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July 22, 1999

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

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

Dear Ms. Salas:

The Minnesota Telephone Association ("MTA") provides for the record its comments on:

- 1) the May 4, 1999 decision of the District Court for Ramsey County, Minnesota;
- 2) the Supplemental Filing of the United States Department of Transportation ("US DOT") submitted May 21, 1999; and
- 3) the ex parte filing of the State of Minnesota, dated June 16, 1999.

**The Minnesota District Court Decision.**

The case of *Minnesota Equal Access Network Systems, Inc. ("MEANS") et al. v. State of Minnesota, et al.*, Court File No. C8-98-5736 was initiated by MEANS and MTA to determine the authority of the State under Minnesota law to enter the Agreement which is also the subject of the Commission's proceeding in CC Docket No. 98-1. The case was based entirely on Minnesota law and raised no issues under the federal Communications Act in general or Section 253 in particular. The Minnesota Court concluded that the state's grant of access to freeway rights-of-way ("Freeway ROWs") to ICS/UCN for installation of fiber optic cable does not violate Minnesota statutes or rules.<sup>1</sup>

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<sup>1</sup> The District Court Decision is being appealed to the Minnesota Court of Appeals.

However, the Court's Findings of Fact do recognize the competitive advantage of exclusive use of the Freeway ROWs. For example, finding No. 48 states:

... Freeway ROWs are a prized route by private companies because of their advantages. They directly connect major population areas and are relatively easy to maintain.

(Emphasis added.) The Court's Memorandum further states:

... Access to these [Freeway] rights of way is sought after because the Freeways directly connect major population areas, are secure, and allow the conduit owner easy maintenance.

The Court's Findings of Fact also recognize that the purpose and effect of the Agreement is to leverage the advantages of exclusive use of the Freeway ROWs in order to obtain an economic benefit for the State. Findings 18, 19 and 20 recognize that the express purpose of the project and the Request for Proposals ("RFP") was to trade exclusive access to the Freeway ROWs for "free" access to the Network.<sup>2</sup> Finding 23 notes that "Exclusive access to the Freeway has been the incentive offered by the state from the inception of the project."

The Court's Findings also confirm that the Agreement resulting from the RFP provides the incentive intended by the State. Finding 36 reads:

In return for the telecommunications services and facilities from ICS, the State agreed to grant ICS exclusive access to approximately 1000 miles of Freeway for installation of its fiber optic network as well as the fiber optic cable of anyone else wishing to use the Freeway ROW.<sup>3</sup>

While the Minnesota Court concluded that a barter of exclusive use of the ROW for economic advantage to the State was not unlawful discrimination under State law,<sup>4</sup>

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<sup>2</sup> The RFP expresses MnDOT's intent to offer exclusive access to the interstate ROWs for installation of a private commercial fiber optic network in exchange for "free" access to the Network by both MnDOT and other State Agencies. Decision, Finding 18. See also, Findings 37 and 38.

<sup>3</sup> The concluding phrase in this quote "as well as anyone else" clearly refers to the fact that the Agreement grants collocation rights to other parties who are willing to have their fiber installed at the time ICS/ICN constructs its facility. In turn, this Finding is apparently referenced in the Court's Conclusion 4 which states: "The Agreement does not preclude consideration of applications of other fiber optic providers for access to the Freeway . . . ." The Court's repeated, and correct, Findings that the Agreement is exclusive demonstrate that this conclusion refers to the Agreement's collocation provisions. See, e.g., Finding 47. MTA has previously stated its reasons why those provisions do not cure the barrier to entry violation of the Agreement.

<sup>4</sup> See, Decision, Conclusion 8.

such a barter is directly at odds with both the letter and intent of Sections 253(a) and (c) of the Communications Act.

Further, there is no indication in the Minnesota Court's decision that the exclusivity granted to ICS was needed to protect the safety of the traveling public. To the contrary, Finding 6 notes that the American Association of State Highway Transportation Officials ("AASHTO") approved installation of fiber optics on interstate ROWs because of significantly reduced safety concerns. In Finding 53 the Court concluded that the AASHTO resolution supporting the Agreement was adopted because of the:

profound nationwide impact that it will have on state transportation departments' ability to develop and finance intelligent transportation systems through innovative public-private shared resources agreements.

This finding supports MTA's argument that the purpose of the Agreement is to create monopoly rents to be shared between the State and ICS/UCN at the expense of open competition. The Minnesota Court concluded that purpose did not violate state law, but that conclusion does nothing to make the Agreement consistent with Section 253.

#### **The Supplemental Filing By US DOT.**

The US DOT Filing shows:

1. That the primary effect and rationale of exclusive access arrangements are to maximize the economic benefit to the State DOTs, and that intelligent transportation systems ("ITS") and other shared resource projects can be successfully implemented without imposing exclusive installation; and
2. That categorical exclusion of further fiber installations in Freeway ROWs is not necessary to assure public safety.

The Access Report attached to the US DOT filing demonstrates that the overriding effect and purpose for State DOTs to grant exclusive installation rights to Freeway ROWs is to increase the economic benefits and compensation that the States receive from use of the ROWs.<sup>5</sup> While US DOT argues that the Commission should support this result, there are three fundamental flaws in this argument.

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<sup>5</sup> The Access Report reads in part:

[I]t appears that state agencies are able to better leverage ROW assets to achieve public sector social and telecommunications objectives when ROW access is constrained.

(At page 19.)

The Access Report concludes:

[A]gencies that restrict direct physical access to ROW and/or restrict the window of opportunity for project approval may be more successful in leveraging ROW

First, maximizing a State's economic return from allowing use of its ROWs is not a goal of the Act, much less a justification for imposing competitive barriers to installation of competitive facilities. Rather, Section 253(c) imposes explicit restrictions on regulation of ROWs.

Second, maximizing such returns may in and of itself violate the requirement that compensation be "fair and reasonable." In *Bell Atlantic-Maryland, Inc. v. Prince Georges's County*, 1999 WL 343646 (D. Md., 1999), *appeal pending*, the Court found that a county ROW ordinance that imposed a fee based on 3% of all revenues received from providing telecommunications service in the county violated the Act. After rejecting the 3% fee, the Court went on to say:

There is a more fundamental error, however, in the manner in which the County has calculated its franchise fee. *The appropriate benchmark is not the "value" of Bell Atlantic's "privilege" of using the County's public rights-of-way to provide telecommunications services in Prince George's County. Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that Bell Atlantic actually uses.*

*Id.* at p. 11 (Emphasis added). The Court further stated that regulation of ROWs must be limited to the types of activities described by the Commission in *TCI Cablevision* and *Classic Telephone*. The Court's conclusion is consistent with the position previously argued by MTA.

Similarly, in *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 582 (N.D. Tex. 1998), the U.S. District Court concluded that the attempt by the City of Dallas to force AT&T to obtain a franchise to provide AT&T Digital Link (ADL) service within the city. The Court specifically rejected the city's claim that it could impose conditions on a carrier that were unrelated to the use of the ROW. The Court said in part:

Many of Dallas's franchise requirements -- such as ... *the dedication of ducts and fiber optic strands to the City's exclusive use* -- ... are totally unrelated to use of the City's rights-of-way, and are thus beyond the scope of the City's authority.

*Id.* at p.593 (Emphasis added.) Maximizing a state's return from use of ROWs not only provides no justification for setting up competitive barriers, but also may in and of itself violate the requirements of the Act.

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assets to obtain statewide deployment of technologically advanced telecommunications infrastructure that will enhance universal service and support transportation management needs.

(At page 21.)

Third, the Act rests on the premise that market forces will best serve the development of telephone competition and that states should not be allowed to manipulate use of ROWs. As the Court said in *Bell Atlantic*:

It was Congress's intention that market competition, rather than state or local regulations, would primarily determine which companies would provide the telecommunications services demanded by consumers.

*Id.* at p. 6.

In contrast, US DOT's argument implicitly rests on the premise that manipulation of the opportunities to use Freeway ROWs by State DOTs is an appropriate means by which to encourage competition and deployment of facilities in rural areas. Further, State DOTs have no role under either the Act or under the laws of most States (including Minnesota) to set telecommunication policy. There is certainly no indication under the Act that State DOTs should become yet another layer of governmental telecommunications regulation or policy setting. *In re TCI Cablevision of Oakland County, Inc.* 12 FCC Rcd. 21396 (FCC 1997).

The Access Report also confirms that exclusive usage policies are unnecessary to implementation of ITS or other shared resource projects. Of the nine projects studied, only three contained categorical exclusive installation rights, one of which (Missouri) predated passage of the Act.<sup>6</sup> Another of the three (Virginia) is under negotiation and has not been finalized.<sup>7</sup> Two of the projects allow unrestricted access to Freeway ROWs.<sup>8</sup>

The US DOT filing also relies on over-broad data which aggregates all accidents resulting from all types of road construction, road repair and other construction activities.<sup>9</sup> Fiber optic installation in Freeway ROWs was approved by AASHTO; however, because it was unlike road construction and unlike other types of utility installations and could usually be located so that there was no activity on the traveled road surface. Data developed by the National Cooperative Highway Research Program of the Transportation Research Board of the National Research Council ("NCHRP") confirms that the risks resulting from construction vary dramatically based on both the type of construction and the location of construction in relationship to the traveled road surface.<sup>10</sup> The NCHRP concludes that construction activities off the traveled road

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<sup>6</sup> Supplemental Filing of US DOT, Attachment 1, p. 19.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at p. 20.

<sup>9</sup> Supplemental Filing of US DOT at p. 3, and Attachment 2.

<sup>10</sup> See, Table 10 to NCHRP Research Results Digest September 1996, Number 192 attached to MTA filing dated December 22, 1998.

surface do not even merit a reduction in speed limits within the construction area.<sup>11</sup> The NCHRP has also concluded that utility activities installations have little or no effect on motorists.<sup>12</sup>

US DOT has access to extensive traffic safety data. The fact that US DOT has presented no data relating to utility or fiber installations occurring off of the roadway surface strongly suggests that such data would not support US DOT's position

US DOT also seems to recognize that fiber installations at the edge of wide Freeway ROWs do not pose significant risks.<sup>13</sup> US DOT suggests that many Freeway ROWs will not allow such installations, indicating that the Minnesota DOT has said that less than 50% of its Freeway ROWs are wide enough to allow construction activities to occur off of the road surface.<sup>14</sup> On the contrary, the Minnesota DOT merely says that less than 53% of its Freeway ROWs are 320 feet wide.<sup>15</sup>

Even in areas where Freeway ROWS are narrower, there are readily available alternatives that limit activity in the ROWs without imposing competitive barriers to installation of competing fiber facilities. These alternatives include installation of multiple conduit systems, such as the system that MnDOT previously required AT&T to install in 1990<sup>16</sup>, and that have also been installed in several other states cited in the US

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<sup>11</sup> "Procedure for Determining Work Zone Speed Limits," *Research Results Digest*, National Cooperative Highway Research Program, September 1996, p. 26, (attached to December 23, 1998 MTA filing states in part:

Work zone speed limit reductions should be avoided whenever possible, particularly in work zones where all work activities are located in shoulder or roadside areas . . . .

<sup>12</sup> *Id.* See also p.31.(Generally recommending no speed limit reduction if construction occurs more than 10 feet from the traveled road surface.)

<sup>13</sup> US DOT says:

Although it is true that this risk is small in some conditions or for some segments of these projects, the fact remains that there will almost certainly be more accidents.

At p. 5.

<sup>14</sup> *Id.* at p. 3.

<sup>15</sup> June 16, 1999 Letter to Magalie Roman Salas and Carol E. Matthey from State of Minnesota, at p. 4.

<sup>16</sup> See, copy of Innerduct Placement Agreement between State of Minnesota and AT&T Communications of the Midwest, Inc. attached which required an 4 duct innerduct system in approximately 75 miles of freeway ROW between St Cloud, Minnesota and Plymouth, a Minneapolis suburb.

DOT Access Report.<sup>17</sup> Competitively neutral administration of those systems is also feasible, as demonstrated by the Empire City Subway system.<sup>18</sup>

In addition, a number of states have adopted policies allowing multiple installations of fiber facilities in Freeway ROWs, including Iowa, Wisconsin,<sup>19</sup> Oklahoma, Arkansas, Illinois, Kansas and Texas. These policies could be adopted only after review by US DOT to assure that safety would be preserved. Similarly, although Minnesota DOT now asserts that exclusive installation rights are needed to preserve Freeway safety, it adopted a policy for Freeway use in 1990 that US DOT reviewed and that did not require exclusive installations. Further, in 1991, Minnesota DOT sought legislation allowing it to impose fees for allowing fiber installations in Freeway ROWs.<sup>20</sup>

Thus neither US DOT nor Minnesota have established any basis by which the Commission could conclude that either, safety requires the long term exclusion of other fiber installations or that the Commission must subjugate its Communications Act obligations to their unsupported claims.

US DOT suggests that if State DOTs are not allowed unfettered discretion to limit access as they see fit, they “may revert to an outright ban” on access.<sup>21</sup> The threat of an unreasonable response from the States should not influence the Commission’s enforcement of Section 253. If State DOTs choose to forego installation of ITS systems rather than make such readily available, completely safe accommodations to competition, the fault is not with the Commission or with Section 253. Accordingly, the threat of unreasonable State reaction to enforcement of the Act should be ignored.

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<sup>17</sup> See, US DOT, Attachment 1, Table 1 which shows that Arkansas, Colorado, Kansas, and Oklahoma projects involve significant amounts of conduit to be installed.

<sup>18</sup> See, March 24, 1999 Letter to Magalie Roman Salas from Dee May, Bell Atlantic

<sup>19</sup> Attached to this letter are excerpts from the State Highway Maintenance Manual issued by the Wisconsin Bureau of Highway Operations. The Wisconsin policy sets forth specific requirements for construction of communications facilities on the longitudinal axis of Freeway ROW, but does not limit the number of entities who may construct such facilities.

<sup>20</sup> In 1991, Senate File 528 was introduced to amend Minn. Stat. §161.45 to both override Rules 8830.3300 and to charge compensation for allowing fiber optic installations in Freeway ROWs. The legislation failed to pass because of opposition to allowing MnDOT to impose fees for ROW use.

<sup>21</sup> Supplemental Filing of US DOT, p. 2.

## The Minnesota Ex Parte Filing

The State of Minnesota's latest ex parte submission contains primarily a repetition of its prior arguments that do no merit any further reply.<sup>22</sup> Two points should, however, be clarified.

First, the State of Minnesota asserts that ICS/UCN is obligated to allow users to obtain an "Indefeasible Right of Use." While this is an interesting assertion, it is reflected nowhere in the voluminous Agreement between the State and ICS/UCN. The only mention of sale of fiber is an ability of the State to prevent such a sale, which is effective if ICS/UCN chooses to make such a sale.<sup>23</sup> The assertion of the State's attorney is no substitute for the absence of any contractual obligation on ICS/UCN.

Second, the State quarrels with MTA's assertions that the photographs of ROW previously provided are "typical" of the Freeway ROW in Minnesota. However, the State confirms MTA's point. The State notes that MTA's discussion of typical rural Freeway ROW indicates that such a Freeway ROW would be "at least 285 feet wide." The State then points out that "53 per cent of the interstate highway ROW in Minnesota is less than 320 feet wide."<sup>24</sup> This necessarily means that 47% (100% - 53%) is over 320 feet wide, wider even than MTA's photograph indicates. Further, based on data attached to the State's Reply Comments, 32% (356 miles of 1106 total miles) of the interstate mileage (in Phases 1 and Optional Phase 1) is in the Minneapolis/St. Paul metropolitan

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<sup>22</sup> For example, the State repeats its arguments that the Agreement is not a "legal requirement." State Filing, p 2. However, the Commission's decision in In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, CCB Pol 96-26, MEMORANDUM OPINION AND ORDER, Released: July 17, 1997, 12 FCC Rcd. 14191 establishes that a "contract" can be a "legal requirement" reading in part:

"[T]he City's contracting conduct would implicate Section 253(a) . . . if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the central business district. In other words, the City's contracting conduct would have to actually prohibit or effectively prohibit the ability of a payphone service provider . . ."  
(Emphasis added.) Id. at 14209, ¶ 38.

(See also, Opposition of MTA dated March 9, 1998, discussion at pp. 11-15. The State also argues that the Act does not apply because ICS/UCN does not provide service directly to the public. Prior decisions of the Commission show that carriers such as ICS/UCN are not exempt. (See, Opposition of MTA dated March 9, 1998 discussion at pp.15-19)

<sup>23</sup> See, MTA filing dated April 21, 1999 at pp. 1-2

<sup>24</sup> June 16, 1999 State Filing at p. 4.

area.<sup>25</sup> where narrower ROW is expected (and where a multiple conduit system would be most appropriate). Accordingly, of the 68% (100% - 32%) of Freeway mileage in rural areas, over 2/3 (47%/68%) is wider than shown in MTA's photograph. MTA's assertion that the photographed segment is typical is confirmed by the State.

The MTA appreciates the opportunity to submit these additional comments.

Respectfully Submitted,

MINNESOTA TELEPHONE ASSOCIATION

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cc: Carol E. Matthey w/attachments  
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<sup>25</sup> See Affidavit of Bhimani, ¶ 5, attached to MnDOT's Reply Comments of the State of Minnesota to Opposition to Request for Declaratory Judgment and Opposition to Request of the Minnesota Telephone Association, et al. for Preemption, stating that in Phase 1 there are 226 urban Freeway miles and another 130 optional urban miles, and 590 rural Freeway miles in Phase 1 and another 160 optional rural miles. Urban mileage is  $356 = 226 + 130$ ; rural mileage is  $750 = 590 + 160$ ; total mileage is  $1106 = 356 \text{ urban} + 750 \text{ rural}$ .

Effective: August 1, 1997	96.00 Utility Accommodation
Supersedes: April 1, 1995	96.30 Freeways
By: Director, Bureau of Highway Operations	
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### **A. General Policy**

Longitudinal installations on freeway right-of-way shall be limited to communications facilities only. The installation of cellular antennas and its associated equipment shall be defined as a longitudinal occupation. Other types of utility facilities may be allowed to longitudinally occupy freeway right-of-way, but only under certain circumstances. See policy 96.31(C) for details.

On highways which are not presently constructed as freeways but the right-of-way has been acquired for the construction of such a facility, the requirements for utility installations shall be the same as for freeways.

Utility facilities may be limited to underground installations, except as provided for crossings or special cases.

Longitudinal utility installations on freeways may be charged a fee for the right to occupy. The Department may also opt for access to communications or other types of services, or a combination of fees and services. If this is warranted, agreements shall be negotiated with each company on a case by case basis, and are aimed at providing mutual benefits to all parties involved.

### **B. Transmission Facilities**

Transmission type utility facilities may be permitted to longitudinally occupy freeways in special cases.

### **C. Distribution Facilities**

Distribution type utility facilities shall not be permitted to longitudinally occupy freeways.

### **D. Service Connections**

Service connections shall not be permitted from transmission or distribution type facilities. Service connections shall not be permitted to cross a freeway.

**Effective:** August 1, 1997

96.00 Utility Accommodation

**Supersedes:** April 1, 1995

96.30 Freeways

96.31 New Installations

**By:** Director, Bureau of Highway Operations

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## **A. General Policy**

Longitudinal installations on freeway right-of-way shall be limited to communications facilities only. This includes the installation of cellular antennas and associated equipment.

Other utilities shall not be installed longitudinally within the access control lines of any freeway. However, in special cases (see section C), such installations may be permitted under strictly controlled conditions.

## **B. Longitudinal Requirements**

A utility may be charged a fee or provide the Department with communication services for the right to locate its communication facilities longitudinally on freeway right-of-way. When fees or services are warranted, an agreement between the utility and the Department shall be negotiated to determine these and other specific requirements of the installation (e.g. co-location between utility companies) prior to the issuance of a permit. Any fee or services package agreed to by the Department and utilities for freeway occupation is not part of the compensable/non-compensable policy regarding utility relocation. Utilities may receive a prorated share of any initial fee payment if the Department requires the utility to move its facility off of freeway right-of-way for a highway improvement project.

Due to the Department's concerns regarding longitudinal freeway installations with respect to safety, aesthetics, multiple installations through the same corridor, and the proliferation of cellular antennas, special provisions may be warranted for each utility installation. This includes, but is not limited to, requiring:

- 1) Utilities to resolve co-location issues with each other before permits are issued.
- 2) Access restrictions to a site during construction and maintenance of the facility.
- 3) A full-time inspector representing the Department paid for by the utility.
- 4) A full-time traffic control provider.
- 5) Installation of a duct (conduit) system and/or placement of its facility within a duct.
- 6) Replacement of damaged or destroyed trees/vegetation or transplanting trees that can be saved at the discretion of the Department. See policies 96.50(G) and 96.54(B) for additional requirements.

Effective: March 1, 1992

96.00 Utility Accommodation

96.30 Freeways

Supersedes: Initial Issue

96.32 Freeway Crossings

By: Director, Bureau of Highway Operations

Page 1 of 2

### A. General Policy

New utility installations and adjustments or relocations of existing utilities may be permitted to cross a freeway.

Where a utility follows a crossroad or street which is carried over or under a freeway, provision shall be made for the utility to cross the freeway on the location of the crossroad or street in such manner that the utility can be constructed and/or serviced without access from the freeway traffic lanes or ramps.

### B. Overhead Utility Crossings

Overhead utility lines crossing a freeway shall be adjusted so that supporting structures are located outside of the access control lines. In no case shall the supporting poles be placed within the clear zone. Where required, intermediate supporting poles may be placed in medians of sufficient width to provide the clear zone from the edges of both traveled ways provided the conditions of policy 96.35 are also met.

If additional lanes are planned, the clear zone shall be determined from the ultimate edges of the traveled way.

When right-of-way lines and access control lines are not the same (e.g. when frontage roads are provided) supporting poles may be located in the area between them.

At interchange areas, supports for overhead utilities shall be permitted only when all of the following conditions are met:

1. The appropriate clear zone is provided with respect to freeway traffic lanes,
2. The appropriate clear zone from edge of ramp is provided,
3. Essential sight distance is not impaired, and
4. The conditions of policy 96.35 are satisfied.

**C. Underground Utility Crossings**

Manholes and other points of access to underground utilities may be permitted within a freeway only when they are located beyond the clear zone of the freeway traffic lanes or ramps provided the conditions of policy 96.35 are satisfied. If additional lanes are planned, the clear zone shall be determined from the ultimate edges of the traveled way.

**D. Irrigation Ditches and Water Canals**

Irrigation ditches and water canals should be excluded from freeways. When a crossing is absolutely necessary, it may be made by underground siphon or through culverts or bridges as appropriate to the size of canal, topographic conditions, and highway safety aspects. Locations and structures are to be designed in the same manner as are facilities for natural transverse drainage.

All access and egress for servicing or patrolling such facilities shall be from outside the access control lines. Special ditch cleaning equipment may be allowed to cross the freeway in those cases where significant travel distance would otherwise be required to utilize grade separation structures provided a permit containing traffic control arrangements is first obtained from the department.

**Effective:** March 1, 1992**96.00 Utility Accommodation****96.30 Freeways****Supersedes:** Initial Issue**96.33 Existing Utilities****By: Director, Bureau of Highway Operations****Page 1 of 1**

When a utility already exists within the right-of-way of a proposed freeway and it can be serviced, maintained and operated without access from the freeway traffic lanes or ramps, it may remain as long as it does not adversely affect the safety, design, construction, operation, maintenance, or stability of the freeway. Otherwise, it shall be relocated.

**C. Occupation for Special Cases**

The Department recognizes that a utility may need to longitudinally occupy freeway right-of-way in special or hardship situations. When longitudinal facility installations other than communications are requested, the utility shall show to the Department's satisfaction:

1. That alternate locations are not available or cannot be implemented at reasonable cost from the standpoint of providing efficient utility services in a manner conducive to safety, durability, and economy of maintenance and operations.
2. That the accommodation will not adversely affect highway and traffic safety, and the design, construction, operation, maintenance, or stability of the freeway
3. That it will not interfere with or impair the present use or future expansion of the freeway.
4. That disapproval of the use of freeway right-of-way would result in a loss of productive agricultural land, or loss of productivity of agricultural land. In this case, the utility must provide information on the direct and indirect environmental and economic effects of such loss. These effects will be evaluated and considered by the Department.
5. That the accommodation satisfies the conditions of policy 96.35.
6. That the facility will be located at or as near as practical to the right-of-way line and in no case within the clear zone.

Utilities shall not be allowed to be installed longitudinally within the median area.

A fee may be charged to a utility for longitudinal occupation, especially if the distance to be covered is over one mile.

<b>Effective:</b> March 1, 1992	96.00 Utility Accommodation
<b>Supersedes:</b> Initial Issue	96.30 Freeways
	96.34 Vehicular Tunnels
<b>By:</b> Director, Bureau of Highway Operations	<b>Page 1 of 1</b>

Utilities shall not be permitted to occupy vehicular tunnels on freeways on new location except in extreme cases. Under no circumstances, however, shall a utility which transports a hazardous material be allowed to occupy a vehicular tunnel.

When a utility occupies space in an existing vehicular tunnel that is converted to a freeway, relocation of the utility may not be required. Utilities which have not previously occupied an existing vehicular tunnel that is incorporated in a freeway will not be permitted therein except in extreme cases.

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**Effective:** August 1, 1997

96.00 Utility Accommodation

96.30 Freeways

**Supersedes:** April 1, 199596.35 Utility Access

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**By:** Director, Bureau of Highway OperationsPage 1 of 2

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## A. General Policy

When permitted by the Department, access for constructing or servicing a utility along or across a freeway shall be limited to:

1. Frontage roads where provided.
2. Gates where permitted.
3. Nearby or adjacent public roads and streets.
4. Trails along or near the right-of-way line which connects only to an intersecting road.

When a gate is allowed, provisions to guard against unauthorized use shall be required.

Entry to the median area should be restricted to nearby grade separation structures, stream channel crossings, or other suitable locations not involving direct access from the freeway traffic lanes or ramps.

The utility shall indicate in its permit application the anticipated maintenance procedures for the proposed installation.

## B. Special Cases: Access from Freeway Lanes/Ramps

When existing utility supports, manholes, or other appurtenances are located in medians, interchange areas, or otherwise inaccessible portions of the freeway, access to them from the freeway traffic lanes or ramps may be permitted. A freeway lane closure may also be allowed to facilitate access provided the utility has an approved traffic control plan from the Department. Access would only be allowed in special cases and only by permits issued to the utility specifying the conditions that will ensure both motorist and worker safety.

## C. Security Fence

The Department's security fence shall not be opened unless otherwise stated in a utility's permit. If the fence is damaged, the utility shall repair or replace the fence before concluding its work operations at the end of the day.

**C. Security Fence (continued)**

If the existing security fence must be opened to facilitate the utility operation, it shall be disassembled and, upon completion of the permitted work, reinstalled in its original location to a uniform profile. All fencing material, with the exception of the posts, may be reused. New posts shall be supplied by the utility. Any fencing material damaged during removal or reinstallation shall be replaced with new material.

During utility construction, the security of the freeway shall be maintained at all times by the installation of a temporary fence. The temporary fence shall be placed between the freeway and the actual work area.

A utility may request to disassemble a portion of the security fence and install a temporary or permanent gate (or gates) in its location. The gate(s) should match the profile of the adjacent security fence. Wood posts may be substituted for the metal posts supporting the gate(s). Any fencing material damaged with the installation of the gate(s) shall be replaced with new material. The gates and any other fencing material shall be supplied by the utility at its own expense.

The gate(s) shall be locked whenever the site is unattended by the utility. The utility shall provide at least two keys per lock to the Department's district chief maintenance engineer.

All work performed and the fencing and gate materials supplied shall conform with the Department's specifications.

**Effective: August 1, 1997****96.00 Utility Accommodation****96.40 Expressways****Supersedes: April 1, 1995****By: Director, Bureau of Highway Operations****Page 1 of 1****A. General Policy**

Transmission and distribution type utility facilities may be permitted to longitudinally occupy expressways. Service connections to utility customers may be permitted from these facilities if feasible alternatives are not available. For example, a feasible alternative would allow access to a facility from a frontage road. The installation of cellular antennas and its associated equipment shall be defined as a longitudinal occupation.

Longitudinal utility installations on expressways may be charged a fee for the right to occupy. The Department may also opt for access to communications or other types of services, or a combination of fees and services. If this is warranted, agreements shall be negotiated with each company on a case by case basis, and are aimed at providing mutual benefits to all parties involved.

**B. Future Expressways**

On highways which are not presently constructed as expressways but the right-of-way has been acquired for the construction of such a facility, the requirements for utility installations shall be the same as for expressways.

<b>Effective:</b> August 1, 1997	96.00 Utility Accommodation
<b>Supersedes:</b> April 1, 1995	96.40 Expressways
	96.41 New Installations

By: Director, Bureau of Highway Operations Page 1 of 1

## A. General Policy

When permitted, longitudinal installations shall be located at or as near as practical to the right-of-way line. Facilities located on private easements may be allowed to overhang the right-of-way in most cases, however, a permit shall be required from the department. Below ground installations should not be within the clear zone. Above ground installations shall not be within the clear zone.

Utilities shall not be allowed to be installed longitudinally within the median area.

## B. Longitudinal Requirements

A utility may be charged a fee or provide the Department with communication services for the right to locate its communication facilities longitudinally on expressway right-of-way. When fees or services are warranted, an agreement between the utility and the Department shall be negotiated to determine these and other specific requirements of the installation (e.g. co-location between utility companies) prior to the issuance of a permit. Any fee or services package agreed to by the Department and utilities for expressway occupation is not part of the compensable/non-compensable policy regarding utility relocation. Utilities may receive a prorated share of any initial fee payment if the Department requires the utility to move its facility off of expressway right-of-way for a highway improvement project.

Due to the Department's concerns regarding longitudinal expressway installations with respect to safety, aesthetics, multiple installations through the same corridor, and the proliferation of cellular antennas, special provisions may be warranted for each utility installation. This includes, but is not limited to, requiring:

- 1) Utilities to resolve co-location issues with each other before permits are issued.
- 2) Access restrictions to a site during construction and maintenance of the facility.
- 3) A full-time inspector representing the Department paid for by the utility.
- 4) A full-time traffic control provider.
- 5) Installation a duct (conduit) system and/or placement of its facility within a duct.
- 6) Replacement of damaged or destroyed trees/vegetation or transplanting trees that can be saved at the discretion of the Department. See policies 96.50(G) and 96.54(B) for additional requirements.

**Effective: March 1, 1992****96.00 Utility Accommodation****96.40 Expressways****Supersedes: Initial Issue****96.42 Expressway Crossings****By: Director, Bureau of Highway Operations****Page 1 of 1**

## **A. General Policy**

New utility installations and adjustments or relocations of existing utilities shall be permitted to cross an expressway.

## **B. Overhead Utility Crossings**

Overhead utility lines crossing an expressway shall be adjusted so that supporting structures are located outside of the clear zone. Where required, intermediate supporting poles may be placed in medians of sufficient width to provide the clear zone from the edges of both traveled ways.

If additional lanes are planned, the clear zone shall be determined from the ultimate edges of the traveled way.

When right-of-way lines and access control lines are not the same (e.g. when frontage roads are provided) supporting poles may be located in the area between them.

At interchange areas, supports for overhead utilities shall be permitted only where all of the following conditions are met:

1. The appropriate clear zone is provided with respect to expressway traffic lanes,
2. The appropriate clear zone from edge of ramp is provided, and
3. Essential sight distance is not impaired.

## **C. Underground Utility Crossings**

Manholes and other points of access to underground utilities may be permitted within an expressway only when they are located beyond the clear zone of the expressway traffic lanes or ramps. If additional lanes are planned, the clear zone shall be determined from the ultimate edges of the traveled way.

**Effective:** March 1, 1992

96.00 Utility Accommodation

96.40 Expressways

**Supersedes:** Initial Issue

96.43 Existing Utilities

**By:** Director, Bureau of Highway Operations**Page 1 of 1**

When a utility exists within the right-of-way of a proposed expressway, it may remain as long as it does not adversely affect the safety of the expressway, based on sound engineering judgment and economic considerations. Otherwise, it shall be relocated.

**Effective: March 1, 1992****96.00 Utility Accommodation****96.40 Expressways****Supersedes: Initial Issue****96.44 Vehicular Tunnels****By: Director, Bureau of Highway Operations****Page 1 of 1**

Utilities shall not be permitted to occupy vehicular tunnels on expressways on new location except in extreme cases. Under no circumstances, however, shall a utility which transports a hazardous material be allowed to occupy a vehicular tunnel.

When a utility occupies space in an existing vehicular tunnel that is converted to an expressway, relocation of the utility may not be required. Utilities which have not previously occupied an existing vehicular tunnel that is incorporated in an expressway shall not be permitted therein except in extreme cases.

S.P. 2780, 7380 & 8680 (I94=392)  
S.P. 2785 (I494=393)  
Hennepin, Stearns & Wright Counties  
Agreement No. 67277

IN TESTIMONY WHEREOF, the Company has caused these presents to be executed in its corporate name by its District Manager  
C.A. Harris President, and its \_\_\_\_\_  
\_\_\_\_\_, and its corporate seal to be hereunto affixed, and the state has caused these present to be executed by its duly authorized officers.

*C.A. Harris*

By C.A. Harris  
Its District Manager President

*Bonnie C Phillips*  
Notary Public, Douglas County, Georgia  
My Commission Expires Jan. 26, 1993

And \_\_\_\_\_  
Its \_\_\_\_\_

STATE OF Georgia )  
COUNTY OF Fulton ) ss

On this 17<sup>th</sup> day of July 17, 1990, before me, a Notary Public within and for said County, personally appeared C.A. Harris and \_\_\_\_\_, to me personally known, who being each by me duly sworn did say that they are respectively the District Manager President and the \_\_\_\_\_ of the corporation named in the foregoing instrument and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Assistant Secretaries said \_\_\_\_\_ and \_\_\_\_\_  
I acknowledged said instrument to be the free act and deed of said corporation. (See attached)

CERTIFICATE

I, Edward E. Blythe, Assistant Secretary of American Telephone and Telegraph Company, a New York Corporation (the "Company") DO HEREBY CERTIFY that the Board of Directors at a meeting, duly called and held, adopted a Schedule of Authorizations effective June 21, 1989 which, as amended, provides in relevant part as follows with respect to the execution of documents:

"Management employees, if it is a specified part of their job, shall have authority to execute with the concurrence of the Law Department, on behalf of and in the name of the appropriate AT&T entity covered by this Schedule, deeds, contracts, leases, assignments, releases, powers of attorney and other instruments."

I FURTHER CERTIFY that C. A. Harris is a management employee, having the title District Manager of Outside Plant Engineering for whom it is a specified part of his job to execute documents relating to the Plymouth-St. Cloud, Minnesota fiber optic cable route.

I FURTHER CERTIFY that the aforesaid C. A. Harris is authorized to execute the necessary documentation and commit AT&T Communications of the Midwest, Inc., through the Company, with respect to the attached Innerducts Placement Agreement and that all necessary corporate approvals have been obtained in relationship thereto.

IN WITNESS WHEREOF, I have set my hand this 16th day of July, 1990.

  
Assistant Secretary

CORPORATE SEAL

S.P. 2780 (I94=392)  
S.P. 2785 (I494=393)  
S.P. 7380 (I94=392)  
S.P. 8680 (I94=392)  
Hennepin, Stearns &  
Wright Counties  
AT & T Communications  
Agreement No. 67277

Recommended for Approval:

*Donald L. Lauer*  
District Engineer - Brainerd

*Patrick C. Hughes*  
District Engineer - Metro

*Leonard M. Lundstrom*  
Utilities Agreements Engineer

STATE OF MINNESOTA  
Commissioner of Transportation

BY *Stephen J. Hoff*  
Deputy Commissioner

*Les A. Smith*  
Deputy Division Director  
Technical Services Division

Approved as to Form and  
Execution:

July 19 1990

*Louis K. Robards*  
Special Assistant  
Attorney General  
State of Minnesota

Approved: \_\_\_\_\_  
Commissioner of Administration  
**Original signed**

JUL 19 1990

By *George T. Loyce*  
Authorized Signature

Encumbered:  
*Paul Harper*  
Commissioner of Finance

By *7/19/90*  
Authorized Signature

Prepared by:  
Utilities Agreements Unit

S.P. 2780 (I94=392)  
S.P. 2785 (I494=393)  
S.P. 7380 (I94=392)  
S.P. 8680 (I94=392)  
Between St. Cloud & Plymouth  
AT & T Communications  
Agreement No. 67277

**INNERDUCTS PLACEMENT**  
**AGREEMENT**

THIS AGREEMENT made by and between the State of Minnesota, acting by and through its Commissioner of Transportation, hereinafter called the "State" and AT&T Communications of the Midwest, Inc., hereinafter called the "Utility" (hereinafter the "Agreement").

**WITNESSETH THAT:**

WHEREAS, the 1990 Minnesota Legislature enacted a law, Act of April 20, 1990, Ch. 426, H.F. No. 1857, sec. 7, which states in part: "Notwithstanding Minnesota Rules 1989, part 8810.3300, subpart 4, a Utility, as defined in Minnesota Rules 1989, part 8810.3100, subpart 4, may lay a fiber optic cable or a conduit containing one or more fiber optic cables inside the control-of-access lines along the portion of the interstate highway designated as I-94 that runs between Maple Grove in Hennepin County and St. Cloud in Stearns County, and the portion of the interstate highway designated as I-494 that runs between Plymouth in Hennepin County

State  
9,721  
PLAINTIFF'S  
EXHIBIT  
284

and Maple Grove in Hennepin County;" and

WHEREAS, the above-referenced Act also states: "The Commissioner of Transportation may impose reasonable conditions on the time, place, and manner of the Utility's installation and maintenance of the cable or conduit and may also charge reasonable fees therefore notwithstanding Minnesota Statutes, Chapters 14 and 16A. If the cable or innerducts of the Utility must be relocated because of reconstruction or maintenance work on an interstate highway, the Utility shall bear the entire cost of the relocation," and

WHEREAS, the Utility desires to construct a four duct system along I-494/I-94 (hereinafter the "Facility") and to occupy and use one or more of the innerducts to place a fiber optic cable for a reasonable fee as authorized by the Act; and

WHEREAS, on June 13, 1990, the State and Utility signed a letter stating their intent to enter into an agreement incorporating, among others, terms addressing matters set out in the letter which, along with other terms are to be memorialized in final long form permits and in this Agreement; and

WHEREAS, State law requires a written agreement between the State and the Utility setting forth their separate responsibilities:

NOW THEREFORE, IT IS AGREED,

#### ARTICLE I. APPLICABLE LAWS, POLICIES, PROCEDURES, TERM

(1) This Agreement allows AT&T to construct and maintain

fiber optic transmission line between Plymouth and St. Cloud, Minnesota on the I-94 and I-494 corridor. This agreement is based on the authorization granted in Act of April 20, 1990, Ch. 462, H.F. No. 1857, sec. 7, and MNDOT'S policy for "Accommodation of Utilities on Highway Rights-of-Way" which has been approved by the Federal Highway Administration. In those instances in this agreement where the State and the Utility agree to specific application of the policy for the above-referenced project, those items are noted and agreed to. Certain specified construction activity will begin at an agreed upon time pursuant to long form permits. If the formal agreement and necessary permits are not obtained by June 21, 1990, it is understood that the Utility may exercise its option to withdraw from this Agreement. Accordingly, the Utility intends to begin construction of a fiber optic transmission line and related facilities along the I-94/494 interstate corridor between Plymouth and St. Cloud after June 21, 1990, pursuant to the terms and conditions of this Agreement and those stated in the long form permits (permits).

(2) Subject to the Utility's option to withdraw provided for in Article I, paragraph (1) above, this Agreement shall become effective upon its execution and shall continue in effect for a term of twenty (20) years. The Utility shall have an option to renew on the same terms and conditions for an additional ten (10) years beyond the original term of this Agreement. At the end of the thirty (30) years the Utility and the State shall have the option to renegotiate a new contract.

## ARTICLE II. PLANS, CONSTRUCTION, AND MAINTENANCE

(1) Attached hereto, marked Exhibit A and made a part hereof are detailed plans indicating the proposed construction.

(2) Only fiber optic cable or cable of comparable or improved characteristics which will not adversely affect the use of the Facility by other occupants will be placed in one innerduct of the Facility and an extra innerduct of the Utility at cross roads will be allowed longitudinal on these sections of I-94 and I-494.

(3) Construction and maintenance activities shall be accomplished without access from through-traffic roadways or ramps except as indicated in the permits.

a. The Utility will provide detail plans on how the proposed Facility will be constructed and maintained.

(4) The Utility has provided a detailed plan on its maintenance schedule including both routine and emergency procedures with the permit application.

(5) The Facility installation shall be placed on a uniform alignment near the right-of-way line or as determined by the department.

a. The Facility will not be allowed within the clear zone of the through-traffic roadways or ramps.

b. Pull boxes may be installed under the existing ground line. The number and location shall be as negotiated by both parties based on the pulling criteria of the cable.

c. Repeater stations will be placed outside the right-

of-way fence or access control limits.

(6) Warning tape will be placed a minimum depth of 12 inches below the existing ground and above the Facility.

(7) The Utility is responsible for the traffic control as set forth in the permits.

(8) The Utility will place the State's innerducts continuously through the route on the highway right-of-way.

(9) The Utility will design and construct the Facility and provide the capital required for the Facility.

**ARTICLE III: COSTS, CONSTRUCTION COST OFFSET AGAINST ACTUAL  
FEE AUDITS**

(1) Attached hereto, marked Exhibit B, and made a part hereof is a detailed itemized estimate of the cost of the work to be performed by the Utility in constructing the Facility.

(2) All additional identifiable reasonable costs reasonably incurred by the State in accommodating the innerduct occupied by the Utility during transportation system maintenance operations and any construction projects will be charged to the Utility. These costs include but are not limited to the following:

a. Design attributable to utility's occupancy

(i) Data Collection.

(ii) Determination of the different phases of the construction project.

b. Construction

(i) Cost to work around Utility.

(ii) Delays caused by Utility inability to remove

its cable and innerduct or innerducts.

(iii) Construction claims arising out of delays caused by Utility.

(iv) Utility claims due to loss of revenue caused by interruption of service.

c. Maintenance

(i) Delays in maintenance due to Utility's failure to locate its cable and the innerduct it occupies except that any notice period to which Utility is entitled under this Agreement shall not constitute a delay.

(3) In the event the Facility must be relocated, any design and reconstruction costs to be assessed to the Utility under paragraph (2) above, will be 25% of the total design and reconstruction cost relating to the four-duct system plus any additional design and reconstruction costs which can be directly attributable to the Utility's occupancy of one innerduct of the Facility, plus the extra innerduct of the Utility at crossroads. In the event the State abandons their portion of the facilities, the Utility will pay 100% of design and construction costs for its relocated facilities. The Utility shall not be entitled to federal funds for relocation of its fiber optic cable and innerduct.

Provided however, that upon any relocation the utility shall not be responsible for any design and construction costs: 1) arising out of the use or occupancy of the Facility by any person other than the Utility. To the extent that costs arise out of the

use or occupancy by multiple users, including the Utility, which costs cannot be directly attributable to the use or occupancy by a specific user, then such costs shall be apportioned among all users on a pro rata basis as determined by the State.

Provided further, any costs to be assessed against the Utility under paragraphs (2) and (3) above, will be submitted to the Utility from the State prior to payment.

(4) The annual fees which shall begin to accrue on October 1, 1990, are based on the location as follows:

Urban Sections:       \$5,000 per mile of occupancy or a minimum fee of \$10,000 per installation, whichever is greater.

Rural Sections:       \$1,600 per mile of occupancy or a minimum fee of \$8,000 per installation, whichever is greater.

The urban and rural sections will be revised when new U.S. census data causes changes in the urban limits along I-94 between Maple Grove and St. Cloud. Fees as established shall be adjusted by the State every 5th year from the effective date of this agreement based on CPI for inflation. The annual fees for this Agreement are determined in Exhibit C, based on the fee schedule indicated in section 4 and will be adjusted in accordance with the terms of this Agreement.

The State will not unreasonably deviate from its policy for "Accommodation of Utilities on Highway Rights-of-Way" in

establishing annual fees charged to other users of the Facility. Nor shall the annual fees charged to the Utility unreasonably exceed those charged other users of the Facility for a comparable occupancy period.

(5) Construction cost offset against annual fee, audit of costs.

a. The State agrees to set off against annual fees the following costs (hereinafter referred to as the "credit"): (i) the cost to place the Facility and (ii) the lesser of \$850,000 or one half of the costs incurred by the Utility prior to March 29, 1990, for the establishment of the cable route between Plymouth and St. Cloud, Minnesota. The set-off shall be administered by reducing the credit on an annual basis in an amount equal to the annual fee (as adjusted) which Utility would otherwise be obligated to pay. The Utility annual fees shall be used to offset the credit until fully applied. The Utility shall begin paying annual fees to the State after the credit is fully applied.

b. The amount of the credit shall be determined on the basis of actual costs of placing the facility plus the lesser of \$850,000 or one half of the costs incurred by the Utility prior to March 29, 1990, on the fiber optic cable route between Plymouth and St. Cloud, Minnesota. Costs will be subject to verification and audit by the State where appropriate. Audits will be conducted at the Utility's office in Minnesota with appropriate Utility's records and personnel available. Pursuant to the terms of the nondisclosure document (hereinafter referred to as the "Protective

Agreement") executed by the State and the Utility, a copy of which is attached hereto as Exhibit D and incorporated herein, the Utility will provide an itemized statement of the costs referred to in paragraph 5 (a) above, within one year after project completion. Project completion is one year after acceptance by the Utility but in no event shall be later than April 1, 1992. Acceptance by the Utility does not occur until restoration activity is completed. Restoration activity shall not exceed one year after cable installation.

#### ARTICLE IV. WAIVER AND INDEMNIFICATION

(1) The utility shall indemnify and hold harmless the State and all of its agents and employees from any and all claims, demands, actions or causes of action of whatsoever nature or character arising out of or by reason of these permits or work done in connection with the Facility, by Utility or its agents or employees or the continuing presence of the Utility by virtue of these permits and/or agreement. The Utility further agrees to defend at its sole cost and expense any proceeding commenced for the purpose of asserting any such claim demand, action or cause of action. Subject to paragraph 3 below, and other than claims for damage to the facility by intentional acts of the State contractors or employees, the Utility shall pay all costs related to service interruptions or damage to their facilities caused by the State's contractor or employees due to highway operations. Provided however, that the Utility does not waive the limitation on it's

liability under its tariff for claims of third parties. In no event shall the Utility's liability to the State exceed the amount of any judgment against the State.

(2) The Utility shall waive any and all claims against the State for damage to the Utility's cable and facilities arising out of the criminal acts of third parties acting without the State's knowledge or consent.

(3) The Utility shall waive any and all claims against the State for accidental damage to the Utility's cable and facilities occurring in the course of boring, blasting, excavating, digging or other similar activity within 50 feet of the Facility, provided that the State or its agents have done all of the following:

a. notified the Utility at least forty eight (48) hours in advance of undertaking such activities within fifty (50) feet of the Facility, in accordance with the Gopher State One Call program;

b. permitted the Utility's representative to enter the property to locate the Facility and Utility's cable, and permitted the Utility's representative to be present during the aforementioned activities and expose the Facility and Utility's cable or work with excavator to expose the same; and

c. has refrained from the aforementioned activities in locations where the Utility's representative has identified the Facility and Utility's cable or, if that is not feasible, followed the Utility representative's reasonable directions, such as hand excavation in undertaking such activities so as to avoid damage to

the Facility or Utility's cable or other facilities.

d. the notice required under (a) above may be given to the Utility by calling the Gopher State One Call toll free number (1-800-252-1166) or such number provided to the State by the Utility.

#### ARTICLE V. MISCELLANEOUS

(1) In its agreements with others who are to perform relocation work covered by this Agreement, the Utility agrees to require compliance with the nondiscrimination regulations of the United States Department of Transportation contained in 49 C.F.R. Part 21 and to incorporate by reference those regulations in any such agreements.

(2) The State retains its right under its Utility Accommodation Policy to revoke the permits issued or this agreement for violations herein stated after discussion with the Utility and a reasonable opportunity for the Utility to resolve the problem.

(3) Upon completion of the Facility three innerducts will be owned by the State. Future agreements with other users of these innerducts will require these users to own these innerducts.

(4) The Utility will own the innerduct in which its fiber optic cable is located and one extra innerduct at crossroads.

(5) Pursuant to the terms of the Protective Agreement, attached as Exhibit D, the Utility shall submit to the State's Utilities Agreements Engineer within six (6) months of completion of the Facility and installation of Utility's cable, "As Built"

plans for the Facility and the Utility's cable and extra innerducts within the Highway Rights-of-Way.

(6) Prior to starting any work on the Highway Rights-of-Way, the Utility shall:

a. Obtain from its contractor a performance bond in an amount equal to the amount of the innerduct installation contract and which bond names the State of Minnesota as an obligee under the bond with respect to the contractor's duties to promptly restore the Highway Rights-of-Way to substantially the same condition as determined and accepted by the State it was in prior to installation of the innerduct system as determined and accepted by the State and provide the State with a copy thereof.

b. Provide documentation that the Utility has and will maintain an appropriate type and amount of insurance coverage as specified in the permit.

c. Receive approved permits and this agreement from the State.

d. Provide to the State the contract including specifications used between the Utility and contractor who will install the innerduct system, provided that, the State and the Utility shall abide by the terms of the Protective Agreement set forth in Exhibit D attached and made a part hereof regarding the disclosure of trade secret information.

(7) The Utility will have a minimum of twelve weeks to relocate its facilities when notified by the State of proposed projects, which notice shall include properly approved plans

regarding the proposed projects.

(8) The Utility will request a permit to place any additional fiber optic cables within the Utility's innerduct and for any future construction within the State's right-of-way.

(9) The Utility will provide prior formal written notice to the State before transfer of its interest in the innerduct it occupies to a parent, subsidiary of a parent affiliate and/or successors.

(10) The Utility and the State agree that this agreement shall be interpreted pursuant to Minnesota law.

# EXHIBIT C

## CITY OF PLYMOUTH TO SOUTH OF ST. CLOUD . AT & T FIBER OPTIC DUCT SYSTEM

<u>ROUTE</u>	<u>REFERENCE POINT</u>	<u>SECTION DESCRIPTION</u>	<u>LENGTH MILES</u>
<u>METRO AREA</u>			
494	021+00.270 027+00.973	CSAH #6 Br. 27679 in PLYMOUNT JCT. TH 94 in MAPLE GROVE	6.691
94	211+00.502 216+00.902	N. LIM. MAPLE GROVE, W. URB. BDRY. TWIN CITIES	5.439
TOTAL METRO AREA MILES=			12.130
ANNUAL FEES = 12.130 MILES X \$5,000.00 = \$60,650.00			
<u>RURAL AREA</u>			
94	169+00.297 211+00.502	AT & T leave R/W to N. near ST.AUGUSTA N. LIM. MAPLE GROVE, W. URB. BDRV. TWIN CITIES	42.296
TOTAL RURAL AREA MILES=			42.296
ANNUAL FEE = 42.296 MILES X \$1,600.00 = \$67,673.60			
TOTAL ANNUAL FEES OF \$128,323.60			

**EXHIBIT D**  
**NON-DISCLOSURE OF TRADE SECRET INFORMATION**  
**UNDER THE MINNESOTA GOVERNMENT DATA PRACTICES ACT**

**WHEREAS, AT&T Communications of the Midwest, Inc. (AT&T) and the Minnesota Department of Transportation (MNDOT) have entered into an Innerducts Placement Agreement to which this Statement is attached; and**

**WHEREAS, the aforesaid Innerducts Placement Agreement includes the commitment by MNDOT to treat any qualifying trade secret information submitted to it by A&T under the agreement as non-public data under the Minnesota Data Practices Act; and**

**WHEREAS, MNDOT has satisfied itself that: (a) AT&T is engaged in competitive enterprise which includes the construction of fiber optic transmission facilities including those which are the subject to the aforesaid Innerducts Placement Agreement; (b) certain cost information, design specifications and construction plans to be submitted to MNDOT pursuant to the Agreement relate directly to a device, method, technique or process that (1) has been supplied by AT&T, (2) that is subject to efforts by AT&T which are reasonable under the circumstances to maintain its secrecy and (3) that derives independent economic value, actual or potential, from not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use within the meaning of Minn. Stat. 13.37, subd. 1; and (c) the aforesaid cost data and other trade secret information may be classified as non-public data under Minn. Stat. 13.37, subd. 2.**

**NOW, THEREFORE,** in consideration of the above premises, the parties have agreed to observe the following procedure relating to the handling of trade secret information:

1. All documents, data, studies, materials, or other matters furnished by AT&T to MNDOT as estimated or actual cost information, in conjunction with the AT&T Plymouth to St. Cloud fiber optic transmission line project shall be treated by MNDOT as trade secret information to be protected as non-public data under the Minnesota Government Data Practices Act and shall neither be used nor disclosed except for the purposes specifically described in the Innerducts Placement Agreement.

2. The trade secret information shall not be disclosed to any person other than regular employees of MNDOT, who have regular day-to-day involvement with the fiber optic transmission line project in question, legal counsel to MNDOT or other authorized state officials who have statutory responsibility to review or audit costs associated with the project.

3. Under no circumstances may any person authorized to inspect the trade secret information discussed herein copy or duplicate in any way such information. Furthermore, such trade secret information shall not be entered into, incorporated into, or stored in any computer or any electronic or magnetic data base or record of MNDOT except as specifically authorized by separate written agreement among the parties.

4. All state employees who are afforded access to any trade secret information described herein shall neither use nor disclose

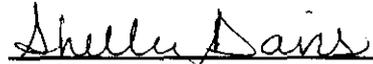
the confidential information for any business, commercial, or competitive purposes or for any purpose other than the purposes specifically described in the Innerducts Placement Agreement.

5. Once the aforesaid Plymouth to St. Cloud fiber optic transmission line project has been completed and any purpose for which the trade secret information has been provided has been satisfied, the trade secret information shall be returned to AT&T.

6. AT&T shall adequately identify its trade secret information by either providing a descriptive letter accompanying the disclosure of such information, by stamping one or more pages of documents with an appropriate notice, or by using both of these techniques.

**CERTIFICATE OF SERVICE**

I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Ex Parte Filing" in CC Docket 98-1 was served this 22nd day of July, 1999, by first class, U.S. Mail, postage prepaid to the following parties:

  
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