BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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In the Matter of	)	
	)	
QWEST CORPORATION	)	RULING
	)	
Petition to Exempt from Regulation Qwest's Switched Business Services.	))	

DISPOSITION: MOTION DENIED

Background. On June 21, 2004, Qwest Corporation (Qwest) filed a Petition to Exempt from Regulation Qwest's Switched Business Services (Petition), pursuant to ORS 759.030(2) and OAR 860-032-0025. The services Qwest proposed to have exempted from regulation fall into three general categories. The first included services that provided access to the network, such as flat-rated and measured lines, private branch exchange (PBX) trunks and Centrex services, including feature packages. The second category included discretionary business features—software enhancements available as access line or trunk options. The last category consisted of Frame Relay and Asynchronous Transfer Mote (ATM) services; i.e., packet switched services in Qwest's Advanced Communications Services Tariff.

Qwest seeks the exemption from regulation in all exchanges in its service territory where it is the incumbent local exchange carrier.[1] Qwest contended in its Petition that there was sufficient price and service competition for Qwest's switched business services that it was entitled to exemption from regulation for those services pursuant to ORS 759.030 and OAR 860-032-0025 and provided the Commission with argument and data, both public and confidential, in support thereof.[2]

The following entities petitioned to intervene in the proceeding and were granted party status: AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Oregon (AT&T); Integra Telecom of Oregon, Inc. (Integra); the Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER); Covad Communications Company (Covad); Time Warner Telecom of Oregon LLC (TWT); Oregon Telecom, Inc. (OTI); Pac-West Telecom (PacWest); Rio Communications, Inc. (Rio); Advanced Telecom Group, Inc. (ATG) and XO Oregon, Inc. (XO). On September 3, 2004, AT&T filed a letter requesting leave to withdraw from the proceeding. The presiding Administrative Law Judge, Allan J. Arlow (the ALJ), issued a Ruling granting the request on September 21, 2004.

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[1]Petition, p. 1.
[2] *Id.*, p. 5, *et seq.*

A prehearing conference was held on August 17, 2004, and a schedule was adopted for the proceeding. Proposed issues lists were submitted, settlement conferences were held and a revised schedule proposed by the parties was adopted by the ALJ by Ruling issued September 22, 2004. The revised schedule provided for the parties to discuss the structure and proposed content of, and prepare and submit responses to, a CLEC survey questionnaire and for the Commission staff (Staff) to summarize the responses from the questionnaire, a process that would take the remainder of the 2004 calendar year. Qwest would then file opening testimony on January 10, 2005, and Intervenor and Staff testimony would be due February 18, 2005. Qwest's reply testimony would be due March 11, 2005, and hearings would be held during the week of April 4, 2005.

The Motion to Dismiss. On September 13, 2004, ATG, Covad, Integra, OTI, Rio, TRACER, TWT and XO (Joint Movants) filed a Joint Motion to Dismiss (Joint Motion) the Petition filed by Qwest. Central to the Joint Movants' arguments is the legal uncertainty with respect to the future availability of unbundled network elements (UNEs) at Commission-approved Total Element Long Run Incremental Cost (TELRIC) prices: "Qwest's Petition is based primarily upon alleged competition from carriers who rely on the availability from Qwest of [TELRIC UNEs]."[3] Not only do the Joint Movants assert that the costs of participating in this proceeding would be financially burdensome, but they contend that any decision by the Commission on whether to deregulate Qwest's business services would be based on a TELRIC UNE environment, an environment whose future is in doubt because of significant, recent judicial and federal agency activity, including a Petition for Writ of Mandamus filed by Qwest itself.[4]

On September 28, 2004, Staff filed a Response in Support of Joint Motion to Dismiss (Staff Response). Staff agreed that "any decision regarding exemption that the Commission may predicate on current levels of competition will likely not be relevant to the level of competition that will exist one year from now…. To the extent that there is competition for the services at issue in Qwest's Petition to Exempt from Regulation, it is largely from [CLECs] that use [UNEs] and the UNE-Platform ('UNE-P') priced at TELRIC to provide their end-users."[5] Staff noted that, while regulatory uncertainty is not uncommon, it is actions that the courts and the FCC have already taken that make the *status quo ante* unlikely to continue. In such an environment, Staff contends "…it would be premature for the Commission to decide whether to exempt the services at issue in Qwest's petition from regulation."[6]

The Qwest Response. Qwest filed a Response to Joint CLECs' Motion to Dismiss, and Staff's Support of Same (Qwest Response) by facsimile transmission at exactly 5:00 p.m., Friday, October 1, 2004.[7] A series of further submissions by the parties followed, but did not affect this ruling in any significant respect.[8]

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[3] Joint Motion, p. 2.
[4] *Id.*, pp. 3-4, cases and FCC Notice of Proposed Rulemaking cited therein and Exhibit A thereto.
[5] Staff Response, p. 1, citing Qwest's Petition.
[6] *Id.*, p. 2.
[7] The date by which Qwest was required to file a response to the Joint Motion was September 28, 2004. *See* OAR 860-013-0050(3)(d). Qwest neither filed a response nor requested an extension of time from the ALJ in which to do so. Indeed Qwest's late submission, being without explanation, apology or request for permission,

Qwest provides several arguments in urging the Commission to deny the Joint Motion. First, Qwest argues that the motion is untimely—the Intervenors should have protested at the August 20, 2004, Public Meeting—and that the Joint Motion violates the Intervenors' representations that their participation would not "*unreasonably delay the proceeding.*"[9] Second, Qwest claims that, while the Commission has the authority to *deny* Qwest's Petition, it lacks the authority to *dismiss* it.[10] Next, Qwest contends that market uncertainty or speculation about the future regulatory environment is an insufficient reason for dismissing the Petition.[11] Qwest further argues that the Commission can always deny its Petition after notice and hearing and can, if it so chooses, re-regulate any services that it finds to no longer be competitive.[12] Qwest concludes that "resources" to participate in the case should not be given weight, especially in light of the lack of major activity in other dockets and the Commission's duty to provide Qwest with the opportunity to be heard.[13]

DISCUSSION

Procedural Issues. I first address some of the procedural issues raised by the Petition, the Joint Motion, the Staff Response and the Qwest Response. A brief chronology of relevant events is in order. I note that this matter came before the Commission at its August 17, 2004, Public Meeting, at which time it adopted the recommendations contained in the Staff Report (Report) and opened an investigation pursuant to ORS 759.030. The Report highlighted several critical facts and issues. First, Qwest's Petition was far-ranging, "proposing deregulation of over 65 switched business service categories, which include over 900 individual business services."[14] Although Qwest was seeking statewide relief, Staff noted that it "believes it is likely that the level and extent of competition for these services may vary by geographic area."[15] Staff then commented on the importance of "Other Factors," specifically the great uncertainty surrounding the availability of UNE-P in light of recent Federal agency and Court activity, which "could possibly significantly alter the existence of price and service competition for some or all of the petition services."[16] Even though the Federal Communications Commission had issued Interim Rules providing for the continued availability of UNEs, the Commission recognized the far-greater-than-usual uncertainty of the environment at the very beginning of this proceeding. A prehearing conference was held on the afternoon of the same date as the

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enabled it to comment on the Staff Response, which it would have been unable to do had it filed in a timely manner. However, in the interest of basing my decision upon as complete a record as possible, I shall consider the substance of the Qwest Response as if it had been timely filed.

[8] Joint Movant's Reply Brief in Support of Joint Motion to Dismiss, filed October 12, 2004, in which Staff concurred; a Qwest letter, dated October 13, 2004, urging the Commission not to consider the Joint Movant's Reply Brief in Support of Joint Motion to Dismiss; and a letter from the Joint Movant's dated October 14, 2004, asking that full consideration be given to Joint Movant's Reply Brief in Support of Joint Motion to Dismiss. These subsequent submissions, though unnecessary and unwelcome, were considered nonetheless.

[9] Qwest Response, p. 3. Emphasis in text.

[10] *Id.,* pp. 4-6.

[11] *Id.,* pp. 6-13.

[12] *Id.,* pp. 13-18.

[13] *Id.,* pp. 18-20.

[14] Report, p. 1.

[15] *Id.*, p. 4.

[16] *Id.*

Public Meeting, at which time, petitions to intervene filed by numerous CLECs were granted and a procedural schedule, agreed upon by the parties, was adopted.

Five days *after* the Commission ordered the investigation to be undertaken and the prehearing conference was held, Qwest filed a Petition for a Writ of Mandamus (Writ Petition) with the U.S. Court of Appeals for the District of Columbia Circuit in *USTA v. F.C.C.,*[17] asserting that the Interim Rules were unlawful and that the Court's removal of unbundling requirements should be enforced.[18] Thus, Qwest's own legal steps undertaken after the original schedule had been agreed upon and adopted by the ALJ, greatly increased the uncertainty regarding the continuation of the current state of marketplace competition.

On September 15, 2004, almost a month after the first schedule was adopted and two days after the Joint Motion was mailed to Qwest, Qwest filed a letter with the Commission indicating that the parties had agreed to a modified schedule for which it sought approval. The modification effectively delayed the key dates in the proceeding by almost four months. That additional time was to be used to conduct a detailed survey and analysis of the competitive marketplace.

Turning to the procedural arguments, Qwest first argues that the Joint Motion is untimely and violates the CLECs' representations made in their Petitions to Intervene that their interventions would not "unreasonably delay the proceeding."[19] Qwest contends that the CLECs should have protested at the August 20, 2004 Public Meeting if they wanted to object. I note, however, that the outcome of the public meeting would be no different, as the Commission took the very step that the CLECs would have recommended. Furthermore, circumstances changed five days after both the Public Meeting and the Prehearing Conference at which the procedural schedule was established, when Qwest filed its Writ Petition described above.

The Joint Motion, filed on September 13, 2004, appended the Writ Petition and relied upon it as a basis for alleging changed circumstances exist. The few weeks that elapsed between Qwest's Writ Petition and the filing of the Joint Motion was not unreasonable. Indeed, given the revised schedule submitted on behalf of all parties by Qwest two days after the filing of the Joint Motion, the Joint Motion has had absolutely no effect on the schedule. Because the Joint Motion, the Staff Response and the Qwest Response have all been considered during the pendency of the survey process agreed upon by the parties, there has been no delay. I therefore reject Qwest's first procedural argument, that the CLECs' motion was untimely and unreasonably delayed the proceeding contrary to OAR 860-013-0021(2).

For the reasons set forth below, I have concluded that the public interest will be better served by examining the issues raised by the Qwest Petition in accordance with the procedures and scope set out below, rather than by dismissal without prejudice. Therefore, I

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[17] *USTA v. FCC,* 359 F. 3d 554 (D.C. Cir. 2004), *petitions for cert. pending, NARUC v. USTA,* Nos. 04-12, 04-15 and 04-18 (U.S. filed June 30, 2004).
[18] Writ Petition, p. 6, *et seq.*
[19] Qwest Response, p. 3.

need not address Qwest's second argument challenging the Commission's authority to dismiss the Petition or what procedural options may be available to it in the future.[20]

The Legal Environment and the Scope of the Evidence in this Proceeding. The competitive status of the telecommunications marketplace has been in an even greater state of turmoil than usual since the United States Court of Appeals for the District of Columbia Circuit (D.C. Court or Court) struck down large portions of the Triennial Review Order (TRO).[21] Under Interim Rules adopted by the FCC,[22] (which the Court has allowed to remain in effect until the end of the year),[23] prices will increase for UNE-P, UNE transport and UNE high-capacity loops. There has also been some indication that the future of UNE-P is in doubt.[24]

It is difficult to imagine that an investigation of the state of competition in Oregon based on a market that developed prior to these immense changes would have sufficient probative value to enable the Commission to make the findings required by ORS 759.030(2) and OAR 860-032-0025. Unfortunately, there is no way for us to calculate, short of wild speculation, the price elasticity of demand for CLEC services as the prices rise above TELRIC. Information regarding UNEs offered prior to the *USTA II* decision is likely to have little to no probative value. I therefore conclude that, in reviewing the evidentiary record, no weight should be given to the presence of UNE-P, UNE transport and UNE high-capacity loops in the assessment of the state of competition in the business market for telecommunications services.

Even if information with respect to CLEC utilization of UNE-P, UNE transport and UNE high-capacity loops is excluded, there is a wealth of data that remains useful and upon which Qwest might well attempt to prove its case. It is therefore up to Qwest to decide whether it wishes to prove its case at this time and under these circumstances. However, if Qwest does decide to proceed, the parties may wish to reconsider the scope of questions to be included in the competitive survey.

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[20] *Id.,* p. 4, *et seq.*

[21] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978 *("TRO"),vacated in part and remanded, USTA v. FCC,* 359 F. 3d 554 (D.C. Cir. 2004), *petitions for cert. pending, NARUC v. USTA,* Nos. 04-12, 04-15 and 04-18 (filed June 30, 2004). For the purposes of this Ruling, the relevant portions of the D.C. Court's decision are those which vacate the FCC's rules regarding local circuit switching, loops and transport.

[22] *Unbundled Access to Network Elements*, Order, FCC 04-179, released August 20, 2004.

[23] Order, *United States Telecom Association, et al., v. F.C.C. et al.*, No. 00-1012, *et al.*, U.S. App. D.C., October 6, 2004.

[24] *Telecommunications Reports,* October 15, 2004.

RULING

1. The Joint Motion to Dismiss filed by Advanced Telecom, Inc., dba Advanced Telecom Group, Inc.; Covad Communications Company; Integra Telecom of Oregon, Inc.; Oregon Telecom, Inc.; Rio Communications, Inc.; Telecommunications Ratepayers Association for Cost-Based and Equitable Rates; Time Warner Telecom of Oregon, LLC and XO Oregon, Inc., is DENIED.

2. The scope of discovery and submission of testimony in this proceeding shall be in accordance with the conclusions noted above.

Dated at Salem, Oregon, this 20th day of October, 2004.

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Allan J. Arlow
Administrative Law Judge

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