ORDER NO. 03-609

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UX 28

In the Matter of	)	
	)	
QWEST CORPORATION'S	)	
	)	ORDER
Petition to Exempt from Regulation	)	
Qwest's IntraLATA Toll Service, Operator	)	
Service Charges, and 800 Service Line	)	
Option.	)	

DISPOSITION: STIPULATION ADOPTED; PETITION TO DEREGULATE OPERATOR SERVICES DENIED

Qwest's Petition. On May 10, 2002, Qwest Corporation (Qwest) filed a petition with the Commission to exempt from regulation intraLATA toll, 800 ServiceLine Option, and Operator Services. Commission Staff filed a June 13, 2002 report for the Public Meeting of June 18, recommending that the Commission suspend the petition and initiate a further investigation. The Commission did so at the Public Meeting. Order No. 02-415.

Qwest's petition asks the Commission to deregulate, pursuant to ORS 759.030, the following services:

1. 800 ServiceLine Option services. Qwest's 800 ServiceLine Option assigns an 8XX number (i.e., 800, 822, 833, 844, 855, 866, 877, or 888) to an exchange telephone number. This allows for the completion of intraLATA 8XX calls, in addition to all other usage.

2. IntraLATA toll services (local long distance). Qwest's intraLATA toll service allows customers to call outside their local area. Qwest's intraLATA toll services covered in the application include Two-Point Message Telecommunications Service

(MTS), MTS related optional service offerings, MTS contracts, 1-800 Calling Service, 800 ServiceLine Option, and the Competitive Response Program.

3. Operator Services. These are services, such as Station to Station and Person to Person, in which a customer calls a Qwest operator for assistance. Operator Services include Operator Handled Surcharges and Busy Line Verification/Interrupt Services. Operator handled surcharges apply when a customer dials "0" when making a call. Classes of calls include Calling Card, Station to Station, and Person to Person. Busy Line Verification/Interrupt Service allows a calling party to determine, with assistance of an operator, whether a line is in use. If so, the operator will interrupt conversation on the line at the party's request.

Procedural History. The Oregon Telecommunications Association, Beaver Creek Cooperative Telephone Company, Eastern Oregon Telecom LLC, GVNW Consulting Inc., Electric Lightwave Inc., Citizens' Telecommunications Company, AT&T Communications of the Pacific Northwest, Inc. (AT&T), and WorldCom Inc. (WorldCom) intervened in the docket. On November 15, 2002, Qwest submitted its prefiled testimony. Parties convened for a settlement conference on January 21, 2003.

As a result of the conference, Qwest and Commission Staff agreed to enter into a stipulation (the Stipulation) to recommend deregulation of Qwest's intraLATA toll and 800 ServiceLine Option services with certain conditions. On February 14, 2003, Staff filed its testimony, in which it submitted the Stipulation and recommended that the Commission grant Qwest's petition to deregulate its intraLATA toll services and 800 ServiceLine Option services. Staff's testimony opposed the portion of Qwest's petition seeking to deregulate its Operator Services. GVNW, a consulting firm representing several independent telephone companies, filed testimony on two different conditions in the stipulation but did not oppose the Stipulation.

On February 28, 2003, Qwest filed its rebuttal testimony to Staff's testimony. AT&T filed testimony on February 28 as well, and WorldCom filed comments on certain access charge issues on the same date. Neither party opposed the Stipulation or opposed Qwest's request to deregulate Operator Services. Qwest moved to strike WorldCom's comments because access charge issues are not relevant to the current docket, and because the procedural schedule required testimony, not comments. The Administrative Law Judge (ALJ) granted Qwest's motion. WorldCom then withdrew from the case.

The ALJ allowed Qwest to file supplemental reply testimony because of several discovery issues, and Qwest filed its reply to AT&T's testimony and WorldCom's comments on March 12, 2003.

The Stipulation. The Stipulation between Commission Staff and Qwest, to which no party filed objections, provides that the Commission should exempt from regulation Qwest's 800 ServiceLine Option and intraLATA toll, subject to conditions. With respect to the 800 ServiceLine Option, the Stipulation imposes two conditions. First, Qwest will notify its 800 ServiceLine customers that the Commission has

deregulated its 800 ServiceLine Option. Qwest will issue the notice at its own expense. The notice will also state that alternatives to Qwest's service exist. Second, Qwest will notify its 800 ServiceLine Option customers at its own expense at least 15 days prior to the effective date of a rate change that it will change its rates. The notice will provide the new rates and will also state that alternatives to Qwest's service exist.

With respect to Qwest's intraLATA toll service, the Stipulation imposes seven conditions. First, each Qwest intraLATA toll service shall continue to be subject to a price floor. Second, Qwest shall notify the Commission of any price changes to any intraLATA toll service rate within 30 days of such price change and will provide its intraLATA toll customer with written notice, at Qwest's expense, of increases in standard service charges at least 30 days before implementation. Qwest is also to notify its intraLATA toll service customers that the Commission has deregulated intraLATA toll services.

Third, Qwest will remain the designated carrier (carrier of last resort), as described in Order No. 93-1133, and will maintain its current toll originatio points unless the Commission authorizes otherwise. Fourth, Qwest is to offer a default option in each exchange where Qwest provides intraLATA toll service, to allow customers to subscribe to standard intraLATA toll service at reasonable rates. Fifth, Qwest is to maintain ubiquitous toll network quality, to reinforce network capacity where and when it is needed, to coordinate with connecting local exchange carriers, to continue to provide toll operator and directory assistance services to rural carriers in Oregon on a wholesale basis, and to maintain service quality in compliance with Commission standards.

Sixth, Qwest is to provide work papers showing total Oregon regulated amounts for calendar 2002, along with a number of other detailed reporting requirements having to do with costs and allocation of investments and expenses. Seventh, Qwest may not deaverage its intraLATA toll rates without prior Commission approval.

Staff submitted testimony in support of the Stipulation because Staff concluded that the public interest no longer requires full regulation of either Qwest's 800 ServiceLine Option or Qwest's intraLATA toll services. Consistent with this finding, under ORS 759.030(2), the Commission may exempt these services from regulation. Staff's concerns about exempting these services from regulation are mitigated by the conditions set out in the Stipulation.

Applicable Law

ORS 759.030 provides in relevant part:

* * * * *

(2) Upon petition by any 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.

* * * * *

See also OAR 860-032-0025.

The Oregon Legislature (section 2, chapter 589, Oregon Laws 1999) has required the Commission to submit an annual report to the Governor and Legislative Assembly including information on

(1) The status of competition in the telecommunications industry;

(2) Significant changes that have occurred in the telecommunications industry during the preceding 12 months;

(3) Statutes that inhibit or discourage competition in and deregulation of the telecommunications industry;

> (4) Specific actions taken by the commission to reduce the regulatory burden imposed on the telecommunications industry, including telecommunications utilities and competitive telecommunications providers;
>
> (5) Specific actions taken by the commission to maximize the opportunities for telecommunications utilities and competitive telecommunications providers to achieve pricing flexibility, including rate rebalancing, exemption from regulation, and streamlined regulations.

In brief, the relevant statute 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)). Under either provision, the Commission must consider the four factors listed under ORS 759.030(4), which are reiterated in OAR 860-032-0025.

Findings of Fact. Based on the preponderance of evidence in the record, the Commission makes the following finds of fact.

Qwest seeks to deregulate four kinds of Operator Services (OS): 1. busy line verification/interrupt services; 2. calling card services; 3. station to station calls; and 4. person to person calls. OS fall into two categories: busy line/interrupt services and operator handled surcharges. Busy line/interrupt service allows a calling party to determine with the help of an operator whether a line is in use. If so, the operator will interrupt the conversation.

Operator handled surcharges are incurred when a customer dials 0 when making a call. Types of operator handled surcharge OS include calling card, station to station, and person to person calls. Station to station is the most important OS service by an order of magnitude. The customer dials 0 and gives the operator personal information about himself and tells the operator what number he or she wants to call (the customer can also dial 0 plus the number with the same result). Dialing 0 connects callers in Qwest's territory to the local carrier (either Qwest or a certified CLEC) for that phone line. The operator will put the call through, and the called party has the option of accepting the call and paying the operator handling charges or refusing the call. Person to person is another type of operator handled call. The caller dials the operator, who then tries to place the call to a specific named person at the requested number.

The calling card OS service involves Qwest issuing a type of calling credit card to its customer. Typically, a customer would then use the card by dialing a number plus identifying information from the previously issued calling card. The operator will assist in completing the call, which is then billed to the caller's calling card account. These are not prepaid calling cards.

Qwest charges $1.30 for the operator assisted station to station call. Qwest's charge for a person to person call is $3.00. Further, Qwest charges $1.40 for a

busy line verification service and $2.80 for its busy line interrupt service. Qwest's charge for a customer dialed calling card is $.50.

In the four states where Qwest's OS services have been deregulated, Qwest has raised the prices as follows: station to station calls increased to $5.50, and person to person increased in three of the four states to $9.99.

The table below lists other carriers' prices for the services Qwest seeks to deregulate. AT&T sometimes offers free promotional use of its OS services.

Operator Service	Qwest	AT&T	MCI
Customer dialed calling card	$ .50	$2.25 to $5.50	$1.25 to $2.00/month
Operator assisted station to station	$1.35	$9.95	$4.99
Operator assisted Person to person	$3.00	$9.99	$3.90
Busy Line Verification	$1.40	$12.50	n/a
Interrupt	$2.80	$12.50	n/a

The Commission's website lists over 70 certified OS providers.

Qwest's Position. Qwest asserts that it has met the statutory requirements of ORS 759.030 for deregulation of the services it has requested in Oregon. It has shown there is service and price competition, that such services are thus subject to competition, and that the public interest no longer requires full regulation of such services. Qwest further asserts that it has met the statutory and administrative factors of ORS 757.030 and OAR 860-032-0025 by showing that these services are available from alternative providers in the relevant market, that the services of alternative providers of these services are functionally equivalent or substitutable at comparable rates, terms, and conditions in their respective markets, that there are no existing or regulatory barriers to entry, and that there are no additional factors that require continued regulation or that preclude deregulation of such services.

ORS 759.030(4). The Four Factors. *The Relevant Market.* Qwest argues that the relevant market includes all providers that represent a viable alternative to Qwest's services. This relevant market, according to Qwest, includes not only the geographic area that Qwest is currently serving as a local exchange carrier but also the areas that Qwest's competitors serve. The vast majority of companies currently providing long distance services (including the services at issue here) in competition with

Qwest offer service anywhere in the state of Oregon, both within LATAs and across LATAs. Qwest argues that this is especially the case because intraLATA toll competition has increased over the past decade and intraLATA dialing parity has become universally available in the state over the past four years. It is safe to assume, Qwest contends, that AT&T and other long distance company services are available statewide.

Qwest notes that OS are available in Oregon from traditional carriers (local and long distance wireline companies) and from nontraditional means, such as alternative operator service (AOS) providers. The Commission has certified over 70 competitive providers to offer OS in Qwest's service territory. These include presubscribed intraLATA toll providers, interLATA toll providers, and competitive local exchange carriers (CLECs). The Commission does not regulate AOS providers or the OS that traditional long distance companies provide.

Functionally Equivalent Services. Qwest argues that its competitors provide comparable, functionally equivalent or substitutable services at comparable rates, terms, and conditions.

In support of its contention that there is service competition for OS, Qwest argues that it has experienced significant declines in volume and market shares for OS. Qwest argues that additional data from AT&T supports this contention.

For OS, a 2000 study by the Pelorus Group (Pelorus study) indicates that toll service providers (interexchange carriers (IXCs) like AT&T, WorldCom, and Sprint) realized 94.8 percent of the national OS market revenue in 1998, and 85.9 percent of the intrastate market, compared to the Regional Bell Operating Companies' (RBOCs) and other incumbent local exchange carriers' (ILECs) 9.3 percent share of such intrastate market. Qwest notes that there has been a significant shift in the RBOCs' market shares for intrastate OS revenues, from 32.1 percent in 1995. Qwest could obtain data on OS minutes of use and volume from only one competitor, AT&T, but this information shows that at least one provider other than Qwest is handling a significant proportion of the intraLATA OS call volume in Oregon. In light of this information, there can be no doubt, according to Qwest, that there is viable competition in the OS market in Oregon.

Barriers to Entry. Qwest argues that there are no economic or regulatory barriers to entry. Qwest cites to the more than 70 certified competitors listed on the Commission's web site. These carriers' ability to bundle or resell services with minimal capital investment is further proof that there are no economic or regulatory barriers to entry in these markets, according to Qwest.

Staff contends that Qwest's access to the "0" dialing code for OS is a barrier to entry. Qwest opposes this position. Qwest argues that there is ample competition despite the 0. Qwest was the predominant provider of the 0 operator access in the past, before intraLATA presubscription, but that is no longer true given the current availability of CLECs, wireless carriers, prepaid calling card providers, and alternative intraLATA presubscribed long distance carriers, all of which can be reached by dialing 0. Qwest showed that most Qwest customers are presubscribed to an intraLATA long

distance provider other than Qwest. The majority of Qwest customers have access to the OS of carriers other than Qwest. Second, Qwest showed that 12 of its 13 other states have deregulated or found OS subject to competition, and Qwest has the 0 code in those states. Qwest argues that Staff is simply wrong when it alleges that all other competitors must use a dial around access code. Presubscribed intraLATA toll carriers automatically receive 0 calls, and interLATA long distance providers' OS are accessed by dialing 00, only one more digit than 0. Qwest argues that this is hardly a barrier to entry, as Staff contends.

Other Factors. Qwest contends that other relevant factors favor deregulation. 1. Qwest's declining market shares show that there is competition. Qwest can quantify and it has quantified (in the confidential record) the steep declines in OS volumes and revenues over the past decade due to competition.

Some may argue that Qwest has too high a market share today even with the competitive losses it has shown. But for many years Qwest was a regulatory monopoly. Since Qwest likely had a 100 percent share, or close to it, of all OS calls just a few years ago, before the advent of competition, it is significant that Qwest now likely has substantially below 50 percent of the total OS market. Qwest argues that the US Congress and the Oregon Legislature were well aware that Qwest and other ILECs had historical monopolies when they enacted deregulation statutes. Nevertheless, they established deregulatory schemes allowing for deregulation if a company like Qwest can meet certain criteria, which Qwest clearly has met in Oregon and elsewhere.

Qwest contends that Staff's testimony is based on flawed assumptions, unsubstantiated allegations, and erroneous information. For example, Qwest showed that there has been a significant shift in the share of intrastate OS revenue from RBOCs like Qwest to toll service providers like AT&T, WorldCom, and Sprint over the past few years, and that by 1998, RBOCs' share of the market had declined to 9.3 percent, while toll service providers' share was 85.9%. Further, Staff attempts to discredit the analysis that Qwest's share of the market is declining because of increased consumer use of alternative providers. According to Qwest, Staff's criticism is wholly without merit, because it is based on the faulty logic that Qwest has provided no credible evidence that the OS market has not contracted. Instead, Qwest showed that Qwest's OS call volumes continued the sharply declining trend in 2002. In addition, since the advent of presubscription in Oregon in 1998, Qwest's intraLATA toll call volumes have declined steeply, while the intraLATA toll volumes of Qwest's competitors have risen sharply. All 0 plus OS calls originated by this subset of intraLATA callers have similarly shifted from Qwest to its competitors. Finally, Qwest showed that the report it cited as evidence for such market share information was based on a report by a well-known, credible market research firm.

2. Qwest argues that the Commission should ensure that there is parity among providers. Qwest is the only regulated OS provider. Qwest believes this is both unfair and discriminatory, especially given the evidence of OS competition in Oregon that Qwest has presented.

3. Most Qwest states have found OS to be competitive. Each state has its own deregulation scheme but many have statutory or administrative factors remarkably similar to Oregon's. According to Qwest, other states have remarkably similar criteria in determining whether to deregulate or to find a service competitive. Iowa, Washington, Arizona, Colorado, South Dakota, and Montana all require their commissions to consider the following factors: (1) the number, size, and distribution of alternative providers of the service; (2) the extent to which services are available from alternative providers in the relevant market or geographic area; (3) the ability of alternative providers to make functionally equivalent or substitutable services readily available at competitive rates, terms, and conditions (or just and reasonable rates, or reasonable and comparable rates); (4) barriers to entry; and (5) other factors similar to those in Oregon.

4. Qwest notes that the Commission can reregulate OS if appropriate.

ORS 759.030(3); (2) Service Competition. Qwest concludes that price and service competition exist for OS in Oregon. The wide array of different types of providers, all of which are unregulated, actively compete against Qwest's OS and have succeeded, as demonstrated in Qwest's market share losses. Qwest's largest competitors, AT&T and WorldCom, are the two largest long distance carriers in the country and have access to 100 percent of the customers in Oregon. Alternatives to Qwest's operator services are available throughout Qwest's Oregon service territory to all market segments. Finally, Qwest argues that the sharp decline in its OS volumes and revenues in Oregon over the past decade clearly shows there is service competition in the OS market.

Price Competition. Qwest notes that its competitors' rates are higher for certain OS. However, Qwest also showed that AT&T has, on occasion, waived all OS usage and service charges for its local service residential customers. Thus, according to Qwest, the range of rates for AT&T's operator services appears to be very broad (from 0 to close to $10.00). Qwest submits that this variation indicates a competitive market. Competition, Qwest contends, does not require every carrier to offer the same service at the same price. The differentiation apparent in the Oregon OS market allows consumers to make their selection based on the product attributes that best meet individual needs. Qwest argues that allowing it to compete on equal footing with other operator service providers, including AT&T, will further enhance the market and bring additional competitive alternatives to Oregon consumers.

Qwest notes that Staff admits how rare perfect competition is. Still, Qwest clearly showed that many alternatives exist to Qwest's operator services and that Oregon subscribers now have easy access to these alternative service options. Qwest asserts that the level of competition in the OS market, although not perfect as an economist might define the term, is more than sufficient to meet statutory requirements for deregulation. Further, as Qwest has shown, Qwest has no market power for OS, even if the price for OS is not set at marginal cost.

The fact that there is a range of prices, and thus the prices of some OS alternatives vary from Qwest's, is not a relevant factor. Qwest contends that there is no Oregon statute or rule requiring prices to be the same to have a service deregulated.

Also, according to Qwest, the fact that prices for OS options vary indicates a competitive market. The key issue is that the consumer has a choice between OS providers.

Further, although Qwest's operator services rates are lower than some of its competitors, Qwest notes that only its OS prices have been set through regulation and not through market forces. In a competitive market providers seek to differentiate themselves to encourage consumers to choose their services. The market, Qwest asserts, will dictate service composition and price.

Qwest notes that in UX 27, the Commission did not apply its previous precedent from Order No. 94-1556 in docket UX 15 (deregulating VMS) and Order No. 98-018 in docket UX 18 (deregulating Qwest's VMS). In those cases, the Commission found that there was price competition for VMS despite the fact that prices ranged from under $5.00 to $25.00 per month. Qwest believes that Staff wishes to punish it because Qwest's prices are much lower than those at the market price levels or because Staff prefers Qwest's prices to those that AT&T, WorldCom, or other alternative providers charge. It would be unfair, according to Qwest, to punish it because its prices are low and other OS providers who remain unregulated are free to set their prices based on market forces. [1]

Qwest notes, finally that there is no requirement that all carriers have the same or similar prices to find that competition exists. Consumers can choose based on the product attributes that meet their individual needs. The market will dictate service composition and price. Allowing Qwest to compete on equal footing with other OS providers including AT&T will enhance the market and bring additional competitive alternatives to Oregon consumers.

Subject to Competition. Qwest argues that its OS in Oregon are subject to competition. There is both price and service competition, so by definition these services are subject to competition.

The Public Interest. Qwest argues that the public interest no longer requires full regulation of OS. Qwest also notes that other states have deregulated Qwest's OS or classified it as competitive. Qwest argues that it does not need to make a showing with respect to public interest if it shows that price competition exists for these services or service competition exists, or Qwest or the Commission can demonstrate that OS is subject to competition. Nor is Qwest required to make such a showing under the alternative basis of deregulation under ORS 759.030(3) and OAR 860-032-0025(1), which requires deregulation if price and service competition exist for OS. This is especially true because the wide array of alternative providers and choices for OS that consumers in Oregon have today. Qwest argues that this Commission's and the Oregon Legislature's procompetitive policies and the current technological and market environment, all make regulation of such services unnecessary and unwarranted. Deregulation will allow all providers of OS to respond effectively and compete in

[1] We address Qwest's argument about precedent in the voice messaging cases in Order No. 03-600, UX 27, order on reconsideration.

meeting the needs of the Oregon consumer, including lowering costs and promoting further competition.

Finally, consistent with the fact that the public interest no longer requires full regulation of OS is the fact that almost all other states in Qwest's region have either deregulated Qwest's OS (Idaho, Iowa, Nebraska, and South Dakota) or have classified Qwest's OS as being competitive (eight other states). Qwest contends that there is no reason for this Commission to arrive at a different conclusion.

Qwest argues that this is first an issue of parity. According to Qwest, competition fosters innovation and the creation of new and better services with more features and options. Qwest is the only operator services provider among the many competitors that is regulated and required to provide calls at prices set by regulation. Other carriers such as AT&T and WorldCom are providing the same type of service. Exempting Qwest's operator services from regulation would allow Qwest to compete on an equal footing. The current scenario, according to Qwest, ensures that regulation or deregulation is based on the type of carrier involved instead of the type of service provided. The other operator services providers are giving comparable, functionally equivalent, substitutable services and remain unregulated.

Third, customers vote with their fingers in deciding to use operator services alternatives. In Oregon, if the Commission finds that there is competition, ORS 759.030 dictates that the Commission should deregulate such services in response to a petition for deregulation.

Staff's Position. Staff urges the Commission to deny Qwest's petition to deregulate the four categories of OS. In summary, Staff argues that although Qwest showed limited service competition, it has not established that there is price competition for its OS. The competing OS, to the extent it exists, is priced substantially above Qwest's. Such high prices by alternative providers "indicate that price constraining competition does not exist in the relevant market." Order No. 03-368 at 17 (UX 27). In the four states where Qwest has been allowed to deregulate its OS, Qwest has increased its OS price to identical levels. Under similar facts in UX 27 the Commission declared that high prices offered by alternative providers shows that price competition is lacking.

Even if Qwest's showing fails to meet the requirements of ORS 759.030(3)(a), the Commission has discretion to grant the petition if Qwest meets one of four requirements. Staff urges us to apply the same analysis as in UX 27. There, at 17, the Commission stated: "We do not believe it is in the public interest to deregulate a service for which the prices will almost certainly go up, with no offsetting benefit to customers." Staff argues that Qwest did not show that the price increases it implemented after OS deregulation in other states were accompanied by any offsetting benefits to consumers. According to Staff, deregulation will likely only bring higher prices to consumers.

Staff contends that the Commission's recent order in UX 27, Order No. 03-368, provides guidance for the resolution of similar issues in UX 28. There, the

Commission applied the ORS 759.030(4) criteria to Qwest's petition to deregulate its DA service. The Commission first considered the relevant market under ORS 757.030(4)(a). The Commission limited its consideration to those services that were directly comparable, as well as those that were reasonable substitutes that were readily available, to Qwest's DA service. The Commission then looked at the prices for the comparable services (comparable rate, terms, and conditions) as required by the statute. The Commission concluded that the alternative providers' prices were relatively high compared to Qwest's ($.65 to $1.99 per call vs. Qwest's first two calls per month free plus $.50 thereafter). Based on this finding, the Commission concluded that price constraining competition did not exist in the relevant market.

The Commission then ended its analysis under ORS 759.030(3) because it concluded that price competition does not exist in the relevant market. Qwest's failure to show price competition under the 759.030(4)(b) criterion negated the need to proceed with the rest of the ORS 759.030(4) analysis under ORS 750.030(3). As a result, the Commission did not make a finding about barriers to entry or any other factors (the criteria of ORS 759.030(4)(c) and (d)).

The Commission next applied ORS 759.030(2), under which it has discretion to allow or deny the petition if Qwest makes one of four showings also using the ORS 759.030(4) criteria. The Commission denied the petition because Qwest could not show that the public interest no longer required full regulation of its DA service. The Commission was concerned about the evidence that Qwest had consistently raised the price of its DA service and eliminated the two free calls in every state where the service had been deregulated. The Commission reasoned "we do not believe it is in the public interest to deregulate a service for which the prices will almost certainly go up, with no offsetting benefit to customers." Order No. 03-368 at 17.

ORS 759.030(4). The Four Factors. *Relevant Market.* Staff proposes that the relevant market is Qwest's service territory in the entire state. Within that geographic market, the relevant market includes those alternative providers that offer OS services. Staff agrees with Qwest that AT&T and MCI, to a more limited extent, are alternative providers offering comparable OS service in the relevant geographic market. (MCI, according to Staff's investigation, does not provide Busy Line Verification/ Interrupt.) Staff also agrees with Qwest that the relevant market includes the fourteen competitive local exchange carriers (CLECs) who self certified in response to a Commission survey that they provided OS services. However, Staff notes that Qwest still owns 98 percent of the residential lines in the local market where the 14 CLECs operate (assuming statewide ILEC market share is representative of Qwest's market).[2]

Qwest also argues that there are over 70 OS providers listed on the Commission's web site. Staff notes that Qwest provided no evidence as to whether any

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[2] Qwest points out that it sells some of that 98 percent to resellers. Thus, according to Qwest, ownership of residential lies is irrelevant, since the end user customer would pay the OS charges to the reseller or CLEC. The percentage of CLEC business lines is at least 21 percent and growing.

of these providers are operating in Qwest's service territory. Nor did Qwest show whether they are in fact providing OS services. The same concerns apply to the dial around providers.

Both Staff and Qwest address the concept of market share within the relevant market analysis. Qwest asserts that it has lost some of the OS market share, which it evinces for the existence of active competition. Staff disagrees with Qwest. Staff contends that Qwest provided data to support its claim that its OS revenue and minutes of use have declined but has provided no evidence to support its claim that it has lost market share. Qwest based its claim of declining market share on an assumption that the OS market grew from 1998 through 2001. Qwest calculated its OS market share by comparing its 2001 OS messages, not revenue, with a forecast of how many OS calls it would have carried if the market had either remained flat or increased at a rate of 2 percent per year since 1998. Qwest states that using a 2 percent annual growth rate from 1998 through 2001 is conservative. Qwest's claim is apparently based on the Pelorus study, which projected that the OS market would grow at an annual rate of 2.4 percent from 1998 to 2004. The Pelorus study does not describe the methodology used to develop its predictions for growth (shrinkage) of the OS market. Nor are the data referenced in the study sufficient to determine market share or forecast changes in the number of OS calls provided.[3]

The study begins its description of the sources of data on the OS market with a disclaimer. Then it lists data sources, none of which contain information on the number of OS calls or OS revenue. What data are available from these sources is price data, which cannot be used to determine the size of the OS market or Qwest's share of that market.

In its supplemental response to Qwest's second set of data requests, AT&T reported that its total intraLATA OS minutes of use in Oregon decreased more than Qwest's. Staff concludes that if Qwest is losing OS market share it is not to AT&T.

If the overall market is declining but Qwest is losing proportionately less minutes of use than its competitors, its market share would actually be growing. Given the above discussion it seems plausible that the OS market has been contracting, especially considering that Qwest is the provider with lowest price, is the incumbent, and is still carrying fewer OS calls.

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[3] Qwest responds that RBOCs and ILECs account for only 3.1 percent of the total market and 9.3 percent of the intrastate market. Toll service providers held 94.8 percent of the total OS market. According to Qwest, this clearly shows that RBOCs and ILECs like Qwest are losing market share. Moreover, the Pelorus study makes clear that there is a relationship between toll services and OS. The primary toll carriers offer OS in Oregon. If toll services are deemed competitive enough to be deregulated, the same should hold for OS. The 70 OS providers on the Commission's website are generally alternative OS providers or stand alone OS providers, such as those that provide OS to hospitals, hotels, prisons, etc. Toll carriers do not offer stand alone OS; they offer OS in conjunction with toll services. Qwest asserts that Staff's argument about market share growing or shrinking is based on mere conjecture.

Functionally Equivalent Services. In Order No. 03-368, the Commission reasoned that high prices for the alternative providers' comparable services is strong evidence that price competition does not exist in the relevant market, at 17. Here, Staff notes that AT&T's and MCI's comparable services are priced high compared to Qwest's. AT&T has a range of prices, Qwest claims. Staff contends that AT&T's offer of free OS was a limited duration promotion.

Barriers to Entry. Staff argues that Qwest's control of the 0 access number is a significant barrier to entry. While Qwest does not own the 0 dialing code, due to the lack of local competition, Qwest does control it: 98 percent of the local residential lines in Qwest's territory are currently Qwest lines. In other words, in 98 out of 100 residential lines, dialing 0 in Qwest's territory routes the call to Qwest. Staff believes that dialing 0 is the most commonly known method to access OS. These facts, Staff argues, support the conclusion that Qwest does control the 0 dialing code and has a significant advantage over its competitors for this key method of accessing OS services.[4]

Other Factors. Staff identified other considerations supporting the conclusion that the Commission should not deregulate Qwest's OS services. First Staff discussed the nature of collect calling, the most important of the OS services. In a collect call, the called party pays the related charges. The called party has no choice about which carrier is carrying the call or what the charge will be. Because there is no choice here, the Commission should be very careful before deregulating. Price competition occurs when customers know their alternatives and make their choices accordingly. This is not the situation with the OS collect calling market.

Second, Qwest's actions in states where service has been deregulated are relevant. The evidence shows that Qwest significantly increased the price of its major OS service, collect calling, in each of the four states that allowed Qwest to deregulate the service. This is significant where Qwest's OS services are already priced sufficiently above cast, as they are here.

Finally, Staff contends that OS is not an often-used service. Therefore, people do not know as much about it, including how to reach alternative providers. Staff is concerned that Qwest's market power, coupled with the lack of customer knowledge about the service and alternative options, may allow Qwest to abuse customers in the OS market.

ORS 759.030(3); (2). Service Competition; Price Competition. Staff urges the Commission to exercise its discretion under ORS 759.030(2) to deny Qwest's

[4] Qwest contends that there is no basis for a regulatory presumption that Oregon consumers cannot choose for themselves or are not knowledgeable about OS options or 00 dialing codes, or that they need the protection of Commission regulation of Qwest's OS. Deregulation means choices, and Qwest urges the Commission not to be paternalistic.

petition for deregulation of OS, because there is no price competition, limited service competition, and because it would be against the public interest to grant it.

Staff argues that the prices charged by AT&T and MCI for OS show that price competition does not exist. In Order No. 03-368, the Commission stated, at 17, that it would not make a finding about service competition because it concluded it was not in the public interest to deregulate a service for which the prices will almost certainly go up, with no offsetting benefit to customers. The Commission should apply the same analysis here, Staff urges.

Public Interest. Staff asserts that there is strong evidence that Qwest will raise prices for its OS service if the Commission grants its petition. Qwest has presented no evidence of offsetting benefits to customers.[5] The Commission should apply the rationale of Order No. 03-368 and deny the petition.

Qwest states that 12 of 13 states have granted its petition to deregulate OS services. Staff contends that this Commission is not required to follow what other states have done. The Commission has no information on whether other states imposed conditions or whether the other states' approval was part of a larger package. Finally, Staff notes that Qwest fails to explain why it increased the price for its collect calling service in the four states where it was granted full deregulation.

Discussion. We review Qwest's application first under ORS 759.030(3). Under that subsection we must grant Qwest's application if both price and service competition exist. Our analysis must include consideration of the four factors listed in ORS 759.030(4) and reiterated in OAR 860-032-0025.

ORS 759.030(4). The Four Factors. *Relevant Market; Functionally Equivalent Services.* We find that the relevant geographic market is Qwest's service territory in Oregon. Within that territory, CLECs, interLATA toll carriers, and intraLATA toll carriers offer comparable (functionally equivalent) OS. We conclude that service competition exists for OS in the relevant market. That competition would appear to be limited, however, based on the percentage of lines that Qwest owns. Qwest objects to Staff's figure of 98 percent ownership of residential lines in its service territory, pointing out that it leases some of those lines to resellers of its services. A customer using OS on one of those lines would pay the reseller, not Qwest. Qwest asserts that at least 21 percent of its business lines are leased by CLECs. While the record does not reveal how many residential lines Qwest leases to resellers, it is safe to assume that Qwest is still far and away the dominant carrier in its service territory.

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[5] Qwest contends that there is no offsetting customer benefit requirement in the statute, nor is there any basis for the Commission's speculation about increasing prices in the future. The standard is whether there is price and/or service competition today. According to Qwest, nothing that Staff argues about innovation or offsetting customer benefits changes the fact the Legislature has made it clear that the Commission should take specific actions to reduce regulatory burdens on telecommunications utilities and to maximize the opportunities to achieve pricing flexibility, exemption from regulation, and streamlined regulations. Qwest cites to ORS 759.015; 759.020, 759.030, and 759.050

Qwest presented market share data from the Pelorus study to bolster its contention that competition exists. Staff has done a persuasive job of putting at issue the growth in the OS market. If the OS market is not growing, and Qwest is losing proportionately less minutes of use than its competitors, its market share could be growing. On this record we cannot find that Qwest is losing market share in the OS market.

Moreover, we note that the Pelorus study remains on the national level and does not give information about Oregon's OS market. Nor does it give information about the number of OS calls or OS revenue. Finally, we note that the Pelorus study includes prepaid calling cards and international location to location calls in its market study. These operator services are not part of Qwest's application and may distort the results. We find that the market share information in this record is ambiguous and general, and choose not to rely on it in this case as well.

Barriers to Entry. We find that Qwest's dominant position with respect to residential lines in its service territory makes the 0 access code a barrier to entry. Staff points out that Qwest does not own the 0 access code, but customers who dial 0 to access OS in Qwest's service territory will be connected to Qwest in an overwhelming percentage of cases. Qwest notes that CLECs control over 21 percent of business lines in its territory. We take this to mean that Qwest controls around 79 percent of those lines and a still higher percentage of residential lines.

Other Factors. Qwest argues that the Commission should ensure parity among providers. Qwest believes it is unfair and discriminatory to allow it to remain the only regulated OS provider in Oregon. Qwest points out that other states in its service territory have found Qwest's OS to be competitive or have deregulated it.

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.

As to Qwest's parity argument, until very recently Qwest was the monopoly provider of local exchange telecommunications services throughout its service territory. It still owns 98 percent of the residential lines in its service territory. While Qwest objects that it sells some of these lines to CLECs, its position in the market is still predominant. Until we see price competition in the OS market segment for which Qwest requests deregulation, our understanding of our role is to keep prices close to cost through regulation.

ORS 759.030(3) (2). Service Competition. As discussed under The Four Factors, above, we find that service competition exists for OS. Alternative providers offer functionally equivalent services within the relevant market.

Price Competition. We find that the competitors for whom we have price data, AT&T and MCI, charge much higher prices than Qwest for OS. Qwest's prices are set above incremental cost. It is reasonable to assume that AT&T's and MCI's prices are well above the cost of providing OS.

Under price competition, we expect prices to fall (as long as they are above marginal cost, as they are for OS services). As we said in Order No. 96-021, "Over the long term, if the conditions for effective competition are met, competition will drive prices closer to incremental cost." In applying ORS 759.030(3), we examine the factual circumstances shown by the record to determine whether price competition exists. We give considerable weight to the fact that the alternative providers price their services higher than Qwest's. We take this to indicate that competitors are unwilling to create sufficient pressure to lower prices. The fact that prices are not falling with alternative providers in the market is evidence that there is a lack of price competition in the market. We also give weight to the fact that Qwest has raised its prices considerably in jurisdictions that have deregulated its OS.

Subject to Competition. We have determined that limited service competition exists for OS. However, we have also found that Qwest is predominant in the OS market within its service territory, which is the relevant market. Further, we have found that price competition for OS does not exist. Based on this record we do not find that Qwest's OS are subject to competition.

The Public Interest. Qwest objects that there is no offsetting benefit requirement in the deregulation statute. It is true that ORS 759.030 contains no explicit requirement for an offsetting benefit. However, ORS 756.040 mandates that we protect customers and the public generally. While the section of Oregon Laws 1999 set out in the Applicable Law section above is procompetitive, ORS 756.040 comes into play in our decision as well. Moreover, the balance between competition and regulation is explicit in ORS 759.015. That statute sets three goals for telecommunications: (1) high quality universal service; (2) just and reasonable rates; and (3) the encouragement of innovation. The Commission is to achieve these goals through a balance of regulation and competition.

If rates are expected to rise after deregulation of OS, this suggests a lack of competition, given that rates are currently above cost. Continued regulation seems appropriate. This conclusion could be overcome by a showing that the higher rates would at least be offset by higher quality service or increased innovation. Thus, ORS 759.015 seems to imply an offsetting benefit analysis. We look to an offsetting benefit to the public in cases such as this one, where the record indicates that consumers will see a price increase with no change in service. We consider such public interest concerns to be "other factors" under ORS 759.040(4)(d).

Qwest has claimed, in a vague and general way, that competition provides the consumer benefits of innovation and wider choice. If Qwest asserts such benefits, we would like to see specific and concrete examples of the benefits of competition that will flow to customers to offset price increases.

Conclusions. With respect to Qwest's OS, we have found that there is no price competition and only limited service competition. Therefore, we are not compelled to deregulate OS under ORS 759.030(3). We have discretion under ORS 759.030(2) to deregulate if price or service competitions exist. Because of our concern that the public

will simply pay a higher price for the same service, we elect not to approve Qwest's petition to deregulate OS.

We find the Stipulation between Staff and Qwest covering deregulation with conditions for Qwest's 800 ServiceLine and intraLATA toll services reasonable and conclude that it should be adopted.

ORDER

IT IS ORDERED that:

1. The Stipulation between Qwest and Staff, attached to this order as Appendix A and incorporated herein by reference, is adopted in its entirety.

2. Qwest's petition to deregulate its Operator Services is denied.

Made, entered, and effective ______________________________.

______________________________	______________________________
Lee Beyer Chairman	**John Savage** Commissioner
	______________________________
	Ray Baum Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.