

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayner	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Request for Service in
Qwest's Tofte Exchange

ISSUE DATE: June 21, 2002

DOCKET NO. P-421/CP-00-686

ORDER REQUIRING SERVICE TO THE
UNSERVED AREA OF QWEST'S TOFTE
EXCHANGE AND REQUIRING
CUSTOMER CONTRIBUTION

PROCEDURAL HISTORY

On May 31, 2000, Robert Tyson, an individual residing in a rural area of Cook County, Minnesota, on Lake Clara (near Tofte), filed a complaint requesting that the Commission investigate the lack of telephone service in that area of Cook County. Attached to the complaint was a petition signed by approximately 70 property owners requesting wireline telephone service for Clara Lake, Tait Lake and Holly Lake (Tofte Petition and Tofte Petitioners, respectively).

On December 14, 2000, Qwest Corporation (Qwest) filed its response to the request for service in the Tofte area. Qwest estimated the cost to provide basic telephone service to 68 residences in Qwest's unserved Tofte exchange was approximately \$2.2 million, using a buried cable design.

From November 2000 to April 2002, various property owners in the Tofte area filed comments with the Commission supporting the need for telephone service.

On February 22, 2002, the Department of Commerce (DOC) filed comments discussing the results of a survey the DOC had sent to petitioners. The DOC recommended that the Commission find that reasonably adequate telephone service is not available to Petitioners and that Qwest be required to provide service to Petitioners and all others within its exchange at the same recurring and non-recurring charges as those charged to customers in the City of Tofte.

On March 20, 2002 Qwest filed comments objecting to the DOC's recommendation to require Qwest to provide service to Tofte petitioners without meaningful cost recovery for Qwest. Meaningful recovery for Qwest would include assessing charges for line extension and construction.

On March 20, 2002, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) filed comments supporting the Petitioner's request for service at the same recurring and non-recurring rates that Qwest currently charges customers in the City of Tofte.

On April 4, 2002, the RUD-OAG filed reply comments.

On April 5, 2002, the DOC filed reply comments.

On May 20, 2002, representatives of the Commission, DOC, RUD-OAG and Qwest toured the area in question and met with interested parties.

On May 29, 2002, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Background

Over the past two years, the Commission has received a petition and letters from over 100 people requesting telephone service to homes located on several lakes in the area north of Lutsen, Minnesota. The lakes represented are within the Tofte telephone exchange service territory, which is assigned to Qwest. Qwest is also designated as an Eligible Telecommunications Carrier (ETC) in this area.¹ Although there are several lakes involved, the properties are generally grouped in clusters around each of the lakes. The area is developing and the petitioners are a mixture of permanent and seasonal residents. The area currently receives sporadic cellular service in some areas and no service in others.

II. Legal Standards

Minnesota statutes have enumerated several goals to guide the Commission in its regulatory efforts. The statute reads, in pertinent part,

¹ In Minnesota Rules part 7812.1400, subp. 1, the Commission determined that on or after July 28, 1997 each local exchange carrier operating in Minnesota "shall be designated" an ETC throughout its service area existing on July 28, 1997. On July 28, 1997, U.S.WEST Communications (now Qwest) served the Tofte exchange.

The following are state goals that should be considered as the commission executes its regulatory duties with respect to telecommunications services:

- (1) supporting universal service;
- (2) maintaining just and reasonable rates;
- (3) encouraging economically efficient deployment of infrastructure for higher speed telecommunications services and greater capacity for voice, video, and data transmission;²

Minn. Stat. § 237.06, Reasonable Rate and Service, sets the standards for rates and services. It states in pertinent part:

It shall be the duty of every telephone company to furnish reasonably adequate service and facilities for the accommodation of the public, and its rates, tolls and charges shall be fair and reasonable for the intrastate use thereof...

Minn Stat. § 237.60, Discriminatory Practices; Service Costs, provides:

Subd. 3. Discrimination. No telephone company shall offer telecommunications service within the state upon terms or rates that are unreasonably discriminatory. No telephone company shall unreasonably limit its service offering to particular geographic areas unless facilities necessary for the service are not available and cannot be made available at reasonable costs. The rates of a telephone company must be the same in all geographic locations of the state unless for good cause the commission approves different rates...

Minn. Rule 7812.0600 Subpart 4, establishes service area obligations for ETCs:

An LSP (Local Service Provider) designated an ETC by the commission must provide local service, including, if necessary, facilities-based service, to all requesting customers within the carrier's service area on a nondiscriminatory basis, regardless of a customer's proximity to the carrier's facilities. An LSP may assess special construction charges approved by the commission if existing facilities are not available to serve the customer.

III. Positions of the Parties

A. Tofte Petitioners

The Petitioners stated numerous reasons for their request for wireline telephone service including 911 public safety issues, quality and availability of phone service, affordability and access to the

² Minn. Stat. § 237.011.

Internet and advanced services. They indicated that they presently have analog cellular phone service that is unreliable and sporadic and that this service will be phased out, thus leaving residents with no cellular service.

Further, residents indicated that their cellular phone bills range from \$10 to \$400 per month. Their 911 calls are routed to the State Patrol in Duluth, approximately 100 miles away, or Bayfield and Ashland, Wisconsin, instead of directly to local officials, causing concern for the amount of time required for a response to a fire, medical, or other emergency.

B. Qwest

Qwest stated it did not contest the authority of the Commission to order Qwest to provide service to the Petitioners, but would object to an Order requiring Qwest to do so without assessing line extension charges or excess construction charges. Qwest would also object to being directed to provide service with a minimum data transmission speed.

Qwest argued that it has not performed the detailed engineering necessary to produce a detailed estimate of construction costs because it has no actual orders from any of the petitioners. However, Qwest estimated the total costs for this construction approximated \$2.7 million. It anticipated that this would be averaged among the total number of customers.

Qwest argued that its Exchange and Network Tariff³ specifies line extension charges for customers requesting service beyond Qwest's existing facilities. The tariff provides that it will extend its line beyond current network facilities for 700 feet at no charge. After that the Company will charge a nonrecurring charge starting at the nearest Network Facility of \$55 per line and a per foot charge of \$0.51 for the first customer line, and a \$0.04 per foot charge for a second line to the same location. Qwest estimated that the total line extension charges for 76 residences, on six lakes, would be approximately \$1.2 million.

Qwest further argued that its tariff authorizes Qwest to apply excess construction charges when the provision of required equipment or facilities at the Companies' expense "would not constitute a prudent investment if the requested service were furnished subject solely to the rates, charges and initial service periods specified in the appropriate tariffs and/or price lists."⁴

It argued that the significant difference between the Line Extension Charges for these facilities and the actual costs of construction compels Qwest to conclude that this would not be a prudent investment for Qwest. Qwest also argued that the DOC's argument that Qwest has options under

³ Qwest's Exchange and Network Services Tariff, Section 4.1.B.16c.

⁴ *Ibid.* Section 4.1.B.1.

its Alternative Form of Regulation (AFOR)⁵ to increase rates would not address Qwest's investment concerns.

Further, Qwest argued that the Commission's statutory authority to require Qwest to provide service is limited by constitutional principles forbidding confiscatory orders and statutory requirements that orders shall not be arbitrary or capricious. If the Commission were to order Qwest to construct the facilities in question without appropriate cost recovery, such an order would be subject to challenge as a confiscatory order. The costs of construction are real costs for facilities that do not now exist and, Qwest argued, should not be borne by Qwest.

In its reply comments, in response to the DOC's comments that another unserved area case involving Ely residents (the Ely⁶ case) was based on facts that were analogous to the Tofte situation, Qwest argued that the Ely case has not been judicially reviewed and should not be viewed as precedent for the current case.

Finally, Qwest stated that it does not support the DOC recommendation that the Petitioners be provided with a data transmission speed of 14.4 kbps. It argued that a guaranteed transmission rate over basic local exchange service is not required in Minnesota or elsewhere in the United States. The public switched network is primarily a voice grade network and Qwest complies with basic voice grade service industry standards. It cannot guarantee modem connect rates over its basic voice grade access. Further, Qwest argued that the data transmission connect rate requirements for an analog voice grade network are not questions that should be addressed in this docket.

C. DOC

The DOC recommended that the Commission find that reasonably adequate telephone service is not available to the Petitioners and Order Qwest to provide telephone service to the Petitioners and all others within its exchange at the same recurring and non-recurring charges as those charged to customers in the City of Tofte.

The DOC argued that there is substantial support for the Petitioner's claim that they are not receiving adequate telephone service.

⁵ AFOR plans, pursuant to Minnesota Statutes § § 237.76 through 237.772, replace rate of return regulation with more flexible pricing procedures.

⁶ *In the Matter of a Petition for Assignment of an Eligible Telecommunications Carrier to Provide Service in Unassigned Territory in Northern Minnesota*, Docket No. P-999/CP-98-1193, ORDER REQUIRING GTE TO PROVIDE SERVICE TO TERRITORY, July 28, 1999.

It argued that Qwest's Exchange and Network Tariff, Section 4, applying line charges for individual customers does not apply under the present circumstances. The Tofte residents are not individuals scattered at random throughout the exchange. Rather, the petition for service is for a large number of customers living in clusters around the various lakes. The tariff should not be interpreted to permit Qwest to charge individual customers for cable installation when the facilities are to be used to serve multiple customers.

The DOC also indicated that Qwest's tariff addressing construction costs for customers in new real estate additions may more closely apply to Tofte because the housing is clustered. However, because the housing has not been built by developers and telephone facilities were not installed prior to construction this tariff does not apply.

Further, the DOC referred to the Commission's decision in the Ely case and argued that the facts in that case are analogous to the situation in Tofte. Ely was also a situation in which there were a significant number of customers requiring telephone service who resided in rural unserved areas. In the Ely case, unlike the Tofte situation, the customers in question were not in a company's assigned service area. Even so, the nearest local company was required to provide service to customers at the same rates that they would pay if they resided within the city of Ely and installation charges were limited to a simple non-recurring charge of \$42.00.

The DOC argued that in the absence of a tariff that applies to the situation in Tofte, the Commission should order Qwest to extend the network facilities at the same recurring and non-recurring charges that apply to customers within the city of Tofte. Such an order would be consistent with the Commission's policy of rate averaging, universal service and with the Order in the Ely case.

In reply to Qwest's argument that an order that did not provide appropriate cost recovery would be confiscatory, the DOC argued that there was a very large differential in the total monthly cost of providing telephone service in the Qwest exchanges. Under the State's current universal service subsidy mechanism, Qwest is allowed to subsidize the cost of providing local service to high cost areas by charging above-cost rates to lower cost customers. However, along with this Qwest has an obligation to serve all customers within its exchange area. This it has not done for the Tofte Petitioners.

D. RUD-OAG

The RUD-OAG supports the position of the DOC that the Commission should require Qwest to provide telephone service to the unserved residents in the Tofte exchange at the same recurring and non-recurring rates as Qwest charges to customers in the city of Tofte. Qwest should not be permitted to impose additional installation or line extension charges for extending service to the unserved residents, nor should they be permitted to impose construction charges.

The substantial special line extension charges Qwest is proposing to impose effectively foreclose landline service for these residents. Cellular service is unreliable and of poor quality. These residents, therefore, are forced to go without adequate telephone service.

The RUD-OAG argued that Qwest will have to recover the costs of extending this service to these residents from its overall rates because there is no state universal service fund in place to provide an explicit subsidy. Further, it is not necessary that Qwest be assured recovery of the costs at the time they are incurred. Telephone companies commonly incur large up-front costs that are recovered over time. To the extent Qwest does not believe it will recover its costs over time, Qwest has the flexibility to raise rates under certain conditions as set forth in its AFOR.

The RUD-OAG also agrees with the DOC that Qwest's tariff⁷ regarding special line extension charges does not cover the situation herein where there are a number of homes in the same general area without service.

RUD-OAG also argued that Qwest's claim that an order requiring Qwest to provide service at the existing recurring and non-recurring rates would result in confiscatory rates is unsupported by existing law. It argued that the determination as to whether rates are confiscatory depends on whether the rates allow the telephone company to earn a reasonable rate of return on its investment. It is the company's bottom line that is used to determine whether the company is making a reasonable rate of return, not whether a rate covers the cost of providing service to an individual customer or a class of customers.

IV. Schedule Provided by Qwest at Staff Request

In response to a request by Commission staff Qwest provided the following construction schedule:

2002

June 1	Begin engineering design
June 17	Engineering complete, submit job for pricing
June 24	Pricing complete, submit for job approvals
July 1	Submit applications for permits and order materials
August 26	Begin placing
September 23	Begin splicing
October 21	Begin test and turn up
November 30	Construction complete

⁷ Exchange and Network Services Tariff, Section 4.1.B.16.

V. Commission Action

The Commission is in full agreement with the Petitioners, the DOC and RUD-OAG that reasonably adequate telephone service is not available to the Petitioners. In recognition of its statutory goal to support universal service, the Commission will order Qwest to provide service to the Petitioners and others in the unserved area of the Tofte exchange. There is no dispute that the Commission has the authority to require Qwest to provide such service. The unserved areas are clearly in Qwest's designated service area and Qwest has been designated an ETC in this area. Qwest has an obligation to provide local service to all requesting customers within the carrier's service area on a nondiscriminatory basis, regardless of a customer's proximity to the carrier's facilities.⁸

The only issue in dispute is who should bear the costs of bringing this service to the Petitioners (and others) in the unserved areas of the Tofte exchange. The Commission agrees with the DOC and the RUD-OAG that excess construction charges and line extension charges as proposed by Qwest should not be charged the petitioners and others similarly situated in the Tofte exchange. Such charges would have the effect of denying service to these individuals by denying them access to telephone service at reasonable rates, which includes not only reasonable monthly rates but reasonable installation rates.

Rather, the Commission will require the Petitioners to share in the cost of extending service to the unserved area by paying a one time \$55.00 per line charge and a \$0.51 per foot non-recurring charge from the residence to the point where Qwest's service line passes the property of a customer wanting service (assumed to be the local access road). This is consistent with the Commission's obligation to promote universal service and maintain just and reasonable rates. It recognizes the obligation of the customer to share in the cost of bringing service to these areas that is based in part on the distance an individual resides from the point of service while at the same time recognizing Qwest's obligations as both the designated provider in that exchange as well as the ETC.

The Commission further concurs with the DOC and RUD-OAG that Qwest's Exchange and Network Tariff, addressing both line charges for individuals and line charges for customers in real estate additions, does not apply in this situation. The Tofte residents are grouped in clusters around various lakes in the area and as such are not seeking individual service extensions. Because the unserved Tofte residents are living in clusters, are not individually seeking new service, and no network facilities have been reasonably deployed, a tariff that applies to individuals and assumes the reasonable deployment of such network facilities does not apply. Costs of bringing service to the local access road are general operating costs appropriately spread over the general body of ratepayers.

⁸ Minn. Rules part 7812.0600, subp.4.

Finally, in line with its obligations to encourage economically efficient deployment of infrastructure for higher speed telecommunications services and greater capacity for voice and data transmission, the Commission will order Qwest to provide service that will allow a minimum data transmission rate of 14.4 kbps.

ORDER

1. Qwest shall provide service in the unserved area of the Tofte exchange under its proposed schedule for engineering and installation, as set forth in Section IV, herein.
2. Qwest shall advise and explain to the Commission, the DOC and the OAG if and when it is determined that Qwest will not be able to meet its schedule.
3. Petitioners shall share in the cost of extending service to the unserved area in the following manner:
 - from the point where Qwest's service line passes the property of a customer wanting service (assumed to be the local access road) there will be a \$55.00 per line and \$0.51 per foot non-recurring, one time charge.
4. Qwest shall provide service that will allow minimum data transmission rates of 14.4 kbps as recommended by the DOC.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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