



# Oregon

Theodore R. Kulongoski, Governor

## Public Utility Commission

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September 9, 2005

### ***Via Electronic Filing and U.S. Mail***

OREGON PUBLIC UTILITY COMMISSION  
ATTENTION: FILING CENTER  
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RE: **Docket No. UX 29** - In the Matter of Qwest Corporation Petition to Exempt from Regulation Qwest's Switched Business Basic Exchange Services.

Enclosed for filing in the above-captioned docket is the Public Utility Commission Staff's Direct Testimony. This document is being filed by electronic mail with the PUC Filing Center. Confidential testimony will be mailed to parties that have signed the protective order.

*/s/ Lois Meerdink*

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Filing on Behalf of Public Utility Commission Staff  
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cc: UX 29 Service List - parties

CASE: UX 29  
WITNESS: Steve W. Chriss

**PUBLIC UTILITY COMMISSION  
OF  
OREGON**

**STAFF EXHIBIT 100**

**Direct Testimony**

**Redacted Version**

**September 9, 2005**

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IS CONFIDENTIAL AND SUBJECT TO PROTECTIVE  
ORDER NO. 05-124. YOU MUST HAVE SIGNED  
THE PROTECTIVE ORDER IN DOCKET UX 29  
TO RECEIVE THIS EXHIBIT.**

1 **Q. PLEASE STATE YOUR NAME, OCCUPATION, AND BUSINESS**  
2 **ADDRESS.**

3 A. My name is Steve W. Chriss. My business address is 550 Capitol Street NE  
4 Suite 215, Salem, Oregon 97301-2551. I am employed by the Public Utility  
5 Commission of Oregon (OPUC) as an Economist in the Economic and Policy  
6 Analysis Section.

7 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND WORK**  
8 **EXPERIENCE.**

9 A. My Witness Qualification Statement is found in Exhibit Staff/101, Chriss/1. I  
10 have submitted testimony before the Commission in UM 1129.

11 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

12 A. The purpose of my testimony is to address Qwest's Petition to Exempt from  
13 Regulation Qwest's Switched Business Services ("Petition") and respond to  
14 Robert H. Brigham's direct testimony. An in-depth discussion of the specific  
15 petition services is provided by David Sloan in Staff/200.

16 **Q. DID YOU PREPARE EXHIBITS FOR THIS DOCKET?**

17 A. Yes. I prepared Exhibits Staff/102, consisting of one page, Staff/103, consisting  
18 of 30 pages, Staff/104, consisting of one page, Staff/105, consisting of one  
19 page, Staff/106, consisting of two pages, Staff/107, consisting of 15 pages,  
20 Staff/108, consisting of four pages, Staff/109, consisting of one page, Staff/110,  
21 consisting of one page, Staff/111, consisting of four pages, Staff/112,  
22 consisting of three pages, Staff/113, consisting of four pages, Staff/114,  
23 consisting of 11 pages, Staff/115, consisting of one page, Staff/116, consisting  
24 of 21 pages, and Staff/117, consisting of 19 pages.

1     **Q. HOW IS YOUR TESTIMONY ORGANIZED?**

2     A. My testimony is divided into the following sections:

- 3     1.             Background on Markets;  
4     2.             The Competitive Local Exchange Carrier (CLEC) Survey;  
5     3.             Standards for Exemption from Regulation;  
6     4.             Analysis
- 7         A. *Factor 1: The extent to which the services are available from alternative*  
8             *providers in the relevant market;*  
9             a. *The relevant market*  
10            b. *Service competition*
- 11         B. *Factor 2: The extent to which the services of alternative providers are*  
12             *functionally equivalent or substitutable at comparable rates, terms, and*  
13             *conditions;*
- 14         C. *Factor 3: Existing economic or regulatory barriers to entry; and*
- 15         D. *Factor 4: Other factors.*
- 16     5.             Intermodal Competition;  
17     6.             Staff's Conclusions;  
18     7.             Staff's Proposal; and  
19     8.             Staff Recommendations.

1 **1. Background on Markets**

2 **Q. WHAT ARE THE DIFFERENT MARKETS GENERALLY DISCUSSED BY**  
3 **ECONOMISTS?**

4 A. There are four types markets generally discussed by economists: monopoly;  
5 oligopoly; monopolistic competition; and perfect competition. The four types  
6 of markets can be viewed on a continuum, with monopoly on one end, perfect  
7 competition on the other, and oligopoly and monopolistic competition in  
8 between.

9 **Q. WHAT IS A MONOPOLY?**

10 A. In the strictest sense of the term, a monopoly market exists if there is only one  
11 supplier of a homogenous product for which there are no substitutes and many  
12 buyers. For the purposes of economic analysis, the assumption that there are  
13 no substitutes is relaxed. What ultimately characterizes a monopolist is that a  
14 monopolist is a price setter and not a price taker. Being able to set the price of  
15 a product allows the producer to set marginal revenue equal to marginal cost in  
16 such a way that the output of the product is constrained and less of the product  
17 is produced than if the market were perfectly competitive. This is because the  
18 producer faces a downward sloping demand curve and thus marginal revenue  
19 is different than the product price. The ability of the firm to establish the market  
20 price of the commodity or service it sells is called monopoly power. Market  
21 power, which is a similar concept, is the ability to profitably set price above  
22 marginal cost. I will use the two terms interchangeably throughout my  
23 testimony.

24 //

1 **Q. WHAT DOES MARKET OR MONOPOLY POWER IMPLY?**

2 A. The existence of market or monopoly power implies a situation where a  
3 company's strengths enable it to ignore, to a certain extent, the constraints on  
4 behavior usually caused by the need to compete with other companies in the  
5 market. Classically, this might occur if a company is able to increase its prices  
6 and not lose significant amounts of business to competitors. A firm with market  
7 power is a "price setter or maker." If a firm does not have market power, it is  
8 said to be a "price taker;" the market establishes the price, not any individual  
9 producer. A firm that does not have market power will eventually lose all of its  
10 business to competitors if it prices its product above the market price.

11 **Q. WHAT ARE THE CONDITIONS THAT GIVE RISE TO SOME DEGREE OF**  
12 **MONOPOLY POWER?**

13 A. The conditions that give rise to monopoly power include one or more of the  
14 following:

- 15 1. exclusive possession of an input required for the service;
- 16 2. existence of economies of scale so great that no economic entry of  
17 competitors is possible after the incumbent is established in the market;
- 18 3. a pre-existing statutory monopoly as ruled by a regulatory body; or
- 19 4. beginning of a wholly new service not yet offered by other companies with  
20 an unknown potential for competition.

21  
22 **Q. IF THERE IS MORE THAN ONE FIRM IN A MARKET, DOES THAT MAKE**  
23 **THE MARKET COMPETITIVE?**

24 A. Not necessarily. Markets that are oligopolies or have monopolistic competition  
25 both feature more than one firm, but may or may not be competitive.

26 \\  
27 \\  
28

1     **Q. WHAT IS AN OLIGOPOLY?**

2     A. An oligopoly is characterized by a small number of sellers who take into  
3         account the actions of their rivals in deciding upon their own actions, thus the  
4         essential feature of an oligopoly is a recognized interdependence among the  
5         firms.

6                 Oligopolies can exist in several forms. For example, an oligopoly may  
7         consist of several companies competing vigorously with each other. On the  
8         other hand, an oligopoly may consist of one dominant firm and a few firms  
9         which form a competitive fringe. In the latter case, the existence of a few small  
10         firms nibbling at the edges of a dominant firm may provide little in the way of  
11         price or service competition for the bulk of the market. Some cartels could also  
12         be thought of as oligopolies.

13     **Q. WHAT IS MONOPOLISTIC COMPETITION?**

14     A. Monopolistic competition exists when there are a number of firms producing  
15         similar but not identical products. The existence of product differentiation can  
16         gives firms an element of market or monopoly power, depending on the level of  
17         differentiation of their product.

18     **Q. WHAT IS THE BENCHMARK AGAINST WHICH THE BEHAVIOR OF**  
19         **MARKETS IS JUDGED?**

20     A. Perfect competition is generally used as the benchmark against which the  
21         behavior of markets is judged.

22     \\

23     \\



1 **Q. SHOULD PERFECT COMPETITION BE THE STANDARD IN THIS**  
2 **DOCKET?**

3 A. No. The purpose for discussing perfect competition is to provide a better  
4 understanding of the definition of competition. Unfortunately, perfect  
5 competition rarely, if ever, exists, and would be an unrealistic standard in this  
6 docket.

7 **Q. WHAT IS PERFECT COMPETITION?**

8 A. Perfect competition exists if the following market conditions hold:

- 9 1. Many Buyers and Sellers – There are many potential or actual buyers and  
10 sellers.  
11 2. Price Taking – Because each firm sells a sufficiently small proportion of  
12 the total market output, its decisions have no impact on market price.  
13 3. Product Homogeneity – The products of all of the firms in a market are  
14 perfectly substitutable with one another.  
15 4. Perfect Information – Buyers and sellers all know the price and quality of  
16 the product.  
17 5. Free Entry and Exit – There are no costs to enter or exit the market. As a  
18 result, buyers can easily switch from one supplier to another, and  
19 suppliers can easily enter or exit a market.

20  
21 Under perfect competition, companies attempt to maximize their profits by  
22 selling all of the output they desire at a given price, which is the market price.  
23 The market price is determined by supply and demand where consumers have  
24 perfect knowledge of the product. Because there are no barriers to entry or  
25 exit, the long-run economic “excess” profit of each company is zero (i.e., a  
26 market return is included in the concept of cost and is the same return  
27 experienced by other firms). If economic profit occurs, other firms or new  
28 entrants will offer more of the product, and this action by all firms causes an  
29 increase in the supply and reduction in price, assuming a downward sloping

1 market demand curve. Perfect competition leads to numerous benefits to  
2 consumers, producers, and society as a whole.

3 **Q. WHAT ARE THE BENEFITS OF PERFECT COMPETITION?**

4 A. There are two main outcomes of perfect competition that are found in the long  
5 run:

- 6 1. Price = Marginal Cost; and
- 7 2. Price = The Minimum Long-Run Average Cost.

8  
9 The first outcome results in allocative efficiency, which means the right amount  
10 of each good and service is being produced from society's point of view.  
11 Allocative efficiency ensures that a nation's resources are best used to serve its  
12 people. The second outcome implies that the good or service being produced  
13 is being produced at its lowest possible cost. Taken together, this implies the  
14 maximum value of goods and services is produced given the availability of  
15 scarce resources. The appeal of perfect competition is that the two outcomes  
16 arise from each company following its own self-interest. Each company sells  
17 as much as it can at the market price and earns zero "excess" economic profit.  
18 Whenever a cost-cutting technique is found, all companies quickly adopt the  
19 technique and prices fall.

20 **Q. WHAT DOES COMPETITION MEAN?**

21 A. Competition can be defined strictly as the situation when anybody who wants to  
22 buy or sell has a choice of possible suppliers or customers,<sup>1</sup> a definition that  
23 adheres to the assumptions of perfect competition. Some industries, such as  
24 those for widely traded agricultural commodities like corn and wheat, come

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<sup>1</sup> "Oxford Dictionary of Economics," John Black, page 72.

1 close to satisfying most of the assumptions of perfect competition. There are  
2 many well-informed participants in the market, and the forces of supply and  
3 demand determine the price of the product. Most individuals do not believe  
4 their actions have any noticeable effect on the price of the product.

5 **Q. IS THIS THE ONLY SITUATION THAT COULD BE DESCRIBED AS**  
6 **COMPETITIVE?**

7 A. No. The word competition can also refer to a situation in which there are at  
8 least a few firms in an industry and those firms compete vigorously for sales,  
9 with each firm trying to get customers at the expense of its rivals. This concept  
10 discards the price-taking assumption, because a firm can no longer sell what it  
11 wants at the market price; that firm must lure customers away from the other  
12 firms. This scenario benefits consumers, as the competitive actions of firms  
13 should lower the market price of the product, and a firm succeeds by better  
14 meeting the needs of its customers.

15 A final view on competition is that a competitive market is one that  
16 requires no intervention to improve its performance. A noncompetitive industry  
17 is one that has some defect that can be corrected. For example, the existence  
18 of other firms vigorously competing on price prevents any single company from  
19 exerting undue market power.

20 **Q. IN YOUR TESTIMONY, WHAT DO YOU MEAN BY “COMPETITION?”**

21 A. I view competition as the combination of an industry with at least a few firms  
22 vigorously competing with each other AND an industry that requires no active  
23 intervention by regulatory bodies, such as the OPUC or federal regulators, to



1                                   **2. The Competitive Local Exchange Carrier Survey**

2       **Q. DO YOU AGREE WITH MR. BRIGHAM'S CLAIM (QWEST/1, BRIGHAM/5,**  
3       **LINES 2-3) THAT THE SURVEY DATA IS INCOMPLETE?**

4       A. Yes. Judge Arlow's March 15, 2005, bench request was sent to 67 CLECs who  
5       are certified by the PUC to provide service in Oregon. Qwest provided the list  
6       of CLECs to be surveyed. Fifty-four of the CLECs responded, and 28 provided  
7       non-zero data. The other 26 CLECs responded that they do not currently  
8       provide business services in Oregon. By virtue of the lack of response from 13  
9       CLECs, the survey can be considered incomplete.

10      **Q. WERE ANY OF THE PROVIDERS LISTED IN MR. BRIGHAM'S**  
11      **DESCRIPTION OF SELECT COMPETITORS (QWEST/1, BRIGHAM/47**  
12      **THROUGH QWEST/1, BRIGHAM/60) EXCLUDED FROM THE SURVEY?**

13      A. Yes. Granite Telecommunications was not included on the Qwest CLEC  
14      survey list.

15      **Q. WERE ANY PROVIDERS LISTED IN QWEST/3, BRIGHAM/1 EXCLUDED**  
16      **FROM THE SURVEY?**

17      A. Yes. CDS Networks, FairPoint Communications Solutions, and QuantumShift  
18      Communications were not included in the Qwest provided CLEC listing.

19      **Q. WERE ANY PROVIDERS LISTED IN QWEST/4, BRIGHAM/1 EXCLUDED**  
20      **FROM THE SURVEY?**

21      A. Yes. Ionex Communications North, Marathon Communications, New Rochelle  
22      Telephone Corp., OrbitCom, PiperTel Communications, Tanager  
23      Telecommunications, Sovereign Telecommunications, Trans National

1 Communications International, and Vycera Communications were not included  
2 in the Qwest listing of CLECs.

3 **Q. WERE ANY OF THE VOIP PROVIDERS LISTED IN MR. BRIGHAM'S**  
4 **DESCRIPTION OF VOIP-BASED SERVICES (QWEST/1, BRIGHAM/66**  
5 **THROUGH QWEST/1, BRIGHAM/80) EXCLUDED FROM THE SURVEY?**

6 A. Yes. Vonage and Packet8 were not included on the Qwest list of CLECs.

7 **Q. OF THE AFOREMENTIONED COMPANIES, ARE ANY NOT LISTED ON THE**  
8 **COMMISSION'S WEBSITE AS COMPETITIVE PROVIDERS?**

9 A. Yes. CDS Networks, FairPoint Communications Solutions, PiperTel  
10 Communications, Sovereign Telecommunications, and Trans National  
11 Communications International are not listed as competitive providers on the  
12 Commission's website.

13 **Q. MR. BRIGHAM STATES THAT "...THERE ARE NO LINE QUANTITIES**  
14 **REPORTED IN ATTACHMENTS 2 AND 3 FOR VARIOUS SERVICES IN**  
15 **VARIOUS RATE CENTERS, A PROBLEM THAT IS MORE ACUTE IN THE**  
16 **MORE RURAL WIRE CENTERS THAT OFTEN HAVE FEWER THAN FOUR**  
17 **REPORTING CLECS" (QWEST/1, BRIGHAM/5, LINES 15-18). WHAT DO**  
18 **YOU BELIEVE IS THE CAUSE OF THE PROBLEM?**

19 A. The low number of CLEC line quantities reported in these wire centers could be  
20 symptomatic of two phenomena. First, for each service or rate center there  
21 may be underreporting of line counts by the CLECs due to the missing survey  
22 responses. Second, for each service or rate center in question, there may be  
23 little CLEC activity, and the low counts could indicate noncompetitive markets.

1 For whatever reason, CLECs have chosen not to compete for Qwest business  
2 customers in these rate centers.

3 **CONFIDENTIAL/**

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 **/CONFIDENTIAL**

9 In conducting the analysis, staff discarded listings for CLECs that, in  
10 their CLEC survey response, indicated that they do not sell business services  
11 in Oregon.

12 **Q. ARE THERE ANY OTHER POSSIBLE REASONS THE LINE COUNTS FROM**  
13 **THE SURVEY COULD BE LOW?**

14 A. Yes. The survey was organized very specifically by provision and by service.  
15 CLECs do not necessarily keep records of their activities in the same format as  
16 Qwest, or in a format that easily transfers into the specific organizational  
17 structure of the survey. Lines may have been omitted simply due to lack of a  
18 way to translate CLEC operations into the survey format.

19 **Q. DOES THE LACK OF SPECIFIC RATE CENTER DATA FOR SOME**  
20 **SERVICES IMPAIR QWEST'S ABILITY TO PERFORM COMPETITIVE**  
21 **ANALYSES PER THEIR PETITION?**

22 A. I do not believe so, given that Qwest's definition of the relevant market for  
23 business services in their petition is all services in the entire state of Oregon.

1 Even though data for some services in some rate centers is not reported,  
2 Qwest would not need that data to conduct their competitive analyses.

3 Per Qwest's request at the July 18, 2005, CLEC survey workshop, staff  
4 compiled the results presented in Attachment 3 of the CLEC survey results  
5 (see Staff/103, Chriss/29-30). The totals row at the bottom of each table in  
6 Attachment 3 represents the total of all CLEC lines for all services in all rate  
7 centers in the state. This data is sufficient for the analysis of the market as  
8 defined in their petition.

9 **Q. GIVEN THAT THE DATA IS INCOMPLETE, DO YOU BELIEVE THAT THE**  
10 **USEFULNESS OF THE SURVEY DATA IS LIMITED?**

11 A. No. Though there are data limitations, the survey results do paint a picture of  
12 the differences in the level of active interest by CLECs to serve business  
13 customers for different services in different rate centers within the state. This  
14 picture will be used by staff in the determination of the relevant market for each  
15 service or groups of services.

16 The survey results provide the Commission with actual service specific  
17 data. The competitive analyses in Mr. Brigham's testimony are based on  
18 wholesale data, which does not break out for which services, and in what  
19 quantities, the CLECs are purchasing Qwest wholesale services. Qwest's  
20 approach is consistent with the presumption that all of the business services  
21 are substitutable, hence service by service analysis is not necessary. Staff  
22 disagrees with the presumption and the substitutability issue is addressed both  
23 in this testimony and by staff witness David Sloan.



1           Based on Mr. Brigham's testimony, Qwest has shown that CLECs are  
2           providing services in competition with some of the petition services, but Qwest  
3           does not demonstrate if any of the services are actually competitive. As I will  
4           show in Section 4, there are instances in which Qwest does not know if a CLEC  
5           who purchases Qwest wholesale services is even providing business services.

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1                   **3. STANDARDS FOR EXEMPTION FROM REGULATION**

2           **Q. PLEASE DESCRIBE THE STANDARDS FOR EXEMPTION FROM**  
3           **REGULATION UNDER ORS 759.030.**

4           A. ORS 759.030(3) requires the Commission to exempt from regulation any  
5           service for which price and service competition exists. ORS 757.030(2) gives  
6           the Commission the discretion to exempt from regulation any service 1) for  
7           which price or service competition exists, 2) that is subject to regulation; or 3)  
8           for which the public interest no longer requires regulation. To determine  
9           whether the criteria of either section (2) or (3) of ORS 759.030 are satisfied, the  
10          Commission must consider

- 11           1. The extent to which services are available from alternative providers in the  
12           relevant market;  
13           2. The extent to which the services of alternative providers are functionally  
14           equivalent or substitutable at comparable rates, terms, and conditions;  
15           3. Existing economic or regulatory barriers to entry; and  
16           4. Any other factors deemed relevant by the Commission.  
17

18           **Q. ARE THE CRITERIA UNDER FOR EXEMPTION FROM REGULATION IN**  
19           **ORS 759.030(3) SATISFIED?**

20          A. No.

21           **Q. ARE THE CRITERIA FOR EXEMPTION FROM REGULATION IN 759.030(2)**  
22           **SATISFIED?**

23          A. It depends. Qwest has asked the Commission to exempt from regulation  
24          4000+ services in all of its service territory in Oregon. As discussed below,  
25          staff's analysis shows that competition does not exist for all of the services at  
26          issue in Qwest's Petition in all of Qwest's service territory. Staff's analysis also  
27          does not show that all of these services are subject to competition in all of

1 Qwest’s service territory, or that the public interest no longer requires regulation  
2 of all these services. However, if Qwest’s request is broken down by  
3 geographically and by service, there are some services that appear to meet the  
4 criteria for exemption from regulation under subsection ORS 757.030(2).

5 **Q. DOES THE COMMISSION HAVE AUTHORITY TO EXEMPT FROM**  
6 **REGULATION ONLY SOME OF THE SERVICES AT ISSUE IN QWEST’S**  
7 **PETITION IN ONLY SOME OF QWEST’S OREGON SERVICE TERRITORY?**

8 A. This is a legal question that will be addressed in brief. However, for purposes  
9 of its analysis, staff has assumed that the Commission does have this authority.  
10 However, if the Commission concludes that it does not have authority to parse  
11 Qwest’s Petition to exempt from regulation only those services that satisfy the  
12 criteria of ORS 759.030(2), or in the event the Commission concludes that it  
13 does have the authority, but chooses not to exercise it in absence of a specific  
14 request by Qwest to do so, staff recommends that the Commission deny  
15 Qwest’s Petition.

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1 **4. Analysis**

2 ***Factor 1: The extent to which the services are available from alternative***  
3 ***providers in the relevant market.***

4 **i. The relevant market.**

5 **Q. WHAT CONSIDERATIONS OR FACTORS ARE USED IN DETERMINING**  
6 **THE EXTENT TO WHICH SERVICES ARE AVAILABLE FROM**  
7 **ALTERNATIVE PROVIDERS IN THE RELEVANT MARKET?**

8 A. First, the relevant market should be defined. The market definition should  
9 include the products, geographic areas, and demographic characteristics. The  
10 question to be asked is “Who uses which services in what area?”

11 Identifying the relevant market is a critical issue. Too broad a definition  
12 may overstate the level of competition, while too narrow a definition may  
13 understate the level of competition.

14 **Q. WHAT PRODUCTS SHOULD BE CONSIDERED IN THE MARKET**  
15 **ANALYSIS?**

16 A. Relevant products are those directly comparable as well as reasonable  
17 substitutes that are available to a consumer. Not all substitutes are sufficiently  
18 comparable and should not be considered in the analysis. Some services are  
19 imperfect substitutes while other services are nearly perfect substitutes.

20 **Q. PLEASE PROVIDE AN EXAMPLE.**

21 A. Assume you want to eat a hamburger for lunch. The most likely choice for a  
22 hamburger would be a local fast food establishment, and the relevant market  
23 would be McDonalds, Burger King, Dairy Queen, and Carl's Jr. A casual dining  
24 sit-down restaurant such as Red Robin also provides hamburgers, but might

1 not be a substitute because of longer service time and higher cost. Similarly,  
2 buying the ingredients for hamburgers and cooking them yourself is not a  
3 comparable substitute given the amount of time and facilities required to  
4 prepare the meal.

5 Additional substitutes could be restaurants that serve foods other than  
6 hamburgers. Perhaps a steak quesadilla is close enough. At the right price,  
7 you might accept a quesadilla over the desired hamburger. The price  
8 differential could be due to better service or a lower asking price. The  
9 important decision is that you had the opportunity to purchase the hamburger  
10 but chose not to.

11 Geographic location is also important. Typically, hungry consumers  
12 are interested in hamburger providers nearby. A fast food restaurant in one  
13 part of town may not be a competitor to another provider located some distance  
14 away. Further, there may be many fast food restaurants in one locality and few  
15 in another, so not all regions have the same choices available.

16 **Q. SHOULD ALL IMPERFECT SUBSTITUTES BE DISREGARDED IN**  
17 **DEFINING THE RELEVANT PRODUCTS IN A MARKET?**

18 A. No. Imperfect substitutes do provide some level of competition and the  
19 potential for competition remains.

20 **Q. HOW SHOULD IMPERFECT SUBSTITUTES BE TREATED?**

21 A. There are two ways to treat imperfect substitutes. First, the analyst can  
22 exclude them from the definition of the relevant market. The other option is for  
23 the analyst to include them in the definition of the relevant market but consider  
24 price as well as additional factors such as extra time, capital expenses, and

1 location. These additional expenses can be considered indirect costs of using  
2 the service. If the full price of a substitute, including indirect costs, is  
3 comparable to the price of the service, then the analyst is more likely to include  
4 the substitute in the relevant market. If the full price of the substitute is clearly  
5 not comparable to the price of the service in question, it is best to exclude the  
6 substitute service from competition.

7 **Q. IS THERE A METRIC AVAILABLE TO DETERMINE IF TWO PRODUCTS**  
8 **ARE SUBSTITUTES FOR ONE ANOTHER?**

9 A. Yes. From an analytical standpoint, the cross-price elasticity of demand can be  
10 used to determine if two goods are substitutes for one another. Simply defined,  
11 cross-price elasticity of demand is the responsiveness of quantity demanded of  
12 one good to a change in price of another good. The measure is calculated as  
13 not to be sensitive to the units being used. If two goods are substitutes, the  
14 cross-price elasticity will be positive. If the cross-elasticity is negative, the two  
15 goods are complements (e.g. hot dogs and mustard). If the two goods are not  
16 related, the cross elasticity will be zero.

17 **Q. AFTER DETERMINING THE RELEVANT MARKET, HOW SHOULD THE**  
18 **COMMISSION DETERMINE THE EXTENT TO WHICH QWEST'S**  
19 **SERVICES ARE AVAILABLE FROM ALTERNATIVE PROVIDERS?**

20 A. One method of determining the extent to which Qwest's services are available  
21 from alternative providers would be through a traditional market analysis. This  
22 analysis would look at the market shares of the providers of the petition  
23 services at the desired geographical level, whether by rate center, region, or  
24 statewide. There are two well discussed measures of market share. One is

1 the CR4, which is the concentration ratio of the top four firms in the market  
2 expressed as a percent of the total market. The second is the Herfindahl-  
3 Hirschman Index (HHI), which takes into account both the number of firms in a  
4 market and the size of each firm. A comparison of the two methods is included  
5 in Exhibit Staff/102.

6 These two measures attempt to determine the potential for market  
7 power, but do not, however, lead to greater certainty. The potential for market  
8 power does not necessarily translate into the abuse or exercise of market  
9 power. Also, calculating the CR4 or HHI requires a decision on the relevant  
10 market. A demonstration that there are a few firms with approximately the  
11 same market share actively competing on price and service could suffice even  
12 though a market with four or less firms has a CR4 of 100 percent.

13 **Q. WITH RESPECT TO THIS DOCKET, SHOULD THE ANALYSIS ALSO**  
14 **INCLUDE THE EXTENT TO WHICH THERE ARE FUNCTIONALLY**  
15 **EQUIVALENT OR SUBSTITUTABLE SERVICES FOR QWEST'S SERVICES**  
16 **AT COMPARABLE RATES, TERMS, AND CONDITIONS?**

17 A. Yes. As I will discuss in more detail in Sections 2 and 5 of my testimony, price  
18 lists were requested as part of the CLEC survey, and data from the responses  
19 was analyzed in relation to Qwest's offerings.

20 **Q. HOW SHOULD THE COMMISSION DETERMINE IF THE SUBSTITUTES**  
21 **ARE OFFERED AT COMPARABLE RATES, TERMS, AND CONDITIONS?**

22 A. The Commission should consider the analysis of price data discussed later in  
23 my testimony to determine if the substitutes are offered at comparable rates,  
24 terms, and conditions to Qwest's offerings.

1 **Q. DO YOU AGREE WITH MR. BRIGHAM'S CLAIM THAT THE RELEVANT**  
2 **MARKET TO BE CONSIDERED BY THE COMMISSION IS ALL QWEST**  
3 **WIRE CENTERS IN OREGON (QWEST/1, BRIGHAM/15, LINES 7-8)?**

4 A. No. Using the entire state as the relevant market potentially overstates the  
5 amount of competition taking place in Oregon. Larger and potentially more  
6 competitive areas such as the Portland area can mask smaller and potentially  
7 less competitive areas. The Qwest approach may be appropriate if the  
8 Commission were responsible for a hypothetical average of all customers.  
9 However, the Commission may have the responsibility to protect the interests  
10 of all customers, not just some customers, or those customers primarily in  
11 metropolitan areas at the expense of customers in rural areas.

12 **Q. PLEASE PROVIDE AN EXAMPLE AS TO HOW IT IS INCORRECT TO**  
13 **APPLY STATE AVERAGES TO INDIVIDUAL MARKETS.**

14 A. Qwest's CLEC Market Share Analysis (Qwest/8) provides an example of how  
15 one market can mask another.

16 **CONFIDENTIAL/**

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]



1 [REDACTED]

2 [REDACTED]

3 **/CONFIDENTIAL**

4           Because potentially competitive rate centers can mask non-competitive  
5 rate centers, it is not appropriate to use the entire state as the relevant market.

6 **Q. SHOULD THE RELEVANT GEOGRAPHIC MARKET ALSO APPLY TO THE**  
7 **LOCATION OF CUSTOMERS?**

8 A. It could. A business customer located in Westport may view the availability of  
9 alternatives in Portland as irrelevant. The business should not be required to  
10 relocate its business to the Portland area for purposes of obtaining choices in  
11 telecommunications offerings. The definition of the market should also take  
12 into account the access to alternative providers by business location. The  
13 Qwest analysis necessarily must assume that availability of alternative  
14 providers must be somewhat uniform across the state in order to define the  
15 market as statewide.

16 **Q. DO YOU AGREE WITH MR. BRIGHAM'S POSITION THAT IT IS *NOT***  
17 **APPROPRIATE TO CONSIDER THE PETITION SERVICES AS SEPARATE**  
18 **AND DISTINCT MARKETS (QWEST/1, BRIGHAM/17, LINES 1-4)?**

19 A. No. In order to consider a set of two or more aggregated services as a market,  
20 evidence first needs to be shown that proves that the services are indeed  
21 substitutes.

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1     **Q. HAS QWEST PROVIDED TO THE COMMISSION ANY STUDIES ON THE**  
2     **CROSS-PRICE ELASTICITIES OF DEMAND FOR THE PETITION**  
3     **SERVICES?**

4     A. No. Qwest has not performed cross-price elasticity of demand studies for the  
5     petition services (see Staff/106). As discussed earlier in my testimony (see  
6     Staff/100, Chriss/11), cross-price elasticity of demand is a formal quantitative  
7     method for determining if two products are substitutes.

8     **Q. DOES QWEST PROVIDE SUITABLE EVIDENCE OF THE**  
9     **SUBSTITUTABILITY OF THE PETITION SERVICES?**

10    A. No. Qwest provides anecdotal evidence that services may be substitutable for  
11    medium-sized customers (Qwest/1, Brigham/17, Lines 9-11), but provides no  
12    quantitative evidence to back up its claim. Qwest also provides no evidence,  
13    anecdotal or otherwise, that would suggest that the petition services are  
14    substitutable for customers of all sizes.

15    **Q. DOES MR. BRIGHAM'S TESTIMONY ADDRESS THE SUBSTITUTABILITY**  
16    **OF 800/OUTWATS SERVICE ("800"), FRAME RELAY SERVICE ("FRS"),**  
17    **OR ASYNCHRONOUS TRANSFER MODE ("ATM") SERVICE WITH THE**  
18    **OTHER PETITION SERVICES?**

19    A. No. Mr. Brigham's discussion of service substitutability (Qwest/1, Brigham/17  
20    and Brigham/83) completely ignores the substitutability of 800, FRS, and ATM  
21    services. Mr. Brigham provides no evidence that these three services are  
22    substitutes and should be considered in aggregate with the other petition  
23    services.

24    \\

1 **Q. IS IT POSSIBLE THAT TWO OR MORE OF THESE SERVICES CAN BE**  
2 **COMPLEMENTARY PRODUCTS?**

3 A. Yes. Staff/107 shows that Qwest has a number of customer addresses served  
4 by two or more of the petition services. While this does not disprove Qwest's  
5 claim that the services are substitutes, it does show that, for a number of Qwest  
6 customers, the services are not necessarily replacements for one another.

7 **Q. HAS QWEST PROVEN THAT THE APPROPRIATE RELEVANT**  
8 **GEOGRAPHIC MARKET FOR THE PETITION SERVICES IS ALL QWEST**  
9 **RATE CENTERS IN OREGON?**

10 A. No. The existence of non-competitive rate centers shows that the availability of  
11 alternative providers is not uniform across the state. Therefore it would not be  
12 appropriate to treat Oregon as one market and blanket-deregulate all Qwest  
13 rate centers within Oregon.

14 **Q. BASED ON THE GEOGRAPHIC AND PRODUCT MARKETS AS**  
15 **SUBMITTED BY QWEST AND TESTIFIED TO BY MR. BRIGHAM, SHOULD**  
16 **THE COMMISSION APPROVE QWEST'S PETITION TO DEREGULATE ALL**  
17 **OF THE BUSINESS SERVICES ACROSS OREGON?**

18 A. No. It would not be appropriate to deregulate the petition services based on the  
19 geographic and product markets as defined by Qwest.

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1 **Q. WHO COULD BE HARMED IF THE COMMISSION WERE TO DEREGULATE**  
2 **QWEST BUSINESS SERVICES BASED ON THE GEOGRAPHIC AND**  
3 **PRODUCT MARKETS AS DEFINED BY QWEST?**

4 **CONFIDENTIAL/**

5 [REDACTED]  
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10 Staff witness Sloan discusses the history of rate groups in Staff/200.

11 **Q. WHY IS THE RATE GROUP DESIGNATION IMPORTANT?**

12 A. Because both the retail price to the end-user and the imputed price floor for  
13 each petition service are different for each rate group (see Staff/108).

14 **CONFIDENTIAL/**

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20 **Q. IF DEREGULATED, WHAT COULD HAPPEN TO THOSE SERVICES FOR**  
21 **WHICH THE CURRENT RETAIL PRICE IS BELOW THE IMPUTED PRICE**  
22 **FLOOR?**

23 A. For antitrust and profit maximizing purposes, Qwest should increase the  
24 deregulated retail price to meet or exceed the imputed price floor. With

1 deregulation, any umbrella protection by the state from anticompetitive behavior  
2 would no longer be present.

3 This result in itself is not undesirable because prices should reflect  
4 costs. The problem is that, currently, there is little evidence that CLECs are  
5 competing in those rate centers, so there is no way to tell if deregulation will  
6 result in increased competition to coincide with higher prices for business  
7 customers.

8 **Q. HOW SHOULD THE GEOGRAPHIC MARKET BE DEFINED FOR THE**  
9 **PURPOSES OF ANALYSIS OF QWEST'S PETITION?**

10 A. The Commission should consider a series of smaller, less-aggregated  
11 geographic markets that center around population centers and physically  
12 separate areas of the state. Qwest, in Qwest/8, and staff, in Staff/103,  
13 Chriss/1, have provided fairly similar breakdowns on the state into smaller  
14 geographic regions.

15 **Q. WHAT IS THE PURPOSE OF BREAKING THE STATE DOWN INTO**  
16 **SMALLER GEOGRAPHIC AREAS?**

17 A. The purpose is to identify relevant markets. The relevant markets will match  
18 with the diversity in the level of competition in markets for business services  
19 around the state. It appears that the diversity in competition correlates well with  
20 the population and business density in different areas of the state.

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1 **Q. HOW DOES THIS DIVERSITY AFFECT HOW CLECS COMPETE WITH**  
2 **QWEST?**

3 A. Theoretically, CLECs are going to enter markets where it is profitable to do so.  
4 They must be able to take advantage of the difference between their revenues  
5 and costs. From a technological standpoint, this could mean building facilities  
6 in as concentrated an area as possible, in order to minimize average fixed  
7 costs of facilities and capture economies of scale while maximizing the number  
8 of customers they can connect. From a marketing standpoint, this could mean  
9 a television or newspaper advertisement that reaches 100,000 potential  
10 customers as opposed to 250 customers.

11 From these standpoints, CLECs would most likely choose to do  
12 business in more largely and densely populated areas, such as Portland,  
13 Salem, Bend, Medford, and Eugene.

14 **Q. IS THERE EVIDENCE TO SUPPORT THIS THEORY?**

15 A. Yes. The CLEC survey shows that CLECs are active/present in larger and  
16 more densely populated markets. An example is that for basic business  
17 service, of the responding CLECs, 15 provide service in Clackamas, 14 provide  
18 service in Portland, 12 provide service in Bend, 12 provide service in Salem,  
19 and 11 provide service in Eugene (see Staff/103, Chriss/1).

20 Conversely, there are rate centers in which no responding CLECs  
21 provide basic business service. These include Siletz, Falls City, Blue River,  
22 Marcola, and Westport (see Staff/103, Chriss/1).

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1 **Q. WHEN CONSIDERING ALL PETITION SERVICES, HOW MANY RATE**  
2 **CENTERS HAVE TEN OR MORE RESPONDING CLECS PROVIDING ANY**  
3 **OF THE PETITION SERVICES?**

4 A. Seven: Albany; Bend; Clackamas; Eugene; Medford; Portland; and Salem.  
5 Roseburg and Redmond each have nine responding CLECs providing any of  
6 the petition services (see Staff/103, Chriss/29).

7 **Q. IS THE RATE CENTER THE APPROPRIATE GEOGRAPHIC UNIT UPON**  
8 **WHICH TO BASE THE ANALYSIS?**

9 A. For some regions, a smaller geographic unit than rate center may be more  
10 appropriate for analyzing the level of competition for Qwest's petition services.  
11 However, a smaller geographic unit was not available. Staff's analysis  
12 addresses this issue by focusing on barriers to entry or other impediments  
13 within regions.

14 **Q. HOW ARE THESE RESULTS AFFECTED BY THE LACK OF RESPONSE TO**  
15 **THE SURVEY BY SEVERAL CLECS?**

16 A. Given the breakdown by geographic area of the current survey results,  
17 additional respondents who provide petition services in Oregon would certainly  
18 bolster the numbers for the larger, more densely populated areas. It is  
19 uncertain if the smaller rate centers would pick up providers.

20 **Q. HOW SHOULD THE COMMISSION CONSIDER THE PRODUCT MARKETS?**

21 A. Each service should be treated distinctly except where the Commission finds  
22 that specific services are in fact substitutable and comparable in price.

23 **Q. WHY IS IT NOT APPROPRIATE TO CONSIDER ALL OF THE PETITION**  
24 **SERVICES IN AGGREGATE?**







1 facilities” and “full-facilities” based competition, respectively (see Qwest/1,  
2 Brigham/22-25). The Commission should also consider resale-based  
3 competition. The Commission should not consider CLEC business services  
4 provisioned over UNE-P, QPP, DS1, DS3, or dark fiber loops and dedicated  
5 transport.

6 **Q. WHY SHOULD UNE-P, QPP, DS1, DS3, AND DARK FIBER LOOPS AND**  
7 **DEDICATED TRANSPORT NOT BE CONSIDERED?**

8 A. Business service provision via UNE-P, QPP, DS1, DS3, and dark fiber loops  
9 and dedicated transport are competition at Qwest’s discretion.

10 **Q. PLEASE EXPLAIN.**

11 A. Mr. Brigham provides an explanation as to the status of UNE-P (see Qwest/1,  
12 Brigham/26-27). The availability of UNE-P will be phased out over a 12-month  
13 period ending on March 11, 2006 (Qwest/1, Brigham/27, Lines 4-5). While  
14 QPP has replaced UNE-P, the current crop of QPP contracts terminates in  
15 2008, after which Qwest may choose to not continue providing QPP.  
16 Additionally, if QPP remains available after 2008, pricing of QPP will be at  
17 Qwest’s discretion. Finally, because in USTA II the D.C. Circuit Court vacated  
18 the FCC’s unbundling rules for “mass market” switching, Qwest is no longer  
19 required to provide access to DS1, DS3, and dark fiber loops and dedicated  
20 transport (see Staff/109).

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1     **Q. MR. BRIGHAM STATES THAT QWEST CONTINUES TO NEGOTIATE QPP**  
2     **AGREEMENTS WITH CLECS AND WILL DO SO IN THE FUTURE**  
3     **(QWEST/1, BRIGHAM/30, LINES 12-16). SHOULD THIS AFFECT HOW THE**  
4     **COMMISSION VIEWS COMPETITION VIA QPP?**

5     A. No. Unless Qwest is required by legislation or a regulatory body to provide  
6     QPP, the company will always have the option of discontinuing QPP service  
7     upon completion of current or future contracts. As stated above, even if Qwest  
8     chooses to continue offering QPP, there can be no assurance that it will not set  
9     a price that is uneconomic for the CLECs.

10           I view competition as a combination of an industry with at least a few  
11     firms vigorously competing with each other AND an industry that requires no  
12     intervention by the OPUC or federal regulators to improve its performance. As  
13     long as Qwest has the ability to curtail the availability of QPP and other  
14     provisions at its discretion, this does not reflect real competition. Therefore, in  
15     order to decide whether or not competition exists for the petition services, QPP  
16     and the other Qwest discretionary provisions should be excluded from the  
17     analysis. It would be an error to presume that Qwest would act altruistically  
18     and foster competition by making its facilities available to competitors at prices  
19     that are economic for CLECs. Qwest would presumably act to maximize  
20     profits.

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1 **ii. Service competition**

2 **Q. HAS QWEST QUANTITATIVELY PROVEN THE EXISTENCE OF**  
3 **COMPETITION FOR ANY OF THE SPECIFIC PETITION SERVICES BY**  
4 **SHOWING THAT THE SERVICES AT ISSUE ARE AVAILABLE FROM**  
5 **ALTERNATIVE PROVIDERS IN THE MARKET?**

6 A. No. Mr. Brigham's testimony hinges on wholesale line counts of Qwest's  
7 resale, QPP, UNE-P, and UNE-L provisions. There is no breakout provided of  
8 what services are being provided by these provisions. In absence of evidence  
9 demonstrating what retail services are being provided by the CLECs, Qwest's  
10 evidence regarding its wholesale activity is not probative of the level of  
11 competition in Oregon.

12 **Q. HAS QWEST PROVIDED ANY CONCENTRATION RATIOS (I.E. CR4, HHI)**  
13 **USING THE LINE DATA?**

14 A. No. While the use of wholesale line data does not indicate competition for any  
15 or all of the petition services, the use of concentration ratios would indicate if  
16 Qwest is selling a large number of lines each to a few CLECs, or fewer lines  
17 each to a greater number of CLECs. This in turn would indirectly provide some  
18 guidance as to the whether Oregon's business services markets are attractive  
19 to a wide range of CLECs.

20 **Q. PLEASE EXPLAIN.**

21 A. Qwest/3, Brigham/1 identifies 50 CLECs that Qwest believes are competing  
22 with Qwest in Oregon.

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6 This duopoly result would suggest that the business services markets  
7 in Oregon have a low potential for competition. Or, are the lines more evenly  
8 split amongst the CLECs, a result that suggests a higher potential for  
9 competition.

10 **Q. SOME CLECS PROVIDE BUSINESS SERVICES VIA THEIR OWN**  
11 **FACILITIES. THIS CONCENTRATION RATIO ANALYSIS WOULD HAVE TO**  
12 **IGNORE FACILITIES BASED NUMBERS BECAUSE QWEST DOES NOT**  
13 **HAVE ACCESS TO SPECIFIC FACILITIES-BASED CLEC LINE COUNTS.**  
14 **DOES QWEST HAVE ANY WAY TO INCORPORATE FACILITIES-BASED**  
15 **CLEC LINE COUNTS INTO A DISCUSSION OF CONCENTRATION**  
16 **RATIOS?**

17 A. Yes. Page 2 of Attachment 3 of the CLEC Survey Report (see Staff/103,  
18 Chriss/30) includes statewide CR4 and HHI calculations for facilities-based  
19 CLECs. Because of the confidentiality protections afforded to the CLECs,  
20 Qwest cannot fully incorporate the values into an overall concentration ratio, but  
21 it is reasonable to use the provided ratios on a stand alone basis. The  
22 previously discussed limitations of the survey would also hold in this instance,  
23 as there is a possibility that non-responding CLECs offer business services  
24 provisioned over their own facilities.

1 **Q. IS QWEST/3, BRIGHAM/1 AN ACCURATE REPRESENTATION OF THE**  
2 **CLECS COMPETING WITH QWEST IN OREGON?**

3 A. Not necessarily. Of the 50 CLECs listed as competing with Qwest, 11  
4 responded to the survey that they do not provide retail business services in  
5 Oregon. The circumstances included the CLEC having no business service  
6 customers, the CLEC only providing residential service, and the CLEC only  
7 providing wholesale transport access.

8 As well, three of the CLECs on the list were not included on the Qwest  
9 list of CLECs to be surveyed. Staff has not had an opportunity to validate  
10 Qwest's claim that these three CLECs are competing with Qwest in Oregon.

11 **Q. ARE THERE ANY OTHER ISSUES REGARDING THE VALIDATION OF**  
12 **QWEST'S CLEC COMPETITION CLAIM?**

13 A. Yes, two. First, provision of business services via resale was not included in  
14 the survey, so staff has not had the opportunity to validate Qwest's resale  
15 numbers. Second, the effective date of the survey was February 28, 2005.  
16 The effective date of Qwest/3, Brigham/1 is May, 2005. Staff does not have  
17 data from the CLECs regarding their business practices as of May, 2005, and  
18 cannot validate Qwest's claims based on available information.

19 **Q. DOES TABLE A ON QWEST/1, BRIGHAM/32 REPRESENT AN ACCURATE**  
20 **COUNT OF CLEC BUSINESS SERVICE PROVISION IN OREGON?**

21 A. Not necessarily. While Qwest has the ability to see what wholesale services  
22 are purchased by CLECs, Mr. Brigham's testimony does not demonstrate an  
23 ability on Qwest's part to determine for what purposes the wholesale services  
24 are being used. This is further demonstrated by the listing in Qwest/3 of

1 CLECs who are purchasing wholesale services from Qwest, but have  
2 responded to the CLEC survey as not providing retail business services.

3 **Q. USING THE NUMBERS QWEST PROVIDED, HOW DO THE MARKET**  
4 **SHARES CHANGE IF, AS DISCUSSED IN SECTION 3 OF YOUR**  
5 **TESTIMONY, LINE COUNTS OF QPP AND OTHER DISCRETIONARY**  
6 **PROVISIONS ARE NOT USED IN THE ANALYSIS?**

7 A. The following table shows the results of subtracting QPP and the other  
8 discretionary provisions:

9 **CONFIDENTIAL/**


10

11 **/CONFIDENTIAL**

12 **Q. COULD TABLE 4.1 ACTUALLY UNDERSTATE QWEST'S MARKET**  
13 **SHARE?**

14 A. Yes.

15 **CONFIDENTIAL/**

16 Table 4.1 ignores the 66,891 QPP lines reported by Mr. Brigham (see  
17 Qwest/1, Brigham/32, Table A).

18 **/CONFIDENTIAL**

1            Though it is uncertain, if QPP were to be discontinued, if these lines  
2            would remain with CLECs or return to Qwest, staff believes that the majority of  
3            the lines would return to Qwest.

4            **Q. PLEASE EXPLAIN.**

5            A. If the availability of QPP were to end, customers may not be able to receive the  
6            same service at the same price from the CLEC. This could be due to the time  
7            and expense in building new facilities to replace the QPP lines, the inability of  
8            the CLEC to get access to the customer's building, or the CLEC deciding that  
9            providing services by provisions other than QPP is not profitable. In cases  
10           such as this, it would make sense that, at least initially, these customers would  
11           switch back to Qwest.

12           **Q. DOES THE CLEC SURVEY REPORT PROVIDE ANY INSIGHT INTO THE**  
13           **LEVEL OF COMPETITION FOR EACH OF THE PETITION SERVICES?**

14           A. Yes.

15           **Q. PLEASE EXPLAIN, BY PETITION SERVICE, WHAT THE CLEC SURVEY**  
16           **RESULTS (STAFF/103) SHOW.**

17           A. For basic business service, as provided by *all* provisions (see Staff/103,  
18           Chriss/4), there is certainly the potential for competition in many areas of the  
19           state. Overall, there are 24 responding CLECs providing basic business  
20           service in one or more rate centers.<sup>2</sup>

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<sup>2</sup> As discussed in the testimony of staff witness Sloan, for purposes of staff's analysis, the 4000+ services at issue in Qwest's Petition have been grouped into ten integrated service offerings: Basic Business Service (Analog); Basic Business Service (Digital); PBX Trunks (Analog); PBX Trunks (Digital); 800 Service/Outwats; Analog Centrex Services; Integrated Services Digital Network –Basic Rate Interface (ISDN-BRI); Integrated Services Digital Network – Primary Rate Interface (ISDN-PRI); Frame Relay; and Asynchronous Transfer Mode (ATM) Service. See Staff/200, Sloan/4-5.



1           The picture changes when QPP and other Qwest discretionary  
2           provisions are removed from the analysis (see Staff/103, Chriss/5). While  
3           dominated by the top four firms, the Portland market has eight CLECs  
4           providing basic business service via UNE-L or facilities-based provision.  
5           Overall, 12 responding CLECs provide basic business service in one or more  
6           rate centers via UNE-L or facilities-based provisions.

7           While the market does not resemble perfect competition, the results of  
8           both analyses potentially approach my definition of competition.

9           **Q. PLEASE EXPLAIN WHAT THE CLEC SURVEY RESULTS SHOW FOR**  
10           **ANALOG PBX.**

11          A. The CLEC survey results paint a bleak picture for competition in the provision  
12          of analog PBX services. Even using the most generous market definition –  
13          statewide, all provisions (see Staff/103, Chriss/7) – there are only five  
14          responding CLECs who have analog PBX lines in service, and even then the  
15          five CLECs only have slightly more than four percent of the market. Unless the  
16          non-responding CLECs are significantly large providers of analog PBX  
17          services, there does not appear to be much potential competition for the  
18          provision of these services.

19          **Q. PLEASE EXPLAIN WHAT THE CLEC SURVEY RESULTS SHOW FOR**  
20          **DIGITAL PBX.**

21          A. The results for digital PBX vary depending upon the market studied. Portland,  
22          using all provisions in the analysis (see Staff/103, Chriss/10) has the most  
23          potential for competition. Provision is significantly lower for the rest of the state.  
24          Perhaps the most positive element to the analysis of digital PBX provision by

1 the responding CLECs is that 86 percent of the provision statewide is via UNE-  
2 L or facilities-based lines (see Staff/103, Chriss/11).

3 **Q. PLEASE EXPLAIN WHAT THE CLEC SURVEY RESULTS SHOW FOR**  
4 **CENTREX SERVICES.**

5 A. The results for Centrex provided via all provisions presents an interesting  
6 dichotomy when compared to the other petition services. Centrex is the only  
7 service for which the responding CLECs have a far larger market share outside  
8 of the major metropolitan areas (see Staff/103, Chriss/13). However, when the  
9 service is considered statewide, using both all provisions and the limited  
10 provision analyses (see Staff/103, Chriss/14), there does not appear to be  
11 significant potential for competition.

12 **Q. PLEASE EXPLAIN WHAT THE CLEC SURVEY RESULTS SHOW FOR 800**  
13 **SERVICES.**

14 A. The CLEC survey results do not indicate a large amount of activity of either the  
15 responding CLECs or Qwest for the provision of 800 services. Potential  
16 competition may exist, as the addition of a non-responding CLEC to the survey  
17 data or additional future entry into the 800 market could radically change  
18 Qwest's share of the market.

19 **Q. PLEASE EXPLAIN WHAT THE CLEC SURVEY RESULTS SHOW FOR ISDN**  
20 **BASIC RATE SERVICES.**

21 A. The CLEC survey results do not indicate a large amount of responding CLEC  
22 activity for the provision of ISDN BRI services (see Staff/103, Chriss/19). It is  
23 uncertain whether the addition of the non-responding CLECs would have an  
24 impact on the analyses.

1 **Q. PLEASE EXPLAIN WHAT THE CLEC SURVEY RESULTS SHOW FOR ISDN**  
2 **PRIMARY RATE SERVICES.**

3 A. The CLEC survey results indicate, using all provisions, that ISDN primary rate  
4 services may be potentially competitive in Portland (see Staff/103, Chriss/21).  
5 Clackamas and the balance of state show far less potential. It is positive,  
6 however, that 95 percent of the responding CLECs ISDN PRI lines are  
7 provisioned over UNE-L or facilities-based lines.

8 **Q. PLEASE EXPLAIN WHAT THE CLEC SURVEY RESULTS SHOW FOR**  
9 **FRAME RELAY SERVICES.**

10 A. The CLEC survey results do not indicate a large amount of responding CLEC  
11 activity for the provision of frame relay services (see Staff/103, Chriss/24-25). It  
12 is uncertain whether the addition of the non-responding CLECs would have an  
13 impact on the analyses.

14 **Q. PLEASE EXPLAIN WHAT THE CLEC SURVEY RESULTS SHOW FOR ATM**  
15 **SERVICES.**

16 A. The CLEC survey results do not indicate a large amount of activity of either the  
17 responding CLECs or Qwest for the provision of ATM services (see Staff/103,  
18 Chriss/27). Potential competition may exist, as the addition of a non-  
19 responding CLEC to the survey data or additional future entry into the ATM  
20 market could radically change Qwest's share of the market.

1     ***Factor 2: The extent to which the services of alternative providers are***  
2             ***functionally equivalent or substitutable at comparable rates, terms and***  
3             ***conditions.***

4     **Q. DID THE CLEC SURVEY PROVIDE ANY INFORMATION REGARDING**  
5             **CLEC SERVICE PRICING?**

6     A. Yes. Thirteen CLECs provided price lists with their survey responses.

7     **Q. WAS STAFF ABLE TO PERFORM ANY ANALYSIS ON THE SERVICE**  
8             **PRICES?**

9     A. Yes. An analysis of monthly recurring charges for flat rated basic business  
10             service was conducted for each rate group in Oregon. Staff/112 illustrates the  
11             results for each rate group, and for each rate center in each rate group that is  
12             served by one or more of the 13 responding CLECs.

13     **Q. PLEASE DESCRIBE THE CONTENTS OF THE ANALYSIS.**

14     A. For each rate group and every rate center therein, the Exhibit shows the  
15             straight average of CLEC offerings, the weighted average of CLEC offerings,  
16             Qwest's retail price, Qwest's imputed price floor, and the number of CLECs  
17             whose offerings are either above or below Qwest's retail price. In order to  
18             protect CLEC confidentiality, CLEC counts in rate centers with less than four  
19             CLECs are not included.

20     **Q. WHAT IS THE DIFFERENCE BETWEEN THE STRAIGHT AND WEIGHTED**  
21             **AVERAGES OF THE CLEC OFFERINGS?**

22     A. The weighted average is more representative of the nature of consumer  
23             response to CLEC offerings in each rate center or rate group. A straight  
24             average, while representative of offerings in each rate center, ignores the law of

1 demand – as price increases, the quantity demanded of a good decreases.  
2 Any CLEC can offer a service in a rate center for any price, but that does not  
3 mean consumers will want to pay that price for the service.

4 For example, assume two CLECs offer flat rated basic business  
5 service in a rate center. CLEC A offers the service for a monthly recurring  
6 charge of \$40 per line, and CLEC B offers the service for a monthly recurring  
7 charge of \$20 per line. The straight average of the two offerings is \$30 line.

8 Keeping the law of demand in mind, suppose that CLEC A has 1,000  
9 lines in service, and CLEC B has 250 lines in service. The weighted average of  
10 the two CLECs is \$24 per line, which reflects consumers' preference for the  
11 cheaper provider of the service.

12 **Q. WERE THE RESULTS OF THE STAFF ANALYSIS OF BASIC BUSINESS**  
13 **SERVICE CHARGES SIMILAR TO THE EXAMPLE?**

14 A. Yes. For the 26 rate centers in rate group one (see Staff/112, Chriss/1), six  
15 had straight averages lower than Qwest's retail price of \$26 per line. However,  
16 the maximum weighted average for a rate center was \$22.07 per line, well  
17 below the Qwest retail price. The overall weighted average for the 13 CLECs  
18 offerings in rate group one was \$21.08 per line. With the exception of  
19 Redmond, in which three CLECs were priced below Qwest's retail price and  
20 three were priced above Qwest's retail price, more CLECs were priced below  
21 Qwest's retail price in each rate center than were priced above Qwest's retail  
22 price.

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1 I suspect that the CLECs may be targeting Qwest customers who may  
2 be less costly to serve than the overall average. This would explain how they  
3 could charge a lower rate and presumably be profitable.

4 **Q. WERE THE RESULTS FOR RATE GROUPS TWO AND THREE SIMILAR TO**  
5 **THOSE OF RATE GROUP ONE?**

6 A. Yes. The exceptions, such as Stanfield and Oakland in Rate Group Two, had a  
7 low number of CLECs offering basic business service in those rate centers.  
8 Overall, fewer of the CLECs included in the study actually have lines in service  
9 in rate groups two and three (see Staff/111, Chriss/2-3).

10 **Q. DO THESE RESULTS SHOW THE POSSIBILITY OF PRICE COMPETITION**  
11 **FOR BASIC BUSINESS SERVICE?**

12 A. Yes, though as with line counts, the caveat of limited response to the CLEC  
13 survey holds. For at least a segment of CLECs, consumers who decide to give  
14 their business to the CLECs are choosing services that cost less than Qwest's  
15 average basic business service offerings.

16 **Q. ARE THESE CLEC OFFERINGS CONSTRAINING QWEST'S ABILITY TO**  
17 **RAISE PRICES?**

18 A. Perhaps not. Qwest prices its basic business services at the price caps set in  
19 UT 125. Those price caps serve as the constraints on Qwest's ability to raise  
20 prices.

21 **Q. WHAT ARE QWEST'S PRICE FLOORS FOR FLAT RATED BASIC**  
22 **BUSINESS SERVICE IN EACH RATE GROUP?**

23 A. For Rate Group One, the price floor is \$18.28 (see Staff/108). For Rate Group  
24 Two, the price floor is \$29.53. For Rate Group Three, the price floor is \$60.54.

1 For Rate Groups Two and Three, Qwest's retail price for flat rate basic  
2 business service is below the imputed price floor. The Commission was not  
3 required to set these prices above the imputed price floor in UT 125, the last  
4 Qwest rate case.

5 **Q. HAS QWEST PROVIDED EXAMPLES OF SERVICE PRICES SIMILAR TO**  
6 **THEIR OWN FOR OFFERINGS FROM LARGE CLECS?**

7 A. Yes. Qwest/9 lists the prices of several CLEC offerings. Many of the prices are  
8 similar to those of Qwest. One important consideration is that many of the  
9 quoted prices are for Qwest territorial areas outside of Oregon, so it is uncertain  
10 if the CLEC offerings are necessarily either offered in Oregon or offered in  
11 Oregon for a different price than the other jurisdictions.

12 **Q. DO YOU AGREE WITH MR. BRIGHAM'S CLAIM THAT THE COMMISSION**  
13 **SHOULD FOCUS ON "WHETHER THERE IS SUFFICIENT COMPETITION**  
14 **TO CONSTRAIN QWEST'S ABILITY TO RAISE PRICES FOR ITS SERVICES**  
15 **IN THE MARKET" (QWEST/1, BRIGHAM/38, LINES 17-19)?**

16 A. Yes. In addition to considering the level of service competition through an  
17 examination of CLEC market shares and concentration ratios, the Commission  
18 should consider whether competition is constraining Qwest's ability to raise  
19 prices for its services in the market.

20 Should the Commission deregulate services for which there is  
21 insufficient competition, local businesses will suffer. The following outcomes  
22 are possible in this regard. Service quality can degrade at current prices.  
23 Qwest could raise its prices for business services increasing the cost to do  
24 business in Oregon. This could reduce the economic health of the state.

1           However, in the event Qwest does raise prices, CLECs may choose to enter  
2           the market.

3           **Q. IS COMPETITION CURRENTLY CONSTRAINING QWEST'S ABILITY TO**  
4           **RAISE PRICES FOR ITS SERVICES IN THE MARKET?**

5           A. No. The current constraints on Qwest's prices are price caps put in place by  
6           the Commission in docket UT 125. Staff witness Sloan discusses the price  
7           caps in Staff/200.

8           **Q. DOES QWEST CURRENTLY PRICE ITS PETITION SERVICES AT THE**  
9           **PRICE CAP LEVEL?**

10          A. Yes. With the exception of ISDN Primary Rate Service special contracts, all of  
11          Qwest's petition services are priced at the price cap level (see Staff/110).

12          **Q. DOES QWEST CURRENTLY HAVE DOWNWARD PRICING FLEXIBILITY?**

13          A. Yes. Staff witness Sloan discusses Qwest's downward pricing flexibility in  
14          Staff/200.

15          **Q. HAS QWEST, IN THE LAST FIVE YEARS, LOWERED PRICES FOR ANY OF**  
16          **THE PETITION SERVICES?**

17          A. Yes. Staff/111 lists the services that have had their prices lowered, the dates  
18          on which the services' prices were lowered, and the reason for the price  
19          changes.

20          **Q. DOES STAFF/110 SHOW ANY REDUCTION IN PRICES DUE TO**  
21          **COMPETITIVE PRESSURES FROM CLEC SERVICES?**

22          A. No. The majority of the price reductions were due to the UT 125 rate case  
23          order. Despite Qwest's claims of line losses of 36 percent to competition  
24          (Qwest/1, Brigham/20, Line 16) from December 2000 through December 2004,



1 the company has not reduced prices on most petition services in order to stave  
2 off the loss of lines and ultimately market share. The only exception is ISDN  
3 Primary Rate Service special contracts. This lack of action by Qwest could be  
4 very consistent with profit maximizing behavior.

5 **Q. IS THERE PRICE COMPETITION FOR THE PETITION SERVICES IN**  
6 **OREGON?**

7 A. Superficially, it could appear as such. More importantly, however, is how has  
8 Qwest, the dominant firm with downward pricing flexibility, responded to the  
9 prices found in the market. It is hard to observe price competition for those  
10 services, and areas, for which little or no CLEC activity exists.

11 **Q. HOW HAS QWEST RESPONDED?**

12 A. As I discuss earlier in my testimony, outside of the regulatory process, Qwest  
13 has responded by continuing its prices for most of the petition services. Qwest  
14 has not lowered its prices for customers in general. It is not clear whether  
15 Qwest has offered special rate discounts for select customers. This is most  
16 telling for basic business service, which makes up the largest portion of  
17 Qwest's business lines.

18 **Q. PLEASE EXPLAIN.**

19 A. Qwest knows of large CLECs that offer basic business service at prices that  
20 are, on their face, competitive with Qwest's rates, especially in Rate Group  
21 One. Furthermore, Qwest, for Rate Group One, can lower its price of basic  
22 business service to \$18.28, which is lower than the weighted averages of every  
23 rate center in staff's analysis. In addition, Qwest prices its basic business  
24 service at the price caps set by the Commission. Finally, Qwest has lost 36

1 percent of its business service lines in the last five years. Given these four  
2 facts, if Qwest's assertion about the competition it faces is true, it is unclear  
3 why Qwest has not acted like a firm in a competitive market would. That is, it is  
4 unclear why Qwest has not responded by pricing its services more  
5 competitively and trying to reclaim the lost lines.

6 **Q. CAN STAFF PROVIDE AN EXPLANATION FOR THIS INACTION?**

7 A. Yes. There are several possible reasons Qwest has not lowered the prices of  
8 the petition services from the price caps.

9 **Q. PLEASE EXPLAIN.**

10 A. According to economic theory, price reductions would not occur as long as  
11 Qwest is operating under the inelastic portion of its demand curve.<sup>3</sup> In this  
12 case, price reductions do not entice sufficient increases in demand to offset the  
13 reduction in price.

14 The first possible reason is that there is no price competition in Oregon,  
15 and other factors other than price determine why customers choose one carrier  
16 over another. Qwest may provide the best customer service of all possible  
17 LECs. Some customers may trust Qwest because, even though its prices are  
18 higher, it is a known quantity. The difference in price or transition costs may  
19 not justify changing LECs. Finally, a customer may be a tenant of a building in  
20 which the owner has contracted with Qwest to exclusively provide  
21 telecommunications services.

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<sup>3</sup> Essentially, a percentage decrease in price will result in a smaller percentage increase in quantity demanded.

1           The second possible reason is that Qwest has determined that the  
2 Oregon operations can sustain a certain amount of losses and still remain  
3 profitable. This could possibly be due to services being priced above marginal  
4 cost or subsidization by other Qwest units or operations in other Qwest states.  
5 This could reflect a segmentation of the market within rate centers, where some  
6 customers have CLECs actively competing for their business. Other areas  
7 have no activity. In this case, Qwest can choose whether to compete for the  
8 identified subset of customers while holding firm on prices for those customers  
9 for which competitive choices are not available at this time.

10           The third possible reason is that the markets for the petition services  
11 are competitive, and Qwest has not yet managed to operate as an effective  
12 competitor.

13           The final possible reason is that, if Qwest is successful in deregulating  
14 the petition services in this docket, Qwest will pursue a path of lowering prices  
15 in order to regain market share. If so, once sufficient market share is garnered,  
16 and a number of CLECs have exited the market, Qwest could raise its rates  
17 and operate as an unregulated monopoly.

18   **Q. DO YOU BELIEVE THAT QWEST WILL PURSUE A LOWER PRICING**  
19   **SCHEME IF THE PETITION SERVICES ARE DEREGULATED?**

20   A. No. Qwest, in jurisdictions in which their business services have been  
21 deregulated, has tended to increase the prices of their services (see Staff/113).  
22 Qwest has reduced the price of services in Nebraska and Utah (see Staff/114),  
23 but staff does not have access to CLEC prices in those states or Qwest cost of

1 service estimates and therefore cannot determine if the reductions by Qwest  
2 are predatory or not.

3 **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR BASIC**  
4 **BUSINESS SERVICE?**

5 A. Superficially, yes, price competition exists for basic business service. However,  
6 Qwest's actions to this point in Oregon suggest that price competition does not  
7 exist.

8 **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR ANALOG PBX**  
9 **SERVICES?**

10 A. Superficially, yes (see Qwest/9), price competition exists for analog PBX  
11 services. However, Qwest's actions to this point in Oregon suggest that price  
12 competition does not exist.

13 **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR DIGITAL PBX**  
14 **SERVICES?**

15 A. Based on Qwest/9, it is uncertain whether price competition exists for digital  
16 PBX in Oregon.

17 **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR CENTREX**  
18 **SERVICES?**

19 A. Based on Qwest/9, it is uncertain whether price competition exists for Centrex  
20 services in Oregon.

21 **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR ISDN BASIC**  
22 **RATE SERVICES?**

23 A. Based on Qwest/9, it is uncertain whether price competition exists for ISDN  
24 Basic Rate services in Oregon.

1     **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR ISDN**  
2     **PRIMARY RATE SERVICES?**

3     A. Based on Qwest/9, it is uncertain whether price competition exists for ISDN  
4     Primary Rate services in Oregon.

5     **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR 800**  
6     **SERVICES?**

7     A. Based on Qwest/9, it is uncertain whether price competition exists for 800  
8     services in Oregon.

9     **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR FRAME**  
10    **RELAY SERVICES?**

11    A. Based on Qwest/9, it is uncertain whether price competition exists for Frame  
12    Relay services in Oregon.

13    **Q. DO YOU BELIEVE THAT PRICE COMPETITION EXISTS FOR ATM**  
14    **SERVICES?**

15    A. Based on Qwest/9, it is uncertain whether price competition exists for ATM  
16    services in Oregon.

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1 ***Factor 3: Existing economic or regulatory barriers to entry.***

2 **Q. DOES THE FRAMEWORK OF MARKET ANALYSIS AFFECT THE**  
3 **EXISTENCE OF BARRIERS TO ENTRY IN THE SWITCHED BUSINESS**  
4 **MARKET IN OREGON?**

5 A. Yes. If the market is analyzed using all of the currently available Qwest  
6 wholesale provisions, it can seem on the surface that no barriers to entry exist.  
7 However, as I have previously discussed, it is inappropriate to consider the  
8 inclusion of QPP and other Qwest discretionary provisions in the market  
9 analyses. Therefore, staff posits that there are three barriers to entry exist in  
10 the switched business market in Oregon. The first two barriers pertain to  
11 facilities-based provision of services.

12 **Q. WHAT IS THE FIRST BARRIER TO ENTRY?**

13 A. The first barrier to entry is the cost of building facilities. While not necessarily  
14 the cost per line for CLECs, the Commission has determined that the average  
15 capital outlay for Qwest to replace a loop is approximately \$658 (see Staff/115).  
16 This loop cost alone, in the absence of much less expensive Qwest  
17 discretionary provisions, represents a potential entry cost, especially for small  
18 CLECs that do not have the backing of large, publicly-traded parent companies.

19 **Q. COULD THE COST OF BUILDING FACILITIES POTENTIALLY LIMIT**  
20 **COMPETITION?**

21 A. Yes. Qwest notes in Staff/115 that "...a CLEC could decide to overbuild only in  
22 low cost areas, with a capital outlay per loop that would be significantly lower  
23 than Qwest's 'average' outlay." Qwest neglects to note the converse; CLECs  
24 could decide to not build in high cost areas because the cost is much higher

1 than Qwest's "average" outlay. Qwest has had years of cost-of-service  
2 regulation to support its efforts to build a network that reaches many areas that  
3 are geographically remote, or have a wide dispersion of potential customers.  
4 CLECs do not have that advantage, and by deciding that high cost areas are  
5 not profitable, could limit the amount of potential competition in high cost areas.

6 **Q. GIVEN THE COST BARRIER TO ENTRY, WHAT COULD POTENTIALLY**  
7 **HAPPEN TO THE MARKETS FOR THE PETITION SERVICES IN OREGON?**

8 A. There could be active competition for customers in low cost areas, and one  
9 monopoly carrier, in this case Qwest, in high cost areas.

10 **Q. WOULD THE LOW COST AREAS BE FREE OF BARRIERS TO ENTRY?**

11 A. No. The second barrier to entry is the possibility of exclusive or limited access  
12 to buildings. While this barrier is important statewide, its potential prevalence is  
13 greatest in areas with high business density, and multiple tenants or  
14 businesses in one building.

15 **Q. PLEASE EXPLAIN HOW THIS BARRIER COULD OCCUR?**

16 A. This barrier could occur when, upon the construction of a building, Qwest or  
17 another LEC is given access to the building to wire it for telecommunications  
18 services and granted exclusive access to the tenants in the building to the  
19 exclusion of the CLECs.

20 **Q. WHO IS HARMED BY THIS BARRIER?**

21 A. The CLECs and ultimately, business services customers. Even in a  
22 competitive market, customers in buildings that have granted exclusive access  
23 to Qwest or another LEC may not have a choice of competitive options.

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1 **Q. WHAT IS THE THIRD BARRIER TO ENTRY?**

2 A. The third barrier to entry is the potential difference in franchise fees charged by  
3 Oregon cities to Qwest and to CLECs.

4 **Q. HAS STAFF IDENTIFIED ANY OTHER BARRIERS TO ENTRY?**

5 A. Yes. Portland in particular has completely different methods of calculating  
6 franchise fees for Qwest than for the CLECs.

7 **Q. HOW ARE PORTLAND FRANCHISE FEES CALCULATED FOR QWEST?**

8 A. According to Ordinance No. 171,914 (see Staff/116), Qwest is charged the  
9 greater of the minimum annual franchise fee or \$2.63 per linear foot of Qwest's  
10 telecommunications system in the streets.

11 **Q. HOW ARE PORTLAND FRANCHISE FEES CALCULATED FOR THE**  
12 **CLECS?**

13 A. CLECs are charged the greater of the minimum annual franchise fee or an  
14 amount equal to five percent of the CLEC's gross revenues for services  
15 originating or terminating in Portland and charged to a circuit location in  
16 Portland. See Staff/117 for an example CLEC franchise fee ordinance.

17 **Q. HOW IS THE DIFFERENCE A BARRIER TO ENTRY?**

18 A. The franchise fee mechanism essentially punishes a CLEC for growing its  
19 business. That is, as more customers are added, or more importantly when  
20 compared to Qwest, switches a current, customer from a lower revenue service  
21 to a higher revenue service, the CLEC pays more in fees to the city.

22 For example, assume Qwest switches a current customer from a  
23 service that generates \$25 of annual revenue to a service that generates \$100  
24 of annual revenue. Assume that this change does not require any additional



1 linear feet of system capacity. This switch will result in no additional franchise  
2 fees paid by Qwest to the city.

3 Assume a CLEC performs the same switch for one of its customers.  
4 The CLEC's franchise fee payment will increase from \$1.25 for this customer to  
5 \$5.

6 While both Qwest and the CLECs must pay franchise fees, the fact  
7 that the CLEC franchise fees are potentially more punitive than Qwest's creates  
8 a barrier to entry.

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1 ***Factor 4: Any other factors deemed relevant by the Commission.***

2 **Q. ARE THERE ANY OTHER FACTORS THE COMMISSION SHOULD**  
3 **CONSIDER IN THIS DOCKET?**

4 A. Yes. One of the hallmarks of perfect competition is perfect information. Used  
5 simply, it means that the buyers and sellers all know the price and quality of the  
6 products in the market. However, it is reasonable to extend the use of the  
7 concept to include what firms in the market know about each other.

8 **Q. HOW IS THIS KNOWLEDGE AN ISSUE IN THIS DOCKET?**

9 A. Qwest, aside from being a seller of retail services, is the provider of wholesale  
10 services for the majority of CLEC activity in the market. This position gives  
11 Qwest an enormous amount of competitive information that other firms in the  
12 market do not have, and could give Qwest an unfair advantage in a deregulated  
13 market.

14 **Q. DO YOU BELIEVE QWEST HAS SUFFICIENT INFORMATION ON CLECS IN**  
15 **OREGON TO BE ABLE TO MANIPULATE THE FUNCTIONING OF THE**  
16 **MARKET?**

17 A. I do. However, it is unknown whether or not Qwest knows more about CLEC  
18 operations in Oregon than they have presented in this docket.

19 **Q. DO YOU HAVE ANY RECOMMENDATIONS REGARDING THIS ISSUE?**

20 A. I do not have any specific recommendations at this time. However, if the  
21 Commission chooses to deregulate any or all petition services in any or all  
22 parts of Oregon, I believe that a condition regarding the flow of CLEC  
23 information between Qwest's wholesale and retail operations could be  
24 appropriate.

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**5. Intermodal Competition**

**Wireless**

**Q. DO YOU AGREE WITH MR. BRIGHAM’S CLAIM THAT WIRELESS SERVICE REPRESENTS “AN INCREASINGLY MEANINGFUL COMPETITIVE ALTERNATIVE FOR SINGLE-LINE OR MULTI-LINE BUSINESS CUSTOMERS? (QWEST/1, BRIGHAM/61, LINE 29 THROUGH QWEST/1, BRIGHAM/62, LINE 1)”**

A. In the abstract, yes. However, Mr. Brigham focuses on the sentiments of potential customers in Colorado (see Qwest/1, Brigham/63, Lines 1-18) and does not provide any quantitative evidence of the cross-price elasticity of demand for wireless and wireline services for business customers, so the level of substitutability is uncertain.

**Q. HAS QWEST PROVIDED ANY EVIDENCE THAT WIRELESS SERVICE IS SUBSTITUTABLE FOR ANALOG OR DIGITAL PBX SERVICES, CENTREX SERVICES, 800 SERVICES, ISDN PRIMARY RATE SERVICES, ISDN BASIC RATE SERVICES, FRAME RELAY SERVICES, OR ATM SERVICES?**

A. No. Qwest only provides evidence that wireless service may be substitutable for basic business service.

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1     **Q. DO YOU AGREE WITH MR. BRIGHAM’S CLAIM THAT “THE EXISTENCE**  
2           **OF WIRELESS ALTERNATIVES NECESSARILY CONSTRAINS QWEST’S**  
3           **ABILITY TO RAISE PRICES FOR WIRELINE SWITCHED SERVICES...”**  
4           **(QWEST/1, BRIGHAM/63, LINES 22-23)?**

5     A. As an economic concept, yes. If wireless services are substitutes for wireline  
6       services, then an increase in Qwest’s wireline prices should drive some  
7       customers to wireless services. However, to what level the substitution may  
8       occur, and the ultimate constraint that the wireless threat poses to Qwest  
9       petition service prices, has not been provided by Qwest.

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**Voice Over Internet Protocol (VoIP)**

12     **Q. DID THE CLEC SURVEY INCLUDE ANY PROVIDERS OF VOIP SERVICES?**

13     A. Yes, but less than four responding CLECs included any information regarding  
14       VoIP. As well, some of the responses included a list of the rate centers in  
15       which VoIP is provided, but no line counts.

16     **Q. DO YOU BELIEVE THAT VOIP COULD BE COMPETITIVE WITH THE**  
17           **PETITION SERVICES?**

18     A. I believe that VoIP could be competitive with some of the petition services at  
19       some future date, but good quantitative data, regarding switching or cross-price  
20       elasticity, to prove or disprove the notion is unavailable at this time.

21       Additionally, it is uncertain how VoIP could serve as a substitute for 800, Frame  
22       Relay, and ATM services.

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1 **6. Staff's Conclusions**

2 **Q. PLEASE PRESENT STAFF'S CONCLUSIONS.**

3 A. Staff concludes the following:

- 4 1. Because potentially competitive rate centers can mask non-competitive  
5 rate centers, it is not appropriate to use the entire state as the relevant  
6 market;
- 7 2. In order to consider a set of two or more aggregated services as a  
8 market, evidence first needs to be shown that proves that the services  
9 are substitutes;
- 10 3. Business service provision via UNE-P, QPP, DS1, DS3, and dark fiber  
11 loops and transport reflect competition dependent on Qwest's  
12 discretion;
- 13 4. Qwest has not proven the existence of competition for any of the  
14 specific petition services on a state-wide basis;
- 15 5. Of the petition services, only basic business service potentially  
16 approaches the definition of competition used in the testimony for  
17 many markets in Oregon;
- 18 6. Using the CLEC Survey Report, Digital PBX and ISDN Primary Rate  
19 services show some potential to be competitive in certain areas of the  
20 state;
- 21 7. Using the CLEC Survey Report, Centrex, 800, ISDN Basic Rate,  
22 Frame Relay, and ATM services do not show potential to be  
23 competitive;

- 1           8.     The current constraints on Qwest's prices are the price caps put in  
2           place by the Commission in docket UT 125;
- 3           9.     Qwest has not reduced prices on most petition services in order to  
4           stave off line losses and loss of market share;
- 5           10.    Superficially, there is price competition for basic business and analog  
6           PBX services, but Qwest's actions suggest that price competition does  
7           not exist for all customers;
- 8           11.    For the remaining petition services, it is uncertain whether price  
9           competition exists;
- 10          12.    The cost to a CLEC of building facilities is a barrier to entry;
- 11          13.    The possibility of exclusive or limited access to buildings is a barrier to  
12          entry;
- 13          14.    The difference in franchise fees between Qwest and the CLECs is a  
14          barrier to entry; and
- 15          15.    Qwest's position as the wholesale provider gives the company an  
16          enormous amount of competitive information that other firms in the  
17          market do not have.

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1 **7. Staff's Proposal**

2 **Q. DOES STAFF PROPOSE AN ALTERNATIVE TO QWEST'S PETITION?**

3 A. Yes. While it is inappropriate to deregulate all services for all of Qwest's  
4 Oregon service territory, it does appear that, for some services in some areas,  
5 services are either subject to competition or the public interest no longer  
6 requires full regulation. This determination is consistent with ORS 759.030 (2).

7 **Q. HOW DO YOU DEFINE "SUBJECT TO COMPETITION?"**

8 A. A petition service is subject to competition if there exists active competitors or  
9 the threat of competitive entry sufficient to provide customers protection against  
10 the exercise of market power.

11 **Q. PLEASE STATE THE SERVICES THAT NO LONGER REQUIRE FULL  
12 REGULATION, AND THE APPLICABLE AREAS.**

13 A. Staff proposal is to deregulate:  
14 1. Basic business services for all Portland rate centers;  
15 2. 800 and ATM services in all of Qwest's Oregon service territory.

16 **Q. PLEASE EXPLAIN WHY BASIC BUSINESS SERVICES SHOULD BE  
17 DEREGULATED IN THE PORTLAND RATE CENTERS.**

18 A. Basic business services should be deregulated for Portland because, as I  
19 stated earlier in my testimony, there is certainly the potential for UNE-L and  
20 facilities-based competition in the Portland rate center. As well, it appears that  
21 customers in Portland who are using CLECs are choosing firms with retail  
22 prices lower than Qwest's.

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1 **Q. DO PRICE AND SERVICE COMPETITION EXIST FOR BASIC BUSINESS**  
2 **SERVICES IN PORTLAND?**

3 A. It is uncertain if price and service competition exists. Qwest's actions to this  
4 point suggest that price competition does not exist. However, it is apparent that  
5 the conditions exist for basic business service provision in Portland to be  
6 subject to competition.

7 **Q. DOES THIS RECOMMENDATION RELY ON THE EXISTENCE OF QPP?**

8 A. No. This recommendation is based entirely on the existence of UNE-L and  
9 facilities-based providers in the city.

10 **Q. PLEASE EXPLAIN WHY 800 AND ATM SERVICES SHOULD BE**  
11 **DEREGULATED STATEWIDE.**

12 A. While it is uncertain whether price or service competition exists for these two  
13 services, Qwest's small customer base for each service suggests that even  
14 limited activity on the part of CLECs could constrain Qwest prices for the  
15 services and reduce Qwest's market share. It is in the public interest that these  
16 two services no longer are subject to full regulation.

17 **Q. WHY DOES QWEST HAVE A SMALL CUSTOMER BASE FOR 800 AND**  
18 **ATM SERVICES?**

19 A. It is reasonable to assume the small customer base for each service is due to  
20 the availability of a federally regulated interstate alternative that is more  
21 attractive to customers than the intrastate service currently regulated by the  
22 Commission.

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1     **Q. UNDER WHAT CONDITIONS SHOULD THE SERVICES BE**  
2     **DEREGULATED?**

3     A. Staff proposes the following conditions for the deregulation of the Qwest  
4     services:

5         1. Qwest agrees to continue offering basic business service, on a stand alone  
6         basis, for each of up to four lines per customer; and

7         2. Qwest agrees not to engage in discriminatory pricing of the deregulated  
8         services. To ensure compliance with this condition, Qwest would continue  
9         to be subject to the complaint and investigation procedures of ORS  
10         756.500, *et seq.*, with respect to allegations of discriminatory pricing for the  
11         deregulated services. Upon request, Qwest must also disclose to  
12         customers information regarding prices charged to customers of  
13         comparable size or requirements. As well, Qwest is required to notify its  
14         customers, of any change in rates, terms and conditions and of the  
15         customer right to request information relating to prices charged customers  
16         of comparable size and requirements and of the customer's right file a  
17         complaint regarding discriminatory pricing with the Commission.

18         3. Qwest agrees that it will functionally separate its employees responsible for  
19         sale of wholesale services from the employees responsible for sale of retail  
20         services. Qwest agrees that it will not share the data from the wholesale  
21         business function with its retail business function. Qwest agrees that it will  
22         develop a "Code of Conduct" that embodies this separation and will provide  
23         annual training to its responsible employees.

24         \\

1 **Q. WHY DO YOU PROPOSE CONDITION ONE?**

2 A. Condition one will ensure that Qwest continues to offer basic business services  
3 in Oregon on a stand-alone basis. Staff is concerned that, upon deregulation,  
4 Qwest may choose to stop providing its basic business service on a stand-  
5 alone basis and will require those in need of basic business services to  
6 purchase bundled services at higher cost. Stand-alone basic business service  
7 may be most needed by smaller business customers who may not find  
8 themselves as attractive to CLECs as larger business customers.

9 **Q. WHY DO YOU PROPOSE CONDITION TWO?**

10 A. As noted in the discussion earlier, the survey analysis is conducted at the rate  
11 center level. So for example, in the Portland region, the analysis shows that  
12 there are facilities based CLECs actively competing for business customers.  
13 However, the analysis is unclear whether the CLECs are competing for every  
14 business customer within the region, or rate centers. It is possible that within  
15 the rate centers, that not all customers have available alternative providers, at  
16 the current time. Therefore, some protections should be afforded to these  
17 customers.

18 **Q. WHAT ARE THE PROTECTIONS PROVIDED BY STAFF'S RECOMMENDED**  
19 **CONDITION?**

20 A. This condition requires Qwest to abide by a complaint process if a customer  
21 believes they are being unjustly discriminated against. For example, it is  
22 possible, if exempted from deregulation, that Qwest will lower its prices for  
23 those customers that have access to CLEC facilities, and raise prices for those  
24 who do not. The inability for CLECs to access some business customers has

1           been identified by Staff as a barrier to entry. The complaint process is aimed at  
2           mitigating the harm this barrier to entry may cause by precluding unjust price  
3           discrimination so that all customers benefit from the pricing pressure created by  
4           the competing CLECs. The Commission would become an arbitrator and  
5           would determine if a price being offered by Qwest unjustly discriminated  
6           against a customer due to the inability of that customer to obtain services from  
7           a CLEC.

8           **Q. WHY DO YOU PROPOSE CONDITION THREE?**

9           A. As noted earlier, Qwest, aside from being a seller of retail services, is the  
10          provider of wholesale services for the majority of CLEC activity in the market.  
11          This position gives Qwest an enormous amount of competitive information that  
12          other firms in the market do not have, and could give Qwest an unfair  
13          advantage in a deregulated market. Therefore the proposed condition  
14          constructs an information firewall to preclude Qwest from sharing information to  
15          gain a competitive advantage.

16          **Q. DO YOU PROPOSE ANY PRICE FLOORS FOR BASIC BUSINESS**  
17          **SERVICES GOING FORWARD?**

18          A. No. Basic business services do not currently have price floors, and staff has  
19          not identified any reasons for which a price floor would need to be imposed.  
20          There are currently laws at both the federal and state level that address  
21          predatory pricing which will serve to protect customers.

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**8. Staff Recommendations**

**Q. PLEASE PRESENT STAFF'S RECOMMENDATIONS.**

A. Staff recommends the following:

1. The Commission should deny Qwest's petition and not deregulate the petition services based on the geographic and product markets as defined by Qwest, and instead consider staff's proposal;
2. The Commission should consider a series of smaller, less-aggregated geographic markets that center around population centers and physically separate areas of the state;
3. The Commission should consider CLEC business services provided only by UNE-L and facilities-based provisions;

**Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

A. Yes.

CASE: UX 29  
WITNESS: Steve W. Chriss

**PUBLIC UTILITY COMMISSION  
OF  
OREGON**

**STAFF EXHIBIT 101**

**Witness Qualifications Statement**

**September 9, 2005**

## WITNESS QUALIFICATIONS STATEMENT

NAME: STEVE W. CHRISS

EMPLOYER: PUBLIC UTILITY COMMISSION OF OREGON

TITLE: ECONOMIST

ADDRESS: 550 CAPITOL ST. NE, SUITE 215, SALEM, OR 97310-1380

EDUCATION: Masters of Science degree, Agricultural Economics, from Louisiana State University (2001).

Bachelor of Science degree, Agricultural Development, from Texas A&M University (1997).

Bachelor of Science degree, Horticulture, from Texas A&M University (1997).

EXPERIENCE: Employed with the Oregon Public Utility Commission as Economist in the Economic Research and Financial Analysis Division since June, 2003. Previously submitted testimony in Oregon docket UM 1129.

Employed as an Analyst and Senior Analyst at the Houston office of Econ One Research, Inc., a Los Angeles-based economic and regulatory consulting firm, between 2001 and 2003. Worked on regulatory and market issues in electricity, natural gas, and oil in both domestic and international markets.

Employed by North Harris College in Houston as an adjunct microeconomics instructor from January through May 2003.

CASE: UX 29  
WITNESS: Steve W. Chriss

**PUBLIC UTILITY COMMISSION  
OF  
OREGON**

**STAFF EXHIBIT 102**

**Exhibit in Support of Direct Testimony**

**September 9, 2005**

## CR4 and HHI

**CR4:** The proportion of the market taken up by the four largest firms. Expressed as a percentage of the market as a whole. CR4 does not take into account the number of firms in a market, nor does it take into account the size differences in the firms.

Market 1				Market 2			
Firm	Market Share (%)	CR4		Firm	Market Share (%)	CR4	
1	85	<b>97</b>		1	25	<b>97</b>	
2	5			2	25		
3	4			3	24		
4	3			4	23		
5	2			5	2		
6	1			6	1		

For both Market 1 and Market 2, the largest four firms make up 90 percent of the market. However, Market 1 has one dominant firm while market share is more distributed among the firms in Market 2, so through CR4 alone it is difficult to ascertain how competitive a market may be.

**Herfindahl-Hirschman Index (HHI or Herfindahl Index):** A measure of market concentration which takes into account both the number of firms in a market and their size differences. The HHI has a range of 0 to 10,000 and is calculated by summing the squares of every firm's market share. For example, if a market has two firms, each of whom have 50 percent market share, the HHI is 5,000:

$$\text{HHI} = (50 \times 50) + (50 \times 50) = 2,500 + 2,500 = 5,000$$

The higher the HHI value, the more concentrated, and potentially less competitive, a market is.

Market 1				Market 2			
Firm	Market Share (%)	CR4	HHI	Firm	Market Share (%)	CR4	HHI
1	85	<b>97</b>		1	25	<b>97</b>	
2	5			2	25		
3	4			3	24		
4	3			4	23		
5	2			5	2		
6	1	<b>7280</b>		6	1	<b>2360</b>	

While Markets 1 and 2 have the same CR4, the HHI illustrates that Market 2 is less concentrated than Market 1 and potentially more competitive.



CASE: UX 29  
WITNESS: Steve W. Chriss

**PUBLIC UTILITY COMMISSION  
OF  
OREGON**

**STAFF EXHIBIT 116**

**Exhibit in Support of Direct Testimony**

**September 9, 2005**

## ORDINANCE No. 171914

Grant a franchise to Qwest Communications Corporation for a period of ten years. (Ordinance)

The City of Portland ordains:

### Section 1. NATURE AND TERM OF GRANT.

#### 1.1 Grant of Franchise.

(A) The City of Portland, Oregon does hereby grant to Qwest Communications Corporation, a Delaware corporation qualified to do business in Oregon, and to its successors and assigns, as approved by the City under Section 15 of this Franchise, a franchise to construct, operate and maintain a Telecommunications System, with all necessary Facilities, in, under, and over the surface of the City's Streets, as shown in blue on a map, attached hereto as Exhibit A, which is incorporated by reference. Grantee may seek to amend, alter or add to its Telecommunications System by filing a map showing such proposed changes with the City's Office of Cable Communications and Franchise Management and with the City Engineer. The City shall respond with its approval, modifications, or denial within 45 days from receiving Grantee's proposal. However, the total length of Grantee's Telecommunication System in City Streets shall not exceed Fourteen thousand thirty eight feet (14,038) linear feet unless separately authorized by the City Council by ordinance. Grantee shall file a map showing the final amendments, alterations or additions, as built, with the City Auditor, the City's Office of Cable Communications and Franchise Management and the City Engineer.

(B) Throughout this Franchise, the City of Portland, Oregon, shall be referred to as the "City", and Qwest Communications Corporation shall be referred to as the "Grantee".

1.2 Duration of Franchise. The term of this Franchise, and all rights and obligations pertaining thereto, shall be ten years from the effective date of the franchise unless terminated sooner as provided herein.

1.3 Effective Date. The effective date of this Franchise shall be 60 days after passage of the Franchise by the City Council, unless Grantee fails to file an unconditional written acceptance of this Franchise in accordance with Section 20 herein, in which event this Franchise shall be null and void. The passage date of this Franchise is set forth on the last page of the original hereof, as stamped by the Council Clerk.

1.4 Franchise Not Exclusive. This Franchise is not exclusive. The City expressly reserves the right to grant rights or franchises to other Persons or corporations, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee hereunder, by franchise, permit or otherwise.

1.5 Charter and General Ordinances To Apply. To the extent authorized by law, this Franchise is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland (1942 compilation, as revised in part by subsequent amendments) as the same now exist or hereafter are amended by the people of the City of Portland, are hereby incorporated by reference and made a part of this Franchise, to the extent authorized by law. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

## Section 2. DEFINITIONS.

2.1 (A) Captions. Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

(B) Definitions. For the purpose of this Franchise, the following terms, phrases, and their derivations, shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word “shall” is always mandatory and not merely directory.

2.2 “City” means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

2.3 “City Council” means the Council of the City of Portland.

2.4 “Facility” means any tangible component of the Telecommunications System.

2.5 “Franchise” means this Franchise agreement, as approved by the City Council and accepted by the Grantee pursuant to Section 20 herein.

2.6 “Indefeasible Right of User Interest” (“IRU”) means a form of acquired capital in a telecommunications system, in which the holder of the interest possesses a right to use the telecommunications system, but not the right to control, maintain, construct or revise the telecommunications system.

2.7 “Minimum Annual Franchise Fee” shall mean \$5,000 in the first year of this Franchise, and shall increase by \$1,000 annually, until reaching a minimum of \$14,000 in year ten (10) of this Franchise.

2.8 “Penalties” means any and all monetary penalties provided for in this Franchise.

2.9 “Person” means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.

2.10 “Streets” means the surface of, and the space above and below, any public street, road, alley or highway, within the City, used or intended to be used by the general public, to the extent the City has the right to allow the Grantee to use them.

2.11 “Telecommunications Services” means long distance, inter-exchange and inter-LATA services, which may include MTS, WATS, 800, operator services, directory assistance and travel card services, as authorized by the Oregon Public Utility Commission, but does not include intra-exchange, intra-LATA, or exchange access services. This Franchise does not authorize the Grantee to operate as a telecommunications provider. The City acknowledges that the Grantee has received such authority from the Oregon Public Utility Commission (the “OPUC”) pursuant to OPUC Order No. 93-1792, dated December 10, 1993.

2.12 “Telecommunications System” means fiber optic cables of up to Fourteen thousand thirty eight feet (14,038) in length, measured linearly, and associated wires, cables, ducts, conduits, vaults, poles and other necessary facilities owned or used by the Grantee for the purpose of providing Telecommunications Services and located in, under and above City Streets, excluding ducts, conduits and vaults leased from another City franchisee, licensee or permittee.

2.13 “Year”, “Annual”, or “Annually” means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

### Section 3. COMPENSATION AND AUDITING.

#### 3.1 Amount of compensation.

(A) As compensation for the benefits and privileges under this Franchise, and in consideration of permission to use the Streets of the City, the Grantee shall pay as a franchise fee to the City, through the duration of this Franchise, an amount equal to the greater of the Minimum Annual Franchise Fee or \$2.63 per linear foot of Grantee’s Telecommunications System in the Streets. The total number of linear feet of Grantee’s Telecommunications System located in the Streets shall be determined by the as-built maps submitted by the Grantee, and approved by the City Engineer, as provided in Section 6.1(B).

(B) (1) The amount of the linear foot franchise fee specified herein shall increase annually by a percentage equal to the change in the Consumer Price Index (CPI) for urban age earners and clerical workers for the Portland, Oregon metropolitan region for the prior year, unadjusted for seasonal variations, as determined by the Bureau of Labor Statistics of the Department of labor and as published in such Bureau of Labor Statistics’ Detailed Report during the time period immediately prior to the due date of the franchise fee payment.

(2) As an example of the calculation of the CPI adjustment, for 1996 the calculation was as follows:

Percentage change in CPI from 1995 to 1996	3.5%
multiplied by the initial linear foot fee	x <u>\$2.54</u>
Annual adjustment	\$.09
Add Annual Adjustment to the Linear foot fee:	\$2.54
	+ <u>\$.09</u>
CPI Revised linear foot fee	\$2.63
CPI Revised linear foot fee	\$2.63
Multiplied by the total linear feet	x <u>14,038</u> feet
Adjusted linear foot franchise fee	\$36,920

3.2 City Use of Telecommunications Services and/or Telecommunications System. If the City requests Telecommunications Services from the Grantee and the Grantee agrees, Grantee may deduct the charges for such services from franchise fee payments. Grantee shall charge the City Grantee's most favorable rate offered at the time of the request charged to a similar user within Oregon for a similar volume of service, subject to any of Grantee's tariffs and regulations on file with the Oregon Public Utility Commission. Other terms and conditions of such services may be specified in a separate agreement between the City and Grantee.

### 3.3 Franchise Fee Payments.

(A) Grantee's Minimum Annual Franchise Fee payable under Section 3.1 herein shall be paid to the City 45 days after the effective date of this Franchise. Each year thereafter, the franchise fee payment shall be made for the immediately preceding calendar year ending December 31. Each annual payment of the Grantee's Minimum Annual Franchise Fee shall be paid on or before the forty-fifth (45th) day following December 31st. Grantee shall pay any balance remaining to the City under the calculation of the linear foot fee on the first year anniversary of the effective date of the Franchise, and annually thereafter.

(B) Franchise fee payments not received by the City on or before the due date shall be assessed interest at the rate of one percent (1%) over the existing prime rate as set by the Wells Fargo Bank, National Association, its successors and assigns, compounded daily. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the City receives the payment.

3.4 Reports. Each linear foot payment shall be accompanied by a written report to the City, verified by an officer or other authorized representative of Grantee, containing an accurate statement of the linear feet of Grantee's Telecommunications System in the Streets, and the computation provided for under Section 3.1 hereof, and, if applicable, any revisions to the maps required under Section 6.1(B) hereof. Such reports shall be in a form satisfactory to the City.

3.5 Cost of Pre-franchising and Publication. Grantee shall reimburse the City for such reasonable pre-franchising costs as the City incurs in entering into this Franchise agreement with

the Grantee, up to Five thousand Dollars (\$5,000). Grantee shall also pay the cost of publication of this Franchise and any amendments thereto, as such publication is required by the City Charter. The City shall provide Grantee with an itemized invoice for any such expenses prior to reimbursement by Grantee.

3.6 Acceptance of Payment and Recomputation. No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under this Section shall be subject to confirmation and recomputation by the City, provided that such audit and computation is completed within two (2) years of the date any audited and recomputed payment is due. If no such audit is conducted within the two (2) year period, then any claim that the City might have had for additional compensation shall be forever waived and relinquished. The Grantee agrees to reimburse the City for:

(A) The reasonable costs of such confirmation if the City's recomputation discloses that the Grantee has paid 95% or less of the Franchise Fees owing for the period at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit; or

(B) One-half of the reasonable costs of such confirmation if the City's recomputation discloses that the Grantee had paid more than 95% but less than 98% of the Franchise Fees owing for the period at issue.

(C) The City's confirmation costs which may be reimbursed under this subsection shall not exceed Five Thousand Dollars (\$5,000.00) per audit.

3.7 If the Grantee disputes the City's determination of underpayment, the Grantee shall place the disputed amount in an escrow account until final resolution.

3.8 All Grantee's books, maps, and records under this Franchise, and its calculation of franchise fee payments to the City, shall be open for inspection by the proper officers or agents of the City upon no less than 48 hours prior written notice during normal business hours to determine the amount of compensation due the City under this Franchise, and shall be kept so as to accurately show the same. All other reports required by the Charter and ordinances of the City shall be made by Grantee from time to time as required.

3.9 Payment of this Franchise fee shall not exempt Grantee from the payment of any license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or other taxing authority, except as may otherwise be provided in the ordinance or ordinances imposing such other license fee, tax or charge.

#### Section 4. GENERAL FINANCIAL AND INSURANCE PROVISIONS

##### 4.1 Insurance.

(A) The Grantee shall maintain public liability and property damage insurance that protects the Grantee and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 5. The insurance shall provide coverage at all times of not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$50,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$500,000 covering all claims per occurrence, plus costs of defense. The limits of the insurance shall be subject to any changes as to maximum statutory limits of liability imposed on municipalities of the State of Oregon during the term of this Franchise. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this Franchise, Grantee shall provide a replacement policy with the same terms. Grantee agrees to maintain continuous uninterrupted coverage, in the terms and amounts required, for the duration of this Franchise.

(B) The Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the reasonable approval of the City Attorney.

(C) In the alternative to providing a certificate of insurance to the City certifying liability insurance coverage as required in this Section 4.1, Grantee may provide the City with a statement regarding its self-insurance. Grantee's self-insurance shall provide at least the same amount and scope of coverage for the Grantee and the City, its officers, agents and employees, as otherwise required under this Section. The adequacy of such self-insurance shall be subject to the City Attorney's review and approval. Upon Grantee's election to provide self-insurance coverage under this subsection, any failure by the Grantee to maintain adequate self-insurance shall be cause for immediate termination of this Franchise under Section 16.

#### 4.2 Faithful Performance Bond.

(A) Upon the effective date of this Franchise, the Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of not less than \$100,000, conditioned that the Grantee shall well and truly observe, fulfill, and perform each term and condition of the Franchise. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of the Franchise, including, if necessary, the time required for removal of all of Grantee's Telecommunications System installed in the City's Streets. The

bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without 30 days prior written notice first being given to the City Auditor. The bond shall be reviewed and approved as to form by the City Attorney.

(B) During the term of the Franchise, Grantee shall file with the City Auditor a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under this subsection if a bona fide, good faith dispute exists between the City and the Grantee.

4.3 Construction bond. During all times when Grantee is performing any construction work in or under the Streets requiring a Street opening permit, Grantee shall post a faithful performance bond, as is required for Street opening permits, running to the City, with good and sufficient surety approved by the City, in the sum of \$100,000. The bond shall be conditioned that the Grantee shall well and truly observe, fulfill and perform each term and condition under Section 6. Grantee shall pay all premiums or other costs associated with maintaining the bond, and shall keep the same in full force and effect at all times during the construction work. The bond shall provide that it may be terminated upon final approval of Grantee's construction work in or under the Streets by the City Engineer which shall not be unreasonably withheld or delayed. Upon such approval, the City agrees to sign all documents necessary to release the bond in accordance with the terms of this Section. During the duration of the construction work, Grantee shall file with the City Auditor a copy of the bond, along with written evidence of the required premiums. The bond shall be subject to the reasonable approval of the City Attorney as to its adequacy under the requirements of this Section.

## Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS.

### 5.1 Indemnification.

(A) Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any direct claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Telecommunications System in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide Grantee with prompt notice of any such claim which Grantee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done without the prior written approval of Grantee. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

(B) Grantee also hereby agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its Facilities in the Streets



in a timely manner in accordance with a relocation schedule furnished to Grantee by the City Engineer, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

## Section 6. CONSTRUCTION AND RELOCATION.

6.1 (A) Subject to applicable regulations of the City, Grantee may perform all necessary construction to construct, operate and maintain its Telecommunications System. All construction and maintenance of any and all Telecommunications System Facilities within Streets incident to Grantee's provision of Telecommunications Services shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee. Grantee shall apply for and obtain all permits necessary for installation and/or construction of any such Facilities, and for excavation and laying of any Telecommunications System Facilities within City Streets. Grantee shall pay all applicable fees due for City construction permits.

(B) (1) Prior to beginning construction, Grantee shall provide the City with an initial construction schedule for work in the Streets and the estimated total cost of such work. When Grantee's construction in the Streets is completed, Grantee shall provide the City with the total amount of City Streets, measured linearly, occupied by Grantee's Telecommunications System, with a map showing the location of its installed Telecommunications System in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

(2) One year after the effective date of this Franchise, and annually thereafter in the event of any alterations, Grantee shall provide a map to the City's Office of Cable Communications and Franchise Management, or its successor, showing the location of Grantee's optical fibers in the Streets on a scale of Three thousand five hundred feet (3,500') per inch or whatever standard scale the City adopts for general use. Grantee shall also provide such maps in an electronic format acceptable to the City and the Grantee.

(C) Grantee may make excavations in City Streets for any Facility needed for the maintenance of the Grantee's Telecommunications System, subject to obtaining permits from the City. Prior to doing such work, Grantee must apply for, and obtain, appropriate permits from the City, and give appropriate notices to any further franchisees, licensees or permittees of the City, or bureaus of the City or other units of government owning or maintaining facilities which may be affected by the proposed excavation.

(D) In the event that emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. Grantee must comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.

6.2 Locates. Grantee shall comply with the requirements of the Oregon Utility Notification Law (Sections 1 to 5 and 7, Chapter 691, Oregon Laws 1995), and the rules and regulations promulgated thereunder.

6.3 Relocation. The City shall have the right to require Grantee to change the location of its Telecommunications System within the Streets when the public convenience requires such change, and the expense thereof shall be paid solely by Grantee. The City shall provide the Grantee with the standard notice given under the circumstances to other franchisees, licensees, or permittees. Should Grantee fail to remove or relocate any such Facilities by the date established by the City, the City may cause and/or effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all direct, indirect and/or consequential costs and expenses incurred by the City due to Grantee's delay. If the City requires Grantee to relocate its Facilities located within the City's Streets, the City will make a reasonable effort to provide Grantee with an alternate location for its Facilities within the City's Streets.

6.4 Grantee's Telecommunications System shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits or other Facilities that may have been laid in the Streets by or under the City's authority. The Telecommunications System constructed or erected by Grantee shall be of good quality and workmanship and shall be maintained in good repair and efficiency.

6.5 Upon Grantee's acquisition of any Telecommunications System Facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee retains any such Facilities in the Streets, the Grantee shall submit to the City a written statement describing all Facilities involved, whether authorized by franchise or any other form of prior right, and specifying the location of all such Facilities. At the City's sole option, as expressed by ordinance adopted by the City Council, such acquired Facilities shall immediately be subject to the terms of this Franchise, within a reasonable period of time to bring such acquired Facilities into compliance with this Franchise.

## Section 7. RESTORATION OF STREETS.

7.1 Whenever Grantee disturbs the surface of any Street for any purpose, Grantee shall promptly restore the Street to at least its prior condition, to the satisfaction of the City Engineer. When any opening is made by Grantee in a hard surface pavement in any Street, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer.

7.2 If Grantee excavates the surface of any Street, Grantee shall be responsible for restoration of the Street and its surface within the area affected by the excavation. The City may, after providing notice to Grantee, refill and/or repave any opening made by Grantee in the Street, and the expense thereof shall be paid by Grantee. The City reserves the right, after providing notice to Grantee, to remove and/or repair any work done by Grantee which, in the determination of the City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee. All excavations made by Grantee in the Streets shall be properly

safeguarded for the prevention of accidents. All of Grantee's work under this Section shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

### 7.3 Tree Trimming.

(A) Only upon obtaining a written permit from the City Forester, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with Grantee's Telecommunications System. Except in emergencies, Grantee may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For purposes of this Section, an emergency exists when it is necessary to prune to protect the public from imminent danger. The owner or occupant shall have seven days from receipt of Grantee's notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, Grantee may prune such tree at its own expense.

(B) The City Forester may, at his or her own discretion, waive the notification and permit process in the case of single trees, if Grantee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by Grantee shall be subject to the approval of the City Forester. The City Forester shall have the discretion to cancel the permit if, at any time, the Grantee or its agents, fails to use proper arboricultural practices.

Section 8. **RESERVATION OF CITY STREET RIGHTS.** Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as not to injure or prevent the unrestricted use and operation of the Telecommunications Systems of the Grantee under this Franchise. However, if any of the Grantee's Telecommunications System interferes with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, the Grantee's system shall be removed or replaced in the manner the City shall direct: provided, however, the City will cooperate with the Grantee to identify possible alternate locations within the Streets. Any and all such removal or replacement shall be at the expense of the Grantee. Should Grantee fail to remove, adjust or relocate its Facilities by the date established by the City Engineer's written notice to Grantee, the City may cause and/or effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

### Section 9. **CITY USE OF DUCTS.**

9.1 Ducts Provided to City in City Streets. Grantee shall install for the City two two-inch ducts to be reserved for municipal purposes as part of Grantee's construction in City Streets as

shown on the map attached to this Franchise as Exhibit A. Upon completing installation and construction of the two two-inch ducts in the City Streets, Grantee shall submit to the City a deed or other form of documentation indicating City ownership of such ducts.

9.2 Ducts Provided to City Across Ross Island Bridge. Grantee shall install two one and one-quarter inch ducts for the City across the Ross Island Bridge. In consideration for providing these ducts to the City, Grantee may take a one-time credit against the Franchise fees of up to Fifteen-thousand Dollars (\$15,000) of Grantee's actual and direct material costs of providing the ducts to the City. Upon submitting documentation to the City that it is taking this credit against compensation paid, or to be paid, under Section 3.1 of this Franchise, Grantee shall also simultaneously submit to the City a deed or other form of ownership documentation for the ducts.

9.3 City Use of Surplus Ducts.

(A) The City may install or affix and maintain wires and equipment for municipal purposes within any of Grantee's surplus ducts or conduit, as defined in Section 12.1 (E). All work to affix and/or maintain City wires and equipment shall be performed by Grantee and shall be performed at City expense. The City shall not have access to Grantee's surplus conduits or ducts without Grantee's prior approval, except in the event of an emergency requiring that the City obtain immediate access to those conduits or ducts. In such an emergency, the City shall exercise its best efforts to notify the Grantee as soon as possible of the emergency and the City's need for access.

(B) The value of the City's use of Grantee's surplus conduits or ducts may not be charged to the City, or be deducted from its franchise fee or other fees or charges payable to the City. Grantee shall not be responsible for any damage resulting to the wires or property of the City occurring as a result of City's use of Grantee's surplus conduits or ducts.

9.4 For the purposes of Section 9, the term "municipal purposes" includes but is not limited to the use of the structures and installations for City fire, police, traffic, water, telephone, and/or signal systems. The term "municipal purposes" does not include: (1) the sale or lease of Telecommunications Services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers; or (3) the transportation of water or wastewater.

Section 10. STREET VACATION. If any Street or portion thereof used by Grantee is vacated by the City during the term of this Franchise, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated Street area, Grantee shall, without expense to the City, forthwith remove its Telecommunications System Facilities from such Street, and restore, repair or reconstruct the Street area where such removal has occurred, and place the Street area in such condition as may be required by the Council which shall be no better than the condition of such Street immediately prior to removal. In the event of failure, neglect or refusal of Grantee, after thirty days' notice by City Council, to repair, improve or maintain such Street portions, the City may do such work or cause it to be done, and the direct

cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. The City will cooperate with Grantee to identify alternative locations within the Streets.

Section 11. MAINTENANCE OF FACILITIES. Grantee shall provide and put in use all Telecommunications System Facilities necessary to control and carry Grantee's Telecommunications Services so as to prevent injury to the City's property or property belonging to any person, firm, or corporation within the City. Grantee, solely at its own expense, shall repair, renew, change and improve said Facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not construct its Telecommunications System in a manner that requires any customer, except the City, to install cables, ducts, conduits, or other Facilities, in, under or over the City's Streets or other public right of way.

## Section 12. COMMON USERS.

### 12.1 For the purposes of this Section 12:

(A) "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

(B) "Conduit Facility" means any structure, or section thereof, containing one or more ducts, conduits, manholes, handhole or other such Facilities in the Grantee's Telecommunications System.

(C) "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.

(D) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association franchised, licensed or otherwise permitted by the City to use the Streets. For the purpose of this Section 12, the Grantee shall not be construed to be a "Licensee" as defined herein.

(E) "Surplus ducts or conduits" are Conduit Facilities other than those occupied by the Grantee or any prior Licensee, one unoccupied duct held by Grantee as an emergency use spare, and other unoccupied ducts that the Grantee reasonably expects to use within the next 18 months.

12.2 Grantee acknowledges that the Streets have a finite capacity for containing conduits. Therefore, Grantee agrees that whenever the City Engineer determines it is impracticable to permit construction of an underground conduit system by any other person which may at the time have authority to construct or maintain conduits or ducts in the Streets, the City Engineer may require Grantee to afford to such person the right to use Grantee's surplus ducts or conduits as the City Engineer finds practicable in common with the Grantee, pursuant to the terms and conditions of an agreement for use of surplus conduits and ducts being entered into by the

Grantee and the Licensee (the parties). If the parties fail to agree within a reasonable time, the City Council shall establish by resolution such terms, conditions and regulations as it may determine to be fair and equitable.

12.3A Licensee occupying part of a Duct shall be deemed to occupy the entire Duct.

12.4 The Grantee shall give a Licensee 120 written days notice of its need to occupy licensed conduit and shall propose that the Licensee take the first feasible action listed:

(A) Pay revised conduit rent designed to recover the cost of retrofitting the conduit with multiplexing, optical fibers, or other space-saving technology sufficient to meet the Grantee's space needs;

(B) Pay revised conduit rent based on the cost of new conduit constructed to meet the Grantee's space needs;

(C) Vacate ducts that are no longer surplus; or,

(D) Construct and maintain sufficient new conduit to meet the Grantee's space needs.

Grantee shall provide a written copy of such notice to the City at the same time such notice is provided to the Licensee.

12.5 When two or more Licensees occupy a section of Conduit Facility, the last Licensee to occupy the Conduit Facility shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space-saving technology or construction of new conduit, all Licensees shall bear the revised cost.

12.6 All attachments shall meet local, state, and federal clearance and other safety requirements, be properly grounded and anchored, and meet the provisions of contracts executed between the Grantee and the Licensee. The Grantee may, at its option, correct any attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay the Grantee for any fines, fees, damages, or other reasonable costs the Licensee's attachments cause the Grantee to incur.

Section 13. DISCONTINUED USE OF FACILITIES. Whenever Grantee intends to discontinue use of its Telecommunications System within all or part of a particular portion of the Streets and does not intend to use said Facilities again in the future, Grantee shall submit to the City Engineer for the City Engineer's approval a completed application describing the facility and the date on which the Grantee intends to discontinue using the facility. Grantee may remove the facility or request that the City permit it to remain in place. If Grantee is permitted to abandon its Facilities in place, upon consent of the City, the ownership of Facilities in the City's Streets shall transfer to the City and Grantee shall have no further obligation therefor. Notwithstanding the Grantee's request that any such facility remain in place, the City Engineer may require the Grantee to remove the facility from the Street area or modify the facility in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require the Grantee to perform a combination of modification and removal of the facility. Grantee shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until such time as Grantee removes or modifies the facility as directed by the City Engineer, or until the rights to and responsibility for the facility are accepted by another person having authority to construct and maintain such facility, Grantee shall be responsible for all necessary repairs and relocations of the facility, as well as maintenance and restoration of the Street area, in the same manner and degree as if the facility were in active use, and Grantee shall retain all liability for such facility.

#### Section 14. HAZARDOUS SUBSTANCES

14.1 Grantee shall comply with all applicable state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to Grantee's Telecommunications System in the City Streets. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(15) (1995).

14.2(A) Grantee shall maintain and inspect its Telecommunications System located in the City Streets. Upon reasonable notice to Grantee and in the presence of an authorized representative of Grantee, the City may inspect Grantee's Facilities in the Streets to determine if any release of Hazardous Substances has occurred, or may occur, from or related to Grantee's Telecommunications System Facilities.

(B) In removing or modifying Grantee's Facilities as provided in Section 13 of this Franchise, Grantee shall also remove all residue of Hazardous Substances in compliance with applicable environmental clean-up standards related thereto.

14.3 Grantee agrees to forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by Grantee's ownership or operation of a Telecommunications System in the Streets.

#### Section 15. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

15.1 Neither this Franchise nor any of Grantee's Telecommunications System located in the Streets by authority of this Franchise shall be sold, leased, mortgaged, assigned or otherwise transferred without the prior written consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall notify the City of any transfers to such entities within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained herein shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Telecommunications System without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this Franchise.

15.2 Grantee shall not lease any of its Telecommunications System Facilities, or the public right-of-way in which such are contained, without the City's consent as expressed by ordinance. However, Grantee may grant Indefeasible Right of User Interests, or may lease or otherwise use its Telecommunications System, or any portion thereof, in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its Telecommunications System. The holder of any IRU in Grantee's Telecommunications System shall not obtain any greater rights under this Franchise, or otherwise, than that held by the Grantee.

15.3 Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the Auditor an executed counterpart or certified copy thereof. No sale, lease, mortgage, assignment, transfer or merger shall be binding upon the City with regard to the rights granted by this Franchise until the successor, assignee or lessee has complied with the requirements of Section 4 of this Franchise, including but not limited to all requirements for public liability and property damage insurance, faithful performance bonds and construction bonds.

15.4 For the purpose of determining whether the City will consent to any assignment, transfer, merger, lease or mortgage, the City may inquire into the qualifications of the prospective party. The Grantee shall assist the City in any such inquiry. The City may condition any assignment, transfer, merger, lease or mortgage upon such conditions as it deems appropriate.

## Section 16. FORFEITURE AND REMEDIES.

16.1 Forfeiture. In addition to any other rights set out elsewhere in this Franchise, the City reserves the right to declare a forfeiture of the Franchise, and all of Grantee's rights arising thereunder, in the event that:

- (A) The Grantee violates any material provision of the Franchise;



(1) For purposes of this Section, the following are material provisions of this Franchise, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Franchise:

(a) The invalidation, failure to pay or any suspension of Grantee's payments of Franchise Fees to the City for use of the Streets under this Franchise;

(b) Any failure by the Grantee to submit timely reports regarding the calculation of its Franchise Fees to the City;

(c) Any failure by Grantee to maintain the liability insurance required under this Franchise;

(d) Any failure by Grantee to maintain the performance bond required under this Franchise; or,

(e) Any failure by Grantee to otherwise fully comply with the requirements of Section 3 through Section 17 of this Franchise.

(B) The Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City;

(C) There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Grantee's operation of its Telecommunications System within the City;

(D) The Grantee's construction schedule is delayed for over 18 months; or,

(E) The Grantee becomes unable or unwilling to pay its debts, or is adjudged a bankrupt.

16.2 Additional Remedies. In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:

(A) Impose a financial penalty of up to \$1,000.00, per Franchise violation; or,

(B) Suspend the Grantee's Franchise rights, until the Grantee corrects or otherwise remedies the violation.

(C) Revocation. The City Council may revoke this Franchise in the event that any provision becomes invalid or unenforceable and the City Council expressly finds that such provision constituted a consideration material to the grant of the Franchise.

**16.3 In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.**

16.4 Notice and Opportunity to Cure. The City shall give Grantee thirty (30) days prior written notice of its intent to exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if the Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if the Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, then the City Council may impose any or all of the remedies available under this Section. However, in no event shall the City exercise its rights under this Section if a bona fide, good faith dispute exists between the City and the Grantee.

Section 17. RENEGOTIATION. In the event that any provision of this Franchise becomes invalid or unenforceable and the City Council or the Grantee expressly finds that such provision constituted a consideration material to entering into this Franchise, the City and the Grantee may mutually agree to renegotiate the terms of this Franchise. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party accepts the offer to renegotiate, the parties shall have 90 days to conduct and complete the renegotiation.

Section 18. EXPIRATION.

(A) Upon the expiration of this Franchise, on application made by the Grantee for franchise renewal or additional authority to exercise the privileges, or any of them, hereby granted, the Grantee shall have the first and preferential right to take and receive such authority upon terms and conditions approved by the City. If the Grantee does not promptly apply for such renewal or additional authority, or if the Grantee rejects the terms and conditions of such authority offered by the City, the City may, after one year from the expiration of the prior franchise, grant a permit or franchise to any other corporation, association, firm, individual or individuals. In the event of such a grant, such other corporation, association, firm, individual or individuals taking such new or additional authority, shall in addition to any compensation to be paid to the City for such new or additional authority, pay to the Grantee, at or before the time such new or additional authority takes effect, and before the Grantee shall be deprived of the right to possess, maintain and operate its Telecommunications System located within the Streets, the fair and equitable valuation of Grantee's Telecommunications System located within the Streets. If the third party and Grantee cannot agree on the fair and equitable value of said Telecommunications System, the dispute shall be submitted for a declaratory determination by the courts of the State of Oregon. Until such time as the City exercises its rights as set forth in this Section, the Grantee's rights and responsibilities within the City shall continue to be controlled by the terms and conditions of this Franchise.

(B) Upon the expiration of this Franchise, the City shall have the right, at-its election, to:

- (1) Renew or extend the Franchise to Grantee, in accordance with the Portland City Charter and applicable law;
- (2) Invite additional proposals and award the Franchise to another grantee;
- (3) Terminate the Franchise without further action; or,
- (4) Take such further action as the City deems appropriate.

Until such time as the City exercises its rights under this Section the Grantee's rights and responsibilities within the City shall be controlled by the terms of the Franchise.

## Section 19. MISCELLANEOUS PROVISIONS

### 19.1 Compliance With Laws.

(A) Both Grantee and the City shall comply with all applicable federal and state laws.

(B) Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

19.2 Severability. If any Section, provision or clause of this Franchise is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Franchise shall not be affected.

19.3 Regulation and Nonenforcement by the City. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Franchise in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise by reason of any failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Franchise by reason of such failure or neglect.

### 19.4 Force Majeure.

(A) For purposes of this Section 19.4, the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts or terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within the control of the parties hereto.

(B) If the Grantee is wholly or partially unable to carry out its obligations under this Franchise as a result of Force Majeure, the Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Franchise, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee's inability, by reason of Force Majeure, to carry out its responsibility and duties under this Franchise.

19.5Choice of Forum. Any litigation between the City and the Grantee arising under or regarding this Franchise shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

19.6Notice. Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee or deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (2) sent by overnight or commercial air courier (such as Federal Express), or (3) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

(A) If to the City: Office of Cable Communications and Franchise Management  
City of Portland, Oregon  
1211 SW 5th Avenue, Room 1160  
Portland, Oregon 97204  
FAX (503) 823-5370

With a copy to: City Attorney's Office  
City of Portland  
Room 315, City Hall  
1220 SW 5th Avenue  
Portland, Oregon 97204  
FAX (503) 823-3089

(B) If to the Grantee: Director of Right-of-Way and Real Estate  
Qwest Communications Corporation  
555 Seventeenth Street  
10th Floor  
Denver, Colorado 80202  
FAX (303) 291-1742

With a copy to: Corporate Counsel  
Qwest Communications Corporation  
555 Seventeenth Street  
10th Floor  
Denver, Colorado 80202

(C) Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

19.7 Public Records.

(A) Grantee acknowledges that information submitted to the City is open to public inspection under the Oregon Public Records Law, ORS 192.410 through 192.505 (1995). Grantee is responsible for becoming familiar and understanding the provisions of the Oregon Public Records Law.

(B) Grantee may identify information, such as trade secrets, financial records, customer information or technical information, submitted to the City as confidential. Grantee shall prominently mark any information for which it claims confidentiality with the word "Confidential", on each page of such information, prior to submitting such information to the City. The City shall treat any information so marked as confidential, until the City receives any request for disclosure of such information. Within five (5) working days of receiving any such request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) working days within which to provide a written response to the City, before the City may disclose any of the requested confidential information. The City shall retain the final discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

19.8 Franchise Amendment. The City has negotiated this Franchise in good faith, in reliance upon the information provided by the Grantee regarding the scope of its authority to offer the Telecommunications Services described in Section 2.11 above. In the event that Grantee actually receives authority to offer telecommunications services outside the scope of this Franchise, or otherwise begins offering telecommunications services outside the scope of those identified in Section 2.11, Grantee shall immediately notify the City. Within 90 days of receiving such notice, the City may either enter into negotiations with the Grantee to revise or amend this Franchise to reflect such changed circumstances, or may proceed with early termination of this Franchise. The parties will negotiate in good faith to revise the franchise to authorize the expanded scope of services.

19.9 Mutual Reservation of Rights. The Grantee and the City disagree on the legality of the requirements of Section 3.1 of this Franchise. Nothing in this Franchise shall be deemed a waiver by Grantee or the City of the rights of Grantee or the City under applicable law. The City reserves and in no way waives any right to enforce these requirements during the term of this Franchise and Grantee agrees to such reservation and non-waiver by the City. Grantee reserves

and in no way waives any right to challenge the enforcement of these requirements and the City agrees to such reservation and non-waiver by Grantee.

Section 20. WRITTEN ACCEPTANCE. On or before the thirtieth day after this ordinance becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by the Grantee, meeting the approval of the City Attorney. A failure on the part of Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this ordinance shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

Section 21. OTHER AUTHORITY SUPERSEDED. Upon effectiveness of this Franchise, any and all authority to operate previously granted to Grantee by the City, including the temporary revocable permit issued to the Grantee by Ordinance No.171689 adopted by the City Council on October 15, 1997 shall be superseded by this Franchise.

Passed by the Council: Dec 31, 1997  
Commissioner Sten  
Henry/Walters  
October 15, 1997

Barbara Clark  
Auditor of the City of Portland  
By Britta Olson  
Deputy

CASE: UX 29  
WITNESS: Steve W. Chriss

**PUBLIC UTILITY COMMISSION  
OF  
OREGON**

**STAFF EXHIBIT 117**

**Exhibit in Support of Direct Testimony**

**September 9, 2005**

ORDINANCE NO. 170283

Grant a franchise to Electric Lightwave, Inc., for a period of ten years.

The City of Portland ordains:

Section 1. NATURE AND TERM OF GRANT

1.1 Grant of Franchise.

(A) The City of Portland (City), does hereby grant to Electric Lightwave, Inc., a Washington corporation qualified to do business in Oregon, (Grantee), and to its successors and assigns, as approved by Section 15 of this Franchise, a franchise to construct, operate and maintain a telecommunications system, with all necessary facilities, in, under, and over the surface of the City's Streets.

(B) Throughout this Franchise, the City of Portland, Oregon, shall be referred to as the "City" and Electric Lightwave, Inc., shall be referred to as the "Grantee".

(C) This Franchise does not authorize the Grantee to operate a cable system or provide video programming, as defined by 47 U.S.C.A §522 (Supp.1996).

1.2 Duration of Franchise. The term of this Franchise, and all rights and obligations pertaining thereto, shall be ten years from the effective date of the Franchise unless terminated sooner as provided herein.

1.3 Effective Date. The effective date of this Franchise shall be 60 days after passage of the Franchise by the City Council unless Grantee fails to file an unconditional written acceptance of this Franchise, in accordance with Section 21 herein, in which event this Franchise shall be null and void. The passage date of this Franchise is set forth on the last page of the original hereof, as stamped by the Council Clerk.

1.4 Franchise Not Exclusive. This Franchise is not exclusive. The City expressly reserves the right to grant rights or Franchises to other Persons, within defined term, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee hereunder, by Franchise, permit or otherwise.

1.5 Charter and General Ordinances To Apply. To the extent authorized by law, this Franchise is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland, (1942 compilation, as revised in part by subsequent amendments), are hereby incorporated by reference and made a part of this Franchise, to the extent authorized by law. Nothing in this Franchise shall be deemed to waive



the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

## Section 2. DEFINITIONS

2.1 (A) Captions. Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

(B) Definitions. For the purpose of this Franchise, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

2.2 "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.

2.3 "City Council" means the Council of the City of Portland.

2.4 "Facility" means any tangible component of the Telecommunications System.

2.5 "Franchise" means this Franchise agreement, as fully executed by the City and the Grantee.

2.6 "Gross Revenues" shall mean gross revenues derived by Grantee for the provision of Telecommunications Services (i) originating or terminating in Portland, Oregon and (ii) charged to a circuit location in Portland, Oregon regardless of where the circuit is billed or paid.

2.7 "Minimum Annual Franchise Fee" shall mean \$4,000 in the first year of this Franchise, and shall increase by \$1,000 annually, until reaching a minimum of \$13,000 in year 10 of this Franchise.

2.8 "Penalties" means any and all monetary penalties provided for in this Franchise.

2.9 "Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.

2.10 "Streets" means the surface of, and the space above and below, any public street, road, alley or highway, within the City, used or intended to be used by the general public, to the extent the City has the right to allow the Grantee to use them.

2.11 "Telecommunications Services" means:

(A) Services interconnecting interexchange carriers, competitive carriers, and/or wholesale telecommunications providers for the purpose of voice, video, or data transmission;

(B) Services connecting interexchange carriers and/or competitive carriers to telephone

companies providing local exchange services for the purpose of voice, video, or data transmission;

(C) Services connecting interexchange carriers or competitive carriers to any entity, other than another interexchange carrier, competitive carrier, or telephone company providing local exchange services, for the purpose of voice, video, or data transmission;

(D) Services interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission; and

(E) This Franchise does not authorize the Grantee to operate as a telecommunications services provider. Prior to providing such services, Grantee shall apply for and obtain such authority as is necessary from the Oregon Public Utility Commission and/or Federal Communications Commission. Grantee shall provide the City with documentation of such authority, upon written request.

(F) Other telecommunications services as authorized by the Federal Communications Commission or the Oregon Public Utility Commission.

(G) Nothing herein shall preclude Electric Lightwave, Inc. from entering into a contract for the use of any portion of its Telecommunications System with any Person or other entity for any services, whether specified herein or not, provided that said Person or entity is another Franchisee, licensee, or permittee and has assumed responsibility for obtaining any required authority from the City.

2.12 "Telecommunications System" means all wires, cables, ducts, conduits, vaults, poles and other necessary Facilities owned or used by the Grantee for the purpose of providing Telecommunications Services and located in, under and above City Streets, excluding ducts, conduits and vaults leased from another City Franchisee, licensee or permittee.

2.13 "Year", "Annual", or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

### Section 3. COMPENSATION AND AUDITING

3.1 Amount of compensation. As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City, the Grantee shall pay as a Franchise fee to the City, through the duration of this Franchise, the greater of a Minimum Annual Franchise Fee or an amount equal to five percent (5%) of the Grantee's Gross Revenues.

3.2 City Use of Telecommunications Services and/or Telecommunications System. If the City requests Telecommunications Services from the Grantee, or installation or maintenance work under Section 9.2 herein, Grantee may deduct the charges for such services from Franchise fee payments. Grantee shall charge the City Grantee's most favorable rate offered at the time of the City's request charged to a similar user within Oregon for a similar volume of service, subject to any of Grantee's tariffs and regulations on file with the Oregon Public Utility Commission. Other terms and conditions of such services may be specified in a separate

agreement between the City and Grantee.

### 3.3 Franchise Fee Payments.

(A) Grantee's Minimum Annual Franchise Fee payable under Section 3.1 shall be paid to the City annually following the effective date of this Franchise. Each annual payment shall be made for the immediately preceding calendar year ending December 31. Each annual payment of the Grantee's Minimum Annual Franchise Fee shall be paid on or before the forty-fifth (45th) day following December 31st.

(B) The Gross Revenue based Franchise fee payable under Section 3.1 shall be computed and paid on or before the forty-fifth (45th) day following each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) during the term of this Franchise.

(C) Franchise Fee payments not received by the City on or before the due date shall be assessed interest at the rate of one percent (1%) over the existing prime rate as set by the bank with which the City contracts for its banking services, compounded daily. Interest shall be due on the entire late payment from the date on which the payment was due until the date on which the City receives the payment.

3.4 Reports. Each payment shall be accompanied by a written report to the City, verified by an officer or other authorized representative of Grantee, containing an accurate statement in summarized form, as well as in detail, of Grantee's Gross Revenues and the computation basis and method. Such reports shall be in a form satisfactory to the City.

3.5 Cost of Pre-franchising and Publication. Grantee shall reimburse the City for such reasonable pre-franchising costs as the City incurs in entering into this Franchise with the City up to \$5,000. Grantee shall also pay the cost of publication of this Franchise and any amendments thereto, as such publication is required by the City Charter. The City shall provide Grantee with an itemized invoice for any such expenses prior to reimbursement by Grantee.

3.6 Acceptance of Payment and Recomputation. No acceptance of any payment shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under Section 3 shall be subject to confirmation and recomputation by the City, provided that such audit and computation is completed within two (2) years of the date any audited and recomputed payment is due. If no such audit is conducted within the two (2) year period, then any claim that the City might have had for additional compensation shall be forever waived and relinquished. The Grantee agrees to reimburse the City for:

(A) The reasonable costs of such confirmation if the City's recomputation discloses that the Grantee has paid 95% or less of the Franchise fees owing for the period at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit; or

(B) One-half of the reasonable costs of such confirmation if the City's recomputation

discloses that the Grantee had paid more than 95% but less than 98% of the Franchise fees owing for the period at issue.

(C) The City's costs which may be reimbursed under this subsection shall not exceed \$5,000.00.

(D) If the City determines that Grantee made any underpayment, and that the underpayment exceeded 5% of the amount due, Grantee shall pay interest compounded at the rate of one percent (1%) over the existing prime rate as set by the bank with which the City contracts for its banking services. Interest shall be due on the entire underpayment from the date on which payment was due until the date on which full payment is received.

3.7 If the Grantee disputes the City's determination of underpayment, the Grantee shall place the disputed amount in an escrow account until final resolution.

3.8 All Grantee's books, maps, and records directly concerning its Gross Revenues under this Franchise and its calculation of Franchise fee payments to the City shall be open for inspection by the proper officers or agents of the City, upon no less than 48 hours prior written notice, during normal business hours to determine the amount of compensation due the City under this Franchise, and shall be kept so as to accurately show the same. All other reports required by the Charter and ordinances of the City shall be made by Grantee from time to time as required.

3.9 Payment of this Franchise fee shall not exempt Grantee from the payment of any other license fee, tax or charge on the business, occupation, property or income of Grantee that may be lawfully imposed by the City or any other taxing authority, except as may otherwise be provided in the ordinance or laws imposing such other license fee, tax or charge.

#### Section 4. GENERAL FINANCIAL AND INSURANCE PROVISIONS

##### 4.1 Insurance.

A. The Grantee shall maintain public liability and property damage insurance that protects the Grantee and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 5. The insurance shall provide coverage at all times of not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$50,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$500,000 covering all claims per occurrence, plus costs of defense. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of this Franchise. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this Franchise, Grantee shall provide a replacement policy with the same terms. Grantee agrees to maintain continuous uninterrupted coverage, in the terms and amounts required, for the duration of this Franchise.

B. The Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The adequacy of the insurance shall be subject to the reasonable approval of the City Attorney.

C. In the alternative to providing a certificate of insurance to the City, certifying liability insurance coverage as required in this Section, Grantee may provide the City with a statement regarding its self-insurance. Grantee's self-insurance shall provide at least the same amount and scope of coverage for the Grantee and the City, its officers, agents and employees, as otherwise required under this Section. The adequacy of such self-insurance shall be subject to the City Attorney's review and approval. Upon Grantee's election to provide self-insurance coverage under this subsection, any failure by the Grantee to maintain adequate self-insurance shall be cause for termination of this Franchise under Section 16.

#### 4.2 Faithful Performance Bond.

A. Upon the effective date of the Franchise, the Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of \$100,000, conditioned that the Grantee shall well and truly observe, fulfill, and perform each term and condition of the Franchise. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of the Franchise, including, if necessary, the time required for removal of all of Grantee's Telecommunications System installed in the City's Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without prior to 30 days written notice first being given to the City Auditor. The bond shall be reviewed and approved as to form by the City Attorney.

B. During the term of the Franchise, Grantee shall file with the City Auditor a duplicate copy

of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under Subsection 4.2 A. if a bona fide, good faith dispute exists between the City and the Grantee.

4.3 Construction Bond. During all times when Grantee is performing any construction work in or under the Streets requiring a street opening permit, Grantee shall post a faithful performance bond or irrevocable letter of credit, as is required for street opening permits, running to the City, with good and sufficient surety approved by the City, in the sum of \$100,000. The bond or letter of credit shall be conditioned that the Grantee shall well and truly observe, fulfill and perform each term and condition under Section 6. Grantee shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated upon final approval of Grantee's construction work in or under the Streets by the City Engineer which shall not be unreasonably withheld or delayed. Upon such approval, the City agrees to sign all documents necessary to release the bond in accordance with the terms of this Section. During the duration of the construction work, Grantee shall file with the City Auditor a copy of the bond or letter of credit, along with written evidence of the required premiums. The bond or letter of credit shall be subject to the reasonable approval of the City Attorney as to its adequacy under the requirements of this Section.

## Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS.

### 5.1 Indemnification.

(A) Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Telecommunications System in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide Grantee prompt notice of any such claim which Grantee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done without the prior written approval of Grantee. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

(B) Grantee also hereby agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its Facilities in the Streets in a timely manner in accordance with a relocation schedule furnished to Grantee by the City Engineer, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

## Section 6. CONSTRUCTION AND RELOCATION.

6.1 (A) Subject to applicable regulations of the City, Grantee may perform all necessary construction to construct, operate and maintain its Telecommunications System. All

construction and maintenance of any and all Telecommunications System Facilities within Streets incident to Grantee's provision of Telecommunications Services shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee. Grantee shall apply for and obtain all permits necessary for installation and/or construction of any such Facilities, and for excavation and laying of any Telecommunications System Facilities within City Streets. Grantee shall pay all applicable fees due for City construction permits.

(B) (1) Prior to beginning construction, Grantee shall provide the City with an initial construction schedule for work in the Streets and the estimated total cost of such work. When Grantee's construction in the Streets is completed, Grantee shall provide the City with a map showing the location of its installed Telecommunications System in the Streets, as built. Such "as-built" maps shall be in a form acceptable to the City Engineer.

(2) One year after the effective date of this Franchise, and annually thereafter, Grantee shall provide a map to the City's Office of Cable Communications and Franchise Management, or its successor, showing the location of Grantee's optical fibers in the Streets on a scale of 3500' (feet) per inch or whatever standard scale the City adopts for general use.

(C) Grantee may make excavations in City Streets for any Facility needed for the maintenance or extension of the Grantee's Telecommunications System subject to obtaining permits from the City. Prior to doing such work, Grantee must apply for, and obtain, appropriate permits from the City, and give appropriate notices to any further Franchisees, licensees or permittees of the City, or bureaus of the City, or other units of government owning or maintaining facilities which may be affected by the proposed excavation.

(D) In the event that emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. Grantee must comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.

6.2 (A) Locates. Grantee is responsible for becoming familiar with, and understanding, the provisions of Oregon Revised Statutes (ORS) 757.541 through 757.571 (1995) (the "One-Call statutes"). Grantee shall comply with the terms and conditions set forth in the One-Call statutes.

(B) The One-Call statutes apply to the location of underground facilities. As an example of how these provisions apply: Within forty-eight (48) business day hours after any City bureau or City Franchisee, licensee or permittee notifies Grantee of a proposed street excavation, the Grantee shall: 1. Mark all of its locatable underground cables, ducts, conduits, or other Facilities within the area of the proposed excavation; 2. Notify the excavator of any unlocatable underground Facilities in the area of the proposed excavation; or, 3. Notify the excavator that the Grantee does not have any underground Facilities in the vicinity of the proposed excavation.

6.3 Relocation. The City shall have the right to require Grantee to change the location of its Telecommunications System within the Streets when the public convenience requires such change, and the expense thereof shall be paid solely by Grantee. The City shall provide the Grantee with the standard notice given under the circumstances to other franchisees, licensees, or permittees. Should Grantee fail to remove or relocate any such facilities by the date established

by the City, the City may cause and/or effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all direct, indirect and/or consequential costs and expenses incurred by the City due to Grantee's delay. If the City requires Grantee to relocate its facilities located within the City's Streets, the City will make a reasonable effort to provide Grantee with an alternate location for its facilities within the City's Streets.

6.4 Grantee's system shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of the City, or with any other pipes, wires, conduits or other facilities that may have been laid in the Streets by or under the City's authority.

6.5 Upon Grantee's acquisition of any Telecommunications System Facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee retains any such Facilities in the Streets, the Grantee shall submit to the City a written statement describing all Facilities involved, whether authorized by Franchise or any other form of prior right, and specifying the location of all such Facilities. Such Facilities shall immediately be subject to the terms of this Franchise.

#### Section 7. RESTORATION OF STREETS.

7.1 Whenever Grantee disturbs the surface of any Street for any purpose, Grantee shall promptly restore the street to at least its prior condition, to the satisfaction of the City Engineer. When any opening is made by Grantee in a hard surface pavement in any Street, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer.

7.2 If Grantee excavates the surface of any Street, Grantee shall be responsible for restoration of the Street and its surface within the area affected by the excavation. The City may, after providing notice to Grantee, refill and/or repave any opening made by Grantee in the Street, and the expense thereof shall be paid by Grantee. The City reserves the right, after providing notice to Grantee, to remove and/or repair any work done by Grantee which, in the determination of the City Engineer, is inadequate. The cost thereof, including the cost of inspection and supervision, shall be paid by the Grantee. All excavations made by Grantee in the Streets shall be properly safeguarded for the prevention of accidents. All of Grantee's work under Section 7 shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

#### 7.3 Tree Trimming.

(A) Only upon obtaining a written permit from the City Forester, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with Grantee's Telecommunications System. Except in emergencies, Grantee may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For purposes of this Section, an emergency exists when it is necessary to prune to protect the public from imminent danger. The owner or occupant shall have seven days from receipt of Grantee's notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, Grantee may prune such tree at its own



expense.

(B) The City Forester may, at his or her own discretion, waive the notification and permit process in the case of single trees, if Grantee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by Grantee shall be subject to the approval of the City Forester. The City Forester shall have the discretion to cancel the permit if, at any time, the Grantee or its agents, fails to use proper arboricultural practices.

## Section 8. RESERVATION OF CITY STREET RIGHTS.

Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as to not obstruct, injure or prevent the unrestricted use and operation of the Telecommunications Systems of the Grantee under this Franchise. However, if any of the Grantee's Telecommunications System interferes with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, the Grantee's System shall be removed or replaced in the manner the City shall direct provided, however, the City will cooperate with the Grantee to identify alternate locations within the Streets. Any and all such removal or replacement shall be at the expense of the Grantee. Should Grantee fail to remove, adjust or relocate its Facilities by the date established by the City Engineer's written notice to Grantee, the City may cause and/or effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

## Section 9. CITY FIBER OPTIC PAIRS AND USE OF DUCTS BY CITY.

### 9.1 Fiber Optic Lines.

(A) Grantee shall give prior notice to the City in the event of any new construction or installation of fiber optic lines with the City. In any such construction or installations, Grantee shall install two pair (4) of optical fibers for the City, excluding single cable of twenty-four (24) fibers or less installed specifically in the Streets for services distribution to a single customer or building.

(B) Within six (6) months from the effective date of this Franchise, Grantee shall provide the City with a single pair (2) of optical fiber within Grantee's existing fiber optic loop in the City's downtown core. The location of Grantee's existing fiber optic loop is specifically described in the map provided by Grantee, attached to this Franchise as Exhibit A.

(C) The City shall use the optical fiber described in Subsections 9.1(A) and (B) above for municipal purposes only. The Grantee shall not deduct the cost of building or installing such optical fiber lines or cable from Franchise fees, or any other payments to the City, or otherwise charge the City for such lines or cable. The City shall have no rights of physical access to such lines for construction, interconnections or splicing without the Grantee's consent.

9.2 Fiber Optic Connections: Upon written request from the City, Grantee shall build and install connections to City fiber optic lines provided by Grantee under Section 9.1 above, for the City who shall use such connections only for municipal purposes. Grantee shall build and install such connections at a charge of its direct costs of materials and labor, plus ten percent (10%). The City shall be responsible for obtaining any necessary authority for Grantee to enter any premises necessary for building and installing the connections requested by the City.

9.3 (A) The City may install or affix and maintain wires and equipment for municipal purposes within any of Grantee's surplus conduit or ducts, as defined in Section 12, without charge to the City. All work to affix and/or maintain City wires and equipment shall be performed by Grantee and shall be performed at City expense at a charge of its direct costs of material and labor, plus 10 percent (10%). The City shall not have access to Grantee's surplus conduits or ducts without Grantee's prior approval, except in the event of an emergency requiring that the City obtain immediate access to those conduits or ducts. In such an emergency, the City shall exercise its best efforts to notify the Grantee as soon as possible of the emergency and the City's need for access.

(B) For the purposes of Section 9, the term "municipal purposes" includes but is not limited to the use of the structures and installations for City fire, police, traffic, water, telephone, and/or signal systems. The term "municipal purposes" does not include: (1) the sale or lease of telecommunications services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers; or (3) the transportation of water or wastewater.

(C) The value of the City's use of Grantee's surplus conduits or ducts may not be deducted from Grantee's Franchise fee, and/or other fees payable to the City. Grantee shall not be responsible for any damage resulting to the wires or property of the City occurring as a result of City's use of Grantee's surplus conduits or ducts.

#### Section 10. STREET VACATION.

If any Street or portion thereof used by Grantee is vacated by the City during the term of this Franchise, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated Street, Grantee shall, without expense to the City, forthwith remove its Telecommunications System Facilities from such Street, and restore, repair or reconstruct the Street where such removal has occurred, and place the Street in such condition as may be required by the Council which shall be no better than the condition of such Street immediately prior to removal. In the event of failure, neglect or refusal of Grantee, after thirty days' notice by City Council, to repair, improve or maintain such Street, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. The City will cooperate with Grantee to identify alternative locations within the Streets.

#### Section 11. MAINTENANCE OF FACILITIES.

Grantee shall provide and put in use all Telecommunications System Facilities necessary to

control and carry Grantee's Telecommunications Services so as to prevent injury to the City's property or property belonging to any Person within the City. Grantee, solely at its own expense, shall repair, renew, change and improve said Facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not construct its Telecommunications System in a manner that requires any customer, except the City, to install cables, ducts, conduits, or other facilities, in, under or over the City's Streets.

## Section 12. COMMON USERS.

### 12.1 For the purposes of Section 12:

(A) "Attachment" means any wire, optical fiber or other cable, and any related device, apparatus or auxiliary equipment, for the purpose of voice, video, or data transmission.

(B) "Conduit Facility" means any structure, or section thereof, containing one or more ducts, conduits, manholes, handhole or other such facilities in the Grantee's Telecommunications System.

(C) "Duct" means a single enclosed raceway for conductors, optical fiber, wire or other cable.

(D) "Licensee" means any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association franchised, licensed or otherwise permitted by the City to use the Streets. For the purpose of Section 12, the Grantee shall not be construed to be a "Licensee" as defined herein.

(E) "Surplus ducts or conduits" are Conduit Facilities other than those occupied by the Grantee or any prior Licensee, one unoccupied duct held by Grantee as an emergency use spare, and other unoccupied ducts that the Grantee reasonably expects to use within the next 18 months.

12.2 Grantee acknowledges that the Streets have a finite capacity for containing conduits. Therefore, Grantee agrees that whenever the City Engineer determines it is impracticable to permit construction of an underground conduit system by any other person which may at the time have authority from the City to construct or maintain conduits or ducts in the Streets, the City Engineer may require Grantee to afford to such person the right to use Grantee's surplus ducts or conduits in common with the Grantee, pursuant to the terms and conditions of an agreement for use of surplus conduits and ducts being entered into by the Grantee and the Licensee.

12.3 A Licensee occupying part of a Duct shall be deemed to occupy the entire Duct.

12.4 The Grantee shall give a Licensee and the City 120 written days notice of its need to occupy licensed conduit and shall propose that the Licensee take the first feasible action listed:

(A) Pay revised conduit rent designed to recover the cost of retrofitting the conduit with multiplexing, optical fibers, or other space-saving technology sufficient to meet the Grantee's space needs; or

(B) Pay revised conduit rent based on the cost of new conduit constructed to meet the Grantee's space needs; or

(C) Vacate ducts that are no longer surplus; or

(D) Construct and maintain sufficient new conduit to meet the Grantee's space needs.

12.5 When two or more Licensees occupy a section of Conduit Facility, the last Licensee to occupy the Conduit Facility shall be the first to vacate or construct new conduit. When conduit rent is revised because of retrofitting of space-saving technology or construction of new conduit, all Licensees shall bear the revised cost.

12.6 All attachments shall meet local, state, and federal clearance and other safety requirements, be properly grounded and anchored, and meet the provisions of contracts executed between the Grantee and the Licensee. The Grantee may, at its option, correct any attachment deficiencies and charge the Licensee for its costs. Each Licensee shall pay the Grantee for any fines, fees, damages, or other reasonable costs the Licensee's attachments cause the Grantee to incur.

### Section 13. DISCONTINUED USE OF FACILITIES.

Whenever Grantee intends to discontinue use of its Telecommunications System within all or part of a particular portion of the Streets and does not intend to use said facilities again in the future, Grantee shall submit to the City Engineer for the City Engineer's approval a completed application describing the facility and the date on which the Grantee intends to discontinue using the facility. Grantee may remove the facility or request that the City permit it to remain in place, which permission shall not be unreasonably withheld or delayed. If Grantee is permitted to abandon its Facilities in place, upon consent of the City, the ownership of Facilities in the City's Streets shall transfer to the City and Grantee shall have no further obligation therefor. Notwithstanding the Grantee's request that any such facility remain in place, the City Engineer may require the Grantee to remove the facility from the street area or modify the facility in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require the Grantee to perform a combination of modification and removal of the facility. Grantee shall complete such removal or modification in accordance with a schedule set by the City Engineer. Until such time as Grantee removes or modifies the Facility as directed by the City Engineer, or until the rights to and responsibility for the Facility are accepted by another Person having authority to construct and maintain such Facility, Grantee shall be responsible for all necessary repairs and relocations of the Facility, as well as restoration of the Street, in the same manner and degree as if the Facility were in active use, and Grantee shall retain all liability for such Facility.

### Section 14. HAZARDOUS SUBSTANCES

14.1 Grantee shall comply with all applicable state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to Grantee's Telecommunications System in the Streets. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(15) (1995).

14.2 (A) Grantee shall maintain and inspect its Telecommunications System located in the Streets. Upon reasonable notice to Grantee and in the presence of an authorized representative of Grantee, the City may inspect Grantee's facilities in the Streets to determine if any release of Hazardous Substances has occurred, or may occur, from or related to Grantee's Telecommunications System.

(B) In removing or modifying Grantee's facilities as provided in Section 13 of this Franchise, Grantee shall also remove all residue of Hazardous Substances in compliance with applicable environmental clean-up standards related thereto.

14.3 Grantee agrees to forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by Grantee's ownership or operation of a Telecommunications System in the Streets.

#### Section 15. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.

15.1 Neither this Franchise nor any of Grantee's Telecommunications System located in the Streets by authority of this Franchise shall be sold, leased, mortgaged, assigned or otherwise transferred without the prior written consent of the City as expressed by ordinance, except to entities that control, are controlled by, or are under common control with the Grantee. Grantee shall notify the City of any transfers to such entities within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained herein shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Telecommunications System without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this Franchise.

15.2 Grantee shall not lease any of its Telecommunications System facilities, or the public right-of-way in which such are contained, without the City's prior consent as expressed by ordinance. However, Grantee may lease its Telecommunications System, or any portion thereof, in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its Telecommunications System.

15.3 Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the Auditor an executed counterpart or certified copy thereof. No sale, lease, mortgage, assignment, transfer or merger may occur until the successor, assignee or lessee has complied with the requirements of Section 4 of this Franchise.

15.4 For the purpose of determining whether the City will consent to any assignment, transfer, merger, lease or mortgage, the City may inquire into the qualifications of the prospective party. The Grantee shall assist the City in any such inquiry. The City may condition any sale, assignment, transfer, merger, lease or mortgage upon such conditions as it deems appropriate.

## Section 16. FORFEITURE AND REMEDIES.

### 16.1 Forfeiture.

(A) In addition to any other rights set out elsewhere in this Franchise, the City reserves the right to declare a forfeiture of the Franchise, and all of Grantee's rights arising thereunder, in the event that:

1. The Grantee violates any material provision of the Franchise;
2. The Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City; or
3. There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Grantee's operation of its Telecommunications System within the City.

(B) For purposes of this Section, the following are material provisions of this Franchise, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Franchise:

1. The invalidation, failure to pay or any suspension of Grantee's payments of Franchise fees to the City for use of the Streets under this Franchise;
2. Any failure by the Grantee to submit timely reports regarding the calculation of its gross revenues based Franchise fees to the City;
3. Any failure by Grantee to maintain the liability insurance required under this Franchise;
4. Any failure by Grantee to maintain the performance bond required under this Franchise;
5. Any failure by Grantee to otherwise fully comply with the requirements of Section 3 through Section 15 of this Franchise.

16.2 Additional Remedies. In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:

- (A) Impose a financial penalty of up to \$1,000.00 per Franchise violation; or,
- (B) Suspend the Grantee's Franchise rights, until the Grantee corrects or otherwise remedies the violation.

16.3 In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems

appropriate.

16.4 Notice and Opportunity to Cure. The City shall give Grantee thirty (30) days prior written notice of its intent to exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if the Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if the Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, then the City Council may impose any or all of the remedies available under this Section. However, in no event shall the City exercise its rights under this Section if a bona fide, good faith dispute exists between the City and the Grantee.

#### Section 17. RENEGOTIATION.

In the event that any provision of this Franchise becomes invalid or unenforceable and the City Council or the Grantee expressly finds that such provision constituted a consideration material to entering into this Franchise, the City and the Grantee may mutually agree to renegotiate the terms of this Franchise. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party accepts the offer to renegotiate, the parties shall have 90 days to conduct and complete the renegotiation.

#### Section 18. EXPIRATION.

Upon the expiration of this Franchise, on application made by the Grantee for Franchise renewal or additional authority to exercise the privileges, or any of them, hereby granted, the Grantee shall have the first and preferential right to take and receive such authority upon terms and conditions approved by the City. If the Grantee does not promptly apply for such renewal or additional authority, or if the Grantee rejects the terms and conditions of such authority offered by the City, the City may, within one year from the expiration of the prior Franchise, grant a permit or Franchise to any other corporation, association, firm, individual or individuals. In the event of such a grant, such other corporation, association, firm, individual or individuals taking such new or additional authority, shall in addition to any compensation to be paid to the City for such new or additional authority, pay to the Grantee, at or before the time such new or additional authority takes effect, and before the Grantee shall be deprived of the right to possess, maintain and operate its Telecommunications System located within the Streets, the fair and equitable valuation of Grantee's Telecommunications System located within the Streets. If the third party and Grantee cannot agree on the fair and equitable value of said Telecommunications System, the dispute shall be submitted for a declaratory determination by the courts of the State of Oregon. Until such time as the City exercises its rights as set forth in this Section, the Grantee's rights and responsibilities within the City shall continue to be controlled by the terms and conditions of this Franchise.

#### Section 19. PUBLIC RECORDS

19.1 (A) Grantee acknowledges that information submitted to the City is open to public inspection under the Oregon Public Records Law, ORS 192.410 through 192.505 (1993). Grantee is responsible for becoming familiar and understanding the provisions of the Oregon Public Records Law.

(B) Grantee may identify information, such as trade secrets, financial records, customer information or technical information, submitted to the City as confidential. Grantee shall prominently mark any information for which it claims confidentiality with the word "Confidential" on each page of such information, prior to submitting such information to the City. The City shall treat any information so marked as confidential until the City receives any request for disclosure of such information. Within five (5) working days of receiving any such request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) working days within which to provide a written response to the City, before the City will disclose any of the requested confidential information. The City shall retain the final discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

## Section 20. MISCELLANEOUS PROVISIONS

### 20.1 Compliance With Laws.

(A) Both Grantee and the City shall comply with all applicable federal and state laws.

(B) Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

20.2 Severability. If any Section, provision or clause of this Franchise is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Franchise shall not be affected, unless City Council determines such Section, provision, or clause was material to the City's agreement to issue a Franchise to the Grantee.

20.3 Regulation and Nonenforcement by the City. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Franchise in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise by reason of any failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Franchise by reason of such failure or neglect.

### 20.4 Force Majeure.

(A) For purposes of this subsection, the term "Force Majeure" shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts or terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within the control of the parties hereto.

(B) If the Grantee is wholly or partially unable to carry out its obligations under this Franchise as a result of Force Majeure, the Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Franchise, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as



possible, under the circumstances, Grantee's inability, by reason of Force Majeure, to carry out its responsibility and duties under this Franchise.

20.5 Choice of Forum. Any litigation between the City and the Grantee arising under or regarding this Franchise shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon.

20.6 Notice. Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee or deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, (2) sent by overnight or commercial air courier (such as Federal Express), or (3) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to the City: Office of Cable Communications and Franchise Management  
City of Portland, Oregon  
1211 SW 5th Avenue, Room 1160  
Portland, Oregon 97204  
FAX# (503) 823-5370

With a copy to: City Attorney's Office, Room 315, City Hall  
1220 SW 5th Avenue  
Portland, Oregon 97204  
FAX (503) 823-3089

If to the Grantee: Legal Department, Electric Lightwave, Inc.  
8100 NE Parkway Drive  
Vancouver, WA 98662  
Fax (360) 253-4425

with a copy to: David Sharkey, Electric Lightwave, Inc.  
8100 NE Parkway Drive  
Vancouver, WA 98662  
Fax (360) 253-4425

Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

#### Section 21. WRITTEN ACCEPTANCE.

On or before the thirtieth day after this ordinance becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by the Grantee, meeting the approval of the City Attorney. A failure on the part of Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this ordinance shall thereupon be null and void. Such

acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

Section 22. OTHER AUTHORITY SUPERSEDED.

Upon effectiveness of this Franchise, any and all authority to operate previously granted to Grantee by the City shall be superseded by this Franchise.

Passed by Council: Jun 19, 1996  
Commissioner Blumenauer  
Henry/Walters  
December 30, 2004  
c:elifran

CASE: UX 29  
WITNESS: David L. Sloan

**PUBLIC UTILITY COMMISSION  
OF  
OREGON**

**STAFF EXHIBIT 200**

**Direct Testimony**

**September 9, 2005**

1 **Q. PLEASE STATE YOUR NAME, OCCUPATION, AND BUSINESS**  
2 **ADDRESS.**

3 A. My name is David L. Sloan. I am employed by the Public Utility Commission of  
4 Oregon (PUC or Commission) as a senior telecommunications analyst in the  
5 Telecommunications Division of the Utility Program. My business address is  
6 550 Capitol Street NE, Suite 215, Salem, Oregon 97301-2148.

7 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND WORK**  
8 **EXPERIENCE.**

9 A. My Witness Qualification Statement is found in Exhibit Staff/201.

10 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

11 A. I describe the telecommunications services listed in the company's Petition to  
12 Exempt from Regulation Qwest's Switched Business Services ("Petition"), as  
13 well as the pricing flexibility allowed Qwest Corporation (Qwest) pursuant to  
14 current statute and rules.

15 **Q. HAVE YOU PREPARED EXHIBITS FOR THIS DOCKET?**

16 A. Yes. I prepared Exhibits Staff/200, consisting of 15 pages, Direct Testimony of  
17 David L. Sloan, and Staff/201, consisting of 3 pages, Witness Qualification  
18 Statement.

19 **Q. HOW IS YOUR TESTIMONY ORGANIZED?**

20 A. My testimony is organized as follows:

21	Services at issue in Qwest's Petition .....	2
22	Current regulation of Qwest's switched business services.....	7

1

**SERVICES AT ISSUE IN QWEST'S PETITION**

2

**Q. WHAT SERVICES ARE INCLUDED IN QWEST'S PETITION FOR EXEMPTION FROM REGULATION?**

3

4

A. Qwest proposes to exempt from regulation the switched business services listed in its Exchange and Network Services tariff, PUC Oregon No. 29 (Tariff 29), its Advanced Communications Services tariff, PUC Oregon No. 27 (Tariff 27), and its Exchange and Network Services Price List – Oregon (Price List). These services include basic and non-basic telephone services and number over 4000. The Commission has interpreted the term "service" (also referred to as "service element") to mean any item separately listed in the company's tariff that has its own unique price. ORS 759.400(1) defines "basic telephone service" as a local exchange telecommunications service defined as basic by rule of the Public Utility Commission. Commission Rule OAR 860-032-0190, *Definition of Basic Telephone Service*, defines the term "basic telephone service". In its petition, Qwest divides the 4000+ switched business services into three categories:

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Category 1: Services that provide access to the network. This category includes both basic telephone services and non-basic telephone services and includes service offering related feature packages. Basic services in this category include:

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- Flat Rate Local Exchange Service

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- Measured Rate Local Exchange Service

23

- Flat Rate Private Branch Exchange (PBX) Service

- 1                   ▪ Measured Rate PBX Service

2                   Non-basic services in this category include:

- 3                   ▪ Centrex services
- 4                   ▪ Private line services
- 5                   ▪ Extended Area Service (EAS)

6                   Category 2: Discretionary business features. This category includes such  
7 services as Caller Identification, Call Forwarding, Call Waiting, and Speed  
8 Dialing.<sup>1</sup> All services in this group are non-basic telephone services pursuant  
9 to Oregon Administrative Rule 860-032-0190 and ORS 759.410 et al.

10                  Category 3: Packet-switched services. This category includes Frame  
11 Relay and Asynchronous Transfer Mode (ATM), which are packet-switched  
12 services included in Qwest's Advanced Communications Services tariff. These  
13 services are non-basic telephone services pursuant to Oregon Administrative  
14 Rule 860-032-0190.

15                  The Tables of Contents to Tariff 27, Tariff 29 and Price List group the  
16 4000+ individual services that are at issue in Qwest's petition into 68 service  
17 groups. With only a few exceptions, the service groups in the Tables of  
18 Content are the same as what is referred to as service offerings. The 68 Table  
19 of Content service groups represent 76 separate service offerings. One  
20 example of a difference is the Table of Contents heading "Packages  
21 Associated with Basic Exchange Service." This Table of Contents service

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<sup>1</sup> Qwest offers over 50 business features. Caller Identification, Call Forwarding, Call Waiting, and Speed Dialing are examples.

1 group includes four service offerings, Business CUSTOMCHOICE, QWEST  
2 CHOICE Business, QWEST CHOICE Two-line Business, and the obsolete  
3 Business CUSTOMCHOICE.

4 For clarification of the difference between a Table of Contents service  
5 group, a service offering and an individual service, I will discuss one service  
6 offering listed in the Table of Contents for Qwest's tariff P.U.C. Oregon No. 27,  
7 "Business Measured Rate Service."

8 Business Measured Rate Service is broken into 4 service groups in Exhibit  
9 B to the Petition: Measured Lines, 6 Hour Usage Package, 9 Hour Usage  
10 Package, and 12 Hour Package. However, Business Measured Rate Service  
11 actually consists of 9 individual price capped service elements: a non recurring  
12 charge, a recurring monthly charge for each of three rate groups, a recurring  
13 monthly charge for each of three usage packages (6, 9, and 12 hour  
14 packages), a per minute charge for intraexchange calls in excess of the  
15 package allowance, and a per minute charge for interexchange calls in excess  
16 of the package allowance.

17 **Q. HOW WERE QWEST'S BUSINESS SERVICES GROUPED TO ANALYZE**  
18 **WHETHER COMPETITION EXISTS?**

19 A. At prehearing conferences, the parties decided to issue the CLEC Survey  
20 discussed in the testimony of staff witness Steve Chriss. See Staff Exhibit  
21 Staff/100. The parties agreed that for purposes of the Survey it would be most  
22 efficient and least confusing to group Qwest's business services into ten (10)  
23 "integrated service offerings":

1           Basic Telephone Services:

- 2           • Basic Business Service - Analog (flat or measured)
- 3           • Basic Business Service - Digital (flat or measured)
- 4           • PBX Trunks - Analog
- 5           • PBX Trunks - Digital

6           Non-Basic telephone Services:

- 7           • 800 Service/Outwats
- 8           • Analog Centrex Services
- 9           • Integrated Services Digital Network – Basic Rate Interface (ISDN - BRI)
- 10          • Integrated Services Digital Network – Primary Rate Interface (ISDN - PRI)
- 11          • Frame Relay
- 12          • Asynchronous Transfer Mode (ATM) Service

13           It is appropriate to analyze Qwest's Petition at this highly integrated level of  
14           service offering. For example, if the Commission determines that the  
15           integrated service offering PBX Trunks - Analog is competitive within a  
16           particular wire center, or related group of wire centers, it is reasonable to  
17           assume that each service offering or individual service under the PBX Trunks  
18           integrated service offering, as listed in the table of contents of Qwest's  
19           applicable tariffs and price list, is competitive within that territory.

20           Conversely, it would be inappropriate to examine Qwest's petition at the  
21           individual service element level. For example, it would probably not be  
22           reasonable to exempt from regulation the individual service element Business



1 Measured Rate Service with a 6 Hour Usage Package, but not exempt  
2 Business Measured Rate Service with a 9 or a 12 Hour Usage Package.

3 **Q. HAVE STUDIES BEEN CONDUCTED WITH QWEST CUSTOMERS IN**  
4 **OREGON TO DETERMINE IF THE VARIOUS SWITCHED BUSINESS**  
5 **SERVICES ARE SUBSTITUTABLE?**

6 A. No, not to my knowledge. The company's filing contains no mention of, or  
7 results from, any study conducted with its Oregon customers to determine if the  
8 various switched business services, for which it is requesting exemption from  
9 regulation, are substitutable. Also, I am not otherwise aware of any such  
10 study.

11 However, absent any reliable results from such a study, I would, from a  
12 simple logic viewpoint, take exception with Mr. Brigham's contention, in his  
13 direct testimony, that the business services are substitutable and that,  
14 therefore, it would not be appropriate to consider different service groups as  
15 distinct markets. See Qwest/1, Brigham/16 and 17.

16 Mr. Brigham selects as his example business group "a medium-sized  
17 business with a **need for several access lines**" (emphasis added). Logically,  
18 for this unique business group which Mr. Brigham has selected, the services of  
19 analog PBX trunks, digital PBX trunks, Centrex Lines, ISDN PRI lines, or basic  
20 business lines, may be substitutable, although we have no study results from  
21 which to draw such a conclusion. However, logically, for the small business  
22 customer, such as the local muffler shop or the local barber shop, the services  
23 of analog PBX trunks, digital PBX trunks, Centrex Lines, ISDN PRI lines would

1 probably not be substitutes for the business's basic business line, although we  
2 have no study results from which to draw such a conclusion. A customer who  
3 wishes to change from basic business service to PBX service must invest in  
4 new customer provided equipment (CPE).

5 The company's contention - that the business services for which it requests  
6 exemption from regulation are substitutable for each other - should be  
7 supported by results from a survey of its Oregon customers. What is important  
8 is whether Qwest's business customers consider the services to be  
9 substitutable. Absent results from such a survey to the contrary, it seems  
10 logical to conclude that, in fact, it would be appropriate for the Commission to  
11 treat the various business service groups as distinct markets. For example, it  
12 would be appropriate for the Commission to grant the company's petition for  
13 deregulation of ATM and Cell Relay services, typically used by large business  
14 customers, and to not grant its petition for deregulation of other business  
15 services. Another reasonable example might be for the Commission to allow  
16 the company's petition for ATM and Cell Relay, typically used by large  
17 business customers, and for the business services of analog PBX trunks,  
18 digital PBX trunks, Centrex Lines, ISDN PRI lines, typically used by medium  
19 sized customers, and to not grant its petition for deregulation of its basic  
20 business services, which most small business customers use.

21  
22 **CURRENT REGULATION OF QWEST'S SWITCHED BUSINESS SERVICES**

1 **Q. UNDER CURRENT REGULATION, WHAT FLEXIBILITY IS QWEST**  
2 **ALLOWED IN THE PRICING OF ITS SWITCHED BUSINESS SERVICES?**

3 A. For non-basic telephone services, Qwest has pricing flexibility under Senate  
4 Bill (SB 622), which authorized “price cap regulation.” For basic telephone  
5 services, Qwest has pricing flexibility under competitive zone regulation. Qwest  
6 also has pricing flexibility for both basic and non-basic telephone services  
7 under statutes relating to special contracts.

8 **Q. PLEASE EXPLAIN QWEST’S PRICING FLEXIBILITY UNDER PRICE CAP**  
9 **REGULATION.**

10 A. The 1999 Oregon State Legislature passed Senate Bill 622 (SB 622), now  
11 codified as ORS 759.400, *et seq.*, which introduced a permanent price cap  
12 regulation option to replace rate of return regulation for telecommunications  
13 utilities that elect the option. Qwest elected the price cap regulation option on  
14 November 30, 1999, to be effective December 30, 1999.

15 Under SB 622, the Commission defines and sets rates for basic telephone  
16 services for utilities such as Qwest that have elected price cap regulation and  
17 sets maximum prices (price caps) and minimum prices (price floors) for non-  
18 basic telephone services.

19 Pursuant to ORS 759.410(4) the price floor must be equal to “the sum of  
20 the total sum of the total service long run incremental cost of providing the  
21 service for the nonessential functions of the service and the price that is  
22 charged to the other telecommunications carriers for the essential functions.”

23 The Commission set the prices for Qwest’s basic telephone service elements

1 and established initial price caps and floors for Qwest's non-basic telephone  
2 service elements in Order No. 01-810 (Docket No. UT 125.)

3 Pursuant to ORS 759.400, *et seq.*, Qwest currently has pricing flexibility for  
4 its non-basic telephone services between the price cap and the price floor for  
5 the service. Price changes are not subject to the hearing, suspension and  
6 notice requirements of ORS 750.180 through ORS 759.190. Contrarily, Qwest  
7 need only notify the Commission of any price change within 30 days after the  
8 effective date of the change.

9 **Q. PLEASE ELABORATE ON QWEST'S PRICING FLEXIBILITY PERMITTED**  
10 **BY COMPETITIVE ZONE SERVICE REGULATION.**

11 A. ORS 759.050(4) allows the Commission to designate all or part of a local  
12 telephone exchange as a competitive zone "upon application by a  
13 telecommunications utility and a showing of competition within its local  
14 exchange, whether or not from certificated providers." ORS 759.050(5)(b)  
15 requires that the price of a competitive zone service, or any essential function  
16 used in providing the competitive zone service, may not be higher than those  
17 prices in effect when the competitive zone was established, unless authorized  
18 by the Commission. Thus, while a telecommunications utility does not have  
19 upward pricing flexibility under competitive zone service regulation, it does  
20 have downward pricing flexibility. ORS 759.050(5)(b)states: "The price and  
21 terms of service offered by a telecommunications utility for a competitive zone  
22 service within a competitive zone may differ from that outside of the zone.  
23 However, the price for a competitive zone service within the zone may not be

1 lower than the total service long run incremental cost, for nonessential  
2 functions, of providing the service within the zone and the charges for essential  
3 functions used in providing the service..."

4 ORS 759.050 became law prior to the passage of the relevant portion of  
5 Senate Bill 622, which is codified as ORS 759.410. Thus, because ORS  
6 759.410 establishes a price cap and price floor regime for Qwest's non-basic  
7 services, ORS 759.050 applies only to Qwest's basic services. Under ORS  
8 759.050, Qwest currently has pricing flexibility for basic services within a  
9 competitive zone. Qwest may change the price for such services between the  
10 price of the service at the time the competitive zone was established and the  
11 price floor for the service. Such price changes may be effective upon notice to  
12 the Commission and are not subject to the hearing, suspension, and notice  
13 requirements of ORS 759.180 through 759.190. All 64 of Qwest's Oregon  
14 exchanges are currently classified as competitive zone exchanges.

15 **Q. PLEASE EXPLAIN QWEST'S PRICING FLEXIBILITY UNDER THE**  
16 **SPECIAL CONTRACT STATUTE.**

17 A. ORS 759.250, "*Contracts for special services; procedure for filing and approval;*  
18 *subsequent review and investigation,*" allows the company, under certain  
19 conditions, to enter into special contracts with customers for basic services.  
20 The company may enter into a special contract with a customer if the service  
21 is: (1) new with limited availability; (2) designed to respond to a unique  
22 customer requirement; or (3) subject to competition. ORS 759.250(2) allows

1 the company to file a special contract with the Commission no later than 90  
2 days following its effective date.

3 **Q. IF THE RETAIL SWITCHED BUSINESS SERVICES AT ISSUE IN THE**  
4 **PETITION WERE EXEMPTED FROM REGULATION, WHAT ADDITIONAL**  
5 **PRICING FLEXIBILITY WOULD QWEST GAIN?**

6 A. As noted above, Qwest is subject to different regulation depending on whether  
7 the service at issue is basic or non-basic. However, if Qwest's petition is  
8 granted, Qwest would be authorized to price the newly deregulated services  
9 above the price caps set by the Commission for both basic and non-basic  
10 telephone services without being subject to the hearing, suspension and notice  
11 requirements of ORS 759.180 through 759.190.

12 **Q. IS THIS THE ONLY FLEXIBILITY THAT QWEST WOULD GAIN?**

13 A. No. Qwest currently must offer each service at the same price to each  
14 customer within a "deaveraged rate group," except when the conditions for a  
15 special contract are met. Exemption from regulation would not only allow the  
16 company upward pricing flexibility for basic and non-basic services, but would  
17 allow the company to charge each customer a different price for the same  
18 service

19 **Q. PLEASE EXPLAIN WHAT YOU MEAN BY A "DEAVERAGED RATE**  
20 **GROUP"?**

21 A. In August 1996, the Federal Communications Commission (FCC) adopted a  
22 rule that requires each state commission to establish different prices for  
23 unbundled network elements (UNEs) "in at least three defined geographic

1 areas within the state to reflect geographic cost differences." In Order No. 00-  
2 481, in Docket UT 148/UM 963, the Commission divided Qwest's wire centers  
3 into three rate zones, or "Rate Groups."

4 In Order No. 01-810, in Docket UT 125, the Commission adopted  
5 deaveraged pricing for 17 of the 68 service groups listed in Qwest's current  
6 Petition. Qwest wire centers included in each of the three "Rate Groups"  
7 referred to in the company's tariff are the same as the wire centers included in  
8 each of the three "deaveraged loop zones" adopted in Order No. 00-481.

9 Prior to Order No. 01-810, Qwest was required to charge the same price  
10 for any service, to any customer within its service territory throughout the State  
11 of Oregon. Order No. 01-810 establishes three different prices for each of the  
12 17 service groups with deaveraged pricing, i.e. a different price in each of the  
13 three Rate Groups. If Qwest's requested exemption from regulation is allowed,  
14 without conditions, Qwest would be allowed to price an exempted service  
15 differently for each customer at any price the market would bear.

16 **Q. WHAT CONCLUSIONS MIGHT YOU DRAW FROM YOUR DISCUSSION**  
17 **OF DEAVERAGED PRICING?**

18 A. It may make sense to allow exemption from deregulation for a particular  
19 service offering in Rate Group 1 (low cost) wire centers while not allowing  
20 exemption from deregulation for the same service offering in Rate Group 2  
21 (medium cost), or Rate Group 3 (high cost) wire centers. I would note,  
22 however, that over 90 percent of Qwest lines are located in Rate Group 1 wire  
23 centers.

1           Also, if the Commission should grant exemption from regulation for any  
2 switched business services, it may make sense to adopt certain conditions  
3 under which some switched business services are exempted from regulation.  
4 Staff witness, Steve Chriss, will discuss specific conditions in his testimony.  
5 See Staff/100.

6 **Q. DO YOU HAVE ANY CONCLUDING REMARKS CONCERNING THE**  
7 **CURRENT REGULATION OF QWEST'S SWITCHED BUSINESS**  
8 **SERVICES OR THE FLEXIBILITY IT MIGHT EXPECT TO GAIN THROUGH**  
9 **DEREGULATION OF THOSE SERVICES?**

10 A. Yes. In Mr. Brigham's testimony, he says that granting the company's petition  
11 would allow Qwest "to react quickly to the market – as its many competitors  
12 can." He also says that this would also remove the requirements associated  
13 with the filing of special contracts which vary from standard pricing, "allowing  
14 Qwest to more quickly respond to a customer's unique needs." See Qwest/1,  
15 Brigham/13.

16           As outlined earlier in my testimony, pursuant to Price Cap Regulation  
17 statutes the company can react to competitive pressures in the market and  
18 reduce prices for non-basic services – and is only required to file notice of the  
19 change with the Commission within 30 days **after the effective date**. Also, the  
20 Competitive zone service regulation, outlined earlier in my testimony, allows the  
21 company to react to competitive pressures in the market and reduce prices for  
22 basic competitive zone services – and the change can become **effective upon**  
23 **filing** with the Commission. Additionally, the special contracts statute allows



1 the company to enter into a special contract for competitive services and file  
2 with the Commission within **90 days after the effective date** of the contract.

3 Additionally, in Mr. Brigham's testimony he states that if the petition were  
4 granted, "Qwest would be able to implement promotions and special offers – a  
5 key marketing tool in a competitive market – without regulatory filings." Mr.  
6 Brigham's statement is true, as long as it is read without any implication that  
7 this would allow Qwest to respond more quickly to a competitive market.  
8 Current statute, ORS 759.182, *Rate schedules for service promotions; rules*,  
9 allows that service promotion schedules **become effective upon filing with**  
10 **the Commission.**

11 I believe that Mr. Brigham's implication that current statutes and rules do  
12 not allow the company to respond to competition in the market is false. I  
13 believe that the company currently has downward pricing flexibility allowing it to  
14 respond to the market. I believe that what the company would gain from the  
15 Commission's granting of any portion of its petition is upward pricing flexibility  
16 (the ability to increase rates without review) and the ability to charge different  
17 customers, within today's rate group, different prices for the same service  
18 (without meeting the requirements of the special contract statute and rules).  
19 Under current statutes and rules, the company is limited to downward pricing  
20 flexibility (the ability to reduce prices to meet a competitive challenge) and must  
21 charge all customers within a Commission approved rate group the same rate  
22 for any service.

1 **Q. ARE YOU RECOMMENDING EITHER APPROVAL OR DENIAL OF**  
2 **QWEST'S PETITION FOR DEREGULATION OF ITS SWITCHED**  
3 **BUSINESS SERVICE?**

4 A. No. In my testimony, I am neither recommending approval nor denial of  
5 Qwest's petition. Staff witness Steve Chriss presents staff's recommendation  
6 in his testimony. See Staff/100.

7 **Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

8 A. Yes.

9

CASE: UX 29  
WITNESS: David L. Sloan

**PUBLIC UTILITY COMMISSION  
OF  
OREGON**

**STAFF EXHIBIT 201**

**Witness Qualifications**

**September 9, 2005**

1

**WITNESS QUALIFICATION STATEMENT**

2

3

I graduated from Kansas University in 1968 with a Bachelor of Science degree in Business Administration, with concentration in the areas of finance and accounting. I began my career in the telecommunications industry in 1968 as a corporate auditor for GTE's Midwest Region. I spent the next 13 years in the telecommunications industry, with GTE and with United Telephone Company of Ohio. During that period I worked in, or directed the activities of, every major function of telephony accounting. I have worked in the development of general rate filings with state utility commissions as special studies manager; maintenance of the accounting books and records as general accounting manager; direction of the internal audit function as director of internal audits; and finally had overall responsibility for the accounting function as company comptroller of General Telephone Company of Ohio in 1981.

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In 1982, I entered the electric industry, with Nevada Power Company in Las Vegas, Nevada. I spent 6 years with Nevada Power Company, serving most of that time as Vice President and Chief Financial Officer of the Corporation.

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In 1988 I entered the natural gas industry as Senior Vice President and Chief Financial Officer of Southwest Gas Corporation in Las Vegas, Nevada.

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As Chief Financial Officer, at both Nevada Power Company and Southwest Gas Corporation, I had primary responsibility for the direction and supervision

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1 of the utility accounting function, information systems, company budgeting, and  
2 the treasury function.

3 I joined the Oregon Public Utility Commission (OPUC) staff's Telecommu-  
4 nications Division in June 1997 as a financial analyst in the rates and technical  
5 analysis section. Since joining the OPUC my responsibilities have included the  
6 design of telecommunications utility rate structures in general rate filings and  
7 Extended Area Service filings. My responsibilities also include the review and  
8 analysis of telecommunications utility tariff filings for compliance with Oregon  
9 law and Commission policy - presenting the results of my review and my rec-  
10 ommendation for disposition of the filing to the Commission at public meetings.

11 I have presented financial testimony in telephone utility general rate pro-  
12 ceedings in Ohio and Pennsylvania and in electric utility general rate proceed-  
13 ings and electric utility financing applications in Nevada. I have also presented  
14 testimony in numerous purchased power deferred accounting proceedings in  
15 Nevada.

16 Since joining the OPUC, I have filed testimony in docket UM 909/UT 147,  
17 related to Staff's investigation into Centrex-related issues, in docket UT 125,  
18 Phase II, related to the rate design for Qwest's Centrex, vertical features and  
19 listing services, in docket UM 979, related to InterLATA extended area service  
20 between Newport and Lincoln City, in docket UT 155, related to Sprint's price  
21 listed services, in docket UT 916 et al., related to sprint's proposal to change its  
22 EAS rate matrix and the establishment of a Southern Oregon EAS Region, in  
23 docket UM 1076, related to InterLATA extended area service between the

1           Siletz and Lincoln City exchanges and in docket UM 1061, related to the  
2           boundaries for the proposed Southern Oregon EAS Region.

3

**UX 29**  
**Service List (Parties)**

<p>STEPHANIE S ANDRUS -- <b>CONFIDENTIAL</b> DEPARTMENT OF JUSTICE REGULATED UTILITY &amp; BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 stephanie.andrus@state.or.us</p>	<p>RICHARD CABE -- <b>CONFIDENTIAL</b>  richard@salidamillwork.com</p>
<p>DOUGLAS K DENNEY -- <b>CONFIDENTIAL</b> ESCHELON TELECOM OF OREGON INC 730 SECOND AVE S STE 900 MINNEAPOLIS MN 55402-2489 dkdenney@eschelon.com</p>	<p>GREGORY DIAMOND -- <b>CONFIDENTIAL</b> COVAD COMMUNICATIONS CO 7901 E LOWRY BLVD DENVER CO 80230 gdiamond@covad.com</p>
<p>ALEX M DUARTE -- <b>CONFIDENTIAL</b> QWEST CORPORATION 421 SW OAK ST STE 810 PORTLAND OR 97204 alex.duarte@qwest.com</p>	<p>DENNIS GABRIEL OREGON TELECOM INC PO BOX 4333 SALEM OR 97302-8333 dgabriel@oregontelecom.com</p>
<p>KAREN J JOHNSON -- <b>CONFIDENTIAL</b> INTEGRA TELECOM OF OREGON INC 1201 NE LLOYD BLVD STE 500 PORTLAND OR 97232 karen.johnson@integratelecom.com</p>	<p>REX KNOWLES XO COMMUNICATIONS SERVICES INC 11111 SUNSET HILLS RD RESTON VA 20190 rex.knowles@xo.com</p>
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## **CERTIFICATE OF SERVICE**

**UX 29**

I certify that I have this day served the foregoing document upon all parties of record in this proceeding by delivering a copy in person or by mailing a copy properly addressed with first class postage prepaid, or by electronic mail pursuant to OAR 860-13-0070, to all parties or attorneys of parties.

Dated at Salem, Oregon, this 9th day of September, 2005.

*/s/ Lois Meerdink*

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