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OPEN MEETING ITEM

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MARC SPITZBERG
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES



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BRIAN C. MCNEIL
Executive Secretary

ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

2003 OCT 21 P 2: 23

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AZ CORP COMMISSION
DOCUMENT CONTROL

DATE: October 21, 2003

DOCKET NO: T-01051B-02-0535

OCT 21 2003

TO ALL PARTIES:

DOCKETED BY

Enclosed please find the recommendation of Administrative Law Judge Philip J. Dion III. The recommendation has been filed in the form of an Opinion and Order on:

DENTON, et al. v. QWEST
(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00 p.m.** on or before:

OCTOBER 30, 2003

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Open Meeting to be held on:

NOVEMBER 4 and 5, 2003

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

BRIAN C. MCNEIL
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 MARC SPITZER, Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
6 MIKE GLEASON
7 KRISTIN K. MAYES

8 TROY & TRACY DENTON,

DOCKET NO. T-01051B-02-0535

9 vs.

10 QWEST CORPORATION.

11 APRIL & BRYANT PETERS,

DOCKET NO. T-01051B-02-0519

12 vs.

13 QWEST CORPORATION.

14 JOHN J. AND PATRICIA J. MARTIN,

DOCKET NO. T-01051B-02-0518

15 vs.

16 QWEST CORPORATION.

17 SUSAN BERNSTEIN,

DOCKET NO. T-01051B-02-0517

18 vs.

19 QWEST CORPORATION.

20 TOMMY L. WHITE

DOCKET NO. T-01051B-02-0516

21 vs.

22 QWEST CORPORATION

23 SANDRA RODR,

DOCKET NO. T-01051B-02-0515

24 vs.

25 QWEST CORPORATION,

26 KIRK & BOBBI LIMBURG,

DOCKET NO. T-01051B-02-0514

27 vs.

28 QWEST CORPORATION,

ARNOLD & TAMARA FATHEREE,

DOCKET NO. T-01051B-02-0513

vs.

QWEST CORPORATION,

1 ERNIE & SHERRY THOMPSON,

DOCKET NO. T-01051B-02-0512

2 vs.

DECISION NO. _____

3 QWEST CORPORATION.

ORDER

4 DATES OF HEARING: July 14 and 15, 2003

5 PLACE OF HEARING: Phoenix, Arizona

6 ADMINISTRATIVE LAW JUDGE: Philip J. Dion, III

7 IN ATTENDANCE: Mike Gleason, Commissioner

8 APPEARANCES: Ms. Theresa Dwyer and Ms. Darcy R. Renfro,
9 FENNEMORE CRAIG, on behalf of Qwest
10 Corporation;

11 Mr. Conley Ward, GIVENS PURSELY, L.L.P., and Ms.
12 Ann. Hobart, BROWN & BAIN, P.A., on behalf of
13 Midvale Telephone Exchange, Inc.;

14 Ernie and Sherry Thompson, in propria persona;

15 Tracy and Troy Denton, in propria persona;

16 Tommy White, in propria person; and

17 Ms. Lisa A. VandenBerg, Staff Attorney, Legal
18 Division, on behalf of the Utilities Division of the
19 Arizona Corporation Commission.

20 **BY THE COMMISSION:**

21 * * * * *

22 Having considered the entire record herein and being fully advised in the premises, the
23 Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

24 **FINDINGS OF FACT**

25 1. On July 9, and July 11, 2002, Troy and Tracy Denton, April and Bryant Peters, John
26 H. and Patricia J. Martin, Susan Bernstein, Tommy L. White, Sandra Rodr, Kirk and Bobbi Limburg,
27 Arnold and Tamara Fatheree, and Ernie and Sherry Thompson (collectively "Original
28 Complainants") filed separate Complaints against Qwest Corporation ("Qwest") that stated the
Original Complainants would like Qwest to be their phone service provider.¹

¹ The separate complaints were consolidated by Procedural Order into this case.

1 2. Qwest has refused to provide telephone service to the Original Complainants based
2 upon Qwest's claims that the Complainants' residences are not located within Qwest's service
3 territory. The area in dispute is located in Poquito Valley in Yavapai County, near Prescott, Arizona.

4 3. The Original Complainants allege that, since Qwest provides telephone service to their
5 next-door neighbors the Lehmans, the Skippers, the Dunns² and the Hernandez', whose residences
6 are also located in Section 11, Qwest is discriminating against them.

7 4. On August 26, 2002, Qwest filed its Consolidated Answer to the Formal Complaints.

8 5. On January 22, 2003, Qwest filed a Motion to Stay the Proceedings Until the
9 Resolution of Midvale Telephone Exchange Inc.'s ("Midvale") Application to Serve Complainants'
10 Area.³

11 6. By Procedural Order dated May 14, 2003, Qwest's Motion to Stay was denied and a
12 hearing was set for June 17, 2003. The Procedural Order also explained that if any of the Original
13 Complainants failed to appear for the hearing then their Complaint(s) could be dismissed with or without
14 prejudice.

15 7. By Procedural Order dated June 6, 2003, the hearing was reset for July 14, 2003.

16 8. On July 1, 2003, Sandra Rodr filed a Motion to Dismiss her complaint against Qwest.

17 9. On July 14, 2003, the hearing was held as scheduled before a duly authorized
18 Administrative Law Judge of the Commission. Troy and Tracy Denton ("Dentons"), Tommy L.
19 White, and Ernie and Sherry Thompson ("Thompsons") (collectively "Complainants") were the only
20 Original Complainants to appear at the hearing. The Complainants appeared without the assistance
21 of counsel. Qwest and Midvale, which intervened in the case at the request of the Commission,
22 appeared with the assistance of counsel. The Commission's Utilities Division Staff ("Staff") also
23 appeared with the assistance of counsel. At the close of the hearing, the matter was taken under
24 advisement.

25 10. On September 12, 2003, the Complainants filed their closing brief.

26 ² The Dunns have subsequently sold their residence and property to the Chavez family, however for ease we will
27 continue to refer to this property as the Dunn residence.

28 ³ On January 10, 2003, Midvale filed an application with the Commission to extend its Certificate of Convenience
and Necessity to include the area where the Complainants reside. The Docket number of that application is T-02532A-
03-0017.

1 11. On September 15, 2003, Qwest filed its closing brief.

2 **Background**

3 12. In December of 1999, the Thompsons moved into their residence at 7120 E. Esteem
4 Way, Prescott Valley, Arizona.⁴

5 13. In September of 2000, the Dentons moved into their residence located at 7225 E.
6 Esteem Way, Prescott Valley, Arizona.

7 14. In December of 2000, Mr. White moved into his residence at 10170 North Poquito
8 Valley Road, Prescott Valley, Arizona. His property is located on the northwest corner of Poquito
9 Valley Road and Esteem Way.

10 15. The Complainants' properties are located in Section 11, Township 15 North, Range 1
11 West.⁵

12 16. Qwest provides services to Section 14, Township 15 North, Range 2 East,⁶ which is
13 located directly south of Section 11.

14 17. Qwest argued that it does not provide telephone service, and is it not certified to
15 provide service, to Section 11. Qwest stated that its policy is not to extend its current service
16 territory because it needs to utilize its resources to serve customers inside of its service territory.

17 18. John Duffy, the manager of policy and law for Qwest, testified that Qwest's service
18 territory ends at the boundary line of Section 14 and Section 11. He further testified that Poquito
19 Valley Road runs through Section 11 and Section 14. He testified that any addresses greater than
20 10000 N. Poquito Valley Road are located in Section 11 and, therefore, are outside of Qwest's
21 service territory.

22 **Complainants' Efforts to Obtain Qwest Service**

23 19. Mrs. Thompson testified that the materials given to them by their realtor,⁷ stated
24 Qwest was serving Section 11.

25
26 ⁴ Please refer to Exhibit C-6, which is attached and shows the various properties and their owners and the relationship of the
27 properties to Qwest's service territory.

⁵ Throughout this Opinion and Order, "Section 11" refers to Section 11, Township 15 North, Range 1 West.

⁶ Throughout this Opinion and Order, "Section 14" refers to Section 14, Township 15 North, Range 2 East.

28 ⁷ Exhibit C-1.

1 20. Ernie Thompson testified that he called Qwest on December 3, 1999, and requested
2 phone service for his residence.

3 21. Notes taken by a Qwest customer service representative during the conversation
4 between herself and Mr. Thompson state Mr. Thompson, "told me that he is about 1500 feet outside
5 the US West⁸ area. The legal description is, Section 11, Township 15[N], Range 1W.⁹ Based on the
6 evidence, it is clear that Mr. Thompson knew that his property was located outside of Qwest's service
7 area before he requested service from Qwest.

8 22. Qwest sent a letter to the Thompsons on January 10, 2000. The letter stated that
9 Qwest's service is temporarily unavailable as there are currently no facilities available to serve the
10 Thompson location. The letter did not deny the possibility of future service, nor did it identify that
11 the Thompson residence was outside of Qwest's service territory.

12 23. During a telephone call with Qwest on January 18, 2000, the Thompsons were told
13 that their order had been placed on hold and that Qwest engineers were working on the situation. The
14 Thompsons were told that Qwest would give them a call and tell them how much it would cost to turn
15 on Qwest's service. That call combined with the aforementioned letter gave the Thompsons hope
16 that their residence would receive Qwest service in the near future.

17 24. However, on January 26, 2000, the Thompsons received a letter from Qwest stating
18 that it had been determined that their residence was located outside of Qwest's service area. The
19 letter went on to state that Qwest does not choose to provide facilities outside of its service area. As a
20 result, the Thompsons' order for telephone service was cancelled.

21 25. The Dentons and Mr. White made similar requests of Qwest during the spring and fall
22 of 2000. In each case they were lead to believe that Qwest would be providing service to their
23 residences, however, after multiple phone calls and letters, Qwest declined to serve either one of their
24 properties.

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26
27 ⁸ US West Communications, Inc. became Qwest Corporation effective June 30, 2000, with Commission Decision
No. 62672, which approved the merger of the parent corporations of US West Communications, Inc. and Qwest
Corporation.

28 ⁹ Exhibit R-14.

1 34. He further testified that the installation of phone service to the Skipper and Dunn
2 residences was done in October of 1999.

3 35. Mr. Dunn testified when someone calls into Qwest and requests phone service, a
4 number of questions are asked by the customer service representative including: the individual's
5 name, credit information, address and what services he/she would like. He testified that if someone
6 calls in and is unable to give an address to Qwest, then the Qwest employee is to ask for the range,
7 township and section number of his/her property. Mr. Duffy stated if the person is unable to give that
8 information, then a customer service representative will ask for driving instructions to the property
9 and if any neighbors currently have Qwest phone service in order to determine if that person's
10 property is located within Qwest's service territory.

11 36. Mr. Duffy stated that he reviewed Qwest's records regarding the installation of phone
12 service to the Lehman residence.

13 37. Mr. Duffy stated he believed that the Qwest employee at the address management
14 bureau went "out of process"¹⁶ when that individual processed the Lehmans' request for telephone
15 service.

16 38. He stated that, based on his review of Qwest's records, Mr. Lehman gave the customer
17 service representative his address of 10150 N. Poquito Valley Road. He stated that the customer
18 service representative asked Mr. Lehman for the address of the residence closest to his home. Based
19 on the notes, Mr. Duffy testified that the response that Mr. Lehman gave was 9750 N. Poquito Valley
20 Road. The 9750 N. Poquito Valley Road address was categorized as a location that was within
21 Qwest's service territory in Qwest's system.

22 39. Mr. Duffy stated that, instead of following Qwest's policy and asking Mr. Lehman for
23 the range, township and section number of his property, he believes that the customer service
24 representative assumed, based on the nearest address to the Lehman property, that the Lehmans'
25 property was within Qwest's service territory, and processed the order. Thus, the Qwest employee
26 extended the service range past 10000 N. Poquito Valley Road and, thereby, extended Qwest's
27

28 ¹⁶ Transcript at page 345.

1 service territory to include the Lehmans' property. Mr. Duffy testified that the employee's actions
2 were contrary to Qwest's policy and that the installation of service to the Lehman property was an
3 error.

4 40. Mr. Duffy also stated that he reviewed Qwest's records regarding the installation of
5 phone service to the Skipper and Dunn properties.

6 41. Mr. Duffy stated the Qwest employees that processed the Skipper and Dunn orders
7 researched Qwest's address system and noticed that the Lehmans' address was built into Qwest's system.
8 Therefore, the employees processed the orders as it appeared the addresses of the Skipper and Dunn
9 properties were within Qwest's service territory.

10 42. Mr. Duffy said that those customer service representatives did not violate any of
11 Qwest's policies as they were working on the assumption that the Lehman's property was within Qwest's
12 service territory and there was nothing in the system to warn those individuals that the Lehmans'
13 property was actually located outside of Qwest's service territory.

14 43. Mr. Duffy stated, in January of 2000, Qwest made a special note in its address system
15 stating that any properties with an Esteem Way address or an address above the 10000 block of
16 Poquito Valley Road were residences that are out of Qwest's service territory and were not to be
17 served. Mr. Duffy stated that after that point, a customer service representative was able to look at
18 the system and if somebody from either of those locations was trying to get Qwest phone service, the
19 customer service representative would tell them that they were out of Qwest's service territory, and
20 cancel the order.

21 44. Mr. Duffy summed up his testimony regarding Qwest's inadvertent service to the
22 Lehmans, Skippers and Dunns by stating that when Mr. Lehman telephoned Qwest, an error was made by the
23 Qwest employee as he did not ask for information regarding where the Lehman property was located,
24 specifically the range, township and section number. Instead, the Qwest employee asked for the
25 address of the closest residence. When Mr. Lehman replied 9750 N. Poquito Valley Road, the Qwest
26 employee took it upon himself, without getting further detail, to extend Qwest's service territory past
27 the range of 10000 N. Poquito Valley Road. That single mistake, Mr. Duffy testified, allowed the
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1 Skippers and Dunns to also receive Qwest's services although they too were outside of Qwest's
2 service territory.

3 45. Mr. Duffy testified that the person who extended Qwest's area of service by providing
4 the Lehman's with telephone service is no longer with Qwest.

5 **Hernandez Property**

6 46. The Complainants also argue that Qwest discriminated against them by providing
7 service to the Hernandez family, who live at 7095 E. Esteem Way, after Qwest had already denied
8 phone service to the Complainants.

9 47. In July of 2000, Qwest rejected the Hernandez family's request for telephone service
10 because they were not in Qwest's service territory.

11 48. At that time, the Hernandez property was a lot that was located in Section 11 and was
12 contiguous to Section 14 as its southern edge was the border between Section 11 and Section 14.¹⁷

13 49. In January 2000, the Hernandez family bought the lot directly south of their residence,
14 which is located in Section 14. In fact, a Qwest employee, Ted Drake, who is an engineer for Qwest,
15 recommended to the Hernandez family that they buy the piece of property directly south of their lot
16 so that they could obtain Qwest's services.¹⁸

17 50. In January of 2000, Qwest inserted a post at the northern edge of the Hernandez'
18 property that is located in Section 14. Qwest ran its services to that post.

19 51. Based on the evidence presented, it is clear that a trench was dug from the post in Section
20 14 to the Hernandez residence in Section 11. The Hernandez family is receiving Qwest telephone
21 service at their home.

22 52. Qwest's position is that, although the Hernandez home is located entirely in Section
23 11, the Hernandez family has a property interest in Qwest's service territory, namely the adjacent
24 parcel in Section 14. Therefore, Qwest argues that the service to the Hernandez family is proper.

25 53. Qwest cited A.A.C. R14-2-502(B), which states, "[E]ach utility which extends a utility
26 service to a person not located within its certificated service area, but located in a non-certificated
27

28 ¹⁷ Exhibit C-6.

¹⁸ Transcript at 508.

1 to reevaluate its willingness to serve those three Sections. Ms. Williams made it clear that if Qwest
2 was ordered to serve a part of Section 11, it is likely that Midvale would not seek to serve the
3 remaining portion of Section 11 or the other two Sections.

4 **Conclusion**

5 59. Pursuant to A.R.S. § 40-334, we do not believe that the record establishes that Qwest
6 discriminated against the Complainants.

7 60. The service to the Lehman, Skipper and Dunn properties was established in error. A Qwest
8 employee went "out of process" and established service at the Lehman residence. In doing so, the
9 range of service, which should have stopped at 10000 N. Poquito Valley Road, was extended
10 northward and the properties of the Skippers and Dunns received service based upon that error.

11 61. Mr. Duffy testified that once Qwest discovered it was serving customers out of territory,
12 Qwest began an investigation and alerted Staff.

13 62. Mr. Duffy testified that Staff responded with a letter stating that the Commission does
14 not have a policy or procedure on how to handle these types of issues. Mr. Duffy stated that after
15 further conversations with Staff, Qwest was ordered not to disconnect the Lehman, the Skipper or the
16 Dunn residences. Qwest to this day is still providing service to those properties.

17 63. Qwest also highlighted the error in its system so that other properties in Section 11
18 would not be provided with service.

19 64. Although the Hernandez family received Qwest phone service after the Complainants
20 were denied service by Qwest, the Complainants failed to show that, in doing so, Qwest
21 discriminated against them.

22 65. Qwest's service to the Hernandez property is distinguishable since they own
23 contiguous property within Qwest's service territory. The allegation in regards to the Hernandez
24 property is similar to the allegation in the Dellinger case in which we found that Qwest's decision not
25 to serve the Dellingers was proper. Further, in this case, Qwest has indicated that if any of the
26 Complainants obtained a property interest in a parcel located in Section 14 that is contiguous to their
27 property in Section 11, then Qwest would provide them with the same service that Qwest currently
28 provides to the Hernandez family.

1 66. Mr. Duffy also stated Qwest made a filing in compliance with Rule 14-2-502(B).

2 67. Although Qwest is technically in compliance with A.A.C. R14-2-502(B), we do not
3 believe it is sound public policy to permit or encourage customers to “game” the system by
4 purchasing contiguous property that is within Qwest’s service territory and privately connecting
5 facilities from that property to another piece of property that is located outside of Qwest’s service
6 territory. If Qwest wants to provide service to a contiguous, non-certified area, it shall install its
7 facilities within the property located outside of its service territory, rather than having its facilities
8 end at the border of its service territory.

9 68. We wish to make clear that our decision in this case is influenced by the fact that
10 Midvale Telephone Exchange, Inc. has requested an extension of its Certificate of Convenience and
11 Necessity to the service area in which the Complainants are located (Docket No. T-02532A-03-
12 0017). Under different factual circumstances, we may reach a different conclusion with respect to
13 Qwest’s obligation to serve a given section of land.

14 69. The Complainants also alleged that Qwest discriminated against them because Ernie
15 Thompson was an employee of Qwest. They further alleged that Qwest provided service to the
16 Lehmans, the Skippers, the Dunns and the Hernandez’ because they were prominent residents in
17 Prescott Valley, Arizona. The evidence presented at the hearing does not support either claim.

18 **The Remainder of the Original Complainants**

19 70. April and Bryant Peters, John H. and Patricia J. Martin, Susan Bernstein, Sandra Rodr,
20 Kirk and Bobbi Limburg, and Arnold and Tamara Fatheree filed complaints against Qwest.
21 However, since that time they have not participated in these proceedings. During the course of this
22 case, Qwest made numerous requests prior to the hearing to dismiss their Complaints because of their
23 lack of participation. Those requests were denied. However, on May 14, 2003 a Procedural Order
24 was issued informing them that if they failed to appear at the hearing, their Complaints could be
25 dismissed with prejudice. The Procedural Order explained the ramifications of dismissing a
26 complaint with prejudice. Since they failed to appear for the hearing, their complaints should be dismissed
27 with prejudice.

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CONCLUSIONS OF LAW

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1. Qwest is a public service corporation within the meaning of the Arizona Constitution and A.R.S. § 40-246.

2. The Commission has jurisdiction over Qwest and the subject matter of the Complaints.

3. Because Qwest's service territory does not include Section 11, Qwest is not obligated to provide telephone service to Section 11.

4. Qwest's service to the Lehman, Skipper and Dunn properties should not be discontinued.

5. Qwest's service to the Hernandez property, which is located partially in Section 11 and partially in Section 14, should not be discontinued.

6. Qwest has not violated A.R.S. § 40-334.

7. The evidence establishes that the relief requested by the Complainants should not be ordered.

ORDER

IT IS THEREFORE ORDERED that the Complaints filed by the Thompsons, Dentons and Mr. White are dismissed.

IT IS FURTHER ORDERED that Qwest shall correct its records to reflect the Skipper's actual address in its records.

IT IS FURTHER ORDERED that Qwest Corporation shall not discontinue service to the Lehman, Skipper, Dunn or Hernandez properties.

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1 IT IS FURTHER ORDERED that the Complaints filed by the Peters, Martins, Bernsteins,
2 Limburgs, Featherees and Sandra Rohr are dismissed with prejudice.

3 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

4 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

5
6
7 CHAIRMAN

COMMISSIONER

COMMISSIONER

8
9 COMMISSIONER

COMMISSIONER

10 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
11 Secretary of the Arizona Corporation Commission, have
12 hereunto set my hand and caused the official seal of the
13 Commission to be affixed at the Capitol, in the City of Phoenix,
14 this ____ day of _____, 2003.

15 _____
BRIAN C. McNEIL
EXECUTIVE SECRETARY

16 DISSENT _____

17 DISSENT _____

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1 SERVICE LIST FOR:

TROY & TRACY DENTON, and VARIOUS OTHER
COMPLAINANTS, vs. QWEST CORPORATION

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T-01051B-02-0535 ET AL.

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28

- In territory
- Boundary
- Open territory
- Home with
- Secure
- Complaint
- Property

EXHIBIT
A-6

STARDUST LANE

103-01-172L EMPTY LOT	103-01-172N EMPTY LOT	103-01-172S Thompson's 7120 E. Esteem Way NO SERVICE	103-01-172Q EMPTY LOT	103-01-172T White's 10170 N. Poquito Valley NO SERVICE
103-01-172E EMPTY LOT	103-01-172G Hernandez's 7095 E. Esteem Way SERVICE	103-01-172H EMPTY LOT	103-01-172J Denton's 7225 E. Esteem Way NO SERVICE	103-01-172K Lehman's 10150 N. Poquito Valley SERVICE
103-01-176L IN TERRITORY EMPTY LOT	103-01-176N Hernandez's 7070 E. Moonlit Drive POST ON LOT	103-01-176Q IN TERRITORY EMPTY LOT	103-01-176S IN TERRITORY EMPTY LOT	103-01-176T Moxley's 9090 N. Poquito Valley IN TERRITORY

ESTEEM WAY

MOONLIT DRIVE

POQUITO VALLEY

103-01-195G
Dunn's/Chavez's
10195 N. Poquito Valley
SERVICE

103-01-195H
Skipper's
10055 N. Poquito Valley
SERVICE

103-01-167H
IN TERRITORY
HOUSE

DECISION NO.

SECTION
11

TERRITORY
BOUNDARY
SECTION
LINE
14