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IDAHO PUBLIC
UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

CITIZENS OF SOLDIERS MEADOW AREA,
Complainants,
vs.
QWEST CORPORATION,
Respondent.

Case No. GNR-T-04-02
MOTION TO DISMISS

Qwest Corporation (“Qwest”), pursuant to Rule 56 of the IPUC Rules of Procedure, moves this Commission to enter an order dismissing the Complaint of the Citizens of the Soldiers Meadow Area on the grounds that it fails to state a claim upon which the Commission can grant relief. This Motion is based on the following facts and on Qwest’s concurrently filed Memorandum.

FACTS

1. Complainants have petitioned the Commission for an order requiring Qwest to extend telephone service to an unincorporated area, largely comprised of vacation homes located near Soldiers Meadow Reservoir (“Soldiers Meadow”).

2. Soldiers Meadow is outside Qwest’s service territory.

3. Qwest does not have any facilities in place that would allow it to serve Soldiers Meadow. When asked in 2003 to estimate the cost of construction, Qwest provided a very rough estimate of \$180,000. Qwest believes that a more detailed engineering analysis would reveal that Qwest’s 2003 estimate was significantly understated.

4. Due in part to the initial construction cost, the residents’ unwillingness to pay such line extension costs, and the length of time necessary for Qwest to recover its investment, Qwest is not willing to serve Soldiers Meadow.

5. When surveyed by Commission Staff, the few (19) residents of Soldiers Meadow who indicated interest in Qwest service indicated an unwillingness to pay significant amounts for the construction. More specifically, 7 indicated no willingness to pay, 6 indicated a willingness to pay no more than \$200 and 6 indicated a willingness to pay no more than \$1,000.

6. Even if Soldiers Meadow were included in Qwest’s service territory, based on the understated \$180,000 estimate and 19 customers, the potential customers would be required to pay all costs of construction in excess of \$9,400 per customer (minus the \$1,600 line extension credit, if applicable, provided under Qwest’s tariff).

7. Staff’s survey reveals that 21 of 22 respondents have wireless service at Soldiers Meadow.

CONCLUSION AND REQUESTED RELIEF

Because Soldiers Meadow is outside Qwest's service territory, Qwest has no obligation to serve. If the Commission were inclined to order Qwest to change its service boundaries, the Complainants would not receive service because, even with the Line Extension credit approved by the Commission for northern Idaho, the service would not be affordable for customers, by their own admission.

Wherefore, Qwest respectfully requests that the Commission enter its order dismissing Complainants' Petition.

Respectfully submitted this 5th day of August, 2004.

Qwest Corporation



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of AUGUST, 2004, I served the foregoing **MOTION TO DISMISS** upon all parties of record in this matter as follows:

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

CITIZENS OF SOLDIERS MEADOW AREA,

Case No. GNR-T-04-02

Complainants,

**MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS**

vs.

QWEST CORPORATION,

Respondent.

Qwest Corporation (“Qwest”) files the following Memorandum in Support of its Motion to Dismiss.

BACKGROUND

On February 18, 2004, Vlado and Vivian Maras and Herb and Trudy Weed (“Complainants”) asked that the Commission consider a formal complaint in which they seek to have Qwest install facilities to serve their homes and those of other residents of an unincorporated vacation home area near the Soldiers Meadow Reservoir known as “Soldiers

Meadow.” Complainants state that the provision of telephone service to their homes would increase their safety as well as their convenience.¹

The record is not clear as to exactly how many residents of Soldier Meadow would subscribe to telephone service if it were offered. That number would, no doubt, be affected by how much customers would be required to pay for installation. In a recent survey conducted by the Commission Staff, 19 of 22 respondents indicated that they were interested in service from Qwest. Of those 19, seven are unwilling to pay any amount for the construction, six are willing to pay up to \$200, and six are willing to spend up to \$1,000.

Soldiers Meadow is outside Qwest’s service territory and several miles from the nearest wire center located at Craigmont, Idaho. It is roughly four miles from the nearest Qwest facilities, located in Forest, Idaho. Qwest also provides service to an area west of Soldiers Meadow known as Waha. Waha is serviced out of the Lewiston, Idaho switch. The nearest facilities in the Waha area, however, are estimated to be 53,780 feet away from Soldiers Meadow.

Qwest has made it clear that it will not voluntarily extend service to the Complainants because they are not in the service area and because the cost of the construction is prohibitive. The exact level of construction costs can, of course, be debated. In 2003, Qwest provided a very broad estimate that construction would cost \$180,000. Qwest believes that a more specific engineering analysis would reveal that \$180,000 is significantly understated. Even using the understated \$180,000 for purposes of this motion, allocating these costs to the tiny potential customer base yields per-customer installation costs that are prohibitive. Based on 19 interested customer locations and \$180,000, the per location cost would be in excess of \$9,400.

¹ It is interesting that 21 of the 22 Soldiers Meadow residents who responded to the Commission’s Staff survey indicated having wireless service in Soldiers Meadow.

ARGUMENT

1. Qwest is not obligated to serve Soldiers Meadow.

It is undisputed that Soldiers Meadow is outside Qwest's service territory. As Staff's July 26, 2004 Survey Summary in this matter acknowledges, Qwest's tariff, which has been reviewed and approved by this Commission, explicitly limits Qwest's service obligation to its service territory.

A. Territory Served, Services Rendered, Rates and Rules and Regulations

The Company renders exchange telephone service, toll telephone service and private line services and channels *throughout the territory served by it* and its connecting companies *as shown in its schedules, which include a description of the services furnished, and maps filed.*

Northern Idaho Exchange and Network Services Tariff, Section 1.1.A (emphasis added).

Rather than accepting the policy expressed by Qwest's tariff, Complainants demand to know why the Commission has not changed Qwest's boundaries to accommodate their request. The fact is that they seek extraordinary relief that should not be granted on the facts of this case.

2. Idaho Code § 61-508 does not support the Complainants' position.

Complainants rely on Idaho Code § 61-508 in requesting that the Commission order a boundary change to accommodate Soldiers Meadow. That reliance is not well placed. Although the statute grants the Commission the power to order "additions, extensions, repairs or improvements to or changes in the existing physical plant . . ." of a public utility, the Commission can do so under the statute only when it finds that such extensions "ought reasonably to be made." *Idaho Code § 61-508*. When the Idaho Supreme Court had occasion to interpret this language it stated:

The use of the word “reasonably” is to be noted. Here again, in determining what is reasonable, the rights of both consumer and proprietor must be considered. In this connection the commission and court must bear in mind the provisions of our state Constitution that no person shall be deprived of his property without due process of law, and that private property may not be taken for public use until a just compensation shall be paid therefor, as well as the similar provisions in the federal Constitution. Sections 13 and 14, art. 1, Idaho Constitution. **To compel the proprietor of a utility to make enlargements or extensions under such circumstances that he could not make a fair return upon his whole investment would certainly be depriving him of his property without due process of law.** In order to justify the commission in ordering enlargements, the commission should be satisfied from the evidence: First that the existing plant is not reasonably sufficient to render adequate service (Washington ex rel. O. R. & N. Co. v. Fairchild, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863); **second, that the extension or enlargement is within the scope of the original professed undertaking of the proprietor of the utility** (N. P. R. Co. v. N. Dak., 236 U. S. 585, 35 Sup. Ct. 429, at page 433, 59 L. Ed. 735); third, that after the making of the enlargements or extensions the owner will be insured a fair return upon his whole investment (Smyth v. Ames, 169 U. S. 466-546, 18 Sup. Ct. 418, 42 L. Ed. 819); fourth, that the particular enlargements or extensions are reasonably necessary to insure reasonably adequate service (N. P. R. Co. v. N. Dak., supra, and Washington ex rel. O. R. & N. Co. v. Fairchild, supra).

Murray v. Pub. Util. Com'n, 27 Idaho 603, 150 P. 47, 52 (1915).
(emphasis added).

Thus, the Commission’s powers under section 61-508 are limited by what is reasonable in light of whether, among other things, the ordered extension is “within the scope of the original professed undertaking of the utility”² and whether the utility “will be insured a fair return on [its] whole investment.” *Id.* The record here is clear that these requirements are not met by the proposed expansion to Soldiers Meadow. Not only is Soldiers Meadow outside Qwest’s service

² Whether section 61-508 actually grants the Commission the authority to change a public utility’s boundary over its objection need not be debated here because, from Qwest’s perspective, the practical arguments against doing so are overwhelming. Should the Commission disagree, Qwest reserves the right to brief the scope of the Commission’s jurisdiction to enter an order requiring the service boundary be changed.

territory, but Qwest could not expect to receive recovery of the investment (assuming the 19 interested residents took basic residential service from Qwest in perpetuity) in less than 49 years³ unless, of course, the potential customers each pay large line extension charges. Given the realities of today's telecommunications industry, deployment of capital where it will not be recovered within a reasonable time cannot be justified.

3. Additional practical concerns stand in the way of changing Qwest's exchange boundary.

In addition to the standards set out in *Murray* for consideration of the reasonableness of a particular extension, the Commission should also consider the policy reasons that support maintaining the boundaries of telephone corporations in fixed locations. If the Commission were to grant the request of the Complainants in this case to alter Qwest's exchange boundaries, it will set precedent that could impact all exchange boundaries and render them meaningless with respect to how each company designs its network.

The telephone network is currently designed by each company based on its defined service area. In the present case, the boundaries have been in place since prior to 1913. If the Commission were to order a change to Qwest's boundary, it would affect Qwest's ability to plan for future network demands. This is a critical concern because, although customers are ordinarily expected to pay for the extension of new facilities to locations that have not previously been served, telephone companies have been held responsible to plan their networks to meet the reasonable demands of their customer base. Thus as a general rule, new line extensions are the customers' responsibility while the company has been expected to install sufficient facilities to serve the populated areas within its territory. Reinforcements of existing facilities to meet

³ Even this estimate is significantly understated. It is based on 19 customers paying \$16 per month. However, this overly-simplified calculation does not account for the cost of providing and maintaining service to the customers.

growth or increased service demands are, in most cases, the companies' responsibility.

However, if companies cannot be sure where their service territory ends, this balance between customer-driven growth and reasonable company management of its network is destroyed.

A network is designed from a serving central office out to the far end of the exchange. The design is based on the concept that it is efficient and economical to place larger size cables closer to the central office where customer density tends to be highest, then taper the cables down as customer density decreases farther away from the central office. At the outermost end of the network design, small cables serving only a discreet number of customers are placed. This results in limited capacity at exchange boundaries. If Qwest has to unexpectedly extend into an area outside the exchange boundaries, in most cases there will not be a cable of sufficient size nearby to serve the unforecasted customer demand. When this happens, cable reinforcement is required farther back in the network to provide sufficient capacity and cable size to handle the expanded customer base.

The Forest, Idaho scenario to which Complainants point is a good example of the practical problem that is presented when boundary changes are contemplated after the telephone company has built its network. Forest is remote in the sense that it is many miles from the serving wire center in Craigmont, Idaho. When some of the potential customers located in Forest requested service, Qwest eventually agreed with Staff to extend facilities in order to avoid litigation over an ambiguity concerning its former line extension tariff. Qwest installed facilities sufficient to meet the customer needs of that sparsely populated, remote area. Now, should the Commission extend the boundary to include Soldiers Meadow, the facilities that were installed to serve Forest will require reinforcement. It would be grossly unfair to require Qwest to bear the

burdensome costs of reinforcing its network where its facilities are inadequate only because the Commission changed the boundary.

If telephone companies cannot rely on their service area boundaries, they cannot reasonably and efficiently manage their networks. This could have a markedly adverse affect on the costs of serving a rural state like Idaho. In addition, ordering Qwest to change its service boundary would restrict the company's control over its costs, thereby impairing its ability to efficiently conduct its business. The reality is that construction dollars and personnel are finite resources, especially in these times of increased competition and industry and financial turmoil. If telephone companies cannot determine what their boundaries are, carriers cannot efficiently plan and allocate resources to customers that are within their boundaries.

4. Changing the boundary to include Soldiers Meadow will not bring service to the Complainants.

Qwest asks that the Commission consider one more practical reality in connection with this case, i.e., that it is the cost of construction and not the Qwest boundary that is the barrier here. Even if the Commission were inclined to change Qwest's service boundary to include Soldiers Meadow, the Complainants will not receive service because the costs of installation are simply too great to make service affordable.

Complainants appear to believe that a service area boundary change is the answer to their concerns. It is not. If these customers were within the service boundary, they would be subject to Qwest's tariff provisions. These provide that customers who seek to have service installed where facilities do not and have not existed are responsible for all installation costs, subject to a per customer credit of \$1600.00. *See No. Idaho Exchange and Network Services Tariff, sec. 4.2.2.* Given the level of the costs discussed above, there is simply no way these potential customers can or are willing to shoulder the financial burden of installing service in the Soldiers

Meadow area. Even if the projected maximum number of 19 customers were to subscribe, and assuming the use of Qwest's 2003 ballpark estimate, each customer is facing a line extension charge of over \$7,800.⁴

Complainants have voiced frustration that customers in Forest were not required to pay line extension charges. It must be remembered, however, that the Forest customers were always located within the exchange boundary and were subject to the prior Qwest tariff that used a different formula for line extension cost recovery. Even so, Qwest and the Commission Staff reached an accord concerning the interpretation of that tariff as applied to the Forest customers. Had the Commission been required to construe the tariff in light of the actual costs of construction and the actual subscriber level achieved in Forest, it is not known whether the resulting precedent would have been favorable to Complainants in this case.

Thus, Complainants' belief that they would have received service without charge had the Commission acted to change the boundary at the time the Forest matter was resolved, is based on gross speculation. Certainly, Qwest would have opposed the boundary change then as it does now. And, Qwest would not have agreed with the Staff to serve the customers in Forest had the agreement also involved an additional four miles of facilities to reach Soldiers Meadow.

It is pointless, however, to speculate how differing results could be achieved if the facts were other than those presented. This Commission must apply the tariff and follow the precedent in place today. The clear conclusion from that process is that changing the Qwest boundary will not benefit the Complainants but will establish a bad precedent for the orderly and efficient development of the network.

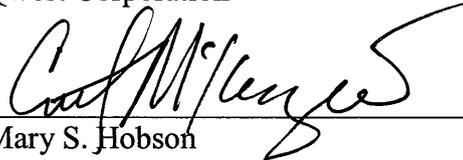
⁴ As noted above, the \$180,000 estimate is believed by Qwest to be significantly understated. Qwest reserves the right to recalculate this amount (and to charge customers accordingly) based on a thorough engineering analysis of providing service to Soldiers Meadow.

CONCLUSION

The Complainants and their neighbors are not located within Qwest's service territory boundary. As a result, Qwest has no obligation to serve them. While these facts would appear to make this a case about a service boundary change, the truth is that such a change will not benefit Complainants. The magnitude of the construction costs block any realistic possibility that the potential customers in Soldiers Meadow will receive service; they simply cannot or are unwilling to afford the line extension charges that will flow to them under Qwest's Commission approved tariff. As a result, it is not necessary for the Commission to consider whether a boundary change is legally or economically justified.

Respectfully submitted this 5th day of August, 2004.

Qwest Corporation



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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2004, I served the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** upon all parties of record in this matter as follows:

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