

ORIGINAL



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

EX PARTE OR LATE FILED

MIKE HATCH
ATTORNEY GENERAL

November 10, 1999

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

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

Dear Ms. Salas:

On Monday, November 8, 1999, Commissioner David Fisher, Laura Bishop and Jack Yarbrough of the Minnesota Department of Administration, Adeel Lari of the Minnesota Department of Transportation, Dennis Ahlers of the Minnesota Attorney General's Office on behalf of those state agencies, and John Horsley, Executive Director of the American Association of State Highway and Transportation Officials, met with Thomas Power, Senior Legal Advisor to Chairman Kennard. The purpose of the meeting was to discuss the State of Minnesota's petition in CC Docket No. 98-1.

The State participants reiterated the State's position, as reflected in filed documents, that the State's contract with ICS/UCN does not violate Section 253 of the Telecommunications Act of 1996, and that it is not anti-competitive and that it will help bring technological advances and competition to rural areas of the State.

Mr. Horsley emphasized the importance of preserving the safety of the freeways and of allowing each state to make its own judgment about how to preserve the safety of the traveling public in their states.

A summary of the points made and of the materials provided at the meeting are enclosed.

Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy are being filed with your office for inclusion in the public record of the above-referenced proceeding.

Very truly yours,

DENNIS D. AHLERS
Assistant Attorney General
(651) 296-7580

Encls.
cc: Thomas Power

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Minnesota Department of Transportation

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News Release

Statewide fiber-optic network project moves forward

Court upholds state's authority to enter "Connecting Minnesota"

May 5, 1999, St. Paul, Minn. – The State of Minnesota's "Connecting Minnesota" fiber-optic network will continue moving forward following a legal victory Tuesday in Ramsey County District Court. Judge Kathleen Gearin yesterday dismissed a lawsuit filed by the Minnesota Telephone Association (MTA) and MEANS Telecom to stop the project. The court rejected all of the arguments against the project, allowing the state to take advantage of the network agreement.

"We are very pleased that Connecting Minnesota is moving forward. Transportation corridors are vital to moving goods and people – and now electronic information as well," said State Transportation Commissioner El Tinklenberg.

A collaboration between public and private sectors, Connecting Minnesota allows ICS/UCN, a Denver-based utility developer, one-time access to lay fiber-optic cable along 900 freeway miles in exchange for installing the infrastructure along another 1,000 miles of Trunk Highway through smaller, less lucrative markets in rural Minnesota. The agreement also provides some telecommunications capacity for the public sector, including K-12 schools, libraries, colleges and universities.

David Fisher, commissioner of the Department of Administration and former vice president and general counsel of Minnetonka-based ADC Telecommunications, said that Connecting Minnesota will benefit both public and private sectors, including local telephone companies, because the network will support more telecommunications service providers. He said the resulting competition will lead to better services and lower costs for everyone.

(more)

Fiber-optic network project moves forward

May 5, 1999

Page 2

"We initiated Connecting Minnesota to wire state government and facilitate the deployment of the fiber-optic technology to areas where service is uneven. This project will introduce and broaden competition between telecom providers so that rural Minnesotans will have equal access to information technology that serves economic development, education and health care," he said.

In her decision, Judge Gearin concluded that the agreement between the State of Minnesota and ICS/UCN is a valid, legally binding contract. She added that fiber-optic cables are to our future as telephone lines were to our past and that government cannot cling to the traditional ways of purchasing services. She also maintained that government must maximize its human and physical resources and that state used a valuable resource, interstate rights-of-ways, to purchase, by barter, another valuable resource – in this case fiber-optic services.

Construction of the network began last fall in northwestern Minnesota along Highway I-94 between Moorhead and St. Cloud. Work will continue on I-94 this summer to connect the stretch into the Twin Cities metro area. Summer construction is also planned for I-90, I-35 and Trunk Highway 14 in southern Minnesota. Telecommunications capacity will be available in segments as the rest of the network is built. Mn/DOT anticipates network completion, including areas in northern Minnesota in mid-2001.

The \$125 million network is being financed, built and maintained by the private sector, under a contract secured by the state through competitive bidding processes. The vast majority of the telecommunications capacity will be available wholesale to private long-distance and Internet service providers.

According to Adeel Lari, Mn/DOT project director, Connecting Minnesota will reach to within 10 miles of about 80 percent of the state's population, and that "local roads" and connections must still be built and maintained by telephone and cable companies, electric utilities or other groups so that business and residential users can make full use of the advanced telecommunications services supported by the fiber-optic technology.

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For more information

www.dot.state.mn.us

State of Minnesota - Connecting Minnesota Fiber-Optic Network Partnership
FCC Docket No. 98-1

What is it?

Connecting Minnesota is a public-private partnership to build a \$195 million fiber-optic network along 2,200 miles of the state roadway system. In exchange for one-time access to 950 miles of Interstate rights-of-way, a private sector utility developer is financing, building and maintaining the network on 1,250 additional miles of state highway ROW in rural areas of Minnesota.

Agreement Promotes Development of Rural Telecommunications System

1. Advances deployment of fiber and thus the availability of new telecommunications technology in rural Minnesota, preserving communities and providing new opportunities for education, economic development and health care.
2. Obligates contractor to provide fiber along 1,250 miles of non-freeway routes in under served rural areas of the state.
3. Makes rural areas more accessible and attractive to communications competitors.

Agreement Provides More Options for Carriers and Service Providers

1. Makes previously unavailable Interstate ROW available to all providers on a one-time basis.
2. Simultaneous colocation is available to all on the Interstate routes - some carriers are taking advantage of it at the present time.
3. Developer operates as a "carrier's carrier" - does not provide service to end-users.
4. Capacity on the network is available to any service provider on a nondiscriminatory basis, adding an alternative for service providers. Primary opponent of agreement is the rural incumbent.

Agreement Preserves Safety of High-Speed Interstate Routes

1. One-time access by single developer maintains the safety of the traveling public, law enforcement and transportation workers while encouraging deployment of additional fiber.
2. Supports installation of intelligent transportation systems along Interstate and rural routes.

Connecting Minnesota is Consistent with the Goals of the Telecom Act

1. States have the duty to safely and prudently manage public rights-of-way in conformance with the 1996 Telecommunications Act, Section 253 a, b and c without prohibiting competitive entry.
2. Duty extends to controlling the frequency, duration and other conditions of access as deemed necessary to protect the public safety and welfare.
3. Promotes competition by adding another option to multiple ROW alternatives available to service providers to build networks.

AASHTO 1999 SCoO Team Recognition Supporting Page

Comments on Mn/DOT's Connecting Minnesota fiber-optic network project* as provided by national transportation officials, agencies, associations, and by media statewide.

"...states and municipalities have the duty to safety and prudently manage public rights-of-way in conformance with (1996 Telecommunications Act) Sec. 253, and (this) duty should extend to controlling the frequency, duration and other conditions of access as deemed necessary to protect the public safety and welfare ..."

- *American Association of State Highway and Transportation Officials, April 19, 1999*
Policy Resolution PR-3-99

"Minnesota, in its Connecting Minnesota initiative, has developed a unique model for allowing access to state-owned highway rights-of-way in exchange for the development of a wide band fiber-optic network."

- *Western Governors' Association, October 20, 1998*

"Shared resource projects, such as that reflected in the Minnesota shared resources agreement, enable the public sector to leverage its limited resources - financial, physical and otherwise - to attract even greater private sector contributions."

- *The Intelligent Transportation Society of America, June 16, 1998*

"The Minnesota agreement is a legitimate exercise of its authority to manage public rights-of-way ... although the agreement grants physical access to a single entity, it is in no other respect exclusive, particularly insofar as telecommunications services are concerned."

- *U.S. Department of Transportation, April 9, 1998*

"Creating the fiber-optic communications network at no expense to the public is an ingenious step. Like the railroads in the 19th century, these facilities are necessary to the economy and the educational institutions of the state."

- *Rochester Post-Bulletin, January 12, 1998*

"It's an extraordinary project that should not be reduced to techno babble. It might not make a sensational headline, but its importance to the state's future cannot be underestimated. "

- *Fargo Forum, January 5, 1998*

"The new public-private partnership to run fiber-optic cable down 1,800 miles of highway rights-of-way is a promising milestone in developing Minnesota's telecommunications backbone."

- *Minneapolis Star Tribune, January 3, 1998*

"Having such a vast system at no cost to taxpayers and getting free access for units of governments far outweighs competitive concerns, especially since the project was open to bidding from anyone qualifies. This is a wonderful opportunity for rural Minnesota at virtually no public cost."

- *Duluth News-Tribune, January 1, 1998*

"... MnDOT's request (for a favorable FCC ruling) will have profound, nationwide impacts on the future ability of state departments of transportation to develop, and finance intelligent transportation systems through innovative, shared resource agreements with the private sector like the MnDOT Agreement ..."

- *American Association of State Highway and Transportation Officials, April 28, 1997*
Policy Resolution PR-8-97

*In addition to the U.S. Department of Transportation, over 30 individual state DOTs have filed formal comments with the Federal Communications Commission in support of Connecting Minnesota and Mn/DOT's approach to balancing highway safety and deployment of telecommunications infrastructure.

This public-private approach is welcome

—*Star Tribune*

**Connecting rural Minnesota via highway system
at no taxpayer cost will help job growth**

—*Duluth News-Tribune*

**Creating a high-speed network for data
transmission will help business and local
governments**

—*Rochester Post-Bulletin*

It's one of (Governor) Carlson's best ideas

—*Fargo Forum*

“Right-of-way” partnership is the right way to ensure high-speed, cost-effective telecommunications access in all parts of the state.

Wiring Minnesota

By David Fisher
and Ewyn Tinklerberg

Onvoy, a for-profit telecommunications provider formerly known as MEANS Telecom, questions the importance of fiber-optic technology, the infrastructure that supports high-speed telecommunications, as a solution to economic development needs.

That observation and other information included in the company's Business Forum (“State misses point in rural telecommunications debate,” Sept. 6.) need to be challenged.

Deployment of advanced telecommunications infrastructure in rural Minnesota alone certainly is not sufficient to meet all of Minnesota's economic development needs. However, it's essential in order for communities to preserve and expand businesses and populations they already have. Advanced telecommunications services allow far more productivity than was possible just a decade or two ago, and dramatically reduce the time and complexity required in getting things done.

Affordable, state-of-the-art telecommunications services are critical to the welfare of business and education in rural Minnesota. With the rise of the “knowledge economy” this infrastructure is required when equal access to information and full participation in the international marketplace are societal goals.

It's true that the real challenge is to make telecommunications services affordable in less densely populated regions of the state. That is why “Connecting Minnesota” a public-private partnership to build a fiber-optic network, has been designed to cover a wide area of the state — along both freeways and trunk highways throughout Minnesota. With a 2,200-mile network that includes 1,250 non-freeway miles, Connecting Minnesota will reach to within 10 miles of 80 percent of the state's population and will help to link even our smaller communities such as Fosston, Slayton and Dodge Center.

‘Track’ partly laid

Onvoy contends that the rural telecommunications infrastructure already is in place and that “the track has been laid.” This may come as a surprise to those communities that today continue to



Star Tribune illustration by Jim Freitag

demand higher speed, advanced networks. Economics drive decisions to build out and upgrade networks, decisions that often bypass smaller Minnesota communities with low populations and correspondingly low subscription rates.

In reality, advanced telecommunications services are available in some places and not in others. Our view is that the telecommunications infrastructure is sufficiently deployed only when the public it serves — and not the carriers — comes to that conclusion. Right now, we are far from that conclusion.

We also are concerned that the fiber-optic infrastructure currently in place lacks substantial network management and interconnectivity capabilities. It is one thing to say there is a great deal of infrastructure already in place, but quite a different matter to assert that this infrastructure can be managed efficiently and cost effectively. There is not “track” unless and until it can bear the traffic.

Part of solution

Part of the telecommunications solution is Connecting Minnesota — a backbone network built, owned and maintained by private enterprise, a firm known as International Communications Services/Universal Communications Networks, or ICS/UCN. The company, based in Denver, is a telecommunications utility developer that specializes in assisting cities, counties and states to develop

telecommunication networks.

The Minnesota network is designed to provide local, community-based carriers access to long-distance broadband services. Within communities, these local carriers will sell services to customers as they always have. These carriers then have the opportunity to link their customers to the Connecting Minnesota backbone, for which they will pay operating fees to ICS/UCN.

In the state's case, the operating fees are already paid, in the form of the highway rights of way used to construct part of the backbone network.

This is a simple, yet brilliant plan that helps achieve the state's objectives of assuring advanced telecommunications at the lowest possible cost to our taxpayers. And it has already survived a court challenge. In May, Ramsey County District Judge Kathleen Gearin dismissed a lawsuit filed by the Min-

BUSINESS FORUM

SUNDAY, OCTOBER 3 • 1999

STAR TRIBUNE • PAGE D11

nesota Telephone Association and MEANS that sought to halt the project. In her ruling, the judge said that fiber-optic cables are to our future as telephone lines were to our past and that government cannot cling to the traditional ways of purchasing services.

Connecting Minnesota clearly does not isolate our communities. The "local roads" and connections for Connecting Minnesota must be built and maintained by local service providers such as telephone companies, cable companies, electric utilities, or wireless providers.

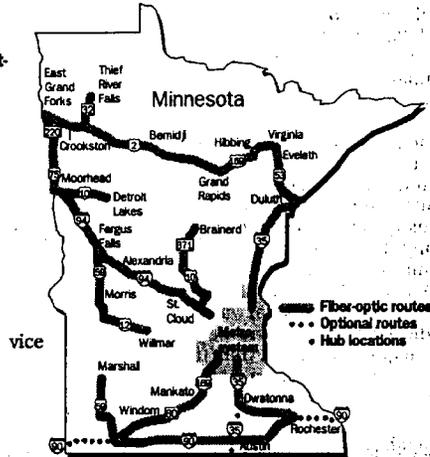
The public-private arrangement responds to the fact that communications services in rural Minnesota are uneven and often more expensive than services in urban areas and regional centers.

Connecting Minnesota will support the state in achieving its goals to encourage rapid deployment of advanced technologies, assure the security and integrity of the state telecommunications network, and promote competition in the marketplace, at pricing that is affordable to the vast majority of Minnesotans.

The project has been cited as a national model for government and business collaboration for the purpose of providing the public with quality network services, which might encourage other private carriers to provide more advanced services in the "local loop" — the stretch of the network between homes and offices and the backbone network.

Indeed, this is a goal of the Ventura administration in every community in which the state requires telecommunications services for its own state agencies. State ser-

Map depicts planned routes for the Connecting Minnesota fiber-optic backbone network. The stretch between Moorhead and St. Cloud is under construction; the remainder of the network is to be completed in segments through 2001.



requirements will be aggregated with those of the community at large, to the greatest extent feasible. Connecting Minnesota supports this objective.

Wired highways

Connecting Minnesota will also meet MnDOT's objectives to place fiber-optic technology along freeways, allowing the transportation department to post information and better manage traffic. This includes MnDOT's network of electronic message boards, video cameras and metered freeway on-ramps. In addition, the fiber will facilitate intelligent highway applications in rural Minnesota such as the Road Weather Information System and deliver information at roadside rest areas and travel information centers around the state.

Through Connecting Minnesota, the state is encouraging the private sector to deploy telecommunications capacity to both urban and rural communities. The

private sector — represented by ICS/UCN and our many local carriers, among others — is providing an alternative infrastructure and enabling competition for services to local communities.

For these networks to reach their full potential, connections — both statewide and local — must be made. We invite Onvoy, the Minnesota Telephone Association and other interested groups to work with the state as a customer in achieving those connections.

Ultimately, the question is whether the various state networks are interconnected and operable, and whether the combined transmission capacity all these systems represent is accessible and affordable for the broadest possible array of services to the broadest number of people. These clearly are the more serious issues before us.



Fisher



Tinklenberg

The authors

David Fisher is commissioner of the Minnesota Department of Administration, which handles state government telecommunications services. Elwyn Tinklenberg is commissioner of the Minnesota Department of Transportation.

Connecting Minnesota



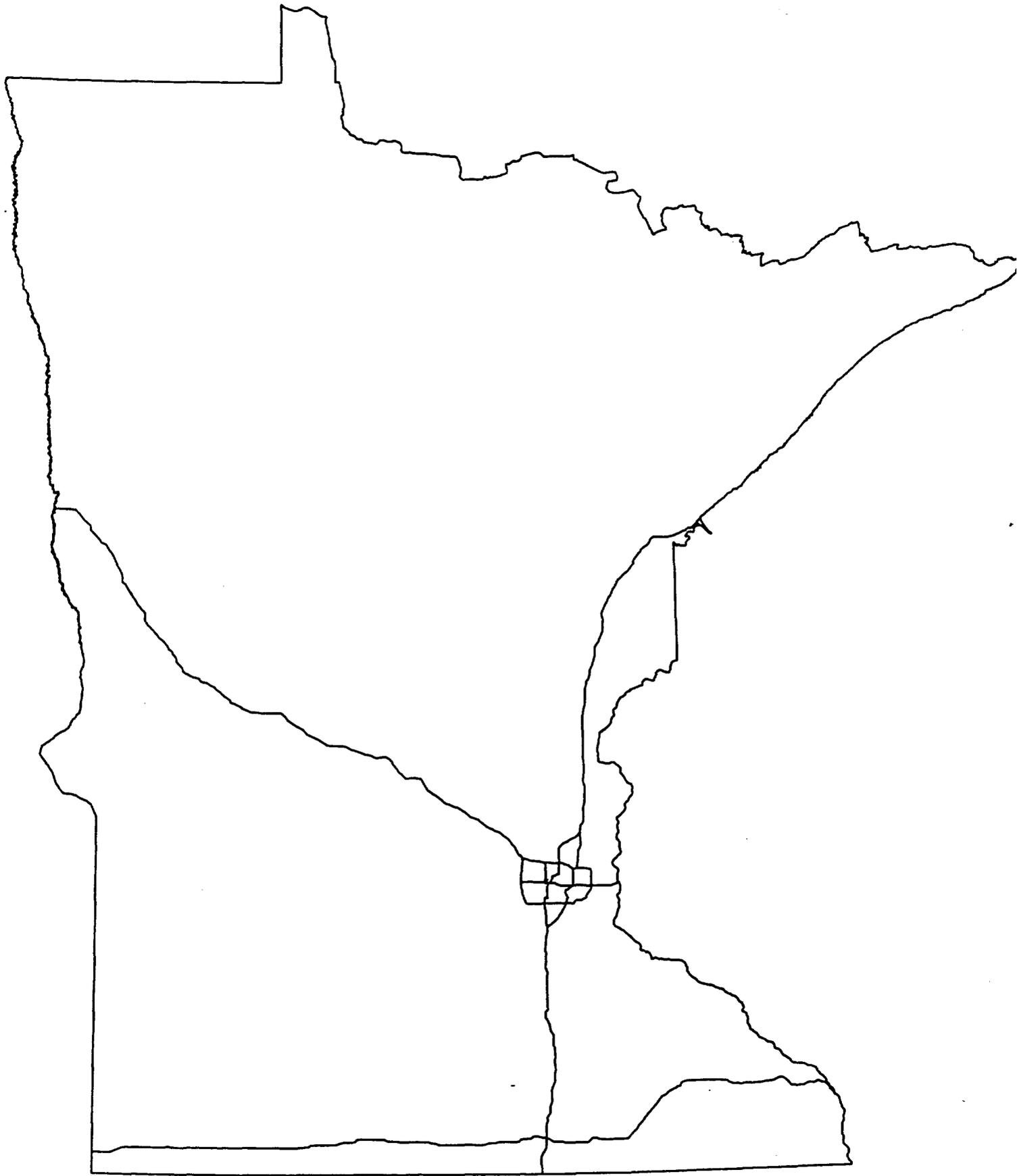
Connecting Minnesota

MONTICELLO

NORTH BRANCH

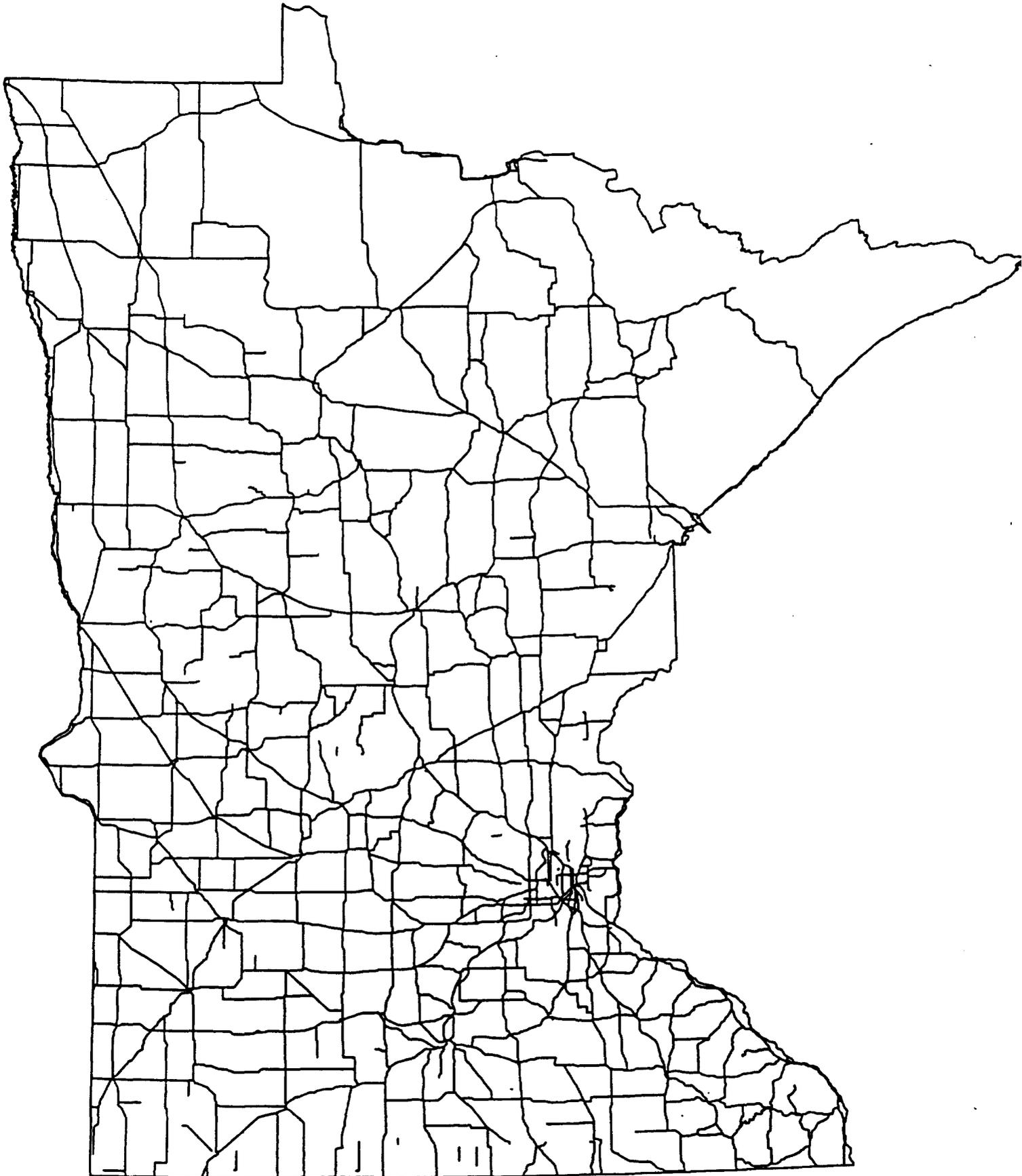


- Initial Routes
- Optional Routes
- Hub Locations

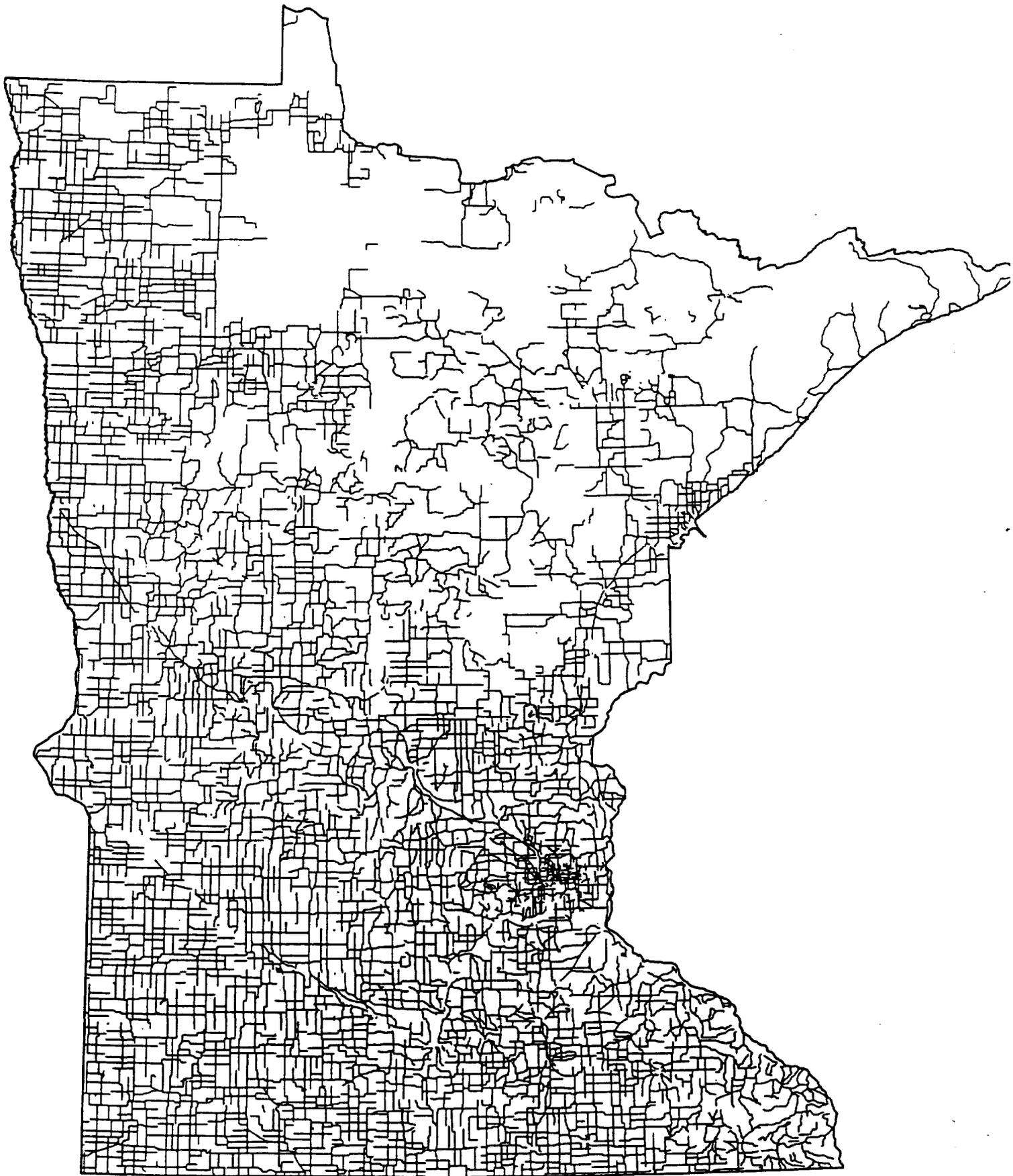


Interstate Highways

Source: Minnesota Department of Transportation, 1997

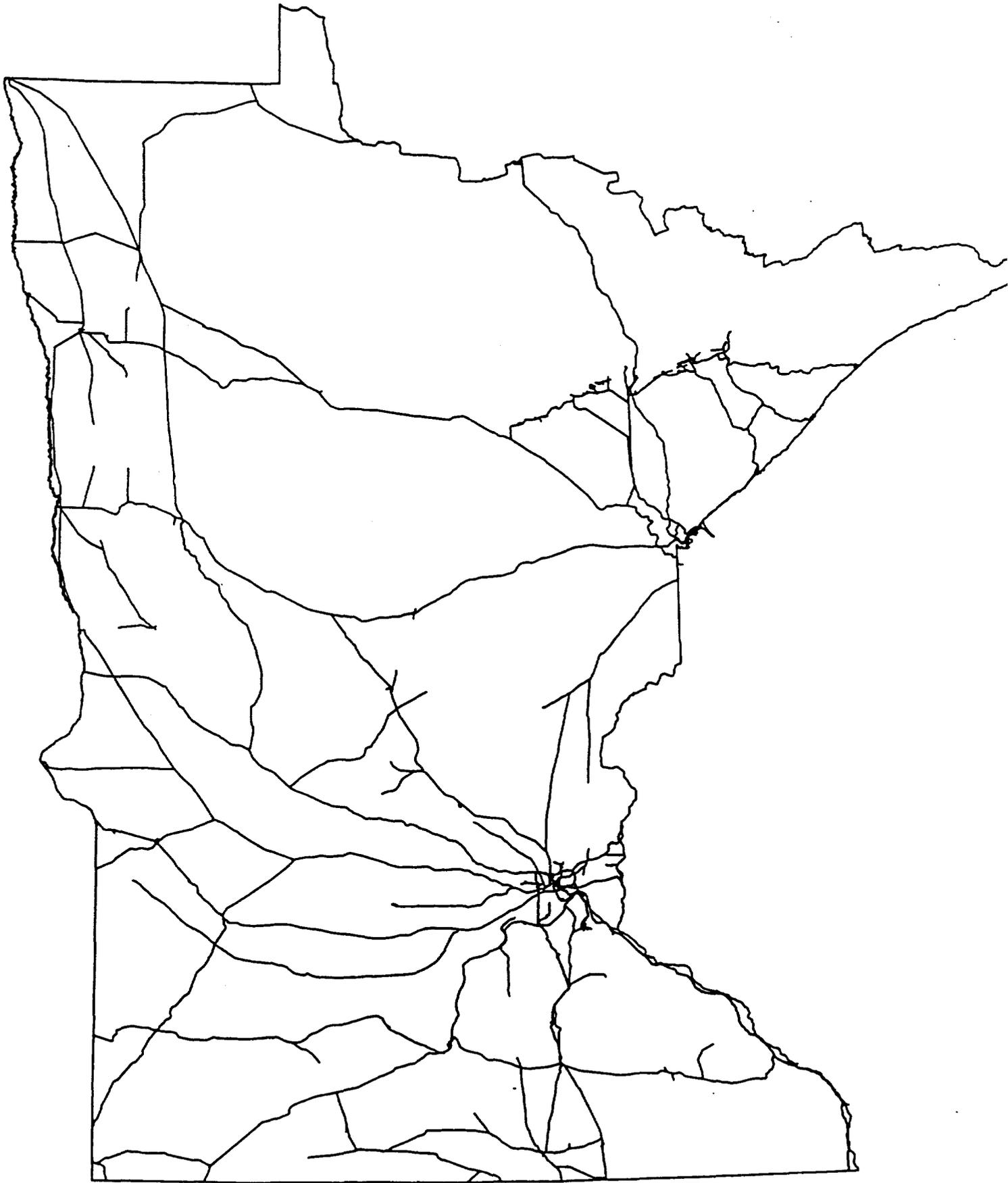


State Trunk Highways (not including Interstate Highways)
Source: Minnesota Department of Transportation, 1997



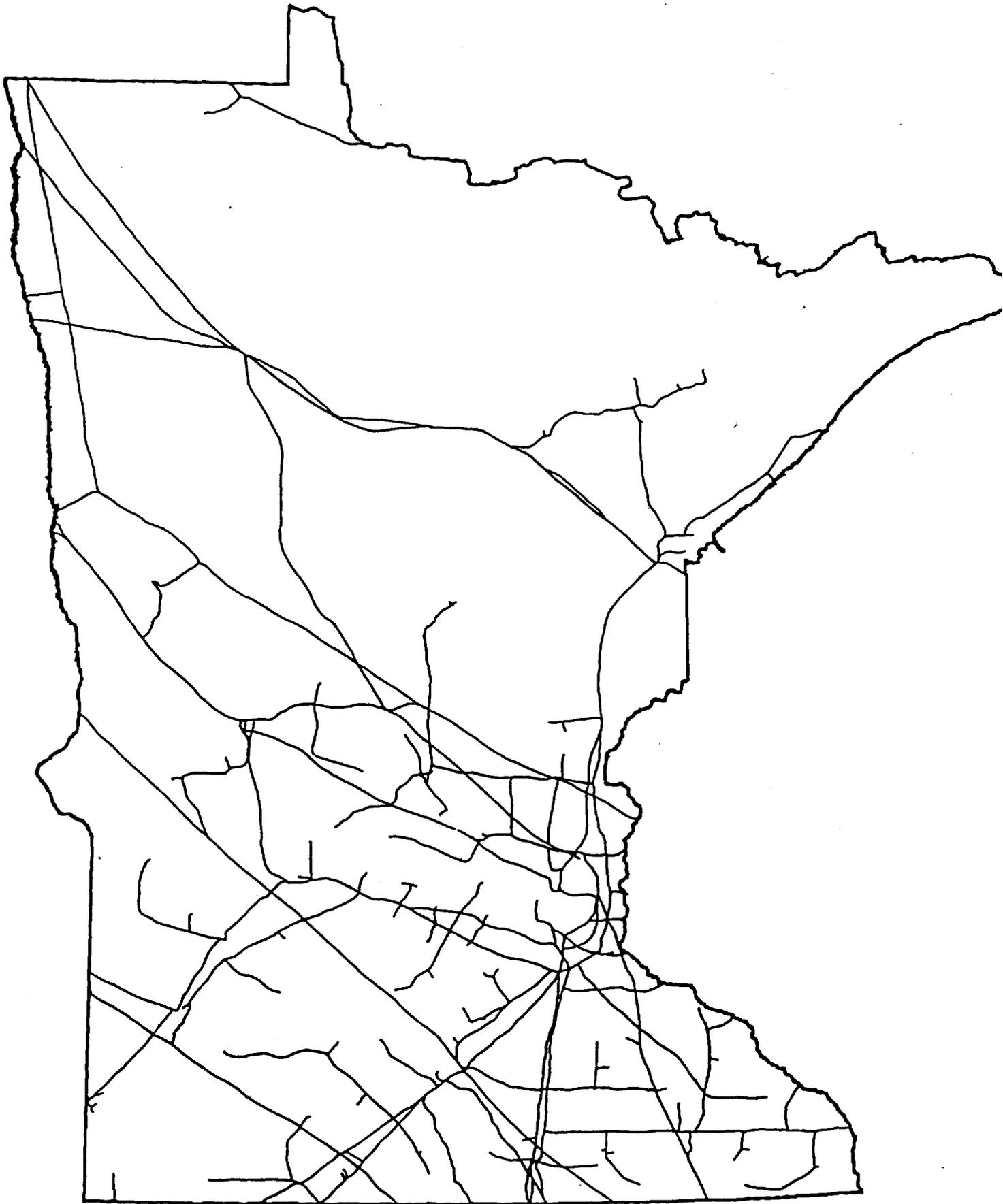
County State-Aid Roads/Highways

Source: Minnesota Department of Transportation, 1997



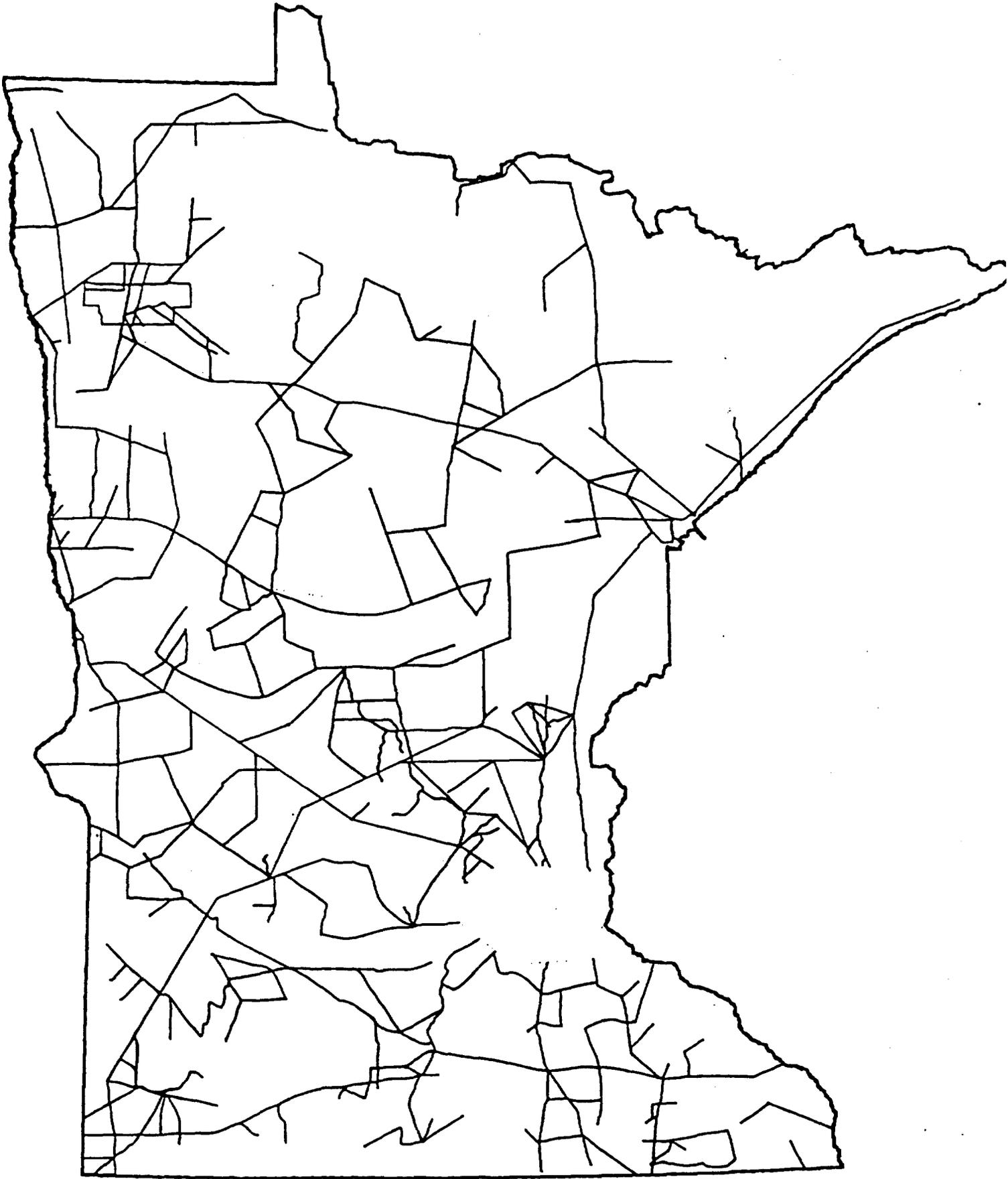
Railroads

Source: Minnesota Department of Transportation, 1997

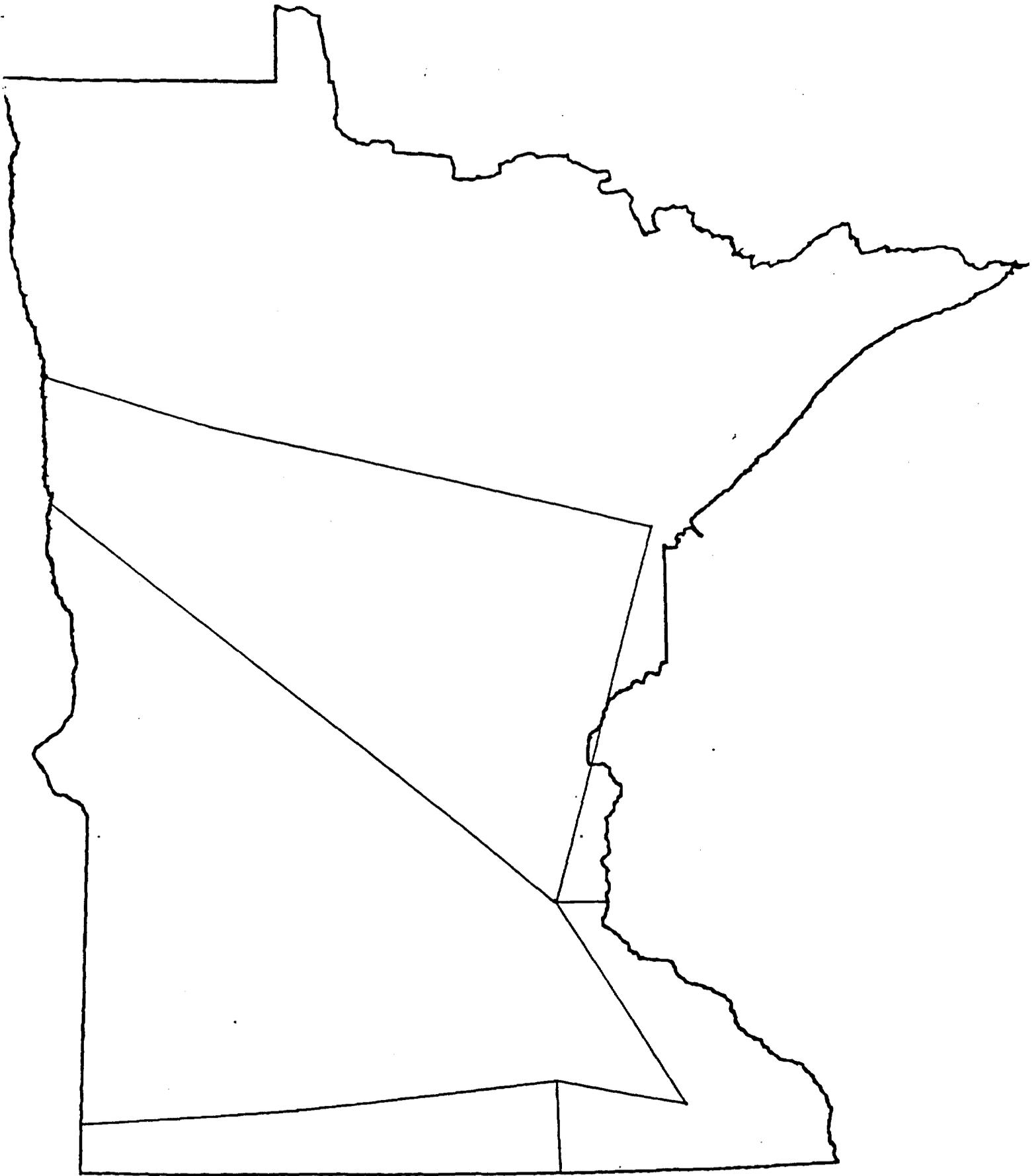


Major Gas and Liquid Pipelines

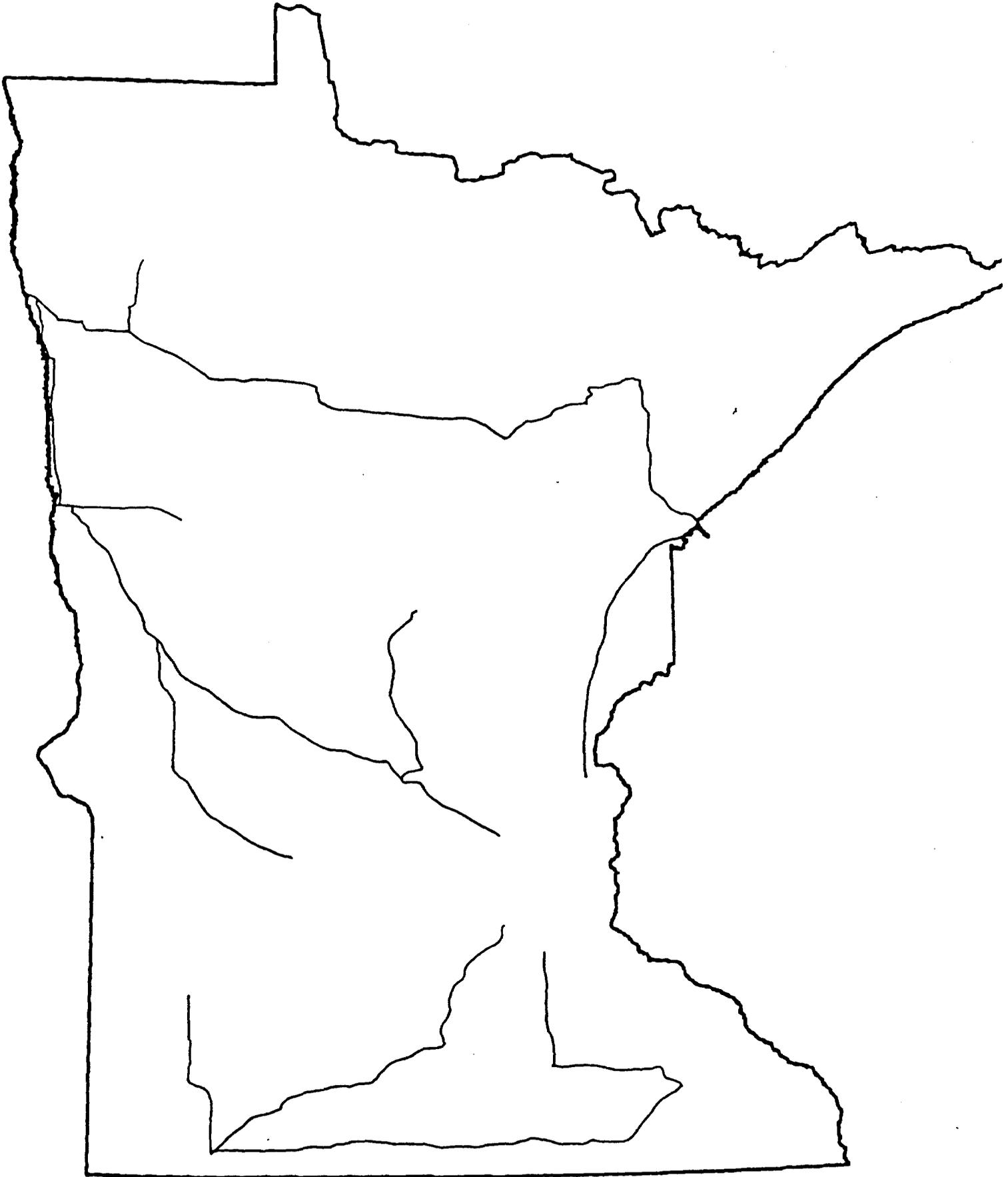
Source: Minnesota Department of Public Safety, 1996



Fiber-Optic Telecommunications Lines
Source: Minnesota Department of Public Service, 1997



MEANS Telecom Network (by 4th quarter 1999)
Source: MEANS Telecom, 1998 (Internet Web Site)



Connecting Minnesota Fiber-Optic Backbone Network
Source: Agreement to Develop and Operate Communications Facilities,
December 23, 1997

MEMORANDUM

The Court rejected all of plaintiffs' arguments in this case. This allows the State of Minnesota to continue with the Connecting Minnesota project. This project is unique. It allows the State to obtain fiber optic cable services in exchange for exclusive access to its freeway rights of way. Access to these rights of way is sought after because the freeways directly connect major population areas, are secure, and allow the conduit owner easy maintenance.

Fiber optic cables are to our future as telephone lines were to our past. The State of Minnesota, its private citizens, and its business entities need to have telecommunications services in order to succeed in the twenty-first century. Government cannot cling to the traditional ways of purchasing services. It must maximize its human and physical resources. The legislature has recognized these truths by encouraging State agencies to share resources and to initiate public-private ventures.

The Departments of Transportation and Administration lawfully entered into an Agreement with the intervenor, ICS/UCN, LLC in order to procure fiber optic telecommunications services and facilities on state trunk highways and interstates. The services are being procured for the use of the MnDOT and other state agencies as well as public institutions such as libraries, colleges and courts. The plaintiffs have failed to sustain their burden of proving either that the State did anything illegal or that the Agreement is in any way unauthorized or contrary to any state law, rule, or constitutional provision. *Griswold v. Ramsey County*, 65 N.W.2d 647 (Minn. 1954). This joint venture became possible when the interstate rights of way became more accessible to the states in 1989.

In 1995, the Minnesota Legislature reaffirmed its intention that both the Commissioners of Administration and Transportation give priority to the reduction of spending of public monies while

at the same time using innovative practices to manage their respective departments. Act of May 30, 1995, ch. 248, Art. 11, secs. 2 and 12, 1995 Minn. Laws 2451 and 2458, codified as Minn. Stat. §§ 16B.04 subd. 4 and 174.02 subd. 1a. This legislation provides:

It is part of the department's mission that within the department's resources the commissioner shall endeavor to:

- (1) prevent the waste or unnecessary spending of public money;
- (2) use innovative fiscal and human resource practices to manage the state's resources and operate the department as efficiently as possible;
- (3) coordinate the department's activities wherever appropriate with the activities of other government agencies;
- (4) use technology where appropriate to increase agency productivity, improve customer service, increase public access to information about government, and increase public participation in the business of government.

The two commissioners were also authorized to combine their authorities in cooperative ventures. Minn. Stat. 471.59 (1998) provides:

"Subd. 1. Agreement. Two more governmental units, by agreement . . . may jointly or cooperatively exercise any powers common to the contracting parties or any similarly powers

Subd. 10. Notwithstanding the provisions of subdivision 1 requiring commonality of powers between parties to any agreement, the governing body of any governmental unit . . . may enter into agreements with any other governmental entity to perform on behalf of that unit any service or function which the governmental unit providing the service or function is authorized to provide for itself.

This legislation further expands the authority of each of the Commissioners to assist one another and share both their like and unlike responsibilities and authorities as was done in the joint venture of

Connecting Minnesota. The September 4, 1996 Memorandum of Agreement between the two commissioners demonstrates the intent of the parties to combine their powers and resources to accomplish the technological advances needed to fulfill their statutory responsibilities.

The Commissioner of Administration has authority for and jurisdiction over the State's telecommunications. MnDOA also has long-standing authority to utilize requests for proposals to acquire utility services where the proposal was the basis of a negotiated agreement. The Commissioner of Transportation has plenary power over the trunk highway system and its uses.

The two Commissioners have authority to combine their respective authorities in furtherance of their duties and responsibilities under the Joint Exercise of Powers Act. Minn. Stat. § 471.59. Both Commissioners have been legislatively directed, among other things, to reduce spending of state money, to use innovative practices to manage state resources, to coordinate activities with one another, and to use technology to improve customer service. Minn. Stat. §§ 16B.04 and 174.02 subd. 1a (1998). They chose to exercise this authority by creating the Connecting Minnesota project. The plaintiffs raised a plethora of challenges to this project. This Court believes that this type of project is legally allowable. The State used a valuable resource (interstate ROWs) to purchase, by barter, another valuable resource (fiber optic services). The fact that the plaintiffs, who are in competition with the intervenor and are unhappy with the terms of the Agreement and the choice of ICS/UCN, does not mean that the State has acted illegally.

K.G.

A handwritten signature in black ink, consisting of several loops and a vertical line, positioned to the right of the initials 'K.G.'

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Minnesota Equal Access Network
Systems, Inc., a Minnesota
corporation, and Minnesota
Telephone Association, Inc., a
Minnesota corporation,

Court File No: C8-98-5736

Plaintiffs,

v.

State of Minnesota, by James
Denn, Commissioner of the
Minnesota Department of
Transportation, and Elaine
Hansen, Commissioner of the
Minnesota Department of
Administration,

Defendants,

and

ICS/UCN LLC, A Colorado limited
liability company,

Defendant-Intervenor.

FINDINGS OF FACT / CONCLUSIONS OF LAW / ORDER

This matter was heard by the Honorable Kathleen Gearin, District Court Judge, the dates of February 8-10, 1999 and February 16, 1999. After receipt of written arguments and memorandums from all parties, the matter was taken under advisement.

Based on the submissions of the parties, entire record, and the arguments of counsel, the Court makes the following:

FINDINGS OF FACT:

1. The parties to the action are:
 - a. Plaintiff, Minnesota Equal Access Network Services, Inc. (MEANS), is a Minnesota corporation with its principal place of business at 10300 Sixth Avenue North, Plymouth, Minnesota, 55441. All of MEANS' shareholder are corporations or cooperatives that provide telecommunications services within the State of Minnesota. MEANS, through its subsidiaries, provides both wholesale and retail telecommunications services within and between communities throughout Minnesota, including communities located along the freeway rights-of-way in Minnesota (ROWs).
 - b. Plaintiff, Minnesota Telephone Association, Incorporated (MTA), is a Minnesota corporation with its principal place of business at 1650 Minnesota World Trade Center, 30 East Seventh Street, Saint Paul, Minnesota, 55101. The members of MTA provide both wholesale and retail telecommunications services within and between communities throughout Minnesota, including communities located along the freeway ROWs. All of MTA's members belong to MEANS.
 - c. Defendant Elwyn Tinklenberg (Tinklenberg) is the Commissioner of Transportation for the State of Minnesota. Defendant Tinklenberg is responsible for the operation of the Minnesota Department of Transportation (MnDOT) and for the performance by MnDOT of its statutory duties as set forth in M. S. § 161B. *et seq.* During the pendency of this action, Defendant Tinklenberg succeeded former of MnDOT Commission James Denn and was substituted as a named defendant by Stipulation of the Parties.
 - d. Defendant David Fisher (Fisher) is the Commissioner of Administration for the State of Minnesota. Defendant Fisher is responsible for the operation of the Minnesota Department of Administration (MnDOA) and for the performance by MnDOA of its statutory duties as set forth in M. S. § 16B. *et seq.* During the pendency of this action, Defendant Fisher succeeded former MnDOA Commissioner Elaine Hansen and was substituted as a named defendant by Stipulation of the Parties.
 - e. Defendant-Intervenor ICS/UCN, LLC (ICS/UCN) is a Colorado limited liability company with its principal place of business at Denver, Colorado. ICS/UCN was formed in May of 1996 for the purpose of negotiating an agreement with the State of Minnesota to implement a proposal submitted by one of ICS/UCN's partners (International Communications Services, Inc.) and two other companies to install the fiber optic network within the freeway and other trunk highway ROWs. ICS/UCN and another company, Stone and Webster Engineering, Inc. (S&W)

eventually signed the Agreement that is the subject of this litigation. S&W, which is not a party, later assigned its interest in the Agreement to another entity, LMAC, LLC, which also is not a party to this litigation.

2. Trial was held before the Court over five days, with 12 witnesses testifying and over 100 exhibits received. Thomas R. Sheran, Esq., and Richard J. Johnson, Esq., Moss & Barnett, 4800 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota, appeared for plaintiffs. Donald J. Muetting, Esq., and Gregory P. Huwe, Esq., Assistant Attorneys General, 525 Park Street, Suite 200, St. Paul, Minnesota, appeared for defendants. Daniel J. Connolly, Esq., and Eric E. Jorstad, Esq., Faegre & Benson LLP, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota, appeared for intervenor.

3. Freeways are highways characterized by four or more lanes separated by a median, restricted access from adjoining properties, no at-grade intersections, no traffic signals, geometrics accommodating higher speed travel, and little or no alternative use for accommodation of utilities. They were designed and built to preserve safety for the traveling public. Safety was a primary reason for the original decision to remove and restrict utilities on interstate highways. The terms "freeways" and "interstate" are used interchangeably.

4. The plaintiff challenges the State's agreement with ICS/USN regarding the development, operation, and maintenance of a fiber optic network using trunk highway and freeway ROWs. This agreement is commonly referred to as the "Connecting Minnesota" agreement. The following is the regulatory history of utility usage of ROWs leading to the Connecting Minnesota Agreement:

- a. In 1959, the Minnesota legislature enacted Laws, Chapter 500, Article II, Section 45 (now codified at M. S. § 161.45), which permits the placement of utility lines within the State Trunk Highway ROWs. "Trunk Highways" include all roads

established or to be established under the provision of Article XVI, Section 2 of the Minnesota Constitution which are under the jurisdiction of the Commissioner of MnDOT.

- b. The Commissioner of Transportation is vested with considerable authority over the state's Trunk Highway system. "The commissioner shall carry out the provisions of Article 14, section 2 [creating, improving, and operating the trunk highway system] of the constitution of the state of Minnesota." Minn. Stat. §161.20 subd. 1 (1998). Further, "The commissioner is authorized by law . . . to locate, reconstruct, improve, and maintain the trunk highway system; . . . and in carrying out duties, to let necessary contracts in the manner prescribed by law." Minn. Stat. §161.20 subd. 2 (1998).
- c. MnDOT's Commissioner adopted and promulgated, effective August 1, 1961, MnDOT's "Rules and Regulations" for the installation and maintenance of utility lines within Trunk Highway ROWs (Ex. 61 at p. 16). These "Rules and Regulations" were incorporated without modification in Minnesota Rules, Parts 8810.3100 et seq. effective July 31, 1983.
- d. MnDOT's ROW Rule generally allows the installation of utility lines longitudinally within "non-interstate" Trunk Highway ROWs defined as "all trunk highways which are not part of the interstate system." These rules were established during the time period that the Federal Highway Administration (FHWA) prohibited the installation of utility lines within Interstate ROWs.
- e. In 1989, the FHWA changed this policy. Before that, State access to interstate highways for longitudinal installation of fiber optic or other utilities was restricted. State trunk highways and other public roads by state law have been relatively open to utilities, since they were built. Longitudinal access to interstate highways was allowed only in hardship situations. A hardship situation arises when the alternative is extremely difficult and unreasonably costly to the utility consumer. Minn. Stat. Sec. 161.45 and Minn. Rule 8810.3300 subp. 4. Other than freeway crossings which are routinely permitted, MnDOT has only authorized longitudinal use of freeway right of way for utilities in three or four instances in the past. Freeways in Minnesota are therefore virtually free of utilities.
- f. The FHWA changed its policy in 1989 and granted to states the right to allow longitudinal installations of fiber optic cable and other utilities along interstate highways. The FHWA required that any changes or proposed changes by states be incorporated into a written policy which each state was required to submit for federal approval.

- g. After the USDOT policy change, each state was required to submit to the FHWA its respective policy on granting utility access to freeways. On or about July, 1990, MnDOT did so and that policy was approved. Both before and after 1990, there have been very few instances where utilities were permitted longitudinally on Minnesota's freeway ROW. Beginning in 1995, the USDOT through its Federal Highway Administration (FHWA) has provided information, guidance, and encouragement to state transportation agencies on allowing fiber optic facilities on interstate highway ROWs under a variety of scenarios. The federal government refers to fiber optics projects which involve a barter of access in return for telecommunications services as "shared resource" projects.
- h. In 1993, the Minnesota Legislature adopted an amendment to Minn. Stat. Sec. 174.02 adding subdivision 6 which authorized the Commissioner of Transportation to enter into public-private partnerships for sharing facilities to promote economic and technological development within and between governmental and non-governmental entities.
- I. A 1995 amendment to Minn. Stat. Sec. 174.02 directed the Commissioner of Transportation to prevent unnecessary spending of public money, to use innovative practices to manage the state's resources, and to coordinate MnDOT's activities with those of other agencies. This amendment expanded the authority of MnDOT to enter into agreements beyond just transportation-related services.
5. In 1995, the American Association of Highway Transportation Officials (AASHTO) developed a revised policy regarding the installation of fiber optic lines within interstate ROWs. It approved such installations. The Federal Highway Administration (FHWA) then began to assist state departments of transportation in use of ROWs to meet their telecommunication needs, including the need for "intelligent transport systems." These efforts and use of ROWs by private entities are generally known as "shared resource" projects. M.S. 174.02 encourages the state departments of transportation to implement such projects.
6. Use of interstate ROWs for installation of fiber optics was approved by AASHTO because of significant differences between the safety implications of fiber optic facilities and other utilities. As noted by AASHTO, these differences include the ability to install fiber optics

with minimal disturbance of existing traffic and infrequent maintenance needs.

7. MnDOT's director of Alternative Transportation Financing, Mr. Adeel Lari, was familiar with the 1995 AASHTO policy change favoring installation of fiber optic lines with interstate ROWs. During 1995, he reviewed and commented on drafts of the FHWA shared resources publications. Mr. Lari also gathered information regarding the development of shared resource projects in other states.

8. At various times since 1974, MnDOT has contracted with private construction companies to have its own telecommunication lines (including fiber optic and coaxial cable) installed longitudinally within metro area freeway ROWs in order to operate MnDOT's Traffic Management System (TMS).

9. This TMS is also used to transmit traffic information to private radio and TV companies and to a private traffic reporting company.

10. The MnDOA is responsible for the creation, operation, and maintenance of a statewide telecommunication network. Minn. Stat. §16B.46 and .465 (1998). The Commissioner "has the responsibility for planning, development, and operations of MNet in order to provide cost effective telecommunications transmission services to MNet users." Minn. Stat. §16B.465, subd. 1 (1998).

11. To carry out its duties, MnDOA's Office of Intertechnology provides telecommunications systems to a variety of governmental entities throughout the state through a network of twelve hubs linked through lines leased from MCI and in part on the MEANS network to a central location in St. Paul. The leased lines make up the State's telecommunications "backbone". Each of the hubs is further linked to communities in each

county in Minnesota. The entire system has been variously known as "STARS," "MNET," and the "State's Network."

12. The legislature authorized the Commissioner of Administration to enter into agreements beyond the normal five-year term limit. Minn. Stat. §16B.465, subd. 7 (1998).

13. The legislature again encouraged the joint exercise of agency powers such as the one involved in this suit between MnDOT and MnDOA by enacting the following:

Subdivision 1. Two or more governmental units, by agreement entered into through action of their governing bodies, may jointly or cooperatively exercise any power common to the contracting parties or any similar powers, including those which are the same except for the territorial limits within which they may be exercised. The agreement may provide for the exercise of such powers by one or more of the participating governmental units on behalf of the other participating units.

Subdivision 10. Notwithstanding the provisions of subdivision 1 requiring commonality of powers between parties to any agreement, the governing body of any governmental unit . . . may enter into agreements with any other governmental unit to perform on behalf of that unit any service or function which the governmental unit providing the service or function is authorized to provide for itself.

Minn. Stat. § 471.59 (1998).

14. This statute authorizes agencies to share common powers and non-common powers. The statute encourages agencies to combine their separate powers for the good of the agencies and the constituencies which they serve.

15. In December of 1995, Mr. Lari presented to the MnDOT Commissioner as well as the MnDOA Commissioner a proposal to "leverage" the freeway ROW "in return for getting some capacity." The proposal would mean that the State would become part of a shared resource project.

16. After presenting the idea to the MnDOT and MnDOA Commissioners, Mr. Lari prepared draft Requests for Proposals (RFP) which he circulated for comment to industry representatives and others in January 1996. MnDOT's "final" RFP (Ex. 2 and 212) was published by MnDOT on February 20, 1996.

17. The final RFP seeks proposals that would not only "[p]rovide MnDOT with communication capacity for the future;" but would also "provide communications access to other governmental entity locations throughout the State," and "... provide all geographic areas of the State with fiber optic access to maintain economic vitality and to provide communications throughout the State." (Ex. 2, p. 2).

18. The RFP expressed 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.

19. The specific Goals and Objectives mentioned in MnDOT's RFPs were:

- a. to develop a public-private partnership venture with communications infrastructure providers and operators to exclusively enter, install and develop communications primarily within state freeway right of way, in exchange for providing operational communications capacity to the state;
- b. to construct and maintain a communication network for much of the area of the state as possible;
- c. to provide MnDOT with communication capacity for the future;
- d. to provide communications access to other government entity locations throughout the state;
- e. to provide the successful bidder exclusive rights to MnDOT freeway right-of-way for commercial communication infrastructure purposes;
- f. MnDOT wishes to barter exclusive rights to freeway right-of-way

in exchange for capacity to satisfy immediate and future state needs.

20. In turn, MnDOT offered in its RFPs to:

- a. provide long-term access to certain MnDOT right of way including the exclusive access for communications infrastructure purposes, to the 1000 miles of freeway, both linear and spot location throughout the state;
- b. consider providing exclusive use of its freeway right of way to the successful proposer. No other private use fiber optic lines would be permitted on the freeways other than the system that now exists along I-94 between St. Cloud and Maple Grove.

21. A workshop was held by MnDOT on December 13, 1995 where MnDOT publicly discussed its intention to offer exclusive access to its freeway ROW in exchange for fiber optic telecommunication services. MnDOT personnel and private parties attended the workshop. A draft RFP was created and circulated by MnDOT on January 3, 1996 to public and private parties, including the FHWA and representatives of the plaintiffs. Responses and suggestions were requested from the recipients. A second draft RFP was circulated to an even wider audience of public and private parties including plaintiffs on January 29, 1996.

22. On February 21, 1996, MnDOT publicly issued the final RFP. It formally published notice of it in the State Register on February 20, 1996. Following the issuance of the RFP, MnDOT held a preproposal meeting on March 21, 1996 to provide interested parties an opportunity to ask questions and seek additional information or clarifications. A follow-up mailing of answers to particular questions about the project was distributed on March 26, 1996. This mailing emphasized that the State's primary objective was to obtain a statewide telecommunications network.

23. Each of the drafts as well as the final RFP made it clear that the State was seeking

a public-private partnership with communications infrastructure providers and operators to install and develop communications systems using the state's freeway ROW in exchange for providing to the State operational communications capacity. Exclusive access to the freeway has been the incentive offered by the State from the inception of the project.

24. On or about April 26, 1996, four proposals responding to the RFP were submitted to MnDOT by several interested parties, including MEANS and International Communication Services, Inc. (ICS). ICS's interest in the project was later assumed by Intervenor ICS/UCN (a newly formed partnership).

25. The proposals were reviewed by an evaluation team made up of people from throughout MnDOT, MnDOA, and from the FHWA. The team was assisted by two additional panels: one dealing with technical issues and the other with administrative issues. At least one of the members of the review team had supervisory responsibility for issuance of utility permits. The evaluation team also interviewed representatives of all proposers.

26. On or about August 14, 1996, MnDOT and MnDOA selected ICS/UCN's proposal. This proposal was recommended by the team and approved by the Commissioners of the DOA and DOT and by Governor Carlson. This telecommunications infrastructure project was given the name "Connecting Minnesota".

27. An attorney for MTA formally objected in writing to MnDOT counsel on August 22, 1996 that the grant of exclusive access to interstate ROWs was violative of federal law. They did not question the legality of the process before that.

28. On September 9, 1996, and again on September 16, 1996, the MTA lobbyist, Mr. Knickerbocker, and MTA President, Mr. Nowick, met respectively with MnDOT Commissioner

Denn and his staff and with MnDOA Commissioner Hansen and her staff to dissuade them from going forward with Connecting Minnesota as advertised in the RFP.

29. On September 4, 1996, MnDOT and MnDOA signed an intergovernmental partnership agreement captioned: "Memorandum of Agreement/Minnesota Communications Infrastructure" (Partnership Agreement). (Ex. 3).

30. The final written agreement between the State and ICS/UCN (Ex. 1) was signed on December 23, 1997 (the Agreement).

31. An amendment to the Omnibus Appropriations Bill was introduced (Ex. 79; see also Ex. 267; Ex. 261, p. 3) which would have deferred implementation of the contract until the public policy issues raised by the Agreement had been addressed by appropriate legislative committees. It failed to pass.

32. By letter dated March 12, 1998, Governor Carlson threatened to veto the appropriations bill if it included the amendment deferring implementation to allow for legislative oversight.

33. The announcement of the Agreement resulted in a number of articles and editorials about Connecting Minnesota throughout the state in January 1998.

34. The Agreement provided to ICS the right and the obligation to construct a fiber optic network on approximately 2000 miles of MnDOT's highway ROW. In return, ICS is obligated to install and maintain at least 48 strands of fiber in three interconnected rings serving the northern and southern parts of Minnesota and the Twin Cities metropolitan area. Ten of the dark fibers will be owned by the State for whatever governmental uses it chooses. The State is also entitled to 20% of the lit capacity of whatever fiber that ICS lit. ICS is obliged to light at

least two fibers.

35. ICS is also obliged to give the State the opportunity to connect to the network at various intervals along the trunk highway ROWs. ICS is further obliged to provide up to \$5 million in services and equipment to interconnect its equipment with the State's existing equipment.

36. 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.

37. On non-freeway ROW, there is no exclusivity and any other utility is entitled to use it for installation and operation of their fiber optic lines.

38. The period of exclusivity is ten years. ICS also has an option to negotiate for another ten years of exclusive access but there is no contractual entitlement to such extended exclusivity. For the final ten years of the 30-year contract, there is no right of exclusivity. At the end of the contract term, all fiber optic cable and associated equipment on the State's ROW will then become the property of the State.

39. The Agreement authorizes ICS to be a wholesaler of fiber optic capacity to telecommunications companies or to anyone else interested in using ICS's fiber. It is also authorized to sell dark fiber to anyone else. It is obliged to provide access to lit fiber and also to sell its dark fiber on a competitively neutral and nondiscriminatory basis. ICS cannot grant anyone a favored status or preferred access that it does not provide to any other entity which is similarly situated. In addition, ICS must install fiber optic cable for any other party, including

competitors, at the time it opens the trench for its own installation.

40. The Agreement allows ICS a single opportunity to open a trench for installation of its own fiber as well as the fiber of any other entity. If maintenance of the line is required during the term of the Agreement, ICS is responsible for such maintenance.

41. The Agreement allows the State to terminate the Agreement at will for public convenience. It provides remedies for either party in the event of termination. It also provides that if any constitutional or legislative provision or a regulation is enacted during the term of the Agreement which impairs ICS's rights, ICS can terminate the Agreement and would be entitled to claim damages. The damages increase as the project construction continues. An amendment to the Agreement was granted to ICS on October 19, 1998. That Amendment allowed ICS and its new construction partner LMAC, LLC to proceed on the first phase of the project without meeting all of the conditions precedent set forth in the Amendment. The first phase of the project involved installation of fiber optic cable along I-90 between Moorhead and St. Cloud. Construction commenced on that portion on or about October 19, 1998 with the installation of two 2-inch conduits through one of which ICS will place 192 strand fiber optic cable. The second conduit is available for a collocater's cable.

42. The restriction imposed on utilities seeking to install their utilities longitudinally along freeways has never been applied to utilities installed for, by, or at the direction of MnDOT. The network of fiber optic cable along freeway ROWs in the Twin City area connecting its ramp meter controls and camera with the MnDOT Traffic Management Center in Minneapolis was installed without applying for or meeting any of the requirements of Minn. Rule 8810.3300. MnDOT has also routinely used freeway ROW for installation of electrical, telecommunications,

and other utilities which it needed or wanted.

43. The director of the MnDOT office that issues utility permits neither reviews nor seeks to enforce any restrictions on use of freeway ROW for utility installations which are part of MnDOT projects. He has never applied Minn. Rule 8810.3300 subp. 4 to restrict MnDOT in any way in its use of its own ROW.

44. MnDOT's intelligent transportation systems relies heavily on the presence of fiber optic cable along trunk highway network. The anticipated deployment by MnDOT of projects such as the road weather information system, traveler information system, integrated corridor traffic management system, and incident management system are a few of the projects which will utilize fiber optic technology that must be in place on the roadway ROW. In addition, MnDOT can use the network to provide voice, data, and video transmission among its statewide system of district and maintenance offices.

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 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.

46. MnDOT, MnDOA, and ICS believe that the Agreement provides the best way for Minnesota to develop such a network. The plaintiff believes that the exclusivity in the Agreement will stifle Minnesota's development. The Court is concerned only with the issue of whether the Agreement is legal, not with whether it is the best one that the State could have

made.

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.

50. During 1996, 1997, and 1998, Mr. Lari and Mr. Schnellman continued to communicate with various interested legislators about the project including Representative Jennings, Senator Kelly, and Senator Novak, as well as staff members of other legislators. These meetings were intended to keep the legislature informed about the project and to answer questions that they might have about the project. Representatives of MnDOA and MnDOT testified in legislative hearings in 1997 and 1998 about the Connecting Minnesota project.

51. During the 1997 legislative session, legislation supported by the plaintiff MTA was introduced and discussed which would have precluded MnDOA from procuring telecommunications services for its legislatively mandated network under Minn. Stat. § 16B.465

except by "lease". During the 1998 legislative session, MTA lobbied for legislative proposals that would have required legislative review of and comment on the Agreement before it could be implemented. These legislative proposals were introduced and considered but did not pass.

52. Opponents of the Connecting Minnesota project and critics of the Agreement, including MEANS and MTA and their respective members, have had ample opportunity to oppose the Agreement. They have done so unsuccessfully at MnDOT, MnDOA, the Executive branch, and the Minnesota Legislature.

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.

CONCLUSIONS OF LAW

1. The Agreement does not impair the police power and public policy discretion of the Minnesota Legislature.
2. The Agreement does not impair or eliminate the ability of the Commissioner of Transportation or his successor to fulfill any statutory obligations.
3. The State's contractual grant to ICS/UCN of access to freeway right of way for installation of fiber optic cable does not violate Minn. Stat. § 161.45 or Minn. Rule pt. 8810.3300 subp. 4.

4. The Agreement does not preclude consideration of applications of other fiber optic providers for access to the freeway under Minn. Stat. § 161.45 or Minn. Rule pt. 8810.3300.

5. The grant of freeway access to ICS under the Agreement does not exceed the authority of the Commissioners of Administration and Transportation.

6. The Guidelines and Policy on Procedures for Accommodation of Utilities on Highway Right of Way submitted by the Commissioner of Transportation to the Federal Highway Administration does not have the force and effect of law and does not create a legally enforceable right or obligation with regard to the plaintiffs.

7. The Agreement between the State of Minnesota by its Commissioner of Transportation and its Commissioner of Administration and ICS/UCN, LLC and Stone and Webster Engineering Corporation is a valid, legally binding contract, and is not void, of no force or effect, unauthorized, or contrary to public policy.

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

Based upon the above Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED:

1. The Plaintiffs' complaint is dismissed in its entirety.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated:

5-4-99



Kathleen Gearin
District Court Judge