Agreement is a desire to protect the public safety. Minnesota also must establish that entering the Agreement, and denying all entities except the Developer longitudinal access to freeway rights-of-way, is "necessary" to protect the public safety.[14] 47 U.S.C. § 253(b) (1996). Minnesota urges the Commission to interpret "necessary" using a reasonableness test:

> Unlike certain types of economic entry regulation, requirements which are clearly aimed at protecting public safety should be reviewed based on whether the regulation or requirement is *reasonable*, not whether it is the least restrictive alternative available.

Petition, at 27-28 (emphasis added). However, the Commission specifically has refused to endorse the interpretation of "necessary" that Minnesota supports here:

> As an initial matter, we reject the [state agency's] claim that its prohibition is defensible because it is a "reasonable exercise of its explicitly reserved authority." An interpretation of section 253(b) that a state's action merely be reasonable ignores the specific language of the statute requiring such state action to be "necessary." Moreover, accepting the [state agency's] claim would, in effect, require us to employ a relaxed interpretation of the term "necessary" that is inconsistent with Congress's purpose of removing regulatory barriers to entry in the provision of telecommunications services.

New England, ¶ 21. There is no need for the Commission to reconsider its ruling in this proceeding.

In its rulings up to this point, the Commission has defined "necessary" in Section 253(b) by engaging in a case-by-case analysis of what less restrictive alternatives exist. Before

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[14] The Commission's determination of whether a particular prohibition is "necessary" to protect the public safety is an "independent basis" under Section 253(b) for refusing to grant an exception to the preemption of Sections 253(a) and (d). *New England*, ¶ 21.

commenting on how that analysis should proceed in this case, it is important to note the kind of prohibition that Minnesota's Petition seeks to validate: the prohibition here is a "flat prohibition." *See id.*, ¶ 22. Minnesota wishes to deny all entities, except the Developer, the right to install, maintain and operate telecommunications facilities longitudinally on freeway rights-of-way and instead force them to incur the additional costs and burdens of either routing their facilities in an alternative manner or purchasing the telecommunications capacity or equipment of the Developer. To compare, the Commission found a flat prohibition in *New England* (which it preempted) because Connecticut denied payphone providers any right to provide service unless they incurred the substantial costs of becoming a local exchange carrier:

> We find that requiring payphone providers to provide local exchange services in order to be eligible to offer payphone services significantly hinders such providers relative to incumbent LECs and certified LECs. Such a requirement substantially raises the costs and other burdens of providing payphone services, thus deterring the entry of potential competitors.

Id., ¶ 20.

The Commission should evaluate whether there is a less restrictive alternative to Minnesota's flat prohibition on longitudinal access to freeway rights-of-way for all entities except the Developer. *See id.*, ¶ 22. As Section II.A explained above, multiple longitudinal access to freeway rights-of-way would not jeopardize the public safety, if structured appropriately. As the AASHTO policy followed by Minnesota recognizes, fiber facilities can be installed and maintained in a safe manner. Exhibit B.

In summary, since Minnesota chose to adopt the *most* restrictive alternative for granting longitudinal access to freeway rights-of-way, it does not qualify for the exception to preemption

in Section 253(b). The Commission must preempt the Agreement under Sections 253(a) and (d).

C. The Agreement Cannot Escape Preemption Because It Is Not Competitively Neutral

On its face, the Agreement is hardly competitively neutral: it grants a single entity, the Developer, an exclusive right of longitudinal access to freeway rights-of-way and forces other entities either to use expensive and problematic alternative rights-of-way or to buy telecommunications capacity and/or effectively lease fiber optic cable and maintenance from the Developer.[15] Minnesota responds that the latter arrangements ensure that "the Agreement operates so as to be *functionally non-exclusive*." Petition, at 10 (emphasis in original). The following subsections attack that claim after first addressing the manner in which Minnesota has misconstrued the Commission's standard for what prohibitions are competitively neutral.

1. Minnesota Misconstrues the Commission's Standard for Evaluating Competitive Neutrality

Minnesota argues that the words "competitively neutral" in Section 253(b) do not require "equal treatment" of affected parties: "In *Open Video Systems*, Third Report and Order and Second Order on Reconsideration, FCC-96-334 (rel. August 8, 1996),[16] the Commission found that the competitively neutral standard of Section 253(b) does not mean 'equal treatment.'" Petition, at 28. Minnesota is utterly mistaken. The *OVS Order* interprets Section 653 (in

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[15] The Agreement uses the terms "collocate" and "collocated fiber" to describe the situation where the Developer will install and maintain fiber owned by another company – but only if the installation is simultaneous with the Developers. The term "collocate" is not used in the same sense as the collocation provisions of the Act. 47 U.S.C. § 251(c)(4) (1996). Instead, Minnesota means for those terms to refer to the practice of installing (and later operating) third-party fiber optic facilities concurrently with the Developer's facilities.

[16] These comments will refer to this decision hereinafter as the "*OVS Order*."

addition to the Second Report and Order in CS Docket 96-46), not Section 253. *OVS Order*, ¶¶ 193-97. Although rights-of-way issues in the OVS docket bear some similarities to rights-of-way issues in Section 253 proceedings, the Commission has not extended its interpretation of Section 653 (in paragraph 195 of the *OVS Order*) to Section 253 in any of its decisions. Minnesota has not advanced any reason or rationale for such an extension of the law in this proceeding.

Indeed, Minnesota relies on the *OVS Order* only to defend its competitive bid process (in which it selected the Developer) and, even then, it misinterprets the standard. Petition, at 28, 31. In the *OVS Order*, the Commission stated that "'non-discriminatory and competitively neutral' does not *necessarily* mean 'equal' treatment."[17] *Id.*, ¶ 195 (emphasis added). The Commission then provided the example of a state or local authority imposing "higher insurance requirements based on the number of street cuts an entity planned to make, even though such a regulation would not treat all entities 'equally.'" *Id.* Minnesota treats this modest example as license for a scheme that would provide the Developer with invaluable and exclusive longitudinal access to freeway rights-of-way and deny all other entities any sort of physical access.[18] This is not competitive neutrality.

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[17] It should be noted that Minnesota drops the word "necessarily" from its recitation of the standard in paragraph 195 of the *OVS Order*. *See* Petition, 28, 31.

[18] In so arguing, Minnesota compares its competitive bid process to the Commission's use of auctions to allocate electromagnetic spectrum, claiming that the nature of the resource in question justifies resorting to a bidding process. Petition, at 31. Minnesota's analogy to the Commission's electromagnetic spectrum auctions is inapt. The Commission employs spectrum auctions because it is impossible to grant multiple parties access to the same set of frequencies. As Section II.A explained, there are few genuine obstacles, save for the recalcitrance of Minnesota, to permitting multiple access to freeway rights-of-way.

The Commission should therefore reject Minnesota's offered standard for "competitively neutral" under Section 253(b) and instead follow its decisions interpreting Section 253.

2. The Agreement's Requirement that the Developer Be a Wholeseller Does Not Render It Competitively Neutral

Minnesota asserts that the Agreement is effectively competitively neutral because it requires the Developer to sell telecommunications capacity only at wholesale and "rates and charges" that are nondiscriminatory vis-a-vis affiliated and unaffiliated purchasers. Petition, at 10, 31; *see* Agreement, §§ 7.7, 7.8. Minnesota's argument is vulnerable to three challenges:

(1) the Agreement places the Developer in the position of being the only wholesale supplier of telecommunications services carried longitudinally over freeway rights-of-way;

(2) the Agreement's wholesale requirement is weak, because the Developer's affiliates can sell telecommunications capacity at retail; and

(3) the requirement that the Developer's "rates and charges" be nondiscriminatory is insufficient, for it fails to address the associated terms and conditions of such sales.

First, the fact that the Agreement requires the Developer to sell its telecommunications capacity only to wholesale customers hardly ensures competitive neutrality. Agreement, § 3.1(b)(viii) (the Developer may sell to "telecommunications service providers" only). The Agreement guarantees that the Developer will be the only wholesale supplier of capacity carried longitudinally over freeway rights-of-way. As Section I.B.2 explained, the Developer will enjoy a cost advantage over all other wholesale suppliers of telecommunications capacity in the state, a position which the Agreement cements for at least ten, and more likely as many as twenty, years. Agreement, § 11.1. Moreover, its rates are unlikely to reflect its lower costs because other carriers, with higher input costs, will be unable to compete. While the Agreement will lead to the

creation of a new telecommunications network in the state, it will not be a competitive one, as Minnesota alleges. *See* Petition, at 4.

Second, the provision in the Agreement limiting the Developer to selling wholesale services is extremely weak. It permits the Developer to sell telecommunications capacity derived from freeway rights-of-way at retail through affiliates. Agreement, § 3.1(b)(vii). The Developer therefore can engage in anticompetitive schemes directed at retail competitors. For instance, to place its retail competitors in a price squeeze, the Developer need only:

(1) sell telecommunications capacity at wholesale market rates to affiliates and non-affiliates alike; and

(2) have its affiliates sell retail services at or near the Developer's cost.

Since it is essentially selling telecommunications capacity to itself, the Developer and its affiliates do not care what the price is.[19] The Developer's affiliates can set their retail rates based *not* upon the prices they paid for wholesale capacity, but rather upon the Developer's real costs. In this manner, their rates can be significantly lower than market rates for wholesale telecommunications capacity. The Developer's retail competitors, on the other hand, cannot access input costs that are below wholesale market rates and would have to suffer losses to match the retail rates of Developer's affiliates. However, if competitors fail to match these manipulated retail rates, they will lose market share rapidly. It is important to note that the Developer may engage in this scheme without violating its duties in the Agreement to be solely a wholesale

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[19] The Agreement does not contain any provision that would require the Developer's affiliates to be financially separate and independent (as, for instance, the Act requires for affiliates of Regional Bell Operating Companies ("RBOCs") that offer interLATA services pursuant to Section 271). *See* 47 U.S.C. § 272 (1996).

provider and to sell capacity at nondiscriminatory "rates and charges."[20] *See* Agreement, §§ 7.7, 7.8. Accordingly, the Agreement's wholesale-only provision is entirely too weak to make the Developer a disinterested provider of wholesale telecommunications capacity.

Third, the Agreement does not regulate in any sense the terms and conditions on which Developer will sell telecommunications capacity. While "rates and charges" must be nondiscriminatory under the Agreement, the contractual terms and conditions of sales may favor Developer's affiliates.[21] For example, the Developer could:

(1) require more onerous protocols and interconnection standards from competitors purchasing telecommunications capacity;

(2) implement electronic ordering interfaces for affiliates, but require competitors to use a manual process;

(3) bill competitors under a stringent payment schedule, while affording affiliates the opportunity to pay on favorable credit terms; or

(4) make information needed to assemble the bills of end users more accessible to affiliates, than competitors.

In any of these or other ways, the Developer may discriminate openly between affiliated and

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[20] Apparently, even Minnesota doubts that the Developer's rates will be nondiscriminatory. When Minnesota needs to purchase telecommunications capacity from the Developer, it has the right to do so at the most favorable rates and charges that the Developer offers. Agreement, § 3.3(d)(ii). The Agreement includes a lengthy provision that specifies how to determine what rates and charges are the most favorable. Agreement, § 3.3(d)(iv)(B). Obviously, Minnesota would have no need to insist upon such a "most favored nations" clause if the Developer's rates truly will be nondiscriminatory.

[21] The closest the Agreement comes to regulating the terms and conditions of sales is to require the Developer to set forth rate "classifications" in published schedules. Agreement, § 7.7. At most, rate classifications may be a narrow subset of terms and conditions, but they are hardly the same thing. Furthermore, the Agreement does not require classifications to be nondiscriminatory if they go beyond the realm of "rates and charges."

unaffiliated entities. Short of terminating the entire Agreement, there is little that Minnesota could do to avert the Developer's misconduct.[22]

In sum, the Agreement grants competitive supremacy to the Developer and its affiliates for both wholesale and retail telecommunications services. The Agreement lacks sufficient breadth and specificity to restrain the Developer and ensure that its activities are nondiscriminatory, assuming for the sake of argument that *any* contractual provisions could perform these duties in the context of an exclusive use agreement.[23]

3. The Opportunity for Entities to Collocate Fiber Optic Cable Along with Developer's Does Not Make the Agreement Competitively Neutral

Minnesota claims that the Agreement operates in a "functionally nonexclusive" manner for the additional reason that third-parties may collocate their fiber optic facilities along with the Developer's. Petition, at 10, 32. The collocation option for third-parties does not render the Agreement competitively neutral because:

(1) the Agreement excessively restricts the time for collocation;

(2) the rates for collocation are unspecified in the Agreement, such that they may be discriminatory and certainly will not be at cost; and

(3) the Agreement gives the Developer substantial freedom to discriminate

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[22] The Agreement does not contain any provision allowing Minnesota to oversee the Developer's commercial practices. While it specifies conditions for default, the Developer's misconduct toward third-parties is not among the enumerated circumstances. *See* Agreement, § 16. At best, Minnesota could terminate the Agreement under Section 15.1 (which grants it broad termination powers), but it is unlikely to take such a drastic step, especially to address run-of-the-mill instances of discrimination.

[23] If such limiting contractual provisions existed in the Agreement, it is not apparent how Minnesota or any other party would enforce them.

against collocated parties in terms of service quality.

First, the Agreement permits third parties to exercise the collocation option only at the time that the Developer installs its own facilities. Petition, at 10 ("Installation of non-network capacity must occur at the same time as installation of network capacity"). This "time limit"creates a serious obstacle for most parties that would want to collocate their own fiber with the Developer's, for the Agreement requires construction to begin in less than six months (on August 1, 1998). Agreement, Exhibit F. In that time period, very few parties — and MFS certainly is not one of them — could raise the financing necessary to pay for the construction of a significant fiber optic network.[24] Likewise, future competitors that will not have entered the market by August 1, 1998 will have no opportunity to collocate fiber.[25] It is unlikely that any party ever will exercise its option to collocate fiber.

Second, even if some parties do manage to collocate fiber, they will not have the same cost structure as the Developer. Since it will perform all of the installation tasks, and will maintain and operate the collocated network when completed,[26] the Developer will charge collocating parties, and its rates undoubtedly will include profit.[27] Collocating parties' costs to

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[24] Indeed, Minnesota has requested expedited treatment for its Petition in order to assist the Developer obtaining financing. Petition, at 5. Of course, other parties in the state have not had the Developer's head start (dating back to Fall of 1997) to locate financing.

[25] In *Texas*, the Commission expressly included "potential competitor[s]" within the coverage of Section 253(a). *Texas*, ¶ 22.

[26] The Developer must perform these tasks because the Agreement forbids it from allowing the personnel of collocating parties to access freeway rights-of-way. Agreement, § 5.12(l).

[27] It is notable that even the Agreement reflects the expectation that the Developer will profit from collocated parties: "State acknowledges that Company may need arrangements

offer telecommunications services will exceed the Developer's costs, at least by the margin of the Developer's profit on installing and maintaining collocated fiber. The Developer will have a competitive advantage over collocated parties, and the effect of the Agreement will not be competitively neutral.

Third, the Agreement does not prevent the Developer from discriminating against collocating parties, as it installs, maintains and operates collocated fiber. The Developer has powerful incentives degrade the quality of installation and service that it provides to competitors. For instance, the Developer could:

(1) install competitors' equipment initially, as well as during network upgrades, more slowly than it installs its own equipment;

(2) fail to repair competitors' equipment in the same interval as it repairs its own equipment; and

(3) fail to perform the same quality of maintenance on competitors' equipment that it performs on its own equipment.

The Commission need only look to its Section 271 proceedings to find the example of an entrenched monopolist (as the Developer would be) resisting the efforts of competitors to gain access to facilities that it controls.[28] The track record of RBOCs making interconnection, unbundled network elements and resold local services available to competitors has been

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with Collocating Customers and the revenues therefrom to make feasible the provision of fiber optic cable to rural areas." Agreement, § 5.12.

[28] *See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, FCC 97-298 (rel. August 19, 1997); *Application of BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, FCC 97-418 (rel. December 24, 1997).

atrocious and accounts for the Commission's refusal to approve even a single application under Section 271.

Importantly, the Agreement does not attempt to restrain the Developer from discriminating against collocating parties as it installs, operates, repairs, and maintains collocated fiber. The Agreement contains a plan for operating, administering, and maintaining the Developer's network ("OA&M Plan"), but it does not apply to collocated fiber.[29] *See* Agreement, § 7.3. The probable contents of the OA&M Plan are set forth in their entirety in the margin.[30] This rather lengthy quotation demonstrates: (a) the kind and degree of protections that

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[29] The Commission may be unaware that the term "Network" in the Agreement (which is used in the OA&M section) excludes collocated fiber (Agreement, § 2.38), because Minnesota apparently failed to file the definitions section of the Agreement with its Petition. *See* Petition, at 4 n. 2.

[30] The OA&M Plan will include provisions "similar to some or all of the following:"

"(i) Specific maximum times for responding to and curing specified types of service failures;

(ii) a detailed maintenance schedule for all Network systems, components and equipment, including both routine and emergency procedures and timing of prior notice to State of scheduled and unscheduled work;

(iii) a detailed manual on operating and administrative procedures and staffing to be located and responsibilities to be carried out at the Network operations center;

(iv) detailed procedures for operating, monitoring, and responding to the Network alarm system;

(v) detailed standards and procedures for accessing the Network, and limitations on the times of day for accessing the Network for routine, preventative, or scheduled maintenance, repair and replacement, consistent with the terms and conditions of the Permits and the Utility Accommodation Policy and with State's need to assure public safety in and efficient management of the Right of Way;

collocated parties will lack under the Agreement; and (b) that Minnesota knew kow to negotiate for adequate protection against discrimination (or at least inferior service) when it wanted to do so. It clearly expended little effort toward that end for collocating parties.

It is also noteworthy that the Agreement contains detailed liquidated damages provisions that benefit the state in the event that the Developer does not meet negotiated performance standards. Agreement, § 16.3 & Exhibit F. The Agreement provides four types of liquidated damages, some of which are disaggregated for thirty different "state offices." *Id.* Again, the Agreement does not provide liquidated damages for collocating parties. This omission may be significant because, at least in the evident opinion of Minnesota, liquidated damages are necessary to protect against construction delays and ensure that the Developer maintains its side of the bargain.

(vi) minimum requirements under which Company or its vendors shall inventory, and general locations for storing and staging such inventory of, materials, components, Equipment and supplies for maintenance, repairs and replacements, based on a stated analysis of expected useful lives of such components, Equipment and supplies;

(vii) required minimum distances of the offices of operations, administration and maintenance service personnel from key, designated points on the Network;

(viii) Equipment and other manufacturers' suggested spare parts lists and maintenance and operating procedures;

(ix) a minimum requirement for monthly meetings with State network operations staff to review service levels, problem logs and related matters; and

(x) a minimum requirement for monthly reports to State on Network performance, problem status and volumes, and use of State's allocated capacity."

Agreement, § 7.3(b).

Minnesota surely will respond to these arguments regarding the deficiencies of the Agreement by stating that it expects the Developer to enter separate agreements with individual collocators, which will include whatever protections collocators deem necessary. The problem with that logic is that it fails to appreciate what little negotiating power collocators will have. The Developer will employ the hammer of a "take-it-or-leave" negotiating position, supported by a fast approaching construction date of August 1, 1998. If it fails to come to agreement with collocators by that date, it is better off. Indeed, the Developer has incentives to stall the negotiations past the construction date simply to preclude other parties from collocating fiber. Since the Agreement is the only document that will bind the Developer once the Commission has declined to invoke Section 253(a),[31] its contents are thus crucial to determining whether collocation will be an option that is practically available. As it stands now, the Agreement is woefully deficient in this regard.

D. The Petition is Facially Defective Because It Fails to Explain How the Agreement Is Consistent with Section 254

In addition to demonstrating that the Agreement meets the public interest objectives set forth in Section 253(b) in a competitively neutral manner, Minnesota also must show that the Agreement is "consistent with section 254." 47 U.S.C. § 253(b) (1996). The Petition does not even attempt to make such a showing and, accordingly, is defective on its face.

The Petition's omission on this point is significant because Minnesota has indicated that the Agreement will help to address universal service concerns by "[c]reat[ing] an opportunity to extend a fiber optic network to rural areas of the State, which otherwise would have little or no

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[31] The Commission, of course, could direct an order to the Developer if it wishes.

prospect of being served by alternative sources of fiber." Petition, at 9; *see also id.*, Exhibit 2 (letter of Scott Wilensky to Richard Johnson (dated September 25, 1997), at 2) (same). In fact, the Agreement contemplates as much: "State acknowledges that Company may need arrangements with Collocating Customers and the revenues therefrom to make feasible the provision of fiber optic cable to rural areas." Agreement, § 5.12; *see id.*, § 11.1(a) ("State and Company also acknowledge that the [exclusivity] covenant will assist Company in financing development of a Network which reaches rural areas of Minnesota.").

Minnesota cannot create a quasi-universal service program to benefit rural areas of the state without complying with Section 254. By including the words "consistent with section 254" in Section 253(b), Congress specifically directed the Commission, in analyzing preemption issues under Section 253, to consider federal law governing state universal service programs. In the instant case, that inquiry would focus on whether the Agreement is an "explicit," "specific, predictable, and sufficient" universal service mechanism. *Universal Service Order*,[32] ¶ 14; 47 U.S.C. § 254(f) (1996). Considering that the Agreement expressly relies on a subsidy from "Collocating Customers" to fund the placement of fiber optic cable in rural areas, Minnesota's ability to demonstrate that the Agreement is an explicit, specific, predictable and sufficient universal service mechanism is doubtful. Minnesota cannot shield the Agreement under the umbrella of Section 253(b) because it most likely is not "consistent with section 254."[33]

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[32] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997) ("*Universal Service Order*").

[33] The Commission should treat Minnesota's failure to address this point as an admission of its validity.

III. MINNESOTA CANNOT JUSTIFY ITS DECISION TO ENTER THE AGREEMENT BASED UPON ITS RIGHT TO MANAGE RIGHTS-OF-WAY IN A COMPETITIVELY NEUTRAL MANNER UNDER SECTION 253(c)

Minnesota seeks to shield the Agreement from preemption under Section 253(c), which permits states to manage rights-of-way in a competitively neutral and nondiscriminatory manner. Petition, at 29-32. As Section II.C noted above, there is nothing competitively neutral about granting exclusive longitudinal access to freeway rights-of-way to one entity (even if it is required to be a wholeseller and to collocate the fiber optic cable of competitors). It is unnecessary to repeat those arguments in order to establish that the Agreement is not competitively neutral and nondiscriminatory consistent with Section 253(c). The subsections, below, instead attack the notion that the Agreement represents permissible management of rights-of-way and argue that Minnesota cannot delegate its right to set "fair and reasonable" compensation to one of the competitors in the market.

A. The Agreement Does Not Represent "Management" of Public Rights-of-Way, but Rather Minnesota's Attempt to Trade Sole Use of a Valuable and Lucrative Privilege for Telecommunications Services and Equipment

Section 253(c) provides an exception to preemption under Section 253(a) in order to safeguard states' traditional authority to manage public rights-of-way. According to the Commission, the purpose of this provision is to permit states

> to perform a range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.

TCI, ¶ 103. In two instances, the Commission has provided examples of permissible management of public rights-of-way:

> These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.[34]

> During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that congress intended to permit under section 253(c), including state and local legal requirements that: (1) "regulate the time and location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."[35]

Based on these examples, it is clear that permissible management of public rights-of-way does not include:

(1) trading exclusive use of freeway rights-of-way for valuable telecommunications services and capacity; or

(2) engaging in the kind of rate regulation that the Agreement will require to ensure that the Developer's rates for wholesale telecommunications capacity sold to itself and other parties are nondiscriminatory.

Minnesota's efforts to guarantee the Developer exclusive longitudinal access to freeway rights-of-way are attributable more to its desire to obtain valuable services and equipment, than to its conclusory invocation of public safety concerns. *See Classic Telephone*, ¶ 42 ("conclusory

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[34] *Id.*

[35] *Classic Telephone*, ¶ 39 (quoting statement of Sen. Feinstein, 141 Cong. Rec. S8172 (daily ed. June 12, 1995)).

statements are inadequate to establish that the Cities actions reflect an exercise of public rights-of-way management authority").

Minnesota could argue that it merely seeks to "regulate the *time and location* of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts." *Id.*, ¶ 39 (emphasis added) (internal quotation marks omitted). But that argument would dramatically understate what Minnesota proposes to do in the Petition. Minnesota wants to forbid some providers ever from accessing freeway rights-of-way themselves, while permitting a single entity to do so. In contrast, Congress certainly intended that:

> (1) setting the "time" for "excavation" would involve scheduling access for multiple entities in a competitively neutral manner; and
>
> (2) regulating the "location" for "excavation" would involve designating which areas are permissible for *all providers* to excavate and which areas are impermissible for *all providers* to excavate.

By entering the Agreement, Minnesota would stray well beyond the boundaries of permissible management of public rights-of-way that Congress envisioned.

Finally, the relevant lexicon of utility accommodation is repleat with detailed requirements for the safe management of rights-of-way. These requirements apply equally to all telecommunications companies and reflect true management of freeway rights-of-way. *Eg.*, *FHWA Highway/Utility Guide*, (June 1993, FHWA Contract No. DTFH61-90-C-0079); *AASHTO Policy on the Accommodation of Utilities Within Freeway Right-of-Way*, as amended by AASHTO Resolution (Exhibit B hereto) (Feb. 1989), *FHWA Program Guide, Utility*

Adjustments and Accommodation on Federal-Aid HIghway Projects (Third Edition 1995, Pub. No. FHWA-PD-95-029); 23 C.F.R. § 645, et seq.; *AASHTO Roadside Design Guide* (1989) (referenced at 23 C.F.R. § 645.211).

B. Minnesota Cannot Delegate Its Right to Set and Receive "Fair and Reasonable" Compensation for Use of Public Rights-of-Way under Section 253(c) to an Individual Competitor

Section 253(c) allows Minnesota to collect only "fair and reasonable" compensation for private parties' use of public rights-of-way. Rather than make provisions for multiple longitudinal access to freeway rights-of-way, Minnesota instead has chosen to grant exclusive access to the Developer, which then may sell the rights to collocated fiber to other carriers. Essentially, Minnesota has delegated its right to set and receive compensation for use of public rights-of-way to the Developer. Without question, the Commission cannot find compensation levels that will be set by one of the competitors in the market, and will be charged to other competitors, to be fair and reasonable within the meaning of Section 253(c). Nearly by definition, one's competitors do not set fair and reasonable fees — they set fees designed to cement their own position in the market and to discourage challengers. For this reason, Minnesota cannot invoke Section 253(c) to protect the Agreement from preemption under Section 253(a).

CONCLUSION

By entering the Agreement, Minnesota has taken action in violation of Section 253 that both prohibits and has the effect of prohibiting carriers from offering telecommunications services in the state. As part of its duty to administer Section 253, the Commission must preempt the Agreement as an unlawful barrier to entry. As argued above, neither Section 253(a),

nor Section 253(b) rescues the Agreement from preemption because: (1) the public safety considerations supposedly guiding Minnesota's actions are either exaggerated or specious; (2) Minnesota's means of allegedly protecting the public safety are of the most restrictive kind; and (2) the Agreement fails in all respects to be competitively neutral. The Agreement violates nearly every aspect of Section 253, and the Commission should not hesitate to preempt it.

Respectfully submitted,

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Dated: March 9, 1998

226339.1

Certificate of Service

I hereby certify that on this 9th day of March, 1998, I caused a copy of the foregoing to be sent to the below listed individual by first-class mail, postage prepaid:

Scott Wilensky
Assistant Attorney General
1200 NCL Tower
445 Minnesota Street
St. Paul, MN 55101-2130

C. Joël Van Over

A

US OFFICE PRODUCTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
The 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) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way	)	CC Docket No. 98-1

DECLARATION OF ROBERT EIDE
ON BEHALF OF
MFS NETWORK TECHNOLOGIES, INC.

Robert Eide declares that:

1. My name is Robert Eide. I am the Senior Vice President, Network Systems Sales for MFS Network Technologies, Inc. ("MFS"). My business address is 1200 Landmark Center, Suite 300, Omaha, NE 68102-1841.

Credentials

2. In my position at MFS, I am responsible for all channels of distribution, including federal and commercial sales of the company's network systems integration services. Before holding my current position, I was Director of Sales, Network Systems at MFS from 1993 to 1995. Before 1993, I was a district sales manager for Northern Telecom, Inc.

3. During my sixteen-plus years in the telecommunications industry, I have also served as an account executive for Motorola Communications and Electronics.

EXHIBIT A

4. I attended Corcordia College, from which I obtained a B.A. in 1976.

5. I grew up in Minnesota and lived there until I was 23. I have lived in Minnesota off and on since that time and reside there now.

Background on MFS

6. MFS and its affiliate companies have installed and constructed over 500,000 fiber miles of fiber optic cable, and operate fiber optic networks, in over 41 states. MFS affiliates provide long distance and local telecommunications services, as well as various enhanced and internet services throughout the United States.

Summary of Declaration

7. I oppose the Agreement between Minnesota, acting by and through its Department of Transportation and Department of Administration (collectively "Minnesota"), and ICS/UCN LLC and Stone & Webster Engineering Corporation (collectively "the Developer"), which would grant the Developer exclusive longitudinal access to freeway rights-of-way in the state. The Agreement gives the Developer a significant competitive advantage because there are distinct cost advantages of constructing a telecommunications network over freeway rights-of-way in Minnesota, as opposed to using other rights-of-way that are purportedly available to competitors.

8. Next, I question Minnesota's claim that public safety considerations preclude granting multiple parties longitudinal access to freeway rights-of-way. The customary practice of placing fiber optic cable away from the surface of the roadway, and the extremely low level of maintenance needed for fiber, minimizes safety considerations.

9. Lastly, I note that Minnesota's plan for the Developer to collocate the fiber optic cable of

other telecommunications carriers will be problematic because: (a) the Developer substantially lacks experience in building and operating fiber optic networks; and (b) there is insufficient time for other carriers to raise the necessary financing and plan and implement a network design.

The Cost Attributes of Freeway Rights-of-Way Are Extremely Favorable

10. Freeway rights-of-way offer some of the most attractive cost characteristics compared to other types of rights-of-way. By accessing freeway rights-of-way, the Developer will minimize its construction costs in three ways.

11. First, the Developer will not become entangled in the elaborate permitting processes that delay carriers using other rights-of-way. Once the Developer has its state-wide permit for the freeways, it can concentrate on constructing its network. With other rights-of-way, carriers often find themselves mired in a variety of different negotiations involving multiple land owners, utilities, and/or municipalities. These negotiations can be expensive and time-consuming.

12. Second, freeway rights-of-way are better suited to facilitating network construction than other types of rights-of-way. Since freeways exist in a "controlled access" environment (which minimizes intersections with other streets), the Developer can lay fiber optic cable by running a cable plow on the land beyond the road's shoulder for miles without interruption.[1] The Developer would not have to resort to extraordinary measures to work around natural or man-made obstacles, because the builders of the freeway generally have

[1] Controlled access to freeway rights-of-way also reduces maintenance costs because it is unlikely that fiber cable, once laid, would be cut or disturbed.

already resolved such problems. In this manner, the Developer can deploy its network very rapidly and inexpensively.

13. Third, freeways serve the population centers that telecommunications carriers seek to serve. Freeway rights-of-way will dovetail naturally with the Developer's marketing plans. There will be few occasions in which the Developer will encounter difficulties in reaching the customers that it wishes to serve.

14. I estimate that the Developer's costs of accessing freeway rights-of-way can be at least 30% less than the costs that competitors will experience in attempting to access alternative rights-of-way.

15. Another aspect of the Developer's cost advantage, which I believe to be significant (but cannot quanitfy), is speed to market. The company that deploys services before its competitors in today's telecommunications market tends to be more successful. Clearly, besides the unfair cost advantage discuss above, the Developer will possess an immense head start over competitors that must utilize rights-of-way other than the freeways in Minnesota.

The Cost Attributes of the Alternative Rights-of-Way Are Not, as Minnesota Claims, Equivalent to Those of Freeway Rights-of-Way

16. Minnesota argues in its Petition that the Agreement does not confer a competitive advantage upon the Developer because alternative rights-of-way in the state are equivalent to freeways. I disagree and would like to set forth the limitations of the alternative rights-of-way that Minnesota identifies.

17. First, state trunk highways require a permit/franchise for every municipality through