

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Petition of the State of Minnesota, Acting by and)
through the Minnesota Department of)
Transportation and the Minnesota Department of)
Administration for a Declaratory Ruling)
Regarding the Effect of Sections 253(a), (b), (c)
of the Telecommunications of 1996 on an)
Agreement to Install Fiber Optic Wholesale)
Transport Capacity in State Freeway)
Rights-of-Way)

CC Docket No. 98-1

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation hereby submits its comments on the petition filed by the State of Minnesota, acting by and through the Minnesota Department of Transportation and Department of Administration ("State" or "Minnesota").¹ MCI opposes the State's proposal as discriminatory on its face and in violation of sections 253(a), (b) and (c) of the Telecommunications Act of 1996 (Act).

The State's proposal to grant exclusive access to the freeway rights-of-way to one entity, Stone & Webster Engineering Corporation (Developer), appears discriminatory on its face and not competitively neutral. This patent discrimination is not alleviated by Minnesota's unsupported assertion that the proposed agreement is "functionally non-exclusive."²

¹ State of Minnesota, Acting by and through the Minnesota Department of Transportation and the Minnesota Department of Administration, Petition for Declaratory Ruling Regarding the Effect of Sections 253(a), (b), (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, (filed January 5, 1998) ("State Petition").

² State Petition at 4.

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I. THE STATE’S PROPOSAL VIOLATES SECTION 253(a) BECAUSE IT HAS THE EFFECT OF PROHIBITING THE ABILITY OF ANY ENTITY FROM PROVIDING TELECOMMUNICATIONS SERVICES

Contrary to the State’s claim,³ its proposal does indeed have the effect of prohibiting new entrants from offering telecommunications services under section 253(a). It is indefensible for a municipality to grant exclusive access to freeway or any other rights-of-way. While the State’s arrangement would not erect an outright ban on excavations to install fiber optic coaxial facilities as in other Commission proceedings, it indirectly produces that result.⁴ The proposal would severely limit access to an available means of providing telecommunications services. Because the proposal would completely limit access to the freeway rights-of-way to entities other than the Developer, the Contract is discriminatory on its face.

The State apparently has a narrow view of what actions can prohibit or have the effect of prohibiting the ability of competing local exchange companies from providing telecommunications services under section 253(a) of the Act. Denying access to rights-of-way necessary to construct facilities can certainly have the effect of prohibiting a new entrant’s ability to provide telecommunications service. While section 253 is worded in terms of “services” and not “infrastructure,” as the State points out,⁵ access to infrastructure is essential to enable the subsequent provision of services. A new entrant that cannot obtain permission to build or access

³ *Id* at 13.

⁴ See, e.g., Public Utility Commission of Texas, Petition for Declaratory Ruling and/or preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1996, CCBPol 96-13, FCC 97-346 at ¶ 41 (rel. Oct. 1, 1997) (PURA) (the Commission concluded that Congress’ enactment of section 253 was a mandate that requires the Commission “to preempt not only express restrictions on entry, but also restrictions that indirectly produce that result.”)

⁵ Petition at 15-16.

facilities within state limits obviously cannot provide competitive local services.⁶

Section 253(a) empowers the Commission to preempt state and local legal and regulatory requirements that impede competitive entry.⁷ Rather, the Commission determines whether the regulation “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁸ The State’s proposed Contract with the Develop directly affects access by telecommunications service providers to the public rights-of-way along the freeway, access to which telecommunications service providers must have on a nondiscriminatory and competitively neutral basis.

State and local governments that impose legal and regulatory requirements that are not competitively neutral are effectively erecting barriers to entry that impede competitive entry. The proposed Contract to “grant exclusive access to State freeway right-of -way”⁹ is not competitively neutral, is a barrier to entry and squarely within the purview of the Act.

A. The Developer Will Have a Competitive Advantage over Competitors

There is no support for the State’s argument that the Act does not cover the proposed Contract because the Developer is not a telecommunications services provider and the service

⁶ Cf. TCI Cablevision of Oakland County, Inc., CSR-4790, FCC 97-331 at ¶ 97 (re. Sept. 19, 1997) (the Commission concluded that, absent a franchise from cities, telecommunications providers lack the legal authority to enter the market and are legally barred from providing service).

⁷ Petition at 4.

⁸ *TCI Cablevision of Oakland County, Inc.*, FCC 97-331 at ¶ 97 (TCI).

⁹ Petition at 1.

that the Developer will provide is not traditionally regulated by the Commission.¹⁰ It is MCI's position that the Developer will indeed be providing a telecommunications service.

The State's claim that the Developer will not be providing telecommunications services is erroneous.¹¹ In the State of Minnesota, the Public Utilities Commission (PUC) has defined "unlit" or "dark fiber" as cable that is "not yet connected to the associated electronics that would make it functional."¹² Based on the definition of dark fiber, "lit" fiber would presumably be cable that *is* connected to the associated electronics that would make it functional, or, in other words, a would make it a telecommunications service. The provision of lit fiber by the Developer therefore would be the provision of telecommunications services.

As a provider of telecommunications services, the Developer would be the only provider with exclusive access to the freeway rights-of-way. The Developer would have the ability to decide what other competitors could have access and at what price. The State's proposed contractual arrangement would unlawfully place the Developer in a pivotal role by affording the Developer with total discretion over which other service providers could enter the market through the freeway rights-of-way.

¹⁰ Petition at 14 (*citing Atlantic Express Communications, L.L.C. Application for a License to Land and Operate a Submarine Fiber Optic Cable Between the Northeastern United States and the United Kingdom*, 11 FCC Rcd. 7033 (1996), and *Norlight Request for Declaratory Ruling*, File No. PRB-LMM086-07, Order Dated January 13, 1987, FCC Rcd 132 (1987)).

¹¹ *Id.* at 1.

¹² *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCI Metro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, 1997 Minn. PUC LEXIS 49, at 40-41 (1997); *AT&T Communications of the Midwest, Inc.'s Petition for Arbitration with Contel of Minnesota, Inc. d/b/a GTE Minnesota under Section 252(b) of the Federal Telecommunications Act of 1996*, 1997 Minn. PUC LEXIS 46, at 35 (1997).

B. The Developer is Not Bound by Section 253

In addition to the discriminatory nature of the proposal, which alone is unlawful and a barrier to entry, the State's proposal effectively delegates its right-of-way authority and responsibilities to a private entity. Section 253 binds state and local governments, not private entities. By delegating its management authority to a private entity, the State is essentially removing any assurance that carriers will be granted access to freeway rights-of-way in accordance with section 253(c).

Despite the State's attempts to contractually bind the Developer to nondiscriminatory and competitively neutral standards, carriers would have no recourse under section 253© in the event of discriminatory conduct.¹³ As a private entity, the Developer is generally not subject to State or Federal telecommunications regulation. Yet, the State through the Departments of Transportation and Administration, would allow the Developer to engage in the provision of telecommunications services. If carriers have problems or questions about terms and conditions, compensation, access and availability, section 253 is foreclosed. New entrants would therefore be deprived of their statutory cause of action under section 253 to seek federal or judicial relief for violations of section 253.

The authority relied upon by the State does not support its argument.¹⁴ While the State argues that the Commission does not typically regulate wholesale transport capacity, the cases cited support the point that the Commission does not anticipate that private companies would

¹³ The proposal is exacerbated by the fact that the Developer's affiliates may offer retail telecommunications services to the public and may utilize network transport capacity. Competitive local exchange carriers (LECs) have no guarantee of competitive neutrality when applying for fiber on the Developer's system. Petition at 4, 10.

¹⁴ *Id.* at 14.

hold their service out indifferently.¹⁵ Under Section 253 of the Act, the State is required to allow access to the public rights-of-way indifferently, and is prohibited from making "individualized decisions, whether and on what terms to deal," as such discrimination is prohibited by the Act.¹⁶ The State cannot delegate this obligation of nondiscrimination by ceding control over the public rights-of-way to a private entity.

C. Competitors Should not be Required to Synchronize their Construction Schedules with those of the Developer

The State's proposal that all construction must be concurrent with that of the Developer is very problematic.¹⁷ Under the proposed Contract, the means by which a new entrant chooses to provide service will be restricted. The Commission has previously concluded that section 253 (a) of the Act, "bars state or local governments from restricting the means by which a new entrant chooses to provide telecommunications services."¹⁸ Unless a competitive LED is authorized to provide service, has finalized its plans for network facilities, and synchronized its construction schedule with that of the Developer, the competitor will not be able to offer facilities-based service of its own if freeway access is necessary.

¹⁵ The distinction between the State and the applicants in the cited cases is made manifest by the language used by the Commission in the cited decisions. *Atlantic Express*, 11 FCC Rcd at ¶ 20 (in granting the requested licenses the Commission stated that the applicant would make "individualized decisions, whether and on what terms to deal" and that "there [was] no reason to expect that the proposed cable circuits would be held out indifferently. . . "); similarly, in *Norlight*, 2 FCC Rcd at ¶ 19 (the Commission found that the proposed network was entitled to private carrier status because NorLight was under no legal compulsion to hold itself out indiscriminately to its user public.

¹⁶ 47 U.S.C. § 253(c).

¹⁷ Petition at 10 ("Installation of non-network capacity must occur at the same time as installation of network capacity, and be performed by one contractor . . .").

¹⁸ See *Public Utility Commission of Texas*, FCC 97-346 ¶84 (rel. Oct. 1, 1997).

Moreover, instead of having the option of constructing their own facilities along the freeway, carriers will be constrained to either purchase, collocate or lease the facilities that the Developer has built.¹⁹ The proposed Contract, for example, provides that the developer “may construct additional routes,” which are referred to in the proposed Contract as optional routes.²⁰ Given that the State proposes to grant exclusive access to Developer, insofar as “optional routes” are concerned, it necessarily follows that all competing providers that seek to construct networks using freeway rights-of-way along these “optional routes,” will be prohibited from doing so unless the Developer elects to construct therein. The State unlawfully ties the business plans of competing providers to that of the Developer. Restrictions on carriers’ choice of facilities violates section 253(a).

II. THE STATE’S PROPOSED CONTRACT IS DISCRIMINATORY AND NOT COMPETITIVELY NEUTRAL

MCI recognizes the State’s concern for public safety, but the State cannot delegate or otherwise avoid its authority to “manage the public rights-of-way . . . on a competitively neutral and nondiscriminatory basis. . .” 47 U.S.C. § 253(c). The means by which the State chooses to allow access to the rights-of-way, however, must be consistent with the Act.

The State’s concern for public safety is no different than that of any other state, city or locale. Indeed, that is why section 253 leaves undisturbed the authority of state and local governments to manage access to and use of the public rights-of-way. The State has the authority to impose reasonable restrictions in public rights-of-way management and thereby

¹⁹ The issue of price for such services adds additional costs for competitors, especially with respect to establishing collocation.

²⁰ Petition at 12 n.12.

regulate the manner in which telecommunications companies erect and maintain lines within the public rights-of-way. Rather than grant exclusive access to one entity, the State should exercise its authority over the public freeways. Such authority includes:

- coordinating and regulating construction schedules (to assist such efforts as preserving effective traffic flow and preventing hazardous road conditions);
- establishing fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;
- tracking all systems using the rights-of-way to prevent interference among facilities; and
- scheduling common trenches and street cuts.²¹

It is well within the State's authority, for example, to restrict the hours of excavations to minimize or avoid disruption on the freeway and maintain the public safety.

²¹ Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, FCC 96-249 at ¶ 3 (rel. June 3, 1996). *See also Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order*, 11 FCC Rcd 13082 (1996) (Classic Decision), *petition for emergency relief, sanctions, and investigation pending* (filed Dec. 6, 1996), *petition for review held in abeyance, City of Bogue, Kansas and City of Hill City, Kansas v. FCC*, No. 96-1432 (D.C. Cir. Jan. 14, 1997) (denying petitioner's motion for writ of prohibition and *sua sponte* holding petition in abeyance).

III. SECTION 253(b) REQUIRES COMPETITIVE NEUTRALITY

The State's proposal cannot be justified under Section 253(b) because it imposes an obligation of competitive neutrality that the State has not satisfied. The State has the burden of demonstrating that its proposal is necessary to protect the public safety, which it has not done.

There is no basis upon to justify an arrangement that forecloses entry to all providers subject to the decision of a potential competitor to build in the public rights-of-way. Even assuming arguendo that this drastic proposal is "necessary," and "represents a legitimate exercise of the rights acknowledged by Sections 253(b) to maximize the safety of the traveling public"²² "[c]ongress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry. . . ."²³ The State cannot ignore the requirements. Furthermore, no interests other than those of the Developer are furthered by the State's action in this regard.

CONCLUSION

For the foregoing reasons, the Commission should preempt the State of Minnesota's proposed contractual arrangement.

Respectfully submitted,

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²² Petition at 5.

²³ *Classic Telephone* at ¶38.

CERTIFICATE OF SERVICE

I, Lonzena Rogers, do hereby certify that on this 9th day of March 1998, I served by first class United States Postal Service, postage prepaid, a true copy of the foregoing Comments, upon the following:

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