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August 31, 2006

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's Motion for Reconsideration of Order No. 06-399, 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  
cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UX 29

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

QWEST'S MOTION FOR  
RECONSIDERATION OF ORDER NO.  
06-399

Pursuant to ORS 756.561 and OAR 860-014-0095, Qwest Corporation ("Qwest") hereby respectfully moves for reconsideration of a very narrow and limited issue in the Commission's recent Order No. 06-399 ("Order"), issued July 12, 2006. In that order, the Commission granted in part, and denied in part, Qwest's petition to deregulate basic business services, associated features and other business services in the state of Oregon. The Commission granted Qwest's petition for basic business services in the Portland and Clackamas rate centers *only*, and then only for those business customers with accounts having four or more business lines, but not three or fewer lines. For the reasons set forth below, Qwest brings this motion for reconsideration.

**INTRODUCTION AND SUMMARY**

In what may be described as a most unusual, and to Qwest's knowledge, unprecedented act, the Commission disregarded much of the evidence that the parties offered and that was admitted into the record, and instead took it upon itself to conduct its own investigation, after the record closed and without giving Qwest any opportunity to respond to that investigation, about certain facts that were not even at issue. That is, despite that, as the Commission admitted, no party offered evidence about "customer size segmentation" or "customer demographic" in the telecommunications business services market in Oregon, the Commission nevertheless decided to review several pages from Qwest's website regarding various Qwest product offerings to small business customers and large business customers for purposes of its decision-making. The

Commission did so by taking “official notice” of several “facts” from Qwest website pages, for the first time, in its *Order*, fully nine months after the record closed.

In fact, not only did no party ever offer such “customer demographic” or customer size evidence (despite Staff’s opposition to a large portion of Qwest’s petition, and the intervenors’ opposition to all of the petition), but Staff itself had *previously analyzed* similar information, in both discovery and the CLEC survey. Staff, however, evidently determined that such customer line information was *not* a basis for denial of Qwest’s petition, as it never offered any evidence in its testimony or made any such arguments in its post-hearing briefing. Indeed, Staff itself, while opposing deregulation of Qwest’s basic business services on a statewide basis, did recommend deregulation of all of Qwest’s basic business services in the Portland rate center.

Moreover, because the Commission did not take “official notice” of various “facts” from the Qwest website until its July 12th Order, it never gave Qwest an opportunity to rebut or meet such evidence. Further still, the “facts” of which the Commission took “official notice” are not even the types of facts that are subject to the rule for official notice. Finally, from a substantive standpoint, and compounding this most unusual and unprecedented approach, the Commission made several incorrect and unwarranted assumptions, and thereafter reached several incorrect and unwarranted conclusions, regarding the officially-noticed “facts.” These incorrect and unwarranted assumptions and conclusions therefore led the Commission to deny the deregulation that Staff had recommended in the Portland rate center, as well as in the Clackamas rate center, for those Qwest business customers having accounts with three or fewer business lines.

Specifically, and as a preliminary matter, the Commission committed procedural *errors of law* by improperly taking official notice of certain “facts” that are not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

These are also “facts” that were not in the evidentiary record when the record closed, and that no

party even offered or advocated. Second, the Commission committed another *procedural error of law* by not providing Qwest the opportunity to respond or rebut the facts noticed. Third, the Commission committed various errors of both *law and fact* by making certain incorrect and unwarranted assumptions, and reaching certain incorrect and unwarranted conclusions, based on its *sua sponte* review of Qwest's website regarding what it concluded were differences in the way Qwest defines and treats "small business" and "large business" customers. Those incorrect and unwarranted assumptions and conclusions constitute errors of law and of fact essential to the Commission's decision on this issue. At a minimum, there is *good cause* for reconsideration.

Accordingly, because the Commission made several procedural and substantive errors of law and fact, it should grant reconsideration of its Order. That is, the Commission should completely ignore and disregard the officially-noticed facts, and thus should decide this issue based *solely* on the record that existed at the close of the evidence in October 2005. Thus, on reconsideration, the Commission should *reverse* its denial of Qwest's petition as to those customers in the Portland and Clackamas rate centers whose accounts have three or fewer lines, and therefore, should deregulate *all* of Qwest's basic business services, in *both* of these two rate centers, without *regard to customer demographic, size or number of lines*.

### **BRIEF PERTINENT PROCEDURAL BACKGROUND AND EVIDENCE**

#### **A. Qwest's petition for deregulation, and subsequent investigation and proceeding**

Qwest has previously set forth the pertinent procedural history in its post-hearing brief. (See Qwest's Opening Post-hearing Brief, pp. 5-7.) No party disputed this procedural history.

For purposes of this motion for reconsideration, Qwest will simply note that it filed its petition for exemption from regulation on June 21, 2004. The parties then engaged in an extensive 16-month contested case proceeding, which included extensive discovery, a survey of competitive services of Competitive Local Exchange Carriers ("CLECs") in Oregon, and

extensive prefiled testimony and exhibits. The proceeding resulted in a two-day evidentiary hearing on October 18 and 20, 2005, with the cross-examination of seven witnesses (two from Qwest, two from Staff, and witnesses from a customer group (TRACER) and two CLECs (Eschelon and XO)), at which time Administrative Law Judge Allan Arlow *closed the record*. (See Transcript (October 20, 2005), pp. 390-391.)<sup>1</sup> The parties then filed post-hearing briefs from December 2005 to February 2006.

**B. Brief overview of the pertinent evidence offered and positions taken**

As mentioned, there was extensive discovery, prefiled testimony, exhibits and two days of cross-examination in an evidentiary hearing in October 2005. With respect to the narrow and limited issue which is the subject of this motion, the parties submitted extensive evidence regarding competition for switched business services in the state of Oregon, including in the Portland metropolitan area. However, at no time did any party ever offer any evidence regarding (1) “customer demographic” or size, (2) alleged “pricing flexibility” for “Large Business” customers vis-à-vis “Small Business” customers, or (3) a “cut-off” number of lines for purposes of deregulation. Indeed, the Order itself states: “*No evidence was offered* either by Qwest, Intervenors or Staff providing any data with respect to the market for telecommunications services in Oregon as *defined by customer size segmentation*, and we have no *Oregon-specific data regarding market share by customer size.*” Order, p. 7. (Emphasis added.)

Further, regarding the parties’ positions and advocacy about the business services at issue, Qwest advocated that *all* switched business services (including all of its basic business services) be deregulated statewide (*all rate centers* in Oregon). Staff, on the other hand, agreed with the deregulation of all of Qwest’s basic services in the *Portland rate center*, but not in any

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<sup>1</sup> Specifically, Administrative Law Judge Allan Arlow ruled that the record would remain open pending two data request responses by two non-party CLECs on completely unrelated matters, and that upon receipt of those responses, he would “close the record.” (Transcript (October 20, 2005), pp. 390-391.)

other rate center in the state (including the Clackamas rate center). TRACER and the Joint CLECs (represented by witnesses from Eschelon and XO) argued against any deregulation of Qwest's services, but for reasons very distinct from those that Staff made regarding 1FB services in non-Portland rate centers. Nevertheless, again, neither Staff nor the other parties (TRACER or the CLECs) advocated or offered any evidence about "customer demographic" or customer size, or about alleged "pricing flexibility" for "Large Business" customers vis-à-vis "Small Business" customers, or about a "number of line cut-off" for deregulation. Order, p. 7.

**C. Order No. 06-399**

On July 12, 2006, the Commission issued its order in response to Qwest's June 2004 petition to deregulate Qwest's switched business services under ORS 759.052 (formerly ORS 759.030). See Order No. 06-399. In the Order, the Commission granted in part, and denied in part, Qwest's petition. Specifically, the Commission granted Qwest's petition with respect to Qwest's 800 Service/OutWATS service, Frame Relay service and Asynchronous Transfer Mode (ATM) service in all rate centers in Oregon (i.e., statewide), pursuant to ORS 759.052(1). See Order, pp. 3, 20. The Commission also granted Qwest's petition with respect to its basic business service and associated features (both digital and analog, and for both flat-rated (1FB) and measured service), but only for customers with *four lines or more*, and only for such four-line and greater customers in the *Portland and Clackamas rate centers*. *Id.*, pp. 3, 19. The Commission denied Qwest's petition for all other services. *Id.*, pp. 3, 19, 20.

In its decision to deregulate Qwest's basic business service and associated features, but only for customers with four lines or more in the Portland and Clackamas rate centers, the Commission relied on its *sua sponte* review of several of Qwest's websites, and thus took "official notice" of what it deemed to be "the Qwest website with respect to the way Qwest defines 'small business' and 'large business' customers." Order, p. 7, and fns. 14 and 15. This

was not evidence that was in the record when the record closed at the end of the evidentiary hearing on October 20, 2005, however, nor had any party offered or advocated such facts.<sup>2</sup>

Further, the Commission then made certain assumptions and reached certain conclusions based on its review of the Qwest website, including its conclusion that with certain Qwest Voice Solution packages, the customer may purchase the “Add-a-Line” feature for up to two additional lines, and that the “Qwest Small Business web pages” provide specific pricing information, while the “Qwest Large Business web pages” do not. See Order, p. 7.

From this *sua sponte* website review, the Commission concluded, but without specifically explaining the particular facts relied upon, that “[a]ccording to the websites through which Qwest markets its business services, Qwest *appears* to currently offer pricing flexibility— i.e., no published, set price for basic business voice grade service— only to businesses that fall into their ‘Large Business’ category.” Order p. 16. (Emphasis added.) In addition, the Commission concluded, again without specifically explaining the particular facts relied upon, that “[s]mall businesses are limited in the feature packages and number of lines to specific offerings at specific prices.” *Id.* The Commission further concluded, on the same basis, that “[l]arge businesses are not restricted to service offerings of one, two or three voice grade service lines and prices are subject to negotiation.” *Id.* Finally, the Commission concluded: “We therefore find that, by Qwest’s own public representations, price competition is not present for voice grade line integrated service offerings for customers with three or fewer lines,” and thus that price and

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<sup>2</sup> As mentioned, the Commission admitted “[n]o evidence was offered either by Qwest, Intervenor or Staff providing any data with respect to the market for telecommunications services in Oregon as defined by customer size segmentation, and we have no Oregon-specific data regarding market share by customer size.” Order, p. 7. Accordingly, on July 27, 2006, Qwest filed formal objections to the Commission’s taking of “official notice” pursuant to OAR 860-014-0050(2), and noted, under a reservation of rights, that Qwest intended to file a motion for reconsideration regarding this decision.

basic business service competition exists in the Portland and Clackamas rate centers “for customers whose accounts include four or more lines.” *Id.*, pp. 16, 19.

## **ARGUMENT**

### **I. STANDARDS FOR MOTIONS FOR RECONSIDERATION**

As the Commission knows, a party may file a motion for reconsideration within 60 days of the service of a Commission order. See ORS 756.561; OAR 860-014-0095(1). Grounds for reconsideration include error of law or fact in the order which is essential to the decision (OAR 860-014-0095(3)(c)), or good cause for further examination of a matter essential to the decision (OAR 860-014-0095(3)(d)). For the reasons set forth below, Qwest respectfully submits that the Commission’s decision on the customer demographic or size or number of line issue in Order No. 06-399, of which no party had raised or offered evidence, has several *errors of law and/or fact* which are essential to the Commission’s decision. At a very minimum, there is *good cause* for reconsideration of a matter essential to the Commission’s decision.

### **II. THE COMMISSION SHOULD GRANT RECONSIDERATION**

Qwest respectfully submits that the Commission should grant reconsideration of its denial of Qwest’s petition in the Order. This is especially so because the Commission erred in improperly taking official notice of certain “facts” that were *not even in the evidentiary record* when the record closed, and which no party even offered or advocated. The Commission also erred by not providing Qwest the opportunity to respond or rebut the facts noticed. Finally, the Commission made several errors of law and fact by making certain incorrect assumptions, and reaching certain incorrect conclusions, based on its reading of Qwest’s website, about purported differences as to how Qwest defines and treats “small” and “large” business customers. At a minimum, there is *good cause* for reconsideration and reversal on this very narrow issue.



**A. The Commission committed a procedural error of law in taking official notice of certain facts**

Preliminarily, the Commission committed a procedural error of law in taking official notice of certain facts under the applicable rules of evidence. This error of law encompasses all of the facts the Commission found on this issue, including those it inferred. These facts include, for example, the Commission's inferences, without any citation to the evidence in the record: (1) about how Qwest purportedly defines "small business" and "large business" customers, (2) that Qwest has "no published, set price for basic business voice grade service" for large business customers, and (3) that prices for services for large business customers are "subject to negotiation." There is no evidentiary basis for those facts.<sup>3</sup>

As Qwest noted in its July 27, 2006 objections to the Commission's taking official notice in Order No. 06-399, OAR 860-014-0050 provides as follows:

- (1) The Commission or Administrative Law Judge (ALJ) may take official notice of the following matters:
- (a) All matters of which the courts of the State of Oregon take judicial notice;
  - (b) Rules, regulations, administrative rulings and reports of the Commission and other governmental agencies;
  - (c) Orders of the Commission;
  - (d) Permits, certificates, and licenses issued by the Commission;
  - (e) Documents and records in the files of the Commission which have been made a part of the file in the regular course of performing the Commission's duties;

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<sup>3</sup> For example, regarding the Commission's conclusion that Qwest purportedly defines "small" and "large" business customers based on "three or fewer lines" (for small business customers), the Commission cites nothing on the Qwest website pages (<http://pcat.qwest.com/pcat/productDetail.do?salesChannel=SmallBusiness&oferId=6683>, [http://www.qwest.com/pcat/large\\_business/product/1,1016,954\\_4\\_25,00.html](http://www.qwest.com/pcat/large_business/product/1,1016,954_4_25,00.html), and <http://www.qwest.com/pcat/smallbusiness/productsandservices/local/index.html>) (see Order, p. 7, fns. 14 and 15) that define small and large business customers in this manner. The Order's two sections entitled "defining market by customer demographic" (pp. 7, 16) appear to be the entire basis for the Commission making four lines or more the criteria for "large business" customers. However, the web pages cited by the Commission (see Order, p. 7, fn. 14) state that a business customer can purchase two additional lines with the Add-a-Line feature for either Qwest Choice Business or Qwest Choice Plus Business. This description comes from the website page that describes the Add-a-Line feature. However, the Commission apparently ignored the fact that a customer can have multiple packages, or can combine stand-alone 1FB lines with a three-line package, or various other combinations of service.

(f) General, technical or scientific facts within the specialized knowledge of the agency;

(g) The results of the Commission's or ALJ's own inspection of the physical conditions involved after notice to the parties.

(2) *The Commission or the ALJ shall notify the parties when official notice is taken.* The notice may be given on the record during the hearing or in findings of fact in a proposed or final order. A party may *object* to the fact noticed *within 15 days* of that notification. The objecting party *may* explain or rebut the noticed fact. (Emphasis added.)

Qwest respectfully submits that the “facts” of which the Commission took “official notice” are plainly not within OAR 860-014-0050(1)(b) through OAR 860-014-0050(1)(g). They are also not within OAR 860-014-0050(1)(a). The applicable rule for OAR 860-014-0050(1)(a) is Oregon Rule of Evidence (ORE) 201(b), which provides as follows:

#### **Kinds of facts**

A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

- (1) Generally known within the territorial jurisdiction of the trial court; or
- (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The “facts” of which the Commission took official notice of are *not* within ORE 201(b)(1) or ORE 201(b)(2). Although Qwest does not question the accuracy of its own website, the “facts” the Commission noticed are not capable of accurate and ready determination by resort to the website. From the Commission's Order, neither Qwest nor any other party can verify the facts the Commission noticed from a review of the cited website pages, and the Order does not specifically identify the particular source, or the specific text that provided the source for the Commission's conclusion. Indeed, the “facts” which the Commission found by inference simply do not appear in the cited website pages. *See, e.g., Banks v. Schweiker*, 654 F2d 637 (9th Cir. 1981) (“ALJ must adequately inform the claimant that he is, in fact, taking official notice and must indicate the facts noticed and their source with a degree of precision and specificity. . . . Without such information, a party cannot be expected to offer an objection”).

For example, the Commission’s inference or conclusion that Qwest limits the offerings available to “small” customers, or that service prices for “large business customers” are “subject to negotiation,” along with other noticed “facts,” are not “capable of accurate and ready determination by resort to” the cited website pages. Thus, the Commission committed a procedural error of law in noticing those facts. Accordingly, the Commission should *reconsider* its Order *without relying on any of these alleged facts*. See e.g., *Benson v. AFSD*, 69 Or.App. 185, 191, 684 P.2d 624 (1984) (reconsideration is the appropriate remedy where agency commits error of law by improperly taking official notice of facts outside the record).

Oregon case law is in accord with Qwest’s position, as case authority under the Oregon Administrative Procedures Act, ORS 183.450(4), makes clear. For example, it is clear in Oregon that although an agency may use its experience and expertise to evaluate and understand evidence, a hearing officer’s or agency’s “general awareness” is not a substitute for evidence. In addition to evidence offered in the record, the agency or hearing officer may only consider noticed facts that ORS 183.450(4) describes, which is limited to general, technical or scientific facts within the specialized knowledge of the agency. See *Amundson v. AFSD*, 63 Or.App. 313, 318, 663 P.2d 810 (1983) (the expertise of agency members and staff cannot serve to inject new, extra-record evidence into the decision-making process); *Rolfe v. Psychiatric Security Review Board*, 53 Or.App. 941, 951, 633 P.2d 846, *rev. den.* 292 Or. 334, 644 P.2d 1127 (1981) (the vice of receiving certain “facts” as evidence outside of the hearing is that it deprives a party an opportunity to challenge them, or to show they are not well-founded or are not relevant, and fundamental principle in contested cases is that factfinding is governed exclusively by the *record of the hearing*). Here, the Commission took administrative notice of what were not general, technical or scientific facts within its specialized knowledge. In so doing, the Commission made an erroneous interpretation of law. See ORS 756.561, OAR 860-014-0095.

On reconsideration, the Commission should completely *disregard* all of the “noticed” facts from the Qwest websites it cited regarding “customer demographic” or customer size, or any distinction regarding the number of customer business lines, and should decide this contested case based on the *evidence in the record as of the date that the record closed* (October 20, 2005). Further, since there was *no evidence in the record* regarding any arbitrary access line split based on “four lines or more” or “three or fewer lines,” and since both Staff and Qwest recommended deregulation of all of Qwest’s basic business services and their associated features in the Portland rate center, without regard to customer demographic, size or number of lines. Thus, the Commission should reconsider its order, and should therefore find that *all* of Qwest’s basic business services and associated features in the Portland rate center should be deregulated, without regard to customer demographic, size or number of lines. Likewise, for similar reasons, the Commission should reconsider its order and should find that *all* of Qwest’s basic business services and associated features in the *Clackamas* rate center should be deregulated, again without regard to customer demographic, size or number of lines.

**B. The Commission committed error of law by receiving additional evidence after the hearing through official notice, but not providing Qwest the opportunity to examine witnesses and rebut or meet such evidence**

In addition, even if the Commission were justified in taking official notice of the subject facts, or in relying on extra-record evidence that no party offered, the Commission further committed procedural error of law by receiving additional evidence *after* the hearing through official notice, without providing Qwest the opportunity to examine witnesses and rebut, meet or explain such evidence. There is an obvious reason why Commission contested case proceedings have prefiled testimony and evidentiary hearings, with cross-examination of witnesses: This allows parties to hear the other parties’ evidence and have an opportunity to rebut it accordingly. However, the fact that no party offered such evidence, and that the Commission did not present

such evidence until after the hearing when it issued the Order (in which it relied on it *sua sponte*) means that Qwest was unfairly deprived of the opportunity to rebut or meet the evidence.

ORS 756.558, dealing with the taking of evidence in a Commission proceeding, provides:

756.558. Taking of evidence; findings and conclusions of law; issuance of orders; providing copies of orders

(1) At the conclusion of the taking of evidence, the Public Utility Commission shall declare the taking of evidence *concluded*. Thereafter *no additional evidence shall be received* except upon the order of the commission and a *reasonable opportunity of the parties to examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence*.

(2) After the completion of the taking of evidence, and within a reasonable time, the commission shall prepare and enter findings of fact and conclusions of law upon the evidence received in the matter and shall make and enter the order of the commission thereon. \* \* \*

Obviously, ORS 756.558 controls over (or helps interpret) any specific provisions of the Commission's rule on official notice (OAR 860-014-0050). Therefore, the Commission was not permitted to take any additional evidence after it closed the record at the hearing unless it gave Qwest the "opportunity . . . to examine any witnesses with reference to the additional evidence and otherwise rebut and meet such additional evidence." Accordingly, the Commission erred by taking notice of these facts without following the required procedures: permitting Qwest to examine witnesses and to rebut or meet the evidence (i.e., to present evidence of its own). Witnesses to be examined could have included Staff (or whomever obtained the evidence), as well as other parties to the extent they may have information that bears on the facts noticed. However, the Commission's Order denied Qwest the opportunity to examine these witnesses or to present its own evidence.

For example, Qwest could have presented its own evidence regarding its marketing practices with its small and large business customers. Qwest also could have examined CLEC

parties on the issues of fact that the Commission raised in the Order, such as whether their offerings are competitive for all customers, or only for those with four or more lines.

Accordingly, the Commission lacked the power to consider additional evidence after the record was closed. Because of this procedural error, the Commission should completely *disregard* all of its “officially noticed” facts (which were not in the record, and were not offered by any party) regarding customer demographic, size or number of lines. The Commission should decide this contested case based solely on the *evidence in the record* as of the date the record closed (October 20, 2005). Further, since there was no evidence in the record regarding such “customer demographic” or size issues, and since both Staff and Qwest recommended deregulation of all of Qwest’s basic business services and their associated features in the Portland rate center, without regard to customer demographic, size or number of lines, the Commission should reconsider its order. Thus, the Commission should find that *all* of Qwest’s basic business services and associated features in the Portland rate center should be deregulated, without regard to such customer size. For similar reasons, the Commission should also reconsider its order and find that *all* of Qwest’s basic business services and associated features in the *Clackamas* rate center should be deregulated, without regard to customer demographic, size or number of lines.

**C. The Commission reached its decision based on several errors of law and fact by making several incorrect and unwarranted assumptions and reaching several incorrect and unwarranted conclusions**

Further, as stated, Qwest does not dispute the accuracy of the facts that appear on its own website. However, the Commission has drawn incorrect and unwarranted inferences and reached certain incorrect conclusions based upon its mistaken interpretation of those facts. In fact, the Commission based its ultimate decision on this issue in large part on those unwarranted and incorrect inferences and conclusions, and thus based its decision on this issue on certain

substantive *errors of law and fact* that are essential to its decision. For the reasons set forth below, the Commission erred, as a matter of law and as a matter of fact, in making the assumptions and reaching the conclusions that it did in its Order.

For example, presumably based on the fact that Qwest's website pages for "Small Business" customers list specific offerings and prices, while the website pages for "Large Business" customers do not list offerings and prices, the Commission concluded that (1) Small Business customers are limited to purchasing specific offerings at specific prices and (2) Large Business customers are not limited to specific offerings, *and* prices for Large Business customers are "subject to negotiation." See Order, pp. 7, 16. This is not true, however. Indeed, the Commission itself appears to recognize that it is *uncertain* about whether this conclusion is true or not, by simply stating that Qwest "appears" to currently offer such pricing flexibility only to large business customers. Order, p. 16.

First, as the Commission knows, and as Qwest's Commission-sanctioned tariffs and price lists make clear, any customer may purchase any service or combination of services that Qwest offers, for which that customer qualifies, at the prices set forth in those tariffs and price lists. Indeed, the Commission has access to Qwest's tariffs or price lists, both through the Commission's own records and files and through Qwest's publicly-available website, and thus the Commission's conclusion that Qwest website does not "provide specific pricing information" is not technically correct. More importantly, to the extent the Commission found that only "small businesses" are limited to features and packages at specific prices, and thus that large business customers are not so restricted, the Commission is simply wrong as a matter of law. In fact, neither set of customers is restricted to any specific product offerings, and the Commission does not show *where* in Qwest's websites Qwest purportedly restricts its specific product offerings to certain sets of business customers.

The Commission is simply wrong as a matter of law that prices for Large Business customers are “subject to negotiation.” Order, p. 16. To the contrary, such prices are *not* “subject to negotiation,” except under circumstances that qualify for a *special contract* under applicable law, such as under ORS 759.410 or ORS 759.250. Again, as the Commission knows, all of the prices for Qwest’s regulated services are set forth in *tariffs and price lists* filed with the Commission. If Qwest were to offer “Large Business” customers (which the Commission defines as those purchasing four or more voice lines) lower prices for their lines, features, or feature packages, those lower prices must, by law, be *filed with the Commission*, either in a tariff or price list or as a special contract; otherwise, Qwest would in violation of its tariffs and price lists, and arguably in violation of ORS 759.205, ORS 759.260 and/or ORS 759.275.<sup>4</sup> In short, Oregon law does not allow Qwest to offer lower prices to Large Business customers if the lower prices or special contracts are not filed with the Commission. Accordingly, the Commission’s incorrect and unsupported inferences and conclusions that it draws from such facts are errors of law. These errors of law and fact are “essential to the [Commission’s] decision” on this issue.

Further still, the Commission does not even show *how* it reached its conclusions based on its review of Qwest’s website. That is, the Commission refers to certain Qwest website pages. Order, p. 7, fns. 14, 15. However, just as a math student is asked to “show your work” (by showing how he or she came to the final answer), so too, the Commission should have shown precisely what particular facts it reviewed, and what assumptions it made based on those facts, to reach the specific conclusions it reached. However, Qwest’s review of the website pages that the

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<sup>4</sup> Moreover, the lack of pricing detail in the “large business” section of the Qwest website has nothing to do with there being a greater degree of pricing variations for large business customers, as the Order seems to be imply. Rather, it is simply that large businesses tend to have more complex telecommunications needs, and this fact, coupled with the fact there are so many more service options to large business customers, necessarily means that it would make more business sense for Qwest to deal with such large customers on a consultative basis. Nevertheless, the prices for all of these large business customer services are still in the publicly-available (and required) tariffs or



Commission cited, without more explanation from the Commission of the particular facts it relied upon for the conclusions it reached, does not reveal any basis for such conclusions.

The Commission also committed errors of law essential to its decision when it concluded, based on Qwest's "own public representations" (websites), that "price competition is not present for voice grade line integrated service offerings for customers with three or fewer lines." Order, p. 16.<sup>5</sup> This is so because even if the Commission were correct that there is a meaningful distinction between customers with "three lines or fewer" and customers with "four lines or more," there is no logical nexus between such a distinction and the Commission's apparent leap of logic that such a distinction therefore necessarily means "price competition is not present" for customers with three or fewer lines. Order, p. 16. In fact, Qwest presented substantial evidence regarding competition for all business customers in Oregon, including "small" business customers. This is especially so because there is no discussion in the Order about the differences between Qwest's prices and those of its competitors (including whether Qwest's competitors make pricing distinctions between customers with three lines or fewer and customers with four or more lines), and because the evidence that Qwest presented (including its Exhibit Qwest/9) showed substantial small business competition from numerous other providers (Qwest's competitors). In other words, even if the Commission were correct that one set of customers could "negotiate" prices and another set could not, that fact alone does not necessarily mean there is a lack of price competition. This is especially so because there is no requirement in Oregon law that prices be "subject to negotiation" as an indicator of price competition, or for purposes of deregulation under ORS 759.052.

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price lists, and do not vary from one customer to the next (except as provided for under such tariffs or price lists or in special contracts filed with the Commission).

<sup>5</sup> The Commission did not explain what it meant by "voice grade line *integrated* service offerings" in its Order. (Order, p. 16 (emphasis added).) This was not a term that any party used in this docket.

Accordingly, even if the Commission determines it did not commit any procedural errors of law, Qwest submits that the Commission committed substantive errors of law and fact by reaching its decision based on several incorrect and unwarranted assumptions that resulted in several incorrect and unwarranted conclusions that were essential to its decision. Qwest respectfully submits that the only remedy for such errors of law and fact is to completely disregard the officially-noticed “facts” from the Qwest website that the Commission reviewed and relied upon, and therefore, to completely reverse the decision as to the denial of deregulation of basic business services in the Portland and Clackamas rate centers for customers with three or fewer lines. As such, the Commission should deregulate *all* of Qwest’s basic business services in those two rate centers, without regard to customer demographic, size or number of lines.

**D. There is *good cause* for reconsideration of a matter essential to the Commission’s decision**

Finally, even if the Commission did not err in taking “official notice” of the facts it noticed, or in not permitting Qwest an opportunity to rebut or meet the evidence, it was highly unusual, and likely an error, for the Commission to have based its decision, *on its own motion*, on evidence that was *not in the record* and that *no party had even offered*. After all, the Commission (and Administrative Law Judge) in a contested case docket sits as a *trier-of-fact*, in an *adjudicatory role*, and not as a party or as a *sua sponte* presenter or developer of facts. This is especially so because the Commission has its own Staff, which is empowered to investigate issues relevant to such a proceeding and to participate as a formal party, and thus to offer its own testimony and advocacy. Indeed, that is exactly what Staff did in this docket, as it conducted a thorough investigation, including very extensive discovery and a very detailed CLEC Survey (the results to which only it was privy), and thereafter presented two witnesses, extensive testimony and post-hearing briefing. Yet Staff apparently chose *not* to make a recommendation

to deregulate only for customers of a certain size or number of lines in the Portland rate center. Indeed, despite its advocacy role in this case, it was not Staff who offered these “facts,” but the *Commission itself* who did so, apparently on its own motion and without being asked to do so.

In fact, Qwest notes that not only did Staff refrain from introducing any evidence or advocacy suggesting a customer line split based on customer size or demographic, but Staff must have necessarily determined that such evidence or advocacy was *not necessary or persuasive* to the issues here. This is so because Staff actually conducted *discovery* regarding the precise issue of a customer’s number of lines, which Qwest answered in full after performing a special study.<sup>6</sup> The CLEC survey that the Commission later issued as bench requests also requested information of CLECs based on a customer’s number of lines.<sup>7</sup> Staff analyzed the results of the CLEC survey as it prepared its testimony and recommendations. Nevertheless, despite the fact that the Commission’s own Staff participated as a party and conducted discovery and a CLEC survey

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<sup>6</sup> Staff’s data requests nos. 4 and 5 asked for data on an access line split basis (1 to 2 lines, 3 to 20 lines and more than 20 lines). Specifically, Staff data request No. 4 asked:

For each of the five calendar years, 1999 through 2003, what was the average (mean) number of local business exchange *access lines* that Qwest had in service *in Oregon for each access line service* included in the petition *by customer size* (per serving location)---i.e., in each of the following line-sized segments: 1 or 2 lines, 3 to 20 lines, and more than 20 lines? (See Attachment A (italics in original).)

Likewise, Staff data request no. 5 requested similar information, but by geographic area. (See Attachment A.)

<sup>7</sup> Questions 6 and 7 of the CLEC Survey that the Commission issued as bench requests provided as follows:

6. Using the matrix provided as Attachment F (tabs F1, F2, F3), please report the quantity of business customers for each service category indicated along the horizontal axis at the top of the report. Please treat each customer location separately (i.e. a company with one location with 25 lines and another with 2 will be listed twice). Please segment your answer into three customer categories: 1 to 2 lines, 3 to 20 lines, and more than 20 lines, which align with the three tabs of the spreadsheet. (Underscoring in original.)

7. Using the matrix provided as Attachment G, please report the quantity of lines for each service category indicated along the horizontal axis at the top of the report. Use the following business customer segments to report line counts: 1 to 2 lines, 3 to 20 lines, and more than 20 lines. For this question, aggregate the number of lines provided to a customer, for each applicable service, where the customer has more than one location of service within Qwest’s rate centers. For example, if you provide service to Acme at five different Acme stores, aggregate the total number of lines across the locations and provide the aggregated number in Attachment G for the respective service. (Emphasis in original.) (See Commission Bench Requests, issued March 16, 2005.)

Unfortunately, however, based on how Staff determined to treat the CLEC information given, neither Qwest nor any other party was provided access to confidential data.

regarding such customer demographic data, it evidently chose not to advocate a specific line “cut-off” for deregulation in its testimony, and instead recommended deregulation of *all* of Qwest’s basic business services and associated features in the Portland rate center. In fact, Staff concluded that competition in the Portland rate center is “sufficient to protect customers against exercise of market power if the basic business service is deregulated.” (Staff Reply Brief, p. 32.)

Accordingly, given the Commission’s various procedural and substantive errors of law and fact, including (1) taking official notice of facts that are not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, (2) receiving evidence after the hearing (and after the record was closed), but not providing Qwest the opportunity to rebut or meet the evidence, (3) committing several errors of law and fact by making incorrect and unwarranted assumptions, and reaching incorrect and unwarranted conclusions, and (4) basing its decision on evidence that was not even in the record and that was not offered by any party, Qwest respectfully submits that, at a very minimum, there is *good cause* for the Commission to reconsider its decision on this narrow and limited issue. As such, Qwest respectfully submits that the Commission should completely disregard all of the officially-noticed facts, and therefore should decide the issue based solely on the evidence in the record *at the time the record closed*. As such, the Commission should deregulate *all* of Qwest’s basic business services and their associated features, in *both* the Portland and the Clackamas rate centers, *without regard to any customer demographic, size or number of lines*.

## CONCLUSION

Qwest respectfully submits that the Commission should reconsider Order No. 06-399 regarding its distinctions on customer demographic, size or number of lines (i.e., customers whose accounts have three or fewer lines and customers whose accounts have four or more lines). The Commission should therefore reverse its denial of Qwest's petition to deregulate its basic business services and their associated features for customers whose accounts have three or fewer lines in the Portland and Clackamas rate centers. Specifically, Qwest respectfully submits that the Commission should deregulate *all* of Qwest's basic business services and associated features, in *both* the Portland and Clackamas rate centers, without regard to distinctions of customer demographic, size or number of lines.

DATED: August 31, 2006

Respectfully submitted,

QWEST



By: \_\_\_\_\_

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Attorneys for Qwest Corporation



# Oregon

Theodore R. Kulongoski, Governor

## Public Utility Commission

550 Capitol Street NE, Suite 215

**Mailing Address:** PO Box 2148

Salem, OR 97308-2148

**Consumer Services**

1-800-522-2404

Local: 503-378-6600

**Administrative Services**

503-373-7394

August 6, 2004

RECEIVED

AUG 09 2004

Alex Duarte  
Qwest Corporation  
421 SW Oak Street  
Portland OR 97204

RE:	<u>Docket No.</u>	<u>Staff Request Nos.</u>	<u>Responses Due By</u>
	UX 29	1 - 17	August 20, 2004

Please provide responses to the following request for information. Contact the undersigned before the response due date noted above if the request is unclear or if you need more time. If you need more time to respond to part of the request but can otherwise respond timely, please provide a partial response by the due date.

1. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of local business exchange *access lines* that Qwest had in service *in Oregon* for *each access line service* included in the petition?<sup>1</sup>
2. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of *units of service* that Qwest had *in Oregon* for *each service* included in the petition as listed in the Index to Exhibit B, excluding those services covered in item 1 above?
3. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of local business exchange *access lines* that Qwest had in service in Oregon *for each of the services* included in the petition *by region* as defined in Table A of the petition?
4. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of local business exchange *access lines* that Qwest had in service *in Oregon* for *each access line service* included in the petition *by customer size* (per serving location)--i.e., in each of the following line-sized segments: 1 or 2 lines, 3 to 20 lines, and more

<sup>1</sup> For Data Requests 1 through 7, the mean for each year would be calculated by taking the monthly total for each of the twelve months from January through December each year and dividing that annual total by twelve (months).

As an alternative to providing an annual mean in answer to this request, provide the number of units of service for a given month---e.g. March---if Qwest believes that this method would produce results that are reasonably typical for a calendar. If this alternative method is used, please include the monthly quantities for March 2004. The mean for each year would be calculated by taking the monthly total for each of the twelve months from January through December each year and dividing that annual total by twelve (months).

than 20 lines?

5. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of local business exchange *access lines* that Qwest had in service *in each region* of Oregon (as defined in Table A of the petition) for *each access line service* included in the petition *by customer size* (per serving location)---i.e., in each of the following line-sized segments: 1 or 2 lines, 3 to 20 lines, and more than 20 lines?
6. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of local business exchange access line *customers* that Qwest had *in Oregon* for *each access line service* included in the petition *by customer size* (per serving location)--i.e., in each of the following line-sized segments: 1 or 2 lines, 3 to 20 lines, and more than 20 lines?
7. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of local business exchange access line *customers* that Qwest had *in each region* of Oregon (as defined in Table A of the petition) for *each access line service* included in the petition *by customer size* (per serving location)---i.e., in each of the following line-sized segments: 1 or 2 lines, 3 to 20 lines, and more than 20 lines?
8. Does the sum, 272,397, at Table B, Column B, omit the 4,981 "resold" lines at Table A (first column) that were sold at regular retail rates---i.e., tariffed?
9. What is included in the sum, 272,397, at Table B, Column B? Provide a list of the specific services and the quantity of each service that are included in this sum.
10. On page 11 of the petition Qwest states:"...the number of business lines Qwest has tracked as being lost to competitors in Oregon between February 2003 and March 2004<sup>14</sup> is nearly 36,000 in the following general business service categories: flat access, measured access, Centrex 21, analog private line, Centrex Plus, Digital Switched Service (DSS), ISDN, PBX trunks, Standby Line, UAS Trunks and Centrex Prime." Provide all support for this statement, including the quantities of lost lines for each service referenced. Provide the quantities of lost lines from all remaining service categories for the same period, February, 2003, and March, 2004.
11. Given that Qwest's Centrex Prime service was exempt from regulation in Oregon through Order No. 00-228 (April 28, 2000), Docket UX 23 (as acknowledged in the petition), why it included in Qwest analysis of regulated services that allegedly were lost to competitors as cited on page 11 of the petition?
12. In other jurisdictions where business services (the services included in this petition) have been deregulated or granted *upward* pricing flexibility, has Qwest changed the rates it charges for those services? If yes, please provide the date deregulation or *upward* pricing flexibility was granted and the dates and amounts of any price changes.

**Resellers Base-Line Data**

13. For each of the five calendar years, 1999 through 2003, what was the average (mean) number units for each of the items on Table A of the petition?<sup>2</sup>
14. For each of the five calendar years, 1999 through 2003, what was the average (mean) number units for each of the items on Table B of the petition?
15. For each of the five calendar years, 1999 through 2003, what was the average (mean) number *units purchased by each CLEC* for each column item on Table A of the petition?
16. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of *facilities-based CLEC access lines in service in Oregon*?
17. For each of the five calendar years, 1999 through 2003, what was the average (mean) number of *facilities-based CLEC access lines in service in each region* of Oregon (as defined in Table A of the petition)?

Please send an original and one copy, and mark responses to the attention of Vikie Bailey-Goggins (503) 378-6366.



Bryan Conway  
Program Manager  
Economic & Policy Analysis  
(503) 378-6200  
Fax: (503) 373-7752

Staff Initiator: Steve Chriss

cc: Service List

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<sup>2</sup> For Data Requests 13 through 17, the mean for each year would be calculated by taking the monthly total for each of the twelve months from January through December each year and dividing that annual total by twelve (months).

As an alternative to providing an annual mean in answer to this request, provide the number of units of service for a given month---e.g. March---if Qwest believes that this method would produce results that are reasonably typical for a calendar. If this alternative method is used, please include the monthly quantities for March 2004. The mean for each year would be calculated by taking the monthly total for each of the twelve months from January through December each year and dividing that annual total by twelve (months).



## CERTIFICATE OF SERVICE

**UX-29**

I hereby certify that on the 31<sup>st</sup> day of August, 2006, I served the foregoing **QWEST CORPORATION'S MOTION FOR RECONSIDERATION OF ORDER NO. 06-399**, 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 31<sup>st</sup> day of August, 2006.

**QWEST CORPORATION**



By: \_\_\_\_\_

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