

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: October 31, 2002

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

ORDER REJECTING PROPOSAL AND  
REAFFIRMING PREVIOUS ORDER

**PROCEDURAL HISTORY**

On May 31, 2000, a petition, signed by approximately 70 persons with property on several lakes north of Lutsen, in rural Cook County, was filed with the Commission. The petitioners requested wireline service to their homes on these lakes. The lakes are within the Tofte telephone exchange service territory, which is assigned to Qwest Corporation (Qwest). Qwest is also designated an Eligible Telecommunications Carrier (ETC) in this area under 47 U.S.C. § 214.

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

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 was 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 on grounds that it did not provide meaningful cost recovery for Qwest. Meaningful recovery, in Qwest's view, 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 petitioners' request for service at the same recurring and non-recurring rates that Qwest currently charges customers in the City of Tofte.

On June 21, 2002, the Commission issued its ORDER REQUIRING SERVICE TO THE UNSERVED AREA OF QWEST'S TOFTE EXCHANGE AND REQUIRING CUSTOMER CONTRIBUTION. Among other things, the Order required Qwest to provide service in the unserved area of the Tofte exchange and required petitioners to share in the cost of extending service to the unserved area by paying a one-time charge of \$55.00 per line and \$0.51 per foot from the point where Qwest's service line passes the property of a customer wanting service (assumed to be the local access road). The Order also set forth a schedule for engineering and installation, and required that the service provides a minimum transmission rate of 14.4 kbps.

On July 1, 2002, Qwest filed a request for Reconsideration, Request for Stay, and Request for Clarification.

On July 11, 2002, the DOC filed comments opposing Qwest's requests.

On August 29, 2002, the Commission issued its ORDER REQUIRING PROPOSAL, which granted reconsideration and required Qwest to set forth proposed prices for extending service to Tofte residents in the unserved areas of the Tofte exchange and indicate the number of people in that area willing to sign up for services at those prices.

On September 6, 2002, Qwest filed its conditional proposal to provide service to the Tofte petitioners and sent its proposal and solicitation for service to the Tofte petitioners.

On September 11, 2002, the DOC filed comments opposing Qwest's proposal.

On September 16, 2002, Qwest submitted the affidavit of Rachel Torrence, a Director in the Technical-Regulatory Group of the Local Network Organization, in response to the DOC's comments regarding cost estimates.

On September 19, 2002, this matter came before the Commission.

## **FINDINGS AND CONCLUSIONS**

### **I. The Present Order**

This Order addresses the Commission's reconsideration of its June 21, 2002 Order and the alternative pricing proposal submitted by Qwest. Many of the issues raised in Qwest's request were raised, briefed, argued and considered in detail when this case originally came before the Commission. In this case the Commission determined that the legal and policy issues were significant and complex and warranted a second look. Having taken a second look, however, the Commission concludes that its original decision (with certain clarifications that will be addressed below) was correct, and for the most part was adequately explained in its June 21 Order.

Therefore, this Order will not provide another definitive explanation of the Commission's decision. Instead, it will address the issues raised on reconsideration and the proposal made by Qwest to provide service to the petitioners and clarify certain aspects of the Commission's June 21 Order.

## **II. Qwest's Proposal**

### **A. Summary of Qwest's Proposal**

Qwest's proposal for extending service to the petitioners included the following:

- Qwest proposed to construct the facilities necessary to extend service to the lots of petitioners and their neighbors only on the properties surrounding Lake Christine, White Pine Lake, Lake Clara, Holly Lake, Tait Lake, and Pike Lake at a charge of \$3,600 per lot for initial service.
- Extending service would be conditioned on the acceptance of 75% or more of currently eligible households.
- The \$3,600 construction charge could be paid in monthly installments over 36 months with no interest or carrying charges.
- Basic rates would apply upon completion of the installation of service. The service would be voice grade service.
- Orders for service under Qwest's proposal would be exempt from schedules, remedies and sanctions specified by the Alternative Form of Regulation (AFOR) plan under which the Company operates. Qwest would not be subject to other penalties for delayed order provisioning as long as Qwest maintained reasonable progress towards completion.
- Extending service would be conditioned upon United States Forest Service approval and the receipt of all other requisite rights of way or other approvals.
- These construction charges would apply on the same terms for future orders for service placed by any of the designated petitioners or owners of other presently unoccupied lots surrounding any of the five lakes. Any other request for service, in any other area, would be addressed separately and not pursuant to this agreement.
- Qwest made its proposal on the condition that it can only become effective upon Commission approval, subject to all the terms and conditions set forth in their entirety.

Qwest offered this proposal as a settlement to address the cost recovery aspects of extending service to the petitioners without waiving its legal positions regarding the interpretation of its tariff, the AFOR, applicable statutes and rules, and other principles of law.

## **B. DOC's Comments on Qwest's Proposal**

The DOC stated that Qwest's proposal (in its letter to residents) referred to costs exceeding "an average of \$10,000 per lot," but Qwest has not provided any cost study or documentation of costs to support that figure. It argued that without information regarding the costs of providing service in the area, the DOC is not in a position to judge the reasonableness of Qwest's proposed pricing.

The DOC further argued that because the proposal lacks a cost basis, the proposal represents an attempt by Qwest to extract as much from Tofte customers as it believes demand will bear. The proposal does not apply universal service principles to obtain reasonably comparable rates but rather attempts to maximize revenues based on what it believes consumers are willing to pay. The Commission should not support this.

Qwest, as an eligible telecommunications carrier (ETC)<sup>1</sup> and a carrier of last resort, has the obligation to provide service to the Tofte petitioners. The petitioners reside within Qwest's Tofte exchange and Qwest must provide service to them at reasonable rates. The granting of special construction charges is a matter of discretion with the Commission and Qwest has provided no evidence to justify the approval of special construction charges.

The DOC also argued that the proposed rate for rural Tofte customers is not reasonably comparable to urban rates. It argued that for the most part urban customers are not required to pay line and excess construction charges, and given that the FCC will likely not consider rural rates exceeding 70 to 80 percent of urban rates to be reasonably comparable, the \$3,600.00 rate proposed by Qwest would not be considered reasonably comparable to rates of urban customers.

Further, the DOC stated that it was likely that most residents will reject Qwest's offer. Therefore, the 75% subscriber acceptance required by Qwest would not be met and no service would be provided to any customer under Qwest's proposal.

The DOC recommended that Qwest's pricing proposal submitted to the commission on September 6, 2002, be rejected.

The DOC recommended that the Commission should reaffirm its Order of June 21, 2002 with the following clarifications:

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<sup>1</sup> 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.

1. Qwest should provide order forms to each of the petitioners and other residents in the Tofte Exchange within 90 days.
2. Qwest should extend its facilities along all public, private and forest service roads serving the customers.
3. Customers should be charged a \$55 installation fee along with a \$.51 per foot charge from the newly installed facilities to their homes.

### **C. Qwest's Response to the DOC's Comments**

Qwest submitted the affidavit of Rachel Torrence, a Director in Qwest's Technical-Regulatory Group of the Local Network Organization, stating that Qwest had submitted cost data and documentation in response to data requests. The affidavit further stated that the total cost for placing facilities to serve the Tofte petitioners was \$2.5 million, with the overall average cost for Qwest to serve each customer/petitioner approximately \$32,900.00.

At the hearing before the Commission, Qwest submitted a cost breakdown consisting of the total cost for each lake, the number of lots on each lake and the average cost per lot for each lake. The average cost per lot ranged from \$5,695 to \$13,156 depending on the lake.

### **III. Qwest's Request for Reconsideration, Stay and Clarification**

In its Order of August 29, 2002, the Commission, among other things, granted reconsideration. Qwest had requested that the Commission reconsider and vacate its June 21, 2002 Order and allow Qwest to recover its construction charges in a manner specified by the Company. In the alternative, Qwest asked that the Commission stay the Order pending reconsideration and pending appeal. Qwest also requested ancillary relief, including approval of a change in the boundary between the Tofte and Grand Marais exchanges, and exemption from the penalty provisions of the AFOR Service Quality Plan for installation delays.

#### **A. Summary of Qwest's Arguments for Reconsideration**

Qwest argued that the Commission misread Qwest's Exchange and Network Services Tariff, ignored cost recovery language in applicable statutes and rules, and ignored principles applicable under Qwest's AFOR. Each of these will be discussed below.

##### **1. Qwest's Tariff**

Qwest argued that its Exchange and Network Tariff applies throughout its territory and would apply in this situation. The tariff provides that customers receive a free 700 foot allowance starting at the nearest network facility. Beyond that allowance there is a fixed charge of \$55.00

and a per foot charge of \$0.51 for the first line.<sup>2</sup> Qwest argued that the Commission's Order rewrote this tariff specifically for the customers in the unserved Tofte exchange area and eliminated the 700 foot allowance, ignored the starting point of the nearest network facility, and invented a new method of calculating the per foot charge.

In addition, Qwest argued that Section 4.1.B.1<sup>3</sup> of its Tariff applies. Qwest advised the Commission that due to the significant difference between Qwest's estimates of applicable line extension charges for these facilities and the actual costs of construction, Qwest's provision of these facilities at Qwest's expense would not be a prudent investment. It argued that the Commission has disregarded this information and disregarded the tariff in this situation.

## **2. Statutes and Rules Require Compensation**

Qwest argued that Minnesota Statutes that require fair and reasonable charges<sup>4</sup> and provide that rates within the state may not be unreasonably discriminatory<sup>5</sup> cannot be interpreted to require Qwest to provide significant construction without cost recovery. Further, Qwest argued that the statutory goals of universal service, just and reasonable rates and economically efficient deployment of infrastructure for high speed services and capacity for voice, video and data transmission<sup>6</sup> do not justify a directive requiring Qwest to bear whatever cost there is to achieve them. Rather, Qwest argued, the ideas of "just and reasonable rates" and "economically efficient deployment of infrastructure" connote a reasonable cost recovery for the telephone company, not a gift to consumers.

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<sup>2</sup> Qwest's Exchange and Network Services Tariff, Section 4.1.B.16.

<sup>3</sup> Qwest's tariff Section 4.1.B.1 states:

Where the equipment or facilities, or both, required to provide a requested service are not available, and their provision entirely at the expense of the Company would not, in the opinion of the Company, constitute a prudent investment, construction or carrying or termination charges or longer than normal initial service periods or combinations thereof may apply, in addition to the regularly applicable charges and in lieu of normal initial service periods, to that part of the cost of the required equipment and facilities which 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.

<sup>4</sup> Minn. Stat. § 237.06.

<sup>5</sup> Minn. Stat. § 237.60, subd. 3.

<sup>6</sup> Minn. Stat. § 237.011(1),(2) and (3).

### **3. Qwest's AFOR**

Qwest argued that there is no mechanism for Qwest to spread the construction costs over the general body of ratepayers served by Qwest, as the Commission stated. Qwest's rates were set at the inception of the AFOR and are to remain constant throughout the duration of the plan. Therefore, under the AFOR there is no vehicle for Qwest to increase prices to other ratepayers to accommodate the costs of construction in the Tofte exchange.

Qwest stated, however, that while the AFOR does not allow for local rate increases, the AFOR does provide for the assessment of special construction costs because Construction Charges are included in the AFOR's list of price-regulated services and approved as the AFOR's Initial Prices. Qwest argued that the Commission has ignored Qwest's lawful request for recovery and by doing so has assigned those costs to Qwest and its shareholders.

#### **B. DOC's Response to Issues Raised by Qwest**

##### **1. Qwest's Obligation to Provide Service to This Area is Fully Funded**

The DOC argued that to develop sound universal service policy or retail rate design the focus in this case should be Qwest's overall operations in Minnesota, not just the cost of service in Tofte. It argued that Qwest's obligation to provide service to the unserved areas of the Tofte exchange has been fully funded through the implicit system of universal service subsidies that Qwest has benefitted from for many years.

The DOC agreed with the Commission that the construction charges related to the extension of Qwest's facilities to serve multiple customers should be recovered through general rates, not through construction charges to individual customers. The agency argued that the Commission's conclusion was consistent with principles of fair and reasonable rates and the obligation to encourage universal service.

The agency pointed out that both national and state universal service law and policy is reflected in Qwest's historical rates and currently in its AFOR plan and argued that Qwest continues to reap the benefit of these public policies as evidenced by its continued strong intrastate earnings.

##### **2. Qwest's Tariff**

The DOC argued that Qwest's position, that its tariff for line extensions and excessive construction charges should be applied in the Tofte situation, never reconciles the impact of the tariff on the customers and the mandates of the Telecommunications Act of 1996 and other statutory obligations to provide service at reasonable rates, including non-recurring rates.

The DOC agreed with the Commission's conclusion that applying Qwest's tariff regarding line and excessive construction charges would have the effect of denying service to the petitioners by denying them access to telephone service at reasonable rates, including reasonable monthly rates and reasonable installation rates.

The DOC argued that the Order does not require that Qwest provide service without line charges and excessive construction charges to any and all randomly placed customers. Rather, the Order clarified that non-recurring charges must be reasonable. Consistent with the principle that these charges must be reasonable, the June 21 Order recognized that individual customers should not have to pay line extension charges or excess construction charges for facilities that were to be used to serve multiple customers and required Qwest to deploy services along service roads where customers were clustered.

The DOC also supported the Commission's conclusion that costs of bringing service to the local access road were general operating costs to be spread over the general body of ratepayers. It argued that the Commission's conclusion confirms that Qwest can recover its costs of providing Tofte customers with service but that Qwest must do so through rates or rate changes under the terms of its AFOR plan.

### **3. Statutes and Rules**

The DOC argued that Qwest's argument that statutes and rules require that Qwest be allowed to impose special construction charges in Tofte does not recognize the fact that telephone companies are obligated to deploy their facilities in a reasonable manner throughout their exchanges and that there are several financial vehicles available to compensate companies.

### **4. Qwest's AFOR**

The DOC stated that Qwest was inaccurate in stating that there was no vehicle in its AFOR to spread costs over its general body of ratepayers. The DOC argued that the AFOR provides that Qwest could increase rates for flexibly priced services. The DOC also indicated that the AFOR carried forward the tariffs that were in place prior to the approval of the AFOR, thereby preserving subsidies existing in Qwest's rates, specifically from business customer rates, access charges, and elective services.

The DOC stated that Qwest's AFOR provides an opportunity to increase the rates for regulated services for construction costs if the costs amounted to more than 20 percent of the gross plant investment of the company. The DOC argued that the 2.7 million in estimated construction costs at Tofte is a *de minimis* portion of this figure. For this reason, the Commission should not raise the rates of price-regulated services in order to pay for the costs of serving customers in Tofte.

### **C. Comments of RUD-OAG**

In oral arguments before the Commission the RUD-OAG supported the reaffirmation of the Commission's June 21 Order.

#### **D. Comments of the Petitioner**

At the Commission meeting the petitioner argued that the residents were entitled to phone service and that as the township expands Qwest should expand its facilities.

#### **E. Qwest's Request for Boundary Adjustment**

Qwest requested a boundary change between Qwest's Tofte and Grand Marais exchanges. It requested to serve the Pike Lake area from the Grand Marais exchange in order to save a significant amount in construction charges

No party objected to Qwest's request.

#### **IV. Commission Action**

The Commission has reviewed the record, including the issues raised on reconsideration and the proposal provided by Qwest, and heard the arguments of all parties. It is the Commission's conclusion that its original decision was correct. Therefore, it will affirm its Order of June 21, 2002 (with clarification as recommended by the DOC) and reject Qwest's proposal of September 6, 2002.

The Commission reiterates its original finding that excess construction charges and line extension charges as proposed by Qwest should not be charged to the petitioners and others similarly situated in the Tofte exchange. The Commission continues to recognize that such charges would, in effect, deny service to these residents by denying them service at reasonable rates.

The Commission rejects the claim that Qwest's excess construction charges tariff justifies or requires the extra charges it proposes in this case. That tariff must be read in light of its purpose, in light of Qwest's statutory duty to serve all persons within its assigned service area, and in light of Minnesota's longstanding commitment to universal service.

Carefully crafted excess construction charge tariffs have long been permitted as an appropriate way to balance the interests of individual customers in receiving service at remote locations and the interest of the general body of ratepayers in affordable rates. Excess construction charge tariffs, however, must not function as tools to evade a carrier's duty to meet the changing needs of its service area as its population shifts and expands.

Assessing a single customer for the costs of bringing service to an isolated location is one thing; refusing service at reasonable, affordable rates to over 70 households in well-defined, growing clusters of homes integrally linked with the local community is another. Applying the line extension and excess construction charges tariff to the petitioners in this case would violate the purpose of the tariffs, longstanding public policies promoting universal service, and Qwest's duty to provide adequate service within its service area.

The Commission rejects the claim that Qwest's being under an AFOR precludes it from recovering these costs. While the AFOR precludes raising basic local service rates under most circumstances, it permits the Company to raise rates for flexibly priced services with minimal regulatory oversight. Further, Qwest's existing basic rates allow for universal service subsidies. It is not the case that the AFOR precludes cost recovery by the Company.

The Commission also rejects the proposal Qwest submitted to the Commission. Qwest's pricing proposal did not demonstrate with appropriate cost support that the pricing proposed was fair and reasonable.<sup>7</sup> Therefore, the Commission could not conclude that excess construction charges were appropriate in this case. The Commission lacks the record necessary to set just and reasonable excess construction charges.

For the same reasons, the Commission rejects Qwest's claim that Minnesota Rules, providing that the Commission may approve excess construction charges if the carrier does not have existing facilities to serve the customer,<sup>8</sup> require approval of the charges in this case. That approval is discretionary with the Commission and while there may be circumstances in which excess construction charges are appropriate, the Commission is not persuaded that they are justified here.

The petitioners reside in Qwest's service area and Qwest has a duty to serve them. Further, as an eligible telecommunications carrier Qwest has the duty to provide service on a nondiscriminatory basis. Requiring Qwest to offer service to these customers at the rates set by the Commission is consistent with these obligations.

Finally, the Commission will grant Qwest's request to change the service boundary between its Tofte and Grand Marais exchanges in order to allow Qwest to serve the Pike Lake area from the Grand Marais exchange. This will save a significant amount in construction charges and will have no negative impact on the Pike Lake petitioners.

### **ORDER**

1. The Commission hereby reaffirms its June 21, 2002, ORDER REQUIRING SERVICE TO THE UNSERVED AREA OF QWEST'S TOFTE EXCHANGE AND REQUIRING CUSTOMER CONTRIBUTION with the following clarifications:

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<sup>7</sup> See Minn. Stat. § 237.28 which states as follows:

In any investigation, action or proceeding arising under, or growing out of, an action initiated by the commission upon its own motion, the burden of proof shall be upon the telephone company to establish the reasonableness of the existing rates.

<sup>8</sup> Minn. Rules, Part 7812.0600, subp. 4

- Qwest shall provide order forms to each of the petitioners and other residents in the Tofte exchange within 90 days;
  - Qwest shall extend its facilities along all public, private and forest service roads serving the customers;
  - customers shall be charged a \$55 installation fee and a \$0.51 per foot charge from the newly-installed facilities to their homes.
2. The proposal by Qwest for serving petitioners living within its Tofte exchange boundary is denied.
  3. Qwest's request to allow the change in its Tofte and Grand Marais exchange boundaries is granted. Qwest shall submit, within twenty days of this Order, revised maps and other necessary documentation to document the exchange boundary change.
  4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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