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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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WT Docket No. 99-217

CC Docket No. 96-98

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 In the Matter of)
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 Promotion of Competitive Networks)
 in Local Telecommunications)
)
 Wireless Communications Association)
 International, Inc. Petition for Rulemaking)
 To Amend Section 1.4000 of the)
 Commission's Rules to Preempt)
 Restrictions on Subscriber Premises)
 Reception or Transmission Antennas)
 Designed to Provide Fixed Wireless)
 Services)
)
 Cellular Telecommunications Industry)
 Association Petition for Rulemaking and)
 Amendment of the Commission's Rules)
 To Preempt State and Local Imposition of)
 Discriminatory and/or Excessive Taxes)
 And Assessments)
)
 Implementation of the Local Competition)
 Provisions in the Telecommunications)
 Act of 1996)
)
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**INITIAL COMMENTS OF
THE NORTH SUBURBAN COMMUNICATIONS COMMISSION, THE
RAMSEY/WASHINGTON COUNTIES SUBURBAN CABLE COMMUNICATIONS
COMMISSION, THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS
COMMISSION, THE SHERBURNE/WRIGHT COUNTY CABLE COMMISSION AND
THE NORTH METRO TELECOMMUNICATIONS COMMISSION**

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SUMMARY

In 1997, the Minnesota Legislature enacted Chapter 123, which amended Chapter 237 of the Minnesota Statutes. The purpose of this amendment was to clarify the authority of the Minnesota Public Utilities Commission and local governments regarding management and regulation of telecommunications companies' use of public rights-of-way. Such clarification was deemed to be necessary in light of numerous statutory changes and ambiguous court decisions.

In Chapter 123, the Legislature has specified that local governments are, within very limited boundaries, authorized to manage and regulate right-of-way use by telecommunications providers. By way of example, municipalities can issue permits and recover their right-of-way management costs. At the same time, however, local government units are prohibited from franchising telecommunications companies and from requiring in-kind compensation or charging revenue-raising fees.

Although the state's draconian measures have now been in effect for over two years, residential consumers have not seen a marked increase in competitive offerings. This state-of-affairs suggests that telecommunications competition is shaped by market factors, such as population density and construction costs, not local right-of-way policies. Indeed, it appears that the high costs of constructing telecommunications facilities, and anticompetitive behavior on the part of incumbent local exchange carriers are primarily responsible for any delays in local competition. Under these circumstances, it would be inappropriate for the FCC to place federal limitations on municipal right-of-way authority, since there is no factual basis for such action.

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**INITIAL COMMENTS OF
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RAMSEY/WASHINGTON COUNTIES SUBURBAN CABLE COMMUNICATIONS
COMMISSION, THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS
COMMISSION, THE SHERBURNE/WRIGHT COUNTY CABLE COMMISSION AND
THE NORTH METRO TELECOMMUNICATIONS COMMISSION**

The North Suburban Communications Commission,¹ the Ramsey/Washington Counties

¹ The North Suburban Cable Communications Commission represents the Minnesota Cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New

Suburban Cable Communications Commission II,² the South Washington County Telecommunications Commission,³ the Sherburne/Wright Cable Communications Commission,⁴ and the North Metro Telecommunications Commission⁵ hereby submit the following comments in response to the Notice of Inquiry issued by the Federal Communications Commission (the “FCC”) on July 7, 1999.⁶

As discussed below, the State of Minnesota has adopted a regulatory scheme that delineates the right-of-way powers local governments may exercise over telecommunications service providers. In particular, local government authority extends only to a narrow category of activities, similar to that set forth in *Classic Telephone, Inc.*, 11 FCC Rcd. 13082 (1996) and *TCI Brighton, North Oaks, Roseville, St. Anthony, and Shoreview*.

² The Ramsey/Washington Counties Suburban Cable Communications Commission represents the Minnesota Cities of Birchwood, Dellwood, Grant, Lake Elmo, Mahtomedi, Maplewood, North St. Paul, Oakdale, Vadnais Heights, White Bear Lake, White Bear Lake Township, and Willernie.

³ The South Washington County Telecommunications Commission represents the Minnesota Cities of Afton, Cottage Grove, Denmark Township, Grey Cloud Township, Newport, St. Paul Park and Woodbury.

⁴ The Sherburne/Wright Cable Communications Commission represents the Minnesota Cities of Buffalo, Big Lake, Cokato, Dassel, Delano, Elk River, Maple Lake, Monticello, Rockford, and Watertown.

⁵ The North Metro Communications Commission represents the Minnesota Cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes, and Spring Lake Park.

⁶ *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (Rel. July 7, 1999).*

Cablevision of Oakland County, Inc., 12 FCC Rcd. 21396 (1997). Under the state framework, local governments may only recover their actual right-of-way management costs from telecommunications right-of-way users. Both telecommunications franchising and in-kind compensation are prohibited.

Given the reduced regulatory burdens placed on telecommunications companies in Minnesota, one would expect telecommunications competition to be growing by leaps and bounds. However, this has not been the case. Many communities, especially in rural Minnesota, have not seen any development of competitive infrastructure since the new regulatory regime became effective in May 1997. This certainly suggests that less regulation will not necessarily lead to more vigorous competition. Assuming the FCC's goal of encouraging such competition, it would not be prudent for the FCC to take any action in the area of municipal right-of-way management, since any federal rules that may be established would have little impact on whether telecommunications providers decide to enter specific markets.

I. **STATUS OF MUNICIPAL TELECOMMUNICATIONS FRANCHISING IN MINNESOTA PRIOR TO THE ENACTMENT OF CHAPTER 123, LAWS, 1997.**

The scope and extent of local authority to manage and regulate the use of public rights-of-way has varied dramatically over the last one hundred and eighteen years. Beginning in 1881, Section 52, tit. 1, c. 34 of the Minnesota General Statutes specifically stated that “[a]ny telegraph or telephone corporation organized under this title has the power and right to use the public roads and highways in this state, on the line of their route, for the purpose of erecting posts or poles on or over the same to sustain the wires or fixtures . . .” This provision was interpreted to give telephone companies the right and privilege of placing facilities in public roads and highways

located in cities and towns throughout Minnesota; local approval was not required.⁷ The only limitation placed on a telephone company's use of public rights-of-way was that such use not "interfere with the safety or convenience or ordinary travel on or over . . . roads or highways."⁸ Local governments had little or no control over whether a telephone corporation could physically occupy public rights-of-way.

On April 19, 1893, the Minnesota Legislature passed an act amending Section 52, tit. 1, c. 34. Pursuant to this amendment, no telephone company had "the right to construct, maintain or operate upon or within any street, alley or other highway of any city or village, any improvement of whatsoever nature or kind, without first obtaining a franchise therefore from such city or village according to the terms of its charter, and without first making just compensation therefore. . . ."⁹ Under this statutory provision, Minnesota local governments received substantial discretion to manage public rights-of-way usage through the franchising process. Further, Minnesota municipalities were statutorily empowered to charge fees for the use public rights-of-way. Such fees were not limited to cost recovery.

In 1901, another act firmly establishing local control over rights-of-way was enacted by the Minnesota Legislature. This particular act specified that "[n]othing herein shall be construed to grant to any person, persons, associations or corporation, any rights for the maintenance of a telephone system within the corporate limits of any city or village in this state, until such person, persons, associations or corporation shall have obtained the right to maintain such system in such

⁷ See, e.g., *Northwestern Telephone Exchange Co. v. City of St. Charles*, 154 F. 386 (D. Minn. 1907).

⁸ See Section 42, tit. 1, c. 34 of the General Statutes of the State of Minnesota.

⁹ See *Northwestern Telephone*, 154 F. at 387.

village or city, nor for a period beyond that for which the right to operate such system is granted by such city or village.”¹⁰ This authority was further solidified by the enactment of Minn. Stat. §§ 300.03-.04, which states that: (i) no telephone company may construct, operate or maintain facilities in municipal public rights-of-way “without first obtaining . . . a franchise . . .” and paying compensation;¹¹ and (ii) franchised telephone companies are subject to municipal regulation.¹² At the time, Minnesota law also provided that telephone companies were subject to a municipality’s “reasonable regulations” pertaining to right-of-way use and that a municipal grant of authority was necessary for the maintenance of a communications system in public roads.¹³

In 1915, however, the Minnesota Legislature adopted a broad and detailed regulatory scheme that empowered the Railroad and Warehouse Commission to regulate telephone companies.¹⁴ Among other things, the 1915 law (hereinafter referred to as the “State Telecommunications Act”) enabled telephone companies to surrender municipal franchises and to operate under permits issued by the state.¹⁵ In addition, the State Telecommunications Act

¹⁰ *Id.*

¹¹ Minn. Stat. § 300.03.

¹² Minn. Stat. § 300.04 (any corporation “obtaining a franchise from a city is subject to conditions and restrictions as from time to time are imposed upon it by the city.”).

¹⁴ *See* 1915 Minn. Laws ch. 152 (current version at Minn. Stat. §§ 237.01-.81 (1997)).

¹⁵ *See* Minn. Stat. § 237.18 (“[a]ny telephone company operating under any existing license, permit, or franchise . . ., upon filing with the clerk of the municipality which granted such franchise, a written declaration that it surrenders such license, permit, or franchise, may receive in lieu thereof, an indeterminate permit . . .”).

provided that the Railroad and Warehouse Commission (now the Minnesota Public Utilities Commission) could authorize and regulate the construction of telephone systems in Minnesota municipalities.¹⁶ The State Telecommunications Act, however, did not repeal local authority to franchise telephone companies under Minn. Stat. §§ 300.03-.04. Despite this fact, at least one court concluded that “chapter 152, Laws 1915, . . . took away from the municipalities the power to license the occupation of the streets by telephone companies and placed it exclusively with” the state, acting through the Public Utilities Commission and its predecessor agency.¹⁷ At the same time, however, the court concluded that cities retained the right “to regulate the use of the streets by the companies” so that they do “not to interfere with the safety and convenience of public travel thereon . . .”¹⁸

In the wake of the *Holm* decision, there was an ill-defined division between permissible right-of-way regulation and impermissible franchising and rights-of-way management. Given the legal uncertainty surrounding the franchising issue, some municipalities continued to enact telecommunications franchising ordinances because Minn. Stat. § 300.03 was still in effect and ostensibly authorized the grant of telephone company franchises.

Some of the ambiguity surrounding municipal right-of-way management authority was dispelled in 1997 when U.S. West sued the City of Redwood Falls. The resulting court decision severely limited local control over the telecommunications industry’s use of public rights-of-

¹⁶ See Minn. Stat. § 237.16(a)(1) (the commission has the exclusive authority to authorize the construction of telephone lines or exchanges in any municipality, and to prescribe the terms and conditions under which such construction must be performed).

¹⁷ *State v. Holm*, 164 N.W. 989, 990 (1917).

¹⁸ *Id.*

way. Indeed, the court in the Redwood Falls case ruled that the State Telecommunications Act “evidences a legislative intent to abolish the right of municipalities to require a franchise from a telephone company.”¹⁹ In addition, the court determined that local control over telephone companies was limited to the location of telecommunications facilities (*e.g.*, poles, wires and other equipment).²⁰ Other right-of-way management activities were found to be beyond the scope of authority reserved to cities under the State Telecommunications Act.²¹

After *Redwood Falls*, the meaning and relevancy of Minn. Stat. §§ 300.03 and 300.04 was in doubt. Two courts had now determined that the State Telecommunications Act completely preempted local regulation of telecommunications companies, except for a narrow category of activities related to the location of telecommunications facilities. Nevertheless, Minn. Stat. §§ 300.03 and 300.04 were still legally valid and would continue to be a source of litigation and contention between cities and telephone companies. Moreover, Minn. Stat. § 222.37 continued to authorize local governments to impose reasonable regulations on a telephone company’s use of public roads. In an attempt to clarify the scope of municipal authority over telecommunications service providers, the Minnesota Legislature enacted Chapter 123, Laws 1997 (“Chapter 123”), in May of 1997.

¹⁹ *U.S. West Communications, Inc. v. Redwood Falls*, 558 N.W.2d 512, 516 (Minn.App. 1997).

²⁰ *Id.*

²¹ In *Redwood Falls*, for example, the court concluded that the city could not require U.S. West to encase its fiber optic lines in a concrete duct.

II. WHAT DID CHAPTER 123 DO, AND HOW DOES IT COMPARE TO THE FEDERAL COMMUNICATIONS COMMISSION'S VISION OF PROPER RIGHT-OF-WAY MANAGEMENT AND THE PRINCE GEORGE'S COUNTY, MARYLAND DECISION?

A. Chapter 123 Established a Statewide Scheme for Regulating the Telecommunications Industry's Use of Public Rights-of-Way.

Chapter 123 amended Chapter 237 of the Minnesota Statutes, Minn. Stat. § 237.01 *et seq.*, and established a statewide scheme governing the use and regulation of public rights-of-way. The state's regulatory framework is primarily set out in Minn. Stat. §§ 237.162 and 237.163 and in rules promulgated by the Minnesota Public Utilities Commission (the "PUC").²² Under § 237.163, a telecommunications right-of-way user may "construct, maintain, and operate conduit, cable, switches and related appurtenances and facilities along, across, upon, above, and under any public rights-of-way."²³ A local government unit, however, has the authority to "manage its public rights-of-way . . ."²⁴ State law defines the phrase "manage the public right-of-way" as a municipality's authority to do any or all of the following: (i) require registration; (ii) require construction performance bonds and insurance coverage; (iii) establish installation and construction standards (consistent with state standards); (iv) establish and define location and relocation requirements for telecommunications equipment and facilities; (v) establish coordination and timing requirements; (vi) require the submission of project data; (vii) require telecommunications right-of-way users to submit, upon request, existing data on the location of their facilities in the public rights-of-way; (viii) establish right-of-way permitting requirements;

²² See Chapter 7819 of the PUC's rules, § 7819.0050, *et seq.*

²³ Minn. Stat. § 237.163, Subd. 2(a) (1997).

²⁴ Minn. Stat. § 237.163, Subd. 2(b) (1997).

(ix) establish removal requirements for abandoned equipment and facilities, if required in conjunction with other right-of-way repair; and (x) impose reasonable penalties for unreasonable delays in construction.²⁵

As a function of their right-of-way management authority, local government units are empowered to adopt ordinances requiring a telecommunications right-of-way user seeking to excavate or obstruct a public right-of-way to obtain a right-of-way permit.²⁶ Likewise, local governments may, by ordinance, require a telecommunications right-of-way user to register with an appropriate agency (*i.e.*, by providing proof of adequate insurance, a valid gopher state one-call registration number, and other information), to furnish plans for construction and maintenance, and to provide reasonable notice of projects that will be undertaken in the public rights-of-way.²⁷ An application for a right-of-way permit can only be denied if: (i) a local government determines that denial is “necessary to protect the health, safety and welfare or . . . to protect the public right-of-way and its current use;”²⁸ or (ii) a telecommunications right-of-way users has not complied with § 237.163.²⁹ A right-of-way permit granted to a telecommunications right-of-way user can be revoked “in the event of a substantial breach of the terms and conditions of statute, ordinance, rule, or regulation or any material condition of the permit.”³⁰

²⁵ Minn. Stat. § 237.162, Subd. 8.

²⁶ See Minn. Stat. § 237.163, Subd. 2(b)(1).

²⁷ See Minn. Stat. § 237.163, Subd. 2(b)(2)-(3).

²⁸ Minn. Stat. § 237.163, Subd. 4(b).

²⁹ Minn. Stat. § 237.163, Subd. 4(a).

³⁰ Minn. Stat. § 237.163, Subd. 4(c).

Aside from managing public rights-of-way, local government units can recover their “right-of-way management costs” from telecommunications right-of-way users.³¹ “Right-of-way management costs” are defined by law as “*actual costs* a local government unit incurs in managing its public rights-of-way, and includes such costs, if incurred, as those associated with registering applicants; issuing, processing, and verifying right-of-way permit applications; inspecting job sites and restoration projects; maintaining, supporting, protecting, or moving user equipment during public right-of-way work; determining the adequacy of right-of-way restoration; restoring work inadequately performed after providing notice and the opportunity to correct the work; and revoking right-of-way permits.”³² (Emphasis added). These costs can be recouped in a variety of ways under § 237.163. For instance, local governments can impose a fee for registration, a fee for each right-of-way permit or a fee applicable to a particular user, when that user causes a local government to incur costs.³³ In charging right-of-way fees, however, municipalities cannot recover from one telecommunications right-of-way user those costs that are attributable to another user’s activities in the public rights-of-way.³⁴ Instead, right-of-way fees must be allocated among all users of the public rights-of-way (including the local government unit itself) so that a user’s fee reflects the proportionate costs imposed on the local government unit by that user.³⁵ In addition, all right-of-way fees must be imposed on a

³¹ Minn. Stat. § 237.163, Subd. 6(a).

³² Minn. Stat. § 237.162, Subd. 9.

³³ Minn. Stat. § 237.163, Subd. 6(a).

³⁴ *Id.*

³⁵ Minn. Stat. § 237.163, Subd. 6(b)(2).

competitively neutral basis.

In managing public rights-of-way and in imposing fees under Chapter 123, local government units cannot (i) discriminate among telecommunications right-of-way users, (ii) grant a preference to any user, (iii) create or erect unreasonable entry requirements, or (iv) require a telecommunications right-of-way user to obtain a franchise or pay for the use of public rights-of-way.³⁶ In addition, local governments cannot require telecommunications right-of-way users to pay in-kind compensation, either as a substitute for a monetary fee or as a condition of access to public rights-of-way.³⁷ These limitations (as well as those set forth above) effectively prevent a local government from recovering the fair market value of public rights-of-way that are being used by telecommunications right-of-way users, and tailoring compensation to meet the needs and interests of the community.

A series of rules issued by the PUC expand upon and amplify municipal powers and limitations set forth in Chapter 123. Under these rules, a local government unit can require a telecommunications right-of-way user receiving a permit to indemnify the local government unit against liability for claims arising out of the wrongful acts and omissions of the permittee or its agents in installing, maintaining or repairing facilities in the public rights-of-way.³⁸ In addition, a local government unit can require a telecommunications right-of-way user who chooses to restore the right-of-way to post a construction performance bond (*e.g.*, a cash deposit, a letter of

³⁶ Minn. Stat. § 237.163, Subd. 7(a)(1)-(4).

³⁷ Minn. Stat. § 237.163, Subd. 7(d).

³⁸ See § 7819.1250 of the PUC's rules.

credit or an individual project bond).³⁹ The amount of a performance bond “must cover an amount reasonably estimated to restore the right-of-way to the condition that existed before the excavation, and may also include reasonable, directly related costs that the local government estimates will be incurred if the right-of-way user fails to perform under the bond.”⁴⁰

The PUC’s rules also require a telecommunications right-of-way user to relocate its facilities in public rights-of-way when it is necessary to prevent interference in connection with: (i) a present or future local government use of the right-of-way for a public project; (ii) the public health or safety; or (iii) the safety and convenience of travel over the right-of-way.⁴¹ As part of the permit application process, the PUC’s rules provide that a local government can require an applicant to provide information concerning the location and depth of facilities in the rights-of-way, the type and size of facilities to be installed, and a description of aboveground appurtenances and any facilities to be abandoned.⁴² A telecommunications right-of-way user is obligated to notify a local government when facilities are to be abandoned.⁴³

With regard to the installation of facilities in the public rights-of-way, the PUC’s rules require a telecommunications right-of-way user to utilize location markers, to place facilities at specified depths, to comply with the National Electrical Safety Code, and to use conduit when

³⁹ See § 7819.3000 of the PUC’s rules.

⁴⁰ See § 7819.3000, Subp. 2 of the PUC’s rules.

⁴¹ See § 7819.3100, Subp. 1 of the PUC’s rules.

⁴² See § 7819.4100 of the PUC’s rules.

⁴³ See § 7819.3300 of the PUC’s rules.

burying fiber facilities (within the limits of a city).⁴⁴ In addition, the PUC rules require a telecommunications right-of-way user to take into account current and future uses of public rights-of-way in placing its facilities.⁴⁵ The rules further require a telecommunications service provider to restore the public rights-of-way to the condition that existed prior to excavation, unless the user is willing to pay a degradation fee.⁴⁶ Statewide requirements specify the maximum limits of restoration methods that a local government unit can impose.⁴⁷

B. Minnesota's Regulatory Framework Appears to be Consistent with FCC Precedent and the Prince George's County Court Decision.

What is remarkable about the Minnesota right-of-way management scheme is how closely it follows the FCC's interpretation of appropriate right-of-way management activities, and the holdings in recent court decisions. In both *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396 (1997) and *Classic Telephone, Inc.*, 11 FCC Rcd. 13082 (1996), the FCC delineated specific right-of-way management functions that would not run afoul of federal law. These functions include (but are not necessarily limited to): (i) coordination of construction schedules; (ii) determination of insurance, bonding and indemnity requirements; (iii) establishment and enforcement of building codes; (iv) keeping track of the various systems using the rights-of-way to prevent interference between them; (v) regulating the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize

⁴⁴ See § 7819.5000, Subp. 1 of the PUC's rules.

⁴⁵ See § 7819.5100, Subp. 3 of the PUC's rules.

⁴⁶ See § 7819.1100, Subp. 1 of the PUC's rules.

⁴⁷ *Id.*

notice impacts; (vi) requiring a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies; (vii) requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations; (viii) enforcing local zoning regulations; and (ix) requiring a company to indemnify a municipality against any claims of injury arising from the company's excavation.⁴⁸ As described below, the state right-of-way management scheme in Minnesota falls squarely within the parameters of authority already established by the FCC.

In particular, the state framework effectively limits local right-of-way management to matters that are directly related to a telecommunications company's use and occupation of public ways, as suggested in *TCI Cablevision* and *Classic Telephone*. By way of example, the ability to require permits and to impose registration requirements allows local governments to keep track of who is placing facilities in the public rights-of-way. Minnesota municipalities may also establish timing and coordination requirements related to excavation of rights-of-way and the installation of facilities. In addition, the state restoration standards and degradation fee ensure that a telecommunications right-of-way user pays its proportionate share of the increased street repair and paving costs that result from repeated excavations. The PUC's rules also allow a local government to impose indemnity requirements on a telecommunications right-of-way user that protect against claims of injury arising from work in the public rights-of-way. Further, the PUC rules authorize local governments to require right-of-way users to post construction performance bonds, as provided in *TCI Cablevision*.

As discussed above, local governments can only deny an application for a right-of-way

⁴⁸ See *TCI Cablevision* at ¶ 103 and *Classic Telephone* at ¶ 39.

permit if: (i) an applicant does not comply with § 237.163; or (ii) it is determined that denial is necessary to protect the health, safety and welfare of the public, or current uses of a public right-of-way. This limited authority is consistent with the recent court decision in Prince George's County, Maryland, which held that municipalities do not have unlimited discretion to grant or deny access to public rights-of-way.⁴⁹ The *Prince George's County* court also concluded that a local government's permit or franchise application process can only request information that is directly related to right-of-way management. Under the PUC's rules, a local government may, as part of its permit application process, request data concerning the location and depth of an applicant's facilities, the type and size of utility facilities to be installed, and the location of aboveground appurtenances and facilities to be abandoned. Such information is certainly related to rights-of-way management, and would likely be allowable under the *Prince George's County* decision.

With regard to compensation for the use of public rights-of-way, the *Prince George's County* court specified that any fees imposed on telecommunications service providers must be directly related to the provider's use of local rights-of-way, and set at a level that is reasonably calculated to compensate a local government for its costs of maintaining and improving public rights-of-way.⁵⁰ Minnesota's right-of-way fee scheme, like the court's, is limited to recovery of actual cost. As mentioned above, Minnesota state law provides that local governments may only charge right-of-way management fees that are "based on actual costs incurred by the local

⁴⁹ See *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp. 2d 805 (D. Md. 1999).

⁵⁰ See *Prince George's County*, 42 F. Supp. 2d at 817-10.

government unit in managing the public rights-of-way.”⁵¹ In addition, both the *Prince George’s County* court and the PUC specify that fees must be apportioned among users, so that no individual user is treated unfairly.⁵²

In sum, the right-of-way management authority granted to local governments pursuant to Minn. Stat. §§ 237.162 and 237.163 is generally restricted to the categories of activities described in *TCI Cablevision* and *Classic Telephone*. Moreover, the state’s regulatory scheme appears to comport with various holdings in *Prince George’s County* pertaining to right-of-way compensation and the proper scope of local right-of-way management.

III. THE STATE RIGHT-OF-WAY MANAGEMENT SCHEME HAS NOT ACCELERATED THE DEVELOPMENT OF TELECOMMUNICATIONS COMPETITION IN MINNESOTA CITIES.

In *Classic Telephone* and *Prince George’s County*, local right-of-way management activities were invalidated, in part, because they allegedly inhibited the development of telecommunications competition. Absent municipal meddling, both the telecommunications industry, the FCC and several courts believe that the public would have the competitive service choices envisioned by Congress when the Telecommunications Act of 1996 was enacted. Given the premise that onerous local government regulation is the primary barrier to the competitive delivery of telecommunications services, Minnesota is a perfect testing ground for evaluating the impact of limited right-of-way management and compensation on telecommunications competition, since the state’s regulatory scheme espouses the FCC’s restrictive view of appropriate right-of-way regulation.

⁵¹ See Minn. Stat. § 237.163, Subd. 6(b)(1).

⁵² See *Prince George’s County* at 818, and § 7819.1000, Subp. 2.

Despite the fact that there are significant limitations on local right-of-way management and compensation in Minnesota, telecommunications competition has not developed in most municipalities. Indeed, as of December 31, 1998 (more than a year and a half after Chapter 123 was enacted), only twenty-seven out of eighty-two competitive local exchange carriers certified to provide service in Minnesota were actually offering services to consumers.⁵³ This evidence certainly suggests that most Minnesota residents still have only one choice when it comes to telecommunications services, even though there are negligible “barriers” to entry at the local level.

More recent information indicates that the competitive environment in Minnesota has not improved as a result of the detailed right-of-way management rules that were issued by the PUC on March 29, 1999. For instance, the City of North Saint Paul, Minnesota, has reported (i) that it has only received one request for information from a telecommunications service provider since the rules were adopted, and (ii) that no new facilities-based providers are offering service to city residents. Likewise, the City of Eagan, Minnesota, has indicated that no new providers have installed facilities in its public rights-of-way since March 1999, and that no right-of-way permits have been requested. In the City of Burnsville, Minnesota, only one provider, McCleod USA Telecommunications Services, Inc., has received permission to install facilities in municipal public rights-of-way since the PUC’s rules were adopted. Similarly, the City of Lauderdale, Minnesota, has informed this office that, during the period from January 1, 1999, through October 5, 1999, permits have only been requested by Northern States Power, MediaOne and

⁵³ See Attachment A to these Comments (showing Minnesota Department of Commerce data on certified competitive local exchange carriers).

U.S. West.⁵⁴ Additional telecommunications providers have not entered Lauderdale's telecommunications market since the PUC's rules became effective. Last, but not least, the City of Oakdale, Minnesota, stated that it has only received telephone inquiries from two telecommunications companies (St. Cloud/USA and Touch America) since March 1999. Those companies, however, have never requested any permits, and are not constructing any facilities in Oakdale's public rights-of-way. At the present time, only MediaOne and U.S. West are applying for permits to construct telecommunications facilities in Oakdale.

All of the foregoing examples are indicative of state-wide trends and show that the regulatory model adopted by Minnesota, and the limitations placed on local right-of-way management and compensation by the FCC and several courts, will not necessarily lead to robust telecommunications competition in municipal markets.

This is because local right-of-way management is not, and has never been, a serious barrier to entry. Claims to the contrary made by the telecommunications industry are unsupported and illusory. As indicated in the FCC's *Notice of Inquiry*, industry allegations are merely anecdotal and do not evidence a pattern of unreasonable right-of-way management and compensation practices.⁵⁵

Telecommunications competition is driven by basic economics, not reduced regulatory schemes. In general, telecommunications companies will select their service markets based on

⁵⁴ See E-Mail from Rick Getschow to Coralie Wilson, dated October 5, 1999, appended hereto as Attachment B.

⁵⁵ See Notice of Inquiry at ¶ 79 ("right-of-way regulation that have been brought to our attention, either formally or informally, cover only a relatively small number of communities . . .").

whether they can expect to earn a high rate of return on their investment. The importance of economics in the construction of competitive networks and the rollout of competitive services is highlighted in a recent Precursor Group report. In this report, a market analyst states that:

the cold reality remains that residential broadband facilities remain simultaneously highly capital-intensive up front and highly capital-inefficient over time because of the lack of geographic density and the lack of high-volume customers. Local residential competitive economics remain dismal unless an AT&T can assume very high penetration rates, cross-subsidize its video monopoly, and vertically leverage its market power into e-commerce by preventing competitive Internet access.⁵⁶

It is therefore evident that the decision to enter a particular market is dependent on population density, necessary capital expenditures and the existence of large consumers of telecommunications – not municipal right-of-way costs (*e.g.*, permit fees and franchise fees).

The development of facilities-based competition is also impacted by the behavior of the incumbent local exchange carrier serving a particular market. As viable competitors become more common, incumbent local exchange carriers have a strong economic incentive to protect their monopoly profits. This incentive can manifest itself in a variety of ways. Commonly, incumbent local exchange carriers (i) refuse to make unbundled network elements available to potential competitors; and (ii) drag out interconnection negotiations. This type of conduct is particularly harmful to telecommunications competition, since incumbent local exchange carriers control essential facilities in the local telecommunications market.

In Minnesota, for instance, U.S. West has commonly engaged in tactics which have

⁵⁶ See The Precursor Group, “Too Rosy an Outlook for Residential Broadband Access Competition?” (June 28, 1999), appended hereto as Attachment C.

prevented and/or delayed competition from taking hold.⁵⁷ In fact, the PUC, as recently as July 29, 1998, found that U.S. West was: (i) refusing to provide forecasts of its traffic volumes and ignoring traffic forecasts provided by MCImetro; (ii) failing to provide notice of network capacity exhaust and of major repair and expansion work; (iii) refusing to confirm the delivery date of interconnection trunks; (iv) failing to install interconnection trunks on promised delivery dates; and (v) unwilling to provide adequate local number portability.⁵⁸ As a result, MCImetro's ability to interconnect was impaired, which meant that MCImetro consumers would have problems sending communications to, and receiving communications from, consumers on other networks. Furthermore, without reliable and convenient number portability, it would be difficult for MCImetro to sign up to consumers, since changing phone numbers is unpopular. As importantly, U.S. West's anticompetitive behavior increased MCImetro's cost of doing business. For these reasons, the PUC concluded that U.S. West's conduct (not local regulatory schemes) "slowed MCImetro's entry into the local telecommunications market in Minnesota."⁵⁹

In general, available evidence shows that economic considerations and incumbent local exchange carrier actions shape how competition develops (or fails to develop) in a given area. There is no proof that the scope of local regulation of rights-of-way is a determinative factor in a telecommunications company's decision-making process. Indeed, the stringent restrictions placed on municipal right-of-way management and compensation in Minnesota has had a negligible impact on telecommunications competition. Under these circumstances, it would be

⁵⁷ See "Summary of MN PUC Findings Against US West" prepared by MCIWorldcomm, appended hereto as Attachment D.

⁵⁸ *Id.*

⁵⁹ *Id.*

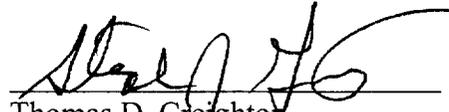
inappropriate for the FCC to adopt a federal rule that restricts local right-of-way management authority, especially given the Constitutional ramifications of such action.

IV. CONCLUSION

In hopes of advancing competition and clarifying the scope of local right-of-way authority, the State of Minnesota established a statewide scheme for local right-of-way management that eliminated telecommunications franchising and reduces local control over right-of-way access. To date, the Minnesota model has not proved to be extremely successful. This is primarily due to the fact that Chapter 123 did not eliminate the market barriers that actually inhibit the development of facilities-based competition – the high cost of constructing telecommunications networks and the anticompetitive behavior of incumbent local exchange carriers.

Placing restrictions on local right-of-way management and compensation is not the proper response to the problem of non-competitive telecommunications markets. The evidence shows that municipal right-of-way policies are not a major factor in shaping the telecommunications industry's business decisions. Indeed, the reduction of local regulatory "burdens" in Minnesota has had little effect on telecommunications competition. Most residential consumers in Minnesota still have only one choice when it comes to local exchange service. Given that the connection between local right-of-way management and the proliferation and growth of competition in telecommunications markets appears to be tenuous at best, the FCC should not establish national right-of-way rules or policies unless and until it can be unequivocally demonstrated that municipal actions are a fundamental barrier to the construction of competitive networks.

Respectfully submitted,



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Stephen J. Guzzetta

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5500 Wayzata Boulevard, #1200
Minneapolis, Minnesota 55416
(612) 546-1200

Counsel for the North Suburban
Communications Commission, the
Ramsey/Washington Counties Suburban
Cable Communications Commission, the
South Washington Telecommunications
Commission, the Sherburne/Wright County
Cable Commission and the North Metro
Telecommunications Commission

October 12, 1999

U:\cable\Mpls 53800\fcc ROW Comments v3.wpd

ATTACHMENT A

SENT BY: ST. PAUL

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*8/8 * indicates co. had local revenue as of 12/30/99*

CLEC

Fax to Steve 612/546-1003

| | | | |
|---|------|--|------|
| ACI Corporation Catherine M. Hapka 6933 S. Revere Pkwy - Ste 100 Englewood, CO 80112 (303) 476-4200 | 5670 | Cable TV Fund 14-A, Ltd. dba Jones Intercable, Inc. 9697 East Mineral Avenue Englewood, CO 80112 (303) 792-3111 | 5110 |
| AT&T Teresa L. Lynch 901 Marquette Ave S, 9th Floor Minneapolis, MN 55402 (612) 376-6768 | 442 | * Cady Telemanagement, Inc. David Patterson 730 2nd Ave. S., Ste 410 Minneapolis, MN 55402 (612) 553-1001 | 5340 |
| Access Network Services, Inc. Steven Brown c/o Intermedia Communications 3625 Queen Palm Drive Tampa, FL 33619 (703) 478-5772 | 5240 | Central Transport Group, LLC Nicholas Prom 2220 125th St NW Rice, MN 56367-9701 (320) 393-3607 | 5583 |
| Ace Link Telecommunications, Inc. Robert Bulman 207 East Cedar Street Houston, MN 55943 (507) 896-3111 | 5639 | Choicetel, Inc. Jeff Paletz 9724 10th Ave N Plymouth, MN 55441 (612) 544-1260 | 5243 |
| Atlas Communications, Ltd. John Fudesco 482 Norristown Road Blue Bell, PA 19422 (610) 940-9040 | 5279 | * City of Buffalo Merton Auger 212 Central Avenue Buffalo, MN 55313 (612) 682-1181 | 5575 |
| Benton Communications and Sales Corporation 2220 125th Street NW Rice, MN 56367-9701 (800) 683-0372 | 5645 | * City of Detroit Lakes Public Utilities Dept. Curt Punt PO Box 647 1025 Roosevelt Ave Detroit Lakes, MN (218) 847-7609 | 5473 |
| * Brooks Fiber Communications of Minnesota, Inc. Edward J. Cadieux One Brooks Center Parkway 4th Floor Town and Country, MO 63017 (314) 216-1479 | 5487 | * Crystal Communications, Inc. Carrie A. Rice 1650 Madison Ave, Ste 100 Mankato, MN 56001 (800) 326-5789 | 5508 |
| C-I Communications, Inc. Thomas D. Stevens PO Box 100 Emily, MN 56447-0100 (218) 763-3000 | 5593 | Dakota Telecom, Inc. William P. Heaston PO Box 66 29705 453rd Ave Irene, SD 57037-0066 (605) 263-3117 | 5634 |

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| Direct Communications, LLC Robert K. Eddy PO Box 310 440 Eagle Lake Road North Big Lake, MN 55309-0310 (612) 262-4100 | 5654 | *FirsTel, Inc. Neil F. Schmid 2900 W 11th Street Sioux Falls, SD 57104 (605) 332-3232 | 3144 |
| Eclipse Communications Corporation Gene DeJordy, Esq. dba Eclipse Communications(MN) 2001 NW Sammamish Road Issaquah, WA 98027 (425) 313-7744 | 5631 | *Firstcom, Inc. Barbara J. Steen 8000 W 78th St, Ste 180 Minneapolis, MN 55439-2535 (612) 829-1000 | 3146 |
| Electric Lightwave, Inc. Jackie Follis 4400 NE 77th Avenue Vancouver, WA 98662-6706 (360) 896-3236 | 5423 | *Frontier Local Services Inc. Gena M. Doyscher 1221 Nicollet Mall, Ste 300 Minneapolis, MN 55403 | 5442 |
| Excel Telecommunications, Inc. Brenda Owens 8750 N Central Expressway Suite 1900 Dallas, TX 75231 (214) 863-8109 | 3021 | *Frontier Telemanagement Inc. Gena M. Doyscher 1221 Nicollet Mall, Ste 300 Minneapolis, MN 55403-2420 (612) 343-2491 | 449 |
| FIBRCOM, Inc. Nelson Neubrech 801 Plymouth Ave. Minneapolis, MN 55411 (612) 287-3673 | 3140 | *GTE Communications Corporation Paul Fuglie dba GTE Long Distance 6665 N. MacArthur Blvd. Irving, TX 75039-2443 (972) 465-4376 | 5139 |
| Farmers Mutual Technologies, Inc. Robert J. Hoffman PO Box 368 2nd St & 3rd Ave Bellingham, MN 56212-0368 (320) 568-2105 | 5383 | Group Long Distance, Inc. Gerald M. Dunne, Jr. Ste 200 1451 W Cypress Creek Rd Fort Lauderdale, FL 33309 (954) 771-9696 | 5392 |
| Federated Telecom, Inc. Ray Busse East Highway 28 Chokio, MN 56221-0156 (320) 324-7111 | 5545 | HomeTown Solutions, LLC East Highway 28 Chokio, MN 56221-0156 (320) 324-7111 | 5750 |
| | | *Independent Emergency Services LLC Walter S. Clay PO Box 279 235 Franklin Street South Hutchinson, MN 55350-0272 (612) 234-5201 | 5270 |

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| *InfoTel Communications, LLC. Gregory Arvig PO Box 2838 Baxter, MN 56425-2838 (218) 825-7880 | 5509 | *MCImetro Access Transmission Services LLC Patrick Chow 201 Spear St, 9th Floor San Francisco, CA 94105 | 5321 |
| Integra Telecom of Minnesota, Inc. James Oss PO Box 299 4690 Colorado St SE Prior Lake, MN 55372 (612) 447-2172 | 5643 | MEANS Communications Corporation Paul J. Mahoney 10300 Sixth Ave N Plymouth, MN 55441 (612) 230-4163 | 5728 |
| Intermedia Communications, Inc. Steve Brown 3625 Queen Palm Drive Tampa, FL 33619-1309 (813) 829-2231 | 5480 | Mainstreet Communications, LLC Nicholas R. Prom PO Box 25 Sauk Centre, MN 56378-0025 (320) 352-1460 | 5656 |
| JATO Communications Corp. Bruce E. Dines 1099 East 18th St, Ste 700 Denver, CO 80202 (303) 297-8909 | 5710 | Marcus FiberLink, L.L.C. James C. Rice 440 Science Drive, Ste 302 Madison, WI 53711 (608) 238-9690 | 5535 |
| KMC Telecom II, Inc. Tricia Brechenridge Ste 415 3075 Brechninridge Blvd. Duluth, GA 30096-4981 (770) 931-5255 | 5426 | *McLeodUSA Telecommunications Services, Inc. Kay Ann Noeth 6400 C Street SW PO Box 3177 Cedar Rapids, IA 52406-3177 (319) 364-0000 | 5323 |
| LCI International Telecom Corp. Heather Troxell dba LCI International 4250 N Fairfax Dr - 12W057 Arlington, VA 22203 (703) 363-4826 | 3009 | *MediaOne Telecommunications Corp. of Minnesota David Seykora 10 River Park Plaza St. Paul, MN 55107 (651) 312-5280 | 3123 |
| Lakedale Link, Inc. Gene R. South, Sr. 9938 State Hwy 55 NW PO Box 340 Annandale, MN 55302-0340 (612) 274-8201 | 5225 | *Metro Fiber Systems Of Mpls/St. Paul Katherine Stanish 707 17th Street, Suite 3600 Denver, CO 80202 (303) 390-6845 | 495 |
| | | Midwest Information Systems, Inc. George Revering 222 South Clayborn Avenue Parkers Prairie, MN 56361 (218) 338-4000 | 2041 |

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|--|------|--|------|
| *Minnesota Power Telecom, Inc. Christopher Anderson 30 West Superior Street Duluth, MN 55802 (218) 723-3901 | 5596 | One Call Telecom, Inc. Joseph Rubin Ste 1200 Baker Bldg. 706 Second Ave S Minneapolis, MN 55402 (612) 904-6670 | 5379 |
| Moorhead Public Service (Phone) 500 Center Avenue PO Box 779 Moorhead, MN 56561-0779 | 5564 | *Otter Tail Telcom, LLC Daryl Ecker 224 W. Lincoln Ave Fergus Falls, MN 56537 (218) 826-6161 | 5446 |
| NEXTLINK Minnesota, L.L.C. Jason Williams 500 108th Ave NE, Ste 2200 Bellevue, WA 98004 (425) 519-8900 | 5736 | *Ovation Communications of Minnesota, Inc. Kenneth A. Kirley 400 S Hwy 169, Ste 750 Minneapolis, MN 55426 (612) 252-5005 | 5478 |
| NorLight, Inc. dba Norlight Telecommunications(TC) James Ditter 275 North Corporate Drive Brookfield, WI 53045-5818 (414) 792-9700 | 5041 | *POPP Telcom, Incorporated William J. Popp Ste 111 620 Mendelssohn Ave. N. Golden Valley, MN 55427 (612) 546-9707 | 438 |
| North American Telecommunications Corporation Charles M. Piluso 3 Expressway Plaza Roslyn Heights, NY 11577 (516) 719-7800 | 5588 | Preferred Carrier Services, Inc. Jeffery J. Walker 14681 Midway Rd, Ste 300 Dallas, TX 75244 (972) 503-3388 | 5335 |
| NorthPoint Communications, Inc. Steven Gorosh 222 Surter St., 7th Floor San Francisco, CA 94108 (415) 743-1818 | 5638 | Quintelco, Inc. Joel R. Dichter One Blue Hill Plaza Pearl River, NY 10965 (914) 620-1212 | 5534 |
| *NorthStar Access, L.L.C. Robert K. Eddy PO Box 207 440 Eagle Lake Road North Big Lake, MN 55309-0207 (612) 262-3839 | 5668 | RCC Network, Inc. Dean Folkow PO Box 2000 Alexandria, MN 56308-2000 (320) 808-2135 | 5407 |
| Northern Communications, Inc. Jeffrey Gilbert 1831 Anne St NW, Ste 100 Bemidji, MN 56601 (218) 586-3100 | 5441 | Range Television Cable Co., Inc. Frank C. Befera 1818 Third Ave E PO Box 189 Hibbing, MN 55746 (218) 262-1071 | 5451 |

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|---|------|---|------|
| Redwood Falls Telephone Company Laren S. Beran 120 East Third St Redwood Falls, MN (507) 641-8000 | 5580 | Telco Holdings, Inc. dba Dial & Save Cecile I. Lucas dba Dial & Save 4219 Lafayette Center Drive Chantilly, VA 20151 (703) 631-5633 | 5504 |
| Runestone Communications, Inc. Lee Maier 123 Memorial Drive PO Box 336 Hoffman, MN 56339-0336 (320) 986-6602 | 5434 | Telephone Associates, Inc. William C. Torrey 329 Grand Avenue Superior, WI 54880 (715) 392-8101 | 5361 |
| Seren Innovations, Inc. Peter M. Glass 15 South 5th St., Suite 500 Minneapolis, MN 55402 (612) 395-3500 | 5704 | Teligent, Inc. Terri Natoli, Esq. & Stuart Kupinsky, Esq. 8065 Leesburg Pike, Ste 400 Vienna, VA 22182 (703) 762-5100 | 5594 |
| Sprint Communications Company L. P. Mark Johnson 901 E. 104th St., 5th Floor Mailstop: MOKCMD0501 Kansas City, MO 64131 (913) 624-5447 | 466 | TotalTel, Inc. (TC) Warren H. Feldman 150 Clove Road, 8th Floor Little Falls, NJ 07424 (201) 812-1100 | 512 |
| TCG Minnesota, Inc. Jeanne Accetta c/o AT&T Two Teleport Dr., Suite 300 Staten Island, NY 10311 (718) 355-2000 | 5496 | U.S. Link, Inc. Michael Roddy PO Box 327 102 Main Street Pequot Lakes, MN (218) 568-4000 | 465 |
| TCI Telephony Services of Minnesota, Inc. Michael Smith 5440 Cumberland Ave, Ste 238 Chicago, IL 60656 (773) 714-1730 | 5261 | US Xchange of Minnesota, L.L.C. David J. Easter 20 Monroe St, Ste 450 Grand Rapids, MI 49503 (616) 493-7019 | 549 |
| Tekstar Communications, Inc. David Pratt 150 2nd Ave SW Perham, MN 56573 (218) 346-5500 | 5542 | VAL-ED Joint Venture, LLP 150 Second Street SW Perham, MN 56573 (218) 346-5500 | 572 |
| Tel-Save, Inc. dba The Phone Company of New Hope(T Tina Tecce alsodbaNetworkServicesOfNewHop 6805 Route 202 New Hope, PA 18938 (215) 862-1803 | 3049 | WETEC LLC dba Unitel Communications Martin Heino 105 - 3rd St. W Park Rapids, MN 56470-0151 (218) 346-5500 | 561 |

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West Central Technologies, Inc. 5526

Dave Kriens
209 Minnesota Street
Sebeka, MN 56477
(800) 945-2163

WinStar Wireless, Inc. (TC) 5246

Robert G. Berger
1577 Spring Hill Rd. 2nd Floor
Vienna, VA 22182
(202) 530-0993

WorldCom, Technologies, Inc. 3012

James Burrell
515 East Amite Street
Jackson, MS 39201-2702
(601) 360-8600

Y Co, Inc. dba Fairmont Cable TV 5370

Rick Plunkett
PO Box 6478
Rochester, MN 55903
(507) 287-0880

ATTACHMENT B

10/08/99

11:22

NSAC/NSCC

002

Coralie Wilson

From: Getschow, Rick [rick.getschow@ci.lauderdale.mn.us]
Sent: Tuesday, October 05, 1999 11:33 AM
To: 'cwilson@ctv15.org'
Subject: RE: R-O-W Query

Cor:

The number of permits were the same for the year before and the year after the adoption of the ROW ordinance in Lauderdale. Permits were issued to the same companies - NSP, Media One, and US West.

Also, I will be at the budget work session on Thursday.

See you there.

Rick

ATTACHMENT C

Aug-05-99 10:21am From-

T-299 P.02/03 F-024



The Precursor Group®

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1747 Pennsylvania Avenue, N.W.
Washington, DC 20006-4691
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Scott C. Cleland

June 28, 1999

Too Rosy an Outlook for Residential Broadband Access Competition?

Summary: TPG suspects that the current rosy deployment outlook for residential broadband access facility choice will fall short of expectations much as residential competition has disappointed since passage of the 1996 Telecom Act. Just as before, there are powerful industry, financial and political interests at play that promote and benefit from a rosy deployment outlook. However, just because the promoters' views are rosy does not make them realistic. There's not a lot of mystery about the prospects for the residential broadband market. All the potential competitors have either a government license or regulated rights of way, and they all have deployment markets and timetables. Attached is a TPG summary of the universe of potential sources of residential facilities-based broadband competition and the likely reach and timetable of broadband deployment. TPG would expect other feasibility surveys of deployment plans to yield healthy skepticism. The cable open access debate largely hinges on the prospects for alternative broadband deployment. The FCC apparently assumes that the market will create enough nationwide competitive alternatives (4 to 5+) to ensure that there would be no anticompetitive effects from a closed cable platform. Federal Judge Panner's recent Portland decision favoring local open access authority declared cable an "essential facility" for competitive ISPs.

Outlook for Residential Broadband Facility Choice: Being generous, and using the FCC's "broadband" definition (200+ kilobits per second in both directions), TPG believes the best practical broadband deployment case for the next three years is that: about one quarter of the country might enjoy a choice of three broadband options (cable modems, DSL, and fixed wireless); roughly one-half of the country could enjoy a choice of cable modems and DSL; and about three-quarters of the country could have cable modems available. The antitrust flip side of this best practical case is that: about one-quarter of the country won't have any broadband offering; about one-quarter will have one option—cable modems; about a quarter will have two options—cable modems and DSL; and about one-quarter will have three options—cable modems, DSL and fixed wireless. TPG suspects actual deployment could be less.

Red Flags Questioning a Rosy Deployment Scenario:
(1) **Where Is DSL?** After years of hype and rosy projections, currently only about one of 15 residential broadband customers uses DSL. Moreover, the underwhelming deployment experience of ISDN (the telcos' former high-speed service—

128 kilobits per second)—roughly 200,000 residential customers over the last 11 years could be a red flag for DSL projections. (2) **Iridium?** The most recent experience we have with new satellite offerings is Iridium, which may go bankrupt, having spent \$5 billion to attract roughly 10,000 customers worldwide. (3) **Fixed wireless?** a) The reason Sprint and MCIWorldcom were able to purchase their fixed wireless cable spectrum is that the previous businesses that used that spectrum went bankrupt. b) Current deployment of fixed wireless has been slowed because the industry has had problems securing economical building roof rights to deploy antennae. The problem is serious enough that the FCC recently launched a *proposed* rulemaking. c) AT&T's \$100 billion investment in cable broadband suggests that AT&T's believes cable broadband could be deployed faster and better than its own fixed wireless "Project Angel." (4) **Tough questions?** a) The official lobbying position of both the local telco and the cable monopolies is that they cannot afford to upgrade their existing facilities to two-way broadband if regulators force them to share their bandwidth with competitors. What does this suggest about the economic viability of a new entrant that has to build facilities from scratch without the cross-subsidy of an existing customer base? b) If AT&T truly believes there are plenty of broadband alternatives, what are AT&T's immediate plans for offering competitive broadband service to the 75% of American households where it claims it will not have cable properties? c) If the FCC truly believes there are going to be plenty of broadband options soon, a "no-opoly," why is the FCC planning to hyperregulate the local telcos' DSL spectrum and DSL offerings? And why is the FCC not trumpeting the benefits of DSL deregulation in order to spur DSL deployment?

Can't Ignore Economics: While it is not "politically correct" to still talk of "natural monopoly" economics, the cold reality remains that residential broadband facilities remain simultaneously highly capital-intensive up front and highly capital inefficient over time because of the lack of geographic density and the lack of high-volume customers. Local residential competitive economics remain dismal unless an AT&T can assume very high penetration rates, cross-subsidize its video monopoly, and vertically leverage market power into e-commerce by preventing competitive Internet access. Ponder how the CLECs have shunned the residential market. Ponder how the FCC manufactured a *effective* 75% local service resale discount (UNEP); that speak volumes about how acutely aware the FCC is of the lingering "natural monopoly" economics in the residential market. (See attached chart) * * * * *

ADDITIONAL INFORMATION AVAILABLE ON REQUEST -- The information contained in this report is based on sources believed to be reliable, but we do not guarantee its completeness or accuracy. This report is for information purposes only and is not intended to be an offer to buy or sell the securities referred to herein. Opinions expressed are subject to change without notice. Past performance is not indicative of future results. From time to time, Legg Mason Wood Walker, Inc. and/or its employees, including the analyst(s) who prepared this report, may have a position in the securities mentioned herein. "Precursor Research" is a registered trademark of Scott C. Cleland, licensed to Legg Mason Wood Walker, Inc. Member New York Stock Exchange/Member SIPC.

Precursor Watch[®] -- Residential Broadband Deployment Outlook

| Residential Provider | Two-Way Broadband? | Estimated Current Residential Subscribers | Availability (Portion of U.S. Households) | | | | | Approximate Current Pricing | Download Speed | Upload Speed |
|--|--------------------|---|---|------|------|------|------|---------------------------------------|-----------------------|-----------------------|
| | | | 1999 | 2000 | 2001 | 2002 | 2003 | | | |
| Wireline | | | | | | | | | | |
| Cable Modem <i>Cable and AT&T</i> | Yes | ~900,000 | | | | | | ~\$100+ (start-up) ~\$45 (monthly) | ~2 mbps | ~500 kbps |
| xDSL <i>ILEC, CLEC, IXC</i> | Yes (most) | ~60,000 | | | | | | ~\$200+ ~\$50+ | ~768± kbps | ~256 kbps |
| Electric Lines <i>Nortel - Nor. Web (Europe) Media Fusion? (Experimental)</i> | Yes | 0 | | | ? | | | n/a | ~1 mbps ~2.5 gbps? | ~1 mbps ~2.5 gbps? |
| Terrestrial Wireless | | | | | | | | | | |
| Digital TV <i>Broadcasters (54-746 MHz)</i> | No | 0 | | | | | | n/a | ~2 mbps | ~28.8 kbps |
| Wireless Loop <i>AT&T Project Angel (1.8-2.1 GHz)</i> | No | 0 | | | | | | n/a | ~128 kbps | ~128 kbps |
| 3G Mobile Wireless <i>PCS (1.88-2.02; 2.11-2.20 GHz?)</i> | Yes (mobile?) | 0 | | | | | | n/a | ~384+ mbps | ~384+ mbps |
| MMDS <i>Sprint, etc. (2.1-2.7 GHz)</i> | Yes (long-term) | ~10,000 | | | | | | ~\$200+ ~\$50 | ~1 mbps | ~256 kbps |
| LMDS <i>Winstar, Teligent, Nextlink, etc. (24, 28, & 38 GHz)</i> | Yes | 0 | | | | | ? | n/a | n/a | n/a |
| Satellite | | | | | | | | | | |
| Existing Systems <i>Hughes DirecPC (Ku band: 10-18 GHz)</i> | No | ~40,000 | | | | | | ~\$200+ ~\$50 | ~400 kbps | ~28.8 kbps |
| Planned Systems <i>Spaceway, Skybridge, Teledesic (Ku 10-18; Ka 18-30 GHz)</i> | Yes | 0 | | | | | | n/a | ~6+ mbps | ~2 mbps |

Key: Two-Way Broadband? FCC defines "broadband" as 200 kbps both ways. Availability: Assuming ~100m U.S. households, circles depict estimated portion: with access available (black); likely to have access available long-term (gray); and unlikely to be targeted for deployment (white). Pricing and Speed: We show a representative price/speed package, selected from a range of options, likely to have the broadest residential appeal. Circles depict the size (speed) of a representative "pipe."

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ATTACHMENT D

Summary of MN PUC Findings Against U S WEST

In its Final Order, July 29, 1998, the Minnesota Public Utilities Commission found that U S WEST had violated state law and breached its respective interconnection agreements in three of the four areas that MCImetro raised in its complaint.

A decision on the fourth claim, U S WEST's refusal to process MCImetro's test orders for unbundled network elements, was deferred pending a decision by the United States Supreme Court in the matter of Iowa Utilities Board vs. FCC, 120 F.2d 753 (8th Cir. 1997). The Commission specifically found that:

1. U S WEST did not provide forecasts of its traffic volumes and ignored the initial forecasts provided by MCImetro (Order at 4);
2. U S WEST did not provide notice of network capacity exhaust and of major repair and expansion work that impaired MCImetro's ability to interconnect. (Order at 4);
3. U S WEST's breaches were the result of "conscious decisions" (Order at 5);
4. U S WEST did not treat MCImetro "fairly, equally, and in a nondiscriminatory manner" (Order at 5);
5. U S WEST's conduct slowed MCImetro's entry into the local telecommunications market in Minnesota (Order at 5);
6. U S WEST violated Minn. Stat. § 237.121 (4) by refusing to provide a service, product or facility in accordance with its contracts and Commission rules and orders (Order at 6);
7. U S WEST did not confirm the delivery date of interconnection trunks within the appropriate time frame (Order at 7);
8. U S WEST violated Minn. Stat. § 237.06 by not installing interconnection trunks on promised delivery dates (Order at 7); and
9. U S WEST did not provide interim local number portability with "as little impairment of functioning quality, reliability and convenience as possible" and did not work with MCImetro to develop a system that would "eliminate customer downtime (Order at 13)."

Chronology of MCI Complaint vs. U S WEST

1. Aug. 1, 1995: Minnesota opens its local telephone markets to competition.
2. Feb. 8, 1996: President Clinton signs the federal Telecommunications Act of 1996 opening local telecommunications markets nationwide to competition.
3. Feb. 16, 1996: MCImetro Access Transmission Services, Inc. applies for interim authority to provide local service in territories of US WEST, GTE, United and Frontier.
4. March 26, 1996: MCImetro requests interconnection negotiations with U S WEST pursuant to the Telecommunications Act of 1996.
5. June 24, 1996: Over U S WEST's objection, Minnesota PUC conditions approval of MCImetro certificate upon reaching interim interconnection agreement with U S WEST and approval of interim tariff.
6. Nov. 1, 1996: MCImetro and U S WEST personnel meet to discuss interconnection requirements. MCImetro provides forecast of facilities to U S WEST.
7. Nov. 5, 1996: PUC orders U S WEST to enter into interim interconnection agreement with MCImetro after negotiations prove fruitless.
8. March 1997: MCI places order for interconnection trunks consistent with November 1996 forecast. U S WEST informs MCImetro that facilities are not available at the local tandem switch. Without interconnection trunks, MCImetro cannot provide service.
9. March 17, 1997: PUC approves final arbitrated interconnection agreement between MCImetro and U S WEST.
10. Spring 1997: Lacking access to U S WEST's local tandem, MCImetro deploys interconnection trunks to U S WEST end offices. This form of interconnection is less efficient and more expensive than connecting at the tandem. Deployment is to occur in three phases, yet MCImetro is repeatedly told by U S WEST that there are no facilities available in the end offices.
11. Sept. 4, 1997: MCImetro files complaint against US WEST for anticompetitive behavior. MCImetro alleges U S WEST's practices created a barrier to entry.
12. Sept. 16, 1997: Commission seeks comments on whether it has jurisdiction over

the complaint; whether reasonable grounds exist to investigate the allegations; or whether to treat the action as a complaint under Minn. Rule 7829.1700 or an arbitration 7812.1700.

13. Sept. 26, 1997: MCImetro, U S WEST, Minnesota Department of Public Service, and the Residential and Small Business Utility Division of the Office of the Attorney General (RUD-OAG) file comments. With the exception of U S WEST, all parties urge the Commission to proceed with an investigation.

14. Nov. 4, 1997: Commission issues Order Finding Jurisdiction and Initiating Expedited Proceeding. Commission finds appropriate mechanism for resolving dispute was provided by Interconnection Agreement between companies. Order establishes procedural schedule.

15. Nov. 14, 1997: U S WEST files Answer to Complaint and Motion to Strike.

16. Nov. 24, 1997: MCImetro files its initial comments, affidavits and opposition to US WEST's Motion to Strike. U S WEST files its initial comments and affidavits on the same day.

17. Dec. 15, 1997: MCImetro and U S WEST file rebuttal comments and affidavits.

18. Jan. 20, 1997: MCImetro, U S WEST and DPS file final comments.

19. March 18 & 19: Commissioner Scott conducts two-day evidentiary hearing.

20. April 17, 1998: MCImetro, U S WEST and DPS file final comments and recommendation. DPS urges Commission to find numerous breaches of state law and interconnection agreement and recommends referring matter to Attorney General for civil penalty.

21. June 17, 1998: Commission holds open deliberations.

22. July 29, 1998: Commission enters against U S WEST Order Finding Breaches of State Law and Interconnection Agreement and Requiring Compliance Negotiations and Filings.