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

In the Matter of	)	
	)	
	)	
The Petition of the State of Minnesota	)	
for a Declaratory Ruling Regarding the	)	
Effect of Section 253 on an Agreement	)	CC Docket No. 98-1
to Install Fiber Optic Wholesale	)	
Transport Capacity in State Freeway	)	
Rights-of-Way	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1999 **Released: December 23, 1999**

By the Commission:

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I. INTRODUCTION

A. Summary

1. In this Order, the Commission declines to grant a Petition for Declaratory Ruling (Petition) filed on January 5, 1998, by the State of Minnesota (State or Minnesota).[1] Minnesota asks the Commission to find that its Agreement with ICS/UCN LLC (Developer) and Stone & Webster Engineering Corporation concerning access to certain rights-of-way is consistent with section 253 of the Telecommunications Act.[2] The Agreement provides the Developer with exclusive physical access, for at least ten years,[3] to longitudinal rights-of-way along Minnesota's interstate freeway system.[4] In exchange for exclusive physical access to these rights-of-way, the Developer commits to construct 1,900 miles of fiber optic transport capacity throughout the State and to provide the State with a portion of that capacity.[5] Minnesota plans to use these facilities to implement an intelligent transportation system and carry state government communications.

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[1] The Minnesota Department of Transportation (MnDOT) and the Minnesota Department of Administration (DOA) filed the Petition on behalf of the State of Minnesota. The Minnesota Department of Administration oversees an integrated system of telecommunications for a variety of state and local agencies. The Petition of the State of Minnesota, Acting by and Through the Minnesota Department of Transportation and the Minnesota Department of Administration, for a Declaratory Ruling Regarding the Effect of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way at 1 (Petition). The Minnesota Public Utilities Commission has not participated in this proceeding.

[2] Petition at 1.

[3] The right to exclusive physical access to the freeway rights-of-way will last for ten years from completion of the project. If Minnesota seeks to reopen the freeway rights-of-way, the Developer will have a "right of first negotiation" for an additional ten years. Petition at 11 (citing Petition, Ex. 5, "Agreement to Develop and Operate Communications Facilities," Section 11.1). Minnesota filed part of the Agreement as an exhibit to its Petition but later submitted the entire Agreement as an *ex parte* filing. Letter from Scott Wilensky, Assistant Attorney General, State of Minnesota, to Carol Mattey, Chief, Policy and Program Planning Division, Federal Communications Commission (Feb. 3, 1998). Cites to the Agreement will be in the following format: Agreement, Section X.X.

[4] Petition at 1. Longitudinal rights-of-way are rights-of-way that run parallel to, or along the roadway as opposed to rights-of-way that run perpendicular to, or across such roadways. *Id.*

[5] The Developer will provide Minnesota with "[a]n average of 20 percent of such lit capacity and up to 30 percent lit capacity on any particular portion of Phase 1 of the Network shall at all times be available to State." Agreement, Section 3.3(a)(ii). Minnesota will have the right to 20 to 30 percent of any additional lit capacity. Agreement, Section 3.3(b)(i). Minnesota will be entitled to 10 dark fiber strands in Phase 1 of the Network. Agreement, Section 3.3(c). Minnesota also has the right to procure additional capacity. Agreement, Section 3.3(d). In addition, the Agreement requires Developer to "provide up to $5 million worth of design and construction services for installing fiber optic cable, Nodes and related Equipment for MnDOT [Intelligent Transportation System] applications." Agreement, Section 3.3(e).

2. On January 9, 1998, the Commission issued a Public Notice seeking comment on the Petition.[6] More than twenty states and/or state agencies submitted letters generally supporting Minnesota. The seventeen carriers that submitted comments unanimously opposed the Petition and asked the Commission to preempt the Agreement.[7]

3. Based on the current record, we cannot endorse this Agreement as requested by Minnesota. Minnesota fails to demonstrate that the Agreement neither prohibits nor has the effect of prohibiting the provision of competitive telecommunications services by certain entities. To the contrary, the Agreement appears to have the potential to adversely affect the provision of telecommunications services by facilities-based providers, in violation of the provisions of section 253(a). As a result, the Agreement is a matter of great concern to the Commission. Indeed, the State's action, effectively granting an exclusive license to Developer, appears fundamentally inconsistent with the primary goal of the Telecommunications Act of 1996, to replace exclusivity with competition.

4. On the other hand, depending on how the Agreement is implemented, the potential competitive effects that fuel our concerns may be largely or wholly ameliorated. As discussed below, our primary concern is that the Agreement may effectively preclude carriers from providing telecommunications services by deploying their own facilities. This concern may be mitigated depending on how the Developer implements provisions in the Agreement that it make excess capacity available for lease or purchase at nondiscriminatory rates. Although we do not grant requests to preempt at this time, we will closely examine any future petitions if the Agreement is implemented in an anti-competitive manner.

B. Background

1. Agreement Between Minnesota and Developer

5. In February of 1996, MnDOT issued a request for proposals for the development of telecommunications transmission capacity along State freeway rights-of-way, in exchange for exclusive physical access to such rights-of-way. In doing so, Minnesota stated that it sought to

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[6] *Commission Seeks Comment on Minnesota Petition for Declaratory Ruling Concerning Access to Freeway Rights-of-Way Under Section 253 of the Telecommunications Act*, Public Notice, CC Docket No. 98-1, DA 98-32 (rel. Jan. 9, 1998). The Commission later changed the dates comments and reply comments were due. *Agreement Filed Related to Minnesota Petition for Declaratory Ruling Concerning Access to State Freeway Rights-of-Way; Revision of Previously Set Comment Dates*, Public Notice, CC Docket No. 98-1, DA 98-236 (rel. Feb. 6, 1998).

[7] A list of the states, state agencies, commenters, and reply commenters appears in Appendix A. MFS argues that the number of states commenting favorably on the Petition "demonstrates the extent to which exclusive access arrangements like the Agreement would be adopted around the country if the Commission does not take action under Section 253." MFS Reply Comments at 2; *see* MCI Reply Comments at 3.

further four public policy goals: (1) development of an intelligent transportation system (ITS) using transmission capacity obtained through the Agreement; (2) extension of a fiber optic network to rural areas of the state; (3) reduction of "telecommunications costs to State government by exchanging rights-of-way access for transmission capacity;" and (4) creation of increased competition by adding another fiber optic telecommunications network in Minnesota.[8] Minnesota decided to award one entity exclusive physical access to the freeway rights-of-way because of traffic safety concerns.[9] This approach differed from the permit process used for access to the rights-of-way along the state trunk highways.[10]

6. Minnesota selected Developer and entered into an Agreement granting Developer

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[8] Petition at 9; USDOT *ex parte* at 1 (filed May 21, 1999)(USDOT May 21 *ex parte*)(Claiming that states are seeking to expand the benefits of ITS and other telecommunications technologies to rural areas and "are usually more successful if they control access to the right-of-way to individual telecommunications providers in some fashion rather than if they allow unencumbered access by multiple providers."). Several commenters argue that these objectives were the only objectives and that public safety was not the motivating factor for offering exclusive access to Developer. USTA Joint Comments at 3-4; Time Warner Reply Comments at 11; USTA Joint Reply Comments at 4-5; *see* Letter from David Cosson, Kraskin, Lesse & Cosson, LLP, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 2 (July 22, 1999)(MTA, Cosson July 22 *ex parte*) (arguing that the purpose and effect of the Agreement is to leverage the advantages of exclusive physical access to the freeway rights-of-way to obtain economic benefit for Minnesota); *see also* GVNW at 6.

[9] Petition at 8; *see* USDOT May 21 *ex parte* at 1-2 ("[S]tates control access not simply to achieve . . . cover [to rural areas], but also in order to reduce safety risk invariably presented by the presence of work crews and equipment on limited access high-speed roadways."). The use of interstate freeway rights-of-ways by utilities has long been subject to federal or state restrictions. Beginning in 1959, federal regulations prohibited the use of longitudinal freeway rights-of-way for utility installations, unless a special hardship circumstance warranted an exception. Minnesota Reply Comments at 34; Exhibit 2, Rebuttal Affidavit of Darryl E. Durgin, at ¶ 6 (Minnesota, Durgin Reply Aff.). Very few hardship exemptions were granted. *Id.*; MFS at 16. In 1988, the Federal Highway Administration (FHWA) delegated to the states its authority to allow utilities to use freeway rights-of-way. *Id.*; *see* Petition at 2, 6. In response to this delegation, MnDOT continued to follow federal policy by limiting longitudinal installation of utility facilities, including fiber optic cable, on the freeway rights-of-way. Petition at 6-7 (citing *MnDOT Procedures for Accommodation of Utilities on Highway Rights of Way*, Highway No. 90-1-P-1, dated July 27, 1990, Section II (Procedures)); MFS at 17. Petition at 2. The American Association of State Highway and Transportation Officials (AASHTO) Board of Directors passed a resolution that found there was a "distinction between -- fiber optic cables and other types of utilities, wherein it is deemed permissible to permit the longitudinal use of freeway rights-of-way for the former while retaining existing policy in opposition to the longitudinal use of freeway rights-of-way for other utility types." Letter from John Horsley, Executive Director, AASHTO, to Magalie Roman Salas, Secretary, Federal Communications Commission at 2 (April 29, 1999)(AASHTO *ex parte*).

[10] Minnesota defines "State Trunk Highway" as "any highway designated a State Trunk Highway pursuant to Minnesota Statutes Ch. 161. State Trunk Highways include 'freeways,' which are defined as any divided highway for through traffic with full control of access." Petition at 7, n.6.

exclusive physical access to the freeway rights-of-way.[11] As part of the Agreement, Developer plans to install fiber optic rings in three regions of Minnesota.[12] The rings require approximately 1900 sheath miles of fiber, approximately 1000 of which will be placed on freeway rights-of-way where Developer will have exclusive physical access.[13] Developer plans to operate its network as a carrier's carrier, providing wholesale transport capacity.[14] The Agreement prevents the Developer from offering "telecommunications services directly or indirectly to the public," although an affiliate of the Developer may do so using Developer's network. The Agreement requires Developer to charge its affiliate "the same rates and charges as it does for similarly situated, unaffiliated, non-interested customers and users of the Network or similarly situated, unaffiliated, non-interested Collocating Customers."[15]

7. The Agreement also requires the Developer to "collocate," *i.e.*, install, fiber owned by third parties at the same time Developer installs its own fiber.[16] Once Developer installs its fiber, however, the trench where the fiber was placed will remain closed for a minimum of ten years.[17] Developer also must maintain the third party fiber it installs. In addition, Minnesota points out that Developer must make both dark and lit fiber available for lease or purchase on a nondiscriminatory

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[11] The Minnesota Equal Access Network Systems, Inc., (MEANS) and the Minnesota Telephone Association, Inc. (MTA) challenged the Agreement in state court. Their challenge was dismissed. *See Minnesota Equal Access Network Systems, Inc., et.al. v. State of Minnesota, et al.*, Court File No: C8-98-5736 (State of Minnesota, County of Ramsey, District Court, Second Judicial District, May 4, 1999)(*MEANS v. Minnesota*), *appealed*. Both the MTA and Minnesota agree that the case was based entirely on Minnesota law and that it did not raise any issues pursuant to the Communications Act or section 253. MTA, Cosson July 22 *ex parte* at 1; Letter from Dennis D. Ahlers, Assistant Attorney General, State of Minnesota, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1 (Sept. 14, 1999)(Minnesota, Ahlers Sept. 14 *ex parte*).

[12] Petition at 12. Exhibit 7 is a map of the proposed project.

[13] Petition at 12. The other 900 sheath miles will be installed on State Trunk Highway rights-of-way that are available to all telecommunications providers on a permit basis. *Id.* "Sheath miles" are "[t]he actual length of cable in route miles." Harry Newton, Newton's Telecom Dictionary 645 (14th ed. 1998).

[14] *See e.g.*, Petition at 4; MTA, Ahlers Sept. 14 *ex parte* at 4.

[15] Agreement, Section 7.8; *see* Petition at 11, n.11.

[16] Petition at 10; *see also* Agreement, Sections 5.12 and 7.7. Third party fiber is referred to as "non-network capacity" or "collocated fiber." *Id.* Although this term is similar to "collocation" in section 251(c)(6) of the Act, 47 U.S.C. § 251(c)(6), there is no relationship between the two.

[17] *See supra* note 4. There are only two exceptions: if "(A) an installation is limited to a bridge span, underpass, overpass, or tunnel; or (B) MnDOT determines that such installation is necessary to avoid hardship or other special circumstances and the total length for such installation does not exceed (I) 1,500 feet at any location or (II) 1,700 feet in the aggregate." Agreement, Section 11.1(c)(v).

basis.[18]

2. The Telecommunications Act of 1996

8. The Telecommunications Act of 1996, as the Supreme Court recently noted, is "an unusually important legislative enactment" that has changed the landscape of telecommunications regulation.[19] Through this comprehensive amendment to the Communications Act of 1934, Congress sought to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[20] Congress rejected the historic paradigm of telecommunications services provided by government-sanctioned, heavily-regulated monopolies in favor of a new paradigm that encourages the entry, through various means, of efficient competing service providers into all telecommunications markets.

9. Among other things, the Telecommunications Act of 1996 amended the Communications Act by adding section 253, which is designed to ensure that state and/or local authorities cannot frustrate the 1996 Act's explicit goal of opening all markets to competition.[21] Section 253 specifically authorizes the Commission to preempt state or local requirements that are contrary to section 253(a) unless they come within certain exceptions.

10. Section 253(a) provides that:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[22]

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[18] Petition at 10, 26 (Minnesota requires that the Developer make its network capacity available "to all similarly situated customers at non-discriminatory rates and charges consistent with Section 253(c) [of the Communications Act]."); Letter from Dennis D. Ahlers, Assistant Attorney General, State of Minnesota, to Magalie Roman Salas, Secretary, Federal Communications Commission, and Carol E. Mattey, Chief, Policy and Program Planning Division, Federal Communications Commission, at 2 (June 16, 1999)(Minnesota, Ahlers June 16 *ex parte*); Minnesota, Ahlers Sept. 14 *ex parte* at 4.

[19] *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2337 (1997).

[20] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[21] *The Public Utility Commission of Texas, the Competition Policy Institute, IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc., Teleport Communications Group, Inc., City of Abilene, Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3480, ¶ 41 (1997)(*Texas Preemption Order*).

[22] 47 U.S.C. § 253(a).

Section 253(b) creates an exception to section 253(a), providing that:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to . . . protect the public safety and welfare . . . .[23]

Section 253(c) also preserves state authority, stating that:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed.[24]

Section 253(d) directs the Commission to preempt the enforcement of state or local requirements that are contrary to sections 253(a) or 253(b) "to the extent necessary to correct such violation or inconsistency."[25]

II. DISCUSSION

A. Overview

11. To determine whether the Agreement violates section 253 of the Act, we must first consider whether the Agreement is subject to section 253. If we find that the Agreement falls within the scope of section 253, we must determine whether the Agreement may prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service. If the Agreement has that effect, the Commission must preempt it unless the Agreement comes within the terms of the exceptions Congress carved out in sections 253(b) and (c). Since Minnesota filed the Petition at issue, it has the burden of demonstrating that the Agreement will not contravene section 253(a), or, if it does, that the requirement falls within one of the exceptions in sections 253(b) and (c).[26]

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[23] 47 U.S.C. § 253(b).

[24] 47 U.S.C. § 253(c).

[25] 47 U.S.C. § 253(d).

[26] Although the party seeking preemption bears the burden of proof that there is a violation of section 253(a), the burden of proving that a statute, regulation, or legal requirement comes within the exemptions found in sections 253(b) and (c) falls on the party claiming that exception applies. *See Texas Preemption Order*, 13 FCC Rcd at 3501, ¶ 83; *Silver Star Telephone Company, Inc., Petition for Preemption and Declaratory Ruling*, 12 FCC Rcd 15639, 15657, ¶ 41 (1997)(*Silver Star Preemption Order*).

B. Applicability/Scope of Section 253(a)

12. Despite Minnesota's argument to the contrary, we conclude that the Agreement falls within the scope of section 253(a), regardless of whether the Developer is providing a telecommunications service. We cannot agree with the assertion by the Intelligent Transportation Society of America (ITS America) that the Agreement fails to qualify as a state or local legal requirement subject to section 253(a) of the Act.

1. The Agreement Falls Within the Scope of Section 253

13. We cannot accept Minnesota's claim that the Agreement is not subject to section 253(a). Minnesota argues, based on the Commission's decision in the *New England Preemption Order*, that in order to fall within the scope of section 253(a), the Commission must make a threshold determination that the requirement at issue restricts the provision of a telecommunications service.[27] The state claims that the Agreement does not have such an effect because (1) the Developer is an infrastructure provider, not a provider of telecommunications services,[28] and (2) the Agreement prohibits the Developer from providing telecommunications services directly to the public.[29]

14. Minnesota's focus on the purpose of the Agreement, and on what the Developer will provide, is misplaced.[30] It is the Agreement's effect on the provision of telecommunications service that is critical, not whether the Agreement could be characterized as dealing with infrastructure development. Parties opposed to the Agreement argue that, by restricting who may deploy telecommunications infrastructure along freeway rights-of-way, the Agreement will have the effect of prohibiting certain entities from providing telecommunications services.[31] As described below, we conclude that the Agreement may have such an effect.

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[27] Petition at 14 (citing *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, Memorandum Opinion and Order, 11 FCC Rcd 19713 (1996)(*New England Preemption Order*); ICS/UNC Reply Comments at 3; Minnesota, Ahlers June 16 *ex parte* at 2-3. Minnesota also notes that the legislative history of the Act focuses on state and local actions that impede the provision of telecommunications services, not the development of telecommunications infrastructure.

[28] Petition at 4; Universal Communication Networks Reply Comments at 3; ICS/UNC, L.L.C. Reply Comments at 3.

[29] Minnesota, Ahlers June 16 *ex parte* at 2-3.

[30] GTE Comments at 9; *see* Time Warner Reply Comments at 4-5 GVNW Comments at 10.

[31] *See* US West Comments at 7; NCTA Comments at 5, 8; MCI Comments at 2-3; *see also* TCG Comments at 5-7; GTE Comments at 8; ALTS Comments at 10; MFS Comments at 9.

15. Our conclusion here is fully consistent with the *New England Preemption Order*. In that order the Commission found that the provision of payphones was a telecommunications service, and that the city's restrictions prohibited a class of carriers from providing this telecommunications service contrary to section 253(a). Whether the state or local requirement affected the provision of telecommunications services was the important issue, not the purported subject matter of the restriction.[32] We use the same analysis here -- whether the requirement has the effect of prohibiting the provision of any telecommunications service.

2. The Agreement Creates a Legal Requirement

16. Similarly, we cannot agree with ITS America's argument that the Agreement does not create a legal requirement to which section 253(a) could apply. As we understand ITS America's filing, ITS America asserts that section 253(a) would not be violated if Minnesota acquired fiber optic capacity for its own purposes. Because Minnesota could contract for fiber capacity for itself, ITS America argues that Minnesota also has the authority to contract out the management of its rights-of-way to a single entity on an exclusive basis.[33] Therefore, ITS America argues that section 253 limits the Commission to reviewing Minnesota's procurement laws. ITS America contends that the Commission does not have the authority to "review contractual arrangements entered into between the State and private parties pursuant to the lawful exercise of its unchallenged procurement laws and procedures under section 253."[34] Thus, according to ITS America the "only 'statute, regulation or other legal requirement' that could be subject to section 253 scrutiny, would be the state's procurement laws or a state law that permits the state or municipality to offer telecommunications services in competition with commercial telecommunications service providers."[35] In other words, ITS America appears to be arguing that the Agreement itself does not create a legal requirement subject to section 253(a).

17. We are not persuaded by ITS America's arguments. We conclude that the Agreement does rise to the level of a "statute, regulation, or legal requirement," and that

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[32] In the *New England Preemption Order*, the area affected by the state legal requirement at issue -- the provision of payphone service -- was also the direct subject matter of the state requirement. *New England Preemption Order*, 11 FCC Rcd at 19720, ¶¶ 17-18. The situation here is somewhat different. Minnesota argues that infrastructure development is the subject directly addressed by the Agreement, while the parties challenging the Agreement argue that it will affect the provision of telecommunications services.

[33] ITS America Reply Comments at 13.

[34] ITS America Reply Comments at 12; *see also* ICS/UNC, L.L.C. Reply Comments at 3.

[35] ITS America Reply Comments at 11-13.

section 253(a) applies to the Agreement itself, not just the State's procurement laws.[36] Although the Agreement is not a statute or regulation, it grants Developer exclusive physical access to certain freeway rights-of-way. Awarding Developer exclusive physical access to these rights-of-way as part of a contract legally binds the State to deny other entities permits for access to these freeway rights-of-way. Therefore, the Agreement between the Developer and the State creates a "legal requirement" that prevents the State from granting potential competitors access to these freeway rights-of-way. In light of this, we see no reason why application of section 253(a) would be limited to Minnesota's procurement statutes as opposed to the Agreement.[37]

18. We conclude that Congress intended that the phrase, "State or local statute or regulation, or other State or local legal requirement" in section 253(a) be interpreted broadly. The fact that Congress included the term "other legal requirements" within the scope of section 253(a) recognizes that State and local barriers to entry could come from sources other than statutes and regulations.[38] The use of this language also indicates that section 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services. We believe that interpreting the term "legal requirement" broadly, best fulfills Congress' desire to ensure that states and localities do not thwart the development of competition. Our conclusion, that Congress intended this language to be interpreted broadly, is reinforced by the scope of section 253(d). Section 253(d) directs the Commission to preempt any statute, regulation, or legal requirement *permitted* or imposed by a state or local government if it contravenes sections 253(a) or (b).[39] A more restrictive interpretation of the term "other legal requirements" easily could permit state and local restrictions on competition to escape preemption based solely on the way in which action was structured. We do not believe that Congress intended this result.

19. As discussed above, we will look at the effect of the state or local government's action to determine whether section 253 is applicable. In this case, Minnesota is not merely acquiring fiber optic capacity for its own use; it is providing a private party with exclusive physical access to the freeway rights-of-way. The fact that Developer can use its facilities along these rights-of-way to provide wholesale telecommunications capacity to others and retail telecommunications service through an affiliate,[40] has the potential to adversely affect competitors that do not have similar access. This situation is very different

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[36] Petition at 12.

[37] NTCA Comments at 2.

[38] 47 U.S.C. § 253(a).

[39] 47 U.S.C. § 253(d).

[40] Agreement, Section 3.1(b)(vii, ix); *see also* Agreement, Section 7.8.

from a traditional government procurement of telecommunications facilities or services.

C. Section 253(a) Analysis

20. Minnesota fails to show that the Agreement does not have the potential to violate section 253(a). In particular, we are concerned that the Agreement has the potential to deprive competitors of the ability to compete on a facilities basis. As the Commission concluded in the *Texas Preemption Order*, such a restriction would violate section 253(a).

1. Precedent from the *Texas Preemption Order*

21. In the *Texas Preemption Order*, the Commission preempted state-imposed build-out requirements on two separate grounds.[41] First, the Commission concluded that section 253(a) bars state or local requirements that restrict the means or facilities through which a party is able to provide service. In particular, the Commission found that new entrants must be able to choose whether to resell incumbent local exchange carrier (LEC) services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options. The Commission reached this conclusion by reading section 253(a) and the statutory definition of "telecommunications service" together. When considered together, these sections provide that no state or local requirement may prohibit or have the effect of prohibiting any entity from providing any offering of telecommunications directly to the public for a fee *regardless of the facilities used.* By requiring competing carriers to provide service by building their own facilities, the Texas law precluded the other forms of entry contemplated by the Act.[42] The Commission found that other provisions of the Act supported this interpretation of section 253(a).[43] As a second,

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[41] Texas law required that certain competitors provide telecommunications services using their own facilities or those of other new entrants. Before the end of the first year, ten percent of these competitors' service territory had to be served through the use of facilities other than those of the incumbent LEC. Before the end of the third year, fifty percent of their service territory had to be served through the use of facilities other than those of the incumbent LEC. *Texas Preemption Order*, 13 FCC Rcd at 3488, ¶ 57.

[42] *Texas Preemption Order*, 13 FCC Rcd at 3496, ¶ 74; *see also* Nextlink Comments at 6-7; NTCA Comments at 3; NCTA Comments at 5-6, 10-11; MCI Comments at 6; ALTS Comments at 13 (citing *Texas Preemption Order*, 13 FCC Rcd at 3521, ¶ 128); MFS Comments at 15; Time Warner Reply Comments at 7-8.

[43] More specifically, we noted that section 251 allows new competitors to enter the market using the three entry strategies noted above. *Id.* at 3496-97, ¶ 75. Section 271, while only applicable to the Bell Operating Companies, also requires those companies to make all three entry strategies available before being allowed to provide in-region, inter-LATA services. Our interpretation also was consistent with the Eighth Circuit's opinion in *Iowa Utilities Board.* In discussing section 251, the Eighth Circuit recognized that new competitors may choose resale, access to unbundled network elements or access to interconnection arrangements offered by incumbent LECs as an entry strategy and stated that "[a] company seeking to enter the local telephone service market may request an incumbent LEC to provide it with any one or any combination of these three services."

independent basis for the decision, the Commission found that enforcement of the build-out requirements would have the effect of prohibiting certain carriers from providing any telecommunications service contrary to section 253(a) because "the substantial financial investment" required to meet the build-out requirement effectively precluded any entry at all.[44]

22. As discussed below, our concern that the Agreement may have the effect of prohibiting facilities-based entry is premised on evidence in the record that utilizing rights-of-way other than the freeway rights-of-way to install telecommunications infrastructure is substantially more expensive than using the freeway rights-of-way. The evidence in the present record precludes us from concluding that the Agreement will not have the effect of prohibiting facilities-based competition because of the availability of alternative rights-of-way, the existence of excess fiber optic capacity, or access to Developer's capacity. We are very concerned that giving Developer exclusive physical access to rights-of-way that are inherently less costly to use has the potential to prevent facilities-based entry by certain other carriers that cannot use these rights-of-way. This would be inconsistent with section 253(a) and the Commission's decision in the *Texas Preemption Order*. On the other hand, the Agreement could be implemented in a manner that does not contravene section 253(a), as indicated elsewhere.[45]

2. Alternative Rights-of-Way

23. Minnesota fails to convince us that the existence of alternative rights-of-way means that the Agreement does not have the potential to prevent certain carriers from providing facilities-based services. Minnesota argues that, although the Agreement precludes competitors from having physical access to freeway rights-of-way, carriers wishing to provide telecommunications services can construct their own fiber optic facilities using alternative rights-of-way. Parties opposing grant of the Petition claim that "there are distinct cost advantages of constructing a telecommunications network over freeway rights-of-way in Minnesota, as opposed to using other rights-of-way that are purportedly available to competitors."[46] These commenters claim that this cost differential is substantial enough to

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Iowa Utils. Bd. v. FCC, 120 F.3d 753, 791 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999). *See* TCG Comments at 7 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15588, ¶ 172 (1996)(*Local Competition First Report and Order*).

[44] *Texas Preemption Order*, 13 FCC Rcd at 3498, ¶ 78.

[45] *See infra* section II, C, 4.

[46] MFS Comments at 14, Declaration of Robert Eide at ¶ 7 (MFS, Eide Decl.); MTA Cosson July 22 *ex parte* at 2 (citing *MEANS v.Minnesota)*: *see* GTE at 8; GVNW at 6; MTA at 29-30, Ex. 4, Affidavit of Kenneth D. Knuth at 3-11 (MTA, Knuth Aff.); USTA Joint Reply Comments at 6-7; TCG Reply Comments at 2; US

make it infeasible for a competitor to use alternative rights-of-way to provide facilities-based services in competition with the Developer or entities using Developer's services. Evidence on the record indicates that the cost of using the alternative rights-of-way is not competitive with using of the freeway rights-of-way, to serve communities along the freeway's route.

a. Gas, Electric, and Oil Pipeline Utility Rights-of-Way

24. The record does not support Minnesota's contention that utility rights-of-way offer suitable alternatives to use of the freeway rights-of-way. Minnesota claims that there are many sources of alternative rights-of-way within the state,[47] including utilities, such as gas pipelines, oil pipelines, and electric power lines.[48] Opponents claim that these utility rights-of-way do not provide a practical alternative to freeway rights-of-way, because: (1) other than electric utilities, they are under no legal requirement to allow telecommunications providers access to their rights-of-way; [49] (2) utilities are potential competitors who may not want to share their rights-of-way with other telecommunications providers;[50] (3) many pipeline companies and electric utilities lack perfected easements that would allow telecommunications

West Reply Comments at 5; Letter from David Cosson, Kraskin, Lesse & Cosson, LLP, to Magalie Roman Salas, Secretary, Federal Communications Commission, and Carol E. Mattey, Chief, Policy and Program Planning Division, Federal Communications Commission at 3 (Dec. 22, 1998), Kenneth D. Knuth Affidavit at ¶¶ 2-7 (MTA, Knuth *ex parte* Aff.); MFS at 14; Time Warner Reply Comments at 9-10; *but see* Minnesota Reply Comments at 14-16, Ex. 3, Fazil Bhimani Reply Affidavit at ¶¶ 4-10 (Minnesota, Bhimani Reply Aff.); ICS/UNC Reply Comments at 4 (Arguing that requiring Developer to collocate third party fiber "presents an opportunity for other entities to defray construction costs associated with the installation of their own fiber and an opportunity for smaller providers to purchase fiber capacity without incurring the associated facilities build out costs.").

[47] Since the freeway rights-of-way have not been available previously, current providers of fiber optic transport capacity use these alternative rights-of-way and several are in the process of constructing additional fiber optic transport capacity along them. Petition at 23; *see* Petition, Ex. 8, Affidavit of Fazil Bhimani at ¶¶ 5-7, 9, 13 (Minnesota, Bhimani Aff.).

[48] Minnesota claims that alternatives include thousands of miles of rights-of-way in Minnesota, some of which parallel the State's freeway system. Petition at 23-24; Petition, Ex. 6, Affidavit of Adeel Lari at ¶¶ 12-13 (Lari Aff.). Minnesota also provides maps comparing the alternative rights-of-way with the freeway rights-of-way. Petition, Exs. 12-17.

[49] MFS, Eide Decl. at ¶¶ 18-19; NCTA Comments at 9; ALTS Comments at 14; Time Warner Reply Comments at 9; *but see* 47 U.S.C. § 224(f).

[50] MFS, Eide Decl. at ¶ 20.

uses of the property;[51] (4) pipeline companies and electric utilities seek to minimize the risk of accidents by locating their facilities away from population centers, and, as a result, are not always the most direct route between population centers;[52] and, (5) pipeline companies and electric utilities may also deny access to their rights-of-way for safety reasons or lack of space.[53] Minnesota has not refuted these claims by its opponents. Therefore, we cannot find that Minnesota has demonstrated that this set of rights-of-way provides a viable, competitive alternative to the freeway rights-of-way.

b. Railroad Rights-of-Way

25. There is also conflicting evidence concerning Minnesota's claim that railroad rights-of-way provide a practical alternative for facilities-based competitors. The MTA asserts that the railroads charge high fees for access to their rights-of-way.[54] The MTA also states that railroad crews must be assigned to insure the safety of workers installing fiber optic cable. In addition, it asserts that installation of fiber optic facilities takes longer because work must be stopped when trains pass through construction areas.[55] The MTA estimates that the cost of using railroad rights-of-ways is twice that of using the freeway rights-of-way.[56] Minnesota counters these arguments by stating that MCI and Sprint have installed fiber in railroad rights-of-way in Minnesota and that Qwest plans to install fiber throughout the nation on railroad rights-of-way.[57] Prior commercial use of railroad rights-of-way does not demonstrate that granting exclusive physical access to freeway rights-of-way will not have the

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[51] MFS, Eide Decl. at ¶ 19; MTA Knuth Aff. at ¶ 13; GVNW at 6; Letter from David Cosson, Kraskin, Lesse & Cosson, LLP, to Magalie Roman Salas, Secretary, Federal Communications Commission, (Jan. 15, 1999), Kenneth D. Knuth Supplemental Affidavit at ¶ 3 (MTA, Knuth Supp. *ex parte* Aff.). Lack of perfected easements would require a telecommunications provider to obtain an additional easement from the land-owner, a potentially expensive and time-consuming undertaking.

[52] MFS, Eide Decl. at ¶ 19; MTA, Knuth Supp. *ex parte* Aff. at ¶ 3.

[53] MFS, Eide Decl. at ¶ 20; MTA, Knuth Supp. *ex parte* Aff. at ¶ 4. Section 224(f)(1) of the Act states: "A utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). The Commission concluded that use of any utility pole, duct, conduit or right-of-way for wire communications triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications. *Local Competition First Report and Order*, 11 FCC Rcd at 16079-80, ¶ 1173. Neither Minnesota nor any of the comments cite to section 224 in response to opponents' arguments.

[54] *See, e.g.*, MTA, Knuth Aff. at ¶ 12; MTA, Knuth Supp. *ex parte* Aff. at ¶ 2.

[55] MTA, Knuth Aff. at ¶¶ 12-13; MTA, Knuth Supp. *ex parte* Aff. at ¶ 2.

[56] MTA, Knuth Supp. *ex parte* Aff. at ¶ 2.

[57] Minnesota Reply Comments at 18.

effect of making future fiber optic construction on railroad rights-of-way economically unattractive in Minnesota. Indeed, it appears that some entities used the railroad rights-of-ways because the freeway rights-of-way were not available and it was easier to negotiate the necessary access.[58] We conclude that Minnesota has not refuted opponents' claims that using railroad rights-of-way would be substantially more expensive than using the freeway rights-of-way to install fiber.

c. State Trunk Highway Rights-of-Way

26. Based on the current record, we cannot agree with Minnesota that rights-of-way on state trunk highways provide a reasonable, competitive, alternative to the use of freeway rights-of-way for the installation of fiber optic facilities. To the contrary, the record demonstrates that freeway rights-of-way have inherent advantages over state trunk highway rights-of-way. Parties challenging the Agreement point to three factors that make it more efficient and less expensive to use the freeway rights-of-way: (1) it is less expensive and less time consuming to negotiate and obtain permission to use freeway rights-of-way; (2) freeways connect major population centers more directly than alternative rights-of-way; and, (3) it is less expensive to install fiber on freeway rights-of-way because there are fewer obstacles such as cross streets, and no other utilities in the right-of-way, for example. Each of these differences is discussed below.

27. It appears that it would be more costly and time-consuming to obtain permission to use state trunk highway rights-of-way than to obtain permission to use the freeway rights-of-way. A carrier wishing to use the state trunk highway system would need to negotiate and obtain permits from MnDOT and all of the municipalities through which the state trunk highway passes in order to install fiber in these rights-of-way.[59] An entity using the freeway rights-of-way would only need to obtain MnDOT's approval. In this regard, we note that at least two requests for preemption filed with the Commission have involved refusals by local officials to grant franchises or rights-of-way permits required for local

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[58] A carrier using railroad rights-of-way would only have to negotiate with one entity, the railroad, rather than every state and local government through which it wishes to install fiber. *See infra* para. 28.

[59] MFS, Eide Decl. at ¶ 11; Ameritech Comments at 2; KMC Comments at 6: MTA Comments at 27-28; Time Warner Reply Comments at 9-10. According to the MFS expert, "the Developer will not become entangled in the elaborate permitting processes that delay carriers using other rights-of-way. . . . With other rights-of-way, carriers often find themselves mired in a variety of different negotiations involving multiple land owners, utilities, and/or municipalities. These negotiations can be expensive and time-consuming." MFS, Eide Decl. at ¶ 11; *but see* Minnesota Reply Comments at 14 ("Some opponents argue that the costs and delays in obtaining multiple permits from municipalities represents a significant cost advantage. Yet no quantification of this advantage has been noted.").

exchange competition.[60]

28. It also appears, based on the present record, that it is more expensive to use the state trunk highway rights-of-way rather than the freeway rights-of-way because the distance between major population centers measured along state trunk highways is greater than the distance between the same points measured along the freeways.[61] According to the MTA, the distance over the trunk highway routes is approximately 10 percent greater than the distance over the freeway routes.[62] As a result, even if the price of installing fiber on both types of rights-of-way is the same per mile -- which, as discussed below, does not appear to be the case -- the cost of using state trunk highway rights-of-way would be greater because the routing of the state trunk highway is less direct than the routing of the freeways.

29. It also appears to be more expensive to install fiber optic transmission facilities along the state trunk highway system than it is to use freeway rights-of-way.[63] Opponents of the Agreement note that freeways are controlled-access roadways with relatively little

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[60] *Classic Telephone, Petition for Preemption, Declaratory Ruling and Injunctive Relief,* Memorandum Opinion and Order, 11 FCC Rcd 13082 (1996)(*Classic Preemption Order*); *Chibardun Telephone Cooperative, Inc., Petition for Preemption Pursuant to Section 253 of the Communications Act*, Order, 13 FCC Rcd 9504 (1998). We also note that we have recently begun an inquiry into state and local governments' policies regarding telecommunications service providers' access to public rights-of-way and how those policies may be affecting competition. *Promotion of Competitive Networks in Local Telecommunications Markets*, 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, paras. 70-80 (rel. July 7, 1999).

[61] Ameritech Comments at 2; MTA, Knuth Aff. at ¶ 11; *see* US West Comments at 13; TCG Comments at 19; Nextlink at 3; KMC Comments at 6.

[62] For example, the state trunk highway route between Minneapolis and Fargo-Moorhead is 7.6 percent longer than the freeway route between these cities. The state trunk highway route between Minneapolis and Duluth is 14.8 percent longer than the freeway route. MTA, Knuth Aff. at ¶ 11.

[63] According to the MTA expert, in rural areas it would cost $1.08 per foot to install fiber on the freeway right-of-way and $1.23 per foot to install fiber on the state trunk highway right-of-way. MTA, Knuth Aff. at ¶¶ 5-6; *but see* Letter from Dennis D. Ahlers, Assistant Attorney General, State of Minnesota, to Magalie Roman Salas, Secretary, Federal Communications Commission, and Carol E. Mattey, Chief, Policy and Program Planning Division, Federal Communications Commission (Feb. 22, 1999), Fazil Bhimani Affidavit at ¶ 4 (Minnesota, Bhimani *ex parte* Aff.)(Challenging some of the MTA expert's underlying assumptions.) As a result, in rural areas, the cost of using the freeway right-of-way would be $5,853.00 per mile and the cost of using state trunk highway rights-of-way would be $6,763.00 per mile. Although the MTA expert asserts that it is much more difficult to estimate the cost of installing fiber in town and city areas, he estimates that the cost of installing fiber in "town" areas using the state trunk highway system is $3.03 per foot or $16,344 per mile, and the estimate for installing fiber in cities of over 2,000 people is $4.22 per foot and $22,788 per mile. MTA, Knuth Aff. at ¶¶ 5-8. The MTA expert estimates that a route along a state highway system would require 15 percent "town type construction" and 85 percent rural construction. The freeway route does not pass directly though such towns, and would be less costly to use in this regard.

interference from cross-streets and other obstacles,[64] such as sewer lines, electric lines, gas pipes, or other objects buried in the rights-of-way.[65] Because there are fewer obstacles, using the freeway rights-of-way will require less engineering and planning than use of the state trunk highway rights-of-way.[66]

d. Cost Studies

30. Both Minnesota and the MTA submit cost studies to support their respective positions on the cost differential between using freeway rather than state trunk highway rights-of-way. Based on the evidence in the record, we are unable to determine whether the cost difference would prevent the provision of telecommunications services by certain entities.

31. At the outset, we cannot accept Minnesota's assertion that cost comparisons must reflect Developer's state-wide transmission network, including installation costs for both rural and urban areas. In determining whether the Agreement could have the effect of prohibiting "any entity" from providing telecommunications service, we conclude that it is appropriate to consider point-to-point cost comparisons since a competitor may wish to use the freeway rights-of-way for particular point-to-point connections. For example, a local exchange carrier may wish to use the freeway rights-of-way to connect its existing switch to facilities in another exchange in order to provide competitive local exchange service. Other carriers may only be interested in providing facilities-based services to specific areas. For such carriers, the relevant consideration in determining whether they can compete effectively in providing such service is a point-to-point comparison. Therefore, in conducting this analysis, we will compare the cost of installing capacity between specific points utilizing freeway rights-of-way versus using state trunk highway rights-of-way between the same points, and not Developer's cost of installing a fiber network in Minnesota.[67]

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[64] Ameritech Comments at 2; MTA, Knuth Aff. at ¶ 3.

[65] Ameritech Comments at 2; USTA Joint Comments at 10; KMC Comments at 6; MTA Comments at 26; MTA Knuth Aff. at ¶ 3; MTA, Knuth *ex parte* Aff. at ¶ 4; MFS, Eide Decl. at ¶ 12 (Freeways have "controlled" or limited access which minimizes intersections, so the Developer can lay cable for miles without interruption. Furthermore, the Developer would not have to use extraordinary measures to work around natural or man-made obstacles because freeway builders generally have already resolved such problems.)

[66] MTA, Knuth *ex parte* Aff. at ¶ 4.

[67] This analysis comports with the MTA expert who states that: "Many potential customers will also need capacity on only a portion of the Network. The recent collocation arrangement between the [Developer] and McLeod demonstrates that customers are often interested in specific routes, for which the [Developer] will have a significant cost advantage, and are not interested in using the [Developer's] full Network. As a result, the cost advantages for different segments . . . are the proper focus for installation cost analysis." MTA, Knuth *ex parte* Aff. at ¶ 5. Strategic Policy Research (SPR) concludes that "the relevant market is the set of points served by

32. Minnesota fails to convince us that the cost differential between using the state trunk highway rights-of-way and the freeway rights-of-way for the installation of fiber optic facilities will be insubstantial when considered in the context of the competitive telecommunications industry, and thus unlikely to adversely affect entry decisions. MTA and MFS assert that the cost of installing fiber along the freeway is approximately 30 percent less than the cost of installing fiber along the state trunk highway.[68] Minnesota appears to concede that the cost differential for fiber installation is between 11 and 21 percent.[69]

33. Moreover, these cost studies do not attempt to quantify all of the advantages of using the freeway rights-of-way. For example, they do not reflect the effect of the administrative costs and delays of having to obtain multiple permits from multiple localities when using the trunk highway system.[70] We also note that using the freeway rights-of-way may improve reliability and lessen maintenance costs since fiber installed on the freeway rights-of-way is less likely to be unintentionally cut because the right-of-way is not shared with other users. For a carrier wishing to provide competitive local exchange service from a remote switch, the reliability of the connection to the remote switch could be critical. A cut in this cable could result in widespread service disruptions for its customers.

34. Minnesota also argues that the cost differential claimed by MTA shrinks to a negligible amount once the Developer's full costs are taken into account. Pursuant to the Agreement, Developer will provide the state with a variety of benefits, including at least 20 percent of the network's lit capacity as well as some dark fiber without charge. The Developer must also bear maintenance costs, provide up to $5 million worth of facilities and services for Minnesota's ITS applications and lay fiber in "less profitable" rural areas. The Developer must also pay prevailing wage rates, which competing companies do not.

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the interstate freeway system in Minnesota. SPR also argues that we used a point-to-point comparison in two orders. MTA *ex parte,* Strategic Policy Research at 1-2 (citing *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interexchange Marketplace*, Second Report and Order; CC Docket 96-149; Third Report and Order, CC Docket 960-61 at ¶¶ 64-69 (1997); International Competitive Carrier Policies, *Report and Order*, 102 FCC 2d 812 (1985)).

[68] MFS, Eide Decl. at ¶ 14; MTA, Knuth *ex parte* Aff. at ¶ 6. The MTA expert estimates a cost differential of approximately 30.57 percent based on a comparison of the cost of installing fiber between Minneapolis and Fargo. The MTA expert estimates a cost differential of approximately 39.41 percent for installing fiber between Minneapolis and Duluth. MTA, Knuth *ex parte* Aff. Table 2. MFS estimates that the Developer's costs "can be at least 30 percent less than the costs competitors will experience in attempting to access alternative rights-of-way." MFS, Eide Decl. at ¶ 14. MFS does not provide underlying documentation to support this assertion.

[69] Minnesota, Bhimani *ex parte* Aff. ¶ 7.

[70] *See supra* para. 27.

According to the state, when all of these costs are included, the Developer will not have a cost advantage over carriers utilizing other rights-of-way.

35. We cannot agree with this analysis. We believe the appropriate comparison must be between what it would cost an efficient carrier to provide facilities-based services using freeway rights-of-way versus state trunk highways. We do not believe that it is appropriate to include in this comparison the additional cost of the benefits that the state is able to extract from Developer only in exchange for granting exclusive physical access to these valuable freeway rights-of-way. Indeed, the state's argument that the Developer's costs should reflect these benefits is premised on the state's position that it would not permit anyone to use the freeway rights-of-way unless they agreed to provide the requested benefits. We believe such an extraction of benefits in exchange for exclusive physical access to rights-of-way is fundamentally inconsistent with the 1996 Act, which endeavors to replace exclusive monopoly rights with open competition.

36. Moreover, it would be an ironic result if a state could seek to avoid a finding of a potential section 253(a) violation through the expedient of claiming it may impose excessive requirements on users of public rights-of-way. Section 253(c) was specifically designed to avoid such a result. That section permits states and local governments to avoid preemption for section 253(a) violations when the state or local government's management of public rights-of-way are implicated, and the state requires "fair and reasonable compensation from telecommunication providers . . . for use of public rights-of-way on a nondiscriminatory basis."[71] We do not believe that the benefits extracted in exchange for access to the freeway rights-of-way in this instance meet the "fair and reasonable compensation" standard laid out in section 253(c).[72]

3. Existing Fiber Capacity and the Ability to Expand It

37. We also disagree with Minnesota's contention that the Agreement is consistent with section 253(a) of the Act because competitors can readily obtain fiber optic capacity on existing networks and resell it. In support of this assertion, Minnesota argues that there is

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[71] 47 U.S.C. § 253(c).

[72] Bell Atlantic - Maryland, Inc. v. Prince George's County, Maryland, 49 F. Supp. 2d 805, 817-19 (D. Md. May 24, 1999), *appeal pending*; AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp.2d 582, 593 (N.D. Tex. 1998)(granting preliminary injunction); AT&T Communications of the Southwest, Inc. v. City of Dallas, 52 F. Supp.2d 763, 769-770 (N.D. Tex. 1999)(granting final declaratory and permanent injunctive relief); MTA, Cosson July 22 *ex parte* at 4; *but see* Minnesota, Ahlers Sept. 14 *ex parte* at 3-4 (arguing that the above-mentioned cases are distinguishable from these facts because the cases involve (1) cities regulating rights-of-way rather than states; (2) certificated carriers not a carrier's carrier; (3) the payment of fees while none is demanded here; and (4) already used rights-of-way, unlike the rights-of-way in this case.)

excess fiber optic capacity in Minnesota, and that current capacity can be expanded.[73] Minnesota asserts that only 15 percent of the fiber optic capacity in Minnesota is lit. Furthermore, the State argues that the most cost-effective means of increasing capacity is to upgrade the electronics on existing systems, rather than install new fiber.[74] As a result, Minnesota argues that current competitors will not face capacity constraints and that new entrants will be able to obtain transport capacity for resale from Developer and other providers at competitive market-based prices.[75]

38. This argument, however, only addresses the potential for entry through resale. As discussed above, we believe that section 253(a) bars state or local action that makes any of the three entry methods unavailable to competitors.[76] Minnesota's argument that current providers can expand capacity at less cost than installing new fiber does not address the potential adverse effect of the Agreement on new entrants that wish to provide telecommunications service by constructing their own facilities.[77] Nor would Minnesota's argument address the effect of the Agreement on an existing telecommunications service provider that wishes to expand the geographic scope of its facilities. The existence of spare fiber optic capacity merely indicates that new entrants will be able to lease fiber optic capacity from other providers for the purpose of resale, and that current facilities-based providers will be able to expand the capacity on existing routes.

4. Making the Agreement "Functionally Non-Exclusive"

39. We conclude that Minnesota has not demonstrated that the Agreement imposes requirements on the Developer that will have the effect of making the Agreement "functionally non-exclusive,"[78] *i.e.*, that it would not "have the effect of prohibiting the ability of any entity to provide any . . . telecommunications services," and therefore would not

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[73] Petition at 21; *but see* RCN Comments at 6 (outside of urban areas only ILECs and AT&T have facilities available for resale). The State currently purchases fiber backbone services from MCI which uses its own facilities and those of MEANS. AT&T operates a fiber optic network in Minnesota. US West has deployed fiber in Minnesota as have interexchange carriers such as MCI, U.S. Link, and Wiltel. In 1994 there were an estimated 7,265 sheath kilometers of fiber in Minnesota. Petition at 21.

[74] Minnesota, Bhimani Aff. at ¶¶ 10-12; Minnesota Reply Comments at 11-12.

[75] Petition at 22-23.

[76] *See* 47 U.S.C. § 253(a); *Texas Preemption Order*, 13 FCC Rcd at 3496, ¶ 74.

[77] ALTS Comments at 13 ("[T]he existence of other sources from which a carrier could obtain [resold] capacity does nothing for the carrier with a facilities-based business plan").

[78] Petition at 24; *see* Universal Communication Networks Reply Comments at 4; ICS/UNC, L.L.C. Reply Comments at 4.

contravene section 253(a).[79] Minnesota argues that the Agreement is "functionally non-exclusive" because it requires the Developer to install collocated fiber for third parties[80] and lease or sell network capacity[81] to telecommunications providers on a nondiscriminatory basis. In light of these safeguards, Minnesota contends that the restriction on physical access to freeway rights-of-way does not prevent any entity from offering telecommunications services, and instead enhances the competitiveness of the market by making available a new source of fiber optic transport.[82]

40. The safeguards contained in the Agreement represent a laudable effort to reduce the potential anti-competitive effects of the Agreement. As discussed above, however, section 253(a):

> bars state and local requirements that restrict the means or facilities through which a party is permitted to provide service, *i.e.*, new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options.[83]

Nonetheless, there is some ambiguity in the safeguards contained in the Agreement. Accordingly, we are unable to determine at this time if the Agreement prevents other facilities-based providers from providing telecommunications services.

a. Installation of Third Party Fiber

41. Requiring the Developer to install fiber for other carriers when it installs its

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[79] 47 U.S.C. § 253(a).

[80] Petition at 24, 26; Agreement, Section 7.7, 5.12; *see* Universal Communication Networks, LLC Reply Comments at 2.

[81] Petition at 24-26; Agreement, Section 7.7; *see* Universal Communication Networks, LLC Reply Comments at 2; ITS America Reply Comments at 20. Network capacity, as opposed to collocated fiber, refers to the fiber the Developer installs on its own behalf. The Developer can sell or lease unlit network capacity, *i.e.*, dark fiber, or lit network capacity. Petition at 26.

[82] Petition at 26; Minnesota, Ahlers June 16 *ex parte* at 2; *but see* MFS Comments at 12 (Arguing that Developer has acquired the ability to veto new entrants's applications to get access to these rights-of-way.).

[83] *Texas Preemption Order*, 12 FCC Rcd at 3496, ¶ 74.

own fiber, does not fully overcome the Agreement's shortcomings.[84] The primary problem with this solution is that the opportunity to collocate fiber is very limited.[85] In order to collocate fiber a competitor must enter into a "User Agreement" with Developer before Developer begins installing fiber.[86] If a competitor is unable to do this before the trench is closed, that competitor will be excluded from collocating fiber in the freeway right-of-way for a period of at least ten years.[87] During this ten year period we expect new carriers to be formed, and existing carriers to expand. Keeping the freeway rights-of-way closed for at least ten years will have a particularly adverse impact on the ability of to-be-formed, start-up, and expanding carriers to offer telecommunications services in Minnesota because they will be unable to place facilities in the most efficient rights-of-way. The ten year restriction forces new entrants to use more expensive rights-of-way, provide service through resale, or "purchase" fiber from Developer. In comments, but not the Agreement, Minnesota claims that new entrants can purchase capacity on an indefeasible right of user (IRU) basis.[88] The Agreement, however, does not sufficiently spell out the obligations of Developer in providing capacity to interested parties.

b. Availability of Network Capacity for Purchase or Resale

42. Based on the present record, we cannot conclude that the Agreement requires

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[84] Section 5.12 requires the Developer to install fiber optic capacity on behalf of those entities who contract with the Developer to install such capacity before Developer lays its own facilities. Developer will install third party (collocated) fiber at the same time it installs its own fiber. Agreement, Section 5.12; *see* Universal Communication Networks Reply Comments at 2, 3.

[85] SBC Comments at 4; *see* USTA Joint Comments at 9, 15; TCG Comments at 17; RCN Comments at 5; Nextlink at 4, 8-9 (late-comers will be relegated to resale only with its lack of control); NCTA Comments at 10, 11 (new entrants must rely upon the network of incumbents); MCI Comments at 6; GTE Comments at 6; NYSTA Comments at 3; ALTS Comments at 12; MFS Comments at 29; Time Warner Reply Comments at 7.

[86] Agreement, Section 5.12(c). *See* ALTS Comments at 12; MFS Comments at 29; GTE Comments at 6; TCG Comments 3, n.2, 11-12; RCN Comments at 3; MCI Comments at 6; KMC Comments at 4.

[87] ALTS Comments at 12; *see* USTA Joint Comments at 9, 15; SBC at 4; RCN Comments at 3; MFS Comments at 29.

[88] Minnesota, Ahlers June 16 *ex parte* at 1; *see supra* Section II, C, 3; SBC Comments at 4. As defined by the Commission, "[a]n IRU interest in a communications facility is a form of acquired capital in which the holder possesses an exclusive and irrevocable right to use the facility and to include its capital contribution in its rate base, but not the right to control the facility or, depending on the particular IRU contract, any right to salvage . . . . The IRU is conveyed by a facility co-owner to a carrier that did not elect to become a facility co-owner or that as a facility co-owner did not purchase sufficient capacity to meet its projected demand over the life of the facility." *See* Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers, CC Docket No. 87-45, Report and Order, 7 FCC Rcd 4561, 4561 n.1 (1992), *recon.* 8 FCC Rcd 4173 (1993).

that Developer to sell network capacity in a manner that makes the Agreement functionally non-exclusive. Minnesota argues that sections 7.7 and 7.8 of the Agreement require the Developer to sell both lit and unlit network capacity, stating that the "unlit network capacity is similar to the bulk capacity made available on an IRU basis."[89] It is possible that under certain circumstances, the ability of interested parties to purchase facilities on an IRU basis might be an adequate substitute for the ability to construct facilities along a particular route. The present record, however, does not demonstrate that this is the case. The language of the Agreement does not clearly state whether the Developer must sell lit or unlit capacity on an IRU basis.[90] Even if interested parties are able to purchase capacity in Developer's network, the present record does not establish that this would be an adequate substitute for the ability to construct facilities along the freeway rights-of-way.[91] For example, we do not know whether the Developer will charge rates, terms, and conditions that are just and reasonable. Although it is possible that the presence of collocated fiber owned by third parties or other fiber capacity in the state would serve as a competitive restraint on the prices Developer could charge for capacity, we cannot determine beforehand if this will be the case.

43. Furthermore, the record does not adequately address whether the ability to obtain fiber on an IRU-like basis is an adequate substitute for physical access to the freeway rights-of-way. Regardless of whether a competitor collocates or "purchases" fiber from Developer, it will not be able to access the facility to maintain and repair it.[92] Several commenters argue that the ability to maintain and repair their own fiber is important to ensure

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[89] Petition at 26; Universal Communication Networks Reply Comments at 2; Minnesota, Ahlers June 16 *ex parte* at 1; Minnesota, Ahlers Sept. 14 *ex parte* at 4; *but see* MTA, Cosson July 22 *ex parte* at 8 (arguing that the Agreement does not contain a contractual obligation to provide fiber on an IRU basis). Minnesota Claims that, pursuant to Section 2.74 of the Agreement, the Developer will "enter into 'User Agreements' under which [a] third party can acquire 'rights of use or access to [Developer's] Network." As a result Minnesota argues that "the Developer is obligated to offer use of and access to [Developer's] Network" on an IRU basis, and will give all telecommunications providers an opportunity to purchase capacity on a nondiscriminatory basis." Minnesota, Ahlers June 16 *ex parte* at 1; Minnesota, Ahlers Sept. 14 *ex parte* at 4.

[90] Letter from David Cosson, Kraskin, Lesse & Cosson, LLP, to Carol E. Mattey, Chief, Policy and Program Planning Division, Federal Communications Commission (April. 21, 1999) at 1; *see also* Time Warner Reply Comments at 8.

[91] *See* Nextlink Comments at 4, 8-9 (late-comers will be relegated to reselling and its lack of control); NCTA Comments at 10 (new entrants will be forced to rely upon the facilities of incumbents); MFS Comments at 11 (Developer controls cost and quality of construction); *see also* KMC Comments at 4 ("Congress clearly recognized [that] a competitor's ability to buy transport capacity from a wholesaler . . . is not the same as that competitor having proprietary development of control over its own facilities." *Id.* at 5.); Time Warner Reply Comments at 8.

[92] TCG Comments at 12 (TCG is concerned that access to TCG equipment by non-TCG personnel could void equipment warranties and threaten the "proprietary and confidential nature of TCG's network." TCG argues that it is more efficient for it to manage and maintain its own facilities. *Id.* at 14); Nextlink Comments at 9.

quality of service and limit costs.[93] Nevertheless, it is possible that this drawback is not significant because fiber optic cable generally requires little maintenance and the likelihood of a cable cut along this right-of-way is relatively low. Moreover, Minnesota suggests that carriers currently swap capacity on fiber optic transport networks.[94] The present record, however, is not adequate to allow us to conclude that the ability of interested parties to collocate fiber or purchase facilities on an IRU basis is an adequate substitute for the ability to construct facilities.

c. Availability of Conduit

44. The availability of conduit space, through which competitors could pull their own fiber, may also ameliorate the anticompetitive effects of limiting physical access to the freeway rights-of-way to one provider for a period of ten years. Minnesota claims that "[a]ny carrier has the opportunity to purchase access [to] either the fiber-optic in the conduit owned by [Developer] or to AT&T's conduit if they wish to pull through their own fiber cable."[95] While we are encouraged to hear that the Developer is installing conduit in the trenches,[96] we do not have enough information about the availability of conduit to conclude that it makes the Agreement functionally non-exclusive. If conduit space were available to competitors in a manner consistent with section 253, it would further ameliorate our concerns because it would enable competitors to pull their own fiber through the conduit at a later time.[97] The current record however neither indicates that the Developer is required to provide conduit nor that it will have the ability to provide such conduit space.[98]

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[93] Ameritech Comments at 3; KMC Comments at 4; *see* MFS Comments at 11.

[94] Minnesota Reply Comments at 26-27; Minnesota, Bhimani Reply Aff. at ¶ 19.

[95] Letter from Laura Bishop, Director of Legislative Affairs, Department of Administration, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1 (Dec. 13, 1999)(Minnesota, Bishop Dec. 13 *ex parte*); Letter from Gregory P. Huwe, Assistant Attorney General, State of Minnesota, to David Kirschner, Common Carrier Bureau, Federal Communications Commission, at 1 (Dec. 16, 1999)(Minnesota, Huwe Dec. 16 *ex parte*).

[96] Minnesota, Huwe Dec. 16 *ex parte* at 1.

[97] This is similar to a rights-of-way policy devised by the City of Boston that maximizes the availability of conduit and minimizes the need for multiple street openings. Letter from Merita A. Hopkins, Corporation Counsel, City of Boston Law Department, to Magalie Roman Salas, Secretary, Federal Communications Commission, Attachment (Mar. 25, 1999).

[98] Minnesota indicates "that once fiber has been pulled through a conduit, it is unlikely that additional fiber will be installed in that conduit, due to the potential for damage to existing fiber and the availability of other upgrade methods." Minnesota, Huwe Dec. 16 *ex parte* at 2 (citing Petition, Bhimani Aff., Ex. 8).

45. The record also indicates that the Developer is installing conduit on behalf of AT&T.[99] This suggests that empty conduit space may be available from AT&T. While this might further ameliorate our concerns, the record does not provide the rates, terms and conditions AT&T would offer for access to the conduit nor whether AT&T would even offer access to such conduit.[100] As a result, we cannot determine, at this time, whether the availability of conduit would ameliorate the anticompetitive concerns that may have been created by the Agreement.

d. Nondiscrimination

46. Minnesota fails to demonstrate that the Agreement's nondiscrimination provisions are sufficient to protect collocators and entities reselling or purchasing Developer's capacity.[101] As commenters note, the Agreement specifically states that it does not create third party rights.[102] As a result, parties wishing to obtain facilities or service from Developer or collocate along the freeway rights-of-way have no right to enforce the Agreement's nondiscrimination requirements.[103]

47. In addition, it is not clear from the record whether the nondiscrimination language of the Agreement provides Minnesota with sufficient oversight powers to ensure that

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[99] Minnesota, Huwe Dec. 16 *ex parte* at 1.

[100] If AT&T is a local exchange carrier, it has the "duty to afford access to [its] poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and condition that are consistent with section 224." 47 U.S.C. § 251(b)(4).

[101] Section 7.7 of the Agreement states in part: "[a]t all times the [Developer] shall maintain, offer, accept, implement and adhere to written, uniform and non-discriminatory rates and charges for all similarly situated customers and potential customers for such customer's rights to use or access the Network or to become Collocating Customers. . . . The term 'similarly situated customers and potential customers' is intended to permit [Developer] to maintain, offer, accept, implement and adhere to different rates and charges for different classifications os customers (including but not limited to Collocating Customers) based on commercially reasonable considerations and distinctions, such as but not limited to volume of capacity in the Network utilized or the volume of data transported by a particular customer or the length of time for which any particular customer commits to the utilization of a specified volume of capacity in the Network or a specified volume of data transported." Agreement, Section 7.7.

[102] US West Comments at 14; Nextlink Comments at 8; KMC Comments at 9; *see* MTA Reply Comments at 6.

[103] Section 20.5 of the Agreement states: "[n]othing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the parties hereto toward, any person or entity not a party to this Agreement, except rights expressly contained herein for the benefit of Lenders." Agreement, Section 20.5.

the rates will be fair and reasonable.[104] The Agreement allows the Developer to raise prices so long as they are not discriminatory.[105] Aside from claiming that the charges were discriminatory, neither Minnesota nor Developer's customers would have a basis to object to the level of charges. Thus, Developer could use its exclusive physical access to the freeway rights-of-way to extract monopoly profits from the fiber capacity it leases or "sells" on an IRU-like basis, as well as from installation and maintenance of collocated fiber.[106]

48. Moreover, if Developer creates an affiliated retail service provider, it could effectively preclude third parties from benefitting from the less expensive rights-of-way by charging all retail customers, including its affiliate, unduly high rates.[107] These charges would not be discriminatory since they would apply to all retail customers, however. While this would reduce the profits of its retail affiliate, Developer could offset this by the increased profits on its wholesale offering. In contrast to this, competitors would simply have lower retail profits if they used Developer's services and facilities. In this way, Developer could retain the benefits of the less expensive rights-of-way for itself and prevent competitors from benefitting from use of the least expensive rights-of-way. Again, the uncertainty over how the Developer will implement the Agreement requires us to exercise caution at this point and not approve the Agreement as consistent with section 253.

49. We conclude that Minnesota fails to demonstrate that the Agreement's nondiscrimination provisions are sufficient to protect resellers and collocators. Neither third

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[104] USTA Joint Comments at 12, 16-17; MFS Comments at 27-28; *see* TCG Comments at 16; RCN Comments at 7, 10; GVNW Comments at 8-9.

[105] Section 7.7 allows Developer to "modify, supplement or revise its rates and charges for use of or access to the Network, so long as such rates and charges, as modified, supplemented or revised, continue to provide uniform and nondiscriminatory rates and charges for use of or access to the Network or for collocating fiber optic cable for similarly situated customers and potential customers." Agreement, Section 7.7.

[106] We note that New York has addressed this issue. In parts of New York, Empire City Subway Company, Limited, a wholly-owned subsidiary of Bell Atlantic, has been granted a non-exclusive right to construct, operate and maintain a system of underground conduits. Empire then leases space in its conduits, the pricing of which is subject to the "control, modification and revision" of New York City. Empire's "rates are determined by rate case proceedings held before the City of New York Department of General Services." Letter from Dee May, Director, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, (March 22, 1999), Att. 1, Yildirim S. Guner Affidavit at ¶¶ 3-8; *see* GVNW Comments at 9.

[107] Agreement, Section 7.8. Section 7.8 of the Agreement allows Developer to have an "affiliated" company but requires the Developer to charge such entity "the same rates and charges as it does for similarly situated, unaffiliated, non-interested customers and users of the Network or similarly situated, unaffiliated non-interested Collocating Customers." Agreement, Section 7.8(c). *See* SBC Comments at 6; Nextlink Comments at 8; *see also* MFS Comments at 26. Developer claims that it does not have any affiliated or subsidiary companies. Universal Communication Networks Reply Comments at 2.

parties nor the State would be able to ensure that the Developer does not capitalize on the monopoly powers granted it by the state. It is possible that the Developer's charges and/or other terms for the purchase of capacity will be reasonable, but, based on the present record, we cannot determine whether this will be the case.

D. Section 253(b) Analysis

50. We conclude that the Agreement is not protected by section 253(b), which preserves from preemption certain state or local requirements that are "competitively neutral," and "necessary" to achieve the public interest objectives enumerated in section 253(b), even if the requirements contravene section 253(a).[108] In particular, Minnesota has not convinced us that the Agreement is competitively neutral. We also note that Minnesota has not shown that the restrictions on physical access to the freeway rights-of-way are necessary to protect the public safety and welfare.

1. Competitive Neutrality of the Agreement

51. We cannot agree with the State's contention that the Agreement is competitively neutral as required by section 253(b) because the State followed a public procurement process in selecting the Developer.[109] In support of its position, Minnesota argues that the requirement for competitive neutrality in section 253(b) only relates to how the requirement is *imposed*, not to the substantive effect of the measure. We do not believe that Congress intended to protect the imposition of requirements that are not competitively neutral in their effect on the theory that the non-neutral requirement was somehow imposed in a neutral manner. Moreover, we do not believe that this narrow interpretation is appropriate because it would undermine the primary purpose of section 253 -- ensuring that no state or locality can erect legal barriers to entry that would frustrate the 1996 Act's explicit goal of opening all telecommunications markets to competition.[110] Therefore, we conclude that the

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[108] *Texas Preemption Order*, 13 FCC Rcd at 3480, ¶¶ 41-42; *see* Silver Star Telephone Company Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order at ¶ 37 (1997) (*Silver Star Preemption Order*). Since Minnesota asserts that the Agreement falls within the exception to preemption created by section 253(b), it bears the burden of demonstrating that the Agreement falls within the parameters of section 253(b).

[109] Petition at 28-30; ICS/UNC, L.L.C. Reply Comments at 7; USDOT Reply Comments at 7-8; *but see* GTE Comments at 10; Time Warner Reply Comments at 10-11. The State issued a Request for Proposals (RFP). The RFP listing criteria for proposals was published in the State Register and, the State awarded the right to negotiate the contract to the party filing the most advantageous proposal. The RFP was open to all qualified parties. Petition at 31; *see also* ICS Reply Comments at 7-8. Minnesota notes that several of the commenters who oppose Minnesota's Petition submitted proposals in response to the RFP. Minnesota Reply Comments at 43.

[110] *Texas Preemption Order*, 13 FCC Rcd at 3480, ¶ 41.

proper inquiry is whether the effect of the Agreement will be competitively neutral.[111]

52. We conclude that the Agreement is not competitively neutral because it grants a single entity, the Developer, exclusive physical access to the valuable freeway rights-of-way for a period of ten years with an option to renew for another ten years.[112] This restriction on physical access is likely, as we explained above, to disadvantage future facilities-based entrants. In reaching this conclusion, we recognize that it is not necessary for a state to treat all entities in the same way for a requirement to be competitively neutral. In fact, treating differently situated entities the same can contravene the requirement for competitive neutrality. In this case, however, Minnesota has not demonstrated that there are differences in circumstances that warrant granting exclusive physical access to the freeway rights-of-way to only one party.

53. Our conclusion in this regard is supported by the decision in the *Texas Preemption Order*. In that Order we found that certain facilities "build out" requirements were not competitively neutral under section 253(b) because they "single[d] out [a specific class of carriers] and require[d] them to construct their own facilities or purchase access to non-incumbent network elements."[113] We also noted that "by imposing the costs of providing facilities based service only on [certain carriers], the build-out provisions significantly affect[ed] the ability of [these carriers] to compete against other certificated carriers for customers in the local exchange market."[114] Here the Agreement forces a specific class of carriers to use alternative rights-of-way that appear to be more costly than the freeway rights-of-way. The only significant difference is that the lack of competitive neutrality in this case is imposed by granting the Developer an advantage -- exclusive physical access to the freeway rights-of-way -- rather than imposing a disadvantage on a certain class of carriers, as was the case in the *Texas Preemption Order*. Furthermore, as discussed above, Minnesota has not demonstrated that the nondiscrimination provisions of the Agreement are sufficient to overcome the effect of granting one entity exclusive physical access to the freeway rights-of-

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[111] In the *Huntington Park Preemption Order*, we were not concerned with how Huntington Park chose Pacific Bell as the provider, we were concerned with the effect of the contract on competition. *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206-07, ¶¶ 32-34 (1997) (*Huntington Park Preemption Order*).

[112] *See* US West Comments at 18-19; Nextlink Comments at 10 (noting that Developer and collocators will have an advantage over other telecommunications providers); NTCA Comments at 5 (noting that Developer benefits by providing Minnesota with service, precluding other carriers from providing service to the State); MFS Comments at 23.

[113] *Texas Preemption Order*, 13 FCC Rcd at 3500, ¶ 82.

[114] *Id.*

way and render the Agreement competitively neutral.[115]

2. Necessity of the Agreement

54. Our conclusion that the Agreement is not competitively neutral is dispositive on the question of whether the section 253(b) exemption applies. We nonetheless take this opportunity to raise concerns about Minnesota's claims that the Agreement is necessary to protect public safety and advance universal service objectives.

a. Public Safety

55. We agree with the State's assertion that requirements protecting the traveling public and transportation workers fall within the general class of requirements potentially protected by section 253(b). Minnesota is concerned that allowing construction on the freeway rights-of-way will increase the number of accidents and fatalities on the freeway, and, as discussed above, that allowing construction more than once every ten years will increase the risk to an unacceptable level.[116] In this instance, however, opponents of the Agreement dispute certain aspects of Minnesota's claims.[117]

56. The record indicates that in many rural areas, the freeway right-of-way extends a considerable distance beyond the paved shoulder, permitting work to take place beyond the paved shoulder.[118] A major highway study in the record also shows "that construction on

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[115] *See supra* Section II, C, 4, d.

[116] Petition at 27; Minnesota, Lari Aff. at ¶ 8; Minnesota Reply Comments at 36, 40; Durgin Reply Aff. at ¶ 20; USDOT May 21 *ex parte* at 4-5 (Noting that the ongoing debate about whether to allow access to these rights-of-way was "not because of doubts about the ability of modern communications technology to serve the public interest, but because of the millions of accidents that occur on the nation's highway each year, and the established fact that the presence of construction vehicles and personnel on the rights-of-way of these roads unfortunately results in additional accidents, injuries, and deaths."); *see also* Crown Castle Reply Comments at 3. It is USDOT's view that requiring relatively frequent reopening of telecommunications trenches "would be unpalatable to most states, which could retain or revert to prior policies forbidding access altogether to affected rights-of-way." USDOT May 21 *ex parte* at 5; *but see* MTA, Cosson July 22 *ex parte* at 7 (arguing that USDOT has safety reviewed state policies allowing multiple installations of fiber facilities).

[117] Although we accord substantial deference to a state's expert agency when considering issues of highway safety, certain aspects of the state's claims are in dispute.

[118] Letter from David Cosson, Kraskin, Lesse & Cosson, LLP, to Magalie Roman Salas, Secretary, Federal Communications Commission, and Carol E. Mattey, Chief, Policy and Program Planning Division, Federal Communications Commission (Dec. 22, 1998), Arnold R. Kraft Affidavit at ¶ 9 (MTA, Kraft *ex parte* Aff.); RCN Comments at 11-12; ALTS Comments at 17; MTA, Cosson July 22 *ex parte* at 6, 8; *but see* USDOT May 21 *ex parte* at 3 (Less than fifty percent of the 2,000 miles covered by the Agreement has a right-of-way so wide

either the 'Shoulder/Roadside' (*i.e.*, on the shoulder or beyond the shoulder) *did not* increase accident rates in on (sic) any road type."[119] According to this study, "[t]he impact of construction on shoulders or roadsides was a 4.3% *decrease* [in accident rates] with rural freeways, [and] a 2.2% *decrease* [in accident rates] with urban freeways," when compared with "normal" road conditions.[120] As such, in areas with wide rights-of-way, the record does not show a correlation between construction work off the highway shoulder and an increase in accidents. Because the Agreement requires construction away from the paved surfaces when rights-of-way are wide enough, Minnesota's safety concerns appear to be overstated, except in areas with very narrow rights-of-way.[121]

57. Moreover, it appears that installing fiber optic facilities has no greater safety impact than typical roadside maintenance, such as removal of refuse, mowing of grass, sign maintenance and replacement, fence repair, and/or culvert construction that occurs routinely. In fact, installing fiber is less intrusive than typical repairs which take place on the roadways such as joint repair and patching, or snow removal, which are common in cold climates like Minnesota.[122] Therefore, based on the record before us, we are unable to determine whether it is necessary to limit installation of fiber to once every ten years on all parts of Minnesota's interstate freeway system.

b. Universal Service

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that construction equipment and crews can avoid working in the shoulder area, *i.e.*, "on more than 1,000 miles of Minnesota's roadways over the next one to two years, telecommunications-related work in the ROW will introduce a non-trivial safety risk to motorists and work crews); Minnesota, Ahlers June 16 *ex parte* at 4 (Claiming that the width of the rights-of-way varies); Minnesota, Ahlers Sept. 14 *ex parte* at 4.

[119] MTA, Kraft *ex parte* Aff. at ¶ 10 (emphasis added), Att. 1, National Cooperative Highway Research Program, *Procedures for Determining Work Zone Speed Limits,* Research Results Digest, Sept. 1996, at Table 10 (NCHRP safety study). Minnesota references the same study cited by the MTA, but cites the data for construction on the paved roadway and the paved shoulder. The MTA points to the data for work off of the paved roadway and beyond the paved shoulder.

[120] MTA, Kraft *ex parte* Aff. at ¶ 9 (emphasis added); *see* NCHRP safety study, Table 10.

[121] ALTS Comments at 17; MFS, Eide Decl. at ¶ 8 (According to MFS declarant: "[t]he customary practice of placing fiber optic cable away from the surface of the roadway, and the extremely low level of maintenance for fiber, minimizes safety considerations."); Ameritech Comments at 3-4 ("The sole justification Minnesota offers for limiting the use of the freeways to a single entity is the historic prohibition on use for these purposes coupled with a naked assertion that access must be limited to a single party in order to address concerns regarding the safety of the traveling public and the adverse consequences of congestion.")

[122] MTA, Kraft *ex parte* Aff. at ¶ 13, Att. 2, National Cooperative Highway Research Program, Longitudinal Occupancy of a Controlled Access Right-of-Way by Utilities, National Research Council (1996).

58. While we applaud Minnesota's efforts to bring advanced services to rural areas, we are concerned that the Agreement is not "necessary to preserve and advance universal service."[123] Minnesota claims that one of the benefits of the Agreement is that it extends fiber optic capacity into rural areas by requiring Developer to install fiber over the entire planned network.[124] As discussed above, however, extracting benefits from the Developer in exchange for exclusive physical access to rights-of-way is, we believe, fundamentally inconsistent with the 1996 Act.[125] At the very least, Minnesota has not demonstrated that this method is necessary to deploy advanced services.

E. Section 253(c)

59. We cannot agree with Minnesota that the Agreement is protected from preemption by section 253(c). Section 253(c) provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[126] Minnesota contends that the decision to grant exclusive physical access to Developer constitutes rights-of-way management that Congress exempted from section 253 preemption. Further, Minnesota claims that it is managing the rights-of-way in a nondiscriminatory manner because Developer is a not a telecommunications service provider.[127] Minnesota also asserts that the compensation required is reasonable, competitively neutral and nondiscriminatory as required by section 253(c). In particular, it asserts that the open procurement process ensures that the state has not unfairly favored one provider over another. The state also argues that the nondiscrimination requirements in the Agreement and the provisions for collocation of third party fiber mitigate any anti-competitive effects of the Agreement.[128]

60. We have serious reservations about whether the Agreement constitutes rights-of-way management for purposes of section 253(c). In particular, the legislative history of section 253(c) indicates that Congress intended to protect the states' traditional regulation of

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[123] 47 U.S.C. 253(b).

[124] Universal Communication Networks Reply Comments at 2, 5; Minnesota, Ahlers June 16 *ex parte* at 5.

[125] *See supra* paras. 35-36.

[126] 47 U.S.C. § 253(c).

[127] Minnesota, Ahlers June 16 *ex parte* at 4.

[128] Petition at 29-32.

rights-of-way.[129] The House Report states that section 253 "makes explicit a local government's continuing authority to issue *construction permits* regulating how and when construction is conducted on roads and other public rights-of-way."[130] In contrast to this, Minnesota has decided not to use a permit process similar to that in effect for other state rights-of-way and instead has granted exclusive physical access to this right-of-way to a single entity in return for valuable consideration.

61. Even assuming that the Agreement constitutes rights-of-way management, Minnesota has not demonstrated that the Agreement is protected by section 253(c). Section 253 requires that both management of public rights-of-way and the requirement for compensation be competitively neutral and nondiscriminatory in order for a state or local legal requirement to be protected under section 253(c).[131] As discussed previously in relation to section 253(b), Minnesota has not shown that the Agreement is "competitively neutral and nondiscriminatory."[132] Therefore, even assuming that the Agreement constitutes protected rights-of-way management -- which we are not convinced, based on this record, that it does -- Minnesota has not shown that such management is competitively neutral and/or nondiscriminatory.

62. Moreover, Minnesota has not shown that the compensation required for access

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[129] *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441; *Classic Preemption Order*, 11 FCC Rcd at 13103, ¶¶ 39-40; *see also* USTA Joint Comments at 12; RCN Comments at 4-5; Midwest Wireless Comments at 6; GTE Comments at 11; MFS Comments at 35. In the Classic Preemption Orders, the Commission found that the types of activities that fall within the sphere of appropriate rights-of-way management include coordination of construction schedules, determination of insurance, bonding, and indemnity requirements, establishment and enforcement of building codes and keeping track of the various systems using the rights-of-way to prevent interference between them. *Classic Telephone, Inc., Petition for Emergency Relief, Sanctions and Investigation*, Memorandum Opinion and Order, 12 FCC Rcd 15619, at 15637, n.102 (citing *Classic Preemption Order*, 11 FCC Rcd at 13103, ¶ 39); *see* GVNW at 5; *see also* ALTS Comments at 13, n.15, 18; MFS Comments at 36; Time Warner Reply Comments at 12; *but see* USDOT Reply Comments at 6-7 (Arguing that the Agreement is a "reasonable exercise of its management authority over public rights-of-way").

[130] House Report No. 104-204, U.S. Congressional & Administrative News, March 1996, vol.1, Legislative History section at 41(emphasis added).

[131] *Classic Preemption Order*, 11 FCC Rcd 13082, 13103, ¶ 39; *Cablevision of Boston, Inc., v. Public Improvement Commission of the City of Boston*, No. 99-1222, 1999 WL 632203, at *11-13 (1st Cir. Aug 25, 1999)(finding that the "larger context suggests that [Congress] would have wanted to impose [the competitively neutral and nondiscriminatory] requirement on both management of rights of way and compensation schemes" despite the fact that syntactically and semantically "competitively neutral" only applies to compensation schemes and not management of rights of way.)

[132] 47 U.S.C. § 253(c); *see supra* Section II, D, 1.

to the right-of-way is "fair and reasonable."[133] The compensation appears to reflect the value of the exclusivity inherent in the Agreement, rather than fair and reasonable charges for access to the right-of-way. Nor has Minnesota shown that the Agreement provides for "use of public rights-of-way on a nondiscriminatory basis."[134]

63. In addressing the status of the Agreement under section 253, we are responding to Minnesota's request for a declaratory ruling on the Agreement. Since we conclude that Minnesota fails to demonstrate that the Agreement will not violate section 253(a) or that it is protected by section 253(b), we must consider whether the Agreement is protected from preemption by section 253(c) in order to fully respond to Minnesota's petition. Our discussion of these issues should not be interpreted as addressing potential issues involving the Commission's jurisdiction under section 253(c).

III. PETITIONS FOR PREEMPTION

64. Many of the parties opposing Minnesota's request for declaratory ruling also ask the Commission to preempt the Agreement in their filings in this proceeding. We do not resolve these requests for preemption at the present time. As our prior discussion makes clear, there are aspects of the Agreement that have the potential to contravene section 253(a), and we invite interested parties to comment on whether the Commission should preempt the Agreement pursuant to its authority under section 253(d). We believe that our consideration of any requests for preemption would be aided by supplemental information concerning the practical effect of this Agreement, and we urge parties to provide us with such information in their comments.

[133] 47 U.S.C. § 253(c).

[134] *Id.*

IV. ORDERING CLAUSE

65. Accordingly, IT IS ORDERED that the Petition for Declaratory Ruling filed by the State of Minnesota IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

Minnesota Petition for Declaratory Ruling
CC Docket No. 98-1
List of Commenters

Comments

Ameritech Corporation (Ameritech)
Association for Local Telecommunications Services (ALTS)
GTE Service Corporation (GTE)
GVNW, Inc. (GVNW)
KMC Telecom Inc. and KMC Telecom II, Inc. (KMC)
MCI Telecommunications Corporation (MCI)
MFS Network Technologies, Inc. (MFS)
Midwest Wireless Communications, L.L.C. (Midwest Wireless)
Minnesota Telephone Association (MTA)
National Cable Television Association (NCTA)
National Telephone Cooperative Association (NTCA)
New York State Telecommunications Association, Inc. (NYSTA)
Nextlink Communications Inc. (Nextlink).
RCN Telecom Services, Inc. (RCN)
SBC Communications Inc. (SBC)
Teleport Communications Group Inc. (TCG)
United States Telephone Association, The Organization for the Promotion and Advancement of Small Telecommunications Companies, The Western Rural Telephone Association and The Competition Policy Institute (USTA Joint Comments)
US West, Inc. (US West)

Reply Comments

Crown Castle International Corp. (Crown Castle Reply Comments)
ICS/UNC, L.L.C. (Developer Reply Comments)
Intelligent Transportation Society of America (ITS America Reply Comments)
MCI Telecommunications Corporation (MCI Reply Comments)
MFS Network Technologies, Inc. (MFS Reply Comments)
Minnesota Telephone Association (MTA Reply Comments)
Teleport Communications Group Inc. (TCG Reply Comments)
Time Warner Cable (Time Warner Reply Comments)
United States Telephone Association, The Organization for the Promotion and Advancement of Small Telecommunications Companies, The Western Rural Telephone Association and the Competition Policy Institute (USTA Joint Reply Comments)
Universal Communication Networks, LLC
U.S. Department of Transportation (US DOT Reply Comments)
US West, Inc. (US West Reply Comments)
Wilbur Smith Associates

States, State Agencies, and other Commenters

Alabama Department of Transportation
American Association of State and Highway Transportation Officials (AASHTO)
Arizona Department of Transportation
City of Boston
Commonwealth of Kentucky Transportation Cabinet
Commonwealth of Virginia, Department of Transportation
DPD Comprehensive Resources Planning
Indiana Department of Transportation
Iowa Department of Transportation
Kansas Department of Transportation
Kentucky Department of Transportation
Massachusetts Highway Department
Mississippi Department of Transportation
Missouri Department of Transportation
Montana Department of Transportation
New Mexico State Highway and Transportation Department
New York State Thruway Authority
North Dakota Department of Transportation
Rep. Phyllis Kahn, Rep. Jean Wagenius, and Rep. Irv Anderson, Minnesota House of Representatives
State of Alaska Department of Transportation and Public Facilities
State of California Department of Transportation
State of Delaware Department of Transportation
State of Florida Department of Transportation
State of Idaho Transportation Department
State of Maine Department of Transportation
State of Minnesota Intergovernmental Information Systems Advisory Council
State of Montana Department of Administration
State of Nebraska, Department of Roads
State of New Jersey Department of Transportation
State of North Carolina Department of Transportation
State of Oregon Department of Transportation
State of Rhode Island and Providence Plantations, Department of Transportation
State of Tennessee Department of Transportation
State of Utah Department of Transportation
State of Vermont Agency of Transportation
State of Wisconsin Department of Transportation
Texas Department of Transportation
Washington State Department of Transportation