricket, provide service packages in Oregon that directly compete, in terms of price and feature functionality, with Qwest's wireline business services. (Qwest/1, Brigham/20-21, 60-65; Ex. Qwest/10 (wireless website pages); Ex. Qwest/11 (wireless pricing); see also Qwest/25, Brigham/44 (Staff and TRACER agree that wireless service may be substitutable for some business services or customers); see also Qwest/25, Brigham/44-49.)

In short, Qwest showed that for a number of business customers, wireless service offers an effective substitute for Qwest's switched business services. Even though wireless service



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may not be a "perfect" substitute for traditional wireline service in all cases, wireless alternatives necessarily constrain Qwest's ability to raise prices for its switched business services. This is so because an increase in Qwest's prices would likely cause at least *some business customers* to replace their wireline services with a wireless phone, thereby further eroding Qwest customer base. Thus, so long as enough customers consider a switch from Qwest's wireline service to wireless service, Qwest would not be able to increase wireline rates without the substantial risk of losing customers and the associated revenues to wireless alternatives. (Qwest/1, Brigham/66; see also Qwest/25, Brigham/47-48, and generally Qwest/25, Brigham/44-49; see also Qwest/51, Fitzsimmons/30-31 (mobile wireless service is commonplace, a very high percentage of business customers already substitute wireless business calls for landline calls, and wireless is used exclusively for some businesses); see also Qwest/51, Fitzsimmons/33-34 (fixed wireless services (Wi-Fi) are also competing against Qwest switched business services today and will do so (Wi-Max) in the future as well).)

### 2. <u>VoIP competition</u>

Qwest also demonstrated that telephone service utilizing VoIP technology is now available to business customers throughout Oregon, and that numerous telecommunications providers are providing VoIP-based telephone service to business customers today in Oregon. Many of these VoIP providers are (or are fast becoming) household names, including AT&T, Vonage, Covad, MCI, XO, McLeod, Unicom and several others. (Qwest/1, Brigham/66-67, and see generally, Qwest/1, Brigham/71-80; see also Exs. Qwest/12 - Qwest/20, Exs. Qwest/36 - Qwest/37 (competitive VoIP website information).) Moreover, although it is relatively new technology, VoIP-based services function in a manner similar to standard circuit-switched telephony, with relatively simple set-up, and with a host of features (like telephone numbers with selected area codes, such as a Portland customer obtaining a Chicago 312 area code telephone


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number instead of a 503 telephone number) that are not available from wireline service. (Qwest/1, Brigham/67, 68; see also Qwest/25, Brigham/40 (although there is no quantitative data regarding VoIP market shares today, the evidence showed that VoIP services are competitive, and substitutable, for Qwest's switched business services); see also generally Qwest/25, Brigham/39-44; Qwest/51, Fitzsimmons/31-33 (due to low cost and wide-ranging functionality of VoIP service, existing communications providers are switching from circuit-switched to IP telephony, in the past few years many non-traditional companies began to offer VoIP, and VoIP is already used by a large number of businesses, with many more to follow).)

Qwest also demonstrated that numerous VoIP options and features are available to meet the needs of many business customers, whether small, medium or large. (Qwest/1, Brigham/67, and pp. 71-80.) Qwest further demonstrated that VoIP provider prices are very competitive with Qwest's switched business services. (Qwest/1, Brigham/71-72; see also Exs. Qwest/12 through Qwest/19 (examples of competitive VoIP-based local exchange services); see also Qwest/25, Brigham/39-44.) Finally, along with traditional wireline and wireless competitive alternatives, the availability of VoIP-based services to Oregon business customers demonstrates that each of the criteria outlined in ORS 759.030(4) have been met. (Qwest/1, Brigham/79-80.)[25]

### B. The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions

The second statutory and administrative factor that the Commission must consider in evaluating this petition is the extent to which the services of alternative providers are

[25] For example, the wide availability of VoIP-based services sufficiently comparable to traditional switched business telephone service demonstrates that "services are available from alternative providers in the relevant market." ORS 759.30(4)(a). Further, VoIP-based services that are "functionally equivalent or substitutable at comparable rates, terms and conditions" are available from alternative providers in Oregon. ORS 759.30(4)(b). in addition, the fact there are multiple VoIP providers in Oregon demonstrates there are no "existing economic or regulatory barriers to entry" in the Oregon business market. ORS 759.30(4)(c). Finally, the emergence of VoIP-based telephony services necessarily constrains the prices that Qwest can charge for traditional wireline telephone service. (Qwest/1, Brigham/79-80.)


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functionally equivalent or substitutable at comparable rates, terms and conditions. ORS 759.030(4)(b); OAR 860-032-0025(3)(b). The evidence in this proceeding demonstrates that all of the alternative wireline business service providers offer functionally equivalent or substitutable services for each of the Qwest switched business services at issue here, and that even many of the wireless services and VoIP services are functionally equivalent or substitutable for Qwest's switched business services. (Qwest/1, Brigham/39-40; see also Qwest/1, Brigham/47-60; Ex. Qwest/9 (analysis of various switched business offerings of Qwest and numerous facilities-based competitors, including AT&T, ELI, Eschelon, Granite, Integra, MCI, McLeod, Oregon Telecom, Rio and XO).) The evidence also demonstrates that these competitors are offering services that are comparable in price, terms and conditions to Qwest's offerings for all three types of services at issue here. (Qwest/1, Brigham/40; Ex. Qwest/9 (matrix of Qwest and CLEC services/prices).)

While it is not easy to obtain comprehensive data on CLEC switched business services or service pricing in Oregon (especially since CLECs do not file tariffs in Oregon), and the parties were unable to obtain meaningful pricing data from the Commission's CLEC Survey, Qwest was nevertheless able to compile a list of alternative switched business service offerings and prices through a variety of means. (Qwest/1, Brigham/40; Ex. Qwest/9 (matrix of selected Qwest and CLEC services and prices).) Thus, Qwest was able to show that the service offerings of 10 unaffiliated CLECs (AT&T, ELI, Eschelon, Granite, Integra, MCI, McLeod, Oregon Telecom, Rio and XO) were extremely comparable and competitive with Qwest's switched business services. (Qwest/1, Brigham/41; Ex. Qwest/9 (matrix of Qwest and CLEC services and prices).) More importantly, as Qwest demonstrated, most of these CLECs serve most rate centers and wire centers in Oregon. Indeed, [**Confidential**- XXX (who did not respond to the CLEC Survey), XXXXXX, XXXXXX, XXXXX, XXXXX, XXXXX and XXX] each serve business customers


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in at least 60 of Qwest's 77 wire centers in Oregon, while [**Confidential-** XXX, XXXXXXXX and XXXXXX] each serve at least 70 (more than 90%) of the wire centers. (Qwest/1, Brigham/15-16; Qwest/25, Brigham/28, 100.) These CLECs also provide features and ancillary products along with their core analog and digital services that provide business customers in Oregon with a wide variety of alternatives to the Qwest switched business services at issue in this petition. (Qwest/1, Brigham/41; Ex. Qwest/9 (matrix of CLEC services and prices).)

### C. <u>Existing economic or regulatory barriers to entry</u>

The third statutory and administrative factor is whether there exist any economic or regulatory barriers to entry. ORS 759.030(4)(c); OAR 860-032-0025(4)(c). The evidence here showed there are no economic or regulatory barriers to entry in the switched business services market in Oregon. (Qwest/1, Brigham/42-47; Qwest/25, Brigham/70-75; Qwest/51, Fitzsimmons/26-28.)

First, the 1996 Telecommunications Act eliminated any legal and regulatory barriers that may have existed to competitive local market entry. (Qwest/1, Brigham/42.) The Act also eliminated economic barriers to entry, particularly through sections 251(c) and 252(d) and subsequent federal and state regulatory orders which require Qwest and other ILECs (1) to resell retail services at an avoided cost discount, (2) to provide UNEs at cost-based rates, and (3) to interconnect with competitors' networks using cost-based reciprocal interconnection charges. (Id.) Third, CLECs in Oregon have virtually no state regulatory requirements that would impede entry, and intermodal competitors such as wireless and VoIP providers have no state regulatory requirements at all. (Qwest/1, Brigham/42-43.) Further, CLECs need not build their own facilities in order to compete against Qwest. This is especially so because of Qwest's



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unbundling obligations, which include its requirement to provide UNEs at TELRIC-based prices. (Qwest/51, Fitzsimmons/27-28.)[26]

Further still, the fact the FCC has phased out UNE-P does not create a barrier to entry for CLECs. This is especially so because the FCC's elimination of switching as a UNE was based on the fact that CLECs have *alternative switching available*, which *by definition* means that UNE-P's elimination cannot impair competition. This also means a CLEC can provide its own switching or purchase switching from another source, and combine this switching with an unbundled loop (UNE-L), at Commission-approved TELRIC-based rates, to serve an end-user customer.[27] Moreover, even though Qwest will no longer provide UNE-P when the FCC's transition period ends, CLECs will still be able to purchase Qwest retail services at Commission-approved wholesale discounts, or to purchase facilities through QPP agreements. These commercially-negotiated agreements allow CLECs to continue purchasing "UNE-P like" service from Qwest now and in the future. (Qwest/1, Brigham/43-44; Qwest/51, Fitzsimmons/26-28.) Finally, perhaps the best evidence that there are no barriers to entry is that CLECs serve business customers in all of Qwest's 77 wire centers in the state, and there are multiple CLECs in every wire center but one. As stated, there are also seven CLECs in at least 60 of these 77 wire centers and three CLECs in at least 70. (Qwest/1, Brigham/15-16; Qwest/25, Brigham/28, 100.)[28]

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[26] Of course, the fact all firms have entry costs, or that telecommunications is a capital-intensive industry, including the need for sunk costs (Tr., pp. 205-206, 325), does not mean there are barriers to entry. (See Qwest/1, Brigham/45-46; Qwest/25, Brigham/70-72; Qwest/51, Fitzsimmons/27, 31-32.) Mr. Chriss of Staff admitted that his discussion regarding barriers to entry was based on potential barriers and not actual barriers. (Tr., pp. 325-330.)

[27] Indeed, there are at least 57 CLEC switches serving wireline local exchange customers in Qwest's Oregon territory. (Qwest/1, Brigham/25; Conf. Ex. Qwest/5; Tr., pp. 109-111, 205 (Dr. Cabe agrees numerous CLECs own substantial switching capacity).)

[28] Qwest also showed there are no barriers to entry due to the cost of constructing facilities (Qwest/1, Brigham/45-47; Qwest/25, Brigham/70-73; Qwest/51, Fitzsimmons/27-28) or from obtaining access to buildings (Qwest/25, Brigham/73, 87-88). Indeed, the Staff and intervenor witnesses admitted that they could not cite to one example of lack of access to buildings or unreasonable costs to access buildings. (Tr., pp. 206-207 (Cabe), 253-254 (Knowles), 328 (Chriss); Exs. Qwest/50 (XO data response) and Ex. Qwest/62 (Staff data response to no. 2-14).) Nor are any potential differences in franchise fees between Qwest and CLECs a barrier to entry. (Qwest/25, Brigham/73-74; Tr., pp. 329-330.) Finally, there is no tie between CLEC market shares and any alleged barrier to

In short, Qwest demonstrated that there are no barriers to entry in the switched business market in Oregon because there already *is* a significant level of competitive entry for such services in Oregon today. CLECs may build their own facilities to compete against Qwest (and many have already done so), or they can purchase Qwest loops at Commission-set TELRIC-based rates and combine them with their own switching (as many CLECs do today). Finally, CLECs can also purchase QPP through a commercial agreement, as 25 CLECs have done. There are at least 50 CLECs serving a significant portion of the Oregon business telephone market through their own facilities and by purchasing UNEs, QPP and retail services at a wholesale discount. Indeed, there would not be such a high level of competition present today if there were significant barriers to facilities-based entry. Thus, there are simply no regulatory or economic barriers to entry that have prevented, or that could prevent, the further growth of competition in the Oregon switched business services market. (Qwest/1, Brigham/47; Ex. Qwest/3 (CLECs providing service in Oregon); Conf. Ex. Qwest/38 (QPP by service).)

### D. <u>Any other factors that the Commission deems relevant</u>

The fourth statutory and administrative factor that the Commission is to consider in evaluating Qwest's deregulation petition consists of any other factors that the Commission deems relevant. ORS 759.030(4)(d); OAR 860-032-0025(3)(d). Qwest also notes that one of the discretionary criteria that allows the Commission to grant a petition for deregulation is the public interest criteria in ORS 759.030(2).[29] Accordingly, because there are a number of public interest reasons why the Commission should grant Qwest's petition, apart from and independent of

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entry. (Qwest/25, Brigham/74-75.) In fact, the party making such an argument (Eschelon) admitted that "a barrier to entry is defined independent of market shares." (Qwest/25, Brigham/53, 74; Ex. Qwest/39 (data response).)

[29] Eschelon and TRACER argue that Qwest may have "market power." (See Eschelon/1, Denney/7-8, 10-12, 33; TRACER/100, Cabe/12-15, 49.) However, for the reasons set forth in section II.D.2., *infra*, Qwest clearly does not have market power such that it can raise prices.

whether there exists price and/or service competition, Qwest will address those public interest reasons in the Argument section.

## ARGUMENT

Qwest respectfully submits that the evidence it has offered in this docket, including the testimony of Robert Brigham (Qwest/1, Qwest/25) and exhibits, and the Rebuttal Testimony of Dr. William Fitzsimmons (Qwest/51), fully demonstrates that Qwest's switched business services, *in all Oregon rate centers*, should be exempted from any further regulation. As discussed further below, Qwest has shown it has met the statutory requirements of ORS 759.030 for deregulation of these services in Oregon because it has shown there is service and/or price competition, and thus that, at a minimum, such services are "subject to competition," and further, that the public interest no longer requires full regulation of such services. Qwest further submits that when the Commission evaluates the petition by considering the statutory and administrative factors in ORS 759.030(4) and OAR 860-032-0025(3), including the presence of alternative providers in the relevant market, the functionally equivalent and substitutable nature of the alternative providers' services, and the lack of barriers to entry and the public interest considerations, the Commission should conclude that Qwest has met the requirements of ORS 759.030(2) and/or (3). For the reasons set forth below, Qwest respectfully submits the Commission should grant Qwest's petition for all rate centers in Oregon.

### I. QWEST'S PETITION MEETS THE REQUIREMENTS OF ORS 759.030(3), WHICH REQUIRES THE COMMISSION TO GRANT THE PETITION

Qwest respectfully submits that its petition meets the requirements of ORS 759.030(3), which provides that the Commission *shall* grant a petition for deregulation if *price and service competition* exist. For the reasons set forth in this brief, and as the evidence in this proceeding shows, there is price *and* service competition for Qwest's switched business services in all Qwest





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rate centers in Oregon. Because Qwest's switched business services in Oregon meet the requirements of ORS 759.030(3), the Commission should deregulate these services.

### A. There is service competition for Qwest switched business services in Oregon

#### 1. There are numerous alternative providers in the relevant market, and they offer functionally equivalent and substitutable services at comparable rates, terms and conditions

First, Qwest has shown that there is *service competition* for business services in Oregon, in all rate centers. For example, as Qwest showed in section II.A. of its Statement of Pertinent Factors above, there are numerous alternative providers throughout the state that compete against Qwest's switched business services, and these alternative providers include both traditional wireline carriers (CLECs) and intermodal competitors like wireless carriers and VoIP providers. There are at least 50 active wireline CLECs (both national and regional companies) actively providing switched services in Oregon. Many of these CLECs focus primarily, or even exclusively, on business customers. These CLECs provide the gamut of competitive business services through facilities-based competition or through the purchase of Qwest wholesale services such as QPP, UNE-P and resale. (See Statement of Pertinent Factors, § II.A., *supra*.) There is also significant intermodal competition from wireless carriers and VoIP providers, and this form of competition is growing rapidly. (Id., § II.A.2.b.) The large number of alternative providers currently operating in Oregon provides strong evidence that there is service competition for Qwest's switched business services in Oregon.[30]

In addition, as Qwest has shown in section II.B. of its Statement of Pertinent Factors, *supra*, these competitors offer comparable, functionally equivalent or substitutable services at

[30] Staff did not really dispute that there is service competition for Qwest's switched business services in Oregon, but it relied too heavily on the incomplete CLEC Survey, and the market share data from that survey. (See e.g., Staff/100, Chriss/10-14.) Staff also relied too heavily on a very narrow definition of the relevant product market. (See e.g., Staff/100, Chriss/17-20.) This definition, however, makes no sense from a real-world perspective to anyone who operates within the telecommunications industry, or who markets products and services in this competitive industry. (Qwest/25, Brigham/5-10; see also Tr., pp. 258-262.)


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comparable rates, terms and conditions. (See e.g., Qwest/1, Brigham/39-40; see also Qwest/1, Brigham/47-60; Ex. Qwest/9 (10-page matrix comparing Qwest's services with those of 10 major competitors).) Again, this is strong evidence that there is service competition for Qwest's switched business services in Oregon.

Indeed, one of the problems with the way Staff approached this case was that it ignored how the real-world telecommunications market really works. For example, Staff segmented all services into separate "buckets," such as 1FB, Digital PBX, Centrex, ISDN-BRI, ISDN-PRI, 800 services, Frame Relay and ATM. (See e.g., Staff/100, Chriss/38-40, 49-50.) It did so as if real business customers could (and would) consider only a specific segment or bucket of services (and no others) for their telecommunications needs, instead of looking at services on a continuum. (Qwest/25, Brigham/11-12, 22-23.) If Staff had not segmented these services as it did, it would have seen that there is a *significant overlap of services,* such as a small business customer considering Centrex and PBX services in addition to 1FB, and a medium or large business customer considering all three of these options, as well as more advanced services (such as ISDN-BRI, ISDN-PRI, 800 services, Frame Relay and ATM services). Such an analysis would show that virtually every customer has several switched service alternatives. (Qwest/25, Brigham/11-12.)

**2. Qwest's business market share information and its declining access <u>lines show there is service competition</u>**

As stated, there is no requirement in Oregon that Qwest lose a certain number of access lines or see its market share erode to a specified level in order for a telecommunications service to be deregulated. In fact, the criteria in ORS 759.030(4) makes no mention of line losses or market share, and thus the criteria can be met even when Qwest market share remains relatively high. As discussed earlier, Qwest's loss of market share is not a necessary condition to meet the criteria outlined in ORS 759.030(4), but the loss of market share actually demonstrates that price and service competition are alive and well in Oregon. In addition, the Qwest market share data discussed in this case is very conservative and actually understates Qwest's losses, especially because it does not include wireless or VoIP-based competition.

Nevertheless, Qwest has shown it has experienced substantial decreases in its access lines for its switched business services in all rate centers in Oregon due to competition, especially over the past four years. Indeed, as it noted, Qwest's switched business access lines have declined about *36%* from 2000 to 2004. (Qwest/1, Brigham/19-20.) These substantial decreases in Qwest's switched business access lines throughout Oregon have resulted in significant market share losses at the expense of increased CLEC market share. Although one can quibble with the specific market share calculations (and Staff and intervenors have), and Qwest admits there is no scientific certainty about its precise market share loss, it is clear that Qwest has experienced significant access line losses (and thus market share decreases) due to competition.

For example, Confidential Exhibit Qwest/40 showed that as of May 2005, CLECs had a total of [**Confidential- XXXXXX**] retail business lines statewide. This amount includes a substantial number of lines at the following rate centers: [**Confidential- XXXXX** in Portland, **XXXXX** in Eugene, **XXXXX** in Salem, **XXXX** in Bend, **XXXX** in Clackamas]. (See Qwest/1, Brigham/32-35 (and Confidential Tables A, C); Conf. Exs. Qwest/40, column F; Qwest/42 (update of Tables A-E); see also Statement of Pertinent Factors, § I.A.2.a.(4).)[31] Based on the aggregate full facilities-based access lines that Staff reported in the CLEC Survey Report, and Qwest's wholesale data, the "conservative" CLEC market share statewide was [**Confidential-**

[31] Qwest was unable to calculate the relative switched business services market share by wire center, rate center or region because Staff's Survey Report provided only geographic detail for basic business lines in Portland and Clackamas. The Commission and Staff refused to allow Qwest (or any party) access to any detail for any rate center or service if there were less than four CLECs at such rate centers, and thus Staff redacted the data. (Tr., p. 286; see also Staff/100, Chriss/11-13.) Yet, despite not allowing Qwest any access to such line count detail, thus precluding Qwest from more specifically advocating its petition on these smaller geographic areas, Staff (and many intervenors) criticized Qwest for Qwest's alleged reliance on statewide data for its petition. (See e.g., Staff/100, Chriss/13-14; TRACER/100, Cabe/21-22; see also Tr., pp. 194-196, 218-221, 228-229, 229-237, 289-290.)

**XX%**], with as much as [**Confidential- XX%** in Portland, **XX%** in Bend, **XX%** in Eugene, **XX%** in Salem, and **XX%** in Clackamas]. (Qwest/1, Brigham/33 (and Confidential Table B); Conf. Ex. Qwest/40, column I; Ex. Qwest/42 (update of Table B).)[32]

However, because it was not allowed to view or obtain full facilities-based access line data at an individual rate center level from the CLEC Survey (other than for the Portland and

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[32] Qwest also calculated a total of **[Confidential - XXXX]** total CLEC business lines in the Hermiston rate center and **[Confidential - XXXX]** total CLEC business lines in the Roseburg rate center, *without accounting for full facilities-based competition.* (See Confidential Ex. Qwest/40, column F.) These rate centers also had significant CLEC market shares **[Confidential - XX%** in Hermiston and **XX% i**n Roseburg ]. (Id., column I.)

There was, of course, much discussion during the evidentiary hearing about the two unique CLECs in the Hermiston and Roseburg rate centers who purchase a small percentage of UNE loops from Qwest and who use some of those loops to provide residential service. (See e.g., Tr., pp. 146-156 (Surrebuttal Testimony of Richard Cabe).) That is, TRACER, through its expert witness Dr. Richard Cabe, attempted to discredit a point that Qwest's witness Mr. Brigham had made at pages 59 and 60 of his rebuttal testimony (Ex. Qwest/25, Brigham/59-60) about various parties' reliance on the Herfindahl-Hirschman Index (HHI), by using competition in the Hermiston exchange as an example. (Tr., pp. 147-149, 153-156.) Specifically, TRACER, through Dr. Cabe, attempted to show that two CLECs (including the one in Hermiston) provided a large percentage of their UNE-L lines to residential customers, thereby attempting to cast doubt on Qwest's position that *most* UNE-L lines are used for business customers. (Id.)

However, a couple of points are in order. First, the record showed that these two CLECs are outliers regarding their use of a large percentage of their UNE-L lines for residential customers. In fact, although Dr. Cabe claimed that a "substantial" portion of Qwest's UNE loops were being used by this competitor in the Hermiston exchange, as well as by another one in Roseburg (Tr., pp. 156, 161), the truth of the matter is that these two CLECs purchase **[Confidential- xxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** in Oregon. (Tr., pp. 158-160; compare also Conf. Ex. Qwest/8, column A and Conf. Ex. Qwest/40, column A, for Hermiston and Roseburg, with UNE-L totals.) More importantly, the record was undisputed that **[Confidential- xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**] purchase more than **[Confidential- XX%]** of all UNE loops in Oregon (Tr., pp. 312-313), and all **[Confidential- xxxxx**] of them serve *only business customers*, and thus do *not* serve residential customers. (Exs. Qwest/55 through Qwest/58; Tr., pp. 135-136 (Eschelon testimony), 252 (XO); and see also Tr., pp. 12-13, 15-16, 312-313 (stipulation).) Thus, despite much time and energy being consumed on a very minor and collateral point, Qwest's basic point that the vast majority of all UNE loops that it provides to CLECs are used by such CLECs to serve business customers remains true and largely uncontroverted.

Second, the point of Mr. Brigham's rebuttal testimony regarding the Hermiston rate center was merely that reliance on a market concentration ratio like HHI is not meaningful. (Qwest/25, Brigham/59-60; Tr., pp. 15-16; Qwest/51, Fitzsimmons/16-20.) Mr. Brigham demonstrated that even if Qwest had lost **[Confidential- xxxxxxxx xxxx]** of the lines in the Hermiston market, the HHI ratio for that rate center would still be high (despite that the market is clearly competitive) because the facilities-based competition comes from [**Confidential**- **xxxxxxx xxxxxxx**]. (Qwest/25, Brigham/59-60; Tr., pp. 170-172 (Dr. Cabe testimony re Hermiston market could still have large HHI if Qwest only had 10% market share).) Indeed, even the intervenors admitted that HHI's usefulness was limited. (Tr., pp. 17, 172.)

Further, even if one were to recalculate the responding CLEC's line counts and market shares as a result of the testimony at the hearing (Tr., pp. 146-172) and the post-hearing data response (Conf. Ex. Qwest/63), there are still significant CLEC line counts, and *minimum* market shares, in this rate center (Roseburg): **[Confidential - XXXX** lines and **XX%**]. (See Ex. Qwest/63 (Roseburg CLEC's data responses pursuant to ALJ ruling at hearing); Tr., pp. 386-389 (ALJ allows record to remain open for CLEC data responses).) This calculation, however, does not even include the facilities-based lines that this CLEC provides. (See Tr., pp. 162-163, 168; Conf. Ex. Qwest/63.)

Finally, as Qwest mentioned at fn. 23, the Hermiston CLEC refused to respond to the Commission's data request. Accordingly, Qwest respectfully submits that the Commission should **strike** all of Dr. Cabe's testimony (Tr., pp. 146-152, 156, 158-167, 169-172) regarding the Hermiston rate center, and give the testimony no weight.



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Clackamas rate centers), Qwest was only able to determine a conservative and likely understated "minimum" CLEC market share in the other rate centers. Moreover, several CLECs, including one major CLEC ("CLEC K"), never responded to the Survey. (Qwest/1, Brigham/37-38; Tr., pp. 349-350.) These market share estimates also do not take into account voice-grade equivalents for high-capacity DS1 and DS3 loops (which is why Qwest prepared Confidential Exhibit Qwest/43, which indicates the potential for significantly greater CLEC market shares throughout the rate centers in Oregon). Finally, these "minimum" CLEC market share estimates do not include the impact of customers served by CLECs in a full-facilities-based manner (except in the Portland and Clackamas rate centers), or by the impact of business end-user customers served by intermodal competitors like wireless or VoIP providers. Nevertheless, the "minimum" CLEC market shares in the non-Portland and non-Clackamas geographic areas ranged from **[Confidential- XX%]** in the Coastal region to [**Confidential- XX%**] in the Eastern region. (Qwest/1, Brigham/35-37 (and Confidential Tables D and E); Conf. Ex. Qwest/40.)[33]

There is also no basis for the Commission to utilize or consider market concentration measures like CR4 and HHI, which are not useful measures of competition. First, as Mr. Chriss of Staff observed (Staff/Chriss/20), there is no necessary relationship between market concentration and market power, or the exercise of market power. (Qwest/51, Fitzsimmons/16-17.) In addition, the relationship between market concentration and market power is tenuous, at best, in a market like telecommunications that is making a transition from a franchise monopoly structure to a competitive structure, and where rapid technological change can allow new entrants to surpass current technologies. (Id., p. 17.) Further, HHI and CR4 calculations are

[33] The "minimum" CLEC market shares for the other larger geographic regions (i.e., without accounting for voice-grade equivalents for high-capacity DS1 and DS3 loops, or full facilities-based lines) were as follows: [**Confidential- XX%** in Central, **XX%** in Eugene, **XX%** in Salem, **XX%** in the Southwest region, and **XX%** in the Willamette region]. (Conf. Ex. Qwest/40, column I.)

static measures, and thus do not capture market dynamics that clearly constrain Qwest's ability to have market power, especially in a time of transition (such as today in the local business market or years ago in the toll market). (Id., pp. 17-18.) Further still, the HHI and CR4 calculations here are based solely on ILEC and CLEC information, and ignore intermodal competition from wireless, VoIP and email. (Id., pp. 18-19.) Staff's calculation is especially troubling because it calculates a separate HHI and CR4 for each switched business service, even though all switched business services should be considered as part of the same market. (Qwest/25, Brigham/58-60; Qwest/51, Fitzsimmons/16-20.) Moreover, as Qwest demonstrated, Qwest could have lost more than half of its access lines or customers, representing a competitive market, and yet there could still be a high HHI or CR4. (Id.; see also Tr., pp. 170-172 (Dr. Cabe testimony regarding Hermiston).) Indeed, other parties conceded that market concentration measures are not necessarily good indicia of competition in a market. (See e.g., Staff/100, Chriss/20; see also TRACER/100, Cabe/38; see also Tr., pp. 17, 172.)

Finally, although some may argue that Qwest still has a "high" degree of market share today, even with the competitive losses it has shown, it must be remembered that for many years Qwest was a regulatory monopoly. Clearly, the United States Congress and the Oregon Legislature were well aware that Qwest and other ILECs had historical monopolies when they enacted deregulation statutes. Nevertheless, they established deregulatory schemes allowing for deregulation if a company like Qwest can meet certain criteria, which Qwest clearly has in Oregon (and elsewhere) for its switched business services. Again, however, the deregulation statute at issue does not require a "market share" test.

Accordingly, and as Qwest shows in more detail in section II.A. of its Statement of Pertinent Factors, *supra*, Qwest's significant access line decreases throughout all rate centers in Oregon, coupled with high CLEC market shares, clearly shows there is *service competition* in the



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Oregon business services market. Given that there is also price competition for such services as Qwest has demonstrated, and discusses below, Qwest respectfully submits that the Commission is required to deregulate such services pursuant to ORS 759.030(3).

**B. <u>There is price competition for Qwest switched business services in Oregon</u>**

Qwest has also shown that there is *price competition* for switched business services in Oregon. (Qwest/1, Brigham/39-40; Qwest/25, Brigham/67-68; Ex. Qwest/9 (matrix of Qwest and CLEC services and prices).) It has done so by showing that its rates, terms and conditions are comparable to those of its competitors for similar services. Qwest has also shown that there is price competition based on its declining access lines and market shares.

**1. <u>The alternative providers' comparable rates, terms and conditions</u>**

While Staff released only limited pricing information from the CLEC Survey in its Exhibit Staff/112, its own analysis (see Ex. Staff/112) showed that there is price competition for basic exchange (1FB) service. (Qwest/25, Brigham/61-62.) More importantly, however, Qwest showed that there are many services which both Qwest and CLECs offer that provide substitutes for 1FB service, with comparable and competitive prices. (Qwest/25, Brigham/61-64, 64-67, see also Ex. Qwest/9 (matrix of Qwest and CLEC services and prices).) Qwest also demonstrated that Qwest and CLECs focus on providing service features, packages and bundles (and not merely stand-alone 1FB service), again with comparable and competitive prices. (Qwest/25, Brigham/61-63; Tr., pp. 64-66.)[34] For example, Qwest showed that its Qwest Choice Business packages and other bundles in Oregon were very competitively priced vis-à-vis its competitors, and it compared its package and bundle prices with numerous competitors to prove the point.

[34] Unfortunately, Staff focused exclusively on 1FB services in making its price competition comparisons, and thus did not analyze or consider add-on services, service packages and bundles. However, in today's marketplace, few competitors solely focus on providing service to stand-alone 1FB customers who do not order any add-on features. The evidence was replete with data that the vast majority of business customers nationally purchase a bundle of services (as high as 75%), and that likewise, a vast majority of Qwest 1FB lines in Oregon



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(Qwest/25, Brigham/63-68; Qwest/1, Brigham/72; Ex. Qwest/9 (10-page matrix comparing Qwest's service prices with those of 10 major competitors); Ex. Qwest/11 (wireless pricing); Qwest/1, Brigham/40-41; see also Qwest/1, Brigham/47-60 (describing 10 different CLECs' services and offerings); Ex. Qwest/44 (Qwest Choice business service description); Ex. Qwest/45 (Qwest Choice bundles).)

Further, Qwest showed other indicia of price competition, such as the fact it has filed a competitive response tariff (often called a "WinBack" tariff) to better compete in the competitive local exchange marketplace, and to attract and retain customers. (Qwest/25, Brigham/66-67; Ex. Qwest/46 (Qwest Competitive Response tariff).) Qwest also demonstrated that it has offered numerous promotions and discounts in order to retain and attract customers, again in response to the price competition for these switched business services. (Qwest/25, Brigham/67.)[35]

### 2. <u>Qwest's declining access lines demonstrate there is price competition</u>

Finally, the fact that Qwest has experienced declining access lines and market share is another strong piece of evidence that shows there is price competition for Qwest's switched business services in Oregon. Clearly, if the alternative providers' prices were not comparable to Qwest's prices, it is highly unlikely that Qwest would have experienced such declines in its business services access lines and market share. It stands to reason that business customers

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[**Confidential- XX**] are either provisioned as a package [**Confidential- XX%**] or with one or more features [**Confidential- XX%**]. (Qwest/25, Brigham/61-62.)

[35] Staff witness Mr. Chriss had several theories as to why Qwest may not have lowered some prices in response to price competition. (See e.g., Staff/100, Chriss/47-48.) However, as Qwest showed, such speculative arguments are without merit, especially because the loss of business customers is not an activity that increases profitability for Qwest, and Qwest could not act in an anti-competitive manner or as a monopolist. (Qwest/25, Brigham/68-70; Qwest/51, Fitzsimmons/35 (the testimony regarding constant prices is incomplete and misleading, the response to competition does not determine the existence of competition, and reducing prices may not always be appropriate).) Indeed, Mr. Chriss admitted that, despite Qwest being deregulated to one extent or the other in many other states, he is not aware of *any* instances in which Qwest has acted in such a manner after its services had been deregulated. (Qwest/25, Brigham/70; Qwest/51, Fitzsimmons/35-36 (providing several reasons why Qwest could not engage in predatory pricing or other similar anti-competitive conduct); see also Tr., pp. 314-315 (Mr. Chriss admitting that he did not know of any such instances); Ex. Qwest/48 (Staff data response); see also Tr., pp. 133-135 (Denney).) Mr. Chriss also admitted that his theories were speculative, hypothetical or theoretical. (See e.g., Tr., pp. 278-279, 319-321, 327-328, 330-331, 334-336, 337-338.)



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would not be migrating to CLECs and other competitive options if such alternative providers did not have attractive prices that compare favorably to Qwest's charges.

Accordingly, there is clearly *price competition* for Qwest's switched business services in Oregon. Given there is also *service* competition as Qwest discusses above, Qwest respectfully submits that the Commission is required to deregulate such services under ORS 759.030(3).

## II. QWEST'S PETITION MEETS ORS 759.030(2) REQUIREMENTS, AND THUS THE COMMISSION SHOULD GRANT THE PETITION IN ITS DISCRETION

Qwest respectfully submits that, as it discussed in the previous section, its petition meets the requirements of ORS 759.030(3), which provides that the Commission *shall* grant a petition for deregulation if both *price and service competition* exist. However, even if the Commission were to conclude that there does not exist both price *and* service competition, as ORS 759.030(3) requires, the Commission *may*, in its discretion, still grant Qwest's petition if the Commission finds that (1) price competition exists, *or* (2) service competition exists, *or* (3) the services are subject to competition, *or* (4) the public interest no longer requires full regulation of these services. ORS 759.030(2). (Emphasis added.) Because Qwest's petition meets, at a very minimum, the requirements of ORS 759.030(2), Qwest respectfully submits that the Commission should deregulate these services in its discretion.

### A. Price competition exists for Qwest's switched business services in Oregon

Clearly, for the reasons set forth above, in section I.B., which Qwest incorporates fully herein, there exists *price competition* for Qwest's switched business services in Oregon. Qwest respectfully submits this finding, standing alone, should justify the Commission, in its discretion, to grant Qwest's petition, in all rate centers in Oregon, pursuant to ORS 759.030(2).

### B. Service competition exists for Qwest's switched business services in Oregon

In addition, for the reasons set forth above, in section I.A., which Qwest incorporates fully herein, there exists *service competition* for Qwest's switched business services in Oregon.


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Qwest respectfully submits this finding, standing alone, should justify the Commission, in its discretion, to grant Qwest's petition, in all rate centers in Oregon, pursuant to ORS 759.030(2).

**C. Qwest's switched business services in Oregon are "subject to competition"**

Given there is both price and/or service competition for Qwest's switched business services in Oregon, it stands to reason that, by definition, and at a very minimum, these services in Oregon are "subject to competition." Moreover, Staff witness Mr. Chriss defines "subject to competition" as services in which "there exists active competitors or the threat of competitive entry sufficient to provide customers protection against the exercise of market power." (Staff/100, Chriss/60.) Qwest certainly believes that it clearly meets that definition here, in all Qwest rate centers in Oregon. Accordingly, Qwest does not believe more needs be said about the "subject to competition" requirement, and thus it hereby incorporates its arguments from subsections I.A. and I.B. above. Moreover, even if the Commission were to find that price *and* service competition do *not* exist, or that price competition does not exist, *or* that service competition does not exist, it should, at a very minimum, find that these switched business services are "subject to competition," and thus the Commission should deregulate these services in its discretion pursuant to ORS 759.030(2).

**D. The public interest no longer requires regulation of Qwest business services**

The last statutory criteria or requirement allowing the Commission to deregulate a telecommunications service in its discretion pursuant to ORS 759.030(2) is if the Commission finds that the public interest no longer requires full regulation of such services. ORS 759.030(2)(d); OAR 860-032-0025(3)(d). As it stated, although Qwest does not know for certain what other factors the Commission may deem relevant in evaluating this petition, it believes that this criterion is closely tied to the Commission's role in considering the public interest, and thus Qwest will address other factors that may not fit squarely into the statutory requirements of ORS



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750.030(2) and (3) or into the other consideration factors of ORS 759.030(4). Qwest will show that, for a number of reasons, the public interest no longer requires full regulation of Qwest's switched business services, and thus the Commission should deregulate such services.

**1. <u>Qwest's declining access line counts show there is competition</u>**

As stated, while there is no requirement in Oregon that Qwest lose a specified level of market share before deregulating its telecommunications services, Qwest's declining business access lines and market shares demonstrably show there is significant price and service competition for its switched business services. Qwest will not repeat its analysis set forth in section I.A.2. of its Argument, *supra*, but merely mentions that these significant declines in business access lines and market shares show that, at a very minimum, the public interest no longer requires regulation of Qwest's switched business services.

**2. <u>Qwest does not have significant market power</u>**

Eschelon's and TRACER's witnesses argue that Qwest may have "market power." (See Eschelon/1, Denney/7-8, 10-12, 33; TRACER/100, Cabe/12-15, 49.) However, Qwest clearly does not have market power such that it can raise prices.

First, contrary to what Mr. Denney argued, lack of CLEC competition in any particular geographic area is not evidence of Qwest market power, especially since Qwest is obligated to serve all areas in its service territory, including high-cost and rural areas. CLECs, however, can decide whether or not to enter a particular geographic area. (Qwest/51, Fitzsimmons/15-16.)

Further, although these same witnesses argued that "market concentration" is an indicia of market power (Eschelon/1, Denney/8, 10; TRACER/100, Cabe/12), such measures (like HHI and CR4 calculations) are poor indicators of market power for several reasons. For example, and as Mr. Chriss observed (Staff/100, Chriss/20), there is no necessary relationship between market concentration and market power, or the exercise of market power. (Qwest/51, Fitzsimmons/16-



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17.)  Further, as Dr. Fitzsimmons noted, it is not really appropriate to correlate any relationship between market concentration and market power in a market like telecommunications that is in transition from franchise monopolies to competition, especially given such rapid technological change.  (Id., p. 17.)  HHI and CR4 calculations are also static and thus do not capture market dynamics that clearly constrain Qwest's ability to have market power.  (Id., pp. 17-18.)  Finally, as noted, the HHI and CR4 calculations here are based solely on ILEC and CLEC data, and thus do not account for intermodal competition from wireless, VoIP and email.  (Id., pp. 18-19.)

### 3. <u>The Commission should ensure there is parity among providers</u>

Qwest submits that the Commission should treat it in the same manner as other similarly-situated carriers.  In Oregon, Qwest is the *only* business services provider among its competitors that this Commission fully regulates.  This is unnecessary given the evidence of switched business services competition in Oregon that Qwest has presented.  In short, Qwest simply seeks *parity* with its competitors.  (See e.g., Qwest/1, Brigham/10; Qwest/25, Brigham/94.)

### 4. <u>Many Qwest states have found Qwest's business services competitive</u>

Qwest has demonstrated that numerous other states in Qwest's region (at least nine) have either deregulated Qwest's business services or have found them to be competitive under their regulatory schemes.  (Qwest/1, Brigham/83-87.)  Qwest recognizes, of course, that this Commission is not bound by what other states do, and that each state will have its own level of competition and standards.  Nevertheless, commissions and legislatures in other states—just like this Commission—have the public interest as their core goal.  Qwest does not believe that these states would have taken such actions if they were against the public interest.

#### a. <u>The Washington business services order</u>

An example of other states' decisions is the deregulation of analog (and later, digital) switched business services in Oregon's neighbor to the north, Washington.  (See Qwest/1,


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Brigham/86; Ex. Qwest/59 (official notice), Order No. 17, Order Granting Competitive Classification (December 22, 2003), docket UT-030614.)[36] In Washington, the statutory and administrative criteria (RCW 80.36.330) for the classification of a competitive service (akin to exemption from regulation here in Oregon) is remarkably similar to that in Oregon. (See Qwest/59, pp. 4-5, ¶¶ 5-9; Tr., p. 264.) In that proceeding, Washington Staff recommended that the Commission grant Qwest's petition in its entirety, despite opposition from various intervenors. (Id., p. 5, ¶ 10.)

The Washington Commission agreed with Staff and Qwest, and thus granted the petition. (Ex. 59, p. 48-50, ¶¶ 138-146; Tr., p. 265.) Specifically, it found that market share and market power analyses appropriately include CLEC competition provided through UNE-P, UNE-L and CLEC-owned facilities, that CLECs provide close substitutes for Qwest's services, and that resale is a meaningful measure of competition. Further, it rejected arguments that UNE-P or UNE-L are not price-constraining. (Id., pp. 36-37, ¶¶ 95-97; Tr., pp. 269-270)[37] The Commission found that Qwest's services were subject to effective competition because (1) customers have reasonably available alternatives, (2) there is no significant captive customer base, and (3) CLEC analog services, provided utilizing UNE-P, UNE loop, special access lines, resale and CLEC-owned facilities, represent genuine alternatives (and essentially complete substitutes) for the Qwest business services. (Id., p. 48, ¶ 140.) Finally, it noted that CLECs enjoyed a 28% market share, and there were 27 to 40 active competitors, varying in size and

[36] More recently, in April 2005, the Washington Commission granted Qwest's petition to deregulate (or reclassify) its *digital* business services, including DSS, ISDN and Frame Relay, in 58 wire centers in that state. (Qwest/25, Brigham/86.) However, because the Commission did so in a public meeting, through a tariff filing, there is no written order. (Id., fn. 104.)

[37] The fact the Washington order was issued before the FCC issued its Triennial Review Remand Order (TRRO) is irrelevant. This is especially so because the FCC found that CLECs are not impaired without UNE-P, Qwest now provides QPP in place of UNE-P, and is obligated to provide QPP through mid-2008, and CLEC market shares in Oregon are higher than the 28% CLEC share in Washington, even if UNE-P and QPP are not considered.

reach. (Id.)[38] Thus, the Commission concluded that Qwest had met its burden to show that its analog business services were subject to effective competition, and deregulation of them was in the public interest. (Id., p. 50, ¶ 146.)[39]

Qwest recognizes Oregon is not Washington, and this Commission does not have all of the details about the competitive landscape in Washington, other than a rather detailed 54-page order. Moreover, Qwest does not argue the Commission is somehow "bound" by Washington's (or any other states') actions in this regard. Nevertheless, Qwest believes that this order, and others, are instructive. Further still, both the Washington Commission and Staff concluded that it was in the public interest to grant a business services deregulation petition with a *28%* CLEC market share statewide (which included both UNE-P and resale) that was far lower than the Oregon CLEC market share calculated in this proceeding. At a minimum, Qwest respectfully submits that the Commission should *strongly consider* the Washington order, and its rationale, and not dismiss it simply because Oregon is not Washington. (See e.g., Tr., pp. 265, 274 (Mr. Chriss dismissing consideration of the Washington order because "we're not Washington").)

**b. <u>Other states' deregulation of Qwest business services</u>**

Numerous other states have deregulated certain Qwest business services. (See Qwest/1, Brigham/83-87.) These include Utah (all business service prices), Iowa (all retail residential and business local exchange services, except for single line flat-rated residential and business service prices), Colorado ("market regulated" services, including all other business services, except for 1 to 5 flat-rated, message or measured business access lines), Minnesota (business basic exchange services for customers with four or more lines in numerous competitive areas), Idaho (all retail

[38] Qwest also provided calculations at more granular levels, such as by exchange and wire center, and by mode of competition. However, like here, some data was consolidated in order to mask highly confidential information. (Qwest/59, pp. 11-12, ¶ 25.)

business service prices, except for basic single line service), North Dakota (all retail business service prices), and South Dakota (all business switched services prices). (Id.; see also Exs. Qwest/21-Qwest/24.) Again, Qwest does not contend that these other states' actions are binding on this Commission, and even though Staff did not review any other deregulation orders (Tr., p. 274), Qwest does believe the Commission should consider them in its analysis of this petition.

#### c. The deregulation orders in other states provide persuasive evidence that the public interest no longer requires regulation <u>of Qwest's switched business services in Oregon</u>

Qwest submits that the fact that many other Qwest states have deregulated Qwest business services or found Qwest's business services to be competitive is persuasive evidence that deregulation is appropriate here in Oregon as well. (Qwest/1, Brigham/83-87.) This is especially so because here in Oregon, if the Commission finds there is competition, as these other states have done, the regulatory scheme (ORS 759.030) dictates that the Commission shall, or may (depending on the depth of competition), deregulate such services in response to a petition for deregulation. Qwest respectfully submits this Commission should make a similar finding in this proceeding.[40]

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[39] As in Oregon, Washington law permits the Commission to reclassify (reregulate) a telecommunications service if such reclassification would protect the public interest. Compare ORS 759.030(3)(b) with RCW 80.36.330(7). (See Qwest/59, p. 54 (Appendix A).)

[40] Although each state has its own deregulation scheme, many states have statutory or administrative factors remarkably similar to those in Oregon. In fact, other states have *remarkably similar criteria* in determining whether to deregulate or to find a service to be competitive. For example, Iowa, Washington, Arizona, Colorado, South Dakota and Montana all require their commissions to consider the following factors: (1) the number, size and distribution of alternative providers of the service, (2) the extent to which services are available from alternative providers in the relevant market (or geographic area), (3) the ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions (or just and reasonable rates, or reasonable and comparable rates), (4) barriers to entry, and (5) other factors similar to those in Oregon. See e.g., Iowa Code, § 476.1D(1), 199 IAC 5.6(1); RCW 80.36.320, 80.36.330, WAC 480-121-061, 480-121-062; Ariz. Admin. Code R14-2-1108; CRS 40-15-207, 40-15-305; SDCL 49-31-3.2; MCA 69-3-807. Thus, although some states' deregulation schemes provide for reduced regulation (instead of "deregulation" *per se*), many of these states do so upon a showing that there exists price and/or service competition or that services are subject to competition, under standards and factors remarkably similar to those in Oregon.

All of these states have based their decisions on evidence that there is competition for business services. There is simply no reason for this Commission to arrive at a different conclusion, especially given the overwhelming evidence that Qwest has presented. Obviously, one cannot reasonably argue that all of these other states somehow "got it wrong." Clearly, these states are entrusted with protection of the public interest and consumer benefit, and yet each found Qwest's switched business services to be subject to competition. The evidence that Qwest has presented here shows that Oregon is not materially different from these other states, and in fact, compared to Washington, the petition and market share data in this case is much stronger. In short, Qwest's switched business services should be deregulated in Oregon.

### 4. Legislative policy encourages competition and deregulation

Moreover, as Dr. Fitzsimmons states, a central goal of telecommunications public policy in the United States is the promotion of the investment and innovation necessary to maintain a dynamic and modern network that is capable of providing high quality, ubiquitous services to customers at affordable prices. Whereas regulation was formerly the primary means to achieve this policy, policymakers now recognize that competition is the appropriate means to do so. As the 1996 Act makes clear, Congress intended for both the promotion of competition *and* the *reduction of regulation* as the means for producing the desired goal of a competitive market. The Act recognizes that there is an inherent tension between competition and regulation, and that as the country moves toward increasingly competitive markets, unnecessary regulation is actually harmful to achieving these policy goals. Unnecessary regulation in competitive markets also has societal costs, such as at the expense of investment and innovation incentives that are crucial for the telecommunications industry's long-term benefits. Finally, the shift from regulation to competition in order to achieve these policy goals requires a real commitment to the process. Thus, a reduction of regulation where competitors have made significant strides, and where there are conditions for the continued development of competition in place, as is the case here, is necessary for competition to fully develop. (See Qwest/51, Fitzsimmons/2-5, 38-39.)

Deregulation would also be consistent with Oregon law and legislative intent and policy. For example, the Oregon Legislative Assembly has found and declared it is a goal of the state to encourage innovation within the telecommunications industry by a balanced program of regulation and competition, and has directed that the Commission administer the telecommunications statutes regarding telecommunications rates and services in accordance with such policy. See ORS 759.015; see also ORS 759.020, 759.025, 759.030, 759.050. Further still, the Commission is required to report to the Governor and Legislative Assembly with information on "specific actions taken by the commission to *reduce the regulatory burden* imposed on the telecommunications industry, *including telecommunications utilities*," as well as "specific actions taken by the commission to maximize the opportunities for telecommunications utilities and competitive telecommunications providers to achieve pricing flexibility, including rate rebalancing, *exemption from regulation* and streamlined regulations." (Emphasis added.)

**5. <u>The Commission can reregulate Qwest's business services if needed</u>**

Finally, Qwest submits that it is confident it has presented a compelling case that Qwest's switched business services are subject to competition, and thus the Commission should deregulate these services as Qwest has requested. However, Qwest also notes that even if the Commission were not 100 percent certain, or has concerns that perhaps the business services market in Oregon will not remain competitive, the Commission has sufficient recourse. Oregon law gives the Commission the power and authority to *reregulate* Qwest's switched business services (or any previously-deregulated telecommunications service) if the Commission "determines an essential finding on which the deregulation was based no longer prevails, and reregulation is necessary to protect the public interest." ORS 759.030(3)(b). This statutory authority should give the Commission the comfort and assurance that the public interest will be protected if future events prove to be different than anticipated.

## III. Responses to the parties' proposals

Two parties (Staff and XO) made proposals or recommendations to the Commission regarding Qwest's petition. Qwest will focus on Staff's recommendation that the Commission grant Qwest's petition with respect only to basic business services (1FB), and their associated features and packages, in the Portland rate center only, as well as its recommendation that the Commission deregulate Qwest's Asynchronous Transfer Mode (ATM) and 800 services statewide. (See Staff/100, Chriss/60-65; see also Qwest/25, Brigham/91-98; Tr., pp. 294-295.) Staff also recommends that three conditions be imposed in the Commission's order, two of which are unnecessary.

The proposal that XO/Time Warner/Integra make (XO/100, Knowles/9-10) is utterly without merit. (See Qwest/25, Brigham/75-90.) Finally, TRACER and Eschelon, the only other parties submitting testimony and appearing at the hearing, do not make any specific proposals, but merely recommend that the Commission deny Qwest's petition in its entirety. (TRACER/100, Cabe/50; Eschelon/1, Denney/32-33.) Clearly, such recommendations are without merit, and the Commission should reject them in their entirety as well.

### A. The Commission should reject Staff's recommendation of denial of 1FB services in rate centers outside of Portland and for non-1FB services

Preliminarily, Qwest appreciates that Staff has recommended that the Commission grant Qwest's petition regarding basic (1FB) services, and their associated features and packages, at least in the Portland rate center. (See Staff/100, Chriss/60-61; see also Tr., p. 298 (finding Portland to be "pretty competitive").) Qwest also appreciates the recommendation to deregulate ATM and 800 services throughout the state. Nevertheless, Qwest does not believe that Staff's



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recommendation to deny the petition with respect to the other rate centers in Oregon, and the other services, is reasonable or appropriate.

### 1. <u>There is no logic to not recommending deregulation for other services</u>

First, there is simply no logic to Staff's recommendation to deregulate only ATM and 800 services, and 1FB service only in Portland, while *not* recommending deregulation of advanced services like analog PBX, digital PBX (DSS trunks), Centrex, ISDN-BRI, ISDN-PRI and Frame Relay. As Qwest has pointed out earlier, Staff has defined the relevant product market far too narrowly, and has failed to account for the substitutability between different switched business services. It makes no sense to deregulate 1FB service in Portland, while keeping PBX, Centrex and ISDN services under the umbrella of regulation, especially since the evidence in this case demonstrates that these services are very competitive. As demonstrated, business customers substitute PBX, Centrex, ISDN and other services for 1FB service, and therefore these services are in the same relevant product market and should all be deregulated.

In essence, Staff argues that these non-1FB services should not be deregulated because the CLEC Survey results did not contain sufficient *quantitative* data to justify such deregulation. (Staff/100, Chriss/37.) Staff provided no other justification for its recommendation. (Id.) However, despite the CLEC Survey's lack of data, Qwest has provided significant evidence in that these services are indeed competitive, and, in fact, several competitors clearly focus on providing these more complex and advanced services to business customers. The Commission should not allow the limitations of the CLEC Survey responses to dictate a result in this case that does not make sense, and that is contrary to all of the other evidence in the case. Quite simply, if



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1FB services meet the criteria for deregulation in the Portland rate center, then all switched business services should be deregulated since they are all part of the same product market.[41]

### 2. **Qwest meets the deregulation criteria for all services in all areas**

Moreover, Qwest has demonstrated that it has met the criteria defined in ORS 759.030(4) for *all petition services*, and that each of these services should be deregulated in *all of Qwest's rate centers*. It is not surprising that some rate centers may have higher CLEC market shares than others, and that the Portland rate center is among the leaders of the pack, but Qwest proved that there is sufficient competition in every rate center, and this competition constrains Qwest's ability to raise prices and exercise market power.[42] More importantly, and as the Washington Commission observed, deregulation is warranted if the *market structure is sufficiently competitive*. (See Qwest/59, p. 14, ¶ 30.)

### 3. **Qwest's offer to cap price increases should alleviate Staff's concerns**

Third, in order to address Staff's apparent concerns about rural Oregon business customers, or those in Rate Groups 2 and 3, Qwest agreed to commit to "capping" any increase in the rural rates for basic business service (1FB) to the level of an increase that might occur in urban areas such as Portland if the Commission were to approve Qwest's petition. (Qwest/25, Brigham/92; Tr., pp. 66-67, 295-297.) Staff does not support Qwest's proposal, however, citing "too many data issues" (ostensibly the Commission's enforcement of any such condition) and what Qwest believes is Staff's over-reliance on only the competitive survey data in the case. (Tr., pp. 354-356 (redirect), 356-358 (re-cross).) Nevertheless, as to the competitive data, Qwest disagrees for the reasons set forth above. As to "data issues," Mr. Chriss did not convincingly

[41] There may also be various issues, such as from a marketing, billing or systems (IT) standpoint, if the Commission were to agree with Staff to limit deregulation only to 1FB services, and only in the Portland rate center.

[42] Indeed, there are at least four other rate centers with higher CLEC market share than Portland's [**Confidential**- **XX%**] share. These four rate centers are [**Confidential**- Bend (**XX%**), Black Butte (**XX%**), Redmond (**XX%**) and Baker (**XX%**)].

show what these data or enforcement issues are, or why they could not be addressed as a condition in the order, especially since the Commission retains general powers to investigate all companies, to seek information, and to re-regulate if appropriate. (Id., pp. 356-358.)

### 4. The Commission should reject Staff's proposed Conditions 2 and 3

Finally, Qwest also disagrees with two of the three conditions that Staff proposes in its testimony. (Staff/100, Chriss/62-64.)[43] The Commission should wholly reject both of these proposed conditions (Conditions 2 and 3).

For example, there is no basis for requiring Qwest to disclose to customers information about prices charged to "customers of comparable size requirements," to notify its customers of the right to request information relating to prices charged to customers of comparable size requirements, or to notify customers about filing complaints with the Commission regarding discriminatory pricing (Condition 2). Although Qwest will certainly include prices for most standard business services (e.g., 1FB, packages) on its website, and thus customers will be able to compare Qwest's rates with its competitors' rates, requiring Qwest to make a special effort to advise customers of prices charged to other customers is unduly burdensome, serves no purpose and certainly does not provide parity among providers. Nor should there be a requirement to divulge the terms of any contract to other customers so they can see if another customer "got the same deal." In a competitive market, no firm is required to release the rates and terms of its contracts to its competitors or to its other retail customers. (Qwest/25, Brigham/93-95.)

There is also no basis to require Qwest to "functionally separate" its wholesale sales employees from its retail sales employees or to agree it "will not share the data from the wholesale business function with its retail business function" (Condition 3). This is especially so

[43] Qwest does not have any objections to Staff's proposed Condition 1, which would condition deregulation on Qwest's agreement to continue offering basic business services on a stand-alone basis. (Qwest/25, Brigham/93.)



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421 SW Oak Street, Suite 810
Portland, OR 97204

because of all of the protections in the 1996 Act and Qwest's extensive policies and practices that safeguard wholesale data from its retail operations. (Qwest/25, Brigham/95-98.) These conditions are simply unnecessary and costly.

### B. <u>The Commission should reject the irrelevant XO special access proposal</u>

Finally, the Commission should reject out of hand the irrelevant "special access" pricing proposal that XO, Time Warner and Integra make through the testimony of XO employee Rex Knowles. (Ex. XO/100.) First, this is not a special access pricing or cost docket, but rather, a deregulation docket about Qwest *retail* switched business services. (Qwest/25, Brigham/76.) Second, such a proposal would violate the FCC's *TRRO*, and thus the Commission does not have jurisdiction to adopt the proposal. (Qwest/25, Brigham/76-81; Tr., pp. 76-77.) In addition, this Commission does not have jurisdiction over interstate special access pricing or the ability to adjust Qwest's intrastate special access prices which are deregulated or subject to price cap regulation under ORS 759.410. (Qwest/25, Brigham/82-87; Tr., pp. 75-77, 120, 249-250 (Knowles).) Third, Mr. Knowles' concerns are really limited to only a few wire centers, and even in those wire centers, Qwest must still offer DS1 and DS3 loops at just and reasonable rates. (Qwest/25, Brigham/30, 77, 81-82; Tr., pp. 112-115.) Fourth, Mr. Knowles focuses on interstate special access prices and ignores Qwest's lower intrastate special access pricing. (Qwest/25, Brigham/82-85; Tr., pp. 82, 248.)

Finally, Mr. Knowles' argument about CLEC lack of access to buildings is without merit, and is based purely on speculation and not on any concrete evidence or personal knowledge. (Id., pp. 87-88; Exs. Qwest/50 (XO data response); Ex. Qwest/62 (Staff data response to no. 2-14).) The same is true about his arguments about the impact of the SBC/AT&T and Verizon/MCI mergers, especially since those mergers will not eliminate any competitors in Oregon, as they would in those states and/or areas of Oregon where SBC and Verizon are



QWEST
421 SW Oak Street, Suite 810
Portland, OR 97204

incumbents. (Qwest/25, Brigham/88-90; Tr., pp. 68-74, 88-93.) accordingly, the Commission should reject this XO special access pricing proposal in its entirety.

## CONCLUSION

For all of the foregoing reasons, Qwest respectfully submits that it has met the statutory and administrative criteria for the deregulation of all of Qwest's switched business services, in every rate center, in Oregon. Accordingly, Qwest respectfully requests the Commission grant Qwest's petition, and thus exempt these services in Oregon from any further regulation.

DATED: December 9, 2005.

Respectfully submitted,

QWEST

By: ______________________________


Alex M. Duarte, OSB No. 02045<br>
Qwest<br>
421 SW Oak Street, Suite 810<br>
Portland, OR 97204<br>
503-242-5623<br>
503-242-8589 (facsimile)<br>
Alex.Duarte@qwest.com


Attorney for Qwest Corporation

**CERTIFICATE OF SERVICE**

**UX-29**

I hereby certify that on the 9th day of December, 2005, I served the foregoing **QWEST CORPORATION'S OPENING POST-HEARING BRIEF** in the above entitled docket on the following persons via U.S. Mail (or via e-mail if so indicated), 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.

*Gregory J. Kopta
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

*Michel Weirich
Department of Justice
1162 Court St., NE
Salem, OR 97301-4096

*Alex M Duarte
Qwest Corporation
421 SW Oak St., Ste. 810
Portland Or 97204

Dennis Gabriel
Oregon Telecom Inc
PO Box 4333
Salem, OR 97302-8333

*Karen J Johnson
Integra Telecom Of Oregon Inc
1201 NE Lloyd Blvd.
Suite 500
Portland, OR 97232

*Rex Knowles
XO Communications, Inc.
111 E Broadway, Ste. 1000
Salt Lake City, UT 84111

*Lisa F Rackner
Ater Wynne LLP
222 SW Columbia St.
Suite 1800
Portland, OR 97201-6618
e-mail: lfr@aterwynne.com

Lawrence Reichman
Perkins Coie LLP
1120 NW Couch St.
10th Floor
Portland, OR 97209-4128

Brad Schaffer
Rio Communications Inc
2360 NE Stephens
Roseburg, OR 97470

*Greg Diamond
Covad Communications Co.
7901 E. Lowry Blvd.
Denver, CO 80230

*Sarah Wallace
Ater Wynne LLP
222 SW Columbia, Ste. 1800
Portland, OR 97201-6618
sek@aterwynne.com

Brian Thomas
Time Warner Telecom Of Oregon LLC
223 Taylor Ave. N.
Seattle, WA 98109-5017

*Richard Cabe (Via e-mail only)
TRACER
Richard@salidamillwork.com

*Douglas K. Denny
Eschelon Telecom of Oregon, Inc.
730 Second Avenue S.
Suite 900
Minneapolis, MN 55402-2489

DATED this 9th day of December, 2005.

**QWEST CORPORATION**

By: ______________________________

ALEX M. DUARTE, OSB No. 02045
421 SW Oak Street, Suite 810
Portland, OR 97204
Telephone: 503-242-5623
Facsimile: 503-242-8589
e-mail: alex.duarte@qwest.com
Attorney for Qwest Corporation