

K R A S K I N, L E S S E & C O S S O N, L L P EX PARTE OR LATE FILED
ATTORNEYS AT LAW
TELECOMMUNICATIONS MANAGEMENT CONSULTANTS

2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Telephone (202) 296-8890
Telecopier (202) 296-8893

April 21, 1999

RECEIVED

APR 21 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Attention: Carol E. Matthey
Chief, Policy and Program Planning Division

**Re: Petition of the State of Minnesota for Declaratory Ruling
CC Docket No. 98-1
Ex Parte filing**

Dear Ms. Matthey:

This letter supplements the *ex parte* filing of the Minnesota Telephone Association (MTA) of December 22, 1998 and provides further information in response to questions raised by the Commission's staff and to *ex parte* filings by other parties, including the February 22, 1999 letter and attachments from the State of Minnesota and its March 18, 1999 *ex parte* letter..

1. Obligation to sell capacity

Common Carrier Bureau staff raised the question of whether the Agreement between ICS/UCN and the State requires ICS/UCN to sell any of the communications capacity it constructs to third parties. Review of the Agreement demonstrates that ICS/UCN has no obligation to sell, assign or transfer ownership of fiber.

Section 7.7(a) which sets forth ICS/USN's obligations regarding rates and charges states, in part:

At all times throughout the Term, Company shall maintain, offer, accept, implement and adhere to written, uniform and non-discriminatory rates and charges...for such customers rights to use or access the Network or to become Collocating Customers....(emphasis added)

There is no indication in this Section or elsewhere of any obligation of ICS/UCN to transfer ownership of any fibers. The obligation to allow "use of and access to the Network is restated in Section 7.7(d), again without any indication of an obligation to offer ownership.

No. of Copies rec'd 0+3
List A B C D E

While ICS/UCN apparently has the right to sell dark fiber, Section 3.3(b)(iii) limits that right to no more than 80% of the remaining fibers in any ring of Phase I, without state approval. The Agreement thus makes a conspicuous distinction between the obligation to provide "use and access" to the Network, and the limited option to sell some facilities.

2. The Agreement constitutes a legal requirement within the meaning of Section 253.

In its February 22, 1999 *ex parte* letter, the State again raises the frivolous claim that the Agreement is not a "legal requirement" within the context of Section 253(a). MTA has previously shown this position to be invalid and will not burden the record with repetition.¹

3. The Agreement is a barrier to entry.

The State's *ex parte* repeats (p. 4) its improbable assertion that by allowing only its selected entity to construct along the most secure, direct and lowest cost rights of way in the state the ability of other entities to provide telecommunications services in the state are enhanced and their costs are not increased. MTA has provided extensive documentation why these claims are untrue. MTA denies the state's suggestion that it has overstated the cost advantage. Further, the extensive remedies provided in the Agreement for any impairment of ICS/UCN's exclusive rights refute the State's assertions that those rights do not provide a significant economic advantage to ICS/USN.

4. The exclusive use provision of the Agreement is not required to protect the public safety or avoid disruption of traffic.

The State's February 22 *ex parte* (p.7) accuses MTA of having a "cavalier" attitude toward safety. This accusation is entirely unwarranted. To the contrary, MTA provided for the record the un rebutted affidavit of an accredited safety expert and publications by national highway and research organizations to demonstrate that the State is waving the safety flag to attempt to scare the Commission into endorsing its anti-competitive Agreement adopted solely for its economic benefit. The Commission can not abdicate review under the Act merely because a state highway department cries "safety", especially when there is substantial record evidence that all legitimate safety concerns have been addressed.

The State has totally failed to explain why construction at the outer edge of a broad right-of-way, using equipment which is never on the traveled roadway, is such a severe hazard that it can only occur once every ten years. Nor has the State rebutted the fact that industry and federal guidelines recognize the minimal risk of such construction, so that, for example, no speed limit reductions are suggested. The March 5, 1999 *ex parte* statement of the U.S. Federal Highway Administration provides no additional substance to this discussion, but only the claim that other states will deny

¹ Opposition of Minnesota Telephone Association, CC Docket 98-1, March 9, 1998, 11-15 (MTA Opposition)

access to freeways if they are not permitted to grant exclusive use to one competitor.² In essence, the State would have the Commission endorse a major barrier to telecommunications competition in order to eliminate any possibility of motorist “rubber necking.” Such a request by the State is totally out of proportion to the far riskier and more intrusive activities that occur frequently in the course of normal highway maintenance.

5. The State cannot “Manage the Public Rights -of- Way” in a Manner that Creates a Barrier to Entry.

The State relies on two district court cases for the proposition that the “competitively neutral” requirement of Section 253(c) applies only to compensation requirements. The implication therefore is that it can discriminate between telecommunications providers so long as its activities can be characterized as “managing” the right-of-way. This view of the law cannot be correct. If the State is correct, Section 253 will become meaningless because nearly all telecommunications facility deployment involves use of rights-of-way. If the Commission rules in favor of the State, it will not be long before every State finds a way to obtain free telecommunications service by granting monopolies disguised as right-of-way management rules. Section 253(c) must be read in the context of Section 253(a) in order that highway managers do not become empowered to create new telecommunications monopolies.

The Commission has recently taken note of the recent Minnesota statute which requires that Minnesota municipalities must manage rights-of-way subject to their jurisdiction in a competitively neutral manner:

...[I]t is in the state’s interest that the use and regulation of public rights-of-way be carried on in a fair, efficient, *competitively neutral*, and substantially uniform manner....

The Commission further noted that in managing and imposing fees for the use of the public rights-of-way, Minnesota law says that a local government may not:

- (1) unlawfully discriminate among telecommunications right-of-way users;
- (2) grant a preference to an telecommunications right-of-way user;
- (3) create or erect any unreasonable requirement for entry to the public rights-of-way by telecommunications right-of-way users;....³

² Letter from Paul Samuel Smith to Magalie Roman Salas, Secretary, March 5, 1999.

³ Petition of US West for a Declaratory Ruling that Roseville, Minnesota Ordinances Inhibit Entry of CMRS Providers in Contravention of the Communications Act, CWD 96-16, DA 99-571, released March 23, 1999; citing Minn. Stats. Sec. 237.163.

This Commission cannot avoid recognizing that the Attorney General of Minnesota is arguing for a federal right to discriminate between competitors in the process of right-of-way management, although the Minnesota legislature has forbidden subdivisions of the state from engaging in the identical practice under comparable circumstances.

6. Exclusive ROW Grants are Not Necessary To Achieve Universal Service Objectives.

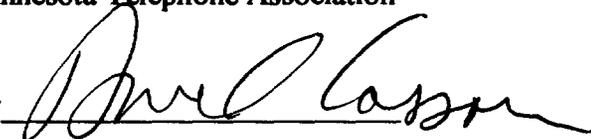
The Federal Highway Administration (FHWA) also makes the claim that without the power to grant exclusive access to right-of-way, states will be “unable to secure the benefits of contemporary telecommunications technology for their less densely-settled areas...” FHWA’s opinions regarding the status of the availability of telecommunications technology in Minnesota is without foundation or merit. FHWA ignores the fact that the record in this case is devoid of any allegations that the members of MTA are not providing “contemporary” technology to subscribers in rural areas of the state. To the contrary, State’s Petition included a map of the extensive fiber deployed in many areas of Minnesota. Not only is the contrary true, but the grant of exclusive access will retard, rather than accelerate the continued evolution of technology and the provision of advanced services as contemplated by Section 706 of the Act.

MTA urges the Commission to act promptly to resolve this matter by rejecting the request for Declaratory Ruling and preempting the Agreement.

Sincerely yours,

Minnesota Telephone Association

By



David Cosson
Kraskin, Lesse & Cosson, LLP
2120 L St. N.W., Suite 520
Washington, D.C. 20037

Richard J. Johnson
Moss & Barnett, P.A.
4800 Norwest Center
90 South Seventh St.
Minneapolis, MN 55402-4129

cc: Claudia Pabo
David Kirshner
All parties