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**Carla M. Butler**  
Sr. Paralegal

October 13, 2005

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

Re: UX-29

Dear Ms. Nichols Anglin:

Enclosed for filing in the above entitled matter please find an original and (5) copies of Qwest Corporation's Response to the Joint Motion to Strike or, in the Alternative, to Modify the Procedural Schedule, along with a certificate of service.

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

Sincerely,

A handwritten signature in black ink that reads "Carla". The signature is written in a cursive, flowing style.

Carla M. Butler

CMB:  
Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UX 29

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

QWEST'S RESPONSE TO THE JOINT MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO MODIFY THE PROCEDURAL SCHEDULE

Petitioner Qwest Corporation ("Qwest") hereby files its brief response to the joint motion to strike or, in the alternative, to modify procedural schedule. Qwest also responds that it objects to the movants' request for expedited consideration, as well as their October 12, 2005 request for oral argument on its motion at tomorrow's prehearing conference, which was requested in order to discuss logistics for the upcoming October 18-20, 2005 hearing, and not to address the motion.

**ARGUMENT**

**I. There is no basis for the movants' procedural arguments**

At the outset, Qwest will not focus primarily on the movants' procedural arguments, regarding Qwest's allegedly not properly serving the rebuttal testimony (Motion, pp. 2:1-4:20), other than to say the following: First, Qwest *timely served* its rebuttal testimony on Friday, October 7, 2005, including *electronic service*, and thus its service was *sufficient* under the procedural rules. Second, Qwest was *not required to hand-serve the testimony*, and no party asked for hand-service or made arrangements to pick up the material (despite that TRACER had previously made arrangements to pick up Qwest's direct testimony back in August). Thus, there was not a "four-day delay," as the movants argue in their October 12th letter. Third, the issue is *moot* in any event. This is so because, although the parties received the confidential portions of the testimony one day later than they had otherwise anticipated (through no fault of Qwest), Qwest has agreed to respond to data requests regarding *confidential information* within *four business days*, if the hearing commences on October 18th, as scheduled. As Qwest mentioned on October 12, 2005, Qwest has done so in order to avoid this argument becoming an issue or a reason to

delay the hearing. Indeed, based on the data requests that TRACER issued on Monday, October 10, 2005 (Exhibit A) and Wednesday, October 12, 2005 (Exhibit A), Qwest has already responded, or will respond by this afternoon, to the October 10th set (Exhibit A), and agrees to respond to the October 12th set (Exhibit B) by the close of business tomorrow if the Commission denies the motion, and thus the hearing commences on October 18, 2005, as scheduled.<sup>1</sup>

## **II. The rebuttal testimony does not prejudice the parties**

As mentioned, Qwest will focus primarily on what it believes is the substantive nature of the motion, which pertains to the matters the movants raise at page 4, line 21 through page 6, line 2 of the motion. However, there is simply no substantive merit to the motion. More specifically, the argument that Qwest's rebuttal testimony is "prejudicial" to the other parties in this docket, or that such testimony "consists of much more than merely a response to the [response] testimony submitted by Staff and the intervenors" (Motion, p. 4:21-23), cannot be taken seriously.

### **A. Rebuttal Testimony of Dr. William Fitzsimmons**

First, with respect to the movants' complaint about Qwest's introducing a new expert economist (Dr. William Fitzsimmons), there was nothing inappropriate about Qwest's doing so. Indeed, Qwest was required to do so. This is so because TRACER, through its economics expert witness, Dr. Richard Cabe, and Staff and Eschelon, through their economic witnesses, Steve Chriss and Douglas Denney, respectively, all raised a whole host of economic arguments (including the Hirschman- Herfindahl Index (HHI), market concentration ratios (CR4), cross-price elasticity studies, and other such issues) in response to what had been Qwest's straightforward

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<sup>1</sup> Qwest also notes that after TRACER issued data requests on Monday, October 10, 2005 seeking copies of every website url reference (request no. 13) and a total of 21 articles (request no. 14) (see Exhibit A), TRACER issued only six additional data requests yesterday (the second day it possessed the confidential information). However, more importantly, five of the six requests had *nothing to do with confidential information* in Qwest's testimony, and the remaining one (request no. 18) simply asked for electronic copies of two confidential exhibits/spreadsheets. (See Exhibit B.) As such, all of these data requests could have been asked on Monday, October 10th. In any event, Qwest has responded, or will respond, to the October 10th requests (Exhibit A) by this afternoon, and agrees to respond to the October 12th set (Exhibit B) by the close of business tomorrow if the Commission denies the motion and the hearing commences on October 18th, as scheduled.

deregulation petition and direct testimony about competition and substitutability in the switched business services market in Oregon. Qwest's company witness Robert Brigham is not an economist, and since Staff, TRACER and Eschelon used three economists, with about 150 pages of economic testimony, Qwest had no choice but to use an economist to rebut such testimony.

Further, the movants argue that Dr. Fitzsimmons introduces a new argument about relative expenditures that was not presented in direct testimony. (Motion, p. 5:2-5.) However, a review of that testimony shows that he is merely rebutting Mr. Denney's and Dr. Cabe's assertions that wireless service is a poor substitute for Qwest business services. (See Qwest/51, Fitzsimmons/30.)

Finally, regarding the articles and studies that Dr. Fitzsimmons cited, these are all authoritative articles that any economist is readily able to access. Moreover, there was no need to include them as voluminous exhibits simply to reference a single point that Dr. Fitzsimmons may have referred to. Further still, TRACER requested these articles in a data request, and Qwest will produce them later this afternoon, in less than three days.<sup>2</sup> Thus, there is simply no prejudice, and indeed, it would have been *Qwest* who would have been prejudiced had it not been given an opportunity to rebut these parties' economic testimony.

**B. Rebuttal Testimony of Robert Brigham**

The movants' arguments about Mr. Brigham's rebuttal testimony are likewise unwarranted. First, almost without exception, Mr. Brigham references the testimony of the other parties, by exhibit and page number. More importantly, there was no way for Qwest in its direct

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<sup>2</sup> The movants argue that Qwest has experience in deregulation dockets throughout its territory and the nature of this docket, and thus "Qwest was aware that economic testimony would be critical to Qwest's case and should have presented the vast majority of Dr. Fitzsimmons's testimony with its case on direct." (Motion, pp. 4:24-5:2.) This argument is bizarre. After all, consistent with its direct testimony, Qwest does not believe that economic expert testimony was needed in this case, and its direct case was straightforward, based on the evidence of competition and substitutability about Qwest's switched business services. It was Staff, TRACER and Eschelon who raised numerous theories regarding HHI, CR4, cross-price elasticity studies and the like, thus requiring Qwest to engage an expert witness economist like Dr. Fitzsimmons to rebut such testimony. There was absolutely no reason

testimony to anticipate or respond to many of the arguments that Staff and the intervenors ultimately made (precisely because Qwest did not raise those issues in its direct testimony, and would not have had to do so in rebuttal had Staff and the intervenors not raised such arguments in their testimony).

Further, the movants' arguments about Mr. Brigham's product market discussion (Motion, p. 5:10-15) are likewise unpersuasive. This testimony is in direct response to the parties' arguments that "each service" is a "separate market." This is clearly rebuttal testimony.

Finally, the "new market share" argument (Motion, pp. 5:20-6:2) is a red herring. As the pertinent testimony shows, the allegedly "new" data is a minor piece of the testimony that is provided in response to the testimony of the other parties, and it deals with little a more than *1,000 loops* (a small fraction of one percent, or a statistical triviality), and it does not change the market share calculations in any material way. (See e.g., Qwest/50, Brigham 53-54.)<sup>3</sup> More importantly, Qwest still relies on its original calculations. These calculations are also very simple, and Qwest has previously provided the data to conduct the calculations in prior data responses.<sup>4</sup>

### **III. The Commission or ALJ should not prejudice the testimony and other evidence**

Finally, the movants are essentially asking this Commission or the ALJ to prejudice the testimony and other evidence. That is entirely inappropriate. If a party believes any particular

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for Qwest to raise issues (those raised by the Staff and intervenor economists) that Qwest does not believe are relevant in the first place.

<sup>3</sup> For that matter, there is no basis for the movants' hearsay statements about Dr. Cabe's "expressed concern that he will not be able to examine these new calculations completely without being able to serve data requests upon Qwest." (Motion, p. 5:22-23, and generally, pp. 5:20-6:2.) Indeed, Dr. Cabe still has not served any such data requests, despite having the confidential data since October 11th. Of course, the assertions made in paragraphs 7 (and 4) of the Affidavit of Lisa R. Rackner are hearsay in any event, and thus should be stricken.

<sup>4</sup> All of this discussion, of course, recognizes there was but a *one-day delay* in obtaining the confidential information, through no fault of Qwest's, and that TRACER has yet to issue any data requests that were dependent on confidential data. As Qwest noted in footnote 1, the only data request involving confidential information that TRACER finally issued late yesterday afternoon simply asked for an electronic copy of two confidential exhibits/spreadsheets. Of course, Qwest was not required to provide with its testimony, and this was certainly a request that TRACER could have requested on Monday, October 10th. Nevertheless, Qwest will agree to provide this response on a CD disk by tomorrow afternoon, as well as the responses to the remaining requests of the October 12th set (Exhibit B) (less than

testimony is inappropriate, or is objectionable, it can make those arguments at the appropriate time, with specific offers of proof. The intervenors have failed to do so, however. Ultimately, any problems with any particular evidence will go to admissibility and the weight of the evidence. However, it is inappropriate for the Commission or ALJ to prejudge the testimony and other evidence based on the scattershot approach that the movants take.

**IV. It would be unfair to other parties and witnesses to modify the schedule now**

Finally, Qwest respectfully submits that it would be eminently unfair and prejudicial to other parties and witnesses, including Qwest and Staff, to modify the schedule at the eleventh hour. First, the October 18-20, 2005 hearing dates were agreed to by all parties months ago, and the hearing dates were even delayed to accommodate various counsel's personal schedules. (See e.g., Joint Motion, Exhibit A, p. 6 (9/16/05 email).)

Second, moving the hearing date would no doubt result in a significant delay, especially since there are so many parties, witnesses and counsel involved. Experience shows that when multi-day hearing dates are modified, invariably there are parties, witnesses or counsel who protest about specific proposed dates because of their own particular unavailability, especially when the proposed modification occurs close to the originally-scheduled dates. (See e.g., Joint Motion, Exhibit A, p. 4 (9/19/05 email).) The likely result would be that the hearing would not take place until after Thanksgiving, and possibly not until after the December holidays, in 2006. (*Id.*) Indeed, Qwest's witnesses and counsel have other commitments in the next couple of months, and Qwest understands that the Staff members involved in this case are heavily involved in the MidAmerica/PacifiCorp merger proceeding (docket UM 1209), which has five public comment hearings around the state this week and the week after October 20th, a settlement conference in early November, Staff testimony due in November and December, and a hearing the

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two days after receiving the requests, and four days prior to the hearing) if the hearing commences on October 18, 2005, as scheduled.

first week of January. (See OPUC website, E-Dockets Actions link, for docket UM 1209.) In short, it would be extremely unfair to both Qwest and Staff to modify the procedural schedule at the eleventh hour.

Finally, even the one-day postponement that TRACER's counsel had previously requested last week poses a problem. This is especially so because, at least as to Qwest's witnesses, they have made both travel and schedule plans based on the hearing starting on Tuesday, October 18th, and not on Wednesday, October 19th. Qwest assumes the same holds true for Staff and the intervenors. To change the hearing date at the last minute would mean that these witnesses' schedules would be adversely affected, and for no good reason.

**CONCLUSION**

Accordingly, there is no procedural or substantive merit to the motion to strike or, in the alternative, to modify the procedural schedule. Thus, Qwest respectfully submits that the Commission should deny the motion in its entirety, and thus that the evidentiary hearing should commence on October 18, 2005 as scheduled.

DATED: October 13, 2005

Respectfully submitted,

QWEST CORPORATION



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Attorney for Qwest Corporation

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October 10, 2005

RECEIVED

OCT 13 2005

VIA EMAIL AND HAND DELIVERY

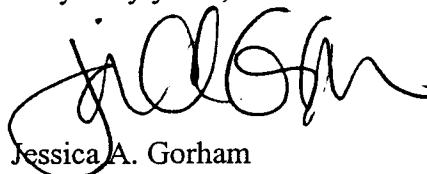
Alex M. Duarte  
Senior Attorney, Policy & Law Department  
Qwest Corporation  
Suite 810  
421 SW Oak Street  
Portland, OR 97204

Re: UX 29 – TRACER’s Fourth Set of Data Requests to Qwest

Dear Mr. Duarte:

Enclosed is TRACER’s Fourth Set of Data Requests to Qwest. Please contact me with any questions.

Very truly yours,



Jessica A. Gorham

Enclosure

cc: UX 29 Service List



1 **DATA REQUESTS**

2 **REQUEST TRACER 13:**

3 Please provide hard copies of all materials referenced by URL in the Rebuttal  
4 Testimonies of Robert H. Brigham and William Fitzsimmons.

5 **REQUEST TRACER 14:**

6 Please provide copies of the following articles referenced in the Rebuttal Testimonies of  
7 Robert H. Brigham and William Fitzsimmons:

8 *Wireless Substitution and Competition: Different Technology but Similar Service –*  
9 *Redefining the Role of Telecommunications Regulation*, Competitive Enterprise Institute  
10 Issue Analysis, December 2004;

11 *2004 SMB Bundled Communications Survey*, Yankee Group, September 2004;

12 “The Great Digital Broadband Migration,” Remarks of Michael K. Powell,  
13 Commissioner, Federal Communications Commission, Before the Progress & Freedom  
14 Foundation, (December 8, 2000);

15 In the Matter of the Petition of Qwest Corporation for Pricing Flexibility for Residence  
16 Services in the Areas Served by 44 Central Offices, Before the Public Service  
17 Commission of Utah, Docket #03-049-49 and #03-049-50, Transcript of Proceedings,  
18 October 28, 2003, Volume II;

19 Taylor, Lester, Telecommunications Demand in Theory and Practice;

20 Weinstock, David S., “Using the Herfindahl Index to Measure Concentration,” Antitrust  
21 Bulletin/Summer 1982;

22 Eschelon Telecom Inc. Prospectus, August 4, 2005;

23 “State of Local Competition 2004,” Association of Local Telecommunications Services,  
24 July 2004;

25 Carroll, Cathy, “High-Tech: Unicom,” *The Bulletin*, August 3, 2004; “UNICOM  
26 Acquires OneEighty Networks’ Central Oregon Operations,” Unicom press release, June  
1, 2005;

Eschelon Telecom Inc., Prospectus, August 4, 2005;

“State of Local Competition 2004,” Association of Local Telecommunications Services,  
July 2004;

“National Small Business Poll: Telecommunications,” National Federation of  
Independent Businesses, Volume 4, Issue 8;

Pocisak, Stephen B., “A Survey of Small Businesses’ Telecommunications Use and  
Spending,” U.S. Small Business Administration, March 2004;

1 "Ford Selects Sprint to Replace Desk Phones with Mobile Devices and Mobilize  
2 Workforce," Sprint Press Release, January 24, 2005

3 "Carrier VoIP Investments Pick up Momentum," Infonetics Research Press Release, July  
4 13, 2005; "Carrier VoIP gains momentum," Telephony Online, July 11, 2005;

5 "In-Stat MDR: Business VoIP Use Rapidly Gaining Ground," *CommWeb*, December 7,  
6 2004;

7 "Businesses Likely to Embrace IP Telephony in 2005 – But Are Needs Being Met?" In-  
8 Stat Press Release, February 14, 2005;

9 "Empirix Survey Finds that Two out of Three Enterprise Telecom Pros are Concerned  
10 about Putting a VoIP Phone on their CEO's Desk," Empirix Press Release, March 7,  
11 2005;

12 "Big Steps Ahead for WiMAX," *Wireless Week*, August 1, 2005;

13 "TowerStream and Vonage Form Alliance to Offer VoIP Over Fixed Wireless  
14 Broadband," Vonage Press Release, August 2, 2005;

15 "XO Opens New Chapter for Local Competition Nationwide, Creates Leading National  
16 Local Exchange Carrier fro Businesses; Progress on Achieving Synergies," XO Press  
17 Release, June 23, 2004.

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October 12, 2005

RECEIVED

OCT 13 2005

VIA EMAIL, FACSIMILE, AND US MAIL

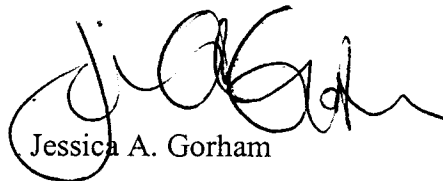
Alex M. Duarte  
Senior Attorney, Policy & Law Department  
Qwest Corporation  
Suite 810  
421 SW Oak Street  
Portland, OR 97204

Re: UX 29 – TRACER's Fifth Set of Data Requests to Qwest

Dear Mr. Duarte:

Enclosed is TRACER's Fifth Set of Data Requests to Qwest. Please contact me with any questions.

Very truly yours,



Jessica A. Gorham

Enclosure

cc: UX 29 Service List

1 **DATA REQUESTS**

2 **REQUEST TRACER 17:**

3 Please see Qwest/51, Fitzsimmons/38, lines 6-9. Is Dr. Fitzsimmons contending that  
4 Qwest is offering products or services at below cost prices? If yes, please provide all  
documents, studies, workpapers, etc., that support Dr. Fitzsimmons' contention.

5 **REQUEST TRACER 18:**

6 Please provide electronic copies of exhibits Qwest/42, Brigham/1-2 and Qwest/43,  
7 Brigham/1-3.

8 **REQUEST TRACER 19:**

9 For the purposes of this request, the term "circuit/facility" is comparable to a UNE loop,  
10 of whatever bandwidth, in service by a CLEC.

- 11 a) Please provide the total number of Qwest's circuits/facilities in service in Oregon  
used to provision loops for retail services.
- 12 b) Please break this number down according to bandwidth of the circuit/facility,  
13 whether the services provided are residential or business, and switched or  
unswitched services, including all cross-tabulations of these categories.
- 14 c) Please indicate the number of circuits/facilities used for ATM or Frame Relay  
15 services, and indicate whether such circuits/facilities are included among  
16 circuits/facilities used for switched or unswitched services.

17 **REQUEST TRACER 20:**

18 Please provide the number of DSL lines Qwest provides on a retail basis in Oregon where  
19 voice and data share a single loop, and break that number down into business and  
residential.

20 **REQUEST TRACER 21:**

21 Please indicate the number and bandwidth of UNE loops leased from Qwest by DLECS  
22 in Oregon.

23 **REQUEST TRACER 22:**

24 Please indicate the number of DSL arrangements in service in Oregon with Qwest  
25 providing retail voice service to an end user and a third party DLEC providing DSL on  
the same loop, breaking this number down into business and residential.

## CERTIFICATE OF SERVICE

**UX-29**

I hereby certify that on the 13<sup>th</sup> day of October, 2005, I served the foregoing **QWEST CORPORATION'S RESPONSE TO THE JOINT MOTION TO STRIKE OR, IN THE ALTERNATIVE, TO MODIFY THE PROCEDURAL SCHEDULE** in the above entitled docket on the following persons via U.S. Mail (or via e-mail if so indicated), by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 13<sup>th</sup> day of October, 2005.

**QWEST CORPORATION**



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