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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UX 29

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

STAFF RESPONSE TO QWEST'S REQUEST
FOR ACCESS LINE INFORMATION FOR
FACILITIES-BASED CLECS

A. Background.

In March 2005, the Commission issued to all competitive local exchange carriers ("CLECs") operating in Qwest service territory a Request for Production of Information (hereinafter referred to as "CLEC Request for Production") to assist the Commission and parties in their investigation of Qwest's Petition to Exempt from Regulation Qwest's Switched Business Services. The Request for Production ultimately issued by the Commission was a product of negotiation among the parties to UX 29.

More specifically, prior to the time the Commission issued the CLEC Request for Production, the UX 29 parties negotiated at length the questions that would be asked of the CLECs as well as what would be done with any information provided by CLECs in response to the CLEC Request for Production. With respect to the latter point, the parties agreed that because the information sought from the CLECs was sensitive and proprietary business information, any information provided by CLECs in response to the CLEC Request for Production would be aggregated by Commission staff to mask the source of the data. This aggregation would be carried out only to the extent necessary to mask CLEC-specific information. Staff produced the data consistent with this understanding. When the Commission issued the CLEC Request for Production, it prefaced the request with an order specifying the conditions under which disaggregated information the CLECs provided in response to the

1 request would be disclosed. Staff believed that it was the general understanding of the parties
2 that the only instance in which a party might request to see the disaggregated data would be to
3 test the integrity of the aggregation.¹

4 Staff has issued its aggregation of data obtained from the CLECs in response to the
5 CLEC Request for Production. Qwest now requests that the ALJ provide it with copies of
6 disaggregated data provided by nine CLECs regarding access line information for facilities-
7 based CLECs. Qwest explains that the information is necessary to show the extent to which
8 CLECs are competing using facilities-based services.² Qwest actions are wholly inconsistent
9 with the parties' discussion precipitating the CLEC Request for Production.

10 Qwest also asks that the ALJ issue a subpoena to one major facilities-based CLEC that
11 did not respond to the CLEC Request for Production. For the reasons discussed below, staff
12 requests that the ALJ deny both Qwest's requests.

13 **B. Request for access line information for facilities-based CLECs.**

14 **1. Disclosure of the information would be of little value to Qwest and would**
15 **harm the CLECs.**

16 Qwest reports that staff's aggregation of the data obtained from the CLEC Request for
17 Production is of limited usefulness because not all CLECs responded to the CLEC Request for
18 Production and because of the manner in which staff aggregated the data. (Qwest Request at 2.)
19 To protect the identity of CLECs that did provide data, staff redacted CLEC data for rate centers
20 and/or services that have less than four participating CLECs. Because of these complaints,
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23 ¹ Staff has contacted counsel for other parties that participated in these discussions who agree
24 with staff's understanding of the circumstances in which parties would request to see the data.

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25 ² Ten CLECs provided facilities-based access line information. Only nine of the ten CLECs
26 designated their information confidential or highly confidential. This response only concerns
information provided by the nine CLECs that designated their information as confidential or
highly confidential.

1 Qwest requests that the ALJ provide Qwest with disaggregated data regarding access line
2 information for facilities-based CLECs that were provided by nine CLECs.

3 Disclosure of the data is not warranted. First, as noted above, disclosure is inconsistent
4 with the parties' understanding of the manner in which data from the CLEC Request for
5 Production would be used. Staff believed the disaggregated data would only be seen by staff.
6 Staff would not have participated in the creation of the CLEC Request for Production had it
7 known that the data collected from the request would be disseminated to UX 29 parties in its
8 disaggregated form.³ Staff's understanding of the parties' agreement regarding the use of the
9 disaggregated data is borne out by the dozens of hours staff spent aggregating the data. It makes
10 no sense that staff would engage in this exercise if it were the parties' understanding that parties
11 would be entitled to use the disaggregated data in the presentation of their cases.

12 Second, disclosing the disaggregated data to Qwest will not address the complaints that
13 Qwest has made with respect to the aggregated data. Even if the Commission disclosed the
14 responses regarding facilities based services provided by the ten CLECS that responded with
15 such information, the information would be so incomplete as to be of limited value. The
16 responses of ten out of the several CLECs that responded to the survey even disaggregated, will
17 not be probative of the state of competition in Oregon without an understanding of the total
18 number of facilities-based providers and their locations.⁴

19 Staff recognizes that the fact that so few CLECs responded to questions regarding
20 facilities-based service is not the fault of Qwest. Notwithstanding, it is not fair to "reward" the
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23 ³ The exception to this is if a party had reason to believe staff had unfairly aggregated the data. In
24 such a case, it may be permissible for a party to have access to the disaggregated data to test the
25 integrity of the aggregation.

26 ⁴ Only nine of the ten CLECs at issue designated their responses as "confidential" or "highly
confidential." However, for the reasons argued in this motion, any data provided by a CLEC in
response to the CLEC Request for Production should not be subject to disclosure, whether the
data was marked confidential or not.

1 CLECs that did respond to the question by disclosing their information to Qwest when that
2 disclosure is of questionable value in this litigation.

3 Furthermore, under *Citizens' Utility Board v. OPUC*, 128 Or App 650, 658, 877 P2d 116
4 (1994), information that is a trade secret or confidential commercial information should not be
5 disclosed if disclosure will work a clearly defined and serious injury. The criteria for non-
6 disclosure is satisfied here. The information at issue could provide a competitive advantage to
7 Qwest. Qwest could use the information to its advantage in negotiating contracts with the
8 CLECs and also, in competing with the CLECs for retail customers. Given the limited value of
9 the information to Qwest in this proceeding, disclosure is certainly not warranted in light of the
10 potential harm to the CLECs and the Commission's ability to gather business data in the future.

11 **2. It is not clear that disclosure is permissible under the Commission Request**
12 **for Production of Information and Modified Protective Order.**

13 Qwest seeks disclosure of the access line information for facilities-based CLECs under
14 the ALJ's March 16, 2005 Ruling: Commission Request for Production of Information.
15 However, it is not clear that Qwest is entitled to disclosure of data provided by CLECs in
16 response to the CLEC Request for Production under the ALJ's Ruling. The ruling states that if a
17 CLEC designates a response to the CLEC Request for Production as confidential or highly
18 confidential, the information will not be released to the UX 29 parties unless a party requests
19 such information and has complied with the terms of the modified protective order. (Ruling at
20 3.) In other words, while the ALJ's March 16, 2005 Ruling outlines a specific procedure to be
21 used in the event a party requests to see data provided by a CLEC in response to the CLEC
22 Request for Production, the ruling makes clear that disclosure may only be had as outlined in the
23 modified protective order. However, the modified protective order does not provide for the
24 disclosure of confidential or highly confidential information to any person other than
25 Commissioners, Administrative Law Judges, Commission staff counsel, Commission advisory
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1 staff members, Commission employees when disclosure is necessary and consultants employed
2 by the Commission.

3 The Commission’s standard protective order, for example Order No. 04-366 issued in UX
4 29 and superseded by the modified protective order, provides that disclosure of information that
5 is marked as confidential shall be made only to qualified persons. The order defines a “qualified
6 person” as (a) the originator of the confidential information, (b) a Commissioner or Commission
7 staff; (c) counsel of record for a party; (d) a person employed directly by counsel of record; or (e)
8 a person qualified by complying with certain criteria. (Order No. 04-306). In contrast, the
9 modified protective order includes a very limited list of persons (only Commissioners, ALJ’s,
10 Commission staff, Commission employees and Commission consultants) that are entitled to see
11 confidential information and does not specify that persons other than Commission or
12 Commission employees or consultants may become eligible to see information under the
13 protective order as is the case under the Commission’s standard protective order. *See* Order No.
14 05-124 at Section 1.(c). In absence of unambiguous authority for Qwest’s request to see the
15 disaggregated access line information for facilities-based CLECs, staff asks that the ALJ deny
16 Qwest’s request.

17 **C. Request for subpoena.**

18 In addition to asking for copies of access line information for facilities-based CLECs that
19 is in the Commission’s possession, Qwest asks that the ALJ or staff issue a subpoena to a major
20 facilities based CLEC that did not respond to the survey.⁵ Because it would not be possible for
21 this CLEC to provide the information confidentially, Staff recommends that the ALJ deny this
22 request as well.

23 Staff has completed its aggregation of access-line information for facilities-based CLECs.
24 If staff were to add information obtained from one additional CLEC to this aggregation, the

25 ⁵ The provider is identified the confidential version of Qwest’s request. The provider will not be
26 identified in Staff’s response.

1 additional information would not be confidential. This is because Qwest and any party would be
2 able to “back-out” the new data from the previously-existing aggregation. It is not appropriate
3 for the ALJ to force one CLEC to provide sensitive commercial information for use in this
4 proceeding that has no chance of remaining confidential.

5 **CONCLUSION**

6 For the reasons stated above, staff asks that the ALJ deny Qwest’s request to see
7 disaggregated access line information for facilities-based CLECs and also, requests that the ALJ
8 deny Qwest’s request to issue a subpoena to a certain CLEC.

9
10 DATED this 12th day of August 2005.

11 Respectfully submitted,

12 HARDY MYERS
13 Attorney General

14 /s/Stephanie S. Andrus
15 Stephanie S. Andrus, #92512
16 Assistant Attorney General
17 Of Attorneys for Staff of the Public Utility
18 Commission of Oregon
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August 2005, I served the foregoing UX 29 Staff

Response upon the parties, hereto by the method/s indicated below:

RICHARD CABE

richard@salidamillwork.com

_____ HAND DELIVER
_____ U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)
 X ELECTRONIC MAIL (EMAIL)

DOUGLAS K DENNEY
ESCHELON TELECOM OF OREGON INC
730 SECOND AVE S STE 900
MINNEAPOLIS MN 55402-2489
dkdenney@eschelon.com

_____ HAND DELIVER
 X U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)
 X ELECTRONIC MAIL (EMAIL)

GREGORY DIAMOND
COVAD COMMUNICATIONS CO
7901 LOWRY BLVD
DENVER CO 80230
gdiamond@covad.com

_____ HAND DELIVER
 X U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)
 X ELECTRONIC MAIL (EMAIL)

ALEX M DUARTE
QWEST CORPORATION
421 SW OAK ST STE 810
PORTLAND OR 97204
alex.duarte@qwest.com

_____ HAND DELIVER
 X U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)
 X ELECTRONIC MAIL (EMAIL)

DENNIS GABRIEL
OREGON TELECOM INC
PO BOX 4333
SALEM OR 97302-8333
dgabriel@oregontelecom.com

_____ HAND DELIVER
 X U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)
 X ELECTRONIC MAIL (EMAIL)

KAREN J JOHNSON
INTEGRA TELECOM OF OREGON
1201 NE LLOYD BLVD STE 500
PORTLAND OR 97232
karen.johnson@integratelecom.com

_____ HAND DELIVER
 X U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)
 X ELECTRONIC MAIL (EMAIL)

REX KNOWLES
XO COMMUNICATIONS SERVICES
11111 SUNSET HILLS RD
RESTON VA 20190
rex.knowles@xo.com

_____ HAND DELIVER
 X U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)
 X ELECTRONIC MAIL (EMAIL)

LISA F RACKNER
ATER WYNNE LLP
222 SW COLUMBIA ST STE 1800
PORTLAND OR 97201-6618
lfr@aterwynne.com

_____ HAND DELIVER
 X U.S. MAIL
_____ OVERNIGHT MAIL
_____ TELECOPY (FAX)
 X ELECTRONIC MAIL (EMAIL)

LAWRENCE REICHMAN
PERKINS COIE LLP
1120 NW COUCH ST - 10 FL
PORTLAND OR 97209-4128
lreichman@perkinscoie.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

BRAD SCHAFFER
RIO COMMUNICATIONS INC
520 SE SPRUCE ST
ROSEBURG OR 97470-3134
brad@rio.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

BRIAN THOMAS
TIME WARNER TELECOM OF OREGON LLC
223 TAYLOR AVE N
SEATTLE WA 98109-5017
brian.thomas@twtelecom.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

MARK P TRINCHERO
DAVIS WRIGHT TREMAINE LLP
1300 SW FIFTH AVE STE 2300
PORTLAND OR 97201-5682
marktrinchero@dwt.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

SARAH WALLACE
ATER WYNNE LLP
222 SW COLUMBIA STE 1800
PORTLAND OR 97201-6618
sek@aterwynne.com

HAND DELIVER
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)
 ELECTRONIC MAIL (EMAIL)

Neoma A. Lane

Neoma A. Lane
Legal Secretary
Regulated Utility & Business Section
Department of Justice