

**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**

STAFF'S REPLY BRIEF

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I. Introduction.

Qwest Corporation (“Qwest”) asks the Commission to exempt from regulation (deregulate) all of the switched business services it provides its Oregon customers. *See* Qwest’s Petition to Exempt from Regulation Qwest’s Switched Business Basic Exchange Service (“Petition”). However, Qwest failed to prove the statutory criteria for deregulation – that the services are subject to competition, that there is price or service competition for the services or that deregulation is in the public interest – are satisfied. *See* ORS 759.030(2) and (3).

The fatal flaw in Qwest’s case is the absence of persuasive evidence. Qwest asserts that “price and service competition are well established throughout Oregon, with a wide array of alternative wireline business service providers (as well as intermodal providers like wireless carriers and VoIP providers) offering functionally equivalent and substitutable switched business services at extremely competitive prices, terms and conditions.” (Qwest Br at 4.) However, Qwest does not support this assertion with persuasive evidence, relying instead on the sometimes vague assurances of its primary witness, Robert Brigham. Mr. Brigham’s assurances that competition exists in each of Qwest’s Oregon rate centers for all 4000+ services at issue in the Petition (the “Petition services”) are not sufficient to prove that this is so.

Further, Qwest failed to prove that regulation of the Petition services is no longer in the public interest. Notably, Qwest already has significant flexibility with respect to price and service. In 1999, Qwest elected regulation under ORS 759.400 *et seq.* Accordingly, Qwest is relieved of traditional rate of return regulation and has substantial price and service flexibility. The Commission does not set cost of service rates for

Qwest. Contrarily, Qwest operates under a scheme of price caps and price floors. Its ability to set prices between the statutory price floors and caps is subject only to its obligation to provide notice to the Commission within 30 days following the effective date of the price change. *See* Staff/200, Sloan/8-12.

As a general matter, Qwest has priced the Petition services at the price caps set by the Commission. Accordingly, it appears that what Qwest seeks in this docket is the ability to raise prices above the current price caps and also, to charge different prices to different customers within rates groups for the same services. *See* TRACER/100, Cabe/6 and Staff/200, Sloan/14. The public interest would not be furthered should Qwest obtain this flexibility.

Notwithstanding Qwest's failure to show that the statutory criteria for deregulation are satisfied for the Petition services, staff of the Public Utility Commission ("staff") recommends that the Commission find, based on staff's analysis, that the statutory criteria for deregulation have been met for three subsets of the services. First, staff recommends the Commission deregulate 800 and ATM statewide because the public interest no longer requires regulation. These services are offered under federal tariffs, and there is little need state regulatory oversight.

Second, staff recommends that the Commission deregulate a third subset of the Petition services, basic business services, in the Portland rate center because these services are subject to competition within that rate center.¹ Qwest's basic business service in the Portland center is a significant portion of Qwest's statewide business

¹ As explained later in the brief, staff did not find that any of the statutory criteria for deregulation are satisfied for any of the services other than basic business services within the Portland rate center and 800 and ATM.

service, comprising **CONFIDENTIAL**/ /**CONFIDENTIAL** of its business services overall.

The following is the summary of the staff conclusions on which its recommendations are based:

- Because potentially competitive rate centers can mask non-competitive rate centers, it is not appropriate to use the entire state as the relevant geographic market;
- In order to consider a set of two or more aggregated services as a relevant product market, it must be shown that the services are substitutes. Qwest did not provide such evidence;
- To establish there is price or service competition for the Petition services or that they are subject to competition, Qwest produced evidence regarding the volume of wholesale services it provides to CLECs, including provisions via UNE-P and QPP. This evidence is not probative of what services CLECs are providing to retail business customers. Further, UNE-P and QPP are only indicative of competition dependent on Qwest's discretion;
- Qwest did not prove the existence of competition for any of the specific petition services on a state-wide basis;
- Based on staff's own analysis, only basic business service potentially approaches the definition of competition articulated by staff for any of the geographic markets defined by staff;
- Using the CLEC Survey Report, Centrex, ISDN Basic Rate and Frame Relay do not show potential to be competitive at this time;
- The current constraints on Qwest's prices are the price caps put in place by the Commission in UT 125;
- Notwithstanding Qwest's assertions that it has lost market share and access lines, Qwest has not competed on price (*i.e.* reduced prices) in order to stave off these losses;
- Superficially, there may appear to be price competition for basic business and analog PBX services, but Qwest's actions, namely its failure to lower prices, suggest that price competition does not exist. For the remaining petition services, it is uncertain whether price competition exists.
- Building costs are a barrier to entry for CLECs;

- The possibility of exclusive or limited access to buildings is a barrier to entry;
- The difference in franchise fees charged to Qwest and CLECs is a barrier to entry;
- Qwest's position as the wholesale provider gives the company an enormous amount of competitive information that other firms in the market do not have.
- The public interest does not require continued state regulation of 800 and ATM because these services are offered under federal tariffs.

As discussed in Qwest's Opening Post-Hearing Brief, this case has a long procedural history. Most notably, the procedural history includes collaboration by the parties² to investigate the status of competition for the services at issue in the Petition. In early 2005, the parties agreed that a survey of questions regarding provision of business services should be issued to CLECs operating in Qwest territory. Qwest designed the survey, dividing the 4000+ services at issue in the Petition into ten "integrated service offerings":

- Basic Business Service – Analog (flat or measured)
- Basic Business Service – Digital (flat or measured)
- PBX Trunks – Analog
- PBX Trunks – Digital
- 800 Service/Outwats
- Analog Centrex Services
- Integrated Services Digital Network – Basic Rate Interface (ISDN-BRI)
- Integrated Services Digital Network – Primary Rate Interface (ISDN-PRI)
- Frame Relay
- Asynchronous Transfer Mode (ATM) Service

Following Qwest's draft of the CLEC Survey, the parties negotiated various points and issues related to the Survey, ultimately agreeing to its content. Administrative

² The current parties to this docket include Qwest, staff, the Telecommunications Ratepayers Association for Cost-based and Equitable Rates ("TRACER"), Eschelon Telecom. Inc., Advanced Telecom, Inc., XO Communications Services, Inc., Time Warner Telecom of Oregon, LLC and Integra Telecom of Oregon.

Law Judge Allan Arlow issued the CLEC Survey to 67 CLECs certified by the PUC to provide service in Oregon. He issued the CLEC Survey as a Commission Request for Information. Fifty-four of the CLECs responded and 28 provided non-zero data. The other 26 CLECs responded that they do not currently provide business services in Oregon. Thirteen CLECs did not respond to the survey at all. (Staff/100, Chriss/10.) To retain CLEC confidentiality, staff aggregated the results of the CLEC Survey and presented parties with summarized information. Staff's analysis in this case is based largely on the results of the CLEC survey.

II. Standard of Review

The relevant statute, ORS 759.030, provides that the Commission must deregulate a service if price and service competition exist (ORS 759.030(3)) and may deregulate a service if price or service competition exist, if the service is found to be subject to competition or if the public interest no longer requires regulation (ORS 759.030(2)). When examining a petition to deregulate under ORS 759.030(2) or (3), the Commission must consider the factors listed under ORS 759.030(4), which are reiterated at OAR 860-032-0025. The relevant text of ORS 759.030 is as follows:

- (2) Upon petition by an interested party and following notice and investigation, the commission may exempt in whole or in part from regulation those telecommunications services for which the commission finds that price or service competition exists, or that such services can be demonstrated by the petitioner or the commission to be subject to competition, or that the public interest no longer requires full regulation thereof. The commission may attach reasonable conditions to such exemption and may amend or revoke any such order as provided in ORS 756.568.
- (3) Upon petition by any telecommunications utility, and after notice and hearing, the commission shall exempt a telecommunications service from regulation under the following conditions:

- (a) Price and service competition exist.
 - (b) A service which is deregulated under this subsection may be regulated, after notice and hearing, if the commission determines an essential finding on which the deregulation was based no longer prevails, and reregulation is necessary to protect the public interest.
- (4) Prior to making the findings required by subsections (2) and (3) of this section, the commission shall consider:
- (a) The extent to which services are available from alternative providers in the relevant market.
 - (b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions.
 - (c) Existing economic or regulatory barriers to entry.
 - (d) Any other factors deemed relevant by the commission.

Because Qwest has petitioned the Commission to deregulate the services, Qwest bears the burden of proof in this proceeding.

III. Argument.

a. Qwest's analysis of the four factors of ORS 759.030(4) is flawed.

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

A. Qwest's definition of the relevant product market is overly broad.

In presenting its case, Qwest acknowledges the statutory factors the Commission must consider in determining whether the statutory criteria of ORS 759.030 are satisfied. First among these factors is the definition of the relevant market, which has two components – the product market and the geographic market. *See* Order No. 03-368 at 16 (UX 27; *In the Matter of Qwest Corporation Petition to Exempt from Regulation Directory Assistance and Related Services*)(Commission stating that its first task in

analyzing a request under ORS 759.030 is to determine the relevant market for purposes of considering the request and filtering the information in terms of that market.) Qwest's definition of the product market, however, is too broad.

Qwest defines the relevant product market as all switched business services in its Petition, asserting "the evidence shows that there is significant overlap between various switched business services and service packages, and customers often substitute one switched business service for another, blurring the lines between various services combinations of services and packages." (Qwest Br at 11.) Given this broad definition of the relevant product market, Qwest argues that all indicators that CLECs are providing service to business customers (or in some cases, customers in general), is evidence that all the services in the Petition are competitive, or at least subject to competition.

In other words, Qwest argues that because all of its Petition services are included in the "relevant market," it is not necessary for the Commission to identify and quantify the services different providers are providing to customers in order to measure competition for each of the services. Instead, the Commission may take evidence that other providers are providing services (such as Qwest's reports regarding wholesale provisioning to CLECs), as evidence that all the Petition services are competitive. *See* Staff/100, Chriss/13 (describing Qwest's argument).

Furthermore, Qwest argues that the relevant product market should include intermodal competition – namely competition from wireless service providers and providers of Voice over Internet Protocol (VoIP). Qwest argues that evidence that wireless and VoIP service is being provided in Oregon is evidence regarding the competitiveness of all the Petition services.

In his rebuttal testimony, Qwest witness Brigham testified that for purposes of determining the relevant market, “[t]he issue is whether the services are good enough substitutes so that they are viewed to provide a reasonable alternative for at least a subset of customers. If there are enough customers that would respond to a price increase in one service (or change in features and functionality) by migrating to the other service, the services are clearly effective substitutes.” (Qwest/25, Brigham/13.)

Mr. Brigham’s cross-examination testimony reveals that Qwest’s threshold of what constitutes “enough customers” for purposes of determining appropriate substitutes is so low as to render Qwest’s analysis useless. For example, Mr. Brigham testified that in the event ten out of one thousand customers moved to a different service in response to a significant price increase, this movement “very well could” mean that the different service is a substitute for the first service. (Tr 40.)

Qwest’s unreasonably low benchmark of what constitutes a substitute service for purposes of defining the relevant market is sufficient reason to reject Qwest’s assertions regarding the scope of the relevant product market. Meaning, if Qwest’s conclusions are based on the assumption that services are substitutable for purposes of ORS 759.030 if 1% of customers finds them to be so, then Qwest’s conclusions are suspect.

In any event, Qwest did not present evidence to show that its standard for substitutability is satisfied with respect to the Petition services. Instead, Qwest merely presented its assertions that the services are substitutable and presented evidence describing the services. That evidence is summarized as follows:

- Mr. Brigham’s testimony that “anyone involved in the telecommunications industry knows that PBX and Centrex are now, and always have been, seen as competitive substitutes by many customers, and these services have been marketed as such.” (Qwest/25, Brigham 8).

- Mr. Brigham’s testimony that “CLECs in Oregon typically offer a substantial range of exchange access services (such as flat business lines, PBX trunks, etc.), as well as associated features that business customers demand (such as call forwarding, voice messaging, etc). It is also common for CLECs to offer service packages including access lines, features, and in some instances long distance calling, at attractive rates that incorporate volume discounts based on the combined services purchased.”
- Mr. Brigham’s testimony that “[b]usiness products overlap and customers can often meet their overall need by substituting one service for another. For example, a medium-sized business with a need for several access lines may purchase analog PBX trunks, digital PBX trunks, Centrex, ISDN, PRI or basic business lines to meet its needs. While these services are not identical from a technology standpoint, customers will substitute these products for one another based on the relative price and the perceived level of benefits they will receive.” (Qwest/1, Brigham/17.)
- Mr. Brigham’s testimony that “numerous CLECs are offering a wide range of telecommunications services that may be substituted for Qwest’s basic and advanced business services,” and that “[t]hese services are comparable to Qwest services in terms of features and functionality, and are offered at competitive prices.” (Qwest/1, Brigham/40.)
- An exhibit purporting to show various switched business services and their prices offered by Qwest and ten CLECs in Qwest territory. (Qwest/9, Brigham 1.)
- Mr. Brigham’s testimony that “[b]usiness customers in Oregon do not view the market in terms of specific services; they view the market in terms of what solutions can meet their telecommunications needs.”
- Mr. Brigham’s testimony regarding the following example: “a business with 200 employees in an office building would seek a service solution that would meet its needs for access to the network, and for various features and functionalities. The customer could meet very similar needs by purchasing an analog PBX (with analog PBX trunks), a digital PBX (with DSS trunks or ISDN-PRI circuits), by ordering a central-office based solution such as Centrex Prime, or VoIP-based PBX service. These services are certainly not different markets from the business customer’s perspective, but they represent effective substitutes for each other.” (Qwest/25, Brigham/11.)
- Print-outs from Qwest’s website describing ISDN Single Line Service, PBX Analog Trunks, Centrex Plus, Digital Switched Service, ISDN Primary Rate Service and Centrex Prime (Qwest/27-28, 31-33/Brigham/1.)

- Print-out from XO’s website describing Centrex and XOptions Flex. (Qwest/29, 34/Brigham/1; Qwest 36/Brigham, Brigham/1-6.)
- Print-out from MCI’s website describing ATM and Frame Relay, Virtual Private Networks and MCI Advantage. (Qwest/34, Brigham/1-4).

Qwest presented similar testimony to establish that providers of wireless service or VoIP offered services that are substitutable for the Petition services. The evidence Qwest presented to show that wireless service and VoIP is substitutable for the Petition services is as follows:

- Mr. Brigham’s testimony that the number of wireless subscribers in Oregon increased from 1, 201,207 in December 2000 to 2,029,224 in December 2004 and the number of total ILEC wireless decreased almost 20% in this same time period. (Qwest/1, Brigham/60.)
- Mr. Brigham’s testimony that wireless service does represent an increasingly meaningful competitive alternative for single-line or multi-line business customers and that substitution of wireless service is starting to “gain traction” in the small business market. (Qwest/1, Brigham/62.)
- Mr. Brigham’s testimony discussing a Colorado Public Utilities Commission proceeding in which some surveyed business customers stated they would consider replacing their business telephone service with wireless phone service. (Qwest/1, Brigham/63.)
- Mr. Brigham’s testimony that “[w]ireless plans are now priced very competitively with Qwest’s flat business local exchange and package rates in Oregon[,]” and an exhibit comparing a sampling of plans offered by various wireless providers with Qwest rates in Portland, Eugene, Salem, Corvallis and Bend. (Qwest/1, Brigham/65 and Qwest/11.)
- Mr. Brigham’s testimony that telephone service utilizing VoIP technology is now available to business customers in Oregon and functions in a manner similar to standard circuit-switched telephony. (Qwest/1, Brigham/66-67.)
- Mr. Brigham’s testimony that VoIP service is being marketed aggressively on a national basis and in Oregon and is priced competitively. (Qwest/1, Brigham/70-71.)
- Mr. Brigham’s testimony describing the VoIP offerings on the websites of various providers or discussed in news releases. (Qwest/1, Brigham 72-78.)

- Print-outs from websites of several companies offering VoIP or wireless service. (Qwest/12-20.)

The testimony described above is not sufficient to establish the Petition services are in fact substitutable for one another or that wireless service and VoIP are substitutes for each of the Petition services. Staff agrees that wireless services and VoIP may be substitutes for some of the services at issue. However, Qwest's inclusion of wireless service and VoIP fails in this analysis because Qwest failed to provide sufficient evidence to show for which of the services wireless and VoIP may be substitutes.

B. Qwest's definition of the relevant geographic market is unclear.

In his direct testimony, Qwest witness Brigham testified that "the Commission should define the relevant geographical market for retail business services to include all Oregon wire centers that Qwest serves[,]” and that “[t]he relevant market for switched business services should be defined to include all of Qwest's Oregon wire centers, and should not be defined by smaller geographic areas.” (Qwest/1, Brigham/15-16.)

In its brief, however, Qwest states that its case is not predicated on a single integrated statewide geographic market and that the Commission may define the market in whatever manner the Commission chooses.³ By failing to define the relevant market for purposes of its case, Qwest places the burden on all the other parties to disprove that competition exists in any conceivable market. This shifting of the burden is inappropriate.

³ Qwest's current position on the appropriate geographic market are as follows: "It is Qwest's position that the relevant geographic market can be defined in whatever manner the Commission, based on its judgment believes is the most appropriate under the circumstances in this proceeding. * * * Having said that, however, Qwest recognizes that the parties, and particularly TRACER, have requested that Qwest set forth in its brief a more specific relevant geographic market proposal so that they could analyze and comment on such a proposal. * * * Accordingly, although Qwest believes the Commission can analyze the relevant geographic market issue at any geographic level it deems appropriate, Qwest would not object to having the relevant geographic market analyzed at the rate center level." (Qwest Br at 17.)

In any event, to the extent that Qwest has left open the possibility that the entire state is the relevant market, staff will address the merit of such a definition. In fact, using the entire state as the relevant market potentially overstates the amount of competition taking place in Oregon. Large and potentially more competitive areas such as the Portland area can mask smaller and potentially less competitive areas. Qwest's CLEC Market Share Analysis provides an example of how one market can mask another.

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Further, the relevant geographic market must also apply to the location of customers. Meaning, a business customer located in Westport would likely view the availability of alternatives in Portland as irrelevant. The business should not be required to relocate its business to the Portland area for purposes of obtaining choices in telecommunications offerings. The definition of the market should also take into account the access to alternative providers by business location. Qwest's original definition of the

geographic market assumes that the availability of providers is uniform through the state. Such an assumption is unsupported.

The risk in using an overly broad market for purposes of the Commission's analysis is significant. As noted above, if the Commission were to use the state of Oregon as the relevant geographic market, a potentially more competitive area could mask the lack of competition in another area. The same is true with respect to the product market – a potentially more competitive service can mask a less competitive service.

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Accordingly, it is not appropriate to conclude that all the CLEC lines serving business customers are indicative of competition for all the Petition services.

As discussed below in the presentation of staff's recommendation, the Commission's analysis of the relevant market must be more disciplined. In absence of persuasive evidence showing that one Petition service is substitutable for another, the Commission should not determine the relevant market for the Petition services assuming they are all substitutes for one another. Rather, the Commission should determine the relevant market for the subsets of services categorized at the integrated service offering

level. Further, in absence of evidence showing that competition is uniform across the state, the Commission should divide the state into different geographic markets to better capture the diversity in competition across the state.

The Commission discussed how it would determine the relevant market in a recent decision addressing a request by Verizon Northwest, Inc. to price list IntraLATA toll, operator and directory services. (Order No. 05-1241 at 6.) In that case, Docket No. UD 13, the Commission defined the “relevant market,” for purposes of ORS 759.030(4)(a) as all the services the customers could use, rather than Verizon’s operator and directory services, to readily access phone numbers. In doing so, the Commission rejected a previous Commission analysis in which it had concluded the alternative service had to be “equivalent” in order to be included in the “relevant market.” Instead, the Commission concluded that the equivalency of the alternative services would be considered under ORS 759.030(4)(b).

Staff’s analysis of the infirmities in Qwest’s definition of the relevant product market is not inconsistent with the Commission’s UD 13 order. Qwest has failed to show that customers consider the services at issue to be substitutes for one another.

In the event the Commission concludes that dividing the Petition services into integrated service offering categories for purposes of determining the relevant market for the services is too narrow, the outcome of the Commission’s analysis would be no different. Even assuming that all the Petition services are in the same relevant market, there is no evidence showing that the Petition services are “functionally equivalent or substitutable at comparable rates, terms and conditions.” Accordingly, Qwest’s analysis would fail when the Commission considers ORS 759.030(4)(b).

A similar conclusion is reached with respect to the geographic market. Even assuming for purposes of analyzing Qwest's evidence that the relevant geographic market is actually each individual rate or wire center, Qwest's evidence is not sufficient to show that the business services are subject to competition or competitive in any of the rate or wire centers.

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

Even assuming the relevant market for purposes of ORS 759.030(4)(a) is as broad as Qwest suggests, Qwest's broad-brush analysis is still not persuasive because there is insufficient evidence showing the Petition services are "functionally equivalent" to each other or substitutable in Oregon at "comparable rates, terms and conditions." In his direct testimony, Qwest witness Brigham testified that to determine whether a service is "functionally equivalent or substitutable" for purposes of analysis of ORS 759.030(4)(b), "the key question is whether the competitive service represents a good enough substitute that it has the effect of constraining Qwest's ability to raise prices for its services." (Qwest/1, Brigham/3-4.)

Ironically, Qwest presented no evidence to demonstrate that this standard, or any standard, for equivalency has been met. Contrarily, Qwest merely presented Mr. Brigham's assertions that the services are substitutable. Qwest's evidence regarding the functional equivalence of the Petition services is not persuasive for the reasons stated above. Accordingly, even if the Commission concludes the relevant market should include all Petition services, it can draw no conclusions from Qwest's evidence as to the

provision of functionally equivalent competitive services, or whether competitors are offering services at comparable rates and terms and under comparable conditions.

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

Qwest's evidence on this factor is simple. Qwest asserts that the 1996 Telecommunications Act ("the Act") eliminated any regulatory or legal barriers to entry and that the Act coupled with subsequent federal and state orders, eliminated economic barriers. *See* Qwest Brief at 32. Qwest's testimony is strongly refuted by the testimony of Telecommunications Ratepayer Association for Cost-based and Equitable Rates ("TRACER"), Eschelon Inc./Advanced Telecom, Inc., ("Eschelon"), Integra Telecom of Oregon ("Integra"), XO Communication Services, Inc. ("XO"), Time Warner Telecom of Oregon LLC ("Time Warner") and staff.

In testimony on behalf of Eschelon, Douglas Denney notes that the Federal Communications Commission (FCC) recognizes the following barriers to entry in the local telecommunications market: scale economies, sunk costs, firm-mover advantages, absolute cost advantages and barriers within control of the incumbent LEC such as operational or technical barriers, and testified that all were real barriers faced by CLECs. (Eschelon, Inc./Advanced Telecom, Inc./1, Denney/27-28.) Dr. Cabe presented similar testimony on behalf of TRACER. Dr. Cabe testified that sunk costs that a market entrant must incur, whether they are costs to build facilities, collocate or train personnel, are a barrier to entry. He also testified that access to multi-tenanted building can also be barrier to entry for CLECs in Oregon. (TRACER/100, Cabe/26-27.)

Similarly, Rex Knowles, who testified on behalf of Integra, XO and Time Warner, also testified regarding barriers to entry in the form of economic constraints precluding

CLECs from building their own facilities and building access restrictions that constrain CLECs ability to connect customer locations to their networks. (XO/1, Knowles/3-4.)

Staff's testimony echoed that of the CLECs and Tracer, identifying three barriers to entry: 1) the cost of building facilities, 2) the possibility of exclusive or limited access to buildings; and 3) potential difference in franchise fees charged by Oregon cities to Qwest and to CLECs. (Staff/100, Chriss/51-53.)

In sum, whether it was the intent of congress to eliminate barriers to entry by passing the Telecommunications Act of 1996, the testimony of the CLECs, staff and TRACER shows barriers still exist. This conclusion is bolstered by testimony of Douglas Denney regarding the market shares of CLECs and ILECs nationwide:

Qwest claims that the 1996 Telecommunications Act removes all barriers to entry and thus opened local markets to competition. If these markets were truly open we would have expected to see competitors make much greater gains in the market than we currently see. One useful exercise is to compare the levels of competition in the local markets with those witnessed in the long distance market after the breakup of AT&T. * * * The long distance competitor market share was above 40 percent nine years after the break up of AT&T, while CLEC market is only 16 percent nine years after the 1996 Telecommunications Act. This is a clear indication that local markets are not fully open to competition. With a large and diverse customer base, there is no other reason that CLEC market shares are as low as they are nine years after the Telecommunications Act. (Eschelon Telecom, Inc./1, Denney/8-9.)

4. Factor 4: Any other factors deemed relevant by Commission.

ORS 759.030(4)(d) allows the Commission, in its analysis of a petition to deregulate under ORS 759.030, to consider any factor the Commission deems relevant. Qwest urges the Commission to consider the following as relevant factors (1) the decline in Qwest's access lines; (2) Qwest's assertion that it does not have significant market power; (3) whether there is parity among providers in Oregon; (4) other state's actions

with respect to Qwest's requests to deregulate business services; (5) legislative policy; and (6) the Commission's authority to re-regulate if necessary. (Qwest Br at 45-53.)

Contrary to Qwest's assertion, none of these factors weigh in favor of deregulation.

A. Declining access lines.

Qwest's assertions regarding declining access lines are not persuasive because it is not clear whether customers are departing Qwest for other companies, whether they are simply switching to other services offered by Qwest or whether their departure is due to economic reasons unrelated to telecommunication service. Without information as to why Qwest's access lines have declined, the simple fact that they have declined is not probative.

B. Market power.

Qwest denies the assertions of TRACER and Eschelon that Qwest has market power, stating that "Qwest clearly does not have market power such that it can raise prices." (Qwest Br 46.) Qwest's assertion is belied by the prices of its business services. As discussed below, with one exception, Qwest prices the Petition services at the price caps set by the Commission. Qwest's pricing of its services does not appear to be constrained by the market and Qwest does in fact, appear to have sufficient market power to raise prices.

C. Decisions of other states are not relevant.

Qwest asserts that deregulation orders from other states are persuasive evidence that the public interest no longer requires regulation of Qwest's switched business services in Oregon. (Qwest Br at 50.) The Commission has previously rejected a similar argument. In Docket No. 28, Qwest relied on decisions of other states for its argument

that the Commission should deregulate Operator Service Charges. The Commission flatly refused to consider decision of other jurisdictions, stating:

We make decisions based on the record in each case before us. What other states have done with respect to OS does not influence our decision on this record. (Order No. 03-609 at 16.)

The Commission should reach the same conclusion here. Decisions in other jurisdictions are based on the particular criteria for deregulation and status of competition within those jurisdictions. Whether the Commissions in Idaho or Washington concluded that the particular facts in the jurisdiction warranted deregulation in light of these states' criteria for deregulation has no bearing on whether the standards in Oregon have been satisfied and are not probative of whether the public interest is in favor of deregulation. Furthermore, even if decisions in other jurisdictions could be probative, they are not in this case in absence of any evidence establishing that the law and facts underlying the decisions are comparable to the law and facts in Oregon.

In fact, review of the order of the Washington State Utilities and Transportation Commission submitted by Qwest reveals that Qwest's reliance on it is misplaced. Most notably, the WUTC issued the order in December of 2003 and relied heavily on the availability of UNE-P to CLECs. Since the WUTC issued its order, the Federal Communications Commission (FCC) has issued its Triennial Review Remand Order ("TRRO") eliminating the obligation of ILECs to provide UNE-P. Because the circumstances are different in 2006 than they were in 2003, the ruling of the WUTC offers this Commission little guidance.

D. Qwest's arguments regarding parity should be disregarded.

Qwest is not situated similarly to its competitors. It is an incumbent LEC. To the extent the Commission deregulates the services at issue in this petition, it should do so on a showing that Qwest's competitors are effectively competing with Qwest, and should not grant the request to ensure Qwest has the same advantages in the market that other competitors may have because of their status as CLECs.

E. Legislative policy does not encourage deregulation when criteria are not satisfied.

The Commission's role under ORS 759.030 is clear – it is to test requests for deregulation against the criteria for deregulation in the statute. The Commission has no authority to deregulate if the criteria are not met. Qwest has failed to establish the criteria for deregulation are met. Accordingly, whether the legislature's policy is to foster competition in the telecommunications industry is not relevant to the Commission's examination of Qwest's case.

F. The fact the Commission can re-regulate does not address potential harm.

As noted by Eschelon and staff, the Commission's primary concern should be the impact of granting Qwest's request for deregulation on retail customers. As TRACER witness Dr. Cabe testified, removing Qwest's remaining regulatory requirements prematurely may allow an exercise of market power that causes substantial harm to customers and also harms development of competition. (TRACER/100, Cabe/49.) As also noted by Dr. Cabe, this Commission must analyze this case in accord with its broad responsibility to protect customers, and the public generally from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and

reasonable rates. *See* TRACER/100, Cabe 49, *citing* ORS 756.040. Contrary to Qwest's assertion, the Commission's ability to re-regulate the Petition services is necessary cannot address all the potential harm from premature deregulation of the services.

b. Qwest failed to prove that there is service or price competition for the Petition services or that the services are subject to competition.

1. Qwest did not establish service competition.

In its brief, Qwest asserts it has shown there is service competition for its switched business services in Oregon by showing 1) the large number of alternative providers currently operating in Oregon; 2) that these providers offer comparable, functionally equivalent or substitutable services at comparable rates, terms and conditions; 3) Qwest's declining market share; and 4) Qwest's declining number of access lines. Qwest Br at 36-42. Qwest is mistaken.

First, Qwest's assertions that there are a large number of alternative providers offering comparable, functionally equivalent or substitutable services is based on information that is not probative and in some instances unreliable. Qwest's assertions regarding CLECs provision of business services are extrapolated from Qwest's wholesale line counts of resale, QPP, UNE-P and UNE-L provisions. However, because Qwest's wholesale line counts do not reveal the nature of the services being provided by CLECs to business customers, they are not probative of the level of competition for any particular service.

Furthermore, Qwest's evidence regarding its wholesale provisioning is not necessarily reliable. First, testimony at the hearing established that a number of Qwest's UNE-L lines are used by CLECs to provide service to residential customers. Second,

Qwest's representations regarding the number of CLECs offering business services in Qwest territory appear to be wrong.

Qwest asserts that there "at least 50 'active' wireline CLECs (including 48 CLECs purchasing wholesale services from Qwest) who compete against Qwest in Oregon" and that "offer retail switched business services that compete directly against Qwest's business services in Oregon." (Qwest Brief at 18.) However, the CLEC Survey reflects that of the 50 CLECs Qwest listed as competing with Qwest, eleven responded that they do not provide retail business services in Oregon. (Staff/100, Chriss/35.) In other words, Qwest's assertions regarding CLECs' retail sales to business customers is based on evidence showing the quantity of wholesale services it provides to 48 CLECs and Qwest's assertion that these CLECs in turn offer competitive retail services to customers. However, it must be concluded from the results of the CLEC Survey that some of the CLECs that purchase wholesale services from Qwest do not provide any business services. In light of this fact, Qwest's reliance on its wholesale numbers to show the level of business competition at the retail level is misplaced.

Moreover, some of the wholesale provisioning that is relied on by Qwest should be discounted because it is at Qwest's discretion. More specifically, the Commission should not consider CLEC business services provisioned via UNE-P and QPP. (Staff/100, Chriss/31-32.) As explained by Eschelon witness Douglas Denney:

[I]t is important to keep in mind that for the purposes of deregulating Qwest's switched business services, the question is whether competition is sufficient to discipline Qwest's competitive behavior in the absence of regulation. * * *

However, when Qwest presents data regarding CLEC lines and market share, it ignores this important caveat and counts lines being utilized by CLECs whether or not they have the ability to place

competitive pressures upon Qwest. The fact is that CLEC customers served via resale, UNE-P, or QPP have little or no ability to serve as the competitive discipline necessary to replace regulation. Resale, UNE-P and QPP lines lack this competitive pressure because Qwest has total control over both their availability and their price to CLECs. As a result, when investigating competition in Oregon, only those lines that have the ability to “regulate” Qwest’s behavior should be considered in an analysis of competition. Therefore, only lines purchased via unbundled loops or lines fully provisioned by the CLEC should be considered in this type of analysis of competition. (Eschelon Telecom, Inc./1, Denney/14-15.)

Staff presented testimony similar to Mr. Denney’s, defining a competitive industry as one that has at least a few firms vigorously competing *and* that requires no intervention by the OPUC or federal regulators to improve its performance. As long as Qwest has the ability to curtail the availability of QPP (and UNE-P), retail services provided via QPP and UNE-P do not reflect real competition. (Staff/100, Chriss/32.)

Furthermore, even taking at face value Qwest’s evidence regarding its wholesale sales to CLECs; it is still not probative of the level of competition for retail services. This is because it is not possible to discern from Qwest’s evidence what CLECs are providing what services. Without this information, the Commission cannot make an informed decision regarding the level of competition for any of the business services.

In summary, Qwest failed to provide persuasive evidence showing that the relevant product market for analyzing whether there is price or service competition for the Petition services, or whether they are subject to competition, is all the Petition services grouped together. Accordingly, the Commission should not conclude, as Qwest urges, that any evidence showing that CLECs are providing service to business customers in any part of Qwest territory is an indicator that *all* the petition services are competitive.

Furthermore, Qwest's evidence regarding CLEC activity in Oregon is not probative of the level of competition for Petition services because it is impossible to tell from Qwest's evidence the level of competition for the individual services. Because these infirmities in Qwest's case exist no matter how the geographic market is defined, the Commission should conclude that Qwest failed to establish service competition for any of the Petition services or that they are subject to competition.

2. Qwest did not establish price competition.

In Docket Nos. UX 27 and UX 28, the Commission examined the record for price constraining competition in order to determine whether price competition existed for the services at issue in those dockets. In absence of such a showing, the Commission concluded the petitioners had failed to show price competition. Here, Qwest did not present evidence to show that its business service pricing is constrained by competitors. Contrarily, Qwest merely offered evidence showing the prices at which competitors were marketing their services in Oregon or in some cases, nationally. It did not, however, offer evidence that the actions of its competitors impacted the prices Qwest charged for its services.

Qwest asserts that it has lost market share and access lines to competition. However, the evidence in the record reflects that Qwest has not reduced its prices in order to stave off these losses. Instead, Qwest's prices remain at the price cap level for the services set by the Commission in UT 125. The Commission should conclude that in the absence of any evidence showing that Qwest's pricing of the business services has been constrained by competition, Qwest did not show price competition.⁴

⁴ Qwest appears to agree that the Commission should focus on whether there is sufficient competition to constrain Qwest's ability to raise prices for its services.

For the reasons stated above, the Commission should conclude that Qwest did not establish that the criteria of ORS 759.030(2) or (3) are satisfied and should deny Qwest's request to deregulate all the Petition services statewide. However, as explained below, staff recommends, based on its own analysis, that the Commission grant Qwest's petition in part, and deregulate some of the services at issue in Qwest's petition.

IV. Staff's analysis and recommendation.

For purposes of its analysis of the relevant market under ORS 759.030(4)(a), staff broke the state down into smaller less-aggregated geographic markets centered around population centers and physically separate areas of the state. (Staff/100, Chriss/26.) The markets identified by staff match with the diversity in the level of competition in markets for business services around the state. (Staff/100, Chriss 26.)

Second, staff did not assume that all the petition services are in the same relevant product market. Contrarily, in the absence of persuasive evidence that the services are substitutable, staff analyzed each petition service individually. This disciplined approach is supported by testimony of TRACER witness, Dr. Cabe, who testified:

Dr. Cabe: * * * But I have to interject – I have to interject that the way one does an analysis of relevant market is not by coming up with very broad-brush strokes to talk about substitution relationships between all kinds of possible products and then concluding that well, since they're all substitutable to some degree, they all belong in the relevant market.

The way you define a relevant market is by starting with a single product and determining what has to be added to that single product in order to come up with a market that's sufficiently large that it makes sense from an analytical perspective.

And in the context of the statute here, you have to start with a service. The Commission – or the statute provides for petitions for services. And when a petition for a service comes in, the Commission is

required to analyze that service and come up with a product market, a geographic market, for that service.

And the relevant market may include many other services, but you have to start from the individual service.

And if you have many services in a single petition, you do it individually for the different services. And you may come up with a separate relevant market for each service. Those relevant markets may overlap, and they could conceivably all be the same thing.

But as a general rule, what you have to do is start from a service, not talk about a bunch possibilities and then mush them together. (Tr 191-92.)

Staff's analysis is not inconsistent with the Commission's ruling in UD 13. In that case, the Commission analyzed whether Verizon's IntraLATA toll, operator and directory services should be price listed. (Order No. 05-1241 at 6.) The Commission defined the "relevant market," for purposes of its examination under ORS 759.030(4)(a) as all the services the customers could use, rather than Verizon's operator and directory services, to readily access phone numbers. In doing so, the Commission rejected a previous Commission analysis in which it had concluded the alternative service had to be "equivalent" in order to be included in the "relevant market." Instead, the Commission concluded that the equivalency of the alternative services would be considered under ORS 759.030(4)(b). (Order No. 05-1241 at 7-8.)

Staff's testimony reflects that staff did not assume that alternative services had to be equivalent. Rather, staff assumed the alternative services had to be reasonable substitutes. In other words, staff concluded that services includable in the relevant market had to perform essentially the same purpose or function for the customer. This is consistent with the Commission's ruling in UD 13, in which it concluded that the relevant market for IntraLATA toll, operator and directory services had to be services the

customer could use to “readily access phone numbers,” or in other words, perform the same function as the services at issue.

Staff’s conclusions regarding the make-up of the relevant product market for each of the petition services stem from the division of services adopted by Qwest for purposes of the Commission bench request in this case. Prior to testimony in this docket, the parties collaborated on the bench request (“the CLEC Survey”) sent to CLECs operating in Qwest service territory and designed to elicit information from CLECs regarding their provision of business services like those listed in Qwest’s petition. Qwest drafted the survey and divided the 4000+ services into ten integrated service offerings. In preparing its case, Staff analyzed the 4000+ services at the highly integrated level Qwest had proposed, and the parties adopted, for the CLEC survey.

- Basic business service – Analog (flat or measured)
- Basic business service – Digital (flat or measured)
- PBX Trunks -- Analog
- PBX Trunks – Digital
- 800 Service/Outwats
- Analog Centrex Services
- Integrated Services Digital Network – Basic Rate Interface (ISDN-BRI)
- Integrated Services Digital Network – Primary Rate Interface (ISDN-PRI)

In the event the Commission concludes that staff’s definitions of the relevant product market for each of the petition services are too narrow, this conclusion should have no affect on the weight accorded staff’s analysis. Even assuming the relevant

product markets are broader than staff assumed for each service, there is no persuasive evidence in the record showing that alternative services in the relevant markets are functionally equivalent services at comparable rates, terms and conditions. Under ORS 759.030(4)(b), the Commission must consider “the extent to which services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions[,]” in its determination of whether services are competitive or subject to competition.

a. The data does not support a finding that there is service competition for any of the Petition services.

As discussed above, Qwest’s wholesale line counts of its resale, QPP, UNE-P and UNE-L provisions are not probative of whether there is competition for the services at issue in the Petition because it is impossible to discern from these line counts what services are being provided by these provisions. (*See* Staff/100, Chris/33.) However, information obtained in the CLEC Survey, which provides specific information about the actual services CLECs are providing to business customers in Qwest territory, is probative of the level of competition for each service.

The results of the CLEC Survey reflect that none of the Petition services satisfy staff’s definition of competition, which is that competition exists in an industry when there are at least a few firms vigorously competing with each other AND the industry requires no intervention by the OPUC or federal regulators to improve its performance. (Staff/100, Chriss/33.)

When all provisions are considered, including QPP and UNE-P, there is potential for competition for some of the services in multiple areas of the state. (Staff/100, Chriss/37-42.) For example, the Survey reflects that 24 of the CLECs that responded to

the Survey provide basic business service in one or more rate center. (Staff/100, Chriss/37.) However, the picture changes when QPP is removed from the analysis. (Staff/100, Chriss 37-38.) Without competition provided by QPP, the number of CLECs providing business services decreases to 12. (Staff/100, Chriss/38.)

As discussed above, the Commission should not include competition via QPP in its analysis of the state of competition. This is because it is within Qwest's discretion whether to offer competitors QPP. Qwest can unilaterally terminate the competition by declining to make QPP available. When only the competition that it is not at Qwest's discretion is considered, along with the evidence regarding barriers to entry that was previously discussed, it must be concluded that there has been no showing of service competition for any of the Petition services.

In addition to examining the number of lines provisioned by competing CLECs, staff utilized the CR4 and Hefindahl-Hirschman Index (HHI) to analyze the potential competitiveness of a rate center. Although neither is a perfect indicator of the existence of market power, a high value for either can be indicative of the potential for the exercise of market power.

The CR4 is the proportion of the market taken up by the four largest firms in the market. The CR4 does not take into account the number of firms in a market, or the relative sizes of the top four firms. *See* Staff/102, Chriss/1. In its analysis of the CLEC survey results, Staff found that for all services provided via all provisions, no rate center for any service had a CR4 lower than 90 percent. This indicates that rate centers that may appear competitive could be dominated by four or fewer firms, though the CR4 does not provide a way to discern if that is indeed the case.

The HHI, unlike the CR4, takes into account both the number of firms in a market and the relative sizes of all of the firms. The lower the HHI value, the more potentially competitive a market is. *See* Staff/102, Chriss/1. The United States Department of Justice (US DOJ) Horizontal Merger Guidelines utilize the HHI in the analysis of mergers. The standards used by the US DOJ are as follows:

1. Post-Merger HHI Below 1000. Markets in this range are unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
2. Post-Merger HHI Between 1000 and 1800. Markets in this range are moderately concentrated. Mergers producing an increase in the HHI of less than 100 points in moderately concentrated markets post-merger are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns depending on the factors set forth in Sections 2-5 of the Guidelines.
3. Post-Merger HHI Above 1800. Markets in this region are highly concentrated. Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns, depending on the factors set forth in Sections 2-5 of the Guidelines. Where the post-merger HHI exceeds 1800, it will be presumed that

mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. (DOJ HMG Section 1.51)

In its analysis of the CLEC survey results, Staff found that no rate center had a HHI value below 3,250 for any service, and that many HHI values for the services were above 5,000. This finding shows that references to competition contain a certain amount of relativism; the markets for each service, regardless of product or geography, would be considered highly concentrated under a DOJ analysis.

Below are several tables that show the results of the CLEC Survey with respect to competition for the Petition Services. The first is a table showing the level of competition for basic business service. The table shows the number of unique CLECs providing the service, Qwest's percentage of Market, the CR4 and the HHI.

Although staff does not conclude that the information in the table shows there is service competition for basic business service under the standard previously discussed, staff does conclude that basic business service is subject to competition in the Portland rate center. Staff concludes a service is "subject to competition" if there is active competition or the threat of competitive entry sufficient to provide customers protection against the exercise of market power." (Staff/100, Chriss/60.)

Basic Business Service

Table 2. Basic Business Services: Total (UNE-L and Facilities-Based Only)				
Rate Center(s)	# of Unique CLECS	Qwest's % of Market	CR4	HHI
	(1)	(4)	(5)	(6)
Portland: Total	8	60.6%	98.6%	4,749
Balance of Region 4	4	86.8%	100.0%	7,654
Clackamas	7	88.4%	99.1%	7,905
Medford	4	90.5%	99.9%	8,268
Balance of State	4	93.8%	99.9%	8,815
Eugene: Total	4	95.6%	100.0%	9,159
Balance of Region 2	5	97.9%	100.0%	9,589
Salem: Total	4	99.3%	100.0%	9,853
Totals	12[†]	78.5%	96.7%	6,384

Region 2: Albany, Corvallis, Dallas, Newport, Siletz, Toledo, Woodburn
 Region 4: Ashland, Central Point, Gold Hill, Grants Pass, Jacksonville, Jefferson, Klamath Falls, Phoenix, Rogue River
 Balance of State: Astoria, Cannon Beach, Seaside, Warrenton, Westport, North Plains, Rainier, Athena, Baker/Sumpter, Hermiston, Milton-Freewater, Pendleton, Stanfield, Umatilla, Bend, Black Butte, Culver, Lapine, Madras, Prineville, Redmond, Sisters, Blue River, Cottage Grove, Falls City, Florence, Junction City/Harrisburg, Leaburg, Lowell, Mapleton, Marcola, Oakland, Oakridge, Roseburg, St. Helens, Veneta
[†] There are 12 unique CLECs providing basic business service via UNE-L and facilities based provisions in Oregon

Staff’s primary considerations were the number of unique CLECs in each rate center and Qwest’s market share. The Portland market has eight CLECs providing basic business service via UNE-L or facilities-based provision. These eight CLECs have 39% of the market for services in Portland. Staff believes this competition is sufficient to protect customers against exercise of market power if the basic business service is deregulated. Further, because deregulation of the services will be under ORS 759.030(2), the Commission can impose conditions to further protect customers from the exercise of market power.

The rate center with the next highest number of CLECS, Clackamas, has seven CLECs. However, Qwest’s market share is very high at 88.4 percent. Staff did not

consider the Clackamas rate center sufficiently competitive to meet the statutory criteria for deregulation. The circumstances of the remaining CLECs and markets are even less favorable with respect to competition for basic business services than the Clackamas rate center and staff's conclusion with respect to these market is the same as for the Clackamas rate center – the evidence does not show that basic business service is subject to competition.

The addition of special access lines to this analysis does not change staff's recommendations. For the entire state, Qwest's market share drops from 78.5 percent to 77 percent.

Finally, as noted above, staff considered the CR4 and HHI values. The HHI value reflects that all the markets, including Portland rate center, are highly concentrated. While this information alone does not indicate the level of competition for the Petition services, it does support staff's conclusions that there is not service competition for any of the services.

Analog PBX

Staff determined through its analysis of the CLEC Survey responses for Analog PBX that the service is not competitive or subject to competition in any rate centers. When UNE-L and facilities-based provisions are considered, only three responding CLECs provide Analog PBX service and only provide the service in two rate centers. (Staff/103, Chriss/8.) When all provisions are considered, the Portland rate center has four CLECs, but those four CLECs only have one percent of the market. (Staff/103, Chriss/7.)

Table 3. Analog PBX (UNE-L and Facilities-Based Only)	
Rate Center	# of Unique CLECs
	(1)
Albany	0
Ashland	0
Astoria	0
Athena	0
Baker/Sumpter	0
Bend	0
Blue River	0
Cannon Beach	0
Central Point	0
Clackamas	0
Corvallis	0
Cottage Grove	0
Culver	0
Dallas	0
Eugene: Total	0
Florence	0
Grants Pass	0
Hermiston	1
Jacksonville	0
Junction City/Harrisburg	0
Klamath Falls	0
Lowell	0
Madras	0
Medford	0
Milton-Freewater	0
Newport	0
Oakland	0
Oakridge	0
Pendleton	0
Phoenix	0
Portland: Total	2
Prineville	0
Rainier	0
Redmond	0
Rogue River	0
Roseburg	0
Salem: Total	0
Seaside	0
Siletz	0
Sisters	0
St. Helens	0
Toledo	0
Umatilla	0
Warrenton	0
Westport	0
Woodburn	0
Totals	3⁺

Digital PBX

Staff determined through its analysis of the CLEC survey responses for Digital PBX that the service is not competitive and is not appropriate for deregulation. Only four CLECs offer Digital PBX via UNE-L and facilities-based provisions statewide. Qwest's market share for the entire state is 85.4 percent. (Staff/103, Chriss/11.)

Rate Center(s)	# of Unique CLECs	Qwest % of Market	CR4	HHI
	(1)	(2)	(3)	(4)
Oregon (Entire State)	4	85.4%	99.9%	7,386

Importantly, Table 4 does not suggest that four CLECs are providing Digital PBX service in every rate center in Oregon. Because Staff did not report data for less than 4 aggregated CLECs, the information had to be aggregated on a statewide basis to sufficiently mask individual CLEC information.

ISDN Primary

Staff determined through its analysis of the CLEC survey responses for ISDN Primary that this service is also not competitive and is not appropriate for deregulation. Only five CLECs offer Digital PBX via UNE-L and facilities-based provisions statewide. Qwest's market share for the entire state is 81.0 percent (Staff/103, Chriss/22.)

Rate Center(s)	# of Unique CLECs	Qwest % of Market	CR4	HHI
	(1)	(2)	(3)	(4)
Oregon (Entire State)	5	81.0%	98.8%	6,839

Again, Table 5 does not suggest that five CLECs are providing ISDN Primary service in every rate center in Oregon. Because Staff did not report data for less than 4

aggregated CLECs, the information had to be aggregated on a statewide basis to sufficient mask individual CLEC information.

Centrex

Staff determined through its analysis of the CLEC survey responses for Centrex that the service is also not competitive in any rate centers. When UNE-L and facilities-based provisions are considered, only two responding CLECs provide Analog PBX service (Staff/103, Chriss/14.)

Table 6. Centrex (UNE-L and Facilities-Based Only)	
Rate Center	# of Unique CLECs
	(1)
Albany	1
Ashland	0
Astoria	0
Athena	0
Baker/Sumpter	0
Bend	1
Black Butte	0
Cannon Beach	0
Central Point	1
Clackamas	1
Corvallis	0
Cottage Grove	0
Dallas	0
Eugene: Total	1
Florence	0
Grants Pass	0
Hermiston	1
Jacksonville	0
Jefferson	0
Junction City/Harrisburg	1
Klamath Falls	0
Lapine	0
Lowell	0
Madras	0
Mapleton	0
Medford	1
Milton-Freewater	0
Newport	1
North Plains	1
Oakland	0
Oakridge	0
Pendleton	0
Phoenix	0
Portland: Total	2
Prineville	0
Rainier	0
Redmond	0
Rogue River	0
Roseburg	0
Salem: Total	1
Seaside	0
Siletz	0
Sisters	0
St. Helens	0
Toledo	0
Umatilla	0
Veneta	0
Warrenton	0
Woodburn	0
Totals	2

ISDN Basic

Staff determined through its analysis of the CLEC survey responses for ISDN Basic that the service is not competitive in any rate centers. When UNE-L and facilities-

based provisions are considered, only two responding CLECs provide ISDN Basic service. (Staff/103, Chriss/19.)

Table 7. ISDN Basic (UNE-L and Facilities-Based Only)	
Rate Center	# of Unique CLECs
	(1)
Albany	1
Ashland	0
Bend	1
Central Point	1
Clackamas	0
Corvallis	0
Cottage Grove	0
Eugene: Total	1
Grants Pass	0
Junction City/Harrisburg	1
Klamath Falls	1
Medford	1
Newport	1
North Plains	1
Portland: Total	2
Roseburg	0
Salem: Total	1
Woodburn	0
Totals	2

Frame Relay

Finally, staff determined through its analysis of the CLEC survey responses for Frame Relay that the service is not competitive in any rate centers. When UNE-L and facilities-based provisions are considered, none of the responding CLECs provide Frame Relay service (Staff/103, Chriss/25.)

Table 8. Frame Relay (UNE-L and Facilities-Based Only)	
Rate Center	# of Unique CLECs
	(1)
Albany	0
Ashland	0
Astoria	0
Athena	0
Baker/Sumpter	0
Bend	0
Blue River	0
Cannon Beach	0
Central Point	0
Clackamas	0
Corvallis	0
Cottage Grove	0
Culver	0
Dallas	0
Eugene: Total	0
Falls City	0
Florence	0
Gold Hill	0
Grants Pass	0
Hermiston	0
Jacksonville	0
Jefferson	0
Junction City/Harrisburg	0
Klamath Falls	0
Lapine	0
Leaburg	0
Lowell	0
Madras	0
Mapleton	0
Marcola	0
Medford	0
Milton-Freewater	0
Newport	0
North Plains	0
Oakland	0
Oakridge	0
Pendleton	0
Phoenix	0
Portland: Total	0
Prineville	0
Rainier	0
Redmond	0
Rogue River	0
Roseburg	0
Salem: Total	0
Seaside	0
Siletz	0
Sisters	0
St. Helens	0
Stanfield	0
Toledo	0
Umatilla	0
Veneta	0
Warrenton	0
Westport	0
Woodburn	0
Totals	0

Furthermore, even if the Commission assumes that Analog PBX, Digital PBX and Centrex should all be included in the same relevant market, the competition for the services is still insufficient to support a finding that there is service competition for these

services, or that they are subject to competition. Even if the survey results for Analog and Digital PBX and Centrex are combined, as they are in the table below, there is still an insufficient number of CLECs providing the service or an insufficient CLEC market share to make the services competitive.

Rate Center	Table X. Analog PBX, Digital PBX, and Centrex # of Unique CLECs				Qwest's % of Market	CR4	HHI
	Analog PBX	Digital PBX	Centrex	Total			
	(1)	(2)	(3)	(4)			
Albany	0	1	1	1			
Ashland	0	0	0	0			
Astoria	0	0	0	0			
Athena	0	0	0	0			
Baker/Sumpter	0	0	0	0			
Bend	0	1	1	1			
Black Butte	0	0	0	0			
Blue River	0	0	0	0			
Cannon Beach	0	0	0	0			
Central Point	0	1	1	1			
Clackamas	0	3	1	3			
Corvallis	0	1	0	1			
Cottage Grove	0	0	0	0			
Culver	0	0	0	0			
Dallas	0	0	0	0			
Eugene: Total	0	1	1	1			
Florence	0	0	0	0			
Grants Pass	0	0	0	0			
Hermiston	1	1	1	2			
Jacksonville	0	0	0	0			
Jefferson	0	0	0	0			
Junction City/Harrisburg	0	1	1	1			
Klamath Falls	0	0	0	0			
Lapine	0	0	0	0			
Lowell	0	0	0	0			
Madras	0	0	0	0			
Mapleton	0	0	0	0			
Medford	0	1	1	1			
Milton-Freewater	0	0	0	0			
Newport	0	1	1	1			
North Plains	0	1	1	1			
Oakland	0	0	0	0			
Oakridge	0	0	0	0			
Pendleton	0	0	0	0			
Phoenix	0	0	0	0			
Portland: Total	2	3	2	3			
Prineville	0	0	0	0			
Rainier	0	0	0	0			
Redmond	0	0	0	0			
Rogue River	0	0	0	0			
Roseburg	0	0	0	0			
Salem: Total	0	2	1	2			
Seaside	0	0	0	0			
Siletz	0	0	0	0			
Sisters	0	0	0	0			
St. Helens	0	1	0	1			
Stanfield	0	1	0	1			
Toledo	0	0	0	0			
Umatilla	0	0	0	0			
Veneta	0	0	0	0			
Warrenton	0	0	0	0			
Westport	0	0	0	0			
Woodburn	0	1	0	1			
Totals	3	4	2	5	95.1%	99.9%	9,062

b. The evidence does not establish that there is price competition for the Petition services.

Price competition will exist when services offered by competitors constrain Qwest's pricing of the services. While there is evidence that some of the CLEC prices for the services at issue are lower than those of Qwest, Qwest, as a general matter, has not responded by lowering its prices. (Staff/100, Chriss/41-45.) Instead, Qwest's prices for most of the services (all but Qwest's prices in its ISDN Primary Rate Service special contracts) are at the price caps the Commission has set for the services. (Staff/100, Chriss/45.) Accordingly, staff concludes that although it may appear, based on prices for the Petition services charged by competitors, that there is price competition, this appearance is deceiving. Qwest's actions; namely its failure to reduce prices, reflects that in fact, price competition does not exist for any of the Petition service.

In Docket Nos. UX 27 and UX 28, the Commission concluded, in the absence of price constraining competition, that there was no price competition for the services at issue in those dockets. The Commission should reach the same conclusion with respect to the Petition services in this docket.

In summary, staff's analysis of the level of service competition for the Petition services, evidence regarding the absence of price constraining competition and evidence regarding barriers to entry that is discussed above, lead staff to conclude that there is no price or service competition services in any of the geographic markets defined by staff. However, staff concludes the evidence shows that basic business service is subject to competition in the Portland market.

If the Commission deregulates basic business service in the Portland market, however, customers may need protection in addition to what the market will provide.

Accordingly, staff recommends that the Commission only deregulate basic business service in the Portland rate center, subject to following three conditions:

1. Qwest agrees to continue offering basic business service, on a stand-alone basis, for each of up to four lines per customer;
2. Qwest agrees not to engage in unduly discriminatory pricing of the deregulated services.⁵ To ensure compliance with this condition, Qwest agrees to be subject to the complaint and investigation procedure of ORS 756.500, *et seq.*, with respect to allegations of discriminatory pricing for the deregulated services. Upon request, Qwest must also disclose to customers information regarding prices charged to customers of comparable size or requirements. Qwest is also required to notify its customers of any change in rates, terms and conditions and of the customer right to request information relating to price charged customers of comparable size and requirements and of the customers' rights to file a complaint regarding discriminatory pricing with the Commission.
3. Qwest agrees that it will a) functionally separate its employees responsible for sale of wholesale services from the employees responsible for sale of retail services; b) not share data from the wholesale business function with retail business function; c) develop a "Code of Conduct" that embodies this separation; and d) provide annual training regarding the separation to its employees.

Staff proposes Condition One to ensure that Qwest continues to offer basic business services in Oregon on a stand-alone basis. Staff is concerned that if the service is deregulated, Qwest will not provide it on a stand-alone basis and instead, will require customers to purchase bundled services at a higher cost. Notably, the customers who may suffer from such practices may be those least attractive to CLECs, small business customers. (Staff/200, Chriss/63.)

⁵ In its testimony, staff recommended that the Commission require that Qwest agree not to engage in "discriminatory pricing" of the deregulated services, rather than "unduly discriminatory pricing." However, staff did not intend to subject Qwest to more onerous pricing restrictions than what is currently required by statute. Accordingly, staff modifies its proposed condition so that it mirrors the current statutory prohibition placed on Qwest.

The prohibition on unduly discriminatory pricing in Condition Two is intended to protect customers residing in different areas of the Portland rate center. All customers in the Portland rate center may not have similar access to alternative providers and access may vary by location. CLEC witness Rex Knowles testified that “many building owners deny CLECs access to their buildings or make such access uneconomic by imposing high fees and onerous conditions. (XO/1, Knowles/4.)

To ensure compliance with Condition Two, Qwest would continue to be subject to the complaint and investigation procedure of ORS 756.500, *et seq.* Qwest would also have to provide customers with information that would inform a complaint under ORS 756.500.

Staff proposes Condition Three because Qwest, aside from being a seller of retail services, is the provider of wholesale services for the majority of CLEC activity in the market. This position gives Qwest an enormous amount of competitive information that other firms in the market do not have, and could give Qwest an unfair advantage in the deregulated market. (Staff/100, Chriss/64.)

Qwest opposes Conditions Two and Three, arguing that they are costly and unnecessary. Specifically, Qwest argues that there is no basis to require Qwest to disclose to customers information about prices charged to customers of comparable size because this information is available and because doing so would serve no purpose. Qwest is mistaken. The requirement would provide customers a tool to help the Commission police unduly discriminatory practices, which is what Condition Two is designed to protect against.

Qwest also argues there is no basis to functionally separate its wholesale sales employees from its retail sales employees, or prohibit data sharing between the two, because of all of the protections in the 1996 Act and Qwest's extensive policies and practices that safeguard wholesale data from its retail operations. Qwest's argument is puzzling. If Condition Three does nothing more than mirror protections already in place, it should not be "costly" for Qwest to agree to the condition or burdensome.

Further, although Condition Three may be unnecessary if Qwest does in fact already have a policy to separate its wholesale and retail functions, and always abides by the policy, the Commission has no assurance that Qwest will do so. Condition Three provides the Commission with a tool to protect competitors in the event Qwest changes its policy regarding functional separation of wholesale and retail activities, or fails to adhere to it.

No party has argued that the Commission does not have authority to authorize deregulation in only a portion of the state. If any party raises that argument in briefs, the argument is without merit. ORS 759.030(2) authorizes the Commission to exempt services from competition "in whole or in part." If the Commission were to deregulate basic business service, it would deregulate the service "in part," as authorized by the statute.

Qwest argues the Commission should reject staff's analysis because the results of the CLEC Survey are not complete. Staff agrees the results are not complete. However, the results of the Survey are the only probative evidence in the record regarding the level of competition for the Petition Services. If the Commission decides not to rely on the Survey results because they are incomplete, the Commission should simply deny Qwest's

Petition on the ground insufficient evidence supports Qwest's request. The Commission should not, as Qwest suggests, assume that complete Survey results would establish competition for all the Petition services and accordingly, conclude that the criteria of ORS 758.030(2) and (3) would be satisfied if only the other thirteen CLECs had provided responses.

Finally, staff also recommends deregulation of ATM and 800 services because the public interest no longer requires regulation. Qwest's customer base for both services is very small. This is likely because these services are available under a federally regulated tariff that is more attractive to customers than the services offered under Qwest's state tariff. (Staff/100, Chriss/61.) Because customers obtain these services under a federally regulated tariff rather than under Qwest's state tariff, and because the small number of customers for these services means even limited activity on the part of CLECs could constrain Qwest prices for these services, the public interest does not require regulation of the services. (Staff/100, Chriss/61.)

V. Response to compromise proposal.

As noted above, staff believes the public interest militates against deregulation of the Petition services in all Qwest territory because such deregulation may lead to price increases, particularly in rural areas. In its reply testimony, Qwest responded to this concern by asserting that it would agree to cap rates for basic business service for rural customers at an amount no greater than that charged customers in urban areas such as Portland. (Qwest/25, Brigham/92 and Qwest Br at 55.) The Commission should reject Qwest's compromise proposal.

The key procedural problem with Qwest's compromise proposal is that Qwest provides no specific details, not even the mechanism by which increases would be calculated or how the mechanism would be effectively enforced. Qwest's compromise proposal simply arrived too late and is too ambiguous to allow parties to conduct discovery or rigorously analyze the proposal.

In any event, there are several drawbacks to the Qwest compromise proposal that likely could not be overcome. First is the lack of any clearly defined benchmark for basic business service that would serve to provide pricing protection for areas not yet sufficiently competitive to curb Qwest's pricing power. For example, Qwest could establish a relatively high "list" price for basic business service in urban markets. This list price would then be made available at discounted prices for specific types of customers such as those with viable alternatives. This segmentation of the market would allow Qwest to maximize profits to a greater level than being constrained to having a single price offering.

In addition, Qwest could bundle services that include basic business service whereby discounts are available to further segment the market. Qwest admits that "the vast majority of basic business service customers actually purchase their services with add-ons." (Tr 65-66.) Additionally Qwest observes that "[i]n today's marketplace, few competitors are focused solely on providing stand-alone 1FB service to customers who don't order any add-on services." Qwest/25, Brigham/61.)

As already noted, Qwest has significant downward pricing flexibility. The basic business service price ceiling is set and Qwest can discount prices from that level to meet

competition. Staff posits that the Qwest compromise proposal's main feature is to remove the current price ceiling, allowing Qwest to significantly raise prices.

The derivative problem with Qwest's proposal is that, if the services are deregulated, the Commission may be limited in its investigatory powers. Qwest has not specified how the Commission would enforce the provisions in the proposal and to what extent the Commission would be able to prevent any price increases deemed unreasonable.

VI. Conclusion.

The record does not contain sufficient evidence to prove that the statutory criteria for deregulation are satisfied for all the Petition services and accordingly, the Commission should deny the request for deregulation as framed by Qwest. The evidence in the record is sufficient to establish that the criteria for deregulation have been satisfied for basic business service provided in the Portland rate center, and for 800 and ATM on a statewide basis. Accordingly, staff recommends that the Commission deregulate basic business service in the Portland rate center and 800 and ATM statewide, subject to the conditions set forth by staff.

DATED this 25th day of January 2006.

Respectfully submitted,

HARDY MYERS
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January 2006, I served the foregoing upon the parties, hereto by the method/s indicated below:

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