



STATE OF MINNESOTA

ORIGINAL

RECEIVED OF THE ATTORNEY GENERAL

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SEP 23 1999

FCC MAIL ROOM

Magalie Roman Salas
Secretary
Federal Communications Commission
445 - 12th Street SW
Washington, DC 20554

EX PARTE OR LATE FILED

Re: FCC DOCKET No. 98-1
Ex Parte Filing

Dear Ms. Salas:

The State of Minnesota (State) provides for the record its comments on the July 22, 1999 ex parte filing of the Minnesota Telephone Association and the July 16, 1999 ex parte filing of AT&T. The State urges the Commission to reach a decision in this matter as soon as possible. The State filed its Petition almost two years ago and the continuing uncertainty surrounding the Commission's position is hampering development of the project. The State trusts that a Commission ruling will be forthcoming in the near future.

A. The Minnesota Court Case.

The MTA correctly points out that the Hennepin County District Court's Decision in Minnesota Equal Access Network Systems, Inc. (MEANS), et al. v. State of Minnesota1 was "based entirely on Minnesota law and raised no issues under the Federal Communications Act in general or Section 253 in particular." However, the MTA then contradicts itself by selectively citing portions of that decision in an attempt to bolster its position in this matter.

The State believes that the court case has little relevance to this matter. However, to the extent that the portions cited by the MTA are considered by the Commission, the following findings made by Judge Gearin should also be considered:

45. The demand for fiber optic cable is rising rapidly. The State needs more fiber optic networks to bring high speed, broadband capacity to many areas of the state where it is not now available or accessible. The benefits of this

1 On July 15, 1999, the MTA appealed the decision and requested the Minnesota Supreme Court to bypass the Minnesota Court of Appeals and hear the matter directly. That request was denied. The appeal is now pending at the Court of Appeals.

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technology will enhance telecommunications services to schools, agencies, courthouses, and other public entities. These benefits will be made available for the private sector in the dark and lit fiber that ICS will install and market to telecommunication service providers.

47. Connecting Minnesota provides ICS with a ten-year guarantee of limited exclusivity to the freeway for approximately half of its network. ICS must share the freeway with any other collocating companies that agree to have ICS install fiber for it at the time that ICS places its fiber in the freeway. ICS must provide competitively neutral and nondiscriminatory access to both its lit and its dark fiber.

48. Alternative routes for installation of fiber optic cable in Minnesota abound. Corridors used by railroads, pipelines, overhead telephone and electrical lines, non-freeway trunk highways, county roads, and municipal streets are all commonly available to telecommunications companies. 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.

49. ICS was awarded the freeway ROW access benefits after winning a publicly announced, open, and competitive process in which plaintiff MEANS participated.

53. AASHTO adopted a resolution of support of Connecting Minnesota on April 18, 1997 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.

54. Connecting Minnesota was granted the 1998 Award for Creative Excellence by the National Association of State Directors of Administration and General Services in the Technology/Technology Application Category on August 4, 1998.

The following legal conclusion of Judge Gearin is also instructive:

8. The agreement does not illegally discriminate against other potential users of the freeway rights of way.

B. Supplemental Filing by USDOT.

The U.S. Department of Transportation (USDOT) filed extensive comments on May 21, 1999 addressing the safety aspects of the State's Agreement. The MTA focuses mostly on the compensation issue.

The MTA asserts that the compensation obtained by the State under the Agreement may not be "fair and reasonable" under the Act. First, since the MTA is not being required to pay any compensation to the State, it has no standing to complain about that compensation. Second, the MTA cites cases that do not apply to this fact situation. The MTA takes the rulings in *Bell-Atlantic-Maryland Inc. v. Prince George's County*, 1999 WL 343646 (D. Md., 1999) and *AT&T Communication of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Texas 1998) out of context. Unlike this matter, both of those cases dealt with cities regulating ROWs that the telephone companies were already using and had a right to continue to use and had to use, if they were to provide service in the area. Furthermore, they both involved certificated companies who were providing telecommunication services to the end user, not a carrier's carrier as in the case here.

In both the *Bell Atlantic* case and the *Dallas* case, the city involved was in effect prohibiting entry into the market by the telecommunication company to the city, because no other alternative ROW existed. Here, absolutely no payment is demanded by the State for use of the ROW by MTA or whomever wishes to install fiber at the time of construction or to lease fiber from ICS/UCN. Furthermore, the State is not trying to restrict currently used ROW, it is trying to open up historically unused ROW for use by anyone on a nondiscriminatory basis. In the cases cited by the MTA and AT&T, the cities were attempting to place a barrier on entry and the challengers were trying to remove the barrier. Here it is the State trying to open up a new ROW while the MTA is trying to prevent it from being used. In this case, the State has not prohibited the MTA from doing anything, in fact, the MTA did bid on the project, and is free to install fiber in the ROW, purchase dark fiber, purchase capacity or construct its own network on any of the myriad of alternative ROWs available to it across the state, including state trunk highways.

Finally, both cases involved local governmental units, which as the court pointed out in *AT&T v. City of Dallas*, unlike the State, do not have "the more general authority to regulate to protect public safety and welfare, advance universal service and ensure quality. This is a function reserved to states by § 253(b), not to local governments." 8 F. Supp. 2d at 591. Thus, the State has much broader authority under the Act to protect the public safety and welfare than do cities, and cases involving city attempts to regulate telephone companies are not relevant to this matter.

AT&T includes the same cases cited by the MTA as well as others, all of whom are not on point in this case because they deal with substantially different facts and with municipal attempts to regulate telephone service.

C. State of Minnesota Comments.

The MTA asserts that the Agreement does not reflect any obligation to make fiber available for purchase. That is incorrect. Section 7.7(a) of the Agreement provides 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 all similarly situated customers and potential customers for such customer's right to use or access the Network or to become Collocating Customers." Section 7.7(d) states:

(d) Company recognizes, acknowledges and confirms that its covenants in Section 5.12 and this Section 7.7 necessarily require that it offer use of and access to the Network, and collocation of fiber cable on the terms of this Agreement, to every customer and potential customer (including but not limited to Collocating Customers) which is financially qualified under general commercial practices.

Thus, it is the case, as stated in the State's Petition in this matter that ICS/UCN has a duty to make fiber capacity available through purchase and/or lease, on a competitively neutral and non-discriminatory basis.

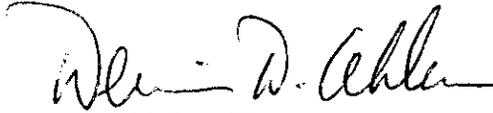
Apparently, the MTA is concerned that the agreement with the State does not explicitly require ICS/UCN to sell capacity on the network to anyone in particular. Since ICS/UCN is not a retail telephone service provider and can only recoup its investment in the network through selling capacity to such service providers, this is hardly a concern. This is the equivalent of expressing concern that the local grocery store is not explicitly obligated by contract to sell the products on its shelves to anyone in particular. Since the only way for the store to recoup its investment is to sell its product, such a concern is obviously misplaced. In this case since the only way ICS/UCN can recoup its investment is to sell capacity on the fiber network, one can be assured that ICS/UCN will attempt to do so. Under the agreement, when it does so it must do so on a nondiscriminatory basis.

The State apologizes for the confusion regarding the width of the ROW caused by a typographical error that occurred in the State's June 16 filing. The filing should have stated that the right of way referred to by Mr. Kraft was 320 feet wide (not 285 feet) and that 53% of the interstate highway system is less than 320 feet wide. The fact is that any way one looks at it hundreds of miles of freeway ROW are narrower than that contemplated by Mr. Kraft and the MTA and thus pose significantly more safety concerns than those contemplated by the MTA.

Magalie Roman Salas
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The State is grateful for the opportunity to file these reply comments and urges the Commission to rule for the State in this matter and to do so as soon as possible.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dennis D. Ahlers". The signature is fluid and cursive, with the first name "Dennis" being more prominent and the last name "Ahlers" following in a similar style.

DENNIS D. AHLERS
Assistant Attorney General
Transportation Division

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cc: All Parties of Record
AG:105103, v. 1