

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UX 29**

In the Matter of the Petition of Qwest  
Corporation to Exempt from  
Regulation Qwest's Business Basic  
Exchange Services

**REDACTED  
POST-HEARING BRIEF  
OF ESCHELON TELECOM, INC.**

**INTRODUCTION AND SUMMARY**

Qwest Corporation (Qwest) has the burden of proof in a deregulation petition to demonstrate its conformance with Oregon's statutory deregulation criteria. Qwest has failed utterly to meet that burden in its petition to exempt all switched business services statewide from regulation. The Public Utilities Commission of Oregon (Commission) should therefore reject Qwest's petition.

Qwest's argument in support of its petition can be summarized as follows:

- Congress passed the Telecommunications Act of 1996 requiring Incumbent Local Exchange Carriers (ILECs) such as Qwest to open their networks to competitors. Approximately ten years have passed since that time.
- New technologies such as VoIP and existing technologies such as wireless are capable of competing with incumbents.
- Qwest has submitted documentation showing that it faces competition in each of its wire centers in Oregon.
- Qwest is regulated and its competitors are not.
- Other state commissions have deregulated some of Qwest's services.
- The Commission should therefore deregulate all of Qwest's business switched services in every wire center in Oregon.

Qwest repeatedly falls back on this defective logic because it has failed to offer evidence actually showing that it faces specific, meaningful competition—competition

that would constrain Qwest's behavior in the marketplace—in any wire center in the state. Qwest has failed to produce product- or market-specific data sufficient to explain why it needs relief from the minimal constraints of Oregon's price cap regulation in order to face competitive threat—particularly when it already possesses the ability to lower prices at will.

Eschelon Telecom, Inc. (Eschelon) will show that Qwest has failed to produce the evidence to meet the statutory criteria for exemption of its switched business services from regulation. Generally accepted methods of documenting the status of competition exist; Qwest has not chosen to bring them forward in this proceeding. Without such evidence, Qwest's mantras--the number of years since the passage of the Telecommunications Act was passed, the treatment of Qwest under other state statutes and circumstances, etc.—are mere distractions.

Eschelon will show that Qwest is not unfairly burdened by regulation in Oregon and that it does not currently face competition that offsets its innate advantages as the incumbent monopolist. Qwest can and does operate successfully under the current regulatory regime. Given these circumstances, the petition that Qwest has submitted consists nearly entirely of rhetoric, with very little attempt--and less success--at producing factual data to meet the statutory criteria. Should Qwest in the future be able to produce hard facts showing that it faces true competition constraining its behavior and rendering all regulation unnecessary, Qwest can petition for deregulation at that time.

The Commission should not allow Qwest to substitute repeated slogans for required evidence. The Commission should reject Qwest's petition for deregulation of its business services.

### **PROCEDURAL HISTORY**

Qwest filed a petition for exemption from regulation of its switched business retail services on June 21, 2004. Staff filed a report on August 13, 2004, recommending that the Commission suspend the petition and initiate an investigation. At the Commission Public Meeting on August 17, 2004, the Commission adopted Staff's recommendation and established a procedural schedule, setting August 31, 2004 as the deadline for interventions.

Eschelon, a competitive local exchange carrier (CLEC) operating in Oregon and seven other states, intervened in this proceeding on August 31, 2004.

The Commission issued the CLEC survey as a Bench Request on October 15, 2004. A CLEC Survey Workshop was held on May 27, 2005; Staff issued the Final CLEC Survey Report on July 27, 2005.

The Commission set the matter for contested case proceedings. Testimony was filed by Qwest, Commission Staff, and intervenors Eschelon, the Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER), and a group of CLECs consisting of XO Communication Services, Inc., Time Warner Telecom of Oregon, LLC, Integra Telcom of Oregon, Inc., and Oregon Telecom. An evidentiary hearing before Administrative Law Judge (ALJ) Allan J. Arlow was held on October 18 and 20, 2005.

Qwest filed its Opening Post-Hearing Brief (Qwest Opening Brief) on December 9, 2005.

### **STATUTORY FRAMEWORK**

The Oregon legislature has established specific goals for the Commission's telecommunications proceedings. Specifically, in meeting its charge of "represent[ing] the customers of any public utility or telecommunications utility and the public generally," the Commission must "make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.<sup>1</sup> This statute is the lens through which all the issues in this proceeding must be viewed.

Qwest has elected to be subject to price cap flexible pricing pursuant to ORS §§ 759.400 to 759.455. Under Oregon's price cap statute, Qwest is not subject to regulation based on earnings, rates, or rates of return.<sup>2</sup> Under the plan, the Commission sets a price cap and Qwest is free to change its rates between the capped rate and a price floor calculated off of total service long run incremental cost (TSLRIC). Basic telephone service, however, is not subject to a price floor or price cap under this statute.<sup>3</sup> Qwest may effect a price change, without the requirements of hearing, suspension, or notice

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<sup>1</sup> Oregon Revised Statutes (ORS) § 756.040.

<sup>2</sup> *Id.* at § 759.410(2).

<sup>3</sup> *Id.* at § 759.410(4).

under ORS §§ 759.180 through 759.190, simply by providing notice to the Commission within 30 days *after* the effective date of the price change.<sup>4</sup>

Qwest's basic services, which are not subject to price floors or caps under the aforementioned price cap regulation, fall under the flexible pricing provisions of the competitive zone statute, ORS § 759.050. Qwest has petitioned successfully for the Commission to establish all 64 of its Oregon exchanges as competitive zone exchanges.<sup>5</sup> The competitive zone statute allows Qwest to change the price of any of its basic services within the parameters of the price in place at the establishment of the competitive zone and the TSLRIC price floor, without the requirements of hearing, suspension, or notice under ORS §§ 759.180 through 759.190, *effective upon filing* with the Commission.<sup>6</sup>

Qwest may also currently offer its services under the statutes governing special contracts, ORS § 759.250, and special promotions, ORS § 759.182. Special promotions go into effect immediately *upon Qwest's filing* with the Commission and must be priced above TSLRIC. Special contracts must be for a new service with limited availability or designed to respond to a unique customer requirement and must be priced above TSLRIC. No filing of a special contract is required until 90 days *following the effective date* of the contract and the contract is presumed approved unless the Commission issues an order otherwise.

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<sup>4</sup> *Id.* at § 759.410(8).

<sup>5</sup> Staff Exhibit 200, Direct Testimony of David L. Sloan (Sloan Direct), p. 10.

<sup>6</sup> ORS § 759.050(5).

Despite the extremely light regulatory hand placed upon Qwest's service offerings by the aforementioned statutes, Qwest has now petitioned pursuant to ORS § 759.030 for exemption from any regulation of its switched business services throughout its Oregon service area. Pursuant to ORS § 759.030(3), the Commission shall exempt a telecommunications service from regulation if price and service competition exist. Pursuant to ORS § 759.030(2), the Commission may grant the exemption if it finds that price or service competition exists, or that such services can be demonstrated by the petitioner or the commission to be subject to competition, or that the public interest no longer requires full regulation thereof.

The legislature established specific factors the Commission must consider in determining the merits of a deregulation petition:

- The extent to which services are available from alternative providers in the relevant market
- The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions
- Existing economic or regulatory barriers to entry
- Any other factors deemed relevant by the commission<sup>7</sup>

The legislature acted wisely in establishing exacting criteria for the Commission's consideration of a deregulation petition because the very few remaining regulatory requirements for a price-capped ILEC are the heart and soul of ratepayer protection. If Qwest's petition were granted, Qwest would no longer be required by state law to, among other things: file tariffs or price lists for any but basic services; refrain from pricing predatorily by setting prices below TSLRIC; provide notice to the Commission or

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<sup>7</sup> *Id.* at § 759.030(4).

any party when implementing price changes; maintain prices below a Commission-approved rate; or submit for Commission approval any rate implemented. These minimal regulatory requirements are the only means by which regulators, consumers, and competitors can monitor the incumbent's behavior to ensure that it is not engaging in "unjust and unreasonable exactions and practices" and that it offers "adequate service at fair and reasonable rates."<sup>8</sup>

Exemption from core regulatory standards thus represents a dramatic retrenchment from basic public interest protections. The legislature made sure that the exemption statute will only allow such a retrenchment if a petitioning party can prove that the elements of true competition have supplanted the need for even minimal regulatory oversight. The petitioning party must show that a competitive market exists that will constrain its behavior to such an extent as to replicate the public interest regulatory protections. The Commission must specifically find that *alternative providers* in the *relevant market* render *services to a sufficient extent* and that those services are *functionally equivalent or substitutable at comparable rates, terms and conditions*. The Commission can only make such findings as a result of a proceeding in which the petitioner has produced the facts necessary to meet its burden of proof.

### **THE BURDEN OF PROOF**

The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position--in this case, Qwest.<sup>9</sup> The party

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<sup>8</sup> *Id.* at § 756.040

<sup>9</sup> *Id.* at § 183.450 (2).

carrying the burden of proof has two obligations: the burden of coming forward with evidence (burden of production); and the burden of persuasion. In this proceeding, Qwest has the obligation to produce evidence showing that it has met each of the statutory criteria to merit deregulation: that *alternative providers* in the *relevant market* are rendering *services to a sufficient extent* and that those services are *functionally equivalent or substitutable at comparable rates, terms and conditions*. Qwest must produce the underlying information necessary to show that *each* of these factors is met to the point that the rigors of the market place will constrain the erstwhile monopolist's perfectly logical goal of exploiting its market share without regard to competitors or their end user customers.

Qwest furthermore must produce evidence showing that its proposal is consistent with the aforementioned legislative goals for telecommunications in Oregon. Specifically, in meeting its charge of "represent[ing] the customers of any public utility or telecommunications utility and the public generally," the Commission must find that the deregulation of all Qwest business services throughout the state would still allow the Commission to "make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."<sup>10</sup>

For each of these issues, the Commission must weigh the evidence put forward by the proponent and rule against the proponent where its position is not "supported by, and in accordance with, reliable, probative and substantial evidence."<sup>11</sup> If, therefore,

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<sup>10</sup> *Id.* at § 756.040.

<sup>11</sup> *Id.* at § 183.450(5).



the party carrying the burden of proof does not meet the first threshold of producing evidence, then that party cannot meet or even reach the burden of persuasion.<sup>12</sup>

### **ARGUMENT**

Qwest witness Robert Brigham advises that the Commission should focus in this proceeding on “whether there is sufficient competition to constrain Qwest’s ability to raise prices for its services in the market.<sup>13</sup> Eschelon agrees with this statement—the burden of proof is on Qwest to demonstrate that competition is sufficient to act as the “regulator” of Qwest’s behavior in the market, replacing the need for any Commission oversight. Eschelon does *not* agree that Qwest has met this burden.

A firm is “regulated” by the market when its behavior is constrained by the presence of true competitive alternatives. If a firm in a competitive market increases price above economic cost (cost plus a reasonable profit), consumers will migrate to the other alternatives, forcing the firm that increased prices to reduce them. In addition, a firm in a competitive market cannot offer an inferior product unless consumers are compensated for this lower quality in the form of lower prices.<sup>14</sup>

Competition will only exist when there are no barriers to entry and exit in a market.<sup>15</sup> A barrier to entry is a circumstance particular to a given industry that creates disadvantages for new competitors attempting to enter the market and provide

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<sup>12</sup> *Id.*; McCormick on Evidence, § 336 (5<sup>th</sup> ed.).

<sup>13</sup> Qwest Ex. 1, Direct Testimony of Robert H. Brigham for Qwest Communications (Brigham Direct), p. 38.

<sup>14</sup> Eschelon Ex. 1, Direct Testimony of Douglas Denney on Behalf of Eschelon Telecom, Inc. and Advanced Telecom, Inc. (Denney Direct), pp. 5-6.

<sup>15</sup> *Id.* at p. 6.

competitive alternatives.<sup>16</sup> In the *TRO*, the FCC recognized the following barriers to entry in the local telecommunications market: scale economies, sunk costs, first-mover advantages, absolute cost advantages, and barriers within the control of the incumbent LEC, such as operational or technical barriers.<sup>17</sup> All of these are real barriers faced by CLECs that can impede or slow the development of competition.<sup>18</sup>

Qwest, however, claims that, because there are no “legal” barriers to entry in the local market, no barriers to entry exist.<sup>19</sup> Qwest makes this claim regardless of the level of CLEC market share.<sup>20</sup> Eschelon disagrees with Qwest’s assertion. Since local telephone markets are open to competition by law, a lack of competition should indicate to this Commission that serious barriers to entry *do* exist and that it is premature to deregulate Qwest’s switched business services.

Qwest, therefore, has the burden of proof to demonstrate, through each of the statutory exemption factors, that barriers to entry are minimal and that Qwest faces true alternative choices that render any regulatory check upon its behavior unnecessary.

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<sup>16</sup> *Id.* at p. 27.

<sup>17</sup> *TRO*, ¶¶ 85-89.

<sup>18</sup> Denney Direct, p. 27.

<sup>19</sup> Brigham Direct, p. 47.

<sup>20</sup> *Id.* at pp. 38-39.

**I. Statutory Criterion Number One: The Extent to Which Services Are Available from Alternative Providers in the Relevant Market.**

**A. Qwest Fails to Demonstrate that the Extent of Services Available from Alternative Providers Is Competitively Significant.**

Qwest repeatedly cites the Telecommunications Act of 1996 (the Act) as proof that a vibrant competitive landscape must exist.<sup>21</sup> In fact, although the Act did create the obligation for incumbent local exchange carriers (ILECs) to open their networks to competitors, local competition is still in a nascent stage nearly ten years after the Act's passage. In Oregon, CLECs have captured only 16 percent of the total local service market, compared to 18 percent nationwide.<sup>22</sup> Oregon CLECs have captured only [\*\*\*begin trade secret end trade secret\*\*\*] percent of the effective market share of business services<sup>23</sup>—that is, those services not offered or controlled by Qwest, as described more fully below.<sup>24</sup>

CLECs still overwhelmingly rely upon Qwest for access to their end user customers. Of all CLEC lines, in this instance including UNE-P/QPP and resale, [\*\*\*begin trade secret end trade secret\*\*\*] percent rely upon Qwest's last mile facilities to reach end users. Taking into consideration the customers of CLECs that are dependent upon Qwest for the local loop together with Qwest's local customers, Qwest

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<sup>21</sup> See, e.g., Brigham Direct, p. 42 (“...any legal and regulatory barriers that may have existed to competitive local market entry were effectively eliminated with the passage of the Telecommunications Act of 1996.”).

<sup>22</sup> Denney Direct, p. 7.

<sup>23</sup> *Id.*

<sup>24</sup> As will be explained more fully below, Eschelon uses the term “effective market share” to denote the share of CLECs that have the *actual ability* to place competitive pressures upon

thus controls the last mile for at least [\*\*\*begin trade secret end trade secret\*\*\*]  
percent of all switched business retail customers in Oregon.<sup>25</sup> The picture is of a  
telephone company that is still firmly at the helm of local telecommunications in the  
state.

Qwest claims that there are 50 “active” CLECs in Oregon that “offer retail  
switched business services that are competitive with Qwest’s business services in  
Oregon.”<sup>26</sup> Staff’s investigation revealed that 11 of the 50 CLECs do not provide retail  
business service in Oregon and a further three CLECs were not on the list provided to be  
surveyed.<sup>27</sup> The actual number of CLEC business service competitors in the state is  
therefore less than three-quarters that cited by Qwest, and the number that were  
examined in the CLEC survey is lower still.

Staff further notes that, because Qwest’s analysis rests on wholesale line counts  
rather than retail lines, it masks the actual ratio of services offered between the various  
CLECs and is therefore “not probative of the level of competition in Oregon.”<sup>28</sup>

Staff, TRACER, and Eschelon, unlike Qwest, produced evidence to demonstrate  
that Qwest is the dominant carrier in highly concentrated Oregon local markets, leaving  
little opportunity for meaningful competitive alternatives. Two widely accepted means  
of measuring market share cited by the intervenors are the four-firm concentration ratio,

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Qwest. These competitors, it will be shown, cannot logically include CLECs serving through  
QPP/UNE-P or resale.

<sup>25</sup> *Id.* at pp. 7-8.

<sup>26</sup> Brigham Direct, pp. 18-19.

<sup>27</sup> Staff Ex. 100, Staff Direct Testimony of Steve W. Chriss (Chriss Direct), p. 35.

<sup>28</sup> *Id.* at p. 33.

or CR4, and the Herfindahl Hirschman (HHI) Index. The CR4 adds together the market share of the four largest firms in the market. A small CR4 represents a market with low levels of concentration, which means that no one firm is dominant. The HHI measures market concentration by summing the squares of each firm's market share.<sup>29</sup> The HHI can range from 0 to 10,000, with 10,000 representing one firm with all of the customers—a market share of 100.<sup>30</sup> Two firms, each with half of the market would produce an HHI of 5,000.<sup>31</sup>

As TRACER witness Dr. Cabe points out, a helpful point of comparison for market share is the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (HMG), which define ranges of HHI values above 1800 as “highly concentrated.”<sup>32</sup> Eschelon witness Mr. Denney demonstrated that the HHI for the switched business market in Oregon is between 5,755 and 6,008.<sup>33</sup> Staff calculated the HHI by wire center and showed similar or higher concentrations for all but one wire center, which was nonetheless still highly concentrated.<sup>34</sup>

Faced with these strong indicators of its market dominance in Oregon and thus, a dearth of competitive alternatives, Qwest can only counter that there are no set levels of market share established in the regulatory exemption statute, and that market share is

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<sup>29</sup> Denney Direct, pp. 10-11.

<sup>30</sup>  $100^2 = 10,000$ .

<sup>31</sup>  $50^2 + 50^2 = 5,000$ .

<sup>32</sup> TRACER Ex. 100, Direct Testimony of Dr. Richard Cabe on Behalf of TRACER (Cabe Direct), p. 11-12.

<sup>33</sup> Denney Direct, p. 11.

<sup>34</sup> Chriss Direct, pp. 19-20, and Staff Ex. 103.

not used as a definition of a barrier to entry.<sup>35</sup> <sup>36</sup> Eschelon does not disagree with these statements, but they are off-point: while market share does not equal a barrier to entry, it is a significant indicator of whether such barriers exist. A demonstrated high level of market concentration should be considered presumptive of a constrained market place in which alternative competitors are *not* available to a *sufficient extent* to provide the necessary external controls protecting ratepayers and competitors from a highly dominant incumbent.<sup>37</sup> It is Qwest's obligation under the exemption statute to come forward with evidence to refute this presumption.

Qwest's attempt to demonstrate weakness in the HHI model by parsing the Hermiston wire center data was particularly revealing on at least two levels. Qwest concentrates on this particular small wire center to attempt to show that Staff's high HHI calculation for this exchange was not consistent with actual market power for Qwest. Qwest states that a particular CLEC's UNE-L lines outnumbered Qwest's retail business lines in the exchange and thus Qwest did not enjoy market power in the wire center's business market.<sup>38</sup> Built into Qwest's calculation is a presumption that UNE-L lines can be reliably considered to be business and not residential lines. Later in the proceeding, however, TRACER witness Dr. Cabe was able to testify to the fact that the Hermiston CLEC's UNE-L lines were, in fact, residential and not business lines.<sup>39</sup> Qwest's sample

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<sup>35</sup> Qwest Ex. 25, Rebuttal Testimony of Robert H. Brigham for Qwest Corporation (Brigham Rebuttal), pp. 52-53.

<sup>36</sup> On the other hand, Qwest advocates *using* such market share evidence if it is arguing a *loss* in Qwest's market share. Qwest's Opening Brief, p. 24.

<sup>37</sup> Cabe Direct, p. 12.

<sup>38</sup> Brigham Rebuttal, pp. 59-60.

<sup>39</sup> Tr. pp. 146-156.

analysis refuting the accuracy of HHI in Hermiston is thus fundamentally flawed. The exercise also calls into question the accuracy of any Qwest market share analysis, which may well have formed other conclusions based on similarly unexamined data.

Having produced little accurate, substantive data to show the availability of competitors, Qwest falls back to arguing that competition *must* exist because the passage of the Act effectively eliminated “any legal and regulatory barriers that may have existed to competitive local market entry” and “the Act eliminated economic barriers to entry.”<sup>40</sup> Qwest’s argument that the Act in itself removed barriers to competitive entry cannot be sustained in light of the slow growth of local competition in ten years. As a reality check, one can look to the long distance market, which burgeoned much more quickly following the opening of long distance service to competition through the 1984 breakup of AT&T. Mr. Denney is able to demonstrate graphically in his testimony that long distance competitors’ market share was above 40 percent nine years after the divestiture of AT&T, while CLEC market share was only 16 percent nine years after the passage of the Act.<sup>41</sup> This is a clear indication that local markets are not fully open to competition. With a large and diverse customer base, there is no other reason that CLEC market shares are as low as they are nine years after the Telecommunications Act.

Qwest also misses the mark by attempting to attack the efficacy of the standard market share methodologies used by the U.S. Department of Justice and the expert witnesses for Staff, Tracer, and Eschelon. Qwest’s resort to this tack demonstrates that it

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<sup>40</sup> Brigham Direct, p. 42.

is unable to rebut the presumption raised that insufficient competitive alternatives exist to constrain Qwest's market behavior.

As the petitioner, Qwest has the obligation to disprove the clear evidence of its concentrated market power that was submitted into the record. Factual methods of demonstrating the meaningful availability of competitive services---retail competitive market data, accepted market share analyses, or cross-price elasticity studies--are within Qwest's ability to produce. Because Qwest has not done so, it has failed to meet its burden of proving the extent of available competition that would constrain its competitive behavior, absent regulation.

**B. Qwest Fails to Prove That Competitive Providers Offer Services That Are Capable of Constraining Qwest's Behavior in the Relevant Market.**

**1. Qwest Does Not Use the Correct Data to Demonstrate the Relevant Product Market.**

As the Commission noted in its Order No. 05-1241, when examining the four factors to determine the merits of an exemption petition, "we must first decide the relevant market."<sup>42</sup> Under ORS § 759.030(2), Qwest must produce evidence that it faces sufficient competition to *constrain its behavior in the relevant market*. Qwest has made no attempt to separate within its data the products that actually have the ability to influence its behavior. As Staff, Eschelon and TRACER have noted, Qwest has total control over the availability and price of some of its products and those products hence assert no

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<sup>41</sup> Denney Direct, p. 9. Both long distance and local figures used by Mr. Denney for his comparison included both residential and business services.

<sup>42</sup> *In the Matter of Verizon Northwest Inc. Petition to Price List IntraLATA Toll, Operator and Directory Services*, Docket No. UD 13, Order No. 05-1241 (the Verizon Northwest Order) (December 9, 2005).



market discipline upon Qwest. These products, including QPP/UNE-P and resale, are not a competitive check upon Qwest's market behavior, but are in fact simply a continuing and predictable revenue stream for Qwest. Other products touted by Qwest as constraints upon its market behavior, such as VoIP and wireless, are too new and unproven or functionally nonequivalent to Qwest's business services to be considered as evidence of competition in this docket.

**a. QPP Should Not Be Considered Part of the Relevant Product Market.**

Qwest includes lines that are leased to competitors under QPP/UNE-P commercial agreements in all of its projections of competitive market share.<sup>43</sup> Staff, TRACER and Eschelon disagree that the QPP product represents a competitive constraint to Qwest's market behavior. Rather, as Staff notes, QPP business service provision is "competition at Qwest's discretion."<sup>44</sup> QPP business does not serve as the competitive discipline necessary to replace regulation because Qwest has total control over both the availability and the price of these services.<sup>45</sup>

Qwest offered the QPP product to its competitors via notices stating that the competitors must comply with the terms immediately or they could be withdrawn.<sup>46</sup> Qwest unilaterally set a July 1, 2008 termination date for all the QPP commercial

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<sup>43</sup> Qwest Ex. 8.

<sup>44</sup> Chriss Direct, p. 31.

<sup>45</sup> Denney Direct, p. 15.

<sup>46</sup> *Id.*, pp. 17-18.

contracts. Qwest will not commit that it will continue to offer QPP to CLECs after July 1, 2008.<sup>47</sup>

Qwest will raise the deregulated segment of the QPP rate structure—the switch port—by over 350 percent, from \$1.14 to \$5.32, over the approximate three-year life of the contracts. This fact offers a window into the likely future of Qwest’s prices if they are no longer regulated. Qwest itself could provide no comfort for Oregon consumers and competitors regarding its price behavior in a deregulated environment: when asked if Qwest would charge just and reasonable prices if deregulated, Mr. Brigham replied that Qwest will charge “the price we need[] to sell at in order to maintain demand.”<sup>48</sup>

Qwest contests the parties’ statements that the eventual loss of QPP will harm competition and thus renders competitive data including QPP products inappropriate. Based upon the FCC’s finding that CLECs are not impaired without unbundled access to switching when it removed switching from the UNE list in the TRRO, Qwest argues that Oregon CLECs must have switching alternatives and would not be harmed by the loss of QPP.<sup>49</sup> Qwest’s logic is flawed. The FCC’s nationwide finding that sufficient alternatives exist to allow competitive access to switching at just and reasonable rates rather than TELRIC is very different from the state-specific evidence that Qwest must produce to justify exemption from all state regulatory requirements. If Qwest had

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<sup>47</sup> Tr. p. 58 (Brigham).

<sup>48</sup> *Id.*, p. 115.

<sup>49</sup> Brigham Rebuttal, p. 31.

submitted data to show that the competitive situation in Oregon is a perfect microcosm of the FCC's broad finding of competitive alternatives for QPP, Qwest might have had a genuine argument that QPP should be included in competitive data. Qwest, however, offers no such documentary evidence showing Oregon alternatives to QPP that will prevent Qwest's exploitation of QPP's termination.

Qwest, in fact, views the determination of a product market as "more of a common sense exercise than is portrayed by a number of witnesses in this proceeding."<sup>50</sup> According to Qwest, it is a matter of "significant numbers of consumers considering[ing] them to be reasonable substitutes,"<sup>51</sup> but Qwest offers no estimate of what that significant number might be, nor does it offer customer surveys regarding product substitutability. Qwest states that determination of a product market "can come from examining if the services are marketed in the same channels,"<sup>52</sup> but Qwest makes no effort to match any showing of competitors' marketing efforts with competitive results by product, and in many cases does not even include discussion of marketing efforts below the regional or national level.<sup>53</sup>

Qwest could have attempted to support its claim that QPP should be considered part of the relevant product market to determine competitive constraint, despite the obvious facts that QPP's price and terms are totally under Qwest's control, Qwest has not committed to its continuance, and it represents a continuous revenue stream for

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<sup>50</sup> Qwest Ex. 51, Rebuttal Testimony of William Fitzsimmons for Qwest Corporation (Fitzsimmons Rebuttal), p. 5.

<sup>51</sup> *Id.* at p. 6.

<sup>52</sup> *Id.*

<sup>53</sup> Brigham Direct, pp. 51-60.

Qwest. Qwest could have offered its own evidence of competitive share without QPP, or pledged to continue the product past Qwest's unilaterally chosen termination date, or offered customer surveys showing the relevant product market. Qwest did not choose to do so.

Qwest has offered no evidence that QPP represents a service available in the relevant product market with the ability to constrain Qwest's market behavior. Qwest must not be allowed to offer QPP product data as evidence of competitive market constraints.

**b. Resale Products Should Not Be Considered Part of the Relevant Product Market.**

Qwest includes resale products in its calculation of competitive market share.<sup>54</sup> For purposes of its petition, Qwest advocates that the Commission find the lines it leases at resale as part of the competition that would constrain its behavior if all regulatory oversight were withdrawn. Eschelon and TRACER strongly oppose the inclusion of resale products in the relevant market data.<sup>55</sup> Staff provides market share analysis based upon competitive provision of UNE-L and full facilities, without the inclusion of resale.<sup>56</sup>

Qwest offers resale products at the wholesale rate required under § 252(d)(3) of the Act. Under this methodology, Qwest charges a wholesale discount that is calculated off the retail rate, including a guaranteed margin, and excluding Qwest's retail costs of

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<sup>54</sup> Qwest Ex. 8.

<sup>55</sup> Denney Direct, pp. 18-19; Cabe Direct, p. 32.

<sup>56</sup> Staff Ex. 103.

marketing, billing, collection, and related costs. When Qwest sells its products at the resale discount, therefore, the revenue impact is equal to that of Qwest's retail sales. Qwest can set retail rates at its chosen levels and remain financially indifferent between retail and resale sales.<sup>57</sup> For these reasons, CLECs using the resale product to compete do not impose market discipline on Qwest with respect to prices.

Qwest attempts to rebut the obvious lack of constraint offered by the resale product by arguing that an increase in Qwest's retail price would actually increase the margin available for the CLEC (because the CLEC's sales and other expenses would remain stable). In fact, while a CLEC's margin might rise, Qwest does not mention that its own revenue rises at a much higher percentage. Thus, if Qwest raises its retail price by a dollar, it collects a dollar more in revenue from each retail customer *and* \$0.83 more from each resale customer--while the CLEC gets an additional \$0.17. The effect is hardly a constraint on Qwest's pricing behavior.

For all these reasons, Qwest has failed to demonstrate that CLECs using resale should be counted as part of a product market that can replace the Commission's regulatory oversight of Qwest.

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<sup>57</sup> Denney Direct, p. 19.

**c. Intermodal Products—VoIP and Wireless—Are Not at This Time a Meaningful Part of the Relevant Product Market.**

Qwest asserts that competition from VoIP and wireless providers is adversely impacting its market share.<sup>58</sup> Once again, however, Qwest fails to offer any substantive data to support its claim.

Qwest cites the increase in wireless subscribers in Oregon from 2000 to 2004 and a decrease in Qwest access lines during that time, drawing a conclusion that the two are cause and effect.<sup>59</sup> As noted by Mr. Denney, however, the fact that two events occur simultaneously does not mean that one is caused by the other. Mr. Denney is able to demonstrate through a simple chart that any number of other causes, including natural business cycles, are as likely--indeed more likely--to have caused the wireline and wireless line changes.<sup>60</sup>

Qwest attempts to rebut Mr. Denney's chart by arguing that the underlying data may include some private line and special access services, which are not switched services, and may include channel terminations provided to CLECs and other customers.<sup>61</sup> While this ARMIS data may include some of the aforementioned products, this does not offset the fact that Qwest has made *no* attempt in its representation of line loss to account for lines "lost" to its own wireless products, or to a customer's move

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<sup>58</sup> Brigham Direct, pp. 66, 79.

<sup>59</sup> *Id.* at p. 60.

<sup>60</sup> Denney Direct, pp. 22-23.

<sup>61</sup> Brigham Rebuttal, pp. 43-44.

from Qwest switched access to Qwest special access, or from Qwest dial-up to Qwest DSL. In short, Qwest attempts to posit wireless market share inroads by juxtaposing two growth charts without attempting to prove their relationship. This does not rise to the level of evidence that should be considered in this proceeding.

Qwest is also not able to demonstrate that wireless is a substitutable product for business wireline services. As discussed more fully in Section III below, Qwest's attempt to show the products as functional equivalents instead demonstrates that wireless is not a reasonable substitute for business wireline services.

Qwest also cites VoIP as a meaningful competitive constraint. Staff notes, however, that Qwest has failed to provide good quantitative data regarding customer switching or cross-price elasticity to prove or disprove this claim.<sup>62</sup> In response to Staff's Competitive Survey, furthermore, only four responding CLECs included any information regarding VoIP.<sup>63</sup>

Qwest even attempts to capitalize on its *lack* of data by stating that the CLEC market share shown in Qwest Ex. 8 must be considered conservative because the data does not reflect the impact of VoIP (or wireless) competitive inroads.<sup>64</sup> In fact, the majority of the impact of VoIP would be reflected in market share data already, because VoIP depends on providers such as Qwest for last mile access to business customers.<sup>65</sup>

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<sup>62</sup> Chriss Direct, p. 57.

<sup>63</sup> *Id.*

<sup>64</sup> Brigham Direct, p. 37; Brigham Rebuttal, p. 42.

<sup>65</sup> Denney Direct, pp. 24-25.

If VoIP were instead offered by a facilities-based CLEC, that data, too, would have been reported by CLECs in the competitive survey. The FCC has found the only type of VoIP that would not be captured in the market share data—so-called “over-the-top” VoIP, which rides someone else’s high-speed connection-- as not sufficiently substitutable to be considered in the relevant product market for wireline services.<sup>66</sup> The dependence of most VoIP technology on providers such as Qwest for access is thus significant for two reasons: 1) it refutes Qwest’s assertion that VoIP competition must be considered as additional to the market share data Qwest has produced; and 2) it is a reason that VoIP cannot be cited as evidence of competitive constraint.

Qwest protests Staff’s insistence on “hard data—such as a cross-price elasticity study—to *prove* that VoIP-based services compete as substitutes for traditional switched business services.” (Emphasis in original.)<sup>67</sup> Qwest disagrees with TRACER that a survey of customers is required.<sup>68</sup> Instead, Qwest advocates the intuitive approach, advising the Commission that “all one has to do is pay attention to the actions of competitors....” Qwest then proceeds to cite nationwide marketing materials of XO, AT&T, and others, without providing *any data* as to the actual use of any VoIP product for business service in Oregon.<sup>69</sup>

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<sup>66</sup> *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, FCC 05-183, WC Docket No. 05-65, Memorandum Opinion and Order (November 17, 2005), ¶¶ 86 and 88.

<sup>67</sup> Brigham Rebuttal, p. 40.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at pp. 40-42.



Qwest could have produced cross-price elasticity studies or customer surveys to attempt to support its claims that wireless and VoIP business competition are currently constraining Qwest's behavior in the market place. Qwest chose not to enter this evidence to meet its burden of proof. For all these reasons, neither wireless nor VoIP can be credibly offered as evidence of competitive restraint on Qwest's market practices in Oregon.

**d. The Commission Should Depend Upon the Correct Market Share Data, Which Has Been Recalculated to Show the Relevant Product Market**

Qwest apparently believes that it may avoid its burden to prove that competition exists in the relevant product market if it repeats enough times an extraordinary claim--- that Qwest need not produce any evidentiary basis for its petition and the Commission may instead depend upon anecdote and Qwest's word. Qwest's self-serving claim should be given short shrift. The Commission should find that Qwest has failed in its burden to bring forward evidence showing the extent to which services are available from alternative providers in the relevant product market.

The Commission should not consider Qwest's market share data, which attempts to demonstrate competitive restraint by including products that demonstrably do not control its behavior: QPP, UNE-P, resale, VoIP and wireless.<sup>70</sup> The Commission should instead look to the analysis of Staff and other intervenors for the true status of

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<sup>70</sup> Qwest Ex. 8.

competition in Oregon. Data representing competition from UNE-L and facilities-based providers found at Staff Ex. 103, based on data gleaned from a painstaking survey process, presents a much more realistic picture of the ability of competitors to constrain Qwest's market behavior. Mr. Denney, too, has put in evidence recalculating Qwest's data to include those competitors who actually have the ability to check Qwest's monopoly instincts.<sup>71</sup> The Commission should use this data, which conforms to the wording and intent of the exemption statute, and not the demonstrably self-serving data offered by Qwest. Using this data, the Commission should determine that Qwest has not met its burden to show the availability of competitive services that justify the cessation of regulation.

**2. Qwest Fails to Show That the Competition It Cites Affects Qwest's Behavior in the Relevant Geographical Market.**

In his Direct and Rebuttal Testimony, Qwest witness Mr. Brigham states that the Commission should define the relevant geographic market for retail business services to include all Oregon wire centers that Qwest serves.<sup>72</sup> Despite these unequivocal statements, Mr. Brigham stated at hearing that Qwest had meant something else than this broad proposal, that it really meant to "ask[] for deregulation in the entire state, all 77 wire centers, okay?"<sup>73</sup> And further, "Well, I think our specific proposal is that we believe that the services should be deregulated in all of the wire centers in all the ...our

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<sup>71</sup> Denney Direct, p. 21.

<sup>72</sup> Brigham Direct, p. 15; Brigham Rebuttal, p. 99.

<sup>73</sup> Tr. p. 29 (Brigham), lines 2-4.

specific proposal is to deregulate switched business services in all of Qwest's exchanges in the state of Oregon. That's what our proposal is."<sup>74</sup>

These somewhat puzzling statements add up to the fact that Qwest has provided *no actual definition of the relevant geographic market*. Qwest instead offers statements regarding some presence of competition in the various Oregon wire centers,<sup>75</sup> lists of marketing CLECs,<sup>76</sup> and an analysis of CLEC competition that varies widely from wire center to wire center, in some instances constituting levels of less than 10%, even with Qwest's inclusion of UNE-P and resale in the analysis.<sup>77</sup>

As noted by Dr. Cabe, Qwest's failure to put forward evidence to demonstrate competition in a relevant geographic market is all the more glaring given the significance placed upon the relevant geographical market by the U.S. Department of Justice and Federal Trade Commission in their Horizontal Merger Guidelines (HMG). The HMG noted in part that a relevant geographical market will include suppliers that provide products at an acceptable location *without incurring sunk costs*.<sup>78</sup>

Sunk costs, which are the portion of fixed costs that are not recoverable, are a barrier to entry for CLECs attempting to enter a geographical market. At hearing, Mr. Brigham agreed that CLECs would in most instances need to invest in a collocation at a Qwest wire center to enter the market, with further costs for additional necessary equipment such as multiplexers, and would then need to engage in the usual marketing

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<sup>74</sup> *Id.* at lines 19-24.

<sup>75</sup> Brigham Direct, p. 27.

<sup>76</sup> *Id.* at pp. 15-16.

<sup>77</sup> Qwest Ex. 40.

<sup>78</sup> Cabe Direct, pp. 22-23, quoting HMG, § 1.0.

necessary to enter a new market.<sup>79</sup> Qwest, however, made no attempt to factor sunk costs into a proposal for a relevant geographical market.

Qwest has failed to put forward evidence demonstrating that services are available from alternative providers in the relevant geographic market such that Qwest can be found to face competitive market discipline rendering regulation unnecessary.

**II. Statutory Criterion Number Two: The Extent to Which the Services of Alternative Providers Are Functionally Equivalent or Substitutable at Comparable Rates, Terms and Conditions.**

The legislature considered the functional equivalency or substitutability of alternative providers' services so necessary to demonstrate true competition that it established this factor as a separate criterion for the Commission's consideration. Only products that are directly comparable or reasonably substitutable for each other should be considered as part of the relevant product analysis. Qwest, however, fails to offer the evidence to show the actual substitutability of the business products it proposes to be deregulated. Indeed, Qwest insists that the entire range of its 4000 + business products must be considered as substitutable and analyzed as a whole.<sup>80</sup>

Staff witness David L. Sloan notes that Qwest has failed to provide any study of its Oregon customers to determine if they consider various switched business services for which it is requesting exemption as substitutable.<sup>81</sup> Qwest's failure to produce such

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<sup>79</sup> Tr. pp. 110-111 (Brigham).

<sup>80</sup> Brigham Direct, p. 16-17.

<sup>81</sup> Sloan Direct, p. 6.

a survey is particularly ironic, given Qwest's sweeping statements that product markets are simply a matter of customer perception.<sup>82</sup>

Mr. Sloan furthermore finds Qwest's factually unsupported statements regarding product substitutability unconvincing. He notes, as an example, that Mr. Brigham's broad statements regarding substitutability of services for basic service to a medium-sized business are irrelevant to a small business customer who would need to invest in customer equipment to move to anything but basic business service.<sup>83</sup>

As explained by Staff witness Mr. Chriss, studies of cross-price elasticity of demand are commonly used to determine if two goods are substitutes for one another. Mr. Chriss defines cross-price elasticity of demand as "the responsiveness of quantity demanded of one good to a change in price of another good."<sup>84</sup> Qwest, however, fails to produce any cross-price elasticity studies to support its contentions that readily substitutable products are available and thus constrain its behavior.

Qwest offers a single survey example from Colorado in an attempt to show that wireless service is substitutable for wireline service if Qwest raised its landline price. Mr. Brigham states that a Colorado survey shows that 25% of Qwest's business customers surveyed would "consider" switching to wireless if Qwest raised its business rate by \$25.00 per month. Another 38% of Colorado customers answered that they would switch to wireless if Qwest raised its rate by \$50.00 per month. From these

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<sup>82</sup> Fitzsimmons Rebuttal, p. 6.

<sup>83</sup> Sloan Direct, pp. 6-7.

<sup>84</sup> Chriss Direct, p. 19.

survey results, Mr. Brigham deduces that wireless is an effective substitute for wireline services and that the existence of wireless must constrain Qwest's pricing behavior.<sup>85</sup>

Qwest's example actually demonstrates that wireless is *not* a product that is readily substitutable for wireline. Because companies cannot raise prices infinitely without facing some restraint on pricing--at least in the form of losing profitability by losing customers—substitutability must be shown by whether a company has the ability to *increase its profits* while raising its price. If its customers have ready substitutes in a true competitive market, it cannot.<sup>86</sup> In the example provided by Qwest, Qwest's near doubling of its prices to business customers would result in only 25% of its customers "considering" switching to wireless. Qwest's single example actually demonstrates two things, neither of which it apparently intended: wireless is a *poor* substitute for switched business services, and, more broadly, Qwest is seemingly incapable of proving substitutability or functional equivalency of its services to fulfill the statutory criterion.

As with the other statutory factors, Qwest falls back on arguing against the need to provide evidence that it has fulfilled the substitutability criterion. Qwest complains that Staff's and other participants' expectation of a cross-price elasticity study or a customer survey to demonstrate product substitutability is "unreasonable."<sup>87</sup> According to Qwest, cross-price elasticity studies are "difficult and expensive" to

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<sup>85</sup> Brigham Direct, p. 63.

<sup>86</sup> Denney Direct, p. 24.

<sup>87</sup> Brigham Rebuttal, p. 7.

perform and therefore should not be expected.<sup>88</sup> When Mr. Brigham answers Ms. Rackner’s question regarding a showing of substitutability by stating that “...you can’t just isolate two services and then try to do some sort of quantification and say okay, there’s this level of substitution that has to occur”—he directly contradicts his oft-repeated mantra that he confirms in his very next answer—“If there are enough customers that would respond to a price increase in one service by migrating to the other service, the services are clearly effective substitutes.”<sup>89</sup>

Given Qwest’s ultimate goal of offering all of its 4000+ Oregon business services totally unfettered by public interest oversight, Qwest’s claim that a cost study or Oregon customer survey is an unreasonable expectation is absurd. Even if such an expectation by the Commission were an unreasonable burden in the circumstances (which it certainly is not), Qwest is free to come forward with alternative quantifiable means to prove that functionally equivalent or substitutable services are readily available from other providers. Qwest has not attempted to do so.

Qwest has failed to prove the existence of sufficient alternative providers offering functionally equivalent or substitutable services at comparable rates, terms and conditions. Qwest has not shown the existence of truly substitutable services that would provide the alternatives necessary to constrain Qwest’s pricing behavior. Because it has not been provided such evidence, the Commission should not exempt Qwest from the minimal restraints of the price cap statute.

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<sup>88</sup> *Id.* at p. 6.

<sup>89</sup> Tr. pp. 41-42 (Brigham).

### **III. Statutory Criterion Number Three: Existing Economic or Regulatory Barriers to Entry.**

#### **A. Qwest's Existing Market Share Is an Indicator of Barriers to Entry.**

Qwest attempts to prove that there are no existing legal, regulatory, or economic barriers to entry by stating that they were all eliminated by the passage of the Act in 1996.<sup>90</sup> Qwest disputes the use of market concentration data as an indicator of existing barriers to entry,<sup>91</sup> yet argues that “the best evidence that there are no barriers to facilities-based entry in the switched business market in Oregon is the fact that there already *is* a significant level of facilities-based competition in Oregon.”<sup>92</sup>

Qwest's press releases reflect not a decrease but an increase in its overall market share. In its recent press release on 2<sup>nd</sup> quarter financial results for 2005, Qwest began reporting to its investors that its competitive losses have slowed and that its gains in the market are rebounding.<sup>93</sup>

Some highlights from Qwest's press release include:

This represents the fifth consecutive quarter of stable revenues, as well as year-over-year growth in mass markets and business revenues. Wireline revenues benefited from an improvement in business local, data and Internet revenues, mass markets growth products such as long-distance and high-speed Internet, as well as wholesale settlements.

Increased package and bundle penetration, win-back initiatives and Qwest's “Feet on the Street” customer acquisition program, and reduction in UNE competition have delivered benefits to the company.

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<sup>90</sup> Brigham Direct, p. 42.

<sup>91</sup> *Id.* at p. 74.

<sup>92</sup> *Id.* at p. 71.

<sup>93</sup> From 2Q 2005 Financial Report

[http://media.corporate-ir.net/media\\_files/irol/11/119535/q\\_2Q05er.pdf](http://media.corporate-ir.net/media_files/irol/11/119535/q_2Q05er.pdf)



Small-business access lines grew both sequentially and year-over-year. Access lines resold by Qwest competitors were down 40,000 sequentially as regulatory changes have leveled the competitive environment.

In fact, a review of Qwest's financial reports shows that the number of resold lines (lines used by competitors such as unbundled loops, resale, UNE-P and QPP) peaked in the 3<sup>rd</sup> quarter of 2004 and has decreased each quarter since.<sup>94</sup> This is hardly a sign of the robust competition Qwest has claimed exists.<sup>95</sup> Nowhere in its reports does Qwest mention imminent harm from alternative forms of competition such as VoIP, wireless, cable providers or CLECs.

As demonstrated in Section I above, generally accepted measures of market share show that Qwest is the dominant provider in a highly concentrated local market in Oregon. The burden is on Qwest to rebut the presumption that it is unconstrained by competitors, who face significant barriers to entry. Qwest fails to do so.

**B. The Changing Nature of the Telecommunications Industry Indicates That Barriers to Entry Are Likely to Increase.**

Qwest witness Fitzsimmons attempts to further explain away the high levels of market concentration in Oregon by stating that HHI and CR4 are static measures that do not capture the market dynamics that are constraining Qwest's ability to exercise market power.<sup>96</sup> Qwest's assertion is ironic; the telecommunications market is indeed rapidly changing, but not in the direction Qwest is alleging. Rather, as a result of FCC decisions,

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<sup>94</sup> Qwest's financial reports can be found at:  
<http://phx.corporate-ir.net/phoenix.zhtml?c=119535&p=irol-reportsOther>

<sup>95</sup> Brigham Direct, p. 20.

<sup>96</sup> Fitzsimmons Rebuttal, p 18.

the inexorable trend is currently toward fewer and more tenuous opportunities for CLECs.

As noted previously, a number of factors point to the fact that Qwest is getting stronger and its market dominance is growing rather than shrinking. Despite Qwest's stated vision of a telecom marketplace where competition has successfully arrived, actual changes taking place today are strengthening Qwest's monopoly power in Oregon. Pursuant to the FCC's Remand Order in its Triennial Review proceeding, final rules are now in place that allow an ILEC to significantly constrain a CLEC's ability to compete. Among the changes being imposed by Qwest based upon the FCC's findings are:

- a) elimination of unbundled switching and thus UNE-P;
- b) elimination of UNE DS1 and DS3 loops in certain wire centers;
- c) elimination of UNE DS1 and DS3 transport routes between certain wire centers;
- d) elimination of dark fiber loops and some dark fiber transport;
- e) restrictions placed upon the number of DS1 and DS3 UNE loops that can be purchased to reach a single location;
- f) restrictions placed upon the number of DS1 and DS3 UNE transport facilities that can be purchased between two wire centers.

Based upon the FCC's orders, Qwest has issued a list of wire centers where it will no longer provide DS1 and DS3 loops at forward-looking economic cost. In addition, Qwest has provided CLECs a list of transport routes where CLECs will no longer be able to purchase DS1, DS3 and Dark Fiber transport at TELRIC rates.

The elimination of TELRIC rates will certainly raise CLECs costs and impact their business plans. [\*\*\* Begin Proprietary

End Proprietary \*\*\*]

Thus, the future of CLEC participation in the local market is at a particularly precarious point. This fact should be weighed by the Commission in its consideration of Qwest's petition to lift all regulatory restraints from its local provision of service.

**IV. Statutory Criterion Number Four: Any Other Factors Deemed Relevant by the Commission.**

**A. The Risks and Burdens to Ratepayers and Competitors from Deregulation Outweigh Any Benefit to Qwest.**

Qwest states that its switched business services must be exempted from state oversight to allow Qwest to react quickly to the market and to be freed of regulatory requirements associated with the filing of special contracts and promotions.<sup>97</sup> In actuality, Qwest currently has pricing flexibility for non-basic services between the price cap and the price floor without the requirement of hearing, rate suspension, or prior notice. For basic services, Qwest has downward pricing flexibility under the competitive zone statute --also without hearing, rate suspension, or prior notice. Qwest has similar flexibility under the special contract statute with only a requirement for a 90-day *retroactive* notice. As discussed more fully in the Statutory Framework section above, Qwest is currently subject to the lightest of regulatory hands—the barest of

necessities to afford competitors and ratepayers any degree of due process or protection from anticompetitive rates.

If Qwest's petition were granted, Qwest would be authorized to price its newly deregulated services above the price caps set by the Commission for both basic and non-basic telephone services without any hearing, rate suspension, or notice whatsoever.<sup>98</sup> As noted previously, Qwest's dramatic increase in price for the deregulated element in its QPP product offers a good predictor of the path its rates would take if deregulated.

In its 2005 Verizon Northwest Order considering Verizon's petition to deregulate operator and directory assistance services, the Commission noted Verizon's acknowledgement that it would likely take advantage of upward pricing flexibility and raise its Oregon rates for the services if they were deregulated. The Commission concluded from this acknowledgement that Qwest *remains the dominant provider of these services*. From this fact, plus the fact that Verizon had produced *no specific evidence* that any of its competitors has a significant market share, the Commission determined that the services were not subject to true competition and the petition should be rejected.<sup>99</sup>

As demonstrated in this proceeding, these two factors—likelihood of upward pricing and a lack of evidence of significant competition—are equally valid regarding Qwest's switched business services. Mr. Brigham has stated that Qwest will charge for deregulated services “the price we need[] to sell at in order to maintain demand” and

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<sup>97</sup> Brigham Direct, p. 13.

<sup>98</sup> Qwest furthermore would not be subject to any sort of rate deaveraging, but would instead be able to offer any customer anywhere in Oregon the particular price Qwest chose and believed the market would allow. Sloan Direct, pp. 11-12.

<sup>99</sup> Verizon Northwest Order, p. 9.

that such prices would perforce constitute a just and reasonable rate.<sup>100</sup> Mr. Brigham has also testified that the current rate of \$1.14 is a just and reasonable rate for the switch port, the only deregulated element of QPP, and that \$5.32--a 350% increase-- will also be a just and reasonable rate under Qwest's QPP offering in approximately two years.<sup>101</sup> As noted throughout this brief, Qwest has also failed to produce specific evidence that any of its competitors has a competitively significant market share. The Commission should therefore come to the same conclusion as it did in the Verizon Northwest Order—the exemption petition should be rejected.

Because Qwest has not met its evidentiary burden to prove that a competitive market currently has the ability to constrain Qwest's use of its market dominance, the risk of a grant of total exemption from public interest oversight at this time outweighs any benefit from the removal of Qwest's already light regulatory burden. A grant of regulatory exemption for Qwest business services would be contrary to the Commission's statutory telecommunications goals--- protection of customers, and the public generally, from unjust rates, and the procurement for the public of adequate service at fair and reasonable rates.<sup>102</sup>

**B. Other State Proceedings Cited by Qwest Have Little Relevance to This Proceeding.**

Qwest cites to deregulatory proceedings in other states in an apparent effort to convince the Oregon Commission that it must grant Qwest's exemption petition.<sup>103</sup> The

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<sup>100</sup> Tr. p. 58 (Brigham).

<sup>101</sup> Tr. p. 118 (Brigham).

<sup>102</sup> ORS § 756.040.

<sup>103</sup> Brigham Direct, pp. 83-87.

Commission should not consider an argument based upon another state's statutory framework and specific competitive circumstances to be relevant to this proceeding. The Commission's task is to consider the evidence brought forward in *this proceeding* to determine if Qwest has met its burden of proving its compliance with the Oregon exemption factors.

Even if a comparison between different states were a valid exercise, furthermore, the four state statutes and proceedings cited by Qwest to demonstrate "the nature of business services regulation in other states"<sup>104</sup> vary in significant ways from Oregon's regulatory regime and Qwest's petition for exemption from it. In Washington, for example, the state statute provides for ongoing protection against predatory pricing if a service is deregulated by requiring prices to continue to cover the cost of services. The deregulated provider must also continue to file price lists.<sup>105</sup> Neither of these protections exists if the ILEC is exempted from regulation in Oregon. Qwest has pricing flexibility for only certain business services statewide in Washington; the rest are deregulated only in specified wire centers.<sup>106</sup> In contrast, Qwest has petitioned for regulatory exemption for all its 4000+ business services statewide in Oregon. In Wyoming, not all business services are deregulated and the incumbent has a continuing obligation to price above cost of service. In South Dakota and Colorado, deregulation was the result of a settlement of the parties, not a fully contested proceeding as the

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<sup>104</sup> *Id.* at pp. 84-85.

<sup>105</sup> RCW 80.36.330.

<sup>106</sup> Brigham Direct, p. 86.

Commission is conducting in Oregon. Following deregulation in Colorado, a competitor of the same or similar product, service, package or bundle may file a complaint with the Commission alleging that Qwest has failed to provide adequate service at just and reasonable rates and Qwest must then prove to the Commission that the service has rates, terms or conditions that are just, reasonable, and not unduly discriminatory.<sup>107</sup>

Finally, the four proceedings cited by Qwest took place either before the *TRRO* or nearly contemporaneously with it, so the state commissions would not have had the ability to analyze the effect of the loss of UNE-P to competitors.

The state proceedings cited by Qwest are thus inapposite because the statutes are not parallel to the sweeping deregulation statutes in Oregon and the proceedings were unlike in procedure and scope.

For all these reasons, the Commission should not consider the actions of other states as relevant to its consideration of Qwest's exemption petition in Oregon.

## **V. Conclusion.**

Qwest has the burden of proving conformance with each statutory factor to merit an exemption from regulation in Oregon. Under Oregon law, the Commission cannot find that Qwest has met its burden unless its arguments are supported by reliable, probative and substantial evidence.

For each factor, widely accepted evidentiary means of proving conformance exist. Staff and intervenors have worked hard to produce their own data and to show

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<sup>107</sup> Order Approving Settlement with Modifications, Docket No. 04A-411T (June 6, 2005), p. 32.

the problems with Qwest's support for its petition. Qwest has the data and the means to produce adequate substantive evidence but did not do so. Qwest instead fell back on oft-repeated criticisms of industry-wide evidentiary methodologies and bland assurances that the passage of time since the Act and the existence of intermodal activity must mean the time for deregulation has come.

The Commission should not allow Qwest to obtain exemption from all regulatory oversight through this inadequate petition. If Qwest has the means and the will to produce substantive, persuasive evidence in the future, it may file a new petition at that time. The Commission should reject Qwest's petition.

Respectfully submitted,

Dated: \_\_\_\_\_

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