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STATE OF MINNESOTA

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June 16, 1999

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**Re: In the Matter of the Petition of the State of Minnesota for Declaratory Ruling
CC Docket No. 98-1**

Dear Ms. Salas and Ms. Matthey:

This letter is in response to the *ex parte* filing of the Minnesota Telephone Association (MTA) dated April 21, 1999, and the *ex parte* filing of the United States Department of Transportation (USDOT) dated May 21, 1999, as well as to provide further information in response to questions raised by the Commission's staff during meetings with the State of Minnesota representatives in March. The State endorses the comments of the USDOT and urges the Commission to give great consideration to those comments. Not only do those comments confirm the concerns of the State as to safety, they also confirm that the exclusiveness of the contract tends to result in a broader dispersion of fiber facilities to rural areas. As the State has demonstrated, the Agreement is consistent with the Act and will operate to encourage telecommunications competition in Minnesota.

1. The Contractor Has an Obligation to Sell Capacity on a Non-discriminatory Basis. The MTA asserts that under the Agreement "ICS/UCN has no obligation to sell, assign or transfer ownership of fiber" to third parties. As evidence for this remarkable assertion, the MTA cites Sections 7.7(a) and (d) of the Agreement which, directly contrary to MTA's claim, specifically provide that ICS/UCN (Contractor) must offer use of and access to the Network, and collocation of fiber cable to all financially qualified customers. Apparently, the MTA is attempting to draw a distinction between the requirement to offer "use of and access to the Network" as opposed to the actual title to a portion of the Network. This is a distinction without a difference. As the FCC is well aware and has long recognized, capacity on a telecommunications network is often sold on an Indefeasible Right of Use (IRU) basis, meaning that the purchaser has an exclusive right to use but does not obtain legal title to the facilities. By its terms the Agreement provides that ICS/UCN will enter into "User Agreements" under which the third party can acquire "rights of use or access to the Network . . ." and collocating customers can own and operate collocated equipment. *See*, Section 2.74. Thus as the State has repeated time and again, the Developer is obligated to offer use of and access to the Network. That will be done on an IRU basis, and will give all telecommunications providers an opportunity to purchase such capacity on a non-discriminatory basis. Finally, even the MTA acknowledges that the Agreement expressly provides for the sale of dark fiber to third parties.

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In conclusion, the Agreement provides for the ability of third parties to purchase a right of use or access to installed capacity, a right to collocate and own and operate its collocated facilities and a right to purchase dark fiber. This gives service providers a number of options to explore should it choose to take advantage of the Agreement.

2. The Agreement is Not a Legal Requirement Within the Meaning of Section 253.

The MTA characterizes the State's claim that the Agreement is not a legal requirement under Section 253 as "frivolous". Fortunately, name calling is no substitute for thoughtful analysis. The fact is that the MTA has not shown that it is required to do anything under the Agreement, nor has it shown that the Agreement has prohibited or had the effect of prohibiting it from providing **any** service in Minnesota. In fact, the MTA claims that it is currently providing "contemporary" technology to subscribers in rural areas of the state, without use of the freeway ROW. MTA letter at 4. If that is the case, it is an admission by the MTA that the Agreement does not "prohibit" the MTA from providing any telecommunications services. This claim by the MTA reveals the MTA's real concern--not that the Agreement inhibits competition but that it encourages it.

Furthermore, ICS/UCN is not providing a telecommunications service as defined by the Act at Section 153 (51). ICS/UCN is not certificated as a telecommunications carrier or telephone company. It is providing capacity to anyone, including the MTA, on a non-discriminatory basis, so that providers of telecommunications services can purchase capacity to provide those services. Thus the Agreement makes the freeway ROW available to all service providers on a non-discriminatory basis. It enhances the ability of providers of telecommunications service to provide that service. It certainly does not prohibit it.

The cases in which the FCC has preempted state or local requirements involve situations in which the state or local government placed requirements on one competitor that another competitor or an incumbent did not have to comply with, and in which all competitors were providing "telephone service" directly to the public. For example, in Docket 96-11, *In re New England Public Communications Council Petition for Preemption Pursuant to Section 253* the Connecticut Department of Public Utility Control issued a decision that "prohibits all except incumbent local exchange carriers (LECs) and certified LECs, from providing telephone service in the State of Connecticut." The Commission preempted the DPUC Decision, finding: "On its face, the DPU Decision "prohibit[s]" a certain class of telecommunications service providers...from "provid[ing] [an] interstate or intrastate telecommunication service." The Commission pointed out that the Act defines "telephone service" as "the offer of telecommunications for a fee directly to the public, regardless of the facilities used." The Commission found that payphone service was a telecommunications service because "it is the offering of telecommunications for a fee to the public."

Likewise, in FCC Docket 97-1, *In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, the Commission preempted requirements of the State of Wyoming that explicitly prohibited new competing telecommunications carriers from providing service in competition with incumbent LECs. The Commission found that such regulation was not competitively neutral because it favored incumbents over new entrants by imposing requirements on new entrants that incumbents did not have to comply with. Again in that situation, the prohibition in question was placed on one group of telecommunications service providers to the detriment of another group of telecommunications service providers.

Here, in contrast, absolutely no requirements are imposed on any telecommunications service provider. Furthermore, all telecommunication service providers are being treated in a non-discriminatory fashion. ICS/UCN is not a telecommunications service provider, it does not provide any telecommunications service for a fee directly to the public. It deals only with such providers and is required under the contract to deal with all of them, incumbents and new entrants on a non-discriminatory basis. Thus the Agreement is not a legal requirement that is prohibited under the Telecommunications Act and does not govern an entity that is providing telecommunications service as defined by the Act.

3. The Agreement Facilitates Competitive Entry Rather than Being a Barrier to Entry. As stated in #1 above, the Agreement provides service providers with a variety of options for using the freeway ROW. Because ICS/UCN is not a telecommunications service provider, its interest is in selling as much capacity as possible as soon as possible, hardly a barrier to entry. Neither the MTA, nor anyone else has been able to show that a single provider has chosen not to enter the market because it did not have direct access to freeway ROW, as opposed to access under the Agreement. Unlike cases in which the Commission has preempted local authorities, the State of Minnesota has not imposed requirements on new entrants in favor of incumbents through its Agreement with ICS/UCN. All telephone companies, incumbents and new entrants are treated the same.

4. The Exclusivity of the Agreement is Essential to Protecting the Public Safety. The MTA continues to assert that it knows more about highway safety than the state and federal transportation authorities, both of whom concluded that an exclusive agreement with a long term is essential to highway safety. The MTA intimates that the Commission may be tempted to abdicate its duties under the Act because the safety issue is raised. The State of Minnesota has more confidence in the Commission than that. The State knows that the Commission will take into account the expertise of the state and federal highway officials and contrast it with that of a group of telephone companies who have no expertise in, nor stake in, highway safety but who do have an obvious motive to underplay the threat to safety that its position raises.

The Supplemental Filing of the United States Department of Transportation dated May 21, 1999, makes it clear that safety is a legitimate concern when it comes to access to

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highway rights-of-way. As USDOT points out, and as the State has pointed out in the past, the MTA bases its conclusions on the safety issue on observation of one location on the freeway ROW near Alexandria, Minnesota. Kraft Affidavit at 2. Mr. Kraft posits a "typical" freeway ROW in Minnesota as having the control of access line 75 feet from the shoulder on one side of the freeway and 60 feet from the shoulder on the other side. That is simply incorrect. As USDOT points out, the ROW varies greatly along Minnesota freeways. The width of the right-of-way referred to by Mr. Kraft is at least 285 feet wide. MnDOT statistics show that over 53 percent of the interstate highway ROW in Minnesota is less than 320 feet wide. Thus Mr. Kraft's "typical" freeway is far from typical in Minnesota. MnDOT and USDOT have an obligation to make every mile of freeway as safe as possible. They cannot take comfort in the MTA's position that most or some areas will not be affected by construction in the ROW. The issue for them is what actions will help ensure safety throughout the state.

5. The State Must Be Allowed to Manage the Public Rights-of-Way so as to Protect the Public Safety and Welfare. The MTA mischaracterizes the State's position as being that "it can discriminate between telecommunications providers so long as its activities can be characterized as managing the right-of-way." April 21 Letter at 3. It goes on to argue that "the State is arguing for a federal right to discriminate between competitors in the process of right-of-way management." That is not the State's position. Understandably, the MTA finds it easier to refute straw men rather than to address the real arguments of the State.

The State is not arguing that it should be allowed to discriminate between telecommunications competitors. As stated earlier ICS/UCN is not a telecommunications service provider. It is not competing with the MTA or any other carriers. Those who purchase its capacity are competitors with each other and they each have the ability to purchase capacity on the freeway ROW or collocate on the ROW on a competitively neutral basis. The State can and must manage the right-of-way so as to protect the public safety and welfare and do so in a way that is competitively neutral. The Agreement does exactly that. It does not in any way discriminate between telecommunications providers--it gives all such providers a competitively neutral access to the capacity to be installed by ICS/UCN, who is not a telecommunications provider.

Likewise the State has not granted a telecommunication provider a monopoly and therefore ruling in favor of the State does not mean that other states will be able to grant telecommunication provider monopolies. Rather, it means that other states could enter into a contract with **someone other than a telecommunication provider** to build capacity on freeway ROW where no telecommunications facilities are presently located and to make that capacity available on a competitively neutral basis to all telecommunications services providers.

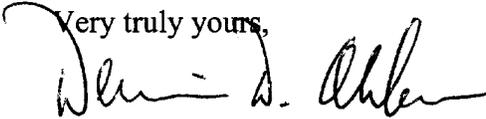
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In contrast, the MTA's position would write out of the Act the clear language and intent of Congress that state authority to manage the public rights-of-way be preserved. Congress made it abundantly clear that that was not its intent.

6. The Agreement Enhances the Achievement of Universal Service Objectives. The MTA implies that it is meeting all of the telephone technology needs of rural areas in Minnesota and therefore the Agreement is not needed to achieve universal service objectives in rural areas of the State. First, MTA's position is inconsistent with its position in this case. If, as it claims, the MTA is already providing up-to-date technology including fiber to all areas of the state, it has no need for the freeway ROW. In fact, its opposition to the State in this case is not that the Agreement is anti-competitive but rather that it might actually bring some competition to areas of the state where the MTA presently has a monopoly. Second, the MTA is careful not to state that it is providing contemporary technology to **all** rural areas of the state, only that many or some rural areas are so served. Finally, rather than affirmatively stating that it does provide up-to-date telecommunications technology to all rural areas in the State, it makes the weakly ambiguous argument 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." Again, if the MTA is already providing the full range of telecommunication services statewide, it obviously doesn't need the freeway ROW; however, if it needs to use the freeway ROW, then its ability to purchase capacity on the freeway ROW on the same terms and conditions as its competitors cannot be viewed as anticompetitive.

As pointed out by the USDOT, "states that seek to expand the benefits of ITS and other contemporary telecommunications technologies to rural areas are usually more successful if they control access to the right-of-way to individual telecommunications providers in some fashion rather than if they allow unencumbered access by multiple providers." DOT Supplemental Filing at 1-2.

The State of Minnesota urges the Commission to resolve this matter by ruling that the Agreement does not violate Section 253 of the Act and ruling that there has been no showing that any telecommunications provider has been prohibited from providing any telecommunications service in Minnesota due to the Agreement.

Very truly yours,

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cc: All Parties of Record
AG:97935, v. 1

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