ORDER NO. 04-225

ENTERED APR 27 2004

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UA 55

In the Matter of	)	
	)	
U S WEST TELECOMMUNICATIONS, INC. (QWEST CORPORATION)	)	
	)	ORDER
Application for an Order Transferring Right to Exclusively Served Territory, Fairway Downs, Oregon City, to Beaver Creek Telephone Company.	)	

DISPOSITION: ORDER NO. 97-297 AFFIRMED

Background. Qwest Corporation (Qwest) offers local telephone service in the Oregon City exchange and is considered the incumbent local exchange carrier (ILEC) in that exchange, as defined by the 1996 Telecommunications Act (the Act). Beaver Creek Cooperative Telephone Company (Beaver Creek) serves as the ILEC in the adjacent Beavercreek exchange.

Beaver Creek also serves as a competitive local exchange carrier (CLEC) in the Oregon City exchange. Pursuant to the Commission's orders in ARB 365 (Orders No. 02-148 and 02-367), Beaver Creek and Qwest have entered into an interconnection agreement for this Beaver Creek competitive traffic.

Beaver Creek and Qwest have also exchanged noncompeting Extended Area Service (EAS) traffic between Qwest's Oregon City exchange and Beaver Creek's Beavercreek exchange without a written agreement since at least 1989, pursuant to Commission Order No. 89-815 (UM 189), which established EAS rules in Oregon.

In 1994, Beaver Creek first approached Qwest (then U S WEST) about the possibility of Qwest transferring to Beaver Creek some territory in Qwest's Oregon City exchange. The developer of a residential subdivision, Fairway Downs in Oregon City, preferred to take service from Beaver Creek and thus would not give Qwest access to the

subdivision, which was then private property. Qwest had no facilities or customers in the development and agreed to the transfer.

Transferring just the Fairway Downs subdivision would have resulted in an island of Beaver Creek service territory in Qwest's Oregon City exchange. To make the boundaries between the Oregon City exchange and the Beavercreek exchange as rational as possible, Commission Staff suggested that a larger portion of the Oregon City exchange than just the Fairway Downs subdivision be transferred to the Beavercreek exchange. Qwest represented to Staff that it had no customers in the area that Staff proposed to transfer with the Fairway Downs subdivision. Qwest and Beaver Creek agreed to square off the area to rationalize the boundaries between exchanges. This squaring off process resulted in a boundary change that included Fairway Downs as well as other surrounding areas.[1]

After Qwest's transfer application was approved on August 6, 1997 (UA 55, Order No. 97-297), it was discovered that Qwest did have customers in the squared off area. To avoid amending Order No. 97-297, the parties entered into a memorandum of understanding (MOU) with respect to the Qwest customers who had been transferred. The MOU, signed on November 3, 1997, stated that Qwest was to continue to provide service in the subject territory unless the customer selected another service provider, and Qwest assumed responsibility for maintenance of its facilities located in the subject territory.

The parties have operated under the MOU from late 1997 to the present. However, the Commission has never approved the MOU. Therefore, Qwest's status in the Beavercreek exchange is problematic. In ARB 445, Beaver Creek argued that Qwest was a competitive local exchange carrier (CLEC) in the Beavercreek exchange. Qwest argued that it was an incumbent local exchange carrier (ILEC) in the squared off area, even though that territory was in the Beavercreek exchange. Qwest supported its position by referring to the MOU, which was designed to maintain the status quo for the Qwest customers who had been transferred to the Beavercreek exchange.

The parties operated under the MOU for four years. In Qwest's petition for an interconnection agreement (ARB 365), however, Beaver Creek raised the issue of the MOU. The Arbitrator and the Commission decided that the MOU was not relevant in that docket. The Commission also ruled that although Qwest no longer had carrier of last resort obligations in the squared off area, it continued to function as an ILEC in that area under the MOU. Order No. 02-367 at 7.

Beaver Creek raised the MOU again in its own petition for interconnection, ARB 445. The main issue in that docket was whether Qwest was operating as a CLEC in serving its customers in the squared off area, such that it was required to enter into an interconnection agreement with Beaver Creek. The Arbitrator and the Commission rejected Beaver Creek's arguments in that docket. The Commission decided that Qwest was not required to enter into an interconnection agreement with Beaver Creek because Qwest

[1] In this Order, the "subject territory" refers to all the territory transferred under UA 55. The "squared off area" refers to the non Fairway Downs area of the subject territory, that is, the area in which Qwest had customers.

serves as an ILEC in the Beavercreek exchange. Order No. 03-073. The Commission also found that the Act does not preclude two ILECs serving the same territory and the same customer base. Order No. 03-073 at 5.

The Commission further determined, in Order No. 03-073, that UA 55 should be reopened to correct the mistake that resulted in the transfer of the squared off area where Qwest was serving customers and to amend its previous order, Order No. 97-297.

In deciding ARB 445, Order No. 03-132, we noted:

> The record in this case strongly suggests that Qwest would not have transferred the subject territory to Beaver Creek if Qwest had known that the subject territory contained Qwest customers. Indeed, the Commission issued Order No. 97-297 relying on the parties' mistaken representation on this very point. We believe it is time to correct this mistake. Accordingly, by this Order, we reopen the UA 55 proceeding pursuant to ORS 756.658 for the purpose of amending Order No. 97-297. We make no determinations on the merits of the issues to be resolved in UA 55 at this time. Instead, we intend that our Administrative Hearings Division will assign an administrative law judge to Docket UA 55 and that the judge will convene a prehearing conference to identify the issues and set a schedule for the proceeding. We wish to make clear that, until the reopened UA 55 is resolved by a subsequent Commission order, the current territorial allocation approved in Order No. 97-297 will continue in effect.

The parties to the reopened docket—Qwest, Beaver Creek, and Staff—appeared at a prehearing conference on March 26, 2003, and agreed on a procedural schedule. A hearing was held on August 6, 2003, with an additional short hearing on September 10, 2003, to cross examine one Qwest witness. Parties submitted two rounds of briefs after the hearing. Beaver Creek moved for permission to submit a supplemental brief, and that motion was denied on January 16, 2004.

Positions of the Parties. **Qwest.** ***Qwest's Proposal.*** Qwest believes that the Commission's role here is to correct the mistake[2] that occurred in 1997, when the squared off

[2] Qwest contends that the Commission has already ruled that it "issued Order No. 97-297 relying on the parties' mistaken representation" that there were no Qwest customers in the subject territory. Qwest argues further that the Commission has ruled that there is nothing unlawful or contrary to the Act about having two ILECs in the same area. *See* Order No. 03-073 at 6. Qwest maintains that these statements are binding precedent on the Commission and should put to rest Beaver Creek's suggestion that there was "no mistake" about transferring the squared off area.
Qwest argues that issue or claim preclusion applies with respect to our previous decisions regarding this territory. We disagree. First, issue and claim preclusion do not apply to Commission proceedings. Second, even if those principles were applicable here, Staff was not a party to the earlier proceedings, so those

territory was transferred from Qwest's Oregon City exchange to Beaver Creek's Beavercreek exchange. Accordingly, Qwest urges the Commission to reallocate the squared off area to its Oregon City exchange. Qwest would then be the only ILEC for customers in the squared off area, and Beaver Creek would be the sole ILEC in the Fairway Downs subdivision. Beaver Creek could serve its customers in the squared off area as a CLEC, as it does for other customers in the Oregon City exchange, without suffering any harm. This reallocation, Qwest asserts, matches the parties' original intention before the territory was squared off to avoid a service island. Qwest argues that there is no good reason for Beaver Creek to end up with a windfall of an area that was not originally its territory and not originally intended to be transferred.

Qwest asks the Commission, in the alternative, to retain the status quo and formalize the MOU. This would mean grandfathering Qwest as an ILEC for the squared off area. Qwest would remain an ILEC provider in the squared off area unless a customer in a particular residence chooses another provider. Since Qwest would be an ILEC in the squared off area, if a customer that left later chose to return to Qwest, the customer would have the option to do so. Qwest could also serve a customer in a newly constructed residence in the squared off area. This, Qwest contends, is the situation that would have existed had the squared off area not been inadvertently transferred to Beaver Creek. Qwest argues that this solution would be fair and would not be disruptive to customers of either carrier. Finally, Qwest notes that this solution has worked well from a customer perspective for around six years.

Fairness Argument. Qwest admits that it made a mistake in agreeing to transfer the squared off area to Beaver Creek. However, Qwest argues that it would be unfair for the Commission to decide that Beaver Creek should remain an ILEC in the squared off area, for several reasons. First, although Qwest mistakenly represented that it had no customers in the squared off area, the whole situation arose because Qwest was trying to accommodate Beaver Creek's and the developer's demands with respect to Fairway Downs.

Second, Qwest argues that it intended to transfer only the Fairway Downs subdivision to Beaver Creek. Qwest argues that it never intended to transfer territory in which it had customers and would have had no motivation to do so. Third, Qwest asserts that all parties agreed with the idea of resolving their conflict through an MOU. Qwest would have been willing to return to the Commission immediately after Staff and Qwest had discovered the mistake, to have the Commission amend Order No. 97-297 or otherwise resolve the issue at that time.

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proceedings would have no preclusive effect. In the present case we have a more complete record with respect to issues of which carrier knew what about customers in the squared off area as well as about other issues. Qwest further argues that the Commission's mandate here is to "correct [the] mistake" regarding the transfer of territory and to "amend" Order No. 97-297. *See* Order No. 03-073 at 6. Qwest believes that this mandate precludes Staff's argument that the Commission should direct the parties to adhere to Order No. 97-297. We disagree. In reopening this docket we precluded none of the possible solutions proposed by the parties. The purpose of this docket is to explore options and reach a reasonable solution.

Finally, Qwest argues that Beaver Creek did know that there were Qwest customers in the squared off area. Thus, according to Qwest, Beaver Creek also contributed to the mistake at issue in this docket. Qwest contends that in fairness, Beaver Creek should have disclosed its knowledge before the Commission issued Order No. 97-297.

Qwest argues next that it would be unfair to penalize it for a mistake. This is especially so, Qwest contends, given that Qwest was attempting to accommodate Beaver Creek and the developer, as well as Staff's concerns about a service island, when it made this mistake. Qwest entered into the MOU in a good faith belief that the MOU would resolve the issues and thus avoid all parties having to go back to the Commission to address the situation. But for the MOU, Qwest would have asked the Commission to modify the Commission's August 1997 order or otherwise address the problem at that time.

Effect of CLEC Status on Customers. Qwest further argues that the Commission should not require it to serve its customers as a CLEC. Qwest maintains that there would be additional costs and requirements for it to function as a CLEC in the squared off area. Qwest does not presently operate as a CLEC in Oregon and is therefore not required to meet CLEC obligations. According to Qwest, imposing these requirements would force customers in the squared off area to change their telephone numbers and would force Qwest to undertake duplicative record keeping and investments. Qwest points out that only a small percentage of its roughly 1.4 million ILEC access lines in Oregon is at issue here. Therefore, Qwest would likely find it not worth the additional expense to undertake CLEC operations. Then Qwest's customers would be forced to switch carriers and change telephone numbers.

Regulatory Taking Argument. Qwest also maintains that if the Commission prohibits Qwest from serving as an ILEC in the squared off area, the Commission could effectively force Qwest to abandon the area and its customers, facilities, and investment. Qwest believes such action would constitute an unlawful confiscation of Qwest's assets. This would be a taking, according to Qwest, because it could effectively force Qwest to abandon its network plant in the squared off area, where Qwest has substantial investment. Qwest asserts that the confidential investment figures in the record do not fully capture the scope of Qwest's significant and historical investment in this area, because they do not include a proportional amount of the common support assets used to provide service to customers. Most of this investment, according to Qwest, was made with the clear understanding that Qwest was the sole ILEC in the squared off territory, and all of the investment was made with the understanding that Qwest was at least one ILEC in the area.

Qwest contends that if it is forced to operate as a CLEC in the squared off area, this could constitute a regulatory taking or confiscation of its assets. Qwest argues that under federal analysis, a regulatory taking occurs when regulation permanently deprives a property owner of all economically beneficial or productive use of its property. For an amplification of the standard, Qwest refers to *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1015 (1992). That case stands for the proposition that regulatory takings cases are essentially factual inquiries but courts focus on "the parcel as a whole." The *Lucas* court

asserts that "total deprivation of use is, from the landowner's standpoint, the equivalent of a physical appropriation." 505 US at 1017.

Qwest argues that Commission action forcing it to function as a CLEC in the squared off area could force it to abandon a network plant in which it has invested hundreds of thousands of dollars on the understanding that it was an ILEC. Qwest could also be forced to abandon hundreds of thousands of dollars of revenues for the services it provides to its customers. Qwest argues that from its standpoint, such Commission action could be the same as physical appropriation.

Policy Argument. A Commission decision requiring Qwest to serve the squared off area only as a CLEC would be bad policy, Qwest argues. Qwest would not have agreed to transfer the subject territory had it known it would be placed in a position of having to abandon the area or lose customers there, or had it known that the only way it could serve the area in the future was as a CLEC. Qwest submits that notions of fairness and equity, including the costs and requirements to Qwest and the potentially adverse impact on customers, as well as Qwest's substantial investment and facilities in the squared off area, militate against any requirement that Qwest service this area only as a CLEC. Qwest also argues that Beaver Creek knew Qwest had customers in the squared off area and that it would be unfair to punish Qwest for its mistaken belief that it had none there, when Beaver Creek had a duty to disclose what it knew.

Beaver Creek. Beaver Creek argues that the core issue in this case is whether Beaver Creek or Qwest has made the effort to provide improved service to the customers in the area and has acted consistently with the status of an ILEC. Beaver Creek argues also that the history of the MOU and the negotiations between the parties is only marginally relevant to resolution of the case.

Beaver Creek outlines the list of questions the Commission should consider in deciding this case. These include: the relative investments of the parties in the squared off area; what Qwest knew about its customers in the squared off area; Qwest's alteration of the MOU and the impact of Qwest's representations or lack thereof concerning the MOU;[3] and the fact that Qwest does not include the squared off area in its filed exchange maps (see ORS 759.005(2)(c)) and is therefore serving in the squared off area as a competitive carrier under ORS 759.020.

Beaver Creek also challenges Qwest's recommended solutions to the problems associated with Qwest's service of the squared off area. Beaver Creek contends

[3] The parties have argued about the MOU, its interpretation, and its effect in both ARB dockets. Parties again presented evidence on the MOU in this docket. Beaver Creek argues that the MOU was intended to allow Qwest to serve only the customers in place in the squared off area at the time of execution. Qwest argues that the MOU allows it to serve those customers and their successors in the squared off area. Regardless of the MOU, however, we determine here, on a more complete record, that the status quo is not tenable. The MOU is an insufficient governing instrument for the parties' interaction in the squared off area. Therefore, we do not again explore the meaning of the MOU.

that the squared off area should not be transferred to Qwest's Oregon City exchange and that Beaver Creek and Qwest should not remain as co ILECs in the squared off area.

Relative Investment in the Squared Off Area. Beaver Creek maintains that it has made far greater investments in the squared off area than Qwest. Beaver Creek's investment, it argues, shows a genuine desire to serve the area as the ILEC. Qwest's investment in the same territory demonstrates a desire to avoid added customer commitments.

Since 1995, Beaver Creek argues, its investment in telecommunications facilities in the squared off area is more than double that claimed by Qwest. This does not take into account the money Beaver Creek paid Qwest to take over the Fairway Downs subdivision or the investments in Beaver Creek's new headquarters built in the squared off area on Henrici Road. Since the formal transfer in 1997, Beaver Creek's investment in providing telecommunications services to the squared off area is roughly four times that of Qwest's stated investment. These figures do not include Beaver Creek's investments to provide Internet access, DSL, and cable TV in the squared off area. This is evidence, Beaver Creek contends, of Beaver Creek's continuing efforts to serve customers in the squared off area.

What Qwest Knew About Its Customers Before the Transfer. Beaver Creek argues that Qwest is at fault in creating the current situation, whether as the result of a mistake or otherwise. If Qwest knew it had customers in the squared off area when it transferred the territory to Beaver Creek, Beaver Creek asserts that Qwest should not be allowed to serve those customers' homes as an ILEC in the Beavercreek exchange in perpetuity. Beaver Creek argues that from a legal standpoint, there is no question that Qwest, as an entity, knew it had customers in the squared off area at the time it transferred the territory to Beaver Creek. Qwest was billing these customers for its services. On some level Qwest was fully aware that there were customers in the squared off area at the time of transfer.

According to Beaver Creek the evidence suggests that some of the Qwest employees involved in the transfer were aware of the customers in the squared off area. Beaver Creek cites to a memo by Qwest employee Jeff Pennington dated October 16, 1997, describing the impact of the MOU on the "present customer base" of Qwest and Beaver Creek.[4]

Beaver Creek also notes that a comparison of Beaver Creek Exhibits 12 and 13 shows that Qwest was aware it had customers in the squared off area. The second page of Beaver Creek Exhibit 12 depicts residential streets in the squared off area. On the first page of Beaver Creek Exhibit 12, dated July 5, 1995, Mike Reding, former Qwest employee, states in reference to addresses on the map on the second page: "per our phone conversation today.

[4] We note that this memo was written after Qwest discovered that it had customers in the squared off area, and therefore give it little weight. Beaver Creek's other evidence is more persuasive of Qwest employees' knowledge that it had customers in the squared off area.

Please block all addresses on the identified streets (see attached) in PREMIS. These addresses now belong to Beaver Creek Telephone Co." Thus, Beaver Creek argues, it is clear that Qwest's employees, including those involved in the transfer, were aware of the fact that Qwest had customers outside the boundaries of the Fairway Downs subdivision that were being transferred to Beaver Creek. If Qwest did know it had customers in the squared off area, Beaver Creek contends, Beaver Creek should serve as the sole ILEC throughout the Beavercreek exchange.

Qwest serves the Beavercreek Exchange as a Competitive Carrier. Beaver Creek argues that it is the only recognized ILEC in the squared off area. Beaver Creek notes that ORS 759.005(2)(c) defines "local exchange telecommunications service" as "telecommunications service provided within the boundaries of exchange maps filed with and approved by the commission." ORS 759.020(3) states in part:

> Except as provided in ORS 759.050, no certificate shall authorize any person to provide local exchange telecommunications service within the local exchange telecommunications service area of a telecommunications utility unless such utility consents, is unable to provide the service, or fails to protest an application.

Beaver Creek's Beavercreek exchange map on file with the Commission shows the squared off area as within the Beavercreek exchange boundaries. Qwest's Oregon City exchange map on file with the Commission does not show the squared off area as being within the Oregon City exchange boundaries. Thus, according to Beaver Creek, Qwest cannot be considered to offer "local exchange telecommunications service" in the squared off area. Further, Beaver Creek argues that Qwest does not fit into any of the statutory exceptions in ORS 759.020. Beaver Creek has not consented; Beaver Creek is not unable to provide service; and Beaver Creek has not failed to protest an application from Qwest to be deemed an ILEC in the squared off area. Finally, Beaver Creek argues that in UM 177, Order No. 00-299 at 4, the Commission found that the transfer of territory was on an exclusive basis. This can only mean to serve the area as the sole ILEC, Beaver Creek contends.

Beaver Creek opposes both of Qwest's recommended solutions. Qwest first proposes that Qwest be the exclusive ILEC in the squared off area for those houses that Qwest served at the time of transfer. Beaver Creek contends that this suggestion would result in service area confusion far greater than the service island problem that originally moved Staff to suggest squaring off the territory. Qwest also proposes to allow Qwest and Beaver Creek to serve the squared off area as co ILECs. This would result in the same confusion that has brought the parties to this stage, according to Beaver Creek. Beaver Creek contends that Qwest and Beaver Creek could disagree about carrier of last resort obligations with respect to customers who might be remote and difficult to serve.

Beaver Creek recommends it be designated the sole ILEC in the squared off area. Beaver Creek further recommends that Qwest have a year to set up its books for CLEC

operations and to enter into the interconnection agreement with Beaver Creek that Beaver Creek previously presented to Qwest. Beaver Creek asks the Commission to state in this order that Qwest is functioning as a CLEC in the Beavercreek exchange

Staff. Staff contends that the MOU has not solved the issues arising from the 1997 transfer of Qwest customers. Beaver Creek and Qwest have differing opinions about the interpretation of the MOU and their roles in the squared off area. They disagree about whether the MOU contemplates that Qwest would continue to serve only customers it served in the squared off area at the time of the transfer or whether it would be allowed to serve new customers that may replace those customers. The parties also disagree about whether Qwest was to continue to serve as an ILEC in the subject territory. These disagreements have led to litigation before the Commission, Oregon appellate courts, and federal district court.

Staff notes that Beaver Creek, Qwest, and Staff have proposed different solutions to stop the continued disputes between Beaver Creek and Qwest arising from the transfer of the squared off area. Staff argues that Beaver Creek's substantial investment in the squared off area, among other things, warrants a Commission determination that Beaver Creek be designated the sole ILEC in the squared off area. Staff, in other words, urges the Commission to give effect to the transfer of rights approved by the Commission in Order No. 02-297.

Staff recommends a resolution similar to Beaver Creek's proposal, but suggests that the Commission allow Qwest a three year period in which to make the transition to service as a CLEC in the subject territory.

Staff argues that Qwest's first proposal, reallocation of the territory back to Qwest, should be rejected. First, Oregon's territorial allocation statutes do not specifically authorize it. Nor is there any principle of contract law or of equity that supports the relief Qwest requests in its first proposal. ORS 759.500 *et seq.* sets out the Commission's authority over allocation of territory for telecommunications utilities. These statutes do not contemplate reallocation of territory when that reallocation is not requested by the utility in possession of the rights associated with the territory in question. On the contrary, these statutes contemplate that territory will be reallocated from one carrier to another when the carriers agree to the transfer. No statute provides a mechanism by which a utility can apply to the Commission to reassign these rights against the will of the utility that owns them.[5]

Staff believes that the Commission may have authority under ORS 756.040, its broad general powers, to order Beaver Creek to give Qwest back the territory Qwest previously transferred to Beaver Creek. However, Staff argues that this authority should be exercised for the purpose of protecting customers and the public generally from unjust and unreasonable exactions and to obtain for customers adequate service at fair and reasonable rates. The record does not establish that the transfer of rights currently held by Beaver Creek

[5] ORS 759.560 provides that the "rights acquired by an allocation of territory may only be assigned or transferred with the approval of the commission. The commission may approve the assignment after a finding that it is not contrary to the public interest."

is necessary to accomplish these objectives.

According to Staff, principles of contract law and equity also do not support Qwest's proposal. These principles are not controlling but can be instructive. By asking the Commission to reallocate territory, the utility is asking the Commission to reform or rescind Qwest's agreement with Beaver Creek under which Qwest agreed to transfer the subject territory to Beaver Creek. Neither reformation nor rescission of the agreement between Qwest and Beaver Creek is warranted under Oregon law.

Staff argues that reformation of a contract is appropriate only when the written agreement does not reflect the agreement intended by the contracting parties, either through a mistake common to both parties or through the mistake of one party accompanied by the fraudulent knowledge and procurement of another. *Manning Lumber v. Voget*, 188 Or 486, 497 (1950). Here, the written agreement between Beaver Creek and Qwest does express the real agreement reached by these parties. Qwest intended to transfer the subject territory to Beaver Creek and in fact did so. It would not be appropriate to reform the contract to reflect a completely different agreement.

Similarly, rescission of the agreement between Qwest and Beaver Creek would not be appropriate under contract principles. A contract may be rescinded if parties have entered into the agreement through a mutual mistake. However, both parties must be mistaken and the mistake must be fundamental in character. *Shopping Centers of America, Inc. v. Standard Growth*, 265 Or 405 (1973). In this case there was no mutual mistake to serve as a predicate for rescission. Beaver Creek knew that Qwest had customers in the squared off area prior to Qwest's transfer of the territory and assumed that Qwest knew as well. In any event, rescission is not appropriate because information regarding the existence of customers in the squared off area must have been readily available to the Qwest employees negotiating the transfer. Qwest employees could have prevented the mistake by taking reasonable measures to determine whether there were customers in the squared off area. Therefore, a nullification of the bargain it made with Beaver Creek is not warranted.

Staff bases its assumption that Qwest knew of its customers in the squared off area on the following: Staff presumes that Qwest has accessible data on all the customers it serves. Further, Staff argues that Qwest must have provided maintenance services to these customers and sent bills to them every month prior to the transfer in 1997. Staff believes that the Qwest employees negotiating the transfer of territory could have determined that the territory contained Qwest customers by exercising due diligence. Staff argues that Qwest should not be allowed to ascribe to Beaver Creek the consequences of its failure to take reasonable measures to inform itself about its operations. *See, e.g., Walcutt v. Inform Graphics, Inc.*, 109 Or App 148, 150 (1991).

Finally, Staff contends that documentary evidence from 1997 and testimony at hearing reflect that the Qwest employees negotiating the transfer were in fact aware that squaring off the territory transferred to Beaver Creek could result in the transfer of current Qwest customers to Beaver Creek. A letter from Dave Warner, a Beaver Creek engineer, to

Nancy Batz of Qwest dated February 7, 1997, addresses proposals to deal with Staff's concern about the service island that would be created if only the Fairway Downs service area was transferred to Beaver Creek. Attached were descriptions of two differently sized territories that could be transferred from Qwest to Beaver Creek, labeled Exhibits A and B.

On February 14, 1997, Jeff Pennington of Qwest wrote to Nancy Batz and another employee after reviewing the proposals. Mr. Pennington recommended that Qwest not accept the proposed transfer described in Exhibit B because it "far exceeds the targeted area (the Fairway Downs subdivision) with corresponding increase in markets and growth impacts" and because "there could be significant impact to customers including two schools." At hearing, counsel for Beaver Creek pointed out to Ms. Batz that the territory described in Beaver Creek's Exhibit B was actually smaller than what was eventually transferred by Qwest to Beaver Creek. Ms. Batz testified that Qwest had considered Mr. Pennington's concerns but transferred the territory anyway. Therefore, Qwest's argument that it mistakenly transferred customers is puzzling. However, even assuming that Qwest employees were not aware of the customers in the squared off area at the time they agreed to a transfer, Mr. Pennington's February 1997 analysis shows that these employees had access to data that would have informed them about the Qwest customers in the squared off area.

Staff also argues that Qwest's equitable arguments are not compelling. Qwest argues that it should receive the territory back because the situation arose through Qwest's attempt to accommodate the demands of Beaver Creek and the Fairway Downs developer; because Qwest's original agreement was to transfer only the Fairway Downs subdivision, and it transferred the squared off area only because Staff suggested that it do so to address concerns about a service island; and because Commission Staff suggested the MOU and Qwest accommodated Staff even though Qwest was willing to return to the Commission immediately.

Staff agrees that it opposed transfer of only the Fairway Downs development based on concerns about a service island and duplicative facilities. Still, Staff contends, that did not relieve Qwest of its obligation to exercise due diligence before the transfer. And even assuming that Staff suggested the MOU as a remedy, nothing prevented Qwest from pursuing the remedy that best protected its interests.

Even assuming that Staff witness Mr. Harris suggested and recommended that Beaver Creek and Qwest address Qwest's mistake with a MOU, Staff argues that this Commission must assume that Qwest is capable of making its own business decisions. Staff points out that testimony by Qwest witness Sheila Harris reflects that Qwest considered at least three options to address its mistake, and decided upon the MOU option not only because Staff suggested it but because Qwest believed it was the best available option. Staff argues that Qwest cannot ascribe to Staff the consequences of such freely made decisions.

Staff contends that Qwest's proposal is not supported by practical considerations. Beaver Creek has been recognized as the ILEC for the subject territory

since Order No. 97-297. Beaver Creek has made significant investment in the subject territory to serve the area for which it is the ILEC and for which it has carrier of last resort responsibilities. Beaver Creek as the ILEC is obligated by its carrier of last resort status to construct facilities throughout the subject territory, and is ready to serve any customer there who requests service from Beaver Creek. Staff argues that it is unlikely that Qwest has facilities in place to serve much of the non Fairway Downs portion of the subject territory. According to Staff, Qwest has merely maintained its system to serve the customers existing in the territory in 1997 and those that replaced them. Staff asserts that designating Qwest as the ILEC in the squared off area is not practical and is likely not in customers' best interests.

Staff also argues that the Commission should reject Qwest's second proposal, that the Commission formalize the status quo. The status quo is continued litigation between Qwest and Beaver Creek and is what led the Commission to reopen this docket.

Staff recommends that the Commission adopt Staff's proposal. Staff analyzed four possible solutions to the continued disputes between Beaver Creek and Qwest over the subject territory. Those possible solutions are, first, rescission of Order No. 97-297 approving Qwest's transfer of the subject territory; second, reallocation of the non Fairway Downs portion of the subject territory to Qwest; third, formalizing the parties' MOU; and fourth, an order directing the parties to adhere to Order No. 97-297. Staff rejected the first three potential solutions and recommends the fourth.

Staff notes that no party requested its first solution, rescission of Order No. 97-297. Rescission would also be unfair both to companies and their customers. Qwest has no facilities and is not able to operate as a carrier of last resort in the Fairway Downs subdivision. Beaver Creek has made significant investment in the entire subject territory in reliance on Order No. 97-297 since the date of that order.

The second solution is what Qwest desires. Staff argues that this solution is not authorized under Oregon's territorial allocation statutes. Staff believes that reallocation of the squared off area could be accomplished only by implementing the first solution, which is rescission of the Commission's approval of the entire allocation. Staff argues that that would be neither desirable nor equitable.

Staff believes that its third solution, formalizing the MOU, will likely not resolve the continued litigation between Beaver Creek and Qwest. Also, Staff believes it is poor public policy and not in the public interest to allow two ILECs to provide local exchange service in the same area on a permanent basis. In effect, Staff contends, the Commission agreed with Staff's assessment when it adopted OAR 860-032-0010(4) in February 2000. That rule states:

> Local exchange telecommunications service provided by a telecommunications utility or a cooperative within the boundaries of local exchanges belonging to another telecommunications utility or cooperative, which exchanges are defined pursuant to ORS 759.005(2)(c), shall be considered

> the operations of a competitive provider, and may only be provided pursuant to a certificate of authority granted by the Commission under ORS 759.020. Such service shall be considered operations of a competitive provider without regard to the manner the provider treats those operations.

Staff notes that the Commission adopted this rule to meet its obligations to treat all entrants into the exchange area assigned to a telecommunications utility or a cooperative with competitive neutrality. Therefore, Staff argues, any entity other than Beaver Creek that provides service in the Beavercreek exchange should do so as a competitive provider. The Commission should not permit some entrants to compete with Beaver Creek as telecommunications utilities and others to compete as competitive providers. Staff believes another reason not to allow two ILECs to serve the same territory is that such a situation could lead to disputes regarding the form of interconnection, reciprocal compensation for exchange of traffic, and who is responsible to provide service to a particular part of the exchange.

Staff maintains that the Commission should not address these policy concerns by simply moving the boundary of the Beaver Creek and Qwest territories to formalize the MOU. The customers of Beaver Creek and Qwest are intermingled, Staff points out, and there is no practical way to move the boundary of the Qwest and Beaver Creek territory or make it zigzag around in order to separate Qwest's and Beaver Creek's customers.

Staff argues that its fourth solution is consistent with the Commission's statutory authority and is equitable and practical. This solution is simply to allow the exchange boundary descriptions to remain as specified in Order No. 97-297 for Beaver Creek and in Order No. 02-567, docket UA 95, for Qwest, and to give full effect to Qwest's transfer of rights to Beaver Creek approved in Order No. 97-297. Beaver Creek should be the ILEC in the subject territory, and Qwest will be allowed to provide service in this territory only as a CLEC.

Staff suggests that Qwest be allowed three years to make the transition to service as a CLEC. Staff further recommends that Qwest's service as an ILEC in the subject territory be strictly grandfathered as of the date of the order concluding this reopened docket. Staff believes that Qwest should be allowed to serve no new customers in the squared off area as an ILEC after that date.

Staff does not accept Qwest's regulatory taking argument. The Commission did not order Qwest to transfer its right to serve customers in the subject territory as an ILEC. Qwest requested approval of the transfer. Qwest's suggestion that the Commission's approval of Qwest's voluntary transfer of rights is a taking is without merit.

In any event, Staff contends that Qwest cannot establish the elements of a regulatory taking. To establish such a taking under Article I, Section 18 of the Oregon Constitution, a property owner must show that the government has deprived the owner of "all substantial beneficial or economically viable use of the property." Because Qwest could

continue to operate in the subject territory as a CLEC, it could continue to obtain economic benefit from its investment in the territory. In these circumstances, Staff argues, there would be no taking.

Staff notes that Qwest witness Mr. Easton testified to prohibitively high costs to operate as a CLEC in the subject territory but provided no financial analysis to corroborate his contentions. Staff argues that his testimony is not persuasive. Qwest will not forfeit any economically viable use of its facilities through this resolution.

Staff argues that Mr. Easton's testimony regarding the value of Qwest's pre 1995 facilities in the subject territory is also unpersuasive. Mr. Easton did not know when facilities had been installed, what period Qwest used for depreciation of the facilities, or what periods may be required by Commission policies. Staff attempted to ascertain the value of Qwest facilities in the subject territory prior to the hearing, with limited success. Qwest did not provide discovery regarding any investments in the territory that preceded 1995. In rebuttal testimony, Mr. Harris of Staff suggests:

> Given the lack of information from Qwest, the Commission should conclude that [pre 1995 investments in the subject territory] have been fully or almost fully depreciated, have almost zero book value and that Qwest has substantially recovered its pre 1995 investment in the subject territory.

To the extent Qwest has invested in facilities for the squared off area from 1995 to 2002, Staff notes that a small part of the investment in 1995-1997 and all of the investment in 1997-2002 is based on central office expenditures prorated to the squared off area. Qwest was not able to provide information as to whether the costs attributed to the subject territory would have been avoided had Qwest not been serving customers in the area. According to Staff, Qwest did not show that operating as a CLEC in the territory would be cost prohibitive.

Staff argues that adopting its proposal would not burden customers. Qwest asserts that customers would be forced to change their telephone numbers and perhaps their local carrier if Qwest has to abandon operation in the squared off area. Staff contends that Qwest did not establish it is likely customers would be forced to change carriers; nor did Qwest establish that customers would have to change their telephone numbers.

As to customers having to change numbers, Mr. Harris of Staff testified that Qwest would have to get a new central office code, that is, an NXX, for CLEC operations in the Beavercreek exchange. The new NXX would be used for new customers. Depending on how Qwest would provide such CLEC service, current customers could keep their telephone numbers through Local Number Portability (LNP or porting). LNP has been available in the Oregon City central office since September 1998. Alternatively, Qwest could serve those customers as it does now, using the current Oregon City central office switch, so porting would not be an issue.

Mr. Linstrom of Beaver Creek also testified that Beaver Creek's switch is LNP capable and that customers switching from Qwest to Beaver Creek in the squared off area would be able to port their Qwest numbers to Beaver Creek.

Commission Discussion and Resolution.

To resolve this dispute, we have posed the following questions.

1. Should the squared off area be reallocated to Qwest? Qwest's first proposal is that the area it originally transferred to Beaver Creek along with the Fairway Downs territory should be reallocated to it as part of the Oregon City exchange. Qwest argues that this solution is equitable because its original transfer of customers to Beaver Creek was a mistake. Qwest further argues that this solution is equitable because Qwest agreed to the proposal to transfer the squared off area only to accommodate Staff's concern with avoiding a service island.

We disagree with Qwest that the squared off area should be reallocated to it. First, the record before us indicates that the transfer of customers along with territory was not a mistake. Beaver Creek and Staff have both cited to exhibits that imply that Qwest employees involved in the transfer of territory had actual knowledge of customers in the squared off area and that Qwest transferred the territory anyway. Even if that were not the case, had Qwest shown due diligence in its own interest, it would have discovered its customers in the squared off area.

In any event, Qwest was the party best situated to determine whether it had customers in the squared off area and the party with the strongest interest in making that determination before agreeing to transfer territory. It is undisputed that Qwest did agree to transfer the squared off area to Beaver Creek. Thus, Qwest's reliance on a mistake as a grounds for undoing the transfer is misplaced.

Staff also points out that we lack specific authority to transfer territory against the will of the company that holds the rights to that territory. As Staff notes, our broad general powers under ORS 756.040 could be read to permit such action on our part, but we find that neither fairness nor policy considerations impel such action on our part.

2. *Should there be two ILECs in the same exchange?* Qwest asks us in the alternative to formalize the MOU and allow it and Beaver Creek to function as ILECs in the Beavercreek exchange. In ARB 445, we described Qwest's position in the Beavercreek exchange as that of an ILEC without carrier of last resort obligations. We reached this conclusion because on the record before us, we found that Qwest was not functioning as a CLEC in the squared off area. Specifically, we found that "Qwest's presence in the subject territory does not constitute competition in a sense that would trigger the interconnection requirements of the [federal Telecommunications] Act [of 1996]." Order No. 03-073 at 4. As we stated in that order, the record there indicated that Qwest inadvertently transferred customers along with the territory it transferred to Beaver Creek.

In Order No. 03-073 we also reopened UA 55, because the parties were in dispute about their status in the squared off area. The record in the present case shows that Qwest had or should have had knowledge about its customers in the squared off area. This finding differs from that in ARB 445, where we relied on the MOU for our interpretation of the parties' relationship in the squared off area. The record of the parties' transactions regarding the squared off area is more complete in the present case, and that, plus our conclusion that the MOU does not adequately govern the parties' relations, compels our determination here that Qwest should cease to function as an ILEC in the Beavercreek exchange.

Moreover, while the 1996 Telecommunications Act does not specifically prohibit multiple ILECs from serving the same territory, we believe that public policy argues against having more than one official ILEC per exchange. We note first that our rule, OAR 860-032-0010(4), states that local exchange service provided by one telecommunications carrier within the exchange boundaries of another carrier shall be considered the operations of a competitive provider. This rule was passed to ensure competitive neutrality for all entrants into the telecommunications arena. We do not consider it good policy to allow an exception to that general rule.

Second, as Staff points out, having two ILECs in a single exchange has led to disputes regarding the form of interconnection and reciprocal compensation for exchange of traffic. It could also lead to disputes about who has carrier of last resort obligations with respect to certain customers. We are not convinced by Qwest's argument that affirming the status quo would put these arguments to rest.[6]

Nor do we accept Qwest's argument that in fairness we should affirm the MOU because Staff facilitated or originated the idea. The record is not clear on who originated the idea. Regardless of how it originated, both Qwest and Beaver Creek signed the MOU. The fact that the MOU may have originated with Staff does not relieve Qwest of the responsibility to act in its own best interests.

It has been difficult to ascertain the extent of Qwest's investment in the squared off area. Relatively speaking, it appears that Beaver Creek has made a greater investment in the area and has made the commitment of moving its headquarters to the area. We are confident that current Qwest customers in the Beavercreek exchange will be well served by either carrier, but are also convinced that Beaver Creek should be the sole ILEC in the exchange.

For these reasons we decline to designate Qwest as an ILEC in the Beavercreek exchange.

[6] As discussed above, in ARB 445 we determined that Qwest was not required to enter into an interconnection agreement with Beaver Creek because Qwest serves as an ILEC in the Beavercreek exchange. *See* Order No. 03-073. Our conclusions in ARB 445 in this regard shall continue throughout the three year transition we impose in this case.

Having considered both of Qwest's proposals, we conclude that neither fairness nor policy reasons weigh in favor of either proposal.

3. Should we affirm Order No. 97-297? Both Staff and Beaver Creek urge this solution, although Staff's proposal would give Qwest three years to make the transition to CLEC status, while Beaver Creek proposes a one year period of transition.

Qwest Operations as a CLEC in the Beavercreek Exchange. If we affirm Order No. 97-297, Qwest will have to operate as a CLEC in the Beavercreek exchange. Qwest argues that it should not be required to serve its customers as a CLEC in the squared off area. Qwest contends that there is no legal or equitable basis for requiring it to serve as a CLEC in an area that it has historically served as an ILEC. To serve as a CLEC, Qwest would have to comply with the obligations set forth in its CLEC certificate. Qwest argues that it would, among other things, have to force customers in the squared off area to change their telephone numbers. Qwest asserts it would also have to undertake duplicative record keeping and investments. Qwest contends that although it did not provide a financial analysis of its position, common sense dictates that it is unlikely to be economical for a company to enter a new line of business for less than 1 percent of its customer base.

Qwest also argues that the small number of customers it serves in the squared off area would not justify the additional expense for CLEC operational and accounting requirements. Qwest could decide to abandon the squared off area customers rather than incur the expense needed to serve them.

We are sensitive to Qwest's concerns. As Staff has pointed out, however, Qwest has not provided figures that allow us to assess the financial impact of CLEC operation or loss of this customer base. Nor has Qwest supplied figures to support its claim that its investment in the squared off area is substantial. *See* Staff's description of Qwest's investments at p. 14 above. The record shows that we can conclude that Qwest's pre 1995 investments in the squared off area have been almost fully depreciated and recovered. We do not find the financial impact of affirming Order No. 97-297 on Qwest significant enough to preclude that solution.

Further, we have explored Qwest's assertion that customers might be forced to change their telephone numbers and find that to be incorrect, as we set out below.

Local Number Portability (LNP). Qwest argues that its customers could be forced to change numbers if Qwest were to operate as a CLEC and decided to abandon service in the squared off area. Qwest argues that wireline LNP has not been defined or deployed for use in different rate centers. Qwest's Oregon City exchange is in the Clackamas rate center, while the Beavercreek exchange is in the Beavercreek rate center. To support its argument, Qwest cites to FCC Second Report and Order, CC Docket No. 95-116, 12 FCC Rcd. 12281, 12328-29, Para. 83, fn. 232 (citing to Industry Numbering Committee Working Group Report, at Section 6.8.1) ("the designated geographic area [for

LNP] is limited to an existing rate center within a geographic NPA"). The Beavercreek exchange is in the Beavercreek rate center, and the Oregon City exchange is in the Clackamas rate center.

We have reviewed the FCC document to which Qwest refers and find that the subject matter of the paragraph and of the Industry Numbering Committee Working Group Report is number pooling, not number portability. Specifically, Section 6.8.1 deals with the manner in which the North American Numbering Plan Administrator (NANPA) and the Local Number Portability Administrator (LNPA) might share numbering information. The footnote to which Qwest cites goes on to quote the Industry Numbering Committee to the effect that pooling of geographic numbers in a local number portability environment allocates numbering resources to a shared reservoir associated with a designated geographic area, initially an existing rate center. The numbering resources in the shared reservoir would be available in blocks or on an individual number basis for assignment to competing service providers participating in LNP. The materials to which Qwest cites do not prove its point about the relationship between LNP for already allocated numbers and rate centers, and we were unable to find any FCC statement that number portability is limited to a rate center.

Qwest has not convinced us that LNP cannot be deployed across rate centers. Staff and Beaver Creek are confident that LNP can be deployed to allow Qwest customers to keep their numbers. We instruct the parties to cooperate in instituting LNP for Qwest customers in the Beavercreek exchange as necessary. If Qwest and Beaver Creek encounter difficulties in deploying LNP for Qwest customers, we encourage the parties to come to the Commission for help in resolving disputes or difficulties.

If, as appears to be the case, LNP can be deployed for Qwest customers in the Beavercreek exchange, concerns about the impact of Qwest operations as a CLEC on customers are addressed. We next address Qwest's arguments that forcing it to operate as a CLEC is a regulatory taking.

Takings Argument. As Qwest points out in its briefs, the U.S. Supreme Court has held that regulation that permanently deprives a property owner of all economically beneficial or productive use of its property is a categorical regulatory taking under the Takings Clause of the Fifth Amendment. See *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1015 (1992). Qwest argues that requiring it to enter a business (becoming a CLEC) in which it does not engage in Oregon simply to serve an area that it has long served as an ILEC would likely deprive it of all economic beneficial or productive use of its property (its network plant in the squared off area) and its property rights (the retail revenues from its ILEC customers there).

Staff responds that Qwest has not met the elements of a regulatory taking. Staff's analysis rests on the Oregon Constitution, but the analysis under either constitution is similar. We conclude that Qwest's takings argument fails. Our action in affirming Order

No. 97-297 would not deprive Qwest of all beneficial or economically viable use of its property. Qwest could use its facilities in the squared off area to function as a CLEC. Its CLEC customers could generate retail revenues for Qwest.

Policy Argument. Qwest contends that it would be bad policy to require it to serve as a CLEC in the squared off area. Qwest states that it would not have agreed to transfer the squared off area had it known it would have to abandon the area or lose customers there, or serve only as a CLEC. *See* Qwest Opening Brief at 24; Qwest Exhibit 16 at 21. Qwest argues that notions of fairness and equity militate against the requirement that Qwest serve the squared off area only as a CLEC. Finally, Qwest argues that it would be unfair to punish Qwest for a mistake when Beaver Creek knew of the customers and failed to disclose its knowledge.

We find this part of Qwest's argument self contradictory. When Qwest agreed to transfer territory to Beaver Creek, and further agreed to square off the territory, Qwest's official position is that it did not know it had customers in the area. Therefore, when Qwest entered into the transfer, it was abandoning the area to Beaver Creek. For it now to state that it would not have engaged in the transfer had it known it would have to abandon the area makes no sense. In any event, Qwest's arguments about fairness and Beaver Creek's duty are not well taken. As Staff witness Tom Harris stated at hearing:

> [Qwest] voluntarily applied to the Commission to transfer territory in 1997. The Commission granted the application and allowed the subject territory to be transferred from [Qwest] into [Beaver Creek's] Beavercreek exchange. Qwest asserts that it made a mistake and did not intend to transfer territory in which it had customers. [Qwest] certainly had an obligation to know whether it had customers in the subject territory. It would set a poor precedent if the Commission reverses its order granting a voluntary application from the company six years after the application was granted and over the objections of [Beaver Creek] because Qwest made a mistake.

We conclude that the appropriate solution to the situation described in this order is to affirm Order No. 97-297. This solution means that Qwest will function only as a CLEC in that exchange. From the date this order is issued forward, Qwest will be allowed to serve no new customers as an ILEC in the Beavercreek exchange, whether at an existing Qwest service location or at a new location. Qwest will have three years from the date this order is issued to complete the necessary steps to operate as a CLEC in the Beavercreek exchange.

ORDER

IT IS ORDERED that:

1. The exchange boundary descriptions shall remain as specified in Order No. 97-297 (UA 55) for Beaver Creek's Beavercreek exchange and Order No. 02-567 (UA 95) for Qwest's Oregon City exchange.

2. The transfer of territory in Order No. 97-297 is affirmed.

3. Qwest shall function as a CLEC in the Beavercreek exchange starting three years from the date of this order, if Qwest continues service in the Beavercreek exchange beyond the three year transition period.

4. Qwest shall serve no new customer, whether at an existing Qwest service location or at a new location, as an ILEC in the Beavercreek exchange from the date of this order.

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.