



STATE OF MINNESOTA

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February 22, 1999

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Chief, Policy & Program Planning Division
Federal Communications Commission
1919 M Street NW, Room 544
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Re: **In the Matter of the Petition of the State of Minnesota for Declaratory Ruling
CC Docket No. 98-1
Ex Parte filing**

Dear Ms. Salas and Ms. Matthey:

This letter is submitted on behalf of the Minnesota Department of Transportation and the Minnesota Department of Administration ("State of Minnesota" or "State") in response to the ex parte filing of the Minnesota Telephone Association ("MTA"), dated December 22, 1998. The State of Minnesota will address the issues identified in Section B of the Suggested Guidelines For Petitions For Ruling Under Section 253 of the Communications Act, FCC 98-295, in the course of replying to the MTA's letter. Also attached is the State of Minnesota's Reply to the MTA's Response to State of Minnesota Reply Comments and supporting documents and affidavit.

1. *What is the statute, regulation, ordinance or legal requirement that is being challenged?*

The MTA identifies no statute, regulation, ordinance or legal requirement that is imposed upon it or its members by the State. Rather, it challenges the Agreement between the State and ICS/UCN dated December 23, 1997 ("Agreement") and the First Amendment to that Agreement dated October 19, 1998 ("Amendment"), neither of which imposes any legal requirement upon the MTA or any of its members or anyone else, other than the parties to those agreements. Contrary to the assertion of the MTA, the State has not conceded, by the filing of its Petition, that the Agreement is a "legal requirement" as referred to in Section 253 of the Act. In fact, as stated in the State's Petition, because the Agreement involves the creation of infrastructure and not the provision of telecommunications services, Section 253 of the Act does not apply to the Agreement. See Petition at p. 4.

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a. The Amendment imposes no legal requirements upon anyone other than the contracting parties.

Like the Agreement, the Amendment imposes no requirements on nor prohibits the ability of any entity to provide any interstate or intrastate telecommunications service. Rather, it facilitates the use of the right-of-way by additional carriers by allowing additional conduit or innerducts to be collocated with those installed by ICS/UCN. The Amendment does not change the nature or effect of the Agreement and thus should have no effect on the Commission's determination in this matter.

Identify and describe any other pending court or state regulatory actions relating to the enforceability of the challenged statute, regulation, or legal requirement.

The Minnesota Equal Access Network Systems, Inc. ("MEANS") and the MTA filed a civil action in State District Court in Ramsey, County, Minnesota challenging the legality of the Agreement under State law. (See February 19, 1999 letter from Donald J. Mueting, Attachment A.) No claims have been raised in that action under the Telecommunications Act of 1996. In that action the plaintiffs assert that the State was without authority to enter into the Agreement under state law. A trial was held in Ramsey County District Court from February 8 through February 16 1999. The matter is now under consideration by the Judge, with a decision expected in March or April of 1999. Plaintiffs had requested a temporary restraining order from the Court delaying construction of the first leg of the project. The Court denied that request and construction has proceeded.

2. What specific telecommunications service or services is the petitioner prohibited or effectively prohibited from providing?

The Agreement neither explicitly nor effectively prohibits any entity from providing any telecommunications service or services. Contrary to the claims of the MTA, the Agreement does not effectively prohibit any entity from providing any telecommunications service anywhere in the State of Minnesota. If anything, the Agreement enhances the provision of telecommunications services both in and between cities along the freeway right-of-way ("ROW") in Minnesota and cities throughout rural Minnesota. It does so by allowing, for the first time, the use of the freeway ROW for installation of high capacity fiber networks, not only for the Developer, but for any other entity that wishes to install such capacity at the same time. Furthermore, it will make available significant amounts of both light and dark capacity for resale to any entity for its own use. Finally, as was pointed out in the State's Petition and Reply Comments, the availability of alternative rights-of-way and existing or potential fiber optic capacity are so great in Minnesota, the Agreement cannot have the effect of prohibiting any telecommunications service. In point of fact, no new restrictions are being imposed upon any

entity by the Agreement, rather it serves to open up new possibilities for competition for telecommunications services state-wide.

The MTA claims that the Developer is "guaranteed" a major cost advantage because "competitors to the exclusive grantee are prohibited from constructing their own facilities along the most cost effective routes". That is incorrect. First, competitors are not prohibited from installing their own facilities, as long as they do so while the fiber network is being constructed. In fact, that is exactly what is going on under the terms of the Amendment. Developer has offered to the MTA the opportunity to install conduit at the time the trench is open for other collocators under the Amendment. MTA could pull fibers at their own schedule if it chose to install the conduit. However, the MTA did not respond to Developer's offer, demonstrating that rather than being interested in competitive options, MTA is more interested in preserving their existing monopoly. Second, the cost advantages, if any, of using the ROW is greatly overstated by the MTA. (See Affidavit of Fazil Bhimani, Attachment B.)

a) What other specific entities, if any, are prohibited or effectively prohibited from providing the service?

None. Not only are there many alternative ROWs, but other entities can collocate their own facilities on the freeway ROWs during the time of construction, as well as buy or lease dark fiber and lease capacity on a non-discriminatory basis after the trench is closed.

b) What group or groups of actual or potential customers are being denied access to the service or services?

None. In fact, contrary to the assertions of the MTA, the Agreement enhances the access of rural customers in Minnesota to state-of-the-art telecommunications services because in addition to providing fiber capacity along the freeway ROW for the first time in Minnesota, the Agreement obligates the Contractor to build a fiber network along the trunk highways in rural Minnesota, at Contractor's expense. The ROW along these trunk highways has been and continues to be available to any telecommunications provider who wishes to install its own facilities. In fact, it is undisputed that fiber already exists in many of the cities along the freeway ROW such as St. Cloud, Moorhead and Duluth.

3. *What are the factual circumstances that cause the petitioner to be denied the ability to offer the relevant telecommunications service or services?*

a) *Does the statute, regulation, ordinance, or legal requirement categorically ban provision of a telecommunications service?*

As the MTA admits, the Agreement contains no ban on the provision of a telecommunication service. (MTA letter at p. 4). While it does limit the time during which fiber may be installed, that is a limitation on the construction of infrastructure not on the provision of a telecommunications service. Furthermore, such a limitation does not constitute a ban on the provision of service any more than an FCC wireless spectrum auction constitutes a ban on the provision of service, simply because it is auctioned once and has a deadline which may not be convenient to some competitors or meet their investment schedule.

b) *Does the...legal requirement have the effect of prohibiting the ability of an entity to provide a telecommunications service?*

No. The Agreement does not have the effect of prohibiting any entity from providing any telecommunications service. In fact, it enhances the ability of entities to provide telecommunications services along the freeway ROW and throughout Minnesota. It reduces entry barriers through the sharing of construction costs and because it allows segment-by-segment construction by collocators rather than requiring them to construct a network over the entire length of the ROW.

1) *How the ... legal requirement...has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. ...For example, if the petitioner alleges that a ...legal requirement raises petitioner's costs, the petition should explain: 1) how the ...legal requirement prohibits or has the effect of prohibiting the ability of any entity to provide any intrastate or interstate telecommunications service,...*

The Agreement in no way raises the cost of any entity. In fact, as stated above, it provides an opportunity for telecommunications carriers to reduce their costs because they can take advantage of shared costs, collocate on a segment-by-segment basis along the interstate ROW and purchase capacity on a resale basis. Furthermore, as fully explained in the affidavits accompanying this letter, the prohibition on further installations during the term of the contract does not give significant cost advantages to any potential competitor so as to effectively prohibit provision of telecommunications service by any competitor. The MTA's claim that the ban on unlimited installations imposes 30% to 50% additional costs on potential competitors is unsubstantiated. In fact, their own affidavit only claims that the additional cost for some selected

rural routes is 33%, a figure that the State disputes and that does not address the remainder of the routes, including the metropolitan routes.

2) *Whether the [legal requirement] does so in a discriminatory manner.*

The Agreement does not prohibit any entity from providing any interstate or intrastate telecommunications service. In fact, as stated previously it facilitates the provision of telecommunications service by opening up the freeway ROW on a non-discriminatory basis. The Developer has a duty, under the Agreement, to concurrently install and maintain fiber optic cable on behalf of any carriers on a competitively neutral and non-discriminatory basis and to make the capacity of its own system available to all telecommunications service providers on a competitively neutral and non-discriminatory basis. Furthermore, the Agreement was entered into following established competitive procurement processes and a request for proposals that was open to any entity on a non-discriminatory basis. The Developer offered members of the MTA the opportunity to install conduit in the ROW and they declined to do so. (See Attachment C, letter to MTA from UCN/LLC.) The MTA members had an opportunity to bid on the Agreement, and indeed MEANS, who is a party to the civil action and has filed opposing comments with the Commission, was one of the respondents to the RFP and was not selected. Apparently, it did not value the ROW in question quite so highly at that time and it is now taking the role of the spurned suitor to the effect that if it can't have it, no one can.

3) *Whether price levels in the market preclude recovery of any such additional costs.*

As stated, the Agreement imposes costs on no one except the Contractor who, in addition to constructing the network along freeway ROW, is obligated to construct a fiber network in and along trunk highways in the rural areas of the state and to provide capacity to the State of Minnesota at no charge. Furthermore, as pointed out in the State's Reply Comments, Developer, because it is constructing facilities to serve state needs, is required by contract to pay prevailing wages. Firms utilizing alternative ROWs are not required to pay prevailing wages and many do not do so. (See Exhibit 3, Bhimani Rebuttal Affidavit, Reply Comments, April 9, 1998).

Competitors are given the opportunity to install their own fiber along the ROW at the same time or to purchase capacity from Contractor on a non-discriminatory basis or any combination of those options. The MTA alleges that competitors who chose neither of those options will incur a 30% to 40% cost disadvantage. Even if this were true, and it is not, it is a choice made by the competitors, not a restriction imposed by the Agreement. As is demonstrated in the attached affidavit, any cost advantage garnered by the Contractor is much less than that asserted by the MTA and may not exist at all given the additional construction and capacity requirements imposed on the Contractor.

4) *Any other factors that demonstrate that the challenged...legal requirement has the alleged effect.*

Contrary to the assertion of the MTA, MnDOT and MnDOA have the requisite authority under state law to enter into the Agreement. This issue is not relevant to the question before the Commission. Furthermore, the State did not “pick the winners” as alleged by the MTA. The Developer was selected under the usual RFP process as set out by state law. It was the process that selected the Developer; an open process in which members of the MTA participated.

5) *Have other governmental entities adopted similar requirements?*

Yes. The States of Missouri, Pennsylvania, Washington, Virginia, Colorado and Arizona have issued RFPs and are contemplating or in the process of negotiating similar provisions in their contracts.

6) *Assuming the Commission determines that modification of the challenged...legal requirement is required, what is the least intrusive action necessary to correct the alleged violation of Section 253?*

The State agrees with the MTA that the “FCC need not provide specific direction to the state as to how to procure telecommunications service, how [to] obtain compensation for use of its rights of way, or how best to promote safety on the highways.” MTA letter at page 6. The Commission’s authority is limited to determining whether the Agreement violates Section 253(a) or (b). The MTA suggests that the Commission “advise the State that its regulation of the use of the state ROWs must be done in a manner that reasonably accommodates all competitors up to the capacity of the ROW.” The Agreement does exactly that in that it allows for competitors to install capacity along the ROW at the same time as the Contractor. No modifications are appropriate or necessary.

The Commission also asked the following questions concerning whether preemption of the challenged legal requirement is within the scope of the Commission’s jurisdiction:

1) *If the requirement is imposed by a local government entity, what is the source of its authority (e.g., state constitution, statute, delegation of state power)?*

The Agreement is not a product of local government but rather was entered into by the State under its authority under state law and in the furtherance of its duties under state law.

2) *Is the challenged...legal requirement:*

a) necessary to preserve and advance universal service consistent with Section 254 of the Act and does it do so in a competitively neutral and nondiscriminatory manner;

b) necessary to protect the public safety and welfare and does it do so in a competitively neutral and nondiscriminatory manner;

c) necessary to ensure the continued quality of telecommunications service and does it do so in a competitively neutral and nondiscriminatory manner; and

d) necessary to safeguard the rights of consumers and does it do so in a competitively neutral and nondiscriminatory manner?

As stated in the State's Petition and restated above, the State has imposed no legal requirements upon any entity other than the Developer, through the Agreement. The Agreement is for the construction of infrastructure and not the provision of telecommunications service. No legal requirements are imposed upon the MTA or any other entities by the State under the Agreement. Therefore, preemption of the Agreement is not within the authority of the Commission.

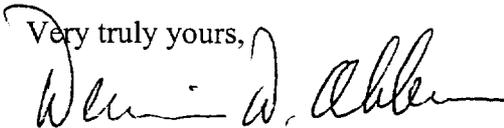
The terms of the Agreement are necessary to protect the public safety and welfare and do so on a competitively neutral and nondiscriminatory manner. The MTA admits that public safety is a valid objective under Section 253. There is little doubt that limiting access to ROWs is necessary to protect the safety of the traveling public in Minnesota. As stated in the State's earlier filings, safety on the freeways is greatly enhanced by limiting access to those freeways to the extent possible. The MTA basically argues that there is so much activity already occurring along the ROWs that some more won't hurt anything. This is a cavalier attitude for public safety that the State cannot endorse and neither should the Commission. As the MTA acknowledges, there are by necessity, many maintenance and safety-related operations that must occur along freeways on an ongoing basis, including surface repair, snow removal, maintenance and cleaning of signs, and maintenance and repair of overpasses and maintenance of the ROW. To add additional, discretionary activity along the ROW is to add an unnecessary risk to the safety of the traveling public. It should be remembered that Minnesota has a relatively short construction season due to the harsh winter weather, approximately May 15 through November 15. This means that necessary repair and maintenance activity is limited to a few months of the year, as would be the installation of fiber. Thus, the disruption of the freeway system is concentrated during the very summer months when traffic on the freeways is heaviest. The State, unlike the MTA, must take the effect of these factors into consideration when judging the effect of ROW construction on the safety of the freeways for the traveling public.

The Commission should also consider the effect of the Agreement on the advancement of universal service, the quality of telecommunications service, especially in rural areas, and the rights of rural consumers to high quality, state-of-the-art telecommunications services. The Agreement promotes and enhances each of those goals of the Telecommunications Act by bringing high capacity fiber to more areas of the state.

3) *Does the challenged...legal requirement pertain to management of, or compensation for access to, rights-of way? If so, please explain the nature of any relationship to rights-of-way management or compensation. If compensation is involved, is it fair and reasonable and required on a competitive and nondiscriminatory basis?*

The Agreement and its relationship to rights-of-way management is explained in detail in the State of Minnesota's Petition and Reply Comments in this matter. As is explained therein, the Agreement allows the State to control access to the ROW and to receive compensation in the form of fiber capacity as well as to expand fiber capacity in the rural areas of the state, at the cost of the Developer. The Agreement was the result of an open RFP process that several members of the MTA participated in. Finally, the Agreement allows all competitors to purchase capacity on a competitive and nondiscriminatory basis as well as to install capacity coincident with the installation of the Contractor. At least two courts have concluded that the term "competitively neutral" applies only to the compensation a telecommunications provider may be charged and not to management of the rights-of-way. AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp. 2d 582, 587 (N.D. Tex. 1998); Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston, C.A. No. 98-12531-MLW (U.S. District Court, Massachusetts, January 27, 1999) at 26-32 (Memorandum and Order at Attachment D).

For all of these reasons, as well as the reasons stated in the State's Petition and Reply Comments, the Agreement is not a prohibition to competition but rather a boon to competition, especially to the rural areas of the state. Therefore, the Commission should declare the Agreement to be consistent with the Telecommunications Act of 1996 and deny the request of the MTA to preempt the agreement.

Very truly yours,

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Encls.

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

CC Docket No. 98-1

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

**STATE OF MINNESOTA'S
REPLY TO MTA RESPONSE**

By this document the State of Minnesota responds to the misperceptions and misrepresentations made in the Minnesota Telephone Association's ("MTA") untimely response to the State's Reply Comments in this Docket. The MTA's response, prepared by Strategic Policy Research ("SPR"), evidences a fundamental misunderstanding of the key points in the Agreement and of the concerns of the State of Minnesota.

RELEVANT GEOGRAPHIC MARKET

The MTA claims that the relevant market is simply those points located along the freeway system in Minnesota. That is absurd. As the State has pointed out, there are existing fiber networks including those installed by MTA member MEANS, that connect points along the freeway, as well as other locations throughout much of the state. Furthermore, the network being built pursuant to the Agreement will not only connect points along the freeway but locations along trunk highways throughout the state. Finally, fiber along the freeway right-of-way ("ROW") obviously provides connectivity to points that are not on the freeway. (Bhimani Affidavit at 3, Attachment B).

Contrary to that of the MTA, the State's definition of the relevant market as the wholesale fiber capacity throughout the state is consistent with that of the United States Telephone Association, the Western Rural Telephone Association, the Organization for the Promotion and Advancement of Small Telephone Companies and the Competitive Policy Institute. (Bhimani Affidavit at 3).

SPR's criticisms of Alan Pierce's view that the market includes "provision of transmission capacity for telecommunications-information-entertainment" also miss the mark. It is clear that fiber is used for broadcast video and cable as well as voice and data and that the line between the two is rapidly blurring. (Bhimani Affidavit at 3).

FIBER SUPPLY IN MINNESOTA

The State has demonstrated that there is an abundant supply of current and planned fiber in Minnesota, especially in the more populated centers, including those on the freeway ROW. SPR accuses the State of taking conflicting positions on this issue, however, it is the MTA's assertion which conflicts. On the one hand it argues that there are rural, remote areas of the State that are not served with fiber and incorrectly criticizes the State for not including those rural areas in the Agreement. However, on the other hand, SPR also argues that it is in those very areas where no fiber exists that construction of the network would result in market power for the Developer. MTA's position seems to be that if the MTA does not want to build there, no one else should be able to either -- and rural telephone customers should wait for state of the art telecommunications until the MTA is good and ready to provide it.

Furthermore, SPR evidences a basic misunderstanding of the Agreement when it states "[If there is such a glut of capacity along freeways, as the State claims, it then seems that the State should have contracted for a rural highspeed network.]" The fact is, it did exactly that! The State required, as part of the price for access to the freeway ROW, the completion of a 900 mile statewide fiber network, on non-freeway ROW, including rural areas with limited current demand. (See attached map, Attachment E.) This is a real cost to the Developer that no other provider is faced with and a real benefit to rural Minnesota telecommunications customers.

This cost, imposed on the Developer by the Agreement, is never taken into consideration by SPR in calculating the alleged cost advantage of the freeway ROW.

ALTERNATIVE RIGHT-OF-WAY

SPR claims that the fact that carriers are negotiating with Developer to place fiber in the ROW, is evidence of the economic value of freeway ROW vis-a-vis other routes. Of course, all routes have particular cost benefits. The fact that negotiations are ongoing simply shows the appropriateness of the costs imposed on the Developer by the State. In order to recover those costs, Developer must seek out other carriers to place fiber on the ROW. If it was interested in a monopoly it would not do so. Furthermore, as stated earlier, the MTA members in MEANS apparently did not value the freeway ROW nearly so highly when it submitted a losing proposal in response to the RFP.

The MTA states they favor “encouraging simultaneous installation.” (SPR Comments at 4.) That is exactly what the Agreement provides for. Unfortunately, the MTA refused to take up 1CS/UCN’s offer to collocate conduit and thus take advantage of an opportunity for simultaneous installation. (See Attachment C.)

CONFERRING MARKET POWER ON THE DEVELOPER

SPR denigrates Mr. Pierce’s comparison of the RFP process to the FCC’s spectrum auctions. Contrary to SPR’s claim, the analogy is relevant because both limit the time during which one has a chance to participate. The FCC spectrum auction is a one-time event and does not re-open every few years to accommodate the business plan or financing arrangement of each potential bidder.

In this instance, not only did parties have a right to participate in the RFP process for the infrastructure, but they also were offered the opportunity to collocate conduit as the network is being constructed and to purchase capacity after it is constructed, all on a competitive, non-discriminatory basis. Furthermore, unlike the spectrum auction, the freeway ROW is not a one-time event but may be opened up to further installation in ten years under the Agreement.

EFFECT ON COMPETITION

SPR agrees that “the State cannot be expected to open its right-of-way at whatever time meets its (MTA’s) investment plans.” (SPR comments at 5.) However, it asserts that the term of the Agreement forces the installation of earlier-than-needed capacity or the leasing of others’ capacity.

First, once again this is analogous to the FCC spectrum auction -- once it is auctioned, others are forced to lease capacity. Secondly, no one is limited to the freeway ROWs. As has been shown, there are a variety of other ROW that are available to other entities that do not involve the freeways.

BALANCING PUBLIC SAFETY AND COMPETITIVE NEUTRALITY

The State has reached a balance of public safety and competitive neutrality by allowing for collocation while the trench is open, and by limiting that access to once in ten years. MTA is in effect suggesting an “all or nothing” case, i.e., either allow open access to the freeway ROW or allow none at all. This is hardly the balanced approach it purports to favor.

Mr. Kraft asserts that installation of fiber optic cables, whether by one or by a number of operators, will not increase the risk of additional accidents. If this is the case, state DOTs would have changed their accommodation policies as soon as the FHWA in 1989 allowed states to adopt their individualized policies. A decade has passed, but more than 40 states still do not allow any utility, including fiber optics, on the freeway right-of-way. Mr. Kraft may have extensive experience in construction safety and may understand what is needed to safeguard the people involved in construction on or near the highway. However, the state DOT’s responsibility is not only to construction workers, but also to the driving public who are the main victims of accidents. This is evidenced in the USDOT, FHWA, AASHTO and other state DOTs FCC filings. It is only the state DOTs who have the responsibility to make this call.

More than 40,000 people are killed and hundreds of thousands are injured every year on U.S. roads. State DOTs are called upon every day to find balance between safety of the driving public and construction and maintenance activities. When the decision is made to undertake construction and maintenance on or near a freeway driving lane, all efforts are taken to make it as safe as possible. Yet the potential for accidents remains. There are no ifs, ands, or buts. Installation of fiber optics on the freeway will increase the potential for accidents. MnDOT would have not allowed this installation by the developer if the fiber optic network was not needed for Intelligent Transportation Systems (“ITS”). ITS is essential to increase the overall efficiency and safety of the driving public.

While the MTA accepts that there are some safety hazards associated with opening access to the freeway ROW, it unreasonably equates the hazard of yearly construction with that of once-in-ten-year-construction, when yearly construction would be obviously ten times as dangerous to the traveling public. Likewise, the MTA’s position that construction in rural areas is not dangerous because of the width of the ROW is without support in the record. Each distraction along the freeway increases the danger especially in the most rural areas where motorists do not expect to encounter such distractions.

The U.S. Department of Transportation (“Department”) and Federal Highway Administration have expressed their support for the State on the matter of safety. (See Reply comments of U.S. Department of Transportation.) The Department has stated that the Agreement “is consistent not only with the . . . Act, but also with applicable provisions related to the federal-aid highway program.” (Department Reply comments, p. 2.) The Department further stated that arguments that Minnesota cannot satisfy section 253(b) because exclusive physical access to public rights-of-way is not truly necessary to protect the public safety and welfare “distort the meaning of this provision [253(b)] and are also at odds with applicable federal transportation law. (Department Reply Comments at p. 5.)

The Department went on to state:

It bears repeating that access control has long been recognized as one of the most significant design factors contributing to safety of a freeway system and is an essential element in preserving the traffic-carrying capacity of highways. 50 Fed. Reg. at 2353. Relatively more frequent access by multiple parties would likely pose a greater risk to these basic interests than more limited access. States may propose utility accommodation plans for public rights-of-way that provide for more rather than less access, but the paramount concern must in every event remain transportation safety and efficiency. We suggest that this is entirely consistent with section 253(b)'s concern for restrictions in the interest of the public safety and welfare. Consequently, the Department believes that Minnesota's agreement to accommodate limited access to its rights-of-way protects the public safety in a manner consistent with both federal-aid highway law and with section 253(b) of the Telecommunications Act of 1996.

(U.S. Department of Transportation Reply Comments at 6.)

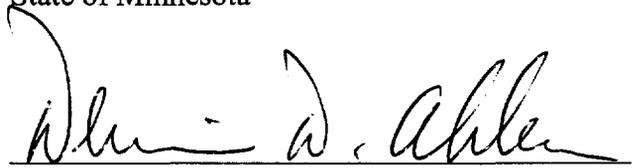
The Department concluded that the State process is also consistent with the Shared Resource Study funded by the FHWA. (Attachment to Department Reply Comments.) That study made two fundamental recommendations by which states might conform to section 253. It proposed that states require the party that obtains exclusive physical access to be (1) selected by a competitive nondiscriminatory process, and (2) allow other telecommunication providers "to purchase capacity at market rates." *See* 23 U.S.C.1 § 112; 49 CFR § 18.36 (C)(1). The Department concluded that "Minnesota has followed both." (Department Reply Comments at 7.) Thus, the U.S. Department of Transportation has endorsed the Minnesota approach as being a balanced one that is consistent with the demands of both highway safety and the Telecommunications Act.

CONCLUSION

The relevant geographic market is wholesale fiber capacity throughout the State. Construction rights, as well as collocation and capacity, are available on a non-discriminatory basis. Competition is enhanced, not threatened, by the Agreement. The Agreement also approximately balances public safety and competitive issues. The State's Petition should be approved.

Dated: 2/22/19

MIKE HATCH
Attorney General
State of Minnesota



DENNIS D. AHLERS
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February 19, 1999

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TELEPHONE: (651) 297-2040

Magalie Salas
Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Re: CC DOCKET No. 98 -- In the Matter of the State of Minnesota's Request for Declaratory Ruling Regarding Applicability of Section 253 of the Federal Telecommunications Act of 1996 to Longitudinal Easement on the State Freeway System

Dear Ms. Salas:

This is provided in response to the request of Mr. David Kirschner, staff attorney for the Federal Communication Commission. It is a summary of the pending Minnesota District Court action captioned *Minnesota Equal Access Network System and Minnesota Telephone Association v. State of Minnesota by James Denn, Commissioner of the Minnesota Department of Transportation, Elaine Hansen, Commissioner of the Minnesota Department of Administration and ICS/UCN, LLC*, Intervenor, Case File No. 62-C8-98-5736, Ramsey County District Court, Second Judicial Division.

The action is a challenge to the contract between the State of Minnesota through its Commissioners of Transportation and Administration and ICS/UCN LLC. The Complaint asserts six counts of illegality regarding the agreement:

- 1) it impairs the power and discretion of the Minnesota Legislature;
- 2) it impairs the ability of future Commissioners of the Department of Transportation to fulfill their statutory obligations;
- 3) it violates a state statute and a rule pertaining to grants of access to utilities to the freeway rights of way;
- 4) it precludes considerations of applications for lawful freeway access by other utilities;
- 5) it creates a competitive advantage not authorized by state law; and,
- 6) it violates the state's FHWA-approved guideline for utility accommodation.

Facsimile: (651) 297-1235 • TTY: (651) 282-2525 • Toll Free Lines: (800) 657-3787 (Voice), (800) 366-4812 (TTY) • www.ag.state.mn.us

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ATTACHMENT A

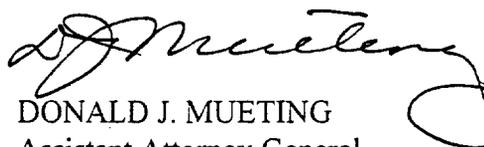
All of the counts asserted are based on state law and, by express reservation of the plaintiffs at paragraph 12 of their complaint, none of them involve any issue relating to the 1996 Telecommunications Act that is presently pending before the Federal Communications Commission.

The defendant state officials and the intervenor, ICS/UCN LLC., refute and deny each and every count in the plaintiffs' complaint and assert that state law authorizes the contract with ICS/UCN, LLC. and that it is consistent with all relevant statutes and rules. In addition, the defendants have asserted that the plaintiffs' claims are barred by waiver, estoppel, and laches.

Construction of the project commenced in the Fall of 1998 on a segment of Interstate 90 between Moorhead and St. Cloud. The plaintiffs had asked the court for an order preventing construction pending the court's final decision after trial. The court denied that request.

The trial of this matter commenced on February 8, 1999 and concluded on February 16. Written submissions of the parties are due by March 15, 1999. It is not known when the judge will issue her ruling.

Very truly yours,



DONALD J. MUETING
Assistant Attorney General
Manager, Transportation Division

(651) 296-3369

DJM:lt

cc: David Kirschner
AG:80702 v1

**AFFIDAVIT OF
FAZIL BHIMANI**

1. This Affidavit addresses issues identified in Minnesota Telephone Association's (MTA) letter dated December 22, 1998 and attached affidavits in matters related to FCC's CC Docket 98-1.

FIBER CONSTRUCTION COST ANALYSIS

2. Mr. Knuth in paragraphs 3 and 4 of his affidavit dated November 23, 1998 provides no cost analysis or facts related to metro area construction. The only mention he makes about cost related to major population centers is one sentence in his original affidavit dated March 6, 1998 (Para. 10 last sentence) where he states "A greater negative impact can result if major population centers are passed".

While it is true that cost of construction is dependent on the size and type of facilities, Mr. Knuth misses the point of my analysis related to metro area construction- i.e., the cost differential for metro area construction on freeway rights-of-way (ROW) and non-freeway rights-of-way is insignificant. Mr. Knuth cannot simply claim "A greater negative impact" by assumption and he cannot simply extend differentials of rural routes to metro routes by assumption.

Information obtained from independent contractors and the Developer's cost does not show any significant cost advantage for the Developer in the metro area. This is supported by the fact that the Developer is looking to route fiber off of the freeway and across non-freeway right's-of-way to reduce cost in the Duluth metro area. Considerable construction obstacles exist in the Minneapolis/St. Paul metro area freeway rights-of-way as noted in my affidavit dated April 8, 1998.

3. It is true as Mr. Knuth notes, that there are multiple components that affect total costs (Affidavit of November 23, 1998, Para. 4 and 6). When presenting percentage advantage figures, Mr. Knuth conveniently does not include the total costs in calculating such percentages. His original affidavit dated March 6, 1998 shows a 59% to 70% cost advantage to the Developer for two rural routes - Minneapolis to Fargo and Minneapolis to Duluth. This percentage differential is significantly reduced to 30.57% and 39.41% when fiber cost is included. If other costs are factored in, such as construction management, traffic control, equipment, etc., these percentage differentials will be considerably less.

4. The cost figures that Mr. Knuth presents based on his experience are not shared by contractors that have done considerable amount of construction, including the contractor constructing for the Developer. In fact, contractors who have seen his pricing information have expressed surprise to me and have remarked "I wish I could quote that price".

Mr. Knuth in his original affidavit of March 6, 1998, develops cost per mile for freeway construction based on certain assumptions. The assumptions do not reflect actual experience on the Moorhead – St. Cloud segment – a significant portion of the Fargo/Minneapolis route used in his analysis. For example, Mr. Knuth assumes an average 150 feet of boring per mile. The actual experience is more on the order of 350 feet per mile. This reflects the large number of drainage culverts (a common sight on freeways), stream crossings, trees, etc., and the fact that the fiber installation is a fence line construction, and it is not allowed to encroach into the 30 foot wide free zone. The free zone is a 30 foot wide area starting from the edge of the shoulder, in which the Developer's contractors are not allowed to work due to safety considerations dictated by the State and FHWA.

Additionally, Mr. Knuth does not include in his analysis additional mileage that the Developer has to construct to connect state locations that take them into cities and towns. This adds approximately 5% to 10% of total mileage along a given rural interstate route.

5. Mr. Knuth, in his analysis on impact of prevailing wages cites percentage figures for installation (44% of total cost) and labor (13% of total cost) costs based on a review of a recently completed project by his firm. The 13% figure for labor conflicts with Mr. Knuth's affidavit of March 6, 1998 (Para. 5 last sentence) in which he identifies labor costs for various types of construction. My assumption is that he would like to change it to say "installation costs" instead of "labor" cost.

My survey of contractors shows that installation cost (i.e. labor and equipment as Mr. Knuth defines it) ranges somewhere between 55% to 60% with the labor component being approximately two thirds of the cost. This results in labor being 36% to 40% - an average of 38% of the total project cost. The survey also shows that differences between prevailing wage rate and open shop wage rate range anywhere from 25% to 30%. This results in a net of 9.5% to 11.4% (.38 x .25 or .38 x .3) increase in labor costs due to prevailing wage differences.

Note: While not significant, Mr. Knuth incorrectly includes prevailing wage increases for Trunk Highway in Column F of Table 2 (November 23, 1998 affidavit). If corrected, his percentages (Column I) would be somewhat reduced.

As stated in my affidavit dated April 8, 1998, the Developer's per mile cost differential of approximately 14% between rural freeways and rural non-freeways is consistent with the study done by Hess - a copy of which was attached as

Attachment A my April 8, 1998 affidavit. The 11% to 21% cost differential shown is consistent with the experience of the Developer. When prevailing wage impact for construction is factored into the Developer's cost or the cost shown in the study, this differential diminishes considerably.

The lack of significant cost differential is further supported by the fact that when responding to the State's Request for Proposal, MEANS (a company of independent telephone companies, most of whom are MTA members) did not provide an attractive response. This would indicate that MEANS did not see the significant cost advantage in using the freeway rights-of-way.

6. Mr. Knuth in his analysis does not mention the cost (or forgone revenue) to the Developer for providing approximately 20% of installed capacity to the State. In addition, the Developer is obligated to build over 900 miles of fiber network on non-freeway rights-of-way in rural Minnesota, a major cost element.
7. Mr. Knuth incorrectly concludes that my cost analysis rests on the assumption that the Developer will bear all costs of installation. My cost analysis looks at the cost differential between the different types of construction. The presence of co-locators is irrelevant to this analysis. Construction costs and funding sources are separate issues. Funding of a project is dependent on the business plan and the business model used in assessing the viability of a project. Actual construction costs (e.g. installation, materials, construction management, etc.) remain the same under different funding sources.

Co-locators allow sharing of costs whether it is on freeway rights-of-way or trunk highways. If multiple parties share construction costs on non-freeway rights-of-way, costs would be also lower to each party. Shared construction is common in the industry. It is true that carriers are interested in co-locating in specific segments based on their business plan. The willingness of the Developer to allow segment specific co-location is evidence that the contract:

- a. Enhances competition by allowing sharing of construction costs among multiple parties and reducing each party's fiber construction cost, thereby lowering entry barriers in serving smaller markets.
- b. Provides for non-discriminatory access to competitors by not requiring that co-locators sign up for the entire network.

THE RELEVANT MARKET IS THE STATE OF MINNESOTA, ALTERNATE RIGHTS-OF-WAY EXISTS AND THERE IS NO MARKET POWER CONFERRED ON THE DEVELOPER

8. It is not only the State that contends that the relevant market for analysis is the wholesale fiber capacity throughout out the State. Others who hold the same opinion include the United States Telephone Association, Western rural

Telephone Association, Organization for the Promotion and Advancement of Small Telephone Companies, and Competitive Policy Institute (See my affidavit dated April 8, 1998 paragraph 13). These are petitioners who oppose the State's filing.

Fiber on the freeway connects points not only along the freeway, but also provide connectivity to points not on the freeway. Similarly, fiber on trunk (non-freeway) highways connects points on a route, and points not on the route by connecting with other networks. Strategic Policy Research's (SPR) argument is akin to saying that the interstate system only allows cars to go between points along the freeway, but does not allow access to points not on the freeway.

Alan Pearce's view of the market, which includes "provision of transmission capacity for telecommunications-information-entertainment" is accurate and relevant. Fiber is used not only to transmit data and voice but broadcast video and cable programs. Recent merger activities (e.g. AT&T/TCI) and entry of cable entertainment providers into telecommunications is testimony to the scope of market as articulated by Mr. Pearce.

9. SPR states that the State should have contracted for a rural high-speed network, in responding to Mr. Schnellman's comment as referenced in the MTA monthly newsletter. If SPR were to look at the fiber routes, it would note that over seventy-five percent of the miles are in rural Minnesota and that over fifty percent of the total route miles are on non-freeway rights-of-way. SPR's observes that the decision by the Developer to invest on routes where there is ample capacity is questionable - an item that SPR may want to discuss directly with the Developer.
10. SPR incorrectly concludes that because carriers are negotiating with the Developer to place fiber in the freeway rights-of-way, that this is because there is a significant cost advantage for installing fiber on the freeway. The carriers are negotiating because it is less expensive to build when construction costs are shared. It would also be less expensive to build on non-freeway rights-of-way if construction costs were shared among two or more parties. The shared construction option is also available to MTA. In fact, the Developer has proposed to MTA to install conduit(s) when the trench is open - allowing MTA or it's members to deploy fiber at their own schedule. This offer from the Developer was rejected by the MTA.
11. The contract does not confer market power to the Developer. As mentioned in earlier affidavit testimony:
 - a. The State utilized the RFP process to select a Developer - a market oriented non-discriminatory process. Vendors responded based on their assessment of the market value of the rights-of-way and their business plan.

- b. Existing fiber capacity in the State and the potential to increase that capacity with incremental cost assures that the Developer cannot exert market power.
- c. The developer is contractually obligated to price in a non-discriminatory manner.

Pearce's analogy of the FCC spectrum is relevant when discussing competitive neutrality. The FCC spectrum analogy can be extended further to refute the notion that rights-of-way should be available to meet any carrier's investment schedule (which may not coincide with trench opening), or provide access to future entrants. In such a scenario, the FCC would never be able to auction off spectrum for fear it may not coincide with investment schedule of carrier's that may want to provide service at a later date, or that future entrants would not have had a chance to submit a bid.

CONCLUSION

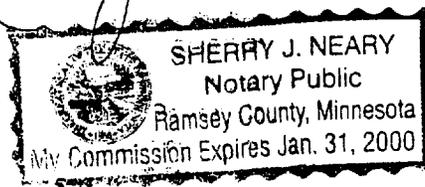
- 12. No significant cost advantage exists for the Developer once all the relevant costs (not just a portion of the total cost) are included in the analysis.
- 13. The relevant market for fiber is the entire state and that the contract does not confer monopoly power to the Developer. Alternative rights-of-way exist and that current technology to increase existing fiber capacity would not allow the Developer to exercise market power. The contract enhances competition and does so in a competitively neutral manner.

Signed Fazil Bhimani
Fazil Bhimani

Date Feb 5 - 1999

Subscribed and sworn to before me on
2-5-99.

Sherry J. Neary
NOTARY PUBLIC





Universal Communication Networks, LLC

March 30, 1998

Mr. Michael Nowick
Executive Secretary Treasurer
Minnesota Telephone Association
1650 World Trade Center
30 East 7th Street
St. Paul, MN 55101-4901

Dear Mr. Nowick,

It was a pleasure speaking with you at the Hubert Humprey Forum on February 25, 1998.

I understand that the MTA has some reservations about the exclusive right-of-way that was granted to ICS\UCN and Stone & Webster to construct a 1750 miles fiber optic network in the state of Minnesota. My partners believe that there is a significant demand for dark fiber in the state of Minnesota for the next 30 years. ICS\UCN will work together with the existing service providers and future service providers to ensure that dark fiber and conduit be made available to all concerned parties within the next ten years.

It is the intent of ICS\UCN to commence construction of this project in August 1998 and invest in excess of \$100 million over the next three years in the state of Minnesota.

The state contract does not allow ICS\UCN to discriminate against any party that desires to lay fiber in the right-of-way. I would like to propose a partnership with the MTA to install at least two 2 inch conduits over the entire proposed route for future use of the MTA members. The cost of this proposal would be negotiated between both parties and the state of Minnesota. If MTA has an alternative proposal, ICS\UCN would be interested in having that discussion as well.

The access to dark fiber in Minnesota will ensure that economic development and growth will be available to the residents and businesses of Minnesota. By working together, we can support our mutual mandate to serve Minnesota well into the twenty first century.

A written response by April 6, 1998 would be greatly appreciated.

Sincerely,

Al Strock
President

910 15th Street Suite 500 Denver, CO 80202
Phone: (303) 534-7085 Fax: (303) 595-8707

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CABLEVISION OF BOSTON, INC.,)
Plaintiff,)

v.)

PUBLIC IMPROVEMENT COMMISSION OF)
THE CITY OF BOSTON, ET AL.,)
Defendants.)

C.A. No. 98-12531-MLW

DOCKETED
MEMORANDUM AND ORDER

WOLF, D.J.

January 27, 1999

This memorandum is based upon the transcript of the decision rendered orally on January 22, 1999, expressing the court's intention to deny Cablevision of Boston, Inc.'s ("Cablevision") Motion for Preliminary Injunction. This memorandum adds citations, deletes some colloquy, clarifies some language, and represents the court's decision in this matter for the purpose of any possible appeal.

* * *

Upon consideration of the literally voluminous pleadings and exhibits, and of the testimony and argument at the six-hour hearing on Cablevision's Motion for Preliminary Injunction, that motion is being denied.

ATTACHMENT D

FINDINGS OF FACT

I find the basic facts to be as follows. I will refer to certain additional facts as they are relevant in the explanation of my analysis of the applicable law.

Plaintiff Cablevision has for many years provided cable television services in the City of Boston. Affidavit of Richard S. Hahn ("Hahn Aff.") ¶ 38. Until recently, it enjoyed a statutory monopoly. Id. It still has about 97 percent of the market. Id. The private defendants in this case have about three percent of the Boston cable television market. See id.

Defendant Boston Edison Co. is a public utility which has for more than a hundred years provided electricity to Greater Boston. Id. at ¶ 7. In order to do so, it has built, among other things, a large network of underground conduit for cable, used to transmit electricity and, to a limited extent, to transmit communications relating to the delivery of electricity. Id. at ¶ 9.

Defendant Public Improvement Commission of the City of Boston (the "PIC") is a division of the City's Department of Public Works. Defendant Joseph Casazza is its Chairman. The PIC is responsible for construction projects involving the City streets. As part of this, the PIC administers a process to permit the construction of new conduit under the City streets and to record its location. It

does that pursuant to M.G.L. c. 166, § 22, which provides municipalities the power to issue what are called "grants of location" for new conduit and establishes the legally required procedure for doing so. Although it is not clear to the court at this point what empowers the PIC to do so, the PIC also records the uses to which authorized conduit is to be put and records amendments to such uses.

In February 1996, a new federal telecommunications statute was enacted. It is known as the Telecommunications Act of 1996, (the "TCA"), 47 U.S.C. § 151 et seq. The proposed statute was the subject of lengthy debate. In essence, it provided for a revolutionary deregulation of the telecommunications industry. See 142 Cong. Rec. H1078 (daily ed. Jan. 31, 1996) (H.R. Conf. Rep. 104-458). The goal of the TCA was to create competition in the provision of telecommunications services, including video services. S. Rep. No. 104-23, at 1-2 (1995).

The TCA is premised on the philosophy that vigorous competition will serve consumers by providing wider choices, better service, and lower prices. Id. at 7. In enacting the TCA, Congress and the President specifically anticipated that electric utilities, which already had networks of conduit and fiber-optic cables, would become competitors to existing cable television operators. Id. Since enactment of the TCA, Congress has encouraged

and, when it has occurred, applauded the entry of utilities into the cable television market. See Federal News Service, Competition Among Video Delivery Systems: Hearing of the Telecommunications, Trade and Consumer Protection Subcommittee of the Committee (July 29, 1997) ("Federal News Service") at *32.

In the anticipation of the TCA, in 1995, Boston Edison told Casazza that it intended to use its existing conduit under the City's streets to compete in the telecommunications business when the federal law was changed to deregulate the industry. Hahn Aff. ¶ 28. Casazza told Boston Edison that he did not believe that the PIC's policy for building new conduit was applicable to Boston Edison's proposal. Id. at ¶ 29. The PIC's policy for constructing new conduit was adopted in 1988. Affidavit of Joseph F. Casazza ¶ 4. It provides that, in order to minimize future disruption to the streets, parties seeking to install new conduit must build additional, empty shadow conduit that can be employed if future demand increases, and also open their project to other service providers who may wish to participate. Policy Relating to Grants of Location for New Conduit Network for the Provision of Commercial Telecommunications Services ("Policy for New Conduit") at ¶ 12.

Boston Edison's request and the foreseeable possible deregulation of the telecommunications industry prompted Casazza to begin to consider developing a new PIC policy concerning changes in

the use of existing conduit under City streets. Hahn Aff. ¶ 29; Tr. of Prelim. Inj. Hr'g ("Tr.") at 213-14 (Jan. 20, 1999). Casazza convened a small group of potentially interested parties, including Boston Edison. Hahn Aff. ¶ 30; Tr. at 213. In April 1996, that group furnished Casazza with a proposed possible policy for changes in the use of existing conduit. Hahn Aff. ¶ 30.

That proposed policy provided, among other things, for the submission of plans to the PIC, by utilities, identifying the location of all existing cable and conduit that were intended to be utilized for commercial telecommunications purposes. Proposed Application of the City of Boston Fiber Optic Conduit Policy to Existing and Newly Constructed Non-Commercial Telecommunications Utility Cable and Conduit at 1. The proposed policy would also have required a utility to petition the PIC for an amendment to its grants of location for the cable and conduit that it intended to use for commercial telecommunications purposes. Id.

Casazza, however, did not act on the proposed policy. Tr. at 215. He did nothing with regard to it, in part because the recently-enacted TCA would require the City to consider issues of telecommunication policy much more broadly and that was not the PIC's function. Id. at 216-17, 221-22.

Casazza had been told of Boston Edison's concept of converting its conduit and cable to telecommunications use and also informed

of Boston Edison's initial planned project. Id. at 211, 220. He did not, however, know all of Boston Edison's plans. Id. at 211. Casazza did not feel that Boston Edison or anyone else was required to follow the possible proposed policy that would have required prior notice and action by the PIC before new cable could be added to existing conduit or existing cable could be converted to telecommunications use. Id. at 214-15.

From 1996 to 1998, Casazza, as Chairman of the PIC, did not believe that Boston Edison was adhering to that proposed policy. Id. at 211, 213-15. Contrary to Cablevision's contention, Casazza and the PIC were not misled by Boston Edison concerning the conversion of its conduit. Id. at 202.

Following enactment of the TCA, in 1997, Boston Edison organized defendant BecoComm as a vehicle for engaging in the non-regulated telecommunications business. Hahn Aff. ¶ 9. It is the business of BecoComm to construct telecommunications fiber-optic systems for other entities which wish to use Boston Edison conduit, which are also known as "rights of way." Id. at ¶ 21.

Defendant RCN Corporation is a holding company which includes defendant RCN Telecom Services, Inc. Affidavit of Scott Burnside ¶ 1. RCN Telecom Services, Inc. provides cable, telephone and Internet services. Id. In September 1996, BecoComm and RCN formed

a joint venture, the defendant RCN-BecoComm, LLC (the "Joint Venture"), which provides telecommunication services, including cable television, to customers in Boston and adjoining cities. Affidavit of Michael Adams ¶ 4. The Joint Venture and Cablevision are direct competitors.

The press release announcing the formation of the Joint Venture stated that the Joint Venture would utilize Boston Edison's network of fiber-optic cable. Boston Edison and C-TEC's RCN Unit Form Partnership to Offer Local Phone, Long Distance, Video and Internet Access, Press Release (Sept. 30, 1996). At various times, additional fiber-optic cable has been added to Boston Edison's conduit for use by the Joint Venture. Affidavit of Ralph J. Canina ¶ 7; Affidavit of Paul Knizer ("Knizer Aff.") ¶ 7.

Casazza was generally aware that this was being done. Tr. at 205-208. Cablevision was also generally aware that this was being done.

In August 1997, Cablevision complained to the Massachusetts Department of Public Utilities, which has since been renamed the Massachusetts Department of Telecommunications and Energy (the "DTE"), that according to public documents, the Joint Venture was currently using "Boston Edison's fiber optic network, rights of way, plant facilities, and name." In re: Application of Boston Edison Co., DPU 97-63, Reply of Cablevision Systems Corp. to Mtn.