

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of: )  
)  
The State of Minnesota Petition for ) CC Docket No. 98-1  
Declaratory Ruling Concerning Access to )  
Freeway Rights-of-Way Under Section 253 )  
of the Telecommunications Act )  
\_\_\_\_\_ )

**OPPOSITION AND REQUEST TO PREEMPT OF THE UNITED STATES TELEPHONE ASSOCIATION,  
THE ORGANIZATION FOR THE PROMOTION  
AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES,  
THE WESTERN RURAL TELEPHONE ASSOCIATION AND  
THE COMPETITION POLICY INSTITUTE**

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## SUMMARY

The Minnesota Petition for Declaratory Ruling raises an issue of national significance -- namely, how far states will be permitted to go in using governmental powers associated with public safety and public rights-of-way management to leverage their ability to secure telecommunications services at little or no cost to the state, but at the expense of the telecommunications industry. At least 17 states have already filed written submissions supporting the Petition.

In exchange for free telecommunications services, Minnesota plans to grant to its Developer exclusive access to the freeway rights-of-way throughout the state. Additionally, the Developer will have sole management responsibility over freeway rights-of-way. Minnesota will receive a minimum of 20%-30% of the capacity of the fiber optic network that the Developer will build in the freeway rights-of-way. The Developer is free to use the remaining capacity to provide services or lease facilities not used by Minnesota.

Telecommunications services providers not in the rights-of-way when the Developer closes its trenches will be foreclosed from placing facilities in the freeway rights-of-way for the foreseeable future. Those providers that are already in the rights-of-way will be required to use the Developer for ongoing maintenance and repair of their facilities. Telecommunications services providers will effectively be precluded from providing telecommunications services in

competition with the Developer because of the preferential position given to the Developer by Minnesota.

Minnesota asks the Commission to declare that its plan does not fall within the scope of Section 253 of the Communications Act or, in the alternative, that its plan is permissible under subsections 253(b) and (c) as a proper exercise of its public safety and rights-of-way management authority.

The Telephone Trade Associations and CPI assert that Minnesota's plan is a clear violation of subsection 253(a) since it effectively prohibits telecommunications services providers from providing telecommunications services. Minnesota's plan is extreme and unnecessary as a way in which to address the public safety issues associated with the use of public rights-of-way along freeways. Its plan is also discriminatory and anticompetitive in that it obviously advantages the Developer over other telecommunications services providers. Minnesota's plan is not sanctioned by the authority reserved to states under subsections 253(b) and (c). Accordingly, Minnesota's Petition should be denied, and the Commission should preempt it from proceeding with its plan.

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The United States Telephone Association (USTA),<sup>1</sup> the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)<sup>2</sup>, the Western Rural Telephone Association (WRTA)<sup>3</sup> (collectively “Telephone Trade Associations”) and the

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<sup>1</sup> USTA is the nation’s oldest trade organization for the local exchange carrier industry. USTA currently represents more than 1200 small, mid-size and large companies worldwide.

<sup>2</sup> OPASTCO is a national trade association of more than 500 independently owned and operated telephone companies serving rural areas of the United States and Canada. Its members, which include both commercial companies and cooperatives, together serve over two million customers.

<sup>3</sup> WRTA is a nonprofit trade association<sup>3</sup> representing nearly 150 small commercial and cooperative telephone systems throughout the rural western United States and its Pacific Rim territories. All of its members’ systems utilize the U.S. Department of Agriculture’s Rural Utilities Service telephone loan program.

Competition Policy Institute (CPI)<sup>4</sup> through the undersigned, hereby oppose the Petition for Declaratory Ruling of the State of Minnesota (Petition) concerning Minnesota's proposal to grant exclusive access to the State's freeway rights-of-way to a single provider of fiber optic transport services and facilities.<sup>5</sup> On the basis of the arguments set forth below, the Telephone Trade Associations and CPI assert that Minnesota's proposed exclusive grant violates subsection 253(a) of the Communications Act and is not a lawful exercise of the authority reserved to states under subsections 253(b) and (c).<sup>6</sup> Accordingly, the Commission should deny the Petition and, pursuant to subsection 253(d),<sup>7</sup> preempt Minnesota from proceeding with the proposed exclusive grant of access to freeway rights-of-way.

## DISCUSSION

### I. FACTS

Based upon the provisions contained in the **Agreement to Develop and Operate Communications Facilities, dated December 23, 1997, by and among the State of Minnesota, Acting by and through the Commissioner of the Department of Transportation**

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<sup>4</sup>The Competition Policy Institute (CPI) is an independent, nonprofit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers.

<sup>5</sup> Petition dated December 30, 1997, and received by the Federal Communications Commission (Commission) on January 5, 1998. See Public Notice, CC Docket No. 98-1, DA 98-32 (rel. Jan. 9, 1998). See also Public Notice, CC Docket No. 98-1, DA 98-236 (rel. Feb. 6, 1998), revising the pleading cycle in this proceeding.

<sup>6</sup> 47 U.S.C. §§253(a), (b) and (c).

<sup>7</sup> 47 U.S.C. §253(d).

**and the Commissioner of the Department of Administration and Stone & Webster**

**Engineering Corporation, a Massachusetts Corporation** (Agreement), a copy of which has

been filed by Minnesota,<sup>8</sup> the following facts are not in dispute and are relevant to the

Commission's evaluation of Minnesota's request for a declaratory ruling:

**A. Minnesota's Stated Reason For An Exclusive Grant**

Minnesota determined that the grant of access permits for a single or very limited number of installations of fiber optic cable and related facilities within the "control of access lines of freeways" throughout the State is in the public interest, but that the grant of such permits to multiple parties will create undue risk to public health, safety and welfare, undue costs of monitoring, administration and maintenance to the State, undue risk of interference with the free flow of traffic, and undue delays and increases in costs to the State to widen, relocate or otherwise alter or improve freeways.<sup>9</sup>

In February 1996, Minnesota issued a **Request For Proposal for Public-Private Partnership in the Development of Communications Infrastructure** through which it solicited proposals for the placement of either or both a fiber optic network and wireless communications facilities longitudinally within the rights-of-way of freeways and other State highways in exchange for free communications services for the State and other governmental entities.<sup>10</sup>

On August 14, 1996, Minnesota selected ICS/UCN LLC and Stone and Webster Engineering Corporation (Developer) for further discussions that led to the execution of the Agreement.<sup>11</sup> Developer's proposal was accepted because it was determined to best serve Minnesota's interests in intelligent transportation systems technology and enhancing and expanding

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<sup>8</sup> See Letter from the State of Minnesota, Office of the Attorney General, Scott Wilensky, Assistant Attorney General, to Magalie Salas, Secretary, Federal Communications Commission, dated February 3, 1998.

<sup>9</sup> Agreement at Section 1.9.

<sup>10</sup> *Id.* at Section 1.10.

<sup>11</sup> *Id.* at Sections 1.14 and 1.15.

its ability to secure affordable and reliable voice communications, data and video transport and other information transmission functions.<sup>12</sup>

Although Minnesota has stated that the public's health, safety and welfare prompted it to negotiate and execute an exclusive agreement, it also acknowledges that its covenant to exclude other parties from freeway rights-of-way during the term of the Agreement will assist the Developer in obtaining financing needed for construction of the state-wide fiber optic network covered by the Agreement.<sup>13</sup>

## **B. The Agreement**

As used in the Agreement, a **freeway** is "any divided highway for through traffic with full control of access, and grade separated interchanges."<sup>14</sup>

The **term** of the Agreement is "the time period commencing on the Agreement date [12/23/97] and expiring 30 years after the last Acceptance Date for the entirety of Phase 1 of the Network, provided that: (a) if the last Acceptance Date of Phase 1 of the Network does not occur within 21 years from the Agreement Date, then the Term hereunder shall expire 21 years from the Agreement Date; and (b) the Term is subject to earlier termination in accordance with this Agreement."<sup>15</sup>

Minnesota grants to the Developer "the right and opportunity to design, finance, construct, install, own, operate, use, administer, maintain and replace the Network, to construct, install, use, administer, maintain and replace the fiber optic cable and equipment of Collocating Customers [a third party for whom the Developer installs fiber optic facilities concurrently with the Developer's installation of the Network but whose facilities are separate from it] and to enter into User Agreements respecting the Network and/or Collocating Customers."<sup>16</sup>

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<sup>12</sup> Id. at Section 1.16.

<sup>13</sup> Id. at Section 11.1(a).

<sup>14</sup> Id. at Section 2.25.

<sup>15</sup> Id. at Section 2.70.

<sup>16</sup> Id. at Section 3.1(a).

Minnesota has agreed “that it shall not grant a license, permit or other right to any other party [than Developer] to construct, install, and operate a fiber optic communications system longitudinally within the Freeway Right of Way locations specifically identified” in the Agreement. This commitment to the Developer expires ten years after the last Acceptance Date for Phase I absent termination of the Agreement for other reasons. Further, if during the period that is between ten and twenty years after the last Acceptance Date for Phase I Minnesota decides to “offer the opportunity to place” an additional fiber optic communications system within the Freeway Right of Way covered by the Agreement, the Developer shall have a first right of exclusive negotiation with Minnesota for the design, permitting and installation of the additional communications system.<sup>17</sup>

Although the rights granted to the Developer by Minnesota do not initially cover cellular, PCS, SMR or DBS facilities,<sup>18</sup> the Agreement gives the Developer “a right of negotiation” to modify the Agreement and provide the Developer rights of access to the Phase I Right of Way for designing, permitting, siting, installing, leasing, licensing, managing, operating and providing use to others of cellular, PCS, SMR and other wireless communications facilities.<sup>19</sup>

In consideration for the grants and commitments made to the Developer, Minnesota will receive 20%-30% of the lit capacity of the Phase I Network and ten dark fiber strands on each of the fiber rings (minimum of five SONET rings<sup>20</sup>) to be provided.<sup>21</sup>

At any time during the Term, Minnesota may request that additional lit or dark capacity be provided to it, to the extent that it is available, at 80% of Developer’s most favored customer rates and charges or 80% of the rates and charges for similarly situated customers.<sup>22</sup> Once the additional capacity is

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<sup>17</sup> Id. at Section 11.1.

<sup>18</sup> Id. at Section 11.1(c)(iii).

<sup>19</sup> Id. at Section 11.7(a).

<sup>20</sup> Id. at Exhibit A. Network Architecture; Narrative Description, Page 3. Item 3.

<sup>21</sup> Id. at Section 3.3(c).

<sup>22</sup> Id. at Section 3.3(d)(iv)(A) and (B).

secured, Minnesota thereafter has exclusive ownership, control and use of it.<sup>23</sup>

The Agreement acknowledges that there will be third party or collocated fiber facilities placed by the Developer. These fiber facilities “must be separate and distinct from, collocated with and installed concurrently” with the Developer’s fiber facilities that are being installed for the Network.<sup>24</sup> The third party fiber owner must enter into a User Agreement with the Developer,<sup>25</sup> and the User Agreement is “subject and subordinate to” the Agreement.<sup>26</sup> Minnesota retains the right to limit the locations of the third party’s nodes and equipment.<sup>27</sup> Minnesota’s right of access to use of the Developer’s huts and pedestals has priority over its use by a third party.<sup>28</sup> All construction and installation work concerning the third party facilities is to be solely performed by the Developer.<sup>29</sup>

With respect to the rates and rates structures for charges to telecommunications services providers from the Developer, the Agreement provides that rates shall be “uniform and non-discriminatory”<sup>30</sup> and that they must be filed with Minnesota and published.<sup>31</sup> The Agreement does not require that the rates charged be fair and reasonable. Nor does it specify a process by which third party telecommunications services providers can challenge the Developer’s rates.

## **II. MINNESOTA’S POSITION**

Minnesota offers the Commission four reasons in support of its request for a declaratory

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<sup>23</sup> Id. at Section 3.3(d)(viii).

<sup>24</sup> Id. at Section 5.12(a).

<sup>25</sup> Id. at Section 5.12(c).

<sup>26</sup> Id. at Section 9.2(c).

<sup>27</sup> Id. at Section 5.12(e).

<sup>28</sup> Id. at Section 5.12(f).

<sup>29</sup> Id. at Section 5.12(g).

<sup>30</sup> Id. at Section 7.7(a).

<sup>31</sup> Id. At Section 7.7(b) and (c).

ruling. First, Minnesota contends that because the Developer will provide fiber optic transport capacity on a wholesale basis and will not be providing telecommunications services directly to the public, Section 253 is inapplicable to the circumstances presented in the Petition.<sup>32</sup> This position does not comport with the facts as represented by Minnesota and is not supported by any reasonable interpretation of Section 253.

As part of the justification offered by Minnesota as to why its exclusive grant of access to freeway rights-of-way will not prohibit the provision of telecommunications services, it states in the Petition that “the Developer must sell or lease transport capacity to all similarly situated customers in a non-discriminatory fashion.”<sup>33</sup> To the extent that the Developer is obligated to provide transport services to all customers that desire it, it is offering telecommunications services for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.<sup>34</sup> Minnesota’s characterization of the Developer as a wholesaler of fiber optic transport services does not change the fact that under the Agreement the Developer must “sell or lease transport capacity to all similarly situated customers in a nondiscriminatory fashion.”

Further, and more importantly, Section 253 is focused on laws, regulations or other legal requirements imposed by states or local governments that serve to prohibit, or have the effect of

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<sup>32</sup> Petition at pp.13-17.

<sup>33</sup> *Id.* at p.26.

<sup>34</sup> See 47 U.S.C. §3(46). This is true even though the terms and conditions upon which the Developer offers the services may effectively prohibit other would be telecommunications services providers from using the Developer’s transport services to, in turn, provide their own telecommunications services.

prohibiting, the provision of interstate or intrastate telecommunications services. It does not matter whether the Developer is providing services directly to the public if, as is the case here, the consequence of the Agreement is to prohibit, or have the effect of prohibiting, the provision of telecommunications services. As the Commission has stated, Section 253 focuses on “removing barriers to entry in all telecommunications markets.”<sup>35</sup> The Commission’s ability to review Minnesota’s action and respond to it under Section 253 is not constrained by whether the Developer is providing services or facilities. Rather, Commission review and preemption is required by Minnesota’s decision to bar all telecommunications services providers, except its Developer, from having access to Minnesota’s freeway rights-of-way.

Second, Minnesota argues that its grant of exclusive access to freeway rights-of-way to the Developer is justified because it will foster competition by adding fiber capacity in Minnesota without prohibiting telecommunication services providers from offering telecommunications services.<sup>36</sup> This position is speculative at best and is not supported by the facts. Through the Agreement, Minnesota has conferred a prospective monopoly upon the Developer with respect to freeway rights-of-way access. Unless a telecommunications services provider is prepared to place facilities in the freeway rights-of-way at the time that the Developer is ready to place its facilities, the telecommunications services provider is thereafter prohibited from placing facilities in the freeway rights-of-way for a minimum of 10 years, and possibly for

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<sup>35</sup> New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order, CCB Pol 96-11, FCC 96-470 (rel. Dec. 10, 1996) (New England Decision), at ¶9. recon. denied, FCC 97-143 (rel. April 18, 1997).

<sup>36</sup> Petition at pp.17-26.

more than 20 years. Accordingly, once the Developer's trench is closed, there is no prospect for additional facilities-based competition along the Developer's routes for the foreseeable future. Facilities-based competition from telecommunications services providers that want to provide fiber-based transport services is, therefore, precluded along the routes controlled by the Developer.<sup>37</sup>

The constraint on competition is not limited to facilities-based competition. Although the Agreement requires that the Developer offer capacity not already committed to Minnesota to "third parties" on a uniform and non-discriminatory basis, nothing in the agreement protects third parties from unfair or unreasonable rates for the services or leasing arrangements provided by the Developer.

Minnesota acknowledges that, at least in part, its decision to grant exclusive access to the Developer was predicated upon assisting the Developer to obtain financing for the project.<sup>38</sup> The Developer is motivated to charge its captive customers premium, if not exorbitant, rates. Telecommunications services providers who are forced to use the Developer's facilities in order to provide services (particularly competing services) to customers along the freeway routes will be held hostage to Developer's rates. Those rates, as well as the terms and conditions imposed by the Developer, may significantly increase the costs of a telecommunications services provider's business. This is not an inconsequential fact. In Minnesota, the routes that are

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<sup>37</sup> The relevant service market in this matter is not only the market for fiber optic transport services. It also includes markets for services that are provided over nonfiber facilities since no other facilities can be placed in the freeway rights-of-way after the Developer places its facilities. The relevant geographic market is the State of Minnesota.

<sup>38</sup> Agreement at Section 11.1(a).

optimal for freeways are very often also optimal for telecommunications transport facilities. Freeway planners, like network planners, want to use the most direct routes to their destinations in order to minimize material, construction and labor costs. Alternatives to the freeway routes are likely to be significantly more costly. The Developer is, therefore, ideally situated to leverage its exclusive access and the higher cost for alternative routes by charging unfair and unreasonable rates for its services and facilities. The likely result is the suppression of competition rather than the expansion of competition.

Additionally, the situation is exacerbated by the fact that Minnesota has the right to acquire additional, unused capacity from the Developer, at a discount, at any time. There may be insufficient capacity on the Developer's network for telecommunications services providers who are denied access to the freeway rights-of-way when they later need it, even if they are willing and able to pay the rates charged by the Developer.

Telecommunications services providers that are ready to place their facilities as the Developer is placing its facilities are not immune from price gouging. The Developer has the exclusive right to construct, install, use, administer, maintain and replace the fiber optic cable and facilities of collocating telecommunications services providers.<sup>39</sup> Like those telecommunication services providers who are forced to acquire transport services and capacity from the Developer, collocating telecommunications services providers are also unprotected from the Developer's ability to unilaterally set prices for the services that they are forced to use and to impose unreasonable terms and conditions.

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<sup>39</sup> Id. at Section 3.1(a).

Minnesota's third argument is that its grant of exclusive access is a proper exercise of its authority to protect public safety and is preserved by Section 253(b). It points to a long-standing policy of severely restricting access to freeway rights-of-way.<sup>40</sup>

It is undisputed that Section 253(b) reserves to states the right to impose requirements necessary to protect public safety. The key word in Section 253(b) is "necessary." Accordingly, it must be asked whether it was necessary for Minnesota to create a monopoly provider/manager of fiber optic transport facilities and services, with exclusive access to freeway rights-of-way, in order for it to fulfill its obligation to provide state residents with safe passage along its freeways? Or, rather, did Minnesota create a monopoly provider/manager of fiber optic transport facilities and services along Minnesota freeways in order to make it attractive to the Developer to construct, at no cost to Minnesota, a state-wide, state-of-the-art, fiber optic communications network with a minimum of 20%-30% of its capacity reserved to Minnesota? In this case, the facts lead to the conclusion that it was the latter.

It is somewhat astonishing to think that in lieu of adopting reasonable and less restrictive regulations to prudently manage access to freeway rights-of-way by telecommunications services providers, it was "necessary" to have a state-wide fiber optic network constructed and preclude all but the Developer from future access to public, freeway rights-of-way. In reality, Minnesota saw an opportunity to secure for itself a state-wide, state-of-the-art communications network at no charge. Unfortunately for telecommunications services providers in Minnesota, in exchange for securing a commitment from the Developer to construct the network, Minnesota elected to

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<sup>40</sup> Petition at pp.26-28.

deprive them of reasonable access to freeway rights-of-way in order to enhance the Developer's chances of securing financing and protect it from competition.

Finally, Minnesota contends that Congress has imposed no limitations upon states and local governments in exercising their traditional right to manage public rights-of-way.<sup>41</sup> Minnesota cannot avail itself of the authority reserved to states and local governments in subsection 253(c) since its actions do not constitute reasonable or traditional rights-of-way management activities,<sup>42</sup> and its actions are neither competitively neutral nor nondiscriminatory.<sup>43</sup> As to access to freeway rights-of-way, Minnesota has plainly discriminated in favor of the Developer and placed competing telecommunications services providers at a competitive disadvantage. Further, Minnesota has failed to assure that the rates charged by the Developer for essential services (including installation, maintenance and replacement services for collocating telecommunications services providers) and facilities are fair and reasonable. The Commission has previously expressed its concern that some local governments are acting outside of the bounds of their traditional public rights-of-way management authority.<sup>44</sup> Minnesota has

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<sup>41</sup> Id. at pp.29-32.

<sup>42</sup> Examples of traditional rights-of-way management activities previously identified by the Commission include: regulating the time and location of excavations; requiring underground rather than overhead placements; requiring the payment of fair and appropriate fees to cover costs associated with street repair and paving; enforcing local zoning regulations; and indemnification for injuries resulting from work in the rights-of-way. See Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, CCB Pol 96-10, 11 FCC Rcd 13082, 13103, ¶39 (1996) (Classic Telephone Decision).

<sup>43</sup> 47 U.S.C. §253(c).

<sup>44</sup> See TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief, Memorandum Opinion and Order, CSR-4790, FCC 97-331, (rel.

clearly stepped outside of those bounds here. Accordingly, Minnesota cannot credibly defend its actions on the basis of the right-of-way management authority reserved to states and local governments in subsection 253(c).

### **III. MINNESOTA'S PFDR SHOULD BE DENIED AND THE COMMISSION SHOULD PREEMPT**

In this instance, Minnesota has gone beyond all reasonable and necessary bounds in using its undisputed authority to protect the public safety and manage public rights-of-way as a means for leveraging an arrangement to secure construction of a state-wide communications network at no cost to itself. In order to induce the Developer to make the necessary financial commitment to the Network, Minnesota: 1) prohibited the future placement of wireline communications facilities in the freeway rights-of-way to be occupied by the Developer; 2) gave the Developer exclusive installation, maintenance and management control over facilities collocated in the freeway rights-of-way when it places its facilities; and 3) has given the Developer free reign to set the rates for its services and facilities. Minnesota should not be permitted to deprive telecommunications services providers of the opportunity to place and maintain their facilities in the State's 1800-2000 miles of freeway rights-of-way when its legitimate public safety and right-of-way management authority can be exercised without effectively prohibiting telecommunication services providers from providing services.

While it is not the Commission's role to judge the appropriateness of Minnesota's decision to enter, through the Developer, the competitive fiber services market, it is the role of the Commission to intercede when, as here, a state seeks to enter and control this competitive

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Sept. 19, 1997) (City of Troy Decision), at ¶105.

market by placing unreasonable and unnecessary restrictions on telecommunications services providers. Minnesota should not be permitted to insulate its actions from scrutiny by merely asserting that it is properly exercising its authority to protect the safety of freeway travelers as reserved to the states by Section 253(b). Nor should it get a pass from review by merely asserting that its actions fall within the authority reserved to the states under Section 253(c) to “manage the public rights-of-way.” Rather, in light of the prohibition that it has imposed on all telecommunications services providers except the Developer, Minnesota must produce evidence that its actions are truly necessary in order to protect the public safety and that the way in which it has chosen to exercise its management authority over freeway rights-of-way does not prohibit or have the effect of prohibiting any telecommunications services provider from providing an interstate or intrastate telecommunications service. Minnesota has failed to convincingly make either showing in its Petition.

**A. Constraints On Wireline Service Providers**

In agreeing to grant the Developer the right “to design, finance, construct, install, own, operate, use, administer, maintain and replace the Network, to construct, install, use, administer, maintain and replace fiber optic cable and equipment of Collocating Customers and to enter into User Agreements respecting the Network and/or Collocating Customers,” Minnesota, in an unwarranted and unnecessary exercise of its management authority over freeway rights-of-way, agreed that it will not “grant a license, permit or other right to any other party [than the Developer] to construct, install, and operate a fiber optic communications system longitudinally within the Freeway Right of Way locations specifically identified” in the Agreement. Collocation of third party facilities in the freeway rights-of way with those of the Developer will

only be allowed for those providers ready and willing to have their facilities placed by the Developer at the same time that the Developer places its own facilities. Thereafter, for the term of the Agreement, access to the freeway rights-of-way is limited to the acquisition of capacity on the Network from the Developer, or from a provider already in the right-of-way that has spare capacity. As to third party facilities that are collocated with the Developer's facilities, all construction and installation work concerning those third party facilities is to be solely performed by the Developer, as is all future maintenance.

Even if a provider is fortunate enough to have facilities ready for placement at the time that the Developer is ready to place its facilities, the provider will be constrained in its use of its facilities. As to third party providers, Minnesota expressly reserves the right to limit the locations of a third party's nodes and equipment. Minnesota also claims priority over third parties with respect to the use of Developer's huts and pedestals.

In exchange for the exclusive grant, Minnesota is to receive 20%-30% of the lit capacity of the Network and ten dark fiber strands on each of a minimum of five SONET rings.<sup>45</sup> Minnesota may increase this initial capacity allotment at any time during the term of the Agreement at an 80% discount from the lowest rates available to other customers or an 80% discount from the rates available to similarly situated customers.<sup>46</sup> Once Minnesota has secured this additional capacity, it reserves to itself exclusive ownership, control and use of it.<sup>47</sup>

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<sup>45</sup> Agreement at Section 3.3(c).

<sup>46</sup> Id. at Section 3.3(d)(iv)(A)(B).

<sup>47</sup> Id. at Section 3.3(d)(viii).

Accordingly, once Minnesota takes capacity from the Network in excess of its initially reserved 20%-30%, the additional capacity that it takes is no longer available for providers that need the capacity and are prohibited from placing their facilities in the freeway rights-of-way.

The Agreement was to take effect on December 23, 1997, and it expires 30 years after the last date on which acceptance is given for a completed segment of the Network.<sup>48</sup> If that acceptance date does not come within 21 years from the date of the Agreement, then expiration is 21 years from the date of the Agreement.<sup>49</sup> Barring a breach of the Agreement by the Developer, providers will be denied access to the freeway rights-of-way indefinitely.

Both collocating providers and providers that are limited to leasing or otherwise acquiring capacity from the Developer are captives of the Developer with respect to the rates to be charged to them for services that can only be obtained from the Developer. Minnesota makes a point of underscoring that the Developer is required to provide its services on a “competitively neutral and nondiscriminatory basis.”<sup>50</sup> But, Minnesota is as silent in its Petition as it is in the Agreement about how providers are to be assured that facilities or services which must be acquired from Developer will be priced at fair and reasonable rates. Although the Agreement provides that all written schedules and documents that identify customer classifications, rates and charges must be filed with Minnesota and that Minnesota will publish those classifications, rates and charges, the Agreement lacks provisions mandating that rates and charges be cost based, or

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<sup>48</sup> *Id.* at Section 2.70.

<sup>49</sup> *Id.*

<sup>50</sup> Petition at p.10.

otherwise fair and reasonable. Further, the Agreement does not identify a process through which a provider may challenge a rate or charge assessed by the Developer or who, other than the Developer, will determine the fairness and reasonableness of its rates and charges.

Minnesota acknowledges that the grant of exclusive access to the freeway rights-of-way favorably affected the Developer's ability to secure financing for the Network. It is self-evident that the incentive for the Developer to charge excessive rates for facilities and services that providers can obtain nowhere else is substantial. Further, the Developer's rates and charges will implicitly, if not explicitly, have the imprimatur of Minnesota associated with them. Providers are exceedingly vulnerable to being charged excessive rates by the Developer, if for no other reason than to subsidize the free initial capacity and services that are being provided to Minnesota and the substantial discounts that Minnesota is assured with respect to additional capacity and services. When the Developer's incentives are combined with the lack of procedural or substantive safeguards for providers, the prospect for unfair and unreasonable rates is substantial. Providers who find it necessary to use the freeway rights-of-way in order to compete with the Developer (perhaps compete with the Developer for the opportunity to provide fiber-based services to Minnesota), or provide other communications services to customers who are most efficiently and economically reached via freeway rights-of-way, may effectively be barred from doing so as a result of Minnesota's exclusive grant to the Developer.

**B. Minnesota's Planned Action Is Unnecessary, Discriminatory And Anticompetitive**

It is important that the Commission separate the issue of Minnesota's desire for its own communications network from its need to protect public safety. The question of the wisdom of a

private state communications network is one that is best addressed in state forums. Additionally, states are entitled to appropriate deference when attending to matters concerning the public's safety. Nonetheless, in the context of Section 253 of the Communications Act, states must demonstrate the necessity of their actions in the public safety area when the result is to effectively prohibit telecommunications services providers from offering their services.<sup>51</sup> In order to sustain its position, Minnesota must demonstrate that an alternative to its extreme approach cannot be found that would also protect the public's safety.<sup>52</sup>

The first question here is whether Minnesota, having decided that it wants a private state communications network, can bar access to public freeway rights-of-ways through the exclusive grant of such access to the Developer in light of the resulting constraints placed on other existing and potential providers of interstate and intrastate telecommunications services. The Telephone Trade Associations and CPI believe that the answer is no. Section 253(a) precludes Minnesota from erecting such a barrier.

The next question is whether Minnesota may nonetheless proceed with the Agreement on the basis of its assertion that there is a legitimate public safety interest to be served by allowing single-party exclusive access and that its action is therefore permissible under Section 253(b) of the Communications Act.<sup>53</sup> The Telephone Trade Associations and CPI believe that the Commission should not allow Minnesota to proceed on the basis of this justification unless

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<sup>51</sup> See New England Decision at ¶21.

<sup>52</sup> Id. at ¶22.

<sup>53</sup> Id. at p.8.

Minnesota can clearly demonstrate that the single-party exclusive arrangement is necessary in order for it to satisfy its legitimate public safety interest. Minnesota has not made such a showing.

Finally, Minnesota's Agreement discriminates in favor of the Developer and fails to ensure that rates for the Developer's services and facilities will be fair and reasonable. Minnesota's authority to manage its public rights-of-way pursuant to Section 253(c) of the Communications Act does not supersede its obligation to do so in a competitively neutral and nondiscriminatory manner. Minnesota's proposed action is afforded no protection under subsection 253(c) of the Communications Act.

For the reasons discussed above, the Petition should be denied, and the Commission should preempt Minnesota from proceeding under the Agreement.

#### **IV. CONCLUSION**

The State of Minnesota proposes to grant exclusive access to its freeway rights-of-way to the Developer who will, in exchange for the exclusive grant, provide Minnesota with free facilities and services on the fiber optic network that it will build in the rights-of-way. Telecommunications services providers will be barred by Minnesota from placing their facilities in the freeway rights-of-way once the Developer places its facilities. Those telecommunications services providers that collocate facilities in the rights-of-way along with the Developer will be required to use the Developer for the placement and ongoing maintenance and repair of their facilities. No safeguards exist to ensure that the rates charged by the Developer for facilities and services are fair and reasonable. There are also no safeguards to ensure that the terms and

conditions imposed by the Developer will be fair and reasonable. Alternative routing options are, for all practical purposes, not viable options when the preferential position maintained by the Developer is considered. If Minnesota is permitted to proceed as planned, its discriminatory action will effectively bar telecommunications services providers from providing certain telecommunications services in many parts of Minnesota.

Minnesota contends that the Agreement is justified as a reasonable exercise of its public safety responsibilities. The Telephone Trade Associations and CPI agree with the Separate Statement of Commissioner Susan Ness accompanying the Memorandum Opinion and Order in California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934 “that the mere incantation of concerns with public safety or crime control, without more, does not immunize a local action against preemptive action.”<sup>54</sup> Minnesota’s planned action is extreme. It will materially inhibit and limit the ability of competitors and potential competitors to compete in a fair and balanced legal and regulatory environment.<sup>55</sup> Minnesota has not demonstrated that its planned action is necessary to address its proffered public safety concerns. Accordingly, its claim of justification pursuant to subsection 253(b) must be rejected.

Minnesota’s argument that its planned action is within the authority reserved to it pursuant to subsection 253(c) is also unpersuasive. On its face, the act of granting exclusive

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<sup>54</sup> California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, Memorandum Opinion and Order, CCB Pol 96-26, FCC 97-251 (rel. July 17, 1997) (City of Huntington Park Decision), Separate Statement at p.23.

<sup>55</sup> See id. at ¶42.

access to Minnesota's freeway rights-of-way to the Developer is discriminatory and anticompetitive. Subsection 253(c), therefore, does not save the Agreement.

On the basis of the foregoing, the Telephone Trade Associations and CPI request that the Commission deny the Petition and preempt Minnesota from proceeding under the Agreement.

Respectfully submitted.

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