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February 21, 2006

Frances Nichols Anglin
Oregon Public Utility Commission
550 Capitol St., NE
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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 Post-Hearing Reply Brief, along with a certificate of service.

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

Sincerely,

Carla M. Butler

CMB:
Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DOCKET NO. UX 29

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

PUBLIC VERSION

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Petitioner Qwest Corporation ("Qwest") respectfully submits its post-hearing reply brief pursuant to Administrative Law Judge Allan Arlow's February 14, 2006 Ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a remarkably consistent approach, all of the responding parties (Staff, TRACER, Eschelon and the Joint CLECs (hereafter collectively "responding parties")) express similar themes: alleging that Qwest has not met its "burden of proof" and has not submitted the "sufficient evidence," "persuasive evidence" or "hard data" about "sufficient competition" allegedly required in order for its petition for deregulation to be granted. What is telling, however, is that despite the responding parties' rhetoric about Qwest's alleged "lack of proof," its presumed "market power," its supposedly "high market share," its existing "pricing flexibility," or the alleged existence of "barriers to entry," they do not seriously address the substantial evidence that Qwest provides. That is, they seem to believe that the only competent and credible evidence is their versions of "hard data" (cross-elasticity studies, customer surveys, and the like), and thus they almost completely dismiss or ignore most of Qwest's substantial evidence, whether it is testimonial evidence (testimony of Robert Brigham and William Fitzsimmons), extensive quantitative evidence (such as its business access line losses and market share losses) or other extrinsic evidence (such as the publicly-available information about competitor services and offerings). The responding parties erroneously seem to believe that so long as Qwest has not presented a panoply of "quantifiable studies," "quantifiable data" or "hard data" (including empirical evidence of exactly which CLEC customers purchase exactly which CLEC services, and exactly which of these CLEC services are substitutes for exactly which Qwest services), Qwest has purportedly failed to meet its burden of proof.

The problems with the responding parties' approach are numerous. They attempt to make a straight-forward deregulation case into something much more complicated and onerous by re-

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writing or re-defining the statutory requirements to construct an unreasonable benchmark (a complex and irrelevant "economic analysis" under the rubric of a "disciplined" approach) that could never be met. For example, while they often refer to the "burden of proof" or "burden of persuasion," in almost 150 total pages they make only a couple of passing references to the appropriate standard, which is whether Qwest has presented "substantial evidence" in support of its petition. They undoubtedly fail to do so because they would rather hold Qwest up to what is essentially a "beyond a reasonable doubt" or "perfect evidence" standard. Thus, the responding parties harp on what they perceive as failings or inadequacies of Qwest's evidence by merely dismissing all of Qwest's price and service competitive evidence as "unpersuasive," "anecdotal" or "vague" (simply because they say it is so). These parties incorrectly characterize and summarize Qwest's testimony, and raise red herrings (such as the alleged "confusion" regarding the market definition, or requiring Qwest to "prove" what services CLECs provide when Qwest offers UNE-L). They do so as they seek to hold Qwest to an absolutely impossible evidentiary standard that proves, *without any possible doubt* and with a level of *certainty* they know Qwest (or anyone else) could never attain, that there is "sufficient competition." In essence, the responding parties set the bar so exceedingly high, with so many proverbial hoops to jump through, that no matter how much time, effort and resources Qwest were to put into this case, and no matter how much competition there actually is in Oregon, it could never meet the deregulation burden for the services at issue.[1]

[1] In an otherwise hard-line position opposing Qwest's petition for deregulation of switched business services, Staff does make one exception and curiously recommends deregulation of basic (1FB) services and their associated features and packages in the Portland rate center, and statewide deregulation of two other services (800 and Asynchronous Transfer Mode (ATM) services). However, for the reasons set forth later in this brief, even then Staff's recommendation is extremely perplexing, and further, is inconsistent with its purported rationale for recommending against deregulation of the other services in the other rate centers. Moreover, as further discussed in this brief, the Staff's recommendation to deregulate only 1FB services and its associated features and packages in the Portland rate center, but not the more advanced services in that admittedly competitive rate center, is surprising and fails to even recognize the real-world level of competitive activity in the business telecommunications market in Portland, let alone in the remaining Qwest rate centers in Oregon.

Qwest respectfully submits that the Commission needs to look at the "big picture," and, seeing it through the appropriate evidentiary and real-world lens, should ask itself several important questions, such as: Has Qwest presented substantial evidence that there is sufficient competition such that its deregulation petition should be granted? Have the responding parties submitted "substantial evidence" (or merely opinions, speculation and red herring arguments) in their attempts to defeat Qwest's petition? Are the responding parties truly viewing the evidence in a reasonable and objective manner in opposing the substantial evidence that Qwest has presented? That is, are they taking into consideration what the deregulation statute really requires, what the Legislature intended in enacting the statute, and what specific evidence (and weight of evidence) is sufficient (and attainable) under the circumstances (i.e., substantial evidence) for the deregulation of local business services in Oregon? Given the impossibility or impracticality of obtaining much of the information that the responding parties profess is necessary, is the evidence that Qwest presented substantial and sufficient enough to show that deregulation of Qwest's business services is warranted? Are the responding parties essentially demanding that Qwest submit "perfect" (but unrealistic) evidence that is impossible for it (or any other deregulation proponent) to produce? Or, stated differently, are they essentially requiring Qwest to prove its deregulation case with *absolutely certainty*, or *beyond a reasonable doubt*, instead of with substantial evidence?

Qwest submits that if the Commission were to ask itself these questions, it would conclude that Qwest has met its burden of proving the pertinent facts of its petition with substantial evidence. Obviously, there are always certain limitations in any case that do not permit a party to present an absolutely "perfect" case, including time and money, access to all of the facts, the impossibility of knowing with any certainty what another party or witness is thinking, and other such factors. Here, the limitations include the fact that Qwest's competitors (including responding

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parties) are not willing or legally required to provide Qwest with competitively-sensitive information about the *hundreds of services* they provide or the *thousands of customers* they have captured. More importantly, these competitors are not willing or legally required to provide any party with information about precisely which services each of their thousands of customers currently purchase from them, and precisely which services these customers purchased from Qwest (or another competitor) prior to purchasing them from such competitors.

Indeed, obtaining any competitive data is like pulling teeth (even for the Commission, not to mention Qwest), as the difficulty regarding the parties' obtaining what was very generalized (and aggregated and masked) data for the CLEC Survey so starkly illustrated. Yet, despite this, the responding parties seek God-certain proof regarding precisely (1) which services that all (of about 50) CLECs offer, (2) which services are provided over all (of the more than 180,000) CLEC business access lines, and further broken down by CLEC, (3) which Qwest (or other competitor's) services each of the CLEC customers migrated from, and (4) which CLEC services have been substituted for which previous Qwest (or other competitor) services.

While the discussion above bluntly highlights the absurdity of such an approach, it is precisely what the responding parties advocate. Although they would surely deny they really demand this type of impossible granular proof, how else could Qwest (or any party) show "that X number of CLECs provide Y services in Z wire centers," or perform an analysis of "all 4000+" services or "discern" "what CLECs are providing what services" to what customers, or "the level of competition for the individual services" provided by Qwest competitors.[2] Moreover, even if

[2] Other examples of such limitless evidence that the responding parties claim that Qwest should have provided included, but are not limited to: testimony and data about "customer purchasing patterns," "information about services actually provided to business customers by CLECs" (instead of the facilities Qwest provides to CLECs), evidence of specific Qwest customers who migrated to specific wireless competitors, "hard evidence" or "surveys" about actual wireless "subscriberships" of non-Qwest wireless customers, "hard data" about VoIP providers who have actually obtained Qwest customers, and cross-elasticity studies or customer surveys of wireline, wireless and VoIP services. (See e.g., SB, pp. 23-24; TB, pp. 21, 26; JB, pp. 8, and fn. 20; EB, pp. 25, 29-30; see

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Qwest *could*, in fact, present such evidence (assuming, of course, that (1) Qwest would be able to obtain it, (2) all CLECs would completely cooperate in providing the extensive information they would require, (3) all CLEC customers would provide their information, and (4) time and money were no object), could it be reasonably assumed that the responding parties would accept such evidence without objection or challenge? Or, assuming the availability of this evidence and the cost-benefit of obtaining it, would it be more likely than not that the responding parties would still seek ways to find flaws in the evidence in an effort to defeat the petition (such as, for example, because Qwest had not shown that 100% of the evidence was 100% certain)? In other words, would it be reasonable to conclude that *any* amount, level or weight of evidence would be likely to satisfy the responding parties that Qwest had presented "substantial evidence" for its petition? Qwest respectfully submits the parties' conduct and advocacy answers these questions.

The Legislature almost certainly did not intend to establish a deregulation process that would require a petitioner to engage in an almost two-year process, spend hundreds (if not thousands) of hours of internal resources, provide as much detailed competitive and other information as was reasonably available, and endure the onslaught of numerous parties with their own agendas (not to mention the Commission using up much of its resources), only to be told it could not meet its burden of proof simply because it could not disprove every conceivable possibility its adversaries might suggest is a basis for less-than-perfect competition. The law in general, and ORS 759.030 in particular, does not require such evidentiary perfection. Rather, in a case of this nature, the statute merely requires that the party with the burden of proof present substantial evidence in support of its petition.

Indeed, proof that the responding parties take this improper approach is found in the fact that despite almost 150 pages of seemingly coordinated response briefs, they spend surprisingly

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also JB, p. 11 (claiming that a 10-page matrix with a comprehensive listing of services and prices offered by 10 competitors was "very limited").)

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little effort actually addressing (and much less rebutting) Qwest's testimonial, quantitative, extrinsic or expert evidence. Rather, they simply repeat over and over the mantras that (1) "Qwest has not met its burden of proof," (2) Qwest has not presented any "hard data" or "real evidence," (3) Qwest has not followed a "disciplined" approach in presenting its evidence. Indeed, the responding parties are seemingly content to blind themselves to what they apparently do not want to see. However, Qwest has submitted competent substantial evidence, and thus the burden shifts to these parties to actually *rebut* Qwest's evidence with *specific facts*, and not merely opinions or speculation. It is also not enough merely to argue in conclusory fashion that Qwest's evidence is not persuasive or sufficient, or that it has not met its initial burden of proof.

Thus, the responding parties' actions, both in testimony and briefs (and throughout the docket), should lead any reasonable and objective observer to conclude that these parties are not able to view the evidence in any objective fashion, no matter what the evidence might show. The consistent approach taken by the parties in opposing Qwest's petition and their attempts to make the bar for approval of Qwest's deregulation petition so onerous, expensive and impossible to meet, confirm such conclusion.

In sum, and as stated, Qwest believes that when the Commission considers all of the substantial evidence that Qwest has presented, it should rise above the rhetoric and perform a real-world common-sense analysis of the substantial evidence that Qwest has provided in this case. With all due respect, Qwest believes that the vast majority of the arguments that the responding parties raise lack any real credibility, and thus they should be taken with the proverbial grain of salt. Although the responding parties have thrown every conceivable obstacle and argument against the wall in hopes that some would stick, and have demanded absolute certainty and perfection from an evidentiary standpoint, an objective view of the evidence reasonably leads to the conclusion that Qwest has met its substantial evidence burden of proof in this docket.

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The responding parties have provided a unison chorus regarding the alleged lack of "persuasive evidence," Qwest's burden of proof, Qwest's presumed "market power" or "high market shares," and alleged "barriers to entry" faced by CLECs. The Commission should have the courage to objectively view the evidence through the appropriate prism, with due regard to the appropriate substantial evidence standard. The Commission should not be swayed by the sheer number of responding parties opposing the petition, or the level of these parties' rhetoric, and should view the evidence in the proper light while giving it appropriate weight under the correct standard. In essence, viewing the evidence in its proper light and giving it its appropriate weight, under the correct standard, Qwest respectfully submits it has presented substantial evidence that there is sufficient competition for the Commission to grant its deregulation petition, for all services at issue, and in all rate centers.

ARGUMENT

I. THE APPROPRIATE REVIEW AND EVIDENTIARY STANDARDS

As mentioned above, the responding parties essentially attempt to re-write the statutory requirements of ORS 759.030 by holding Qwest to a "burden of proof" or "burden of persuasion" that would effectively require Qwest to "prove" its deregulation case *beyond a reasonable doubt*, or through some type of "perfect evidence" standard. However, that is not what the law requires.

First, ORS 759.030 is silent with respect to the quantum of evidence necessary for the Commission to find that price and/or service competition exists, that the services are subject to competition, or that the public interest no longer requires full regulation of the services at issue. There are also no specific standards for review in ORS Chapters 756 or 759. However, for purposes of a court reviewing the Commission's findings on judicial review, the court applies the "substantial evidence" standard of review. That is, the Commission's order must be supported by *substantial evidence* in the record. ORS 183.482(3)(c). "Substantial evidence" means any

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evidence that a reasonable person would use to reach the same conclusion. *Younger v. City of Portland*, 305 Or. 346, P.2d 262 (1988); *Matney v. Adult and Family Services Division*, 99 Or. App. 513, 517, 783 P.2d 528, 530 (1989). Substantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding. See ORS 183.482(8)(c); *Garcia v. Boise Cascade Corporation*, 309 Or. 292, 294, 295, 787 P.2d 884, 885 (1990). A court must "evaluate the substantiality of supporting evidence by considering *all* the evidence in the record." *Younger v. City of Portland,* 305 Or. 346, 356, 752 P.2d 262 (1988). (Emphasis added.) That is, the court must evaluate evidence against the finding as well as evidence supporting it to determine whether substantial evidence exists to support that finding. If a finding is reasonable in light of countervailing as well as supporting evidence, the finding is supported by substantial evidence. See *Armstrong v. Asten-Hill Co*., 90 Or. App. 200, 206, 752 P.2d 312 (1988).

In addition, although neither the Administrative Procedures Act (APA) or ORS Chapters 756 or 759 expressly prescribe a standard (or burden) of proof applicable to administrative proceedings like this one, Oregon courts have held that in an administrative hearing, the burden of proof "is by a *preponderance of evidence* in the absence of some legislative adoption of a different standard." *Staats v. Newman*, 164 Or. App. 18, 22, 988 P.2d 439, 441 (Emphasis added); *Gallant v. Board of Medical Examiners,* 159 Or. App. 175, 183, 974 P.2d 814 (1999); see also *Sobel v. Board of Pharmacy*, 103 Or. App. 374, 379, 882 P.2d 374, 379, 882 P.2d 606 (1994), *rev. den*. 320 Or. 588, 890 P2d 994 (1995); *OSCI v. Bureau of Labor and Industries*, 98 Or. App. 548, 555, 780 P.2d 743, *rev. den.* 308 Or. 660, 784 P.2d 1101 (1989). "Preponderance of the evidence" can be described best in terms of probabilities (i.e., that the proponent must prove that the existence of the fact in dispute is more probable than its non-existence). See *Cook*

v. Michael, 214 Or. 513, 519, 330 P.2d 1026, 1029 (1958) (citing Morgan, *Basic Problems of Evidence* (1954), p. 2.)

Accordingly, all that Qwest must prove in this proceeding is that there is substantial evidence, viewed by the preponderance of the evidence, to support its petition for deregulation of its switched business services. For the reasons set forth below, and in its testimony and opening brief, Qwest has presented substantial evidence, by a preponderance of the evidence, that it meets its burden of proof for deregulation of these services under ORS 759.030.

II. QWEST MEETS ALL STATUTORY AND ADMINISTRATIVE CRITERIA

There are various statutory and administrative criteria set forth in ORS 759.030(4) and OAR 860-032-0025(3) that the Commission is to consider in determining whether Qwest switched business services should be exempted from regulation. Under ORS 759.030(3)(a), these services *shall* be exempted from regulation if there exists price *and* service competition, and under ORS 750.030(2), these services *may* be exempted from regulation if (1) there exists price *or* service competition; (2) the services are *subject to competition*; *or* (3) the public interest no longer requires full regulation of such services. The responding parties address these statutory and administrative criteria, but despite much overheated and misleading rhetoric that is often out of context, they fail to convincingly rebut Qwest's evidence that these criteria have been met.[3] Qwest will first reply to the responding parties' arguments regarding the ORS 759.030(4) criteria, and then will reply to the responding parties' conclusions about the competition and public interest criteria under ORS 759.030(2) and/or ORS 759.030(3).

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[3] Qwest notes that the responding parties seem to be under the mistaken impression that the four criteria in ORS 759.030(4) and OAR 860-032-0025(3) are absolute tests which Qwest must pass with evidence beyond a reasonable doubt. However, as noted, the evidentiary standard is the preponderance of the evidence, and thus Qwest merely must meet the statutory requirements of ORS 759.030(2) or ORS 759.030(3) with a showing that it is more likely than not (or "more probable than not") that Qwest meets these standards. As for the criteria in ORS 759.030(4), they are just that- criteria for the Commission to consider. There is no requirement that Qwest meet any particular test; all that these criteria require is that the Commission consider them "as a whole" in its overall analysis. Thus, each of the criteria is merely part of the totality of the circumstances that the Commission is to consider. See e.g., Order No. 05-1241 (UD 13), p. 8.

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

This first statutory and administrative criterion 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). Qwest agrees that there are two dimensions to the relevant market: the *relevant product market* and *the relevant geographic market.*

1. The relevant market[4]

a. The relevant product market

In its testimony and opening brief, Qwest showed that the relevant product market should be defined to include *all* switched business services, as defined in Qwest's Petition, especially because there is *no dispute* that there is significant overlap between various switched business services and service packages. Indeed, the responding parties make much ado about the fact that "not *all* customers view *all* services as substitutes," and they further allege that Qwest did not present quantitative studies or surveys about substitutability, that Qwest's relevant product market was "too broad" or "broad-brushed," and that Qwest has failed to "adequately define" the relevant product market. Nonetheless, the responding parties do *not dispute* Qwest's evidence that customers often substitute one switched business service for another, and that such product substitution blurs the lines between various services and combinations of services and packages. (See e.g., Qwest Opening Brief ("QB"), pp. 11-15.) Moreover, they do not dispute 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. (*Id*., pp. 12-23, Qwest/25, Brigham/16; TRACER/100, Cabe/20 (admitting that "Centrex service was designed to compete with the combination of a customer premise PBX and PBX trunks to the ILEC central office"); Tr., pp.

[4] There is no dispute that although one of the criteria under ORS 759.030(4) is "the extent to which services are available from alternative providers in the relevant market," there is *no specific requirement* in ORS 759.030(2) or ORS 759.030(3) for the petitioner to "define" the "relevant market." (See e.g., Qwest/25, Brigham/4.)

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366-367 (Sloan).) Rather, they are content to simply argue the most extreme examples, such as that ISDN-PRI may not be a substitute for many customers' basic 1FB lines. (See e.g., TB, p. 20.)

Further, it is telling that the responding parties almost completely ignore Dr. Fitzsimmons's expert economic testimony (Qwest/51, Fitzsimmons/5-13) regarding the relevant product market.[5] Not only did they not ask Dr. Fitzsimmons, who has extensive and vigorous academic and telecommunications industry experience, any questions at the hearing (Tr., pp. 121-125), thus making all of his testimony completely unrebutted, but they again virtually ignore his testimony in their response briefs. Thus, they do not dispute Dr. Fitzsimmons' testimony that if, after considering the quality and prices of two services, significant numbers of customers consider them to be reasonable substitutes, then the services represent economic alternatives to each other. (QB, pp. 12; Qwest/51, Fitzsimmons/6; Tr., pp. 187-188, 190-192 (TRACER agreeing about substitutes).) Nor do they dispute Dr. Fitzsimmons' testimony that other relevant considerations include examining whether the services are marketed in the same channels, whether competitors market their services as substitutes, and whether providers are viewed as competitors. (Id.) They also ignore, and thus do not dispute or rebut, Dr. Fitzsimmons' testimony that for services to be in the same product market, it is not necessary for them to be identical, reasonably interchangeable, or even have similar prices or quality. (QB, p. 12-13; Qwest/51, Fitzsimmons/7-10.)

As Qwest demonstrated, and as no party really disputed, 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. There is such a significant

[5] Indeed, despite filing almost 150 pages of extensive argument, the responding parties largely ignored Dr. Fitzsimmons's expert testimony, and when they did refer to his testimony, they failed to rebut such testimony. (See e.g., EB, pp. 9, 19, 33; TB, pp. 11, 24; JCB, pp. 6-7.) In fact, Staff, which filed a 48-page brief and took much of the lead in opposing Qwest's petition, did not once discuss, let alone mention, Dr. Fitzsimmons' expert testimony.

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level of overlap as to what services small, medium and large business customers can purchase to meet their needs that virtually every business customer has several switched service alternatives. (QB, pp. 14-15; Qwest/25, Brigham/11-12, 22-23; Tr., pp. 37-38.) Thus, the responding parties' apparent conclusion that 1FB, PBX and Centrex are not in the same "relevant market," simply because some small (one or two-line) businesses might not view the services as substitutes, is unwarranted. Qwest demonstrated with substantial evidence (Qwest 25, Brigham/13-26) that for many customers, these services are indeed substitutes, and therefore, the services should be included in the same relevant market. (QB, pp. 11-15; Qwest/25, Brigham/11.)[6] Clearly, no experienced telecommunications professional would argue that Centrex, PBX systems and ISDN-PRI are not substitutes, and no such professional would insist that a cross-elasticity study would be needed to prove what is simply common sense- that these services are substitutes. Indeed, Qwest demonstrated that its competitors also market Centrex services and PBX systems as substitutes. (Qwest/25, Brigham/17-18; Tr., p. 193 (TRACER agrees); 277-278, 294-295 (Staff agrees).)

Indeed, in its response brief, Staff seems to shy away from its previous arguments about substitutability of particular products, such as analog PBX (see Staff/Chriss/38), but instead purports to summarize, *without analysis and with considerable inaccuracy*, Qwest's alleged positions and testimony about the relevant product market. (SB, pp. 8-11.)[7] Qwest is uncertain about Staff's point in doing so, but notes that despite several pages of Qwest's purported positions

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[6] As Qwest discusses later, VoIP and wireless services could also be, and are, substitutes for many business customers, as are ATM and Frame Relay services, and thus they are all in the same relevant product market. (QB, pp. 27-30; Qwest/25, Brigham/21-26, 40-41, 44-47.)

[7] For example, Staff claims that Qwest has an "unreasonably low benchmark" of what constitutes a substitute service for purposes of defining the scope of the relevant product market (allegedly based on "1% of customers"), that "Qwest did not present evidence to show that its standard for substitutability is satisfied," and that "Qwest merely presented its assertions that the services are substitutable" by presenting evidence describing the services. (SB, p. 8.) Staff then purported to summarize Qwest's evidence regarding the relevant product market and substitutability, including the substitutability of wireless and VoIP services. (SB, pp. 8-11.) Staff concluded by alleging that Qwest's testimony was "not sufficient." (SB, p. 11.)

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and testimony, Staff does not rebut any of Qwest's testimony on this issue.[8] In fact, although it devotes several pages and 18 bullet points in an attempt to summarize Qwest's testimony (often without citation to the evidence), it devotes no more than one three-sentence paragraph to its position. Even then, however, all that Staff says, *without any analysis* or reference to any facts, is that Qwest's testimony is "not sufficient" to establish substitutability, and that Qwest has "failed to provide sufficient evidence to show for which [sic] of the services wireless and VoIP may be substitutes." (SB, p. 11.)

Another problem with Staff's discussion of the relevant product market is that it makes the same mistake that it made in docket UD 13 (and in docket UX 27 before that) by defining an overly narrow relevant product market. In docket UD 13, which was Verizon's price list petition for directory assistance (DA) and operator services (OS), the Staff initially advocated a very narrow relevant product market, and the Commission initially agreed. See Order No. 03-531, pp. 4-5. After Verizon appealed and the Circuit Court reversed and remanded the matter, Staff still advocated a very narrow relevant product market, consisting of only DA and OS "available over a wireline telephone to all customers in Verizon's territory," thus excluding possible alternatives (such as print or computer directories, calling cards or wireless telephone services). The Commission on remand rejected that view, however, and noted that its previous adoption of Staff's narrow definition in docket UX 27, which was Qwest's DA deregulation petition, was in

[8] In fact, the only Qwest testimony that Staff actually addresses (SB, p. 8) results in a misleading characterization about "Qwest's threshold" regarding the number of customers necessary to show substitutability. (SB, p. 8.) TRACER commits this error as well. (TB, pp. 19-20.) They claim that Qwest's "threshold" or "benchmark" for substitution was 10 out of 1,000, or one percent, of customers migrating to another service. (SB, p. 8; TB, pp. 19-20.) However, even a cursory reading of the hearing transcript will show that Qwest's witness Mr. Brigham merely answered TRACER's lawyer's questions about extreme hypothetical numbers (1 out of 500,000, 100 out of 1,000, 10 out of 1,000). (See Tr., pp. 36-42.) Moreover, Mr. Brigham explained his answer (which Staff and TRACER ignore) by noting that depending on various factors, one product or service "could very well" be a substitute for another, even with such low numbers. (Id., pp. 40-42.) Staff's and TRACER's attempts to use such extreme, misleading and out-of-context examples are disingenuous at best, and provide ample evidence of their desperation on this issue, especially given that they fail to address most of Mr. Brigham's testimony, and virtually all of Dr. Fitzsimmons' testimony, on the relevant product market and substitutability.

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error. Order No. 05-1241, p. 7. Thus, the Commission adopted Verizon's broader definition. *Id.* Despite applying the same approach here (such as in its determination to exclude QPP, UNE-P, wireless and VoIP from the relevant product market), Staff backpedals by acknowledging Order No. 05-1241, but then arguing that its position here "is not inconsistent" with Order No. 05-1241. (SB, pp. 14, 26.)[9]

Staff cannot seriously make this argument, and its overly narrow definition of the relevant product market here suffers from the same flaws as its previous relevant market positions in dockets UD 13 and UX 27. Of course, rather than *prove* its points with specific rebuttal of Qwest's evidence, Staff is apparently content to simply continue with its conclusory arguments that there is "no evidence" of the substitutability of the services, or that Qwest's evidence is "not sufficient" to show that its services are competitive or are subject to competition in "*any* of the rate centers or wire centers." (SB, pp. 14-15 (emphasis added).)[10] In fact, although Staff itself believes that to be reasonable substitutes, "services includable in the relevant market had to perform essentially the same purpose or function for the customer" (SB, p. 26), Staff does not apply that test. If it had done so, it would not have defined the relevant product market so narrowly, and thus would not have concluded, for example, that analog PBX and digital PBX do not provide the same functions, or that PBX and Centrex do not provide the same functions, or that PBX systems do not provide the same functions as 1FB lines.

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[9] Staff discusses Order No. 05-1241 in its relevant geographic market discussion (SB, pp. 14-15), although the points it discusses from that order pertain to the relevant *product* market, not the relevant geographic market.

[10] These conclusory statements, unsupported by any of the extensive, detailed and granular substantial evidence that Qwest submitted about competition in all of its wire centers and rate centers, are all the more remarkable given that Qwest not only provided numerous exhibits with specific wire center and rate center competition data (see e.g., Confidential Exhibits Qwest/8, Qwest/40, Qwest/42, Qwest/43), but that Qwest's opening brief was full of competitive data broken down by rate centers, including ranges of CLEC market share throughout each rate center. (See e.g., QB, pp. 16, 19, 25-27, 38-39.)

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TRACER also resorts to extreme examples when it purports to compare the prices for 1FB and ISDN-PRI. (TB, p. 20.)[11] However, what is "complete folly" is that TRACER compares the $39.99 monthly price for the Qwest choice flat-rated line (one line) with the ISDN-PRI monthly price of $537.00. However, in a classic apples-to-oranges (or perhaps an apple to an apple tree) comparison, TRACER fails to mention that precisely because the T-1 facility can be "configured as 23 or 24 voice channels," the appropriate comparison is not $39.99 v. $537.00 (a comparison of one line to 24 lines), but rather, the appropriate comparison would be 24 separate 1FB lines (at almost $960) to the $537.00 for the ISDN-PRI service. Clearly, for a business customer that has a need for 24 lines, and even one with a need for significantly fewer than 24 lines, ISDN-PRI service (even with its one-time nonrecurring installation charge) would in many cases represent a substitute for 1FB service. (See e.g. Tr., pp. 37-44 (discussing substitutability of many services, including ISDN-PRI, as well as other advanced services).)[12]

TRACER, while still alleging that Qwest presented "no credible evidence" on substitutability, also acknowledges that no cross-elasticity studies should be required. (TB, p. 20.) Staff also seems to have backed away from its previous extensive testimony (Staff/100, Chriss/23, 56, 57) arguing that Qwest's case was defective because it did not present any quantitative or cross-elasticity studies or data. Staff did so, no doubt, because of numerous admissions that such studies are not necessary for this type of a case, and the fact that they do not know of any deregulation case that has considered such studies or data. (See e.g., Tr., pp. 277-

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[11] The Joint CLECs do not really say anything new or different in their brief regarding the relevant product market: they merely argue, consistent with all responding party themes, that Qwest's petition includes "over 4000 services" or that Qwest does not provide "quantitative data" or "quantitative evidence" regarding substitutability for each of the 4000 services. (JCB, pp. 7-8.) On the other hand, Eschelon primarily focuses its relevant product market discussion on its arguments that the Commission should not include competition based on QPP, UNE-P, resale, wireless or VoIP in the competitive analysis. (TB, pp. 17-25.) Qwest will address the types of competition that should be addressed later in this brief.

[12] Moreover, the customer's ISDN options are not limited to ISDN-PRI service. As Mr. Brigham explained, ISDN-BRI service (marketed by Qwest as ISDN Single Line Service) "is often purchased as an alternative to 1FB service, especially for a customer who may utilize a second 1FB for data purposes." (Qwest/25, Brigham/14-15, Qwest/27.)

278, 294-295, 332, 366-367.) Not to be outdone, the Joint CLECs argue that Qwest should have presented "hard data" or "quantitative studies" to prove substitutability. (JCB, pp. 8-10.)[13]

Despite claims of no "credible evidence" or mere "assertions," the testimony of two experienced telecommunications veterans, with a combined 50 years of experience in the industry, and in the economics of the industry (Dr. Fitzsimmons), as well as the substantial evidence of substitutability (Qwest/25, Brigham/5-25), is most certainly "credible evidence." This is especially so given that the responding parties fail to even attempt to rebut most of these witnesses' testimony, and the little that they do try to rebut is unconvincing and self-serving.

TRACER also goes so far as to suggest that Qwest "could have put on testimony of sales persons regarding customer purchasing patterns" or "purchasing patterns of 1FBs." (TB, pp. 20-21.) Of course, TRACER fails to point out exactly what such sales or purchasing pattern testimony would accomplish, or prove. It also fails to show that such testimony has ever been used in any deregulation proceeding, in any jurisdiction, or why the testimony of two experienced industry veterans offering a significant amount of factual evidence is "not sufficient." Moreover, any such testimony would necessarily have to be a high-level snapshot, given the almost **[Confidential – xxxxxx]** business lines that Qwest has lost in the four years between 2000 and 2004 alone (and would surely have been subject to TRACER criticism that it was not complete, or was merely

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[13] In fact, they seem to argue that Qwest must separately "analyze" all 4000 switched business services and demonstrate that each and every service is in the relevant product market and is substitutable for each other. (JCB, pp. 8-10.) Indeed, they argue that Qwest should have shown that "X number of CLECs provide Y services in Z wire centers" (as if all CLECs (or any of them) would be willing or obligated to provide such information).

There is also no merit to the joint CLECs' complaints that some CLECs reported that they do not provide business services, or that not all CLECs with interconnection agreements obtain services or facilities from Qwest. (JCB, pp. 8-9.) The Joint CLECs ignore that Qwest has never represented that all CLECs offer all services in all rate centers, nor does Qwest need to do so. Moreover, this is akin to saying that because only 39 of 50 CLECs offer services, and not all 50 do, that must somehow mean that *no CLECS offer services* or that the evidence about the other 39 CLECs is not credible.

that salesperson's "opinion"). Rather, it appears that this is merely "make work" and/or a convenient argument since there is no such testimony in the case.[14]

Finally, there is no merit to the argument that Qwest has not shown the level of substitution or competition by service because it cannot demonstrate what particular business service a CLEC provides when it purchases UNE-L from Qwest. (See e.g., SB, pp. 21, 23, 24, 28; JCB, p. 9.) Clearly, it is impossible for Qwest to obtain such information. (Qwest also notes there are [**Confidential – xxxxx**] UNE-L lines at issue.) This is yet another example of the unrealistic and unnecessary "perfect evidence" standard that these parties attempt to impose on Qwest. More importantly, the precise nature of the particular business service that is being provisioned with each UNE-L line is not necessary in order to determine that CLECs use UNE-L to compete against Qwest, and that the vast majority of these lines are used to provision business services in competition with Qwest's business services.

Accordingly, Qwest presented substantial evidence on the relevant product market. In doing so, Qwest proved, by a preponderance of the evidence, that the relevant product market should be defined to include *all* switched business services in Oregon.

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[14] In addition, the fact that Qwest is unable to estimate with any reasonable certainty the small minority of CLEC UNE-L lines that are not used to serve business customers is yet a continuation of a red herring argument. First, the Joint CLECs ignore that Qwest never said all UNE-L lines are used for business services, but only that the *majority* of them were (and Qwest proved that it is the *vast majority*). (See e.g., QB, p. 20, and fns. 23, 32; Tr., pp. 13, 16 311-313, 135-136, 252; Exs. Qwest/53, Qwest/55, Qwest/57, Qwest/58.) (Qwest will not address the nonsense about the Hermiston and Roseburg UNE-L lines, but refers the Commission to footnotes 23 and 32 of its opening brief for a further explanation. See also Tr., pp. 156-161 (TRACER admitting these CLECs had only about seven percent of UNE-L lines, but still finding that to be a "substantial" amount); see also pp. 162-163, 168 (these CLECs also have facilities-based lines).) More importantly, Qwest is not required to provide exactly what number or percentage of UNE-L lines are used for business because, whether it is 90% of the [**Confidential - xxxxx**] lines, or 95%, or 98%, is irrelevant, especially since the slight difference in these numbers makes no material change to the minimum [**Confidential – xxxxxx**] CLEC lines in the state of Oregon today, or the [**Confidential –** almost **xxxxxx (xxxxxx** to **xxxxxx)]** business lines that Qwest has lost in four years. The same holds true with the minor market share changes as a result of Qwest's calculations using "voice grade equivalents" to which the Joint CLECs refer. (JCB, p. 9.)

b. The relevant geographic market

As Qwest mentioned in its opening brief, there was also much discussion at the hearing about the relevant geographic market. In the end, Qwest is willing to accept that the parties may have genuinely misunderstood each other about this issue. Although Qwest believes that its position was clear, 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), and it did so. (QB, pp. 16-18.) Moreover, if any party believed any further elaboration was required, all responding parties had the right to seek to reopen the record within 10 days of Qwest's opening brief for the limited purpose of analyzing the competitive data on a more granular basis. (QB, p. 17; Tr., pp. 376-389.) However, *no party did so,* and thus any complaints about alleged misunderstandings about Qwest's position on the relevant geographic market should be given no weight.[15]

Thus, given that (1) Qwest elaborated about its position on the relevant geographic market in its opening brief, (2) Qwest stated that it would not object to having the relevant geographic market analyzed at the rate center level, (3) the granular data that Qwest presented in its evidence was broken down by rate centers, and (4) no party sought to reopen the record, there is no basis for any party's continued arguments about Qwest having advocated "one single integrated geographic market," or using specious examples like a customer in Westport having to move to Portland to obtain competitive options. (See e.g., SB, p. 12; TB, p. 16.)

[15] As Qwest has previously stated, because Qwest believes that there is sufficient competition throughout *all* rate centers in the state of Oregon that it serves, Qwest seeks to deregulate all switched business services in all of its rate centers in the state. (See e.g. QB, pp. 17-18; Qwest/1, Brigham/15; Qwest/25, Brigham/26-27; Tr., pp. 24-29.) The fact that TRACER may complain that it still does not understand Qwest's position, or that the Joint CLECs complain that Qwest has yet to define the relevant geographic market in a meaningful way (JCB, p. 6), is irrelevant. All parties had an opportunity to seek to reopen the record if they deemed it necessary, and the fact that they failed to do so speaks volumes about their ability to assess Qwest's position on the relevant geographic market. The Commission should turn a deaf ear to the responding parties' complaints about this issue.

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In reality, the argument that Qwest's case should be rejected because it has allegedly not properly defined the relevant geographic market is nothing more than a red herring. There is no need to specifically define a relevant geographic market before embarking on an analysis of competition as long as the data can be evaluated on a granular geographic basis. In fact, Qwest has provided significant data by wire center, rate center and geographic region, which has allowed a very granular analysis of the level of competition in each Oregon wire center. (See e.g., Confidential Exs. Qwest/8, Qwest/40, Qwest/43; see also Qwest/4, Qwest/5, Qwest/6, Qwest/38, Qwest/42; Tr., pp. 25-29, 195, 289.) Data was available, from Qwest and the Commission Survey, for any party to make a proposal based on whatever geographic market definition it believed was appropriate in this case. In fact, the alleged lack of a hard geographic market definition apparently did not hamper Staff, as it developed its recommendation to deregulate 1FB service and associated features and packages in the Portland *rate center*. (QB, pp. 17-18; see also Staff/100, Chriss/60-61.) The constant harping on the lack of a clearly defined "relevant geographic market" is merely a distraction from the real issues in this case—whether the criteria in ORS 759.030 have been met.

As Qwest mentioned, the relevant geographic market may be defined in whatever manner the Commission, based on its judgment, believes is the most appropriate under the circumstances in this proceeding. Nevertheless, regardless how the geographic market may be defined, the evidence in this case supports the deregulation of petition services in all of Qwest's wire centers, rate centers, exchanges or regions. Moreover, as the Washington Commission stated a couple of years ago about the relevant geographic market when it deregulated Qwest's analog business services in that state, "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." (QB, p. 17; see Ex. Qwest/59, p. 30, ¶ 78 (emphasis added).)

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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.

In its response brief, Staff argues that Qwest is somehow attempting to place the burden of proof on the responding parties to "disprove that competition exists in any conceivable market." (SB, p. 11.) This is an odd and nonsensical statement, and Qwest has done nothing of the sort. Thus, it is perhaps not too surprising that Staff fails to cite to any evidence to prove its point. Of course, if Staff disagrees with Qwest about the state of competition in any rate center, it must rebut Qwest's evidence with specific facts, which all parties opposing the party with the initial burden of proof must do. That is not a shift of the burden of proof, however.

Because Staff has trouble in rebutting Qwest's position, it resorts to extreme examples to "prove" that meaningful competition does not exist. For example, Staff refers to Westport, an exceedingly small rate center with all of 78 business lines (or less than .02 of 1% of approximately 431,000 wireline business access lines in the state) to make its point. (SB, p. 12; see also TB, p. 16; JCB, pp. 7-8 (citing Mapleton and Westport rate centers examples).) However, just like the "1 out of 500,000" or "10 out of 50,000" customer examples that TRACER is so fond of using (TB, p. 19), such an aberrant example does not demonstrate anything more than the fact that there are a few very small rate centers in sparsely-populated areas of Oregon that Eschelon, Integra, Time Warner or XO are not flocking to. (Tr., pp. 204-205 (TRACER admits that CLECs often target geographic areas they deem attractive or profitable over other geographic areas).) That is hardly an indicia that there is not sufficient competition, or that such services are not, at a minimum, "subject to competition." The fact is, there already is competitive entry in all of Oregon's wire centers—including even small ones such as Westport. As the Washington Commission noted, the scenario of Qwest raising prices in just a few selected exchanges or wire centers is unrealistic, especially because it is highly unlikely that Qwest would

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spend significant time and money, and incur significant ill will, in offering its services for higher prices in just those selected wire centers. (Ex. 59, p. 40, ¶ 107; see also p. 17, ¶ 41, p. 40, ¶ 108.)[16]

Likewise, TRACER tries to sow confusion about the relevant geographic market, and thus spends numerous pages rehashing the evidence that allegedly led TRACER and Staff to misunderstand Qwest's position on the relevant geographic market in the first place. (TB, pp. 10-13, 15-16.) Qwest disagrees that it was unclear regarding this issue. Nevertheless, as stated, no party, let alone TRACER, sought to reopen the evidence, despite having the opportunity and right to do so. TRACER cannot have it both ways.[17]

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

As Qwest showed in its testimony and opening brief, there are numerous alternative providers throughout Oregon who provide services to business customers that compete against Qwest's switched business services. Competition in the local business market has increased so dramatically over the past few years that nearly all business customers in all Oregon rate centers have competitive alternatives to Qwest's retail business services. Although the parties tried hard to minimize (or completely eliminate) consideration of many types of alternative providers or forms of competition, they failed to do so convincingly, as set forth below.

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

There was no real dispute that there are many active wireline CLECs competing against Qwest in Oregon. Although various parties quibbled about the exact number of active providers,

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[16] For the same reasons, Staff's arguments about a Westport customer having to "move to Portland" for "competitive options," or that Qwest somehow assumes the availability of providers being "uniform," are careless non sequiturs that need no further response, other than to say that Qwest has never advocated that, and Staff admits such. (Tr., p. 292.)

[17] For those reasons, TRACER's continual discussion about Qwest's "too broadly defined" definition of the relevant market as "its entire Oregon-serving territory" (TB, pp. 14) should be disregarded as moot. TRACER clearly knows that this is not Qwest's advocacy, and if TRACER truly believed at one point that it was, such mistaken belief is no longer reasonable after the rebuttal testimony, the hearing in October and Qwest's opening brief in December.

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or the fact that some CLECs may not have reported business lines (or indeed, even responded to the incomplete CLEC Survey), all parties seem to agree (or at least do not dispute) that there are various forms of wireline competitors, and that wireline-based CLECs provide business retail switched services in all 77 of Qwest's Oregon wire centers. Indeed, no party disputed (although they all ignored) there are at least three CLECs in 70 of Qwest's 77 wire centers.

1) Facilities-based competition (UNE loop and full bypass)

In addition, although most responding parties took issue with the relative weight that should be attributed to certain forms of competition, and questioned the precise percentage of UNE-L lines being used for business services, no party really argued against Qwest's evidence regarding the existence of facilities-based wireline carriers or the accuracy of its UNE-L line data. Indeed, the full facilities-based line data used in Qwest's analysis of competition [**Confidential- XXXX lines**], conservatively understated as it was, came from the Commission's own incomplete CLEC Survey. None of the other responding parties took issue with these quantities. Nor did any party dispute the fact that full facilities-based lines and UNE-L lines are both modes of effective competition against Qwest.

As for UNE loops, no party disagreed with Qwest's line count data, which showed [**Confidential- XXXXX**] UNE loops that Qwest had provisioned to 19 CLECs as of May 2005. The responding parties, however, ignore that the UNE loops are also geographically dispersed, as there are at least eight rate centers with more than 1,000 UNE loops, and four rate centers with at least 4,800 UNE loops. (See Confidential Exs. Qwest/8, column A, Qwest/40, column A Qwest/43, column A.) Further, although the Joint CLECs complained (JCB, p. 9) about Qwest's alternative use of "voice grade equivalents" for DS1 and DS3 loops, which increased the loop count to [**XXXXXX**] loops, no one disputed such evidence with any facts or analysis. More importantly, Qwest did not rely on this voice grade equivalent data to prove that sufficient

competition exists. (See e.g., Tr., pp. 53-54 (explaining why Qwest performed the voice-grade equivalent calculations).)

Further still, although some of the responding parties continue to raise issues about Qwest's evidence that the vast majority of UNE-L lines are used to serve business customers (TB, p. 26 (incorrectly arguing that "Qwest assumed one hundred percent of the [UNE] loops. are being used to provision business services"); JCB, p. 9 (same); SB, p. 24; EB, p. 14), such complaints are nothing more than nitpicking about the fact that Qwest cannot know precisely how many UNE-L lines are used for business services, and that two CLECs in Hermiston and Roseburg may actually use UNE-L lines to serve some residential customers. (EB, pp. 14-15.) Nevertheless, Qwest has never claimed that "all" UNE-L lines are used for business services, or that it has any way of knowing precisely how many UNE-L lines are used for business services versus residential services. Further, Qwest certainly is not obligated to demonstrate precisely how many UNE-L lines service business customers in order to meet its deregulation burden. Suffice it to say that Qwest proved that the *vast majority* of UNE-L lines are used for business services (Tr., pp. 13, 16, 311-313, 135-136, 252; Exs. Qwest/53, Qwest/55, Qwest/57, Qwest/58 (showing that [**Confidential – XX%**] of all UNE-L lines are purchased by only three CLECs who serve business customers exclusively).) Moreover, as stated, there is no necessity for Qwest to prove the impossible–that is, there is no need to prove the precise number of UNE-L loops that are being used for business services (or, for that matter, what particular business services CLECs offer when they purchase UNE-L from Qwest). (See e.g., Tr., pp. 300-303 (Staff agreeing it would be "odd" for CLECs to share such information with Qwest and that it would be reasonable to assume certain carriers use UNE-L for business services).) Indeed, despite much chatter on the issue, no party disputes that evidence with any facts.

2) QPP and UNE-P competition

Qwest also showed it faces competition from CLECs serving business retail customers using the Qwest Platform Plus™ ("QPP") [**Confidential- XXXXX** business lines] and/or QPP's predecessor product, the UNE Platform ("UNE-P") [**Confidential- XXXX** business lines] (QB, pp. 21-22) throughout Oregon. In fact, the QPP lines are extremely well-dispersed throughout the state, as there are no less than 14 rate centers with at least 1,000 QPP business lines, and six rate centers with at least 3,500 QPP business lines each. (Confidential Exs. Qwest/8, column D; Qwest/40, column D, Qwest/43, column D.) Perhaps even more importantly, QPP business lines exist in *all 77 Qwest wire centers* (and thus all Qwest rate centers) in Oregon, and there are multiple CLECs in all but one rate center (Westport). (*Id.*)

The responding parties do not take issue with Qwest's QPP and UNE-P line counts, but they do vociferously argue that the Commission should not consider competition that is based on QPP or UNE-P. They claim that such modes of competition are "not price constraining" because they are allegedly offered at Qwest's "discretion" or under Qwest's "total control." Further, they claim that Qwest can "unilaterally terminate" competition by declining to offer its platform-based service. (SB, pp. 22-23, 29; TB, p. 29; EB, pp. 17-20.) The responding parties are wrong.

First, the FCC clearly had seen UNE-P (a platform-based service at TELRIC prices) as a viable mode for CLECs to compete. Although the FCC no longer requires ILECs to provide such platform-based services at TELRIC prices, it does recognize that commercially-negotiated arrangements for platform-based services (like QPP) are a viable method for CLECs to compete today. While the responding parties challenge QPP as a viable and price-constraining mode of competition, Qwest has demonstrated that QPP is *not* at Qwest's "control" or "discretion" for a number of reasons. First, QPP is a negotiated commercial agreement, and the terms are not "dictated" by Qwest, but are the result of negotiations between the parties. Second, Qwest is

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legally required to provide QPP (and thus cannot "unilaterally terminate" it) through at least July 2008. Third, QPP is subject to just and reasonable rates. As such, switched business services provided by CLECs utilizing QPP provide meaningful competition, and they do act as a price constraint on Qwest's switched business services. (QB, p. 22; see also Qwest/25, Brigham/30-37; Qwest/51, Fitzsimmons/20-25; see also Tr., p. 58.)

Further, while Qwest is not *required* to provide UNE-P beginning next month (or QPP after July 2008), this is because the FCC determined in the Triennial Review Remand Order ("*TRRO*") that CLECs are *not impaired* without access to the switching UNE.[18] The responding parties (see e.g., SB, pp. 22-23, 29; Staff/100, Chriss/31-32, 37) argue that if Qwest were to discontinue its QPP offering, CLECs would be *impaired*, and its QPP customers would need to return to Qwest for service. Of course, the FCC determined that CLECs are *not impaired* without access to Qwest switching since they have alternatives to Qwest switching (and QPP). Thus, even if Qwest were to discontinue its QPP offering, CLECs would have other options to provision service. (Qwest/25, Brigham/33.) However, as Mr. Brigham explained in his testimony, to simply eliminate QPP-like options for CLECs would not be in Qwest's best interests, either, so long as such a wholesale option can be provided at a price that is compensatory. (Qwest/25, Brigham/32; see also Tr., pp. 58 (anticipating that Qwest would be negotiating with CLECs before QPP expiration in 2008).)[19]

3) <u>Resale</u>

Although admittedly not large in volumes [**Confidential- XXXX,** or less than **X%** of total CLEC lines], the provision of switched business services via resale is yet another mode of

[18] Thus, the FCC determined that CLECs did not need UNE-P in order to compete with Qwest since they have other options, including self-supplying switching or purchasing switching from another carrier, which could be combined with the purchase of UNE-L. Of course, the CLEC could also self provision all facilities.

[19] Further still, there is no merit to Staff's "belief" that "if QPP were to be discontinued," "the majority of the lines would return to Qwest" (Staff/100, Chriss/3000), especially since this is simply Staff's "theory" based on mere "possibilities."

wireline competition. (QB, pp. 22-23.) Indeed, 26 CLECs were still purchasing business lines at the wholesale discount for resale to end-user customers. (Qwest/1, Brigham/30-31.)

Again, as with QPP, some responding parties argue that resale is not price-constraining. (SB, pp. 22-24; TB, pp. 29-30; EB, pp. 20-21.) They claim that Qwest "controls" resale (even though the Commission sets the resale discount), and thus that the Commission should not consider such evidence. However, resale does in fact act as a price constraint and provides pricing discipline on Qwest's switched business service prices. This is especially so for the reasons shown in Mr. Brigham's example. (Qwest/25, Brigham/38-39; see also Qwest/51, Fitzsimmons/25.) In its testimony, Staff apparently disagreed with the other responding parties, and agreed with Qwest that the Commission should consider resale-based competition in its analysis. (See Staff/100, Chriss/31; Qwest/25, Brigham/37.) Thus, its about-face citation to Eschelon's testimony (SB, p. 22-23) is odd, to say the least.

b. <u>Intermodal competition</u>

Qwest also demonstrated that although it (or any other party) cannot determine the precise extent of such competition, there is no question that there is extremely fast-growing competition from intermodal competitors who employ other technologies, such as wireless, Voice over Internet Protocol ("VoIP") and cable telephony, in order to compete in the business market. Qwest demonstrated that intermodal competition, often provisioned by large providers (including well-established CLECs), has had a significant impact in the switched business services market in Oregon and throughout the country. (QB, pp. 21-30; Qwest/1, Brigham/60; see also Qwest/1, Brigham/60-66, 66-80; Qwest/25, Brigham/39-44, 44-49.)

The responding parties, however, attempt to minimize or largely ignore such intermodal competition for a variety of specious and overstated reasons. Qwest will show that these head-in-the-sand reactions are without merit.

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1. **Wireless competition**

Staff acknowledges that wireless competition can be a substitute for some business lines. (SB., p. 11.) However, it argues that Qwest "failed to provide sufficient evidence to show for which [sic] of the services wireless" may be a substitute. (*Id.*) In addition, Eschelon argues that wireless services (along with VoIP) are "not at this time a meaningful part of the relevant market," and that Qwest has failed to prove that any of its access line loss (the effect) was "caused" by wireless competition. Eschelon apparently believes that quantitative evidence such as cross-elasticity studies are required that show X number of customers migrated from Y Qwest wireline services to Z wireless services. (EB, pp. 22-25, 29-31.) The Joint CLECs merely parrot the line that Qwest has failed to provide evidence of wireless substitution, and that Qwest's evidence does not show a "significant" number of business customers abandoning wireline services for wireless services. (JCB, p. 10.) Finally, TRACER makes similar arguments, with emphasis on its claim that since wireless is a substitute for only "some" wireline services, it does not represent a sufficient form of competition. (TB, pp. 30-32.)

The responding parties essentially ask that the burden be placed on Qwest to prove the impossible; that is, to prove, with absolute certainty, the correlation between the exploding growth of wireless (more than 69% in four years between December 2000 and December 2004, to more than 2 million "lines" today in Oregon alone) and Qwest's [**Confidential - XX%**] business access line losses, as if this highly probative evidence is not only an aberration, but is completely unrelated. Obviously, Qwest is not claiming that every single one of the almost [**Confidential – XXXXXX**] lost lines in only a four-year period have migrated to wireless (there are many other competitors nipping at Qwest's heels, quite successfully, in fact), or that wireless is a substitute for "all" Qwest business customers. Rather, Qwest is merely saying that to anyone experienced in the telecommunications industry, it should not be in dispute that (1) wireless competition has

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been the cause of much ILEC (and Qwest) access line loss (and has no doubt slowed growth in CLEC access lines, as well) and (2) wireless competition acts as a price constraint on ILEC (and Qwest) pricing. (See QB, pp. 28-29; Qwest/1, Brigham 20-21, 60-65; Qwest/10; Qwest/11; Qwest/25; Brigham/44; 49; Qwest/51, Fitzsimmons/30-34.) The responding parties would essentially have the Commission close its eyes to the real world and not see the obvious- that wireless services are as ubiquitous as wireline service today, and only the blind, or intentionally unbelieving, fail to see that this is so.

Further still, despite response party arguments about the alleged lack of data or substitutability, the evidence in this case demonstrates that for *many* business customers, wireless service *is* an effective substitute for some of Qwest's switched business services. Moreover, even if wireless service is not a "perfect" substitute for "all" wireline customers, wireless alternatives necessarily constrain Qwest's ability to raise prices for its switched business services. This is especially 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's customer base. (QB, pp. 28-29; 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; 33-34.) There is, of course, no obligation for Qwest to prove that wireless is or can be a substitute for "all" wireline services, as the responding parties (especially TRACER) imply. ORS 759.030 does not require Qwest to prove that "all" customers view a method of competition to be a substitute in order for it to be considered as a substitute.

Accordingly, the bottom line is that despite the lack of any "cross-elasticity studies," there can be no serious or honest dispute that the continued growth of wireless competition is a factor for the Commission to consider in analyzing the alternative providers in the relevant market. The fact is, there are now more wireless "lines" in Oregon than wirelines, and Qwest provided

evidence that wireless services are being marketed as a replacement for wireline service. (See Qwest/1, Brigham/60-66; Qwest/25, Brigham/44-49.)

2. VoIP competition

Qwest also demonstrated that VoIP services are now available to business customers of all sizes throughout Oregon, and that numerous providers (including very large and established companies, such as AT&T, and companies participating in this proceeding, such as XO) are providing VoIP-based telephone services, at very competitive prices, to business customers today in Oregon. (QB, pp. 29-30.) Staff agreed that VoIP was a substitute for some customers. (SB, p. 11.) Moreover, no one disputed that VoIP-based services function in a manner similar to standard circuit-switched telephony, with relatively simple set-up, the use of a standard phone and with a host of features, including many that are not available from wireline service. (QB, pp. 29-30; Qwest/1, Brigham/67, 68; see also Qwest/25, Brigham/40.) Further still, no party disputed Qwest's substantial evidence that described competitive VoIP offerings and that demonstrated that VoIP services are available from many carriers at competitive rates. Indeed, Qwest provided substantial evidence showing that Oregon business customers have numerous VoIP options. (See e.g., Qwest/1, Brigham 72-80; Qwest 12 through Qwest/20.) To highlight just one such competitive offering here, Qwest provided substantial evidence regarding XO's XOptions Flex service, which XO launched in 45 markets–including Portland–in April 2005. Qwest also provided evidence that less than six months later (in September 2005), XO was already boasting about having added its 1500th business VoIP services customer. (See e.g., Qwest/1, Brigham/77-78; Qwest/25, Brigham/40-42; Qwest/19; Qwest/36; Qwest/37.)[20] It is disingenuous for XO to argue in this proceeding that VoIP-based services are not a meaningful

[20] Recent XO press releases have boasted even more about VoIP growth. Moreover, although this information is not Oregon-specific, Qwest notes that such state-specific information is impossible to obtain. Qwest also notes that it is ironic that although XO complains about an alleged "lack of hard data," it withheld any detailed Oregon data regarding its number of customers. (See Ex. Qwest/55 (response no. 2).)

substitute for wireline services, while at the same time aggressively marketing its VoIP services to Oregon business customers as a substitute for traditional wireline services.

The responding parties raise similar complaints about VoIP as they do about wireless. For example, they claim that (1) Qwest did not offer a "survey of customers" or "hard data" about VoIP substitutability, (2) VoIP is only available to customers with broadband availability (and thus extensive market penetration is unlikely at this time), (3) the FCC "may" change VoIP's regulatory status, (4) VoIP offers only the "possibility" of competition, and (5) Qwest did not provide "sufficient evidence" that VoIP was a substitute for Qwest's services. (EB, pp. 22-25; TB, pp. 32-33; SB, P. 11; JCB, p. 10.) Their protests are not valid, however.

First, as Qwest has shown, detailed quantitative analyses or "surveys" are not necessary to show that VoIP (or wireless) is a substitute for many business services, and for many business customers. The continued discussions about the lack of "hard data" and "customer surveys," and their "no sufficient evidence" cousins, are simply red herrings. Further, the mere fact that VoIP requires "broadband availability" is vastly overstated, especially because Qwest does not claim that VoIP service would be a desired option for every single business customer (nor does Qwest *need* to show it would be). Nevertheless, broadband is becoming more and more prevalent every day, and, in fact, the FCC's Broadband Report estimated that there were 439,447 high speed lines in Oregon as of December 2004.

Finally, the argument that the FCC may possibly change VoIP's current access charge-exempted regulatory status is the definition of speculation and conjecture. As discussed below, in section II.C. regarding claims about the "changing landscape of telecommunications" or "recent FCC actions," the Commission should not give any weight to such speculative musings.

In short, although Qwest does not have a wealth of Oregon-specific VoIP quantitative customer data (which VoIP providers like XO do not publicly release), and thus has not ascribed

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any particular market share to VoIP providers, or reduced its estimate of its own market share because of such VoIP competition (or attempted to estimate VoIP's effect on growth in CLEC wireline business access lines), there is no question that the existence and presence of VoIP competition is a factor that the Commission should consider in its analysis of the 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

The second statutory and administrative criterion is the extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions. ORS 759.030(4)(b); OAR 860-032-0025(3)(b). Qwest easily meets this criterion.

Although the responding parties attempt to make much ado about whether certain services belonged in the same relevant product market as others, or whether they were "substitutable" for another, they do not seriously attempt to show that the types of services that Qwest discusses are not "functionally equivalent" to Qwest's switched business services, or that they are not truly substitutable. Indeed, all they argue is that Qwest did not prove functional equivalence, or that it should have provided a "cost study" or "customer survey."

Nor did the responding parties attempt to deny Qwest's substantial evidence that these functionally equivalent or substitutable services are available at comparable rates, terms and conditions. (See Qwest/1, Brigham/40; Ex. Qwest/9 (matrix of Qwest and CLEC services and prices).) Again, they merely argued that Qwest "did not prove its case," or that there is no price competition. (SB, pp. 15, 24-25, 42; TB, p. 39; JCB, pp. 11, 12.) The Joint CLEC argument that Exhibit Qwest/9 (re 10 major CLECs' prices and services) showed a "very limited number of competitors and services" is nothing more than a throwaway argument. Even a cursory review of the document shows that it has a wealth of information (obtained through publicly-available sources) about the services and prices of 10 major competitors, and it is, indeed, comprehensive

"hard data." Obviously, it is not possible for Qwest to know the services and prices of "every competitor," especially since CLECs do not file tariffs in Oregon. Nevertheless, Qwest was certainly able to present substantial evidence regarding the services and prices of *many* of its competitors. Finally, all parties here are well aware that CLECs do not provide such information publicly (and would object vociferously if Qwest were to seek to obtain it).

While the responding parties would seek to force Qwest to some impossible burden of proof by their interpretation of the statute and by imposing an improper evidentiary standard requiring proof beyond a reasonable doubt, the substantial evidence that Qwest has presented more than adequately proves the extent to which the services of alternative providers are functionally equivalent or substitutable to Qwest's switched business services at comparable rates, terms and conditions. Qwest has clearly met this citerion.

C. Existing economic or regulatory barriers to entry

The third statutory and administrative criterion is whether there exist any economic or regulatory barriers to entry. ORS 759.030(4)(c); OAR 860-032-0025(4)(c). Despite much carping and hand-wringing (and speculating) about alleged barriers to entry, the evidence proves that there are *no economic or regulatory barriers to entry* in the switched business services market in Oregon, for a variety of reasons. (Qwest/1, Brigham/42-47; Qwest/25, Brigham/70-75; Qwest/51, Fitzsimmons/26-28.) In fact, Mr. Chriss of Staff himself admitted his discussion about barriers to entry was based on *potential* barriers and *not* "actual barriers," and even TRACER admits these are merely "possible" types of barriers. (Tr., pp. 325-330; TB, p. 34.)

The responding parties make several different "barrier to entry" arguments. First, they argue that "sunk costs" are barriers to entry. (TB, pp. 34-35 (arguing, without any citation to evidence or authority, that sunk costs are a "barrier to entry"); EB, pp. 11, 27-28 (arguing sunk costs are a barrier to entry in relevant geographic market discussion); SB, pp. 16-17 (citing to

TRACER and Eschelon testimony of sunk costs).) However, despite much over-hyped rhetoric, a review of their sunk cost testimony shows that they are simply discussing *theoretical* and *hypothetical* potential barriers. There is absolutely *no evidence* of any such barriers, however. Indeed, the fact there are so many CLECs actively participating in the telecommunications business services market in Oregon (and elsewhere) today is proof positive that there are no significant "sunk cost" barriers to entry. (See Qwest/1, Brigham/46.) Of course, the mere fact all firms have entry costs, or that telecommunications is a capital-intensive industry requiring the incurrence of some sunk costs, does not mean such "sunk costs" are barriers to entry. (See Qwest/1, Brigham/45-46; Qwest/25, Brigham/70-72; Qwest/51, Fitzsimmons/27, 31-32.)

In fact, probative proof that there are no economic barriers to entry in Oregon is that 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 possess substantial switching capacity); 109-110, 116 (testimony regarding switches).) Further still, 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 at least seven CLECs in 60 of these 77 wire centers, and at least three CLECs in 70 wire centers. (Qwest/1, Brigham/15-16; Qwest/25, Brigham/28, 100.)[21] In other words, simply saying that there are barriers to entry does not make it so.

[21] TRACER also argues that Qwest's role as an incumbent gives it "significant advantages," and that Qwest "automatically" has advantages as the "dominant firm." (TB, pp. 34-35.) This argument is circular and illogical. TRACER apparently seems to say that because Qwest is an ILEC, it should not be deregulated precisely because of its ILEC status and the alleged "advantages" that "automatically" come from that regulatory status. If that were the case, the Legislature in Oregon (and presumably elsewhere) would never allow an ILEC like Qwest to seek deregulation of its services in the first place (precisely because it is an ILEC with all of the supposed advantages that TRACER claims). Evidently, however, the Legislature thought otherwise since it did establish a scheme to allow Qwest and other "incumbents" to seek deregulation. The Commission should disregard such hyperbolic arguments.

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The responding parties (other than Staff) also claim that the "changing nature of the telecommunications industry" or "recent actions of the FCC" are barriers to entry, or are likely to increase barriers to entry in the future. (TB, pp. 35-36; EB, pp. 33-35; JCB, pp. 11-12.) These arguments are not only speculative by definition, but they are based on an underlying paranoia that regulatory policy 10 years to the month after the 1996 Act was enacted (policies which are encouraging continued CLEC investment in networks, and thus competition) somehow will mean that competition will decrease or go away in the future.[22] That makes absolutely no sense, especially since national and state policymakers have continued to decree that competition in the telecommunications industry is a vital national policy, and that the convergence of so many different technologies, including wireline, wireless, VoIP, cable, satellite and even power lines, will only continue the rapid increases in competition for telecommunications.[23] These CLEC and TRACER arguments are nothing more than "sky is falling" rhetoric. The Commission should give these conjectural utterings absolutely no weight. (See e.g., Tr., p. 209 (TRACER agreeing FCC "change in direction" is "necessarily speculative").)

Further still, the Joint CLECs and Staff still persist in the unsupported argument that there are barriers to entry as a result of the cost of constructing facilities or from obtaining access

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[22] Eschelon's and the Joint CLECs' citations to the changes brought by the *TRRO* are not convincing. (EB, p. 34; JCB, pp. 3, 17.) As the Commission knows, those changes resulted from the determinations by the FCC, the national expert agency on telecommunications matters, that CLECs like Eschelon would *not be impaired* at certain wire centers that met very high standards. As the evidence showed, that means that Qwest would no longer be required to provide UNE-P to CLECs throughout Oregon since CLECs are not impaired without it. Of course, the fact that CLECs are not impaired without UNE-P means that they have competitive options to UNE-P, and thus the removal of UNE-P cannot be defined as a barrier to entry. Moreover, pursuant to the criteria outlined in the *TRRO*, Qwest would no longer be required to provide DS1 and DS3 loops at TELRIC prices in only *one* wire center (Portland Capitol) in Oregon (although these loops will still be available at special access rates). For high-capacity transport, only *five* wire centers would be affected, for both DS1 *and* DS3 transport, and there are only two additional wire centers where DS3 transport would not be available. The vast majority of transport routes in Oregon would still be available at UNE prices. (Qwest/25, Brigham/81-82.) Thus, it is a complete mischaracterization for these parties to claim that the *TRRO* "eliminates," or even "significantly limits," CLEC access to high capacity loops and transport.

[23] These arguments are as meritless as any hypothetical ILEC argument that the FCC in the future will be overly CLEC-friendly, or anti-ILEC, simply because President Bush has recently nominated a senior vice president and assistant general counsel of CompTel, the CLEC lobbying and advocacy group.

to buildings. (JCB, p. 16; SB, pp. 7, 20, 47.) Qwest debunked such notions, however. (Qwest/1, Brigham/45-47; Qwest/25, Brigham/70-73, 87-88; Qwest/51, Fitzsimmons/27-28; Tr., pp. 206, 253-254; 326-328.) Indeed, Staff, TRACER and XO all admitted 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).) Yet, despite admitting no personal knowledge of such occurrences, Staff argues the point anyway.[24]

Finally, Eschelon laments that Qwest's "existing market share" is an indicator of barriers to entry. (EB, pp. 32-33; Tr., p. 129.) This is an odd claim, however, especially since it is irrelevant to the issues here, but also because Eschelon has admitted "a barrier to entry is defined independent of market shares." (Qwest/25, Brigham/53, 74; Ex. Qwest/39 (Eschelon data response).) Further, in support of this argument, Eschelon cites to press releases from Qwest's corporate parent's second quarter 2005 SEC financial report. (EB, pp. 32-33; see also JCB, p. 9, fn. 24.) Eschelon apparently believes that statements about the slowing of competitive losses and about certain revenue increases by the combined Qwest family of companies, for all products and in all states, or about decreases in certain wholesale lines regionally, are somehow probative to the issues here, and are therefore proof that the undisputed [**Confidential -XX%**] percent decline in Qwest's business access lines in Oregon between 2000 and 2004 were not the result of competition. Obviously, not only was this report not specific to Oregon (or even specific to Qwest Corporation), but in addition, switched business services are only one component of the whole. It is certainly possible to increase total revenues in a growing

[24] Remarkably, Staff again argues its previous testimony about potential differences in franchise fees charged by municipalities to Qwest and to CLECs. (SB, pp. 4, 17.) It did so despite that Qwest showed that Staff was mistaken, and that Staff had reviewed the wrong franchise agreement (the one between the City of Portland and Qwest's *CLEC affiliate*) for its testimony. (Qwest/25, Brigham/73-74; Tr., pp. 329-330.)

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aggregate market that includes high speed data, wireless and VoIP, while still losing market share in the wireline business market. Thus, this press release adds nothing to the analysis here.

D. Any other factors that the Commission deems relevant

The fourth statutory and administrative criterion consists of any other factors that the Commission deems relevant. ORS 759.030(4)(d); OAR 860-032-0025(3)(d). The responding parties raise a number of issues that they ask the Commission to consider as part of this criterion. However, because many of these factors dovetail with the public interest discussion regarding ORS 759.030(2), Qwest addresses them in section IV, *infra*.

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

Upon applying the appropriate statutory and administrative criteria to the evidence, under the appropriate evidentiary standards, Qwest believes it meets the ORS 759.030(3) requirements that *both* price *and* service competition exist, and thus the Commission is required to grant its petition. The other parties, however, try as hard as they can to ignore the substantial evidence Qwest has presented, and thus raise numerous extraneous arguments, theories and misleading or out-of-context ramblings in their attempts to defeat Qwest's petition. The Commission should not be swayed by these claims. An objective analysis of the evidence and statutory and evidentiary requirements leads to the unmistakable conclusion Qwest has met its deregulation burden of proof by presenting substantial evidence, by the preponderance of the evidence for its petition, and thus that the Commission should grant Qwest's petition for deregulation.

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

In its brief, Staff, who relied too heavily on the incomplete CLEC Survey and the associated market share data, as well as on a very narrow definition of the relevant product

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market, argues that there is no "service competition" because the evidence is "not probative" or is sometimes unreliable. Staff ostensibly does so because Qwest's "wholesale line counts do not reveal the nature of the services being provided by CLECs," and "it is not possible to discern from Qwest's evidence what CLECs are providing what [sic] services," or "the level of competition for *the individual services*." (SB, pp. 21, 23-24 (emphasis added).) Other responding parties make similar arguments. (JCB, p. 8 (claiming it was necessary to show "X number of CLECs provide Y services in Z wire centers"); TB, p. 28.) This is a manufactured argument, however, especially because Staff is well aware that Qwest does not have access to such information. Perhaps more importantly, it is not necessary to show that "X number of CLECs provide Y services in Z wire centers" to show that the CLECs are using Qwest's wholesale services to serve customers, and that most of these CLECs primarily or exclusively serve business customers. This is more than circumstantial evidence, and it is persuasive.

Staff also complains that Qwest's evidence is "not necessarily reliable," presumably because of the constantly rehashed UNE-L examples in Hermiston and Roseburg, and because 11 of the 50 CLECs which Qwest had identified responded to the CLEC Survey that they do not provide retail business services in Oregon. (SB, pp. 21-22; also JCB, p. 8; EB, p. 12; TB, pp. 26-27.) Again, however, Staff and the others desperately make a mountain out of a molehill by pointing to outlier examples of UNE-L being used for some residential services (which Qwest has never denied), but failing to mention that it is undisputed the *vast majority* of UNE loops are used for business services, and that fully [**Confidential-** ***XX%***] of UNE loops are purchased by three CLECs who exclusively serve business customers. (See e.g., QB, p. 20, and fns. 23, 32; see also Tr., pp. 13, 16, 311-313; Exs. Qwest/53, Qwest/55, Qwest/57, Qwest/58.) As for the 11 CLECs who reported no services (or the 13 CLECs who never responded to the incomplete Survey (Staff/100, Chriss/10; Tr., pp. 282, 289)), Staff fails to mention (and only it knows) what

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percentage of Qwest's wholesale counts are attributable to these CLECs. Staff seems to play a game of statistical nitpicking by focusing on the *minutiae*, instead of looking at the big picture that shows service competition.[25]

Finally, Staff again raises its "QPP and UNE-P are within Qwest's control" argument. (SB, pp. 22-23.) Qwest has already addressed this argument in section II.A.2.a., *infra*.[26]

2. Qwest's business market share information and its declining access line counts show there is service competition

As Qwest has previously stated, no party claims (although some imply) that there is a requirement that Qwest lose a certain number of access lines or see its market share erode to a specified level in order for its services to be deregulated. This is understandable because ORS 759.030 has no such requirement. Nevertheless, Staff seems to imply that a certain CLEC market share level is necessary, and presumably this level is something close to the *39.6%* CLEC market share (and 60.4% Qwest market share) that it calculated for the Portland rate center (which included only full facilities-based and UNE-L competition) since this is the only rate center for which it recommends deregulation.

As Qwest demonstrated, even though loss of market share is not necessary to meet its burden under ORS 759.030, its market share losses actually demonstrate that price and service

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[25] It is also ironic that the responding parties cast suspicion on Qwest's wholesale data (though Qwest was the only party who presented its own "hard data"), and yet Staff and the others are singularly content to simply take the word, without question, of 11 CLECs who claimed they do not provide business retail services. Further, even if 11 of the 50 CLECs do not serve business customers—which is not supported by Qwest data—The fact that there would be 39 rather than 50 competitors changes nothing. Any market with 39 competitors is still a market with a substantial number of competitors.

[26] TRACER's arguments about service competition seem to revolve around its claims that there is a "presumption" that Qwest has "market power," based on its witness' HHI studies, and that Qwest's market share data is flawed. (TB, pp. 22-26.) Qwest addresses the market power argument in section IV.B.2 of its brief, and the Qwest market share issues in section IV.B.1. The remainder of TRACER's arguments on this issue are a rehash of the arguments that Qwest's data does not provide information about services offered by CLECs (which Qwest addresses above) or that certain modes of competition (QPP, UNE-P and resale) should not be considered (which Qwest has previously addressed). (TB, pp. 26-30.) The Joint CLECs do not seriously address service competition, other than to also trot out the well-worn conclusory argument that Qwest has not shown "price and service competition." (JCB, pp. 2-3, 5, 9, 17.) Finally, Eschelon, which spends more than 40 pages on a variety of issues, including the criteria in ORS 759.030(4), never directly discusses the issues of service competition or price competition in its brief (other than to simply note the statutory requirements). (EB, p. 6.)

competition exist throughout Oregon (despite that this conservative market share data understates Qwest's losses, and does not include wireless or VoIP-based competition). (QB, pp. 37-38.) Although Staff and TRACER spend considerable time attacking Qwest's market share data, a look at their arguments shows that to do so, they necessarily rely on a host of inaccurate and misleading statements and self-defined criteria, and they simply dismiss as irrelevant all competitive access lines provided through platform-based services and/or resale.

Both parties, for example, cling to the completely overblown and largely anecdotal finding that two CLECs serving the communities of Hermiston and Roseburg may use some UNE-L lines to serve residential customers. (SB, pp. 21-22; TB, pp. 26-27.) Never mind that one of these CLECs refused to respond to the Commission's post-hearing data request seeking to confirm that report,[27] and never mind that it remains unrebutted that these two CLECs' use of UNE-L for residential service, whether factual or not, represented only a minor aberration, rather than the norm, as Qwest has previously shown. As a second example of the lengths to which Staff and TRACER have gone in their arguments, both parties try to discount Qwest's market share data in general based on the unusual and self-concocted criterion that Qwest has not shown which specific business service is being provided by each access line that each CLEC purchases from Qwest on a wholesale basis–as if the CLECs would ever share that type of competitively-sensitive information with Qwest. (SB, p. 23; TB, p. 26.)

There is perhaps no better example of the responding parties' ignoring of the relevant evidence than their complete denial of competition despite the fact that, in *the four-year period between 2000 and 2004*, Qwest experienced declines in its switched business access lines of about [**Confidential**- ***XX%***, from **XXXXXX** to **XXXX**], and has seen even further erosion since

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[27] For that reason, and as Qwest mentioned in its opening brief (QB, fns. 23, 32), 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.

then. (QB, p. 25; Qwest/1, Brigham/20; Qwest/40.) The parties seem to ignore the fact that these access lines did not simply go away. Rather than providing any specific evidence to rebut Qwest's substantial evidence, the responding parties instead ignore the market share data, mount a campaign of speculation as to why this is so (such as the questionable suggestions there is a "declining economy" in Oregon or there are "economic reasons unrelated to telecommunications service"), and take the easy way out by simply arguing that Qwest did not "prove" that these declines are from competition, or that Qwest did not submit "sufficient evidence" or "persuasive evidence." (See e.g., SB, pp. 18, 31-41; TB, pp. 25-30; JCB, p. 9; EB, pp. 25-26.)

For example, despite almost 150 pages of briefs, the responding parties *never* once mention Qwest's evidence about CLECs having a minimum total of [**Confidential- XXXXXX**] retail business lines statewide, or about five rate centers having anywhere from almost 10,000 CLEC lines (in a couple of mid-sized rate centers) to more than 80,000 CLEC lines. (QB, pp. 19-21, 23-27, 38-39; Conf. Exs. Qwest/40, Qwest/43.) They likewise ignore Qwest's CLEC market share calculations, which show not only high market shares in Portland [**Confidential- XX%**], but also in several other rate centers. The statewide market share is [**Confidential- XX%**]. (*Id.*)[28] They also ignore the fact that all market share data is necessarily understated and conservative, in part because (1) several CLECs, including one major CLEC ("CLEC K"), never responded to the Survey, (2) these market share estimates do not take into account voice-grade

[28] Although the responding parties were content to ignore QPP, UNE-P and resale lines, and they made much ado about the fact a few UNE loops might not be used for business services. They never spend much time discussing market shares, and certainly do not analyze or address the state of competition in any particular rate center. This is so despite that they clamored about a relevant geographic market having to be smaller than the entire state, and despite that they possess all of the rate center data they need to discuss market shares at a granular level.

Thus, the responding parties failed to ever address the fact that CLEC market shares include the following, among others: [**Confidential- XX%** in Portland, **XX%** in Bend, **XX%** in Eugene, **XX%** in Salem, and **XX%** in Clackamas]. (QB, p. 39; Conf. Ex. Qwest/40, column I.) Rather, they prefer to use misleading statistics like Eschelon's and Staff's claim that CLEC market share was only 16% nine years after passage of the Act. (EB, pp. 11, 15; SB, p. 17.) They cavalierly do so despite that these percentages do not take into account all of the numerous CLECs with fewer than 10,000 lines, and that it is a *total* switched access line percentage, and is not specifically limited to business services, which are far more competitive than residential services. (QB, p. 19, fn. 11.)

equivalents for high-capacity DS1 and DS3 loops, and (3) these estimates do not include the impact of business end-user customers served by intermodal competitors like wireless or VoIP providers. (QB, pp. 38-40; Qwest/1, Brigham/37-38; Tr., pp. 349-352.) Nevertheless, the minimum CLEC market shares in the non-Portland geographic areas ranged from [**Confidential- XX%**] in the Coastal region to [**Confidential- XX%**] in the Eastern region. (QB, p. 40; Qwest/1, Brigham/35-37 (and Confidential Tables D, E); Conf. Ex. Qwest/40.)[29]

The responding parties also take much stock in market concentration measures like CR4 and the Herfindahl-Hirschman Index ("HHI"), which is used by the United States Department of Justice to analyze mergers of competitors. (SB, pp. 29-33; EB, pp. 12-15, 33.) These measures, however, are not useful and do not provide a meaningful measure of the level of competition. (QB, pp. 23-24, 40-41, 46-47; Qwest/51, Fitzsimmons/16-20.)

First, as Staff admits (Staff/100, Chriss/20), there is no necessary relationship between market concentration and market power, or the exercise of market power. Not surprisingly, therefore, the responding parties ignore, and thus fail to rebut, Qwest's undisputed evidence that the relationship between market concentration and market power is tenuous in a market like telecommunications (which 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).

Nor do the responding parties address the fact that the DOJ uses HHI to evaluate mergers, not to determine whether deregulation of a service or services is warranted—two entirely different questions—or that the HHI and CR4 calculations here are based solely on ILEC and CLEC information, and thus ignore intermodal competition from wireless and VoIP. They

[29] 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.)

further fail to address the fact that Qwest could have lost more than half of its access lines or customers (or indeed, even 90% of its customers), representing an extremely competitive market, and yet there still could be a high HHI or CR4 index (such as, for example, because there are only two or three total competitors). (Qwest/51, Fitzsimmons/18-19.)[30] Indeed, although 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, 171-172), several responding parties continue to stress these measures. (SB, pp. 29-33; EB, pp. 12-15, 33.)[31] It is no wonder, therefore, that despite the fact that no exchange in Washington had an HHI less than 5,000, the Commission Staff recommended, and the Commission approved, deregulation of all of Qwest's analog business services in that state. (See Qwest/59, p. 14, ¶ 30, and pp. 14-16, ¶¶ 31-39.) The Washington Staff pointed out that even a very high market concentration index does not mean a service could not be competitive "if the market structure is sufficiently procompetitive" (which is certainly the case in Oregon as well).

[30] A graphic example why HHI makes absolutely no sense here is as follows: to get under a 1,000 HHI that TRACER advocates for an "unconcentrated" market (TB, p. 23; SB, pp. 29-31; EB, pp. 12-15, 33), there would need to be the "perfect competition" of 10 different CLECs, each with no more than 10% market shares (10 X 10 [10 squared]=100 X 10 competitors= 1,000). Anyone with even an inkling of knowledge of the telecommunications industry in this country knows that this is not likely to happen in our lifetimes given the unique nature of the industry and its regulatory history. Indeed, even a "moderately concentrated" range of 1,000 to 1,800 HHI would mean that no provider could possibly have more than 20% market share (20 X 20) X 5 = 2000). Using an example closer to home, if Qwest's market share declined to only 50%, with one competitor achieving a 50% share, the HHI index would be 5,000. A Qwest market share decline all of the way to *30%,* with another provider capturing 70% of the market, would result in an even higher HHI of 5,800. In this case, Qwest clearly has little market power, yet the market shows a high level of concentration. (See also Tr., pp. 16-17 (explaining why HHI is not a good indicator of market power, using the Hermiston market as an example, to which TRACER agreed); Tr., pp. 131-132 (Eschelon agreeing that when AT&T had 60% of the long distance market, the HHI was more than 3,600); Tr., pp. 169-172 (TRACER HHI recalculations).) Thus, while HHI may be useful in analyzing the antitrust implications of a dominant soap maker's merger with or acquisition of another soap maker, it does not fit in analyzing the telecommunications industry, let alone a non-merger deregulation petition under ORS 759.030.

[31] The responding parties also ignore Qwest's point that while they may believe Qwest's market share is still "too high," they need to consider present market shares in the context that for many years Qwest was a regulated monopoly. Clearly, federal and state legislators and policymakers were well aware that Qwest and other ILECs had historical monopolies when they enacted deregulation statutes. Nevertheless, they established deregulatory schemes like ORS 759.030 to allow a company like Qwest to seek to deregulate its services if it could meet certain criteria, which Qwest clearly has in Oregon for these services.

Further, the HHI and other market concentration indicators are by definition backward-looking and cannot be blindly used to measure market power. (Qwest/51, Fitzsimmons/19.) These indicia offer a snapshot of a market at a period of time, and ignore the dynamics of the marketplace. For example, rapid changes in technology (such as VoIP or wireless) may have a profound impact on a firm's market power on a going-forward basis, yet this would not be reflected in a static measure of market share or concentration. As noted in the FTC's Horizontal Merger guidelines:

> Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agency may conclude that the historical market share of that firm overstates its future competitive significance.[32]

In short, there is no credible rebuttal to Qwest's substantial evidence that there is service competition for the switched business services at issue in this docket. Qwest has met its burden.

B. There is price competition for Qwest switched business services in Oregon

Likewise, despite the responding parties' repeated naysaying, Qwest has also shown with substantial evidence that there is *price competition* for switched business services in Oregon. (See e.g., Qwest/1, Brigham/39-40; Qwest/25, Brigham/67-68; Ex. Qwest/9 (matrix of Qwest and CLEC services and prices).) Indeed, Qwest demonstrated that its rates, terms and conditions are comparable to those of its competitors for similar services.

1. The alternative providers' comparable rates, terms and conditions

Qwest showed with substantial evidence that the alternative providers' rates, terms and conditions were comparable to Qwest's, and in many cases, even better. Qwest provided a wealth of pricing information to make its case on this issue. (See e.g., Exs. Qwest/9 (matrix of 10

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[32] Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines*, April 2, 1992, Section 1.521.

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competitors' services and prices); Qwest/11; Qwest/1, Brigham/39-42; Qwest/25, Brigham/61-70.) Qwest also showed with substantial evidence 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 comparing Qwest and CLEC services and prices).) Even Staff's own analysis (see Ex. Staff/112) showed there is price competition for basic exchange (1FB) service. (Qwest/25, Brigham/61-62.)[33]

Staff responds that Qwest "did not present evidence" to show its business service pricing is "constrained by competitors," or that "the actions of its competitors impacted the prices that Qwest charges for its services." In essence, Staff argues there is no price competition because "Qwest has not reduced its prices in order to stave off competition." (SB, pp. 24-25.) TRACER also argues that Qwest currently sets almost all of its prices at its price cap. (TB, pp. 1-2.)[34] The problem with these positions, however, is that they effectively ignore much of the evidence.

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[33] Unfortunately, however, 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. There was no dispute, however, that few business competitors today focus solely on providing service to stand-alone 1FB customers who do not order any add-on features. For example, a vast majority of Qwest 1FB lines in Oregon [**Confidential- XX%**] are either provisioned as a package [**Confidential- XX%**] or with one or more features [**Confidential- XX%**]. (Qwest/25, Brigham/61-62.)

[34] A number of responding parties argue that Qwest does not need deregulation because it already has "pricing flexibility" under ORS 759.410. (EB, pp. 2, 4-6, 35-36; TB, pp. 1-2, 8, 40; SB, pp. 1-2, 47; JCB, p. 12, fn. 36.) This argument is a non sequitur. First, pricing flexibility is not the same as deregulation. (See e.g., Tr., pp. 369-370.) Second, the price cap statute specifically provides that it is not intended to limit the ability of a telecommunications utility to seek deregulation under ORS 759.030. See ORS 759.410(7). Third, Qwest seeks parity, or a level playing field, in order to compete more effectively against its competitors. As Dr. Fitzsimmons noted, the response to competition does not determine the existence of competition, and the mere fact that price caps are in place do not substitute for competition and deregulation. (Qwest/51, Fitzsimmons/4-5, 35-36.) Fourth, there are still numerous regulatory burdens, including the filing of special contracts. (Qwest/1, Brigham/13; Tr., pp. 19, 20-21, 99, 119, 370-371.)

Moreover, as to the responding parties' speculative arguments that Qwest seeks deregulation solely to raise prices, Qwest showed that it could not do so because any attempts to raise prices would simply result in the loss of customers to competitors. (Qwest/25, Brigham/69-70; Tr., pp. 41-42; pp. 319-320 (Staff admitting that its four possible reasons for Qwest not reducing most prices are "speculative" and that it does not know or offer an opinion on that issue).) Moreover, given the competitive landscape, there is no evidence that Qwest is likely to raise prices if deregulated. Indeed, no party presented any evidence of Qwest raising prices in the many other states in which it has been deregulated (unlike Staff doing so in dockets UX 27 (directory assistance) and UX 28 (operator services).) Thus, this "price increase" argument appears to be nothing more than an appeal to emotion.

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As Qwest demonstrated, Staff provides an incomplete analysis of price competition in the local Oregon market. This is especially so because it focused almost exclusively on 1FB services, and ignored the fact that there are many services which both Qwest and CLECs offer that substitute for Qwest switched business services, and that Qwest and CLECs focus on service packages and bundles (and not only stand-alone 1FB services). No meaningful analysis of basic business services can be performed without considering add-on services, packages and bundles. (Qwest/25, Brigham/61-62; Tr., pp. 64-66.) Qwest spent considerable time rebutting Staff's analysis by comparing its services and prices with CLEC services and prices, only to have Staff in effect ignore such evidence. (Qwest/25, Brigham/62-66 (including service bundle pricing of various CLECs).) Qwest also demonstrated that Staff's arguments about constant prices are incomplete and misleading, that the "response to competition" does not determine the *existence of competition*, and that reducing prices may not always be appropriate. (Qwest/51, Fitzsimmons/35; see also Qwest/25, Brigham/68-69 (describing unrebutted reasons why Staff's arguments about Qwest not reducing prices to "stave off losses" are in error, and the Staff's focus on reduction of the 1FB price misses the point).) In any event, Qwest showed that it *has* reduced rates in many cases, especially through discounted packages, bundles and promotions. (Qwest/25, Brigham/65-67 (describing packages, bundles and promotions, and explaining the competitive dogfight in the market); Ex. Qwest/47.)

Finally, Eschelon's reliance (EB, p. 36) on the Commission's order in docket UD 13 is inapposite. There, the Commission found there was *no price competition* for the Verizon services at issue (indeed, the Commission found that competitors' prices were several times higher than Verizon's regulated prices), and that Verizon acknowledged it would raise prices after deregulation. See e.g., Order No. 05-1241, p. 9. That is clearly not the situation here. Similarly, Eschelon's repeated use of the alleged "350% increase" of the switch port in the QPP contract (EB,

pp. 18, 36-37) is all the more amazing given that Qwest exposed the utter fallacy of this claim. (See Qwest/25, Brigham/33-34 (explaining that the port charge was the only increase, over four years, and that the effective increase of the total QPP price was about a 6% increase per year); Tr., pp. 116-118 (same).)[35]

2. Qwest's declining access lines demonstrate there is price competition

Finally, the responding parties ignore the fact that Qwest's declining business access lines—a dramatic [**Confidential - XX%**] decline in just four years—and its declining market share provide further indicia of price competition for Qwest's switched business services in Oregon. (QB, p. 25; Qwest/1, Brigham/20, 38.) They also could not rebut the common sense notion that if 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. Obviously, utter speculation about a "declining economy" (JCB, p. 9) or other "economic reasons" (SB, p. 18) as reasons for Qwest's line losses is not sufficient and is completely unsupported by any factual evidence presented by any of the parties.

There is clearly *price competition* for Qwest's switched business services in Oregon. Since there is also *service* competition, Qwest has met its burden under ORS 759.030(3).

[35] As with its discussion about service competition, TRACER's price competition arguments revolve around its "presumption of market power" claim (based on HHI) and its complaints about Qwest's market share data being flawed, as well as its arguments about lack of proof or hard data or studies, or its concerns about QPP, UNE-P and resale. (TB, pp. 22-30.) In other words, TRACER lumps service competition and price competition together, without any separate analysis, and Qwest has already addressed these arguments at various parts of its brief. In fact, the only separate reference to "price competition" in TRACER's brief is its unsupported speculative argument that if Qwest is deregulated prematurely, it *could* discriminate through aggressive price competition in only certain areas. (TB, p. 29.) Clearly, this is the epitome of an unsupported parade of horribles that needs no response.

The same holds true with the Joint CLECs, who do not specifically analyze price competition, but merely repeat their conclusory statement that Qwest did not show price competition. (See e.g., JCB, pp. 2-3, 8-9, 17-18.) Finally, as with the service competition issue, Eschelon again never directly discusses price competition in its brief (other than to note the statutory requirements). (EB, p. 6.)

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

Even if the Commission does not agree with Qwest that there exists *both* price *and* service competition for switched business services in Oregon, it nevertheless *may*, in its discretion, grant Qwest's petition if it 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.) At a very minimum, Qwest's petition meets these requirements, and thus Qwest respectfully requests that the Commission deregulate these services in its discretion in all Oregon rate centers.

Qwest has already discussed "service competition" in section III.A. above, and "price competition" in section III.B. Accordingly, it will not address these factors further.

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

Preliminarily, since price and/or service competition exists for Qwest's switched business services in Oregon, by definition, these services in Oregon are "subject to competition," and thus the Commission may grant Qwest's petition. However, even if the Commission does not agree, Qwest has easily met the much less rigorous standard of "subject to competition."

Staff's 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." (SB, p. 31; Staff/100, Chriss/60; Tr., p. 300.) However, ORS 759.030 does not define "subject to competition," and thus the Commission should not be necessarily guided by one witness' opinion as to what "subject to competition" means. That caveat notwithstanding, Qwest has demonstrated that its switched business services in Oregon do indeed meet even Mr. Chriss' definition of "subject to competition." As Dr. Fitzsimmons noted in his unrebutted testimony, the fact that [**Confidential – XX%**] of switched business lines in Oregon are in rate centers with CLEC shares of 30% or more, and that [**Confidential –** less than

X%] of lines are in rate centers with CLEC share of 10 % or less, is "strong evidence that CLECs are highly successful in serving the vast majority of business customers in Qwest's service area, indicating that Qwest does not have market power." (Qwest/51, Fitzsimons/28.) By any objective standard, Qwest has clearly shown that its switched business services in Oregon are "subject to competition," as Qwest has demonstrated that competition already exists in all 77 Oregon wire centers, and that there are numerous competitors marketing and offering a variety of business services throughout the state.

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

Finally, 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). The responding parties' claims that the public interest requires continued regulation of Qwest's switched business services in Oregon, or that it is not in the public interest to grant Qwest's petition, are completely without merit and lack credibility.

1. Qwest's declining line counts and market shares show competition

In their zeal to deny the validity of Qwest's petition, the parties close their eyes to the realities of the switched business services market in Oregon, and ignore the fact that Qwest has had substantial declines in its business access lines. They claim such declines are not the result of competition, but are due to other reasons, like "a declining economy," "economic reasons," or other fanciful theories. Or, taking the easy way out, they self-servingly claim that Qwest simply has not proven that these declines are due to competition, or that Qwest has failed to establish a "link" between these declines and competition. The evidence does not bear this out, however.

Qwest very clearly presented *undisputed and unrebutted evidence* that its business access lines decreased from [**Confidential–XXXXXX** to **XXXXXX]**, a dramatic [**Confidential–XX%**]

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decline in only four years (December 2000 to December 2004), and that they decreased even further–to [**Confidential – XXXXXX**] lines by May 2005. (QB, pp. 20, 38; Qwest/1, Brigham/20; Qwest/40.) That evidence, coupled with all of the market share data that Qwest has presented, which Qwest will not repeat here, more than effectively shoots down the responding parties' wishful thinking to the contrary.

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

TRACER continues to argue that Qwest has "market power." Indeed, there are no less than *45* references to "market power" in TRACER's brief, as if its constant drumming of this term will simply make it so. TRACER's argument (to which the other responding parties join in, but without any of their own separate analyses) really boils down to its argument that there must be a "presumption" of market power because of Staff's HHI calculations. (TB, pp. 21-25.) In other words, TRACER builds up the straw man that there is a "presumption" of market power because of the high HHI calculations, and then expects Qwest to knock it down. The problem with this tactic, however, is that it is built on a faulty premise (that a high HHI means there is a presumption of market power). Once that premise is undercut, however, the rest of the argument falls down. Moreover, even if the premise were to have any validity as far as it goes (from a purely theoretical standpoint), the unrebutted evidence about declining Qwest access lines and market share, along with the unrebutted evidence of the significant inroads made by the large number of competitors who have entered the market and are actively marketing competing services, makes clear that such "market power" mantra is just unsupported whistling in the wind.

It is, of course, rather easy to throw around conclusory terms like "market power." It is TRACER, however, who utterly fails to prove, with any *competent or admitted evidence*, that Qwest has market power. As the proponent of the argument about market power, it is *TRACER's*

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burden to prove it, not Qwest's obligation to disprove it.[36] TRACER cannot, however, as all it can point to is its witness' speculation that because there are high market concentrations, based on an irrelevant measure like HHI, there must be a "presumption" Qwest has market power.[37]

As Dr. Fitzsimmons testified, without challenge (and as Staff's economic witness agrees), there is no necessary relationship between market concentration and market power, or the exercise of market power. (Qwest/51, Fitzsimmons/16-17; Staff/100, Chriss/20.) In fact, it is inappropriate to correlate market concentration and market power in the American telecommunications industry given its transition from franchise monopolies to competition and the rapid technological changes affecting communications and their markets. (Qwest/51, Fitzsimmons/17.) The responding parties' reliance on HHI and CR4 calculations are equally flawed, as these measures are static and do not capture market dynamics that clearly constrain Qwest's ability to have market power. (Id., pp. 17-18; see also Qwest/59 (Washington order), p. 14, ¶ 30.) These measures, as calculated by Staff, are also based solely on ILEC and CLEC data, and do not account for intermodal competition from wireless or VoIP. (Id., pp. 18-19.)

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

The responding parties lazily dismiss Qwest's public interest position about parity among competitors on the simplistic ground that Qwest is an "incumbent provider," or that the Commission rejected a parity argument in docket UX 28 (regarding operator services). (SB,

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[36] TRACER argues, *without citation to evidence or authority*, that "all witnesses" agreed the Commission's inquiry for deregulation is "whether there is sufficient competition to restrain an exercise of market power by the incumbent," and that "whether sufficient 'competition exists' to constrain Qwest and whether Qwest has 'market power' are two sides of the same coin." (TB, p. 5, fn. 14.) That is, of course, not the statutory test under ORS 759.030, although it is certainly not the first time a responding party has attempted to rewrite the statute. However, that is exactly what TRACER seeks by arguing, without support, that "Qwest must necessarily prove that it does not have market power" (instead of TRACER, as the proponent of the theory, having the burden to prove it). Further, the fact the Commission may consider market power in this case, or that it has considered market power as one of the "other factors" analysis in other deregulation dockets, does not mean Qwest has the burden of proof to *disprove* market power. In short, the Commission should not allow TRACER to turn the tables on *its* burden of proof.

[37] TRACER does admit, however, that Qwest is not a "monopolist" today. (Tr., p. 200.)

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p. 20; TB, pp. 34-35, 37; JCB, p. 12.) However, the legislative drafters of ORS 759.030, and those legislators who voted for it, were certainly well aware that the statute was designed for "incumbents" (or "telecommunications utilities," as used in the Oregon statutes). Although the responding parties were content in noting that Qwest is an "incumbent," or that "parity for parity's sake is not in the public interest," they certainly cannot dispute that Qwest is the *only* business services provider among its competitors that this Commission fully regulates, or that the deregulation statute was established to provide regulatory parity, upon a proper showing (as here) by "incumbents." As for the UX 28 case, the Commission in that docket had found there was *no price competition* for the operator services at issue (indeed, the Commission found that competitors' prices were several times higher than Qwest's regulated prices), and thus did not find parity to be a factor in that particular case. (See e.g., Order No. 03-609, pp. 6, 12, 16.) That is not the situation here, and thus the UX 28 order is inapposite.

4. Many Qwest states have found Qwest's business services competitive

Qwest has demonstrated that at least nine other states in Qwest's region have either deregulated Qwest's business services or have found them to be competitive under their regulatory schemes. (Qwest/1, Brigham/83-87.) While this Commission is certainly not bound by other state decisions, and each state will have its own level of competition and standards, the commissions and legislatures in other states have the public interest as their core goal—just like this Commission. This Commission should, as it often does in other regulatory proceedings, *consider* what other states have done in this regard.

a. The Washington business services orders

Several responding parties attempt to disregard or minimize the Washington business services deregulation orders (or other state orders and legislation). They do so primarily by arguing that other states' decisions are not relevant to Oregon. In particular, they argue that the

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Washington analog business services order is not probative, the law in Washington may be different from the law in Oregon (although TRACER admits the Washington standards are "quite similar" to those in Oregon), the Washington analog services order was issued before the *TRRO* (when UNE-P was readily available, and thus circumstances are different today), and that a deregulated provider there must still continue to cover costs and continue to file price lists. (SB, pp. 18-19; TB, pp. 37-38; EB, p. 38.) These arguments are easily rebutted.

First, Staff's argument that decisions of other states are not relevant (SB, pp. 18-19) is odd indeed. Although the Commission may not have been influenced in docket UX 28 (SB, pp. 18-19; JCB, pp. 12-13) by what other states had done with respect to deregulation of operator services based on "this record" (which was before it, for which the Commission found no price competition), that does not mean that the Commission found other states' decisions to be irrelevant.[38] Indeed, the Commission often considers what other states have done in its analysis and consideration of regulatory dockets before it.[39] Clearly, the Washington order is probative, and not only does TRACER admit that the standards in Washington (RCW 80.36.330) are similar to those in Oregon, but Qwest has already proved it, and Staff's witness admitted it. (QB, p. 48; see also Qwest/59, pp. 4-5, ¶¶ 5-9; Tr., p. 264.)

It appears that the main concern about the Washington analog order (and several other deregulation orders) is that it was issued before the *TRRO*. (SB, p. 19; EB, pp. 39; TB, pp. 37-

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[38] It is ironic that Staff argues that what has happened in other states is not probative given that in dockets UX 27 and UX 28, Staff and the Commission relied on the events in other states after directory assistance and operator services were deregulated in those states. (See Order No. 03-368, pp. 6, 15-17 (UX 27); Order No. 03-609, pp. 5, 6, 11, 12, 14 (UX 28).)

[39] In fact, just in the past few years, and limited to cases in which Qwest has been involved, the Commission has considered and often relied on other states' decisions in at least the following orders and dockets: See e.g., Arbitrator's Decision (April 19, 2004), adopted in Order No. 04-262, ARB 527 (AT&T); Arbitrator's Decision (September 20, 2004), adopted in Order No. 04-600, ARB 537 (Western Radio); Arbitrator's Decision (August 11, 2005), adopted in Order No. 05-980, ARB 584 (Covad); Order Nos. 05-088 and 05-206, ARB 589 (Universal); ALJ Ruling (March 23, 2005), affirmed in Order No. 05-208, UC 600/DR 26 (NPCC); Order No. 05-704, UM 1040 (Beaver Creek); Order No. 06-037, IC 12 (Qwest/Level 3 VNXX); Arbitrator's Decision (February 2, 2006), ARB 671 (Universal). The Commission also considered numerous decisions from other states in various rulings and recommendations in docket UM 823 (Qwest's 271 docket).

38; Tr., p. 352.) However, that is a difference without a real distinction. This is especially so because UNE-P has been replaced by QPP, and QPP will be available for at least 2½ years, and Qwest is legally obligated to provide these platform-based UNE-P-successor services for only a couple of dollars more per line. (QB, pp. 21-22; Qwest/25, Brigham/31-32, 33-34.) More importantly, as a review of the Washington analog order shows (Qwest/1, Brigham/86; Ex. Qwest/59), the Washington Commission granted Qwest's petition despite evidence that the CLEC business market shares there were *less than 29%* (*including* UNE-P). Here in Oregon, CLEC business market shares are far greater than the Washington CLEC market shares in 2003 *even if UNE-P and QPP are excluded* (which they should not be). (See e.g., Tr., p. 270 (Staff calculated Qwest's statewide market share at about **70%**, *excluding* UNE-P, QPP and resale).)[40]

Further, 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), RCW 80.36.330(7). (See also Ex. Qwest/59, p. 54 (Appendix A).) The Washington Commission has certainly not done so, even after the *TRRO*. In fact, it actually later granted Qwest's petition to deregulate (or reclassify) its *digital* business services, including DSS, ISDN and Frame Relay, in 58 wire centers in *April 2005*, two months *after* the *TRRO* was issued in February 2005. (Qwest/25, Brigham/86, and fn. 104.)[41] In short, this Commission should not be persuaded by the responding parties' speculation that the elimination of UNE-P somehow will have any material adverse impact on competition; to the contrary, the FCC evidently has

[40] As it does with the deregulation status in other states, Eschelon mischaracterizes the Washington orders when it claims that "Qwest has pricing flexibility for only certain business services in Washington; the rest are deregulated only in specified wire centers." (EB, p. 38.) The truth of the matter is that the Washington Commission determined that *all* Qwest retail *analog* business services are competitive *in all* Qwest wire centers (see Ex. Qwest/59), and that *digital* business services are competitive in 58 Washington wire centers, encompassing the overwhelming majority of Washington business lines. (Qwest/1, Brigham/86, and fn. 104.)

[41] The same holds true with respect to some of the deregulation in other Qwest states.

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concluded that because CLECs are not impaired without UNE-P, UNE-P is not necessary for competition (which is the FCC's primarily goal) to continue flourishing.

In any event, Qwest will not repeat all of its discussion of the Washington analog order here. Rather, Qwest simply refers the Commission to Exhibit Qwest/59 (especially pp. 36-37, 48-50 (¶¶ 95-97, 138-146)) and Qwest's opening brief (QB, pp. 47-49).[42]

Accordingly, Qwest believes the Washington orders are probative and thus the Commission should *strongly consider* them, and their rationale, and should not dismiss the orders simply because they are from a different commission or because Oregon is "not Washington." (Tr., pp. 265, 274.) The same rationale that applied to the two Washington decisions should apply here as well.

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

Only Eschelon addresses the deregulation in other states that Qwest had discussed. (EB, pp. 37-38.) However, Eschelon fails to rebut Qwest's evidence, and indeed, it fails to cite to *any authority or testimony* to support its arguments. In fact, in its apparent zeal to have the Commission ignore the trends throughout Qwest's region on deregulation issues, Eschelon resorts to several misleading statements (or outright mischaracterizations) about these states' deregulation schemes.[43] Ironically, although the responding parties in their testimony often

[42] Eschelon's argument that Qwest must still continue to cover costs and continue to file price lists is of no consequence. (EB, p. 38.) Both of these requirements apply to *all* deregulated companies and to *all* CLECs in Washington, whereas in contrast, CLECs do not file tariffs in Oregon. Thus, the fact that Qwest and CLECs must still file tariffs or price lists in Washington and that Qwest would no longer need to file tariffs in Oregon (like CLECs) is irrelevant here; the point is that Qwest merely seeks parity, or an equal playing field, which it has in Washington and which it seeks here. And, of course, Qwest would still continue to cover costs, as it has previously committed to do. (Tr., pp. 100-104; Ex. Eschelon/3.)

[43] Eschelon purports to distinguish four of the 10 other states that Qwest cited about deregulation of Qwest business services in those states. (Compare EB, pp. 38-39 with QB, pp. 47-51 and Qwest/1, Brigham/83-87). It does not address the other six states, however, and it does not accurately reflect the status in those four states.

For example, as for Colorado and South Dakota, Eschelon is partly correct: deregulation there *was* the result of "settlement agreements." (EB, pp. 38-39.) However, it is *not* accurate to say these settlement agreements were not the result of "a fully contested proceeding as the Commission is conducting in Oregon." To the contrary, these settlement agreements *were* the result of contested commission dockets, and the commissions thereafter approved the agreements. *Order Approving Settlement with Modifications*, Docket Nos. 04A-411T and 04D-440T

speculated about a parade of horribles that might occur if Qwest were deregulated, no party could cite to any example of any such conduct in the states where Qwest has been deregulated (see Tr., pp. 278-279, 314-315, 320-321, 337-338), despite that Staff has done so in other deregulation dockets (UX 27 (directory assistance) and UX 28 (operator services)).

4. <u>Legislative policy encourages competition and deregulation</u>

Not much more needs to be said about Qwest's position that Oregon legislative policy encourages both competition and deregulation, and that Qwest has proved the former, and thus it is now time that it be accorded the rights of the latter. The responding parties continue to raise the deregulation bar to unattainable levels, however, as if legislative policy is meant to dictate continuing outmoded forms of regulation on Qwest forever. They never rebut, or even address, Qwest's economic expert witness Dr. Fitzsimmons's testimony about telecommunications public legislative policy in the United States and how deregulation is warranted here. (QB, pp. 51-52; Qwest/51, Fitzsimmons/2-5, 38-39.) The same holds true with respect to state law, legislative intent and policy. See e.g., ORS 759.015; ORS 759.020, 759.025, 759.030, 759.050. Indeed, these parties' only response is the tired refrain that Qwest has not disproved the presumption it has market power, or that it has not proven its case. (TB, p. 38; SB, p. 20; JCB, pp. 13-14.)

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

Finally, Qwest noted that the Commission has sufficient recourse in its ability to reregulate Qwest's switched business services if it determines that an essential finding on which the deregulation was based no longer prevails, and that reregulation is necessary to protect the

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(Co. PUC, June 6, 2005); *Order Reclassifying Qwest's Local Exchange Services as Fully Competitive*, Docket No. TC03-037 (SD PUC, October 29, 2003). This is not much different from what this Commission did when it approved a stipulation between Qwest and Staff in deregulating intraLATA toll in docket UX 28. See Order No. 03-609. Further, Eschelon is technically correct that "not all business services" in Wyoming are deregulated, and that incumbents must continue to "price above cost of service." (EB, p. 38.) However, as Qwest mentioned, other than "essential" services (such as *single-line* flat-rated rated business services), many business services are essentially deregulated in that state. The fact that all ILECs must "price above cost" is not an issue. Finally, Qwest has already discussed Washington above, including at fn. 42.

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public interest. ORS 759.030(3)(b). While acknowledging that the Commission has this statutory right, and thus that the Commission can protect the public interest if it were ever to become necessary, the responding parties dismiss this Commission authority by arguing that "it may be impossible for the Commission to know that such re-regulation is required" (because it would not possess the appropriate information to seek to re-regulate). Similarly, they argue that removing Qwest's regulatory requirements "*may* allow an exercise of market power that causes substantial harm to customers and also harms development of competition," and thus the Commission's authority to re-regulate the petition services "cannot address all of the potential harm from premature deregulation." (SB, pp. 20-21 (emphasis added); TB, pp. 39-40.)[44]

In other words, TRACER apparently takes the position that the Commission somehow loses its broad authority to investigate (which is especially odd because it previously cited to the "Commission's broad powers"). That is obviously not so. Moreover, Qwest would continue to be subject to general antitrust law prohibiting unfair competition (such as predatory pricing). As for Staff's arguments, they are nothing more than a citation to the TRACER witness' conclusory speculation, without any evidence, about what Qwest "may" do if its switched business services are deregulated. That is certainly not a good enough basis to dismiss this powerful Commission tool, especially since the Legislature specifically included it in the statute.

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[44] The Joint CLECs' argument is even more odd. They argue that reregulation "would require another extensive and time-consuming proceeding similar to this docket." (JCB, p. 14.) Even if true, however, that is obviously not a proper reason to dismiss this Commission authority. The Joint CLECs seem to say that it is somehow acceptable for Qwest to be put through an "extensive and time-consuming" almost two-year process, but for that same reason, one should ignore that the Commission has the power to reregulate (because another process may be needed). They also argue that there could be "substantial damage to consumers and CLECs can occur in the interim" between deregulation and reregulation. (JCB, pp. 14-15.) That, of course, assumes the underlying theory that there would be some harm. Moreover, this argument could always be used as an excuse to deny any petition for deregulation. Obviously, one must presume that the Legislature put in that provision in the statute for a reason. Finally, the Joint CLEC argument (JCB, pp. 14-15) that the harm to Qwest of maintaining regulation is "relatively minor" compared to the alleged harm to customers is utterly without merit, and is easily argued by competitors that have vested economic self-interests in seeing a competitor continue to be regulated.

V. RESPONSES TO THE PARTIES' PROPOSALS

Staff and XO also commented on Qwest's responses to the previous proposals that they had made in their testimony. (SB, pp. 42-46; JCB, pp. 15-19.) Qwest replies to such comments.

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

Staff's proposal to deregulate only basic (1FB) service and its associated features and packages in the Portland rate center, but not in the other rate centers, as well as to deregulate ATM and 800 services, but not other services, does not make sense. Worse, Staff is inconsistent in its recommendations and advocacy, and this is reflected in large part on its overly data-centric view of the evidence (and of the telecommunications industry in Oregon).

1. There is no logic to not recommending deregulation for other services

Fatal flaw number one in Staff's proposal is the illogical recommendation to deregulate only ATM and 800 services, and 1FB services with associated features and packages 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. This is due in large part to Staff's overly narrow definition of the relevant product market, and its complete failure to account for the substitutability between different switched business services. Further, Staff never responded to Qwest's comment in its opening brief that it makes no sense to deregulate only 1FB service in Portland, while continuing to regulate PBX, Centrex and ISDN services, simply because there was, in Staff's mind, a lack of sufficient *quantitative* data in the incomplete CLEC Survey regarding these services. Staff's recommendation is simply not based on any real-world experience in or knowledge of the telecommunications industry generally, or in Oregon. (See e.g., Tr., pp. 258-262, 275.) Staff's over-reliance on the incomplete and misleading CLEC Survey data, and its own flawed analysis of that data, coupled with its absolute refusal to consider any of the real-world, common-sense evidence that Qwest presented, led Staff to

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essentially discount the fact that business customers substitute PBX, Centrex, ISDN and other services for 1FB service, and thus that these services are in the same relevant product market and should all be deregulated. 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. To put it plainly, if 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.[45]

2. <u>Qwest meets the deregulation criteria for all services, in all areas</u>

Also flawed is Staff's limiting of its recommendation for deregulation of basic (1FB) services to only the Portland rate center, and to no other rate centers. First, although Staff, along with the other responding parties, claimed that Qwest had defined only a "statewide" relevant geographic market, Staff was apparently able to determine that at least the Portland rate center was sufficiently competitive for 1FB services.[46] While Staff used words such as "potential for competition," or "subject to competition in the Portland market," it is apparent that it would not have recommended deregulation of any service, in any geographic area, if it did not truly believe there was sufficient competition, or that doing so was in the public interest. (See e.g., Tr., pp. 297-300.) Since Staff never really explained why it recommended only Portland, and no other rate center, one can reasonably assume that it had to do with what Staff believed was a "sufficient" "market share." However, Staff never really discussed why it did not believe Qwest had met its burden of proof in any other rate centers, despite the fact that, in addition to Portland, there are high CLEC shares (even if one were to eliminate the services that Staff did) in numerous other rate centers, and at least two CLECs present in every rate center (except one less-than-80-line

[45] As Qwest previously mentioned, 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. (QB, p. 55, fn. 41.)

[46] Likewise, TRACER was more than willing to discuss market shares in different rate centers. (TB, p. 25.)

rate center). 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%**)].[47] Although it is certainly not surprising that some rate centers have higher CLEC market shares than others, or that the Portland rate center is among the leaders of the pack, there is sufficient competition in every rate center, and this competition constrains Qwest's ability to raise prices or to exercise "market power" throughout the entire state. Of course, the level of market share is not determinative as to whether the statutory criteria have been met. At a very minimum, it is clear that the *market structure* in Oregon is sufficiently competitive, and thus that all of Qwest's services are *subject to competition* in *all* rate centers in the state. (See e.g., Ex. Qwest/59, pp. 14-15, 37, 49, 52, ¶¶ 30-34, 99-101, 141, 144 (Washington analog order discussing the fact that high market share and market concentration does not mean services are not competitive if the *market structure is sufficiently pro-competitive*, and that such market structure includes Qwest's 271 application process and approval and the operation of a performance assurance mechanisms to protect against "backsliding" in providing UNEs fairly and efficiently).)

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

Staff rejected Qwest's offer to cap any potential price increases by lamenting that there were "no specific details," including "the mechanism by which increases would be calculated or how the mechanism would be effectively enforced." (SB, p. 47.) Thus, although Staff first cited to "data issues" when it changed its view about Qwest's proposal (Tr., pp. 296-297, 355-356, 357), it now evidently complains about lack of detail. However, Staff protests are not well taken.

[47] For example, of the 57 rate centers in Oregon, *minimum* CLEC market shares were above 40% in 12 rate centers, above 30% in 32 rate centers, and above 20% in 49 rate centers. Indeed, only five rate centers (totaling only 626 lines, or .15%) of the more than 431,000 total business switched access lines in Oregon) had less than 15% CLEC market shares. These market share percentages, of course, do not account for any full facilities-based lines of the 11 CLECs that failed to respond to the CLEC Survey (which makes it woefully incomplete), and further does not include wireless or VoIP business lines.

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The Qwest compromise proposal is very simple: In order to address Staff's expressed concerns about rural Oregon business customers, or those in Rate Groups 2 and 3, Qwest agrees, upon approval of Qwest's petition, to commit to capping any increase in the rural rates for basic business service (1FB) to the level of any increase that might occur in urban areas like Portland. (QB, pp. 55-56; Qwest/25, Brigham/92; Tr., pp. 66-67, 295-297, 361-362.) There is nothing difficult about this proposal, and it effectively alleviates Staff's concerns about rural areas.

Staff's further attempt to argue "several drawbacks," such as a "clearly defined benchmark for basic business service" (SB, p. 47), are odd given that Staff has recommended the deregulation of Qwest's basic business services, which have always been referred to as "1FB" services, with uniform prices within each of the three rate zones in Oregon. Further, the examples that Staff speculates about (SB, p. 47) make no sense, as they assume, without any evidence or logic, that Qwest would set a high "list" price or bundle in the urban areas, and then offer separate discounts or bundles to its tens of thousands of urban customers (requiring tens of thousands of individual case basis contracts) just to drive away more rural customers.[48] Staff's imagination, while creative, would be better served in addressing the real-world evidence of competition in Oregon than to conjure up far-fetched hypothetical stories of Qwest "discriminating" against rural customers.[49] In short, Staff never convincingly proved why any "details" could not be addressed in a condition in the order. (QB, pp. 55-56; Tr., 355-357.)

[48] The Washington Commission noted that it would be highly unlikely that Qwest would find it worth its while to spend significant time and money, and incur significant ill will, in offering its services for higher prices in just certain selected rural wire centers for the sake of trying to gain a very small increased margin of income. (See Ex. Qwest/59, p. 40, ¶ 107.)

[49] Of course, Staff seems to forget that the Commission would retain its extensive general investigation powers, as well as its authority to reregulate any or all of these services if warranted. For that reason, Staff's speculative argument that the "derivative problem" with Qwest's compromise offer is that "the Commission *may* be limited in its investigatory powers" cannot be taken seriously. (SB, p. 48 (emphasis added).) The Commission does not need Qwest to tell it how it (the Commission) could enforce the condition, which is based on capping any potential future price increases, and not to determine if any such price increases are "deemed unreasonable." (Id.)

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

Finally, Staff attempts to prop up rationales for a couple of its proposed conditions. (SB, pp. 42-46.) However, Staff never really addresses the concerns that Qwest raised in its opening brief (QB, pp. 56-67), as Staff primarily restates what it and others testified to in their prefiled testimony. (SB, pp. 43-44.) Its only response regarding proposed Condition 2 (allegedly designed to prevent undue discrimination and provide disclosure of information to customers), offered without any analysis, rationale or explanation, is that "[t]he requirement would provide customers a tool to help the Commission police unduly discriminatory practices," and that it would "protect customers residing in different areas of the Portland rate center." (SB, pp. 44.) Staff, however, never responds to Qwest's reasons (QB, pp. 56-57) why such requirements are unnecessary, and indeed, are *discriminatory against Qwest* (especially since Qwest would be the only deregulated or unregulated competitor with such requirements).

Likewise, there is no analysis in Staff's comments regarding Condition 3 (the "functional separation" of Qwest's wholesale sales employees from its retail sales employees). Rather, Staff ignores Qwest's stringent existing policies (in compliance with Section 222(b) of the Telecommunications Act) that prevent the sharing of wholesale information with retail employees, as described in Qwest/25, Brigham 95-97. Staff simply argues that "the Commission has no assurance that Qwest will do so" (comply with its wholesale obligations under the 1996 Act), and that the proposed condition is "a tool to protect competitors in the event Qwest changes its policy regarding functional separation of wholesale and retail functions, or fails to adhere to it." (SB, p. 45.) Even a cursory reading of the language that Staff employs in this proposed condition (SB, p. 43) shows that it is completely unnecessary, duplicative, would be costly to implement, and is the regulatory equivalent of using a sledge hammer to kill an ant, especially

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given that Staff admitted it had no facts or specific evidence about Qwest abusing any retail/wholesale relationship (i.e., there is no ant to kill). (See Tr., pp. 330-331.)

The Commission should reject both of these proposed conditions (Conditions 2 and 3).

B. The Commission should reject the irrelevant XO special access proposal

Finally, XO (as part of the Joint CLECs) again attempted to justify its irrelevant and unlawful special access proposal. (JCB, pp. 15-19.) However, it utterly failed to do so.

After merely summarizing its testimony on the issue (JCB, pp. 15-17), XO argues that "Qwest confuses a finding of no impairment without access to UNEs with a finding that price and service competition exists." (JCB, p. 17.)[50] While Qwest agrees that this is a deregulation docket to determine whether price and service competition exist in the Oregon business market, and is not an impairment docket, XO is simply wrong, and provides *no authority*, for any suggestion that the Commission can, as a "condition" to a deregulation order, reduce Qwest's intrastate special access prices or violate the FCC's *TRRO*. (QB, pp. 57-58; Qwest/25, Brigham/76-81; Tr., pp. 76-77, 120.)

In addition, XO suggests, again *without authority*, that the Commission's "broad powers to regulate telecommunications utilities and protect the public interest" is somehow sufficient to adjust Qwest's intrastate special access rates that are either *deregulated* (DS3) or *price capped* (DS1). However, XO certainly does not cite to any authority that the Commission's broad general powers allow it to reduce the rates for Qwest's price capped intrastate DS1 special access services, or Qwest's deregulated intrastate DS3 special access services (other than the Commission's power under ORS 759.030 to reregulate DS3 special access services in an

[50] XO's comments about "Qwest own conduct" and "Qwest's response [to FCC action] has been to repeatedly increase the prices of those [special access] services" (JCB, p. 18) are curious, especially in light of the evidence that Qwest has *not increased* these prices as XO claims. (QB, p. 57; Qwest/25, Brigham/87.) Although XO's witness did make such a claim, and XO repeats it in the Joint CLECs' brief, the witness could provide no evidence, or any detail or specifics, about such price increases. (Tr., p. 248.) XO is simply wrong.

appropriate docket, under appropriate circumstances). See also Qwest/25, Brigham/82-87; Tr., pp. 75-77, 120, 249-252 (Knowles).)[51]

Finally, XO apparently ignores Qwest's points (QB, p. 57) that its special access concerns are really limited to only a few wire centers for DS1 and DS3 transport, and only one wire center for DS1 and DS3 loops. Even in those wire centers, however, Qwest must still offer DS1 and DS3 loops and transport at just and reasonable rates. XO's focus on interstate special access prices also ignores Qwest's *lower* intr*a*state special access pricing in Oregon. (See also Qwest/25, Brigham/30, 77, 81-82, 82-85; Tr., pp. 112-115, 82, 244-248, 291.)

CONCLUSION

Qwest has met its burden of proof under ORS 759.030(2) and/or ORS 759.030(3) for deregulation of *all* of its switched business services at issue in this petition, and in *every* rate center in Oregon. Accordingly, Qwest respectfully requests the Commission grant Qwest's petition *in its entirely*, and thus exempt all these services in Oregon from any further regulation.

DATED: February 21, 2006

Respectfully submitted,

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[51] XO's general citation to ORS 759.410 (JCB, p. 19 and fn. 59), for the apparent proposition that "the Commission can investigate and adjust (reduce) any proposed price decreases in Qwest's price-capped services," does not make sense. First, there are many subsections in ORS 759.410, but XO does not cite to any specific provision to prove its point. Second, there is nothing in that statute that remotely provides that the Commission can involuntarily require Qwest to reduce its price-capped retail prices. Third, XO fails to rebut the jurisdictional reasons (see QB, p. 57) why the Commission cannot raise these prices that Qwest raised.

Not surprisingly, neither XO nor the Joint CLECs repeat their previous speculative and unsupported arguments about the impact of the SBC/AT&T and Verizon/MCI mergers. (See e.g., QB, pp. 57-58.)

CERTIFICATE OF SERVICE

UX-29

I hereby certify that on the 21st day of February, 2006, I served the foregoing **QWEST CORPORATION'S POST-HEARING REPLY 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.

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DATED this 21st day of February, 2006.

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