

January 25, 2006

VIA EMAIL AND US MAIL

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Oregon Public Utility Commission  
550 Capitol Street NE #215  
PO Box 2148  
Salem, OR 97308-2148

Re: UX 29 – TRACER’s Reply Brief

Dear Sir or Madam:

Enclosed for filing in the above-named docket is the original and five copies of TRACER’s Reply Brief. Please contact me with any questions.

Very truly yours,



Jessica A. Gorham

Enclosure

cc: UX 29 Service List

**CERTIFICATE OF SERVICE**  
**UX 29**

I hereby certify that a true and correct copy of **TRACER'S REPLY BRIEF** was served via U.S. Mail on the following parties on January 25, 2006:

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ATER WYNNE, LLP

  
Jessica A. Gorham

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
UX 29**

In the Matter of

QWEST CORPORATION

Petition to Exempt from Regulation  
Qwest's Switched Business Services

**TRACER'S POST-HEARING  
RESPONSE BRIEF**

**January 25, 2006**

**PUBLIC VERSION**

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1 The Telecommunications Ratepayers Association for Cost-based and Equitable Rates  
2 (“TRACER”) respectfully submits this brief in reply to Qwest Corporation’s (“Qwest”) Opening  
3 Post-Hearing Brief (“Qwest’s Brief” or “Opening Brief”) in support of its petition for  
4 deregulation of its switched business services in Oregon pursuant to 759.030(2)-(4) of the  
5 Oregon Revised Statutes (“ORS”) (the “Petition”).<sup>1</sup>

## 6 I. INTRODUCTION

7 In 1999, Qwest elected to be subject to regulation under ORS 759.400 *et seq.*, and thus  
8 permanently left behind rate of return regulation. Today, under this “price cap” legislation,  
9 Qwest no longer has its prices set in rate cases based on the cost of service, but rather operates  
10 under a scheme of price caps and price floors. Price floors are set at “the sum of the total service  
11 long run incremental cost of providing the service for the nonessential functions of the service  
12 and the price that is charged to other telecommunications carriers for the essential functions:”<sup>2</sup>  
13 The caps were set by the Commission in UT 125.<sup>3</sup> Qwest’s complete flexibility to set prices  
14 between the statutory price floors and caps is subject only to its obligation to provide notice to  
15 the Commission within 30 days *following* the effective date of the price change.<sup>4</sup> In addition,  
16 Qwest is free to bundle services, offer packages of services, and enter into special contracts with  
17 large customer, so long as it notifies the Commission of its actions within 30 days. Accordingly,  
18 as a practical matter, Qwest already has all the flexibility it needs to *lower* prices to meet  
19 competition any time it wishes, subject only to minor notice requirements.<sup>5</sup>

20 On the other hand, as explained by Commission Staff in this case, Qwest has currently set  
21 its prices for all of its switched business services—except ISDN-Primary Rate Service—at the

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22 <sup>1</sup> *In the Matter of the Petition of Qwest Corporation to Exempt from Regulation Qwest’s Switched Business Services*,  
23 OPUC Docket No. UX 29 (June 21, 2004) (“Qwest’s Petition”).

24 <sup>2</sup> ORS 759.410(4).

25 <sup>3</sup> *In the Matter of the Application of U.S. West Communications, Inc. for an Increase in Revenues*, Docket No. UT  
26 125, Order No. 01-810 (Sept. 14, 2001).

<sup>4</sup> ORS 759.410(8)(a).

<sup>5</sup> TRACER/100, Cabe/6, lines 13-15.

1 level of the cap itself.<sup>6</sup> So while Qwest is currently free to lower prices to meet competition, it  
2 cannot raise them. Accordingly, what Qwest stands to gain in this docket is clear—the authority  
3 to *raise* prices for its switched business services *without Commission review*.

4 In its Opening Brief, Qwest’s attempts to downplay its interest in upward pricing  
5 flexibility by asserting that the deregulation it seeks would “remove the regulatory and time-  
6 consuming burdens of Qwest’s ‘special contract’ and promotion/special offer filing  
7 requirements.”<sup>7</sup> Indeed, Qwest never even mentions that, if its Petition is granted, it will gain the  
8 ability to raise prices from current levels. Given the minimal administrative burdens imposed on  
9 Qwest under its current price cap regulation,<sup>8</sup> it is difficult to believe that these minor filing  
10 requirements constitute Qwest’s primary motivation for seeking deregulation.

11 Thus, for business customers such as TRACER members, there is much at stake in this  
12 docket. If Qwest’s Petition is granted, Qwest will gain the ability to raise its prices for switched  
13 business services to any level it wishes—subject only to those pricing constraints that may be  
14 imposed by current levels of competition. If current competition is not sufficient to restrain  
15 Qwest’s exercise of market power, then these customers should expect significant increases in  
16 the prices they pay for telecommunications services.<sup>9</sup>

17 Under ORS 759.030, the Commission *must* grant Qwest the relief it seeks only if it finds  
18 that price and service competition exist; in addition, it *may* grant the Petition if its finds that the  
19 relevant services are “subject to competition,”<sup>10</sup> or “that the public interest no longer requires full  
20

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21 <sup>6</sup> Staff/100, Chriss/45, lines 10-11.

22 <sup>7</sup> Qwest’s Brief at 9.

23 <sup>8</sup> At hearing, Qwest’s witness, Robert Brigham, admitted that Qwest currently has complete ability to lower prices,  
24 bundle services and enter into special contracts with business customers with no prior notice requirements. *See*  
25 *Cross-Examination Hearing Transcript (“Tr.”) p. 19, lines 2-3 (Brigham).*

26 <sup>9</sup> It is true that most TRACER members are large businesses, and that they do for the most part purchase services  
from Qwest through negotiated special contracts. *Tr.* p. 210, lines 4-7 (Cabe). However, Qwest’s tarriffed prices  
currently serve as a starting point for any special contract negotiation, and are thus highly correlated to the prices  
TRACER members pay.

<sup>10</sup> ORS 759.030(2), (3).

1 regulation of the services.”<sup>11</sup> And while there has been some disagreement as to how these  
2 standards should be interpreted, all parties agree that a proper application of the factors and  
3 standards requires that Qwest’s Petition cannot be granted unless and until Qwest proves the  
4 existence of competition that is sufficient to constrain Qwest’s ability to raise prices above  
5 competitive levels. In other words, Qwest must prove the existence of not just *some* competition,  
6 but rather the existence of *effective* competition. Only then can the Commission be assured that  
7 competition will take the place of regulation in ensuring “just and reasonable rates.”<sup>12</sup>

8 Reviewed as a whole, Qwest’s Petition fails to present or apply a careful analysis of  
9 current competitive data and instead relies on a “competition—I know it when I see it” approach.  
10 *First*, Qwest fails at the crucial first step of the statutory analysis when it fails to define the  
11 relevant geographic and product markets in any reasonable manner. Instead of engaging in the  
12 type of thoughtful analysis required by the statute, Qwest rests on broad generalizations and  
13 subjective observations, and in doing so significantly exaggerates the level of competition in the  
14 market. Qwest’s Petition should be rejected on this basis alone. *Second*, the data produced in  
15 this case do not prove a level of competition sufficient to constrain Qwest’s ability to raise prices  
16 above competitive levels. On the contrary, Staff and TRACER’s calculations show that the  
17 market for the Petition services is in fact highly concentrated, creating a presumption that Qwest  
18 retains the power to raise prices above competitive levels. *In addition*, Qwest presents data  
19 regarding competition without regard to whether such competition could reasonably be expected  
20 to discipline Qwest’s market power. *Finally*, both Staff and TRACER have produced evidence  
21 of a current unfavorable regulatory environment for CLECs that suggest that current levels of  
22 competition in the market cannot be relied upon to discipline Qwest’s prices in the future.

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23  
24  
25 <sup>11</sup> ORS 759.030(2).

26 <sup>12</sup> ORS 756.040(1).

1 Market power cannot be determined by reviewing raw data, by making broadbrush  
2 generalizations, or by casual observation. Market power is not determined on a “you know it  
3 when you see it” basis. On the contrary, an assessment of market power such as the Commission  
4 must make in this docket requires a disciplined economic analysis of the appropriate markets and  
5 the degree of competition in those markets. And when subjected just such careful analysis,  
6 Qwest’s case fails. For all of these reasons, Qwest’s Petition must be rejected.

## 7 II. LEGAL STANDARD

8 Qwest petitions the Commission for deregulation under ORS 759.030(3), or in the  
9 alternative, 759.030(2). Oregon Revised Statute 759.030(3) requires that, upon petition by any  
10 telecommunications utility, and after notice and hearing, the Commission *shall* exempt a  
11 telecommunications service from regulation if price *and* service competition exist. Oregon  
12 Revised Statute 759.030(2), on the other hand, provides the Commission with discretionary  
13 authority to deregulate. Under section (2), the Commission, upon receiving a petition and  
14 following notice and investigation, *may* exempt from regulation telecommunications services for  
15 which the Commission finds: (1) price competition exists; *or* (2) service competition exists; *or*  
16 (3) those services which the petitioner or the Commission demonstrates are subject to  
17 competition; *or* (4) the public interest no longer requires full regulation of these services.

18 Under ORS 759.030(3), in response to a petition, the Commission is mandated to  
19 deregulate an ILEC service if it finds that “price and service competition” exist for the services at  
20 issue. On its face, this charge is quite general, as the statute does not state what level of  
21 competition will suffice. However, in this case, all of the parties agree that evidence of “some”  
22 competition will not satisfy the statute. On the contrary, the question presented by a petition for  
23 deregulation under either subsection (2) or (3) is whether there is sufficient competition in the  
24  
25  
26

1 relevant market to restrain an exercise of market power by the incumbent—in this case, Qwest.<sup>13</sup>  
2 In other words, if competition in the relevant market has developed to a degree that Qwest is  
3 constrained from raising prices above competitive levels, then regulation can be lifted, and the  
4 Commission can rely on competition to protect the public. However, if competition exists in the  
5 relevant market, but if it is not sufficiently robust to restrain Qwest from raising prices above  
6 competitive levels, then Qwest retains market power and the current regulation should remain in  
7 place.<sup>14</sup>

8 In determining whether competition is sufficient to grant a petition for deregulation under  
9 either subsection (2) or (3), the statute requires the Commission to consider each of the following  
10 four factors:

- 11 (a) The extent to which services are available from alternative providers in the relevant market.
- 12 (b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions.
- 13 (c) Existing economic or regulatory barriers to entry.
- 14 (d) Any other factor deemed relevant by the Commission.<sup>15</sup>

15 By requiring the Commission to consider each of these factors, it is apparent that the  
16 Legislature sought to ensure that the Commission could not deregulate a service without  
17 undertaking a rigorous economic analysis of the extent—and effectiveness—of competition in  
18 the relevant market. Clearly, if the Legislature had intended for the Commission to deregulate a  
19

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20 <sup>13</sup> Qwest/1, Brigham/38, lines 17-19 (“the Commission should focus on whether there is sufficient competition to  
21 constrain Qwest’s ability to raise prices for its services in the market”); TRACER/100, Cabe/8, lines 13-15;  
22 Staff/100, Chriss/44, lines 12-19.

23 <sup>14</sup> All witnesses at the hearing agreed that the Commission’s inquiry for deregulation is whether there is sufficient  
24 competition to restrain an exercise of market power by the incumbent. The questions of whether sufficient  
25 “competition exists” to constrain Qwest’s prices and whether Qwest has “market power” are two sides of the same  
26 coin. Market power is the ability to raise prices above competitive levels. If the competition that exists in the  
market is sufficient to restrain Qwest’s prices, then Qwest has no market power. And if Qwest is able to price its  
products above competitive levels, then Qwest has market power. Thus, in order to prove that price and service  
competition sufficient to restrain Qwest’s pricing, Qwest must necessarily prove that it does not have market power.

<sup>15</sup> ORS 759.030(4).

1 service based on its “general impression” or “sense” of whether competition exists, it would not  
2 have required a finding by the Commission after notice and hearing and consideration of the  
3 factors in ORS 759.030(4).

4 At various times in this proceeding, Qwest and other parties have loosely referred to the  
5 four factors in ORS 759.030(4) as “standards” or “criteria” for deregulation.<sup>16</sup> However, this  
6 characterization is not strictly correct. The factors in ORS 759.030(4) are exactly that—factors.  
7 Each factor describes a set of information or data that is relevant to an analysis of competition  
8 and market power, and ORS 759.030(4) requires the Commission to consider all such evidence,  
9 at a minimum, before ruling on a petition for deregulation. In UD 13, the Commission recently  
10 articulated the role of the ORS 759.030(4) factors in its analysis of whether certain services were  
11 “subject to competition”:

12 In our analysis, all factors—including additional factors we deem  
13 relevant—are important; however, no single factor is dispositive. While  
14 we address the factors individually, we view them as a whole to determine  
15 whether the evidence presented is sufficient to conclude that the service is  
16 subject to competition and thus warrant the price listing of the service.<sup>17</sup>

17 In this docket, the Commission is tasked with the same job. It must review all relevant  
18 evidence as a whole, including the information identified by ORS 759.030(4), and determine  
19 whether the evidence presented demonstrates the existence of competition sufficient to constrain  
20 Qwest’s ability to exercise market power.

21 The Commission’s evaluation of Qwest’s Petition is also guided by the overarching  
22 responsibility embodied in ORS 756.040(1), to “protect \* \* \* customers, and the public  
23 generally, from unjust and unreasonable exactions and practices and to obtain for them adequate  
24 service at fair and reasonable rates.” The Commission must ensure that any decision it makes to  
25 grant a petition under ORS 759.030 is consistent with its responsibilities under ORS 756.040(1).

26 <sup>16</sup> See, e.g., Qwest/1, Brigham/38, lines 4-7 and Qwest/1, Brigham/39, lines 11-12 (“I have shown that the criterion listed in ORS 759.030(4)(a) has been satisfied.”)

<sup>17</sup> *In the Matter of Verizon Northwest Inc.*, Docket No. UD 13, Order No. 05-1241, at 8.

1 That is, the Commission should grant a petition for deregulation only if the Commission finds a  
2 level of competition sufficient to prevent “unjust and unreasonable exactions and practices.”<sup>18</sup>  
3 Such a finding requires a careful economic analysis of whether the price and service competition  
4 in the market can and will provide discipline sufficient to replace regulation.

### 5 III. SUMMARY OF ARGUMENT

6 The basic premise of Qwest’s Petition is that there is such extensive competition in  
7 Oregon for Qwest’s switched business services that the Petition services no longer need to be  
8 regulated by the Commission. In support of its Petition, Qwest offers quantities of data intended  
9 to document the level of competitive business service offerings statewide.

10 In this brief, TRACER argues that the Commission should deny Qwest’s Petition for the  
11 following reasons:

12 *First*, the Commission should deny Qwest’s Petition because Qwest has failed to define  
13 the “relevant market” to reflect actual economically distinct geographic and product markets,  
14 which is the crucial first step of a sound economic analysis of competition. Qwest’s definition of  
15 the “relevant market” as all switched business services in Oregon is far too broad, creating the  
16 appearance of more competition than actually exists, and the Commission should reject Qwest’s  
17 Petition on this basis.<sup>19</sup>

18 *Second*, the Commission should deny Qwest’s Petition because Qwest has failed to prove  
19 the existence of “price and service” competition sufficient to constrain Qwest’s market power:<sup>20</sup>

20 (1) The Commission Staff’s CLEC Survey Report reveals a highly concentrated  
21 market, even in the relevant market as defined by Qwest, creating a presumption  
22 that existing competition is not sufficient to constrain Qwest’s market power;

23 (2) Qwest’s own evidence is unpersuasive because:

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24 <sup>18</sup> ORS 756.040(1).

25 <sup>19</sup> See Section IV. A., *infra*.

26 <sup>20</sup> See Section IV. B., *infra*.

- 1           ▪       Qwest’s data is based on information regarding Qwest’s sales of facilities  
2           to CLECs, even though Qwest has no idea what services CLECs actually  
3           offer using Qwest facilities.
- 4           ▪       Qwest’s data relies heavily on evidence of CLEC services offered by  
5           providers that rely entirely on facilities that Qwest is under no legal  
6           obligation to continue to provide. Such CLEC services cannot be relied  
7           upon to provide any real market discipline and should be excluded from  
8           consideration.
- 9           ▪       Qwest relies on evidence of resold Qwest services. Resale can provide  
10          only marginal market discipline.

11           (3)       Qwest’s own evidence does nothing to rebut the presumption of market power  
12          created by Staff’s market concentration analysis. Even accepting Qwest’s data as  
13          evidence of effective competition, the data show that Qwest retains the lion’s  
14          share of Oregon business services market and uneven levels of competition across  
15          the state cannot justify granting Qwest upward pricing flexibility that is not  
16          needed to respond to competition;

17           (4)       Qwest erroneously relies on evidence of services offered by wireless and VoIP  
18          providers although such services cannot be considered viable alternatives to the  
19          Petition services to a significant number of customers.

20           (5)       Consideration of other factors militates against deregulation. First, significant  
21          barriers to entry exist in the relevant market and, second, Qwest’s evidence  
22          amounts to a snapshot in time that captures the competitive activity that  
23          developed in an environment that no longer exists. Recent events have signaled  
24          an end to the environment of favorable access to unbundled network elements  
25          (“UNEs”) that supported development of local exchange competition. These  
26          remaining beachheads of competition comprise the bulk of the competition Qwest  
                now points to as the source of market discipline on which the Commission should  
                rely to replace the constraint of regulation.



1 products and a geographic area that is no bigger than necessary to  
2 satisfy this test.<sup>24</sup>

3 Stated in simpler terms a relevant market is defined as the smallest product/geographic  
4 combination that, if monopolized, would make a price increase profitable.<sup>25</sup> A tentative market  
5 definition should be tested against this standard. That definition is too narrow if it fails to  
6 incorporate substitutes that consumers regard as “close enough,” as measured by consumers  
7 switching to a substitute in response to a price increase. If a tentative market definition is found  
8 to be too narrow, the definition is expanded to incorporate the next best products or locations that  
9 consumers regard as “close enough” substitutes, but stops as soon as the market definition is  
10 sufficiently expansive to meet the price increase test cited above.<sup>26</sup> Despite that fact that Qwest  
11 accepts the importance of defining the relevant market,<sup>27</sup> it has utterly failed to do so in any  
12 reasonable manner.

13 ***I. Qwest’s Proposed Definition of the Geographic Market***

14 ***a. Qwest’s Geographic Market Should be Examined on the Statewide Terms  
15 Proposed in its Petition and Testimony.***

16 Consistent with its Petition, Qwest’s witness, Robert Brigham, in his opening testimony  
17 very clearly presented Qwest’s proposal for the relevant geographic market: “In this proceeding,  
18 the Commission should define the relevant geographic market for retail business services to  
19 include all Oregon wire centers that Qwest serves.”<sup>28</sup> Mr. Brigham repeated Qwest’s proposed  
20 definition of the relevant geographic market later in his opening testimony, stating that “the  
21 relevant market for switched business services should be defined to include all of Qwest’s  
22

23 <sup>24</sup> TRACER/100, Cabe/16, lines 12-17 (quoting *Horizontal Merger Guidelines* at § 1.0, US Department of Justice  
and the Federal Trade Commission, Issued April 2, 1992, Revised April 8, 1997).

24 <sup>25</sup> TRACER/100, Cabe/17, lines 1-2.

25 <sup>26</sup> TRACER/100, Cabe/17, line 21 – TRACER/100, Cabe/18, line 2.

26 <sup>27</sup> Tr. p. 24, lines 5-13 (Brigham).

<sup>28</sup> Qwest/1, Brigham/15, lines 7-8.

1 Oregon wire centers, *and it should not be defined by smaller geographical areas.*”<sup>29</sup> Qwest  
2 could not have been clearer. Qwest was proposing that its Petition be evaluated on the basis of  
3 the broadest possible geographic area, and it advocated against defining the market on any other  
4 level. Accordingly, in analyzing Qwest’s Petition and the data offered by Qwest and Staff,  
5 TRACER witness Dr. Richard Cabe accepted Qwest’s statewide market as the basis for his  
6 review and recommendations.<sup>30</sup>

7 Mr. Brigham repeated this recommendation in his rebuttal testimony.<sup>31</sup> However, it was  
8 only on in the rebuttal testimony of Qwest’s outside witness Dr. Fitzsimmons, filed less than two  
9 weeks before the hearing, that Staff and Intervenors received an indication that Qwest might be  
10 wavering on its geographic market proposal. There, Dr. Fitzsimmons suggested that when Mr.  
11 Brigham stated that the relevant market should be defined as the entire state, that perhaps he did  
12 not really mean it.<sup>32</sup> Instead, he suggested that the Commission should review the data and  
13 accept any geographic definition it believed appropriate.<sup>33</sup> Of course, this written testimony  
14 directly contradicted Mr. Brigham’s recommendation that the Commission “should not... [define  
15 the market] by smaller geographical areas.”<sup>34</sup>

16 On cross-examination by TRACER’s counsel at hearing, Mr. Brigham began to disavow  
17 his earlier geographic market proposal:

18 Q: . . . I want to first talk about the geographic component [of  
19 the market]. And Qwest has proposed that the Commission  
20 define the relevant geographic market for retail business  
21 services to cover all of Oregon . . . Is that correct?

22 A: I would not characterize it that way.

23 <sup>29</sup> Qwest/1, Brigham/16, lines 24-26 (emphasis added). Again later in his rebuttal testimony, Mr. Brigham repeated  
24 that “the relevant market this Commission should consider is the entire switched business service market.”  
25 Qwest/25, Brigham/99, lines 7-8.

26 <sup>30</sup> TRACER/100, Cabe/24, lines 1-16.

<sup>31</sup> Qwest/25, Brigham/27, lines 7-25

<sup>32</sup> Qwest/51, Fitzsimmons/13, lines 8-17.

<sup>33</sup> *Id.*

<sup>34</sup> Qwest/1, Brigham/16, lines 24-26.

1 Q: Okay. Could I turn your attention to your Direct . . .  
2 testimony, page 15, lines seven through eight. Could you  
3 read those lines to me?

4 \* \* \* \*

5 A: “In this proceeding, the Commission should define the  
6 relevant geographic market for retail business services to  
7 include all Oregon wire centers that Qwest serves.”

8 Q: Okay. And I also want to turn your attention to your  
9 Rebuttal Testimony at page 99.

10 \* \* \* \*

11 A: Yes, it says, “The relevant market this Commission should  
12 consider is the entire switched business services market in  
13 Oregon.”

14 Q: Okay. So let’s go back again. Qwest has asked the  
15 Commission to define the relevant market as Qwest-serving  
16 wire centers in Oregon; is that correct?

17 A: I would not define it that way. \* \* \*<sup>35</sup>

18 Then Mr. Brigham seemed to adopt Dr. Fitzsimmons’s approach, that the geographic  
19 market could be defined in any of a number of ways, And in the end, Mr. Brigham would not  
20 make a recommendation as to how the Petition should be analyzed:

21 Q: And at what geographic level should the Commission  
22 perform its analysis?

23 A: Well, I think that’s an issue of some judgment. I mean, you  
24 certainly could look at it at a wire-center level. I think that  
25 may be a little bit too granular. You could certainly look at  
26 it at a rate center level. You know, you kind of have to use  
some judgment here and look at all the different, you know,  
markets, as say well, you know, you could look at it as a  
region. You could have, like, broken it down by eastern  
region –

Q: Qwest doesn’t have a specific proposal, does it?

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<sup>35</sup> Tr. p. 24, line 18 – p. 25, line 25 (Brigham).

1           A:     Well, I think our specific proposal is that we believe that  
2                   the services should be deregulated in all of the wire centers  
3                   in all the – our specific proposal is to deregulate switched  
4                   business services in all of Qwest’s exchanges in the state of  
5                   Oregon. That’s what our proposal is.<sup>36</sup>

6           In its Opening Brief, Qwest now claims that it never intended to propose that the  
7           Commission define the relevant geographic market as all Qwest wire centers in the state of  
8           Oregon, and that the “parties may have genuinely misunderstood each other about this issue.”<sup>37</sup>  
9           Qwest agrees that it may have seemed to be suggesting that the entire state is all one big market  
10           for business services; however, it points out that it provided more granular data and never  
11           suggested that the Commission *could not* analyze the data on the basis of smaller geographic  
12           regions, despite its recommendation that the Commission *should not* do so.<sup>38</sup> Indeed, it appears  
13           now that Qwest may believe that there *is* some smaller unit of analysis that would be appropriate,  
14           stating as it does on brief: “Qwest would not object to having the relevant geographic market  
15           analyzed at the rate center level.”<sup>39</sup> However, all of this is beside the point.

16           It is true that nowhere in the testimony does Qwest state that Commission *could not* look  
17           at aggregate statewide information. However, not objecting to a particular definition of the  
18           market is not the same as actually offering a proposal, and the fact is that Qwest’s Brief only  
19           further muddies the waters as to what Qwest is proposing.

20           Qwest’s disavowal of its original proposal and refusal to define the correct geographic  
21           market for analysis should be rejected. First, Qwest should not be allowed to force the parties,  
22           including Commission Staff, to analyze and respond to a moving target. In Qwest’s Petition, as  
23           well the opening and rebuttal testimony of its policy and economic witness Robert Brigham,  
24           Qwest argued that the Commission should review the Petition on the basis of a statewide market.

24           <sup>36</sup> Tr. p. 29, lines 8-24 (Brigham).

25           <sup>37</sup> Qwest’s Brief at 16.

26           <sup>38</sup> Qwest/1, Brigham/16, lines 24-26.

<sup>39</sup> Qwest’s Brief at 17.

1 Had Qwest proposed a different geographic market, then the other parties would have analyzed  
2 Qwest’s Petition very differently.<sup>40</sup> At the very least, by changing its proposal, Qwest has  
3 wasted the valuable resources of the parties.

4       Second, and more importantly, while Qwest has disavowed its original proposal, it has  
5 not offered the Commission an alternative. As Petitioner, the burden is on Qwest to prove that  
6 its services in the relevant markets satisfy the standard for deregulation under ORS 759.030. The  
7 definition of a relevant market is a critical initial step in a deregulation analysis under the statute,  
8 and as such, the burden should rest on Qwest, not the Commission, to craft a defensible proposal  
9 for defining the relevant market. By refusing to take a position as to the correct geographic  
10 market, Qwest effectively requires the Commission, Staff, and intervenors to review the data at  
11 every conceivable level, and then *disprove* the existence of sufficient competition. Qwest should  
12 not be allowed to shift its own burden in this manner.

13       The only proposal for a geographic market made by Qwest in this case is that of a  
14 statewide market, and that is the basis upon which Qwest’s Petition should be analyzed. If  
15 Qwest is now proposing a definition of the relevant geographic market *other* than the statewide  
16 market, Qwest should be clear about its intention and should be required to refile a new petition  
17 for deregulation on that basis. The Commission is not required and should decline to do Qwest’s  
18 work for it.

19               *b. Qwest’s Geographic Market is too Broadly Defined and Should be Rejected.*

20       Qwest’s definition of the relevant market as its entire Oregon-serving territory is  
21 economically incorrect, and all of Qwest’s subsequent analysis of competition based on this  
22 definition is skewed as a result.

23 \_\_\_\_\_  
24 <sup>40</sup> Tr. p. 233, lines 9-13 (“Staff also understood the Petition to be—the geographic market would be the entire  
25 state.”) (Mr. Weirich, Colloquy). Tr. p. 220, lines 24-25, p. 221, lines 1-12 (Cabe). (“If a different relevant market  
26 had been defined, and whatever evidence offered in support of the existence of competition in that relevant market, I  
would have examined it as it was presented.”)

1 In defining the relevant geographic market, economists distinguish between suppliers that  
2 can provide an acceptable substitute without incurring sunk costs. Participants in a geographic  
3 market include firms producing or selling the relevant products in the proposed geographic area.  
4 In addition, participants may include other firms depending on the likely supply responses to a  
5 “small but significant non-transitory” price increase. A firm is viewed as a participant in a  
6 geographic market if, in response to such an increase, it would likely enter the market rapidly—  
7 without incurring sunk costs.<sup>41</sup> In other words, in order for two areas of the state, A and B, to be  
8 included in the same geographic market, the providers located in area A would have to be  
9 prepared and ready to serve the customers in area B. Instead, Qwest has simply proposed the  
10 broadest possible market and has defended it using empty generalizations.

11 In his opening testimony, Mr. Brigham defends Qwest’s proposal of a statewide  
12 geographic market:

13 Q. Why should the relevant market include all of Qwest’s wire  
14 centers?

15 A. As I will describe below, Qwest is now experiencing a high  
16 level of competition for its retail switched business services  
17 throughout its Oregon service territory. Business service  
18 competition is not limited to large metropolitan areas such  
19 as Portland but extends also to the smaller Oregon  
20 communities that Qwest services. In fact, business  
21 customers are currently purchasing competitive local  
22 exchange services in all of Qwest’s wire centers.

23 In addition, competitors are *marketing* business  
24 services to customers throughout the state, indicating that  
25 they view the relevant market to be the entire state. . . Not  
26 only are CLECs *marketing* business services throughout the  
state, but many competitors are also *currently serving*  
business customers in a high percentage of Qwest’s wire  
centers.<sup>42</sup>

<sup>41</sup> See TRACER/100, Cabe/22, line 17 – TRACER/100, Cabe/23, line 2 (quoting HMG).

<sup>42</sup> Qwest/1, Brigham/15, lines 10-25.

1 Mr. Brigham's comments may be true as far as they go, but they most certainly do not  
2 amount to an adequate defense of a statewide geographic market. On the contrary, Qwest has  
3 not only failed to employ a reasonable analysis of the correct geographic market, it has also  
4 proposed a market that *on its face* makes no sense at all. As explained by Dr. Cabe, Qwest's  
5 statewide definition of the market relies on the false proposition that a small, geographically  
6 restricted provider in a remote part of the state is, or could quickly become, an available  
7 substitute for any business customer, large or small, in any other part of the state.<sup>43</sup> Dr. Cabe  
8 concluded:

9 It is incorrect for Qwest to define the geographic market to  
10 include its entire Oregon serving territory. For this definition to be  
11 correct would require that every provider in Qwest's service  
12 territory be able to offer its service in every other part of Qwest's  
13 serving territory "rapidly" and "without incurring significant sunk  
14 costs." This is clearly not true. If Qwest believes that it is  
15 probable that, for example, a facilities based provider offering  
16 service in downtown Portland would incur the sunk costs  
17 necessary to respond to a small price increase in La Pine, it can  
18 make that argument. Instead, Qwest has implicitly assumed that  
19 this response is not only probable, but will occur "rapidly" and  
20 "without incurring significant sunk costs." . . . This approach to  
21 market definition is simply not useful in the Commission's task of  
22 evaluating the extent of competition.<sup>44</sup>

23 Put another way by Staff witness Chriss:

24 A business customer located in Westport may view the  
25 availability of alternatives in Portland as irrelevant. The business  
26 should not be required to relocate its business to the Portland area  
for the purposes of obtaining choices in telecommunications  
offerings. The Qwest analysis must assume that availability of  
alternative providers must be somewhat uniform across the state in  
order to define the market as statewide.<sup>45</sup>

Qwest's data, on the other hand, clearly indicates that the number of alternative providers  
and service options vary greatly from one part of the state to another.<sup>46</sup> Qwest's entire Petition,

<sup>43</sup> TRACER/100, Cabe/24, lines 1-16.

<sup>44</sup> TRACER/100, Cabe/24, lines 3-16.

<sup>45</sup> Staff/100, Chriss/22, lines 9-16.

<sup>46</sup> Qwest/40, Brigham/1-3.

1 and all supporting analysis and evidence, is based on this analytically flawed definition of the  
2 geographic market. For that reason, the Commission should reject not only Qwest’s definition of  
3 the relevant market, but its petition for deregulation as a whole.

4 **2. *Qwest’s Definition of the Relevant Product Market is Too Broad and***  
5 ***Should be Rejected.***

6 A conventional analysis of what products belong in a relevant product market should  
7 begin by focusing on an individual product—*e.g.*, basic business dial tone, or 1FB—and asking  
8 whether a hypothetical monopolist would find it profitable to impose a small but significant price  
9 increase. If a significant enough number of the monopolist’s customers of 1FB would accept the  
10 small price increase instead of migrating to another service to make it profitable for the  
11 monopolist, then 1FB belongs in a product market all by itself. However, if in response to a  
12 small price increase, a significant enough number of the monopolist’s 1FB service would migrate  
13 to a substitute service rather than pay the small price increase, then that substitute service must  
14 be included in the same product market.<sup>47</sup> In other words, whether two products are close  
15 enough substitutes to be included in the same product market is determined by asking “whether a  
16 hypothetical monopolist, monopolizing one of those products, could impose a significant but  
17 nontransitory price increase on that one product and find that price increase to be profitable,  
18 despite the existence of the other product.”<sup>48</sup> “If the other product is a close-enough substitute  
19 that such a monopolist couldn’t profitably impose that price increase without also monopolizing  
20 the other product, then the other product must be included in the relevant market for the first.”<sup>49</sup>

21 For purposes of its Petition, Qwest has defined the relevant product market as “all  
22 switched business services,” including flat-rated and measured lines, private branch exchange  
23 (PBX) trunks, Centrex services, including feature packages, discretionary business features,

24 <sup>47</sup> TRACER/100, Cabe/18, lines 14-22.

25 <sup>48</sup> Tr. p. 189, lines 16-20 (Cabe).

26 <sup>49</sup> *Id.*, lines 21-25 (Cabe).

1 Frame Relay and Asynchronous Transfer Mode (ATM) services, and packet switched services in  
2 Qwest's Advanced Communications Services Tariff.<sup>50</sup> Qwest justifies including all of these  
3 services into the same product market by observing that "there is significant overlap between  
4 various switched business services and service packages, and customers often substitute one  
5 switched business service for another, blurring the lines between various services and  
6 combinations of services packages."<sup>51</sup> According to Mr. Brigham, "a medium-sized business  
7 with a need for several access lines may purchase analog PBX trunks, digital PBX trunks,  
8 Centrex, ISDN PRI or basic business lines to meet its needs . . . It would make no sense to  
9 consider these services to be in different markets when customers can and do substitute these  
10 products for each other."<sup>52</sup>

11 Thus, by relying on broad-brush generalizations, Qwest avoids any careful analysis of  
12 whether the services contained in its proposed market definition actually serve as legitimate  
13 substitutes for each other in any meaningful way. As explained by Dr. Cabe, "[T]he way one  
14 does an analysis of relevant market is not by coming up with very broad-brush strokes to talk  
15 about substitution relationships between all kinds of possible products and then concluding that  
16 well, since they are all substitutable to some degree, they all belong in the relevant market."<sup>53</sup>  
17 "Such a broad definition of relevant product market is well understood to minimize the influence  
18 of any particular firm by bringing into the analysis the providers of services that are not truly in a  
19 position to impose market discipline."<sup>54</sup>

20 Qwest's failure to analyze its product market definition is all the more striking given  
21 Mr. Brigham's explicit acceptance of the proper first steps of the framework for analysis. In his  
22 rebuttal testimony, and again at hearing, Mr. Brigham agreed that the point of determining

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23 <sup>50</sup> Qwest's Petition, p. 1.

24 <sup>51</sup> Qwest's Brief at 11 (citing Qwest/1, Brigham/16-17; Qwest/25, Brigham/7-8).

25 <sup>52</sup> Qwest/1, Brigham/17, lines 8-15.

26 <sup>53</sup> Tr. p. 191, lines 16-21 (Cabe).

<sup>54</sup> TRACER/100, Cabe/21, lines 17-19.

1 whether two products belong in the same product market is to ensure that Qwest would be price  
2 constrained from raising the price of A by of the presence in the market of Product B.<sup>55</sup>  
3 Moreover, Mr. Brigham further agreed that in defining the market, it is essential to include in the  
4 same product market only those services that that they are viewed as reasonable alternatives for  
5 at least a subset of customers.<sup>56</sup> Mr. Brigham specifically concedes: “If there are enough  
6 customers that would respond to a price increase in one service (or a change in features and  
7 functionality) by migrating to the other service, the services are clearly effective substitutes.”<sup>57</sup>  
8 However, at hearing, Mr. Brigham resisted giving any further definition to its use of the term  
9 “enough,”<sup>58</sup> thus allowing Qwest to continue to suggest that if two services are substitutes for  
10 any subset of customers, they ought to be placed in the same product market. In fact, when  
11 pressed, Mr. Brigham admitted that in his own view, if out of 500,000 1FB customers, only one  
12 percent of these customers would migrate to a PBX service in response to a significant price  
13

14  
15 <sup>55</sup> Tr. p. 41, lines 2-11 (Brigham).

16 <sup>56</sup> Tr. p. 36, lines 3-8 (Brigham).

17 <sup>57</sup> Qwest/25, Brigham/13, lines 3-6.

18 <sup>58</sup> The following colloquy with TRACER’s attorney illustrates:

19 Q. Okay now it’s the term “enough” that I wanted to get at, because I think that’s  
20 maybe where the parties have some disagreement. . . . And let’s take . . . a comparison between  
21 1FB and PBX . . . [I]n your testimony you’ve clearly said that you believe that those are . . . [in]  
22 the same product market because they’re substitutable; is that correct?

23 A. Yes.

24 Q. Okay. Let’s say, though, that you had a universe of half a million . . . 1FB  
25 customers. . . . And in response to . . . a significant increase in price let’s say you discovered that  
26 only one of those customers switched to PBX. Would that change your view? Would you then  
decide that 1FB and PBX are not in the same product market?

A. Well, I think you need to look at a lot of different things. Certainly if you had a  
market where there was 500,000 and only one customer, that might lead you to believe that  
customers are not viewing them as substitutes.

. . . .

Q. Okay. So you would at least agree with me that in order for two products to be  
substitutes for each other . . . that there would have to be a certain critical mass of customers  
migrating from one to another in order for you to continue to view those products as substitutes?

A. I don’t believe that there’s a numerical value you can say where you can say  
where okay, if ten percent of the customers . . . move, or 20 percent or two percent. I don’t  
believe there is a numerical number you can place on it. Tr. p. 36, line 18 – p. 38, line 5.

1 increase in 1FB, he would still consider that 1FB and PBX “very well could” be considered  
2 effective substitutes.<sup>59</sup> Qwest appears to applying a very low bar indeed.

3 The complete folly of Qwest’s approach is best illustrated by its insistence on placing  
4 1FB and ISDN-PRI in the same product market. Qwest’s rationale for including them in the  
5 same product market appears to be that “there may be some customers that would . . . have  
6 several 1FB’s that might decide to migrate to ISDN-PRI.”<sup>60</sup> The monthly recurring charge for a  
7 QWEST CHOICE flat-rated business line is \$39.99 In contrast, the monthly recurring charge for  
8 an ISDN PRI delivered over a T-1 and configured as 23 or 24 voice channels is \$537.00, and the  
9 nonrecurring charge is \$1,925.00 If Qwest truly wanted to test whether ISDN would serve as a  
10 reasonable substitute for 1FB for a significant enough subset of customers, Qwest would need to  
11 determine what percent of its 1FB customers were purchasing what number of multiple 1FB  
12 lines. From this data, Qwest could make some responsible assumptions about what percent of its  
13 1FB customers might reasonably determine that it was in their economic interest to migrate to  
14 ISDN PRI in response to a small price increase in 1FB. In contrast, by contenting itself with the  
15 (probably correct) assumption that ISDN-PRI would serve as a substitute for *some* undefined  
16 subset of customers, Qwest fails to ask whether that subset is economically significant and  
17 whether the existence of that subset could impose any market discipline whatsoever on Qwest’s  
18 ability to raise prices for 1FB above competitive levels.

19 In its Opening Brief, Qwest complains that it should not be required to perform cross-  
20 elasticity studies in order to defend its product market definition. Qwest points out that cross-  
21 elasticity studies are expensive and that other evidence should suffice. Qwest is correct that it is  
22 not required to perform costly cross-elasticity studies to determine the correct product market.  
23 However, this observation is hardly relevant given that Qwest could have and failed to provide

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25 <sup>59</sup> Tr. p. 40, lines 12-18 (Brigham).

26 <sup>60</sup> Tr. p. 42, lines 20-23 (Brigham).

1 any credible evidence that all of the products listed in the Petition belong in the same product  
2 market. For instance, as explained by Dr. Cabe, Qwest could have put on testimony of sales  
3 persons regarding customer purchasing patterns.<sup>61</sup> Similarly, Qwest could have provided data,  
4 such as purchasing patterns of 1FBs, as described above. However, Qwest did not even engage  
5 in the “thought exercise” of asking itself whether all of the same products belong in the same  
6 market in any type of thoughtful or deliberate fashion. Evaluating the extent and effectiveness of  
7 competition is in fact a complex question of economics; rigorous analysis of data is the only way  
8 to evaluate competition in a meaningful manner. Casual observation and sweeping  
9 generalizations will not suffice.

10 Qwest’s entire Petition, and all supporting analysis and evidence, is based on this  
11 analytically flawed definition of the product market, which like Qwest’s geographic market,  
12 skews all data of competition in Qwest’s favor. For that reason, the Commission should reject  
13 not only Qwest’s definition of the relevant market, but its petition for deregulation as a whole.

14 **B. The Commission should deny Qwest’s Petition because Qwest has failed to**  
15 **prove “price and service competition”—that is, the existence of competition**  
16 **sufficient to constrain Qwest’s market power—as required by**  
17 **ORS 759.030(3).**

18 Leaving aside the flaws in Qwest’s proposed definition of the relevant market, Qwest’s  
19 Petition nevertheless fails to prove that price and service competition exist in the relevant market  
20 for purposes of deregulation under ORS 759.030(3). First, Staff’s HHI calculations create a  
21 presumption that Qwest has market power. Second, Qwest’s market share data has serious flaws  
22 that render it unpersuasive evidence of effective competition. Third, even if the Commission  
23 were to view Qwest’s market share data as persuasive evidence of competition in general, the  
24 level of competition evidenced by Qwest’s data is insufficient to constrain Qwest’s market  
25 power. *Fourth*, the Commission should not consider Qwest’s evidence of wireless and VoIP

26 <sup>61</sup> Tr. p. 224, lines 13-25 (Cabe).

1 services in this docket. Finally, consideration of barriers to entry and the current regulatory  
2 environment further militate against deregulation of the Petition services.

3 ***1. The Evidence Creates a Presumption that Qwest Has Market Power.***

4 In order to assess Qwest's Petition, the parties to this docket negotiated a comprehensive  
5 and confidential survey of questions that was sent as a Bench Request to 67 CLECS who are  
6 certified by the OPUC to provide services in Oregon. The data collected information about the  
7 nature of and amount of business services provided by each CLEC, and Commission Staff  
8 summarized the aggregated results in the CLEC Survey Report ("CLEC Survey Report").<sup>62</sup> In  
9 addition, Staff calculated the values of the Herfindahl Hirschman Index ("HHI") for various  
10 aggregations of market participants.<sup>63 64</sup> The HHI is a single index that attempts to capture  
11 market concentration over the whole range of possible distributions of firm size. Values of the  
12 HHI range from near 0 in the case of many market participants each holding a tiny market share,  
13 to 10,000 in the case of a perfect monopoly.<sup>65</sup> Dr. Cabe testified that while "no threshold value  
14 of the HHI will determine whether competition rises to the statutory standard for deregulation,  
15 \* \* \* indicia of concentration, including the HHI, can serve an important descriptive function."<sup>66</sup>

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18 <sup>62</sup> Staff/103, Chriss/1-30. Fifty-four of the CLECs responded, and 28 provided non-zero data. The other 26 CLECs  
19 responded that they do not currently provide business services in Oregon. 13 CLECs did not respond at all. *See*  
Staff/100, Chriss/10, lines 4-7.

20 <sup>63</sup> Staff also calculated four firm concentration ratios ("CR4s"). The CR4 is the percentage of the market served by  
21 the largest four firms in the market. Where data are available, CR4 concentration ratios can be used to provide a  
descriptive sense of the size and distribution of firms. Because the HHI was available for all relevant levels of  
aggregation, Dr. Cabe, and this Brief, focus on the HHI as the measure of market concentration.

22 <sup>64</sup> As noted by Dr. Cabe in his Direct Testimony, Staff's aggregations of market participants are much more useful  
23 than those reported by Qwest, but should not be confused with "relevant markets" for purposes of the statutory  
analysis of competition. TRACER/100, Cabe/11, FNs 6 and 7. It is not uncommon to calculate indicia of  
concentration such as the CR4 and the HHI for aggregations of market participants that do not comprise a "relevant  
market." *Id.*

24 <sup>65</sup> Such concentration ratios have been used for many decades, and the HHI has become prominent because of its use  
25 by the U.S. Department of Justice and Federal Trade Commission to establish thresholds set out in the Horizontal  
Merger Guidelines ("HMG"). *See* TRACER/100, Cabe/11, lines 12-15.

26 <sup>66</sup> TRACER/100, Cabe/11, lines 16-19.

1 The HMG defines the range of HHI values below 1,000 as “unconcentrated,” from 1,000 to  
2 1,800 as “moderately concentrated,” and above 1,800 as “highly concentrated.”<sup>67</sup>

3 Staff’s reported results from the UX 29 CLEC Survey found HHI values ranging from  
4 perfect 10,000 down to a low of 3,968 in downtown Portland, and nowhere was the market out of  
5 the “highly concentrated” range.<sup>68</sup> In fact the vast majority HHIs were above 5,000 with several  
6 at a perfect 10,000.<sup>69</sup> Thus, every analysis performed by Staff yielded HHI values that the HMG  
7 would regard as highly concentrated.<sup>70</sup> Dr. Cabe, and Staff witness, Mr. Chriss agree that “high  
8 market concentration establishes a presumption of market power.”<sup>71</sup>

9 Staff also calculated Qwest and CLEC market shares using Qwest’s own data plus Staff’s  
10 data on CLEC facilities-based lines, but excluding the line counts of UNE-P and QPP and that  
11 Qwest had included in its own market share calculations.<sup>72</sup> Table 4.1 indicates that Qwest’s total  
12 market share statewide is **70%**.<sup>73</sup>

13 Throughout this case, Qwest has dismissed Staff’s market share and HHI calculations.  
14 Qwest points out that the parties have focused on the market share and concentration data, and  
15 complains that “this singular focus on market share and market concentration is unwarranted.”<sup>74</sup>  
16 In particular, Qwest points out that “[n]owhere in the criteria listed in ORS 750.030(4) is market  
17 share or measures of market concentration mentioned, and the statute clearly does not include a  
18 market share or market concentration test.”<sup>75</sup> It makes sense that Qwest would wish to draw the  
19 Commission’s attention away from this compelling evidence of market power, however, its  
20 attempts to do so are unavailing. First, Commission precedent is clear that consideration of

21 <sup>67</sup> TRACER/100, Cabe/12, lines 1-7.

22 <sup>68</sup> Staff/103, Chriss/29.

23 <sup>69</sup> *Id.*

24 <sup>70</sup> TRACER/100, Cabe/12, lines 8-12.

25 <sup>71</sup> Tr. p. 200, lines 6-13 (Cabe).

26 <sup>72</sup> Staff/100, Chriss/36, Table 4.1.

<sup>73</sup> Staff/100, Chriss/36, lines 12-17.

<sup>74</sup> Qwest’s Brief at 23

<sup>75</sup> Qwest’s Brief at 23.

1 current and potential market power exerted in the relevant market is a necessary step in  
2 evaluating a petition for deregulation.<sup>76</sup> And while all economic witnesses seem to agree that a  
3 high market concentration is not necessarily *conclusive evidence* of market power,<sup>77</sup> only the  
4 Qwest witnesses seem to disagree with the notion that a high market concentration is *strong*  
5 *evidence* of market power.<sup>78</sup>

6 Second, Qwest attempts to undermine the significance of the HHI and CR4 test results by  
7 pointing out that the CLEC data on which the CLEC Survey Report was based was incomplete.  
8 It is true that several CLECs did not respond to the CLEC Survey, and that one of those CLECs  
9 is a significant provider.<sup>79</sup> However, a simple recalculation performed by Dr. Cabe illustrates the  
10 weakness of Qwest's position. Specifically, Dr. Cabe wanted to determine whether the failure of  
11 several CLEC to respond to the CLEC Survey could have appreciably affected the market  
12 concentration calculation. In other words, Dr. Cabe wanted to know whether, had all CLECs  
13 responded to the CLEC Survey, would Staff's market concentration results have been  
14 appreciably different.<sup>80</sup> To answer this question, Dr. Cabe conservatively assumed that the non-  
15 responding CLECs had as much market share as *all* of the CLECs that did respond to the survey,  
16 thereby doubling the lumped-together CLEC market share, increasing the size of the market, and  
17 consequently reducing Qwest's market share. Using those figures, Dr. Cabe recalculated the  
18 HHI by rate center and found that even the lowest recalculated HHI value was still well into the  
19 "highly concentrated" range.<sup>81</sup>

20 Furthermore, if Qwest did not trust the validity of the CLEC Survey data, it was free to  
21 perform HHI studies on its own data. It easily could have done so relying on line count data it  
22

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23 <sup>76</sup> See, e.g., *In re: U.S. West Communications, Inc.*, Docket UX 16, Order No. 94-1608 (Oct. 28, 1994).

24 <sup>77</sup> TRACER/100, Cabe/14, lines 4-26; Staff/100, Chriss/20, lines 7-9; Qwest/51, Fitzsimmons/17, lines 11-13.

25 <sup>78</sup> Qwest/51, Fitzsimmons/17, line 11 – Qwest/51, Fitzsimmons/20, line 15.

26 <sup>79</sup> Qwest's Brief at 6.

<sup>80</sup> TRACER/100, Cabe/13, lines 3-18.

<sup>81</sup> *Id.*

1 has in its own possession, adding in estimates of full facilities-based lines contained in the CLEC  
2 Survey. Qwest chose not to do so. Qwest’s attempts to erode the credibility of Staff’s market  
3 share and market concentration calculations are not persuasive.<sup>82</sup>

4 **2. Qwest’s Market Share Data is Flawed**

5 Of course Qwest offered its own market share data in support of its petition. Qwest’s  
6 data suffers from significant flaws that make it hard to assess. The primary source of Qwest’s  
7 market share data can be found at Qwest/40, Brigham/1-3, titled “CLEC Market Share Analysis -  
8 Oregon, Including EEL and LMC Loops, May 2005” (“Qwest’s Market Share Analysis”).<sup>83</sup>  
9 Qwest’s Market Share Analysis is a three-page spreadsheet that (1) breaks down the number of  
10 UNE-L, EEL & LMC, UNE-P, QPP, and resale lines provided by Qwest to CLECs in Oregon,  
11 and (2) adds together these figures to produce “Total CLEC Business Access Lines,” which is (3)  
12 further broken out by geographical area, rate center, and wire center. Qwest also provides data  
13 for its own business access lines by wire center, rate center, and geographical area. Based upon  
14 all of these numbers, Qwest calculates the percentage of the market attributable to all CLEC lines  
15 combined, and the percentage attributable to all Qwest lines. Qwest’s Market Share Analysis  
16 purports to show that Qwest provides [Confidential-XXXXXX] CLEC business lines in Qwest’s  
17 Oregon serving territory, comprising [Confidential-XX%] of total Oregon business lines.

18 In its Opening Brief, Qwest also summarizes the data from its Market Share Analysis by  
19 large cities, mid-sized cities, and smaller cities. According to Qwest’s summary, the two lowest  
20 Qwest market shares in the state were 49% in Baker and 54% in Portland.

21 Qwest also provides Qwest/43, Brigham/1-3, which contains all of the same data as  
22 Qwest’s Market Share Analysis, with one significant exception: Qwest recalculates all of the

23 <sup>82</sup> Finally, Qwest takes the position that Staff’s market share calculations are not meaningful because they do not  
24 encompass “the entire relevant market” – including wireless and VoIP. *Qwest’s Brief at 24*. This position is  
25 similarly without merit. For the reasons discussed below, these services are correctly excluded from the relevant  
26 product market.

<sup>83</sup> Qwest/40, Brigham/1-3.

1 high capacity loops provided to CLECs as “voice grade equivalents.” That is, where Qwest  
2 provides a DS-1 to a CLEC, Qwest Exhibit 43 represents that DS-1 as 24 access lines. Where  
3 Qwest provides a DS-3 to a CLEC, Qwest Exhibit 43 represents that DS-3 as 672 access lines.<sup>84</sup>

4 In addition to the fact that Qwest’s market share calculations are based on flawed  
5 definitions of the relevant product and geographic markets, as explained above, Qwest’s data is  
6 not persuasive evidence of effective competition for the following reasons: *First*, Qwest’s data  
7 does not provide information about services actually provided to business customers by CLECs.  
8 Rather Qwest’s data can only tell us what facilities Qwest is providing to CLECs. *Second*,  
9 Qwest’s data improperly includes as evidence of competition services offered by providers who  
10 rely on UNE-P and QPP. *Third*, Qwest’s data improperly includes evidence of services offered  
11 by wireless and VoIP providers as evidence of competition. The following sections explain these  
12 flaws in Qwest’s data in greater detail.

13 a. *Qwest’s Data Does Not Provide Information About Services Offered by*  
14 *CLECs*

15 In fact, as explained by Mr. Brigham, Qwest has no way of knowing what products or  
16 services the CLECs are actually using these facilities to provide to their customers.<sup>85</sup> To  
17 compensate for this lack of information, Qwest makes a number of assumptions—two of which  
18 were proven to be erroneous at the time of hearing. Most significantly, in all of Qwest’s market  
19 share calculations, Qwest assumed that one hundred percent of the UNE loops being sold to  
20 CLECs are being used to provision business services. However, TRACER provided evidence  
21 that in at least two specific markets—Hermiston and Roseburg—the CLECs are using UNE-  
22 loops to provide services largely to residential customers. This assumption resulted in market  
23

24 <sup>84</sup> Tr. pp. 51-54 (Brigham) (explaining how and why Qwest calculated the CLEC market share data based on voice-  
25 grade-equivalent calculations for DS-1 and DS-3).

26 <sup>85</sup> Tr. pp. 15-16 (Brigham); Tr. pp. 147-156 (Cabe).

1 share data that is significantly flawed.<sup>86</sup> Similarly, in Qwest Exhibit 43, Qwest makes the  
2 admittedly erroneous assumption that all high capacity loops provided to CLECs are being used  
3 to provide voice services. That is, Qwest ignores the fact that CLECs are almost certainly using  
4 a significant percentage of these high capacity loops for non-switched services. And  
5 compounding this error, Qwest makes sure that none of its own high capacity loops that are  
6 provided to customers for non-switched services are included in the data at all. Qwest admits  
7 that this error produces an overly conservative view of Qwest’s market share.<sup>87</sup>

8 *b. Qwest’s Evidence Improperly Includes Evidence of Services Offered by*  
9 *Providers Who Rely on QPP and UNE-P.*

10 At hearing and in its Opening Brief, Qwest has asserted that it faces competition “from  
11 CLECs using the Qwest Platform Plus <sup>TM</sup> (“QPP”) and/or QPP’s predecessor product, the UNE  
12 Platform (“UNE-P”).<sup>88</sup> As Qwest indicates, CLECs can purchase QPP and UNE-P platforms  
13 that include the loop, switching and shared transport to provide local service relying entirely on  
14 Qwest facilities. According to Qwest, as of July 2005, Qwest had negotiated 36 QPP agreements  
15 with CLECs in Oregon, encompassing 97% of the combined UNE-P/QPP lines in the state.<sup>89</sup> As  
16 of the end of May 2005, Qwest’s data showed that CLECs were purchasing [Confidential-  
17 XXXXX] QPP lines from Qwest to serve business customers as well as [Confidential-XXXX]  
18 remaining UNE-P lines. These QPP and UNE-P lines represent one-third of the total lines that  
19

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20 <sup>86</sup> “Yes, the market shares that Mr. Brigham calculates that include UNE loops, all, as I understand it, include the  
21 assumption that UNE loops are used only to serve businesses. That UNE loops are never used to serve residences.  
22 Or they’re used to serve residences in only a negligible number of cases.

23 So the market-calculation on page—in the table on page 60, I believe it is—is based on an assumption that is, in a  
24 very, very large way, mistaken.

25 And the extent to which – the extent to which the market-share calculations elsewhere in Mr. Brigham’s  
26 testimony and exhibits are mistaken is not clear. But even including these two CLECs, which account for a  
substantial number of UNE loops, a substantial correction would be required to state market shares calculated by  
Mr. Brigham correctly.” Tr. p. 156, lines 7-22 (Cabe).

<sup>87</sup> Qwest/25, Brigham/54, line 25 – Qwest/25, Brigham/55, line 9.

<sup>88</sup> Qwest’s Brief at 21.

<sup>89</sup> *Id.*

1 Qwest points to as evidence of competition.<sup>90</sup> TRACER does not question the accuracy of  
2 Qwest’s data regarding QPP and UNE-P lines, but rather the notion that these data are evidence  
3 of effective competition.

4 QPP and UNE-P lines purchased by CLECs are not evidence of competition that can  
5 effectively constrain Qwest’s established market power, because CLECs that rely on QPP and  
6 UNE-P are not “alternative providers” as that term is used in ORS 759.030(4)(a). When CLECs  
7 purchase QPP lines from Qwest, the relationship between Qwest and a QPP provider is like that  
8 between a manufacturer and a retailer of the manufacturer’s products—not the relationship  
9 among competing manufacturers.<sup>91</sup> QPP providers are most accurately viewed as distributors of  
10 Qwest’s products, controlled in most respects by Qwest.<sup>92</sup> In QPP contract negotiations, for  
11 example, Qwest simply dictates the terms and the CLECs face a “take-it-or-leave-it” negotiation  
12 on all important terms, including rates.<sup>93</sup> Additionally, Qwest has every right to cut off the QPP  
13 distribution channel entirely by simply declining to enter into new QPP contracts when the  
14 current contracts expire on July 31, 2008.<sup>94</sup>

15 In its Opening Brief, Qwest asserts that the elimination of UNE-P and the addition of  
16 QPP has not had any negative impact on platform-based competition in Oregon; to the contrary,  
17 the number of these platform lines (now primarily QPP) is about [Confidential-XX%] higher  
18 than March 2004 and about [Confidential-about XX%] higher than in December 2002.  
19 According to Qwest, these figures demonstrate that CLECs can be successful in the local market  
20 by using QPP instead of UNE-P. However, given the costs already sunk by CLECs it is not  
21 surprising that they have not discontinued marketing platform products in those areas where they  
22

23 <sup>90</sup> TRACER/100, Cabe/27, lines 24-26.

24 <sup>91</sup> TRACER/100, Cabe/28, lines 1-12.

25 <sup>92</sup> *Id.*

26 <sup>93</sup> TRACER/100, Cabe/29, lines 4-13.

<sup>94</sup> TRACER/100, Cabe/28, lines 9-12; TRACER/100, Cabe/30, lines 4-6.

1 are committed. However, whether they can actually make money selling QPP is yet to be  
2 determined.

3 The Commission should not overlook the fact that QPP and UNE-P lines represent  
4 approximately 1/3 of the CLEC lines on which Qwest relies to prove CLEC market share.<sup>95</sup>  
5 Qwest calculated of its average statewide market share as 58%, counting QPP and UNE-P as  
6 CLEC market share. When Commission Staff performed its own market share calculations, *not*  
7 counting QPP and UNE-P as CLEC market share, is calculated Qwest's statewide average as  
8 78.5%.<sup>96</sup> Given Qwest's complete control over the fate of the QPP market, and the significant  
9 market share that it represents, the Commission should not rely on Qwest's evidence of QPP and  
10 UNE-P lines purchased by CLECs as proof of price-constraining competition.

11 *c. Qwest's Evidence of Business Services Offered by Providers Who Rely on*  
12 *Resale is Not Compelling Proof of Competition.*

13 At hearing and in its Opening Brief, Qwest has also asserted that it faces competition  
14 from CLECs that purchase Qwest retail services at Commission-approved wholesale discounts  
15 and then resell the service to end-users. According to Qwest, as of May 2005, 26 CLECs were  
16 purchasing [**Confidential-XXXX**] business lines for resale.

17 Resale competition, especially at the very low volume demonstrated by Qwest's data,  
18 cannot provide competitive discipline over Qwest's pricing. Resale providers are "competitors"  
19 in a limited sense, as they can compete with Qwest only if they can provide retailing function  
20 better than Qwest can.<sup>97</sup> This is essentially the same type of relationship that Qwest has with  
21 QPP providers, but the Commission exercises greater control over the character of the  
22 relationship and Qwest cannot dictate prices in the way that it can with QPP providers.<sup>98</sup>

23  
24 <sup>95</sup> TRACER/100, Cabe/27, lines 24-26.

25 <sup>96</sup> Staff/103, Chriss/5.

26 <sup>97</sup> TRACER/100, Cabe/31, lines 4-20.

<sup>98</sup> *Id.*

1 Resale competitors, at best, can discipline the efficiency of Qwest's retailing functions.<sup>99</sup>  
2 Moreover, the volume of resale competition has never been large, and such a small volume of  
3 competition, operating with a margin determined by the wholesale discount, with competitors  
4 needing to incur costs to provide their own retailing functions, is very unlikely to provide any  
5 substantial competitive discipline.<sup>100</sup> Accordingly, the Commission should not consider Qwest's  
6 evidence of resale competition compelling evidence of competition sufficient to constrain  
7 Qwest's demonstrated market power.

8 **3. In Any Event, Qwest's Market Share Evidence Fails to Prove**  
9 **Competition Sufficient to Constrain Qwest's Market Power.**

10 Even if the Commission were to accept that Qwest's market share data is evidence of  
11 effective competition, that data hardly suggests that Qwest lacks market power. Considered on a  
12 statewide basis, Qwest's data purports to show that Qwest maintains 58% percent of the market  
13 for unswitched business services, while in many portions of the state, Qwest retains a near-  
14 monopoly share. In short, Qwest's data does nothing to overcome the presumption created by  
15 Staff's market concentration studies that Qwest does in fact have market power in the relevant  
16 market.

17 **4. The Commission Should Not Consider Qwest's Evidence of VoIP and**  
18 **Wireless Services in this Docket.**

19 **a. Qwest's Evidence of Wireless Services is Not Compelling Evidence of**  
20 **Competition.**

21 In addition to relying on evidence of services by providers who rely on QPP, UNE-P, and  
22 resale, Qwest's Petition also relies on vague and irrelevant evidence of "wireless competition."  
23 In its post-hearing brief, Qwest offers the statistic that wireless subscribership (both residential  
24 and business markets) in Oregon grew more than 69% between 2000 and 2004, and that Qwest's

25 <sup>99</sup> TRACER/100, Cabe/31-32, line 21-TRACER/100, Cabe/32, line 5.

26 <sup>100</sup> TRACER/100, Cabe/32, lines 1-5.

1 business access lines decreased during the same period. Qwest does not offer any evidence  
2 linking these two statistics, nor any evidence regarding the number or extent of wireless  
3 subscriptions by businesses. Qwest also cites to evidence, in the form of copies of print and  
4 internet advertising, that numerous wireless carriers provide service packages in Oregon. Again,  
5 Qwest does not corroborate the evidence of service *offerings* with any hard evidence regarding  
6 actual business subscriberships. Qwest’s argument, in sum, is that “wireless alternatives  
7 necessarily constrain Qwest’s ability to raise prices for its switched business services \* \* \*  
8 because an increase in Qwest’s prices would likely cause at least *some business customers* to  
9 replace their wireline services with a wireless phone.”<sup>101</sup>

10       Once again, Qwest mistakenly assumes that proof of “some” competition satisfies the  
11 standard for deregulation set forth in ORS 759.030. Rather, the Commission standard for  
12 deregulation of a service requires proof of something more than “some” competition; it requires  
13 proof of competition *sufficient to constrain the exercise of market power*.<sup>102</sup> Qwest’s evidence of  
14 wireless services in Oregon is simply not evidence of “price-constraining” competition, as ORS  
15 759.030(4)(a) inherently requires. First, Qwest’s evidence only demonstrates that wireless  
16 competitors have the *possibility* of competing in the relevant market, not to what extent price and  
17 service competition now exist. Second, even Qwest’s witness, Mr. Brigham, testified that “all  
18 customers do not see wireless as a perfect or viable substitute.”<sup>103</sup> Indeed, Mr. Brigham’s  
19 testimony refers to a study finding that only 25% of Colorado business customers would consider  
20 replacing wireline services with wireless in response to a \$25 increase (approximately double) in  
21

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22 <sup>101</sup> Qwest’s Brief at 28.

23 <sup>102</sup> In UX 16, the Commission squarely rejected a petition for deregulation based on proof of “some” competition,  
24 stating that proof that there were other providers of the service proposed for deregulation, without evidence  
25 regarding the extent of the availability or cost of those services, only demonstrated that potential competitors have  
26 the *possibility* of competing and providing effective competition, not to what extent price and service competition  
now exist. *See In re: U.S. West Communications, Inc.*, Docket UX 16, Order No. 94-1608 (Oct. 28, 1994).

<sup>103</sup> Qwest/1, Brigham/66, lines 7-8.

1 the price of wireline service.<sup>104</sup> In other words, in response to a 50% increase in price, less than  
2 ¼ of business customers would *consider* replacing wireline with wireless. This statistic is hardly  
3 evidence that wireless competition has the capacity to discipline Qwest’s prices.

4 *b. Qwest’s Evidence of VoIP Services is Not Compelling Evidence of*  
5 *Competition.*

6 Qwest’s Petition also asserts that services using VoIP technology now compete with  
7 Qwest’s switched business services throughout Oregon. For some of the same reasons explained  
8 above regarding Qwest’s evidence of wireless services as competition, the Commission should  
9 not give much weight to Qwest’s generalized evidence of VoIP as a source of competition with  
10 Qwest’s business services.

11 First, Qwest did not offer any survey of customers or hard data demonstrating the extent  
12 to which VoIP services have actually penetrated the switched business market. Rather, it asserts  
13 that “numerous telecommunications providers are providing VoIP-based telecommunications  
14 services to business customers today in Oregon,” pointing only to web pages describing various  
15 VoIP offerings. Mr. Brigham testified that although there is not quantitative data regarding VoIP  
16 market shares today, the evidence showed that VoIP services are competitive and substitutable  
17 for Qwest’s switched business services.<sup>105</sup> Quite to the contrary, VoIP is likely to serve as an  
18 acceptable alternative to Qwest’s Petition services only for those end users who have sufficiently  
19 fast and reliable broadband internet connections. As a result, extensive market penetration by  
20 VoIP services is unlikely at this time.<sup>106</sup> Qwest also makes no mention of the important fact that  
21 originating VoIP calls are not subject to access charges, which substantially lowers the costs of  
22 providing long distance services to a VoIP customer. The FCC may remove this advantage,  
23

24 <sup>104</sup> Qwest/1, Brigham/63, lines 10-12

25 <sup>105</sup> Qwest/25, Brigham/40, lines 18-20.

26 <sup>106</sup> TRACER/100, Cabe/43, lines 18-26.

1 which would take away much of the competitive edge that has recently fueled growth of the  
2 VoIP market.<sup>107</sup>

3         Once again, Qwest’s evidence of VoIP service offerings only demonstrates that VoIP  
4 competitors have the *possibility* of competing in the relevant market, not to what extent price and  
5 service competition now exist. For the Commission to grant a petition for deregulation under  
6 ORS 759.030, it requires proof of something more than the possibility for competition; it  
7 requires proof of competition *sufficient to constrain the exercise of market power*. Proof of  
8 competition sufficient to constrain market power must be based on quantifiable economic data,  
9 not casual observations based on internet research. Qwest’s evidence of VoIP services in  
10 Oregon is not compelling evidence of “price-constraining” competition.

11                   **5.         *Consideration of Additional Factors Militates against Deregulation.***

12         In evaluating whether Qwest has met its burden of proof, the Commission is required to  
13 consider the four statutory factors of ORS 759.030(4),<sup>108</sup> the first and second of which—even  
14 Qwest agrees—go to the essential inquiry of “whether there is sufficient competition to constrain  
15 Qwest’s ability to raise prices for its services in the market.”<sup>109</sup> Having already addressed the  
16 questions of market power and competition above in Section IV. B. (1)-(3), we turn now to  
17 address the third and fourth factors that ORS 759.030(4) requires the Commission to consider.

18  
19  
20  
21 \_\_\_\_\_  
<sup>107</sup> TRACER/100, Cabe/44, lines 3-13.

22 <sup>108</sup> In determining whether competition is sufficient to grant a petition for deregulation under either subsection (2) or  
(3), the statute requires the Commission to consider each of the following four factors:

- 23 (a)         The extent to which services are available from alternative providers in the relevant market.  
24 (b)         The extent to which the services of alternative providers are functionally equivalent or  
substitutable at comparable rates, terms and conditions.  
25 (c)         Existing economic or regulatory barriers to entry.  
(d)         Any other factor deemed relevant by the Commission. ORS 759.030(4).

26 <sup>109</sup> Qwest/1, Brigham/38, lines 18-19.

1           a.     *There Are Significant Economic Barriers to Entry Into the Relevant*  
2                    *Market.*

3           The third statutory factor that ORS 759.030(4) requires the Commission to consider is the  
4 extent to which there are existing economic or regulatory barriers to entry in the relevant market.  
5 ORS 759.030(4). In his testimony, Dr. Cabe offers an extensive list of possible types of “barriers  
6 to entry,” including “sunk costs, scale economies, scope economies, absolute cost advantages,  
7 capital requirements, first-mover advantages, strategic behavior by the incumbent, product  
8 differentiation, long-term contracts, and network externalities.”<sup>110</sup> Bearing this list in mind, it is  
9 clear that there are significant economic barriers to entry market at issue in Qwest’s Petition.

10           First, there are significant sunk costs that must be incurred by any provider wishing to  
11 compete against Qwest’s switched business services. Essentially, if entering a market requires a  
12 firm to incur costs that will not be recoverable in the event that entry is unsuccessful, and if the  
13 success of entry is subject to some uncertainty, then a barrier to entry exists. The greater the  
14 amount of sunk costs required to enter the market, the greater the barrier to entry. Here, the  
15 nature of the sunk cost depends on how the provider plans to provide service. UNE-P and QPP  
16 providers risk significant start-up costs in the form of OSS, training, and advertising. UNE-L  
17 providers risk those same costs as well as the cost of collocation, establishing transport, and  
18 installing and configuring a switch. A full-facilities based carrier risks the significant sunk cost  
19 of all network facilities. For business services, customer-specific sunk costs are significant,  
20 because large business customers typically develop sophisticated telecommunications services  
21 that are configured to work with the service and equipment of the ILEC, so a new entrant must  
22 overcome the costs of reconfiguring the customer-owned equipment.

23           The significance of this economic barrier to entry cannot be overemphasized, and it is  
24 exacerbated by the fact that Qwest, as the incumbent, enjoys the significant advantages of

25           <sup>110</sup> TRACER/100, Cabe/24, lines 22-24.

1 incumbency that also act as a barrier to entry. There can be no doubt that in Oregon’s switched  
2 business market, Qwest is the dominant firm that “automatically” has all the advantages of  
3 incumbency that are associated with the switched business market.<sup>111</sup>

4 *b. Recent FCC Actions Are Unfavorable to CLEC Market Entry*

5 The fourth statutory factor that ORS 759.030(4) requires the Commission to consider is  
6 any other factors deemed relevant by the Commission.” ORS 759.030(4). In this docket, the  
7 Commission should consider the impact of recent actions on the services and market at issue in  
8 Qwest’s Petition.

9 The Federal Communications Commission (“FCC”) has recently taken a number of steps  
10 away from the policies put in place in August 1996 that supported the development of UNE-  
11 based competition. First, the FCC’s Triennial Review Remand Order (“TRRO Order”) held that  
12 incumbent LECs were no longer required to make unbundled network elements available to  
13 CLECs at cost.<sup>112</sup> In addition to this shift in philosophy regarding access to UNEs, the FCC’s  
14 Notice of Proposed Rulemaking indicates that the FCC is seriously considering changing the  
15 TELRIC pricing framework in way that could substantially increase UNE rates.<sup>113</sup>

16 As a result of the TRRO Order and the TELRIC NPRM, many UNE-based CLECs are  
17 making business decisions in anticipating of a regulatory much less favorable to UNE-based  
18 competition than the environment for the last 8 years or so during which the current level of  
19 competition developed.<sup>114</sup> At hearing, Dr. Cabe summarized the significance of this point to this  
20 docket:

21  
22 <sup>111</sup> Tr. p. 202, lines 8-21.

23 <sup>112</sup> *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of*  
*Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand at ¶ 2, FCC Order 04-290 (Feb. 4,  
2005).

24 <sup>113</sup> *In the Matter of the Review of the Commission’s Rates Regarding the Pricing of Unbundled Network Elements*  
*and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed  
25 Rulemaking, FCC 03-224 (September 15, 2003) (hereafter “*TELRIC NPRM*”).

26 <sup>114</sup> TRACER/100, Cabe/39, lines 1-8; Qwest/25, Brigham/13, lines 3-6.

1 ALJ Arlow: Dr. Cabe, do you believe that current CLEC  
2 behavior is influenced by their speculations or their  
3 anticipation of changes? So in other words,  
4 investments that they may make today or business  
5 decisions that they may be making today reflect  
6 their opinions of the FCC's actions?

7 Dr. Cabe: Yes, precisely; that's why it's relevant. My  
8 interpretation of [the FCC's actions] doesn't really  
9 matter; it's the interpretation of the CLECs that  
10 would have to continue investing and expanding  
11 their operations, as they did from 1996 to 2004, in  
12 order for a snapshot of today's competition to be  
13 relevant.

14 Because if we've gone through a change in  
15 CLECs' anticipation of the environment they're  
16 going to be operating in, and they now believe it to  
17 be much less favorable in terms of access to UNEs,  
18 then a snapshot of the UNE-based competition that  
19 exists today isn't really relevant. It doesn't reflect  
20 what is likely to proceed in the future.

21 For the many reasons explained above, Qwest's Petition fails to prove that price and  
22 service competition exist in the relevant market for purposes of deregulation under  
23 ORS 759.030(3). Qwest's evidence simply does not demonstrate that there is sufficient  
24 competition to constrain Qwest's ability to raise prices for its services in the relevant market.

25 **C. The Commission should not exercise its discretion to deregulate the services  
26 pursuant to ORS 759.030(2), because the public interest requires continued  
regulation of Qwest's business services.**

1 The final statutory criteria allowing the Commission to deregulate a telecommunications  
2 service in its discretion pursuant to ORS 759.030(2) is if the Commission finds that the public  
3 interest no longer requires continued regulation of the service. In TRACER's view, and as  
4 explained above, so long as Qwest retains market power that the public interest will require  
5 continued regulation. At any rate, Qwest's arguments that the public interest no longer requires  
6 continued regulation of the petition services are unpersuasive.

1 First, Qwest argues that its declining access line counts show that there is competition  
2 and that in fact Qwest does not have “significant market power.”<sup>115</sup> However, as more fully  
3 explained above, Qwest’s high market concentration creates a presumption of market power that  
4 has not been rebutted in this case. And while the fact that Qwest is losing market share to  
5 CLECs over time is certainly relevant to an analysis of market power, it certainly does not prove  
6 that Qwest does not currently retain market power with respect to the Petition services.

7 Qwest next argues that Qwest’s Petition should be granted because the public interest  
8 requires parity among providers. In other words, Qwest argues that the public interest demands  
9 that the Commission treat Qwest in the same manner as it treats all other carriers. While this  
10 “equal treatment” argument might have some surface appeal, Qwest is getting the cart before the  
11 horse. The Commission currently uses regulation to constrain Qwest’s ability to raise prices  
12 above the existing caps because it is assumed that in the absence of such regulation, as the  
13 incumbent LEC, Qwest would have market power to raise prices above competitive levels.  
14 Conversely, it is assumed that as the new entrants to the market, CLECs do not have market  
15 power and therefore do not need to be subject to price caps. Thus, parity for parity’s sake is not  
16 in the public interest. Until Qwest proves that it no longer retains market power to raise prices  
17 above competitive levels for the Petition services, Qwest’s current price cap regulation should be  
18 continued.

19 Qwest argues that its Petition should be granted because its business services have been  
20 deregulated, or found to be competitive—in nine other states. This argument is unpersuasive.

21 Qwest relies on a 2003 order from the Washington Utilities and Transportation  
22 Commission granting Qwest’s basic business exchange services “competitive classification.”<sup>116</sup>  
23 In that docket, Qwest requested competitive classification for its analog business services

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24 <sup>115</sup> Qwest’s Brief at 23-24.

25 <sup>116</sup> Order No. 17, Order Granting Competitive Classification (December 22, 2003) issued in UT-030614. Qwest/59,  
26 Official Notice (“the Washington Competitive Classification Order”).

1 throughout the state. As explained in Qwest’s Brief, the WUTC found that Qwest’s services  
2 were subject to effective competition under standards quite similar to those found in the Oregon  
3 statutes. However, Qwest errs in relying on this decision. The Washington Competitive  
4 Classification Case was decided long before the FCC removed Qwest’s obligation to provide  
5 CLECs with UNE-P, and the Commission’s decision to grant Qwest’s Petition explicitly rested  
6 in large part on the easy availability and pervasiveness of in the market of business services  
7 utilizing UNE-P.<sup>117</sup> Given that UNE-P is no longer available, and that the regulatory  
8 environment is significantly less favorable for CLECs, the Washington Competitive  
9 Classification case provides no real support for Qwest’s Petition.

10 Similarly, a number of the deregulation orders cited by Qwest were issued at a time when  
11 the regulatory environment was vastly different than the one CLECs are facing today.<sup>118</sup>  
12 Moreover, in each of these cases Qwest has requested a different degree of deregulation for  
13 different services than those listed in Qwest’s current Petition.<sup>119</sup> Thus, while the Commission  
14 may be interested in how other states have treated Qwest deregulation petitions in the past, they  
15 should be only very cautiously relied upon.

16 Qwest also argues that its Petition should be granted because legislative policy favors  
17 competition and deregulation. It is true that competition and deregulation are both favored by  
18 both state and federal policy. In fact, competition and deregulation are favored *in that order*.  
19 That is, the public interest demands that first competition should be encouraged, and then, when  
20 competition can take the place of regulation in constraining market power, deregulation can  
21 occur. However, in the absence of market power constraining competition, deregulation will not  
22 be in the public interest.

23  
24 <sup>117</sup> See Washington Competitive Classification Order, ¶ 141-143.

25 <sup>118</sup> See Orders cited in Qwest/1, Brigham/86.

26 <sup>119</sup> *Id.*

1 Qwest argues that even if the Commission is not “100 percent certain” that competition is  
2 sufficient to restrain an exercise of market power that the Commission can just “re-regulate”  
3 Qwest’s switched business services.<sup>120</sup> While the statute gives the Commission the authority to  
4 do so, without the pricing and service data, it may be impossible for the Commission to even  
5 determine that such re-regulation is required.

6 In his Direct Testimony, Dr. Cabe compares the consequences of premature deregulation  
7 of Qwest’s business services to the consequences of a failure to deregulate when in fact  
8 competition actually suffices to constrain Qwest’s market power. As explained by Dr. Cabe, if  
9 the Commission were to grant Qwest’s Petition for deregulation before competition is actually  
10 sufficient to justify deregulation, the major consequences would be the following: First, Qwest  
11 would not need to seek Commission approval for price increases, and competition would not be  
12 sufficient to prevent Qwest from profitably increasing some prices.<sup>121</sup> It would be in Qwest’s  
13 economic interests then to increase prices selectively for those customers with little or no access  
14 to competitive services.<sup>122</sup> This ability to discriminate among customers for price increases and  
15 decreases would allow Qwest to increase some prices to some customers in order to finance very  
16 aggressive price competition where it chooses to do so.<sup>123</sup>

17 Qwest would also be freed from the obligation to file special contracts or maintain tariffs  
18 or price lists.<sup>124</sup> Thus, in the event the Commission deregulates Qwest’s switched business  
19 services before competition is sufficient to discipline Qwest’s exercise of market power,  
20 deregulation will remove precisely the information necessary for the Commission to investigate  
21 unduly discriminatory price increases and anticompetitive behavior that are likely to follow.<sup>125</sup>

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23 <sup>120</sup> ORS 759.030(3)(b).

<sup>121</sup> TRACER/100, Cabe/48, lines 22-24.

<sup>122</sup> TRACER/100, Cabe/48, line 24 – TRACER/100, Cabe/48, line 1.

<sup>123</sup> TRACER/100, Cabe/48, line 20 – TRACER/100, Cabe/49, line 4.

<sup>124</sup> TRACER/100, Cabe/49, lines 4-7.

<sup>125</sup> TRACER/100, Cabe/49, line 10.

1 By contrast, if the Commission were to take a cautious approach and maintain Qwest's  
2 current form of regulation even in the presence of price constraining competition, any adverse  
3 consequences will be very minor. First, Qwest already enjoys very significant pricing flexibility,  
4 including the ability to lower prices to meet any competitive threat. However, if, as Qwest  
5 maintains, competition is continuing to grow, then when events bear out this prediction, the  
6 Commission may reconsider its decision on its own motion a new petition from Qwest. In the  
7 interim, the only regulatory burdens on Qwest will be those of filing and maintaining price lists,  
8 tariffs and special contracts.<sup>126</sup>

## 9 V. CONCLUSION

10 For all of the above reasons, TRACER respectfully requests that the Commission deny  
11 Qwest's Petition for deregulation of its switched business services in Oregon.

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25 <sup>126</sup> TRACER/100, Cabe/48, lines 6-19.