

Before the
Federal Communications Commission
Washington, D.C. 20554

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OCT 12 1999

In the Matter of)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

I. INTRODUCTION

The United States Telephone Association (USTA), as the principal trade association for the local exchange carrier industry, on behalf of its members, respectfully files these comments concerning the Federal Communications Commission's (FCC or Commission) third further notice of inquiry in the above-captioned proceeding.¹

Specifically, USTA's comments address state and local governments rights-of-way management matters.² To the extent that state and local governments abuse their rights-of-way authority, USTA believes it is incumbent upon the FCC (1) to readily exercise its authority under section 253(d) of the 1996 Telecommunications Act to preempt such abusive behavior; and (2) to preclude any preferential rights-of-way management treatment for local or state government-owned telecommunications operations.

¹Notice 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 ("TFNPRM") (adopted, Jun. 10, 1999; released, July 7, 1999; with the date extended by Order Extending Pleading Cycle (adopted and released, Aug. 6, 1999).

²TFNPRM at ¶ 79.

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II. COMMENTS

One example of a right-of-way management abuse by a state that is illustrative of the kinds of problems carriers face is in Minnesota. USTA has filed comments and reply comments in *In re The State of Minnesota Petition for Declaratory Ruling Concerning Access to Freeway Rights-of-Way Under Section 253 of the Telecommunications Act*, CC Docket No. 98-1.³ In this matter, the State of Minnesota is attempting to leverage its authority over access to rights-of-way along interstate highways to secure telecommunications facilities for itself in exchange for favored treatment for its preferred network developer. The actions of Minnesota, as demonstrated by USTA's filings and those of the Minnesota Telephone Association,⁴ have clearly placed carriers at a competitive disadvantage in relation to the State's preferred developer. The FCC should quickly

³See *In re The State of Minnesota Petition for Declaratory Ruling Concerning Access to Freeway Rights-of-Way Under Section 253 of the Telecommunications Act*, CC Docket No. 98-1, "Opposition and Request to Preempt of the 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 (Mar. 9, 1998); and "Reply Comments of the 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". (Apr. 9, 1998). See also, "Opposition of Minnesota Telephone Association to Request for Declaratory Judgment Request of Minnesota Telephone Association for Preemption" *In re The Petition of State of Minnesota 1996 Acting by and Through 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*, CC Docket No. 98-1 (Mar. 9, 1998)(CC Dkt. No. 98-1); "Reply Comments of the Minnesota Telephone Association, CC Dkt. No. 98-1 (Apr. 9, 1998); and Joint letter from David Cosson of Kraskin, Lessee & Cosson, LLP and Richard J. Johnson, Moss & Barnett, P.A., representing the Minnesota Telephone Association to Magalie Roman Salas, FCC Secretary and Carol E. Matthey, FCC Chief, Policy & Program Planning Division, in CC Dkt. No. 98-1 (Dec. 22, 1998).

⁴*Id.*

act to preempt Minnesota in this instance.

Another example of where a state is attempting to abuse its governmental control over rights-of-way has been provided to USTA by the Utah Rural Telecom Association (URTA). Attachment I hereto is a memorandum from URTA describing efforts by Utah to unreasonably control carriers' access to rights-of-way.

A number of courts have had to intervene to restrain states and local governments that have abused their rights-of-way authority.⁵ To the extent that carriers have to bring such rights-of-way matters before the FCC, USTA believes the FCC should not be reluctant to exercise its authority under section 253 to remove state and local government imposed barriers to entry. Specifically, section 253(d) states that:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. [Section 253(d) of the Communications Act of 1994, as amended by The Telecommunications Act of 1996 (47 U.S.C. 253(d)).]

Increasingly, local and state governments are creating local and state networks as a means to avoid purchasing services from non governmental common carriers. While it may, under state law, be within the authority of state and local governments to create such networks, it is clearly anti-competitive and an abuse of governmental authority for state and local governments to use their control over rights-of-way access by non governmental telecommunications services providers to

⁵See, e.g., *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland* (Civil Action No. JFM 98CV 4187)(D. MD.)

advantage their proprietary positions as either private or common carriers for telecommunications services. In such cases, the Commission must intervene and exercise its preemptive authority under section 253(d) to provide common carriers with recourse against abusive and anti-competitive governmental rights-of-way practices. It is equally abusive for governments to exact non cost-based fees for access to rights-of-way by non governmental carriers or unfairly use their taxing authority to disadvantage non governmental carriers. Attachment II hereto is a set of principles concerning governmental networks that has been adopted by USTA members.

III. CONCLUSION

USTA urges the FCC to exercise its section 253(d) preemption authority in a deliberate and timely manner when carriers bring cases of governmental abuse to its attention.

Respectfully submitted,

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COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION
Attachment I
(contains Oct. 8, 1999 Memorandum by the Utah Rural Telecom Association)

DATE: **October 8, 1999**

RE: **Right-of-Way Issues**

You have asked for input on rights-of-way issues to be provided to the FCC. The Utah Rural Telecom Association ("URTA") takes this opportunity to share our concerns about Utah state and local government authorities' attempts to revise long-standing policies on rights-of-way access.

Historical Review

In Utah, access to rights-of-ways for both state highways and local government roads for many years has been allowed upon payment of only a minimal permit fee. In the last several years, however, government officials have begun to look at highway rights-of-ways as a possible source of additional revenue. This process accelerated with passage of the Telecommunications Act of 1996 and the subsequent opening of the interstate highway system for access by telecommunication companies. The State of Utah, through the Utah Department of Transportation ("UDOT"), for the past two years has been advocating various proposals to allow access to the interstate rights-of-ways upon payment of substantial fees. URTA and other telecommunication providers were successful in defeating legislation in the 1999 Utah Legislature, which would have given almost *carte blanche* authority to UDOT to set user fees. The 1999 Legislature, however, did create a 20 person Utilities in Highway Rights-of-Way Task Force (the "Task Force") to study the issues of rights-of-way compensation and reimbursement of expenses for required utility relocations. The Task Force has been meeting monthly for the past several months and will make its final recommendations to the Legislature in November, 1999.

Recommendations of the Rights-of-Way Task Force

Major division and controversy have marked the work of the Task Force. In August 1999, the Task Force submitted an initial report to members of the Legislative Management Committee. The Task Force made the following recommendations:

1. The goal of telecommunication access to interstate highway rights-of-way is to enhance a statewide digital network infrastructure. This recommendation passed the task force unanimously. The task force later unanimously adopted the language that "the purpose shall be to further develop the statewide digital network in order to meet the telecommunication needs of state agencies and to enhance the learning purposes of higher and public education."

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2. The task force unanimously indicated general agreement on the following issues:
 - a. Barter arrangements or a combination of cash and barter are authorized, but are to be entered into at the option of both UDOT and the provider.
 - b. Barter arrangements shall be valued based on the incremental cost to the provider.
 - c. Cash payments may be one-time or amortized over a ten-year period.
 - d. The right-of-way licenses should be nonexclusive.
 - e. Any capacity obtained by the state as barter should be for exclusive state government and higher and public education use and not be sold or leased in competition with other providers. The acceptable uses of acquired capacity are outlined under the purposes listed in recommendation #1.
 - f. The length of any contract should be limited to a term of 30 years.
 - g. Any relocation costs along the interstate should be the provider's responsibility as is currently specified in Utah Code Subsection 72-7-108(5).
 - h. Any damage to fiber or lost service should be the responsibility of persons who caused the damage or lost service as provided in current law.
 - i. Maintenance of the fiber should be the provider's responsibility as specified in each agreement.
3. Compensation for interstate right-of-way access should be paid by one-time fees as determined for each zone of the state as follows:
 - a. \$1,500 per mile for Zone 1 (Wasatch Front, Ogden to Provo, urban area);
 - b. \$1,000 per mile for Zone 2 (Ogden to Brigham City, Provo to Santaquin, and Cedar City and St. George areas); and
 - c. \$500 per mile for Zone 3 (the remainder of the state's rural areas).This recommendation passed the task force on an 11-7 vote.
4. The firewall provisions that limit the ability of highway authorities to require additional compensation from telecommunication providers should be strengthened. This recommendation passed the task force on a 19-1 vote.
5.
 - a. The state should recover its actual costs to facilitate and maintain interstate right-of-way access. This recommendation was made by general agreement of the task force.
 - b. All excess proceeds should be deposited in the General Fund instead of the Transportation Fund. This recommendation passed the task force on a 10-8 vote.

The Task Force was seriously divided over the most controversial issue: the compensation proposal. Nevertheless, the industry's proposal, advanced initially by URTA, passed by a majority of 11 votes to 7. URTA believes that a one-time fee ranging from \$500 to \$1,500 mile will not significantly degrade the deployment of additional digital infrastructure in the State nor will it significantly raise subscriber's telephone bills. Unfortunately, despite the

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Task Force's majority vote on this compensation proposal, legislative leaders and the governor have vowed to ignore the Task Force's recommendation and to move forward with a proposal to collect substantial fees for interstate access, on the rationale that the interstate is a "valuable asset" of the State and that companies should pay royally for access.

The UDOT Revised Proposal

Since the Task Force made its report, the Senate Co-chair of the Task Force has, with the assistance of UDOT, developed a new compensation proposal, which is a modification of the original UDOT proposal. This proposal would impose exceptionally high fees on a per-mile basis for access to the interstate right-of-way. The major difference from earlier UDOT proposals is that the new proposal allows for a proportionate splitting of the set fee among all telecommunications companies that are allowed access to the interstate during the prescribed period that access is opened. Access to a given segment of the interstate would be allowed only periodically (proposed from as short as 18 months to as long as once every 5 years). Any company who wanted access would be allowed in during the time UDOT opens the right-of-way. UDOT would authorize one trench in the opened segment and would let as many companies as wanted in, to have access to that one trench.

It is proposed that every company in the trench share the cost of the right-of-way fee. Each company in the trench will pays its proportionate share based on that company's participation.. In other words, a company's share of costs would be determined by this formula:

$$\frac{\text{Company's Conduit Size}}{\text{Total Conduit in the Trench}} = \text{Proportionate share}$$

Obviously, if many companies participated in the project, any one company's costs would decrease. If only one company participated, the costs would be extraordinary as set forth below. The compensation would be based on five zones:

- Zone 1 - All of I-70, Tremonton to Idaho on I-84, Payson to Arizona on I-15 and Wyoming to Silver Creek Junction on I-80.
- Zone 2 - Idaho to Weber on I-15; Echo to SR84 on I-84; Magna to Nevada on I-80; Springville to Payson on I-15; SR89 to I-15 on I-84.
- Zone 3 - Weber to Parish Lane on I-15; Silver Creek to Parleys on I-80.
- Zone 4 - Parish Lane to Springville on I-15.
- Zone 5 - Parleys to Magna on I-80; All of I-215.

The charges proposed are set forth below. This is a one-time fee. Companies would also be given an option to pay on a 30 year lease discounted to PV at 7.5 percent.

- Zone 1 - \$10,000 mile
- Zone 2 - \$28,000 Mile

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Zone 3 - \$61,000 mile
Zone 4 - \$105,000 mile
Zone 5 - \$156,000 mile.

In lieu of these cash payments, UDOT proposes to allow a company the option of bartering fiber to pay the access fee. URTA is very concerned about what the State will do with the bartered fiber it receives. Various state officials have given assurances that the State will not go into competition with private companies. However, this remains to be seen. The sponsor has suggested that the State will offer subsidized fiber to local telephone companies to install fiber networks.

UDOT insists that this proposal will be limited only to the interstate and that it will not advocate anything other than a cost-based permitting fee on other state highway rights-of-way. Given the inexorable demand for additional sources of government revenues, it remains to be seen if this commitment will hold in the long run.

Rights-of-Ways on Municipal Roads.

In addition to the foregoing, some cities and counties in Utah have indicated an intention to charge a right-of-way access fee unrelated to the costs associated with access for local roads. One city has charged \$1.00 per foot per year for access to its rights-of-ways. This enormously explosive issue in Utah is still to be fought. Many local government authorities are interested in utilizing user fees as an indirect taxation method. Given the on-going dynamics of government's need for new revenue sources and the general aversion to raising income taxes, the risk that counties, cities and towns will also institute high annual fees for access to their rights-of-way cannot be disregarded.

URTA is very concerned about any compensation proposal which would radically alter the status quo of cost-based permitting fees and which would lead to similar exorbitant fees being charged on other state and local roads. Legislative leaders, however, have repeatedly given commitments that what is adopted for the interstate right-of-way will not be allowed for other state roads or for local county and city roads. This may be further addressed in the 2000 Legislature, through additional statutory language to strengthen the firewall against state and local government charging fees above permitting costs for rights-of-ways on other state highways and local roads.

URTA's Concerns

URTA's position has consistently been that access to any government right-of-way should be allowed and that government should charge no more than a cost-based permit fee for

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such access. While as a political reality, URTA could be forced to acquiesce to a different result, it maintains that the appropriate principle to be followed is cost-based compensation. **URTA would support urging the FCC to advocate a national policy of cost-based access to interstate rights-of-way in order to advance the development of digital, high bandwidth telecommunications infrastructure in this country.**

Charging high fees for access to interstate rights-of-ways could have a devastating impact on telephone customers in Utah. State policy is to make telecommunication services widely available to all customers in the State at affordable prices. The incredibly high charges proposed will increase telephone companies' costs significantly and will in turn be passed on to telephone customers by higher monthly telephone bills. These drastically increased costs may make telephone service unaffordable to some citizens. Rural telephone company subscribers will be particularly hard hit because increased rights-of-way fees calculated on a per-foot basis will be greater in rural areas due to the increased distances involved. In addition, rural telephone companies must spread increased costs among a smaller customer base. The result could be an extraordinary increase in the cost of local telephone service for rural subscribers. Charging such fees could also seriously delay deployment of advanced technology throughout the State, since the cost to run cable in rights-of-ways will skyrocket.

Interstate rights-of-ways are owned by the citizens of the State (not state agencies) and should be utilized for the benefit of the citizens. Thus, uses should be granted to multiple providers. State taxpayers created through their tax dollars the interstate highway system. Taxpayers (as utility customers) should not be charged a second time for the rights-of-ways they have already paid for with their tax dollars. The goal should not be, as UDOT proposes, to maximize revenue to the State. The goal should be to optimally use State resources to improve infrastructure and the quality of life for citizens. The interests of the State are served by an affordable state-of-the-art telecommunications system. State resources, including the interstate highway system, should be utilized to advance rather than to impede this interest

URTA is also concerned about the possible impact of this proposal on the costs of obtaining private rights-of-ways, arising from parties attempting to use the interstate fee as a comparable in determining the value of a private right-of-way. What the State requires by way of compensation for interstate access, may become the floor fee for private rights-of-ways. If a private landowner knows what UDOT charges (which he will because the amount the State charges is required to be open for public inspection), it is clear that such landowner will think he is entitled to at least the same compensation should he grant an easement to a telephone company. The result could be a tremendous increase in the costs of providing infrastructure. However, the Legislature appears amenable to drafting language to exclude the use of such fees as a comparable in an eminent domain proceeding. Nevertheless, there still exists the possibility

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that private landowners will increase their demanded compensation for a perpetual easement across their land based on what the companies have to pay to UDOT.

Relocation Reimbursement

The Task Force has also been mandated by the Legislature to come up with a process that “provides uniform reimbursements for utility relocation in all state highway rights-of-ways,” including the development of a “simple formula that determine the share of relocation reimbursements for both highway authorities and utility provers so that both will have an incentive to minimize the relocation costs.” Section 72-7-108(6) Utah Code Ann.(1999).

It is URTA’s position that the Legislature has, in the above-quoted language, already mandated a cost-sharing reimbursement approach between UDOT and companies for required utility relocations. The Task Force has not yet adopted a specific reimbursement formula but is expected to do so in its October 19, 1999 meeting.

Summary

As you can tell, rights-of-way issues are extremely controversial and still unresolved in the State of Utah. URTA supports a national policy to allow access to interstate rights-of-way at cost or near cost in order to facilitate the deployment of digital infrastructure.

If you have any questions or need additional information, please call URTA’s executive director, Nancy Gibbs at (801) 766-6262 or its attorney, Jerry D. Fenn at (801) 578-3535.

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Attachment II

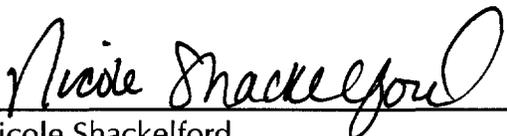
(contains USTA Members Adopted Statement of
Principles on Government Competition with Telecommunications Providers)

USTA PRINCIPLES ON GOVERNMENT COMPETITION WITH TELECOMMUNICATIONS PROVIDERS

1. Government owned telecommunications operations should not be regulated by the same governmental entity as they are owned.
2. Government owned competitive telecommunications operations should be subject to the same regulation as non-government owned firms engaged in the provision of the same service(s). Government shall impute to its cost of providing service the cost of taxes and fees consistent with the obligations of private (e.g. non-government) telecommunications carriers.
3. There should be a presumption against government ownership and operation of telecommunications concerns when private industry provides or indicates a willingness to provide the relevant service at a reasonable price.
4. Government owned competitive telecommunications operations should not have access to any subsidies, in the form of tax exemptions (including income, property, gross receipts and excise taxes), tax exempt bond financing, or other subsidies, that are not available to non-government owned enterprises, or, non-government owned operations that compete with government owned operations should receive the same subsidies and exemptions. Government shall impute to its cost of providing telecommunications services a cost of capital consistent with the cost of capital available to private (e.g. non-government) telecommunications carriers.
5. Government shall not use its sovereign powers, such as control of rights of ways or powers of condemnation, to provide an advantage to government owned competitive telecommunications operations over non-government owned concerns nor delegate its sovereign powers to a competitive non-government owned telecom services provider.
6. In general, government inefficiencies should not be masked by taxpayer subsidies. Otherwise, government owned competitive telecommunications carriers can charge low rates even though they have higher operating costs. Not only do government owned competitive operations encourage positive competitive advantages for the government owned entity, they also encourage handicapping of the non-government entity.
7. State statutes that prohibit such entry by government owned competitive telecommunications operations should be upheld notwithstanding Section 253 of the Telecom Act of 1996. States generally have the right to determine the types of operations their political subdivisions may undertake..
8. Government owned competitive telecommunications providers should have no greater ability to allocate costs among other services (i.e., electricity load management) than non-government providers.

CERTIFICATE OF SERVICE

I, Nicole Shackelford, do certify that on October 12, 1999, Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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