

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Request by City Signal Communications, Inc.
for Declaratory Ruling Concerning the Use of
Public Rights of Way for Access to Poles in
Cleveland Heights, Ohio Pursuant to
Section 253

CS Docket No. 00-253

In the Matter of
Request by City Signal Communications, Inc.
for Declaratory Ruling Concerning the Use of
Public Rights of Way for Access to Poles in
Wickliffe, Ohio Pursuant to Section 253

CS Docket No. 00-254

In the Matter of
Request by City Signal Communications, Inc.
for Declaratory Ruling Concerning the Use of
Public Rights of Way for Access to Poles in
Pepper Pike, Ohio Pursuant to Section 253

CS Docket No. 00-255 ✓

**ADELPHIA BUSINESS SOLUTIONS, INC.'S
OPPOSITION TO MOTION TO STRIKE**

Pursuant to Section 1.727(e) of the Commission's Rules,¹ Adelfphia Business Solutions,
Inc. ("ABS") hereby opposes the request of the National Association of Telecommunications

¹ 47 C.F.R. § 1.727(e). While Section 1.727 applies typically in complaint proceedings against common carriers, it appears to be the only section of the Commission's Rules governing the filing of oppositions to motions, generally. To the extent that Section 1.727(e) does not apply in this instance, ABS requests that this be accepted as a permitted *ex parte* submission pursuant to Section 1.1206 of the Commission's Rules.

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Officers and Advisors (“NATO A”) to strike ABS’ Comments in the above-captioned proceedings.²

I. INTRODUCTION

In its Comments in these proceedings, ABS presented the Commission with a detailed discussion of the relevant law and policy regarding the issues raised by City Signal Communications, Inc.’s (“City Signal”) petitions – namely, that municipal delay creates a barrier to entry in violation of Section 253(a), and that discriminatory, competitively biased underground construction requirements also constitute an unlawful barrier to entry. In one part of ABS’ Comments, it provided the Commission with examples of some of the municipal delay problems that it has encountered. That discussion was included to provide support for ABS’ assertion that municipal delay is a widespread problem, not isolated to City Signal’s experience, warranting the Commission’s grave concern and firm remedial action.

Despite the relevance and appropriate nature of ABS’ Comments, NATO A has, in the guise of Reply Comments, requested that the Commission strike ABS’ Comments, along with the Comments of Level 3 and Metromedia Fiber Network Services (“MFNS”).³ NATO A’s submission is inappropriate, and should be denied. Contrary to NATO A’s claim, ABS’ Comments did not seek preemption of actions outside the City Signal petitions, and ABS was not

² Reply Comments of the National Association of Telecommunications Officers and Advisors; Chandler, AZ; Burbank, Culver City, Glendale, Richmond and Walnut Creek, CA; Jefferson Parrish, LA; Newton, MA; Dearborn, MI; and Clayton, MO (“NATO A Reply”).

³ While styled as “Reply Comments,” NATO A’s submission does not address any substantive factual or legal issue raised in the City Signal petitions, and focuses only on its request to strike and on attacking the factual submissions of MFNS and Level 3.

required under the Commission's rules to serve the municipalities it discussed. In addition, NATOA's "reply" does not respond to the substance of ABS' Comments. Indeed, the affidavits attached to NATOA's "reply" ultimately support ABS' point that unabashed municipal delay is widespread and constitutes a significant barrier to entry in violation of Section 253(a).

II. ABS IS NOT PETITIONING THE COMMISSION TO MAKE ANY FINDING REGARDING THE ACTION OF THE SPECIFIC COMMUNITIES THAT ABS IDENTIFIED

NATOA's primary, if not sole, basis for asking the Commission to strike ABS' Comments is that, NATOA argues, ABS seeks Commission preemption of the municipal actions it described.⁴ Specifically, NATOA asserts that "ABS asks not only that the City Signal petitions be granted but also that the 'delay and discrimination' ABS claims to have suffered in other communities be declared unlawful."⁵ NATOA's assertion is incorrect, and grossly mischaracterizes ABS' Comments.

ABS did not request Commission preemption of the municipal actions it described. The partial quotation used by NATOA comes from the Conclusion portion of ABS' Comments. ABS' sentence states, in full, as follows: "For the reasons discussed above, the Commission should promptly grant City Signal's petitions and declare that such delay and discrimination are unlawful."⁶ Clearly, ABS' statement makes no reference to the municipal actions discussed *as examples* in the body of ABS' Comments. The "such" that NATOA conveniently failed to quote, makes clear that the "delay and discrimination" language refers to the actions identified in

⁴ NATOA Reply at 3.

⁵ NATOA Reply at 3.

⁶ ABS Comments at 29.

City Signal's petitions. Moreover, it was not outside the bounds of the Commission's Public Notices in this matter for ABS to ask for a reaffirmation by the Commission of the general rule that unreasonable delay and discriminatory, competitively biased actions by municipalities are unlawful.

ABS included the brief discussion of some of the municipal delays it has encountered in order to support its assertion that delay is not a problem unique to the *City Signal* petitions. Moreover, ABS provided the examples to amplify the points made by *City Signal* that the reasons given by the Respondent Cities' for their delays in authorizing *City Signal's* use of the public rights-of-way do not pass muster under Section 253(a), and that the impact of such delays is diametrically at odds with Congress' purpose in enacting the 1996 Act. Indeed, if ABS had not included such concrete examples, municipal concerns, like NATOA, would no doubt have attacked ABS for making the assertion without factual support.⁷ NATOA's procedural wranglings expose a fundamental lack of support on the substantive issues, and should be rejected.⁸

III. NATOA'S COMMENTS REINFORCE THE EXISTENCE AND IMPACT OF MUNICIPAL DELAY

In its "reply", NATOA seeks to rebut the factual assertions of MFNS and Level 3

⁷ Indeed, ABS did not choose lightly to identify specific communities. It is all too aware that by "naming names" it took a substantial political risk of retribution, both from the named communities, and from other members of close-knit groups, like NATOA. Despite that risk, ABS felt that it was important for the Commission to have this information in order to better understand the nature and impact of the illegal practices that *City Signal* has experienced.

⁸ Moreover, NATOA's motion is overbroad. The overwhelming majority of ABS' Comments had nothing to do with the issues raised by NATOA.

regarding certain communities.⁹ Yet, careful review reveals that NATOA's submission actually supports ABS', MFNS', and Level 3's point that municipal delay is all too common and has had a substantial, adverse impact on the introduction of competitive telecommunications services in local markets.

For example, attached to NATOA's submission is the Declaration of Laura D'Auri, Deputy City Attorney for the City of Culver City, California. In her Declaration, Ms. D'Auri asserts that "Culver City is progressively and actively pursuing its policy of encouraging competition and welcoming entrants in the telecommunications field."¹⁰ In reality, however, the facts exposed in Ms. D'Auri's Declaration make ABS', MFNS' and Level 3's point. In her Declaration, Ms. D'Auri sets forth a timeframe of events. While her description is not complete (for example she notes that the City met with ABS on May 31, 2000, but ignores the fact that ABS first contacted the City in February, 2000),¹¹ her declaration nonetheless exposes a delay of over one year – for which the City is unapologetic and offers no satisfactory justification. Her Declaration shows that the City first met with ABS in at least May, 2000, and admits that the City will not even be "ready to *process* Adelphia's request for entry" until after February 26, 2001 – **one year** after ABS first contacted the City.¹² As to Level 3's application, Ms. D'Auri

⁹ ABS notes that the text of NATOA's discussion does not directly address ABS' factual showing.

¹⁰ NATOA Reply, Declaration of Laura D'Auri at ¶ 2.

¹¹ ABS Comments at 13. Ms. D'Auri does not dispute ABS' assertion that it first contacted the City in February, 2000 to request access to the rights-of-way.

¹² D'Auri Decl. at ¶ 28 (emphasis added). Ms. D'Auri's Declaration creates some confusion as to the status of the City's Ordinance. She states that "With the adoption of the Pass Through Ordinance on February 26, 2001. . . ." Yet, her Declaration is dated February 13, 2001. Presumably, she means that the City anticipates that it will adopt the ordinance at a meeting

provides an approximate completion date of April, 2001 (again, nearly a year after the City initiated its “review” of right-of-way management).¹³ She does not even hazard a guess as to when ABS’ request might be granted.

The City of Culver City is a classic example of a municipality that, five years after the passage of the 1996 Act, has placed CLEC entry on hold while it “studies” right-of-way management. The declaration of the City’s own Deputy Attorney merely serves to reinforce the point made by ABS, MFNS, and Level 3 that delay, like that encountered by City Signal, is widespread and creates a virtually impenetrable barrier to CLEC entry, in violation of Section 253(a). Her Declaration does not support NATOA’s motion to strike but, rather, emphasizes the need for prompt and decisive Commission action in the City Signal cases.

IV. ABS WAS NOT REQUIRED TO SERVE THE IDENTIFIED COMMUNITIES

In a footnote, NATOA asserts that ABS’ Comments should be stricken for failure to serve the communities discussed therein.¹⁴ In support, NATOA cites *Amendment of Ex Parte Rules*.¹⁵ NATOA’s assertion is incorrect.

First, the Commission’s rules require only that “petitions” for rulemaking or declaratory ruling be served on localities that are subject of the “petition.” ABS filed comments, not a petition for declaratory ruling or rulemaking. Second, the Commission’s rules require service

scheduled for February 26, 2001, but given the vagaries of municipal government, that cannot be considered an absolute certainty, leaving open the possibility of still further delays.

¹³ D’Auri Decl. at ¶ 25.

¹⁴ NATOA Reply at 2 n.3.

¹⁵ 14 FCC Rcd. 18831, 18838 (1999).

only on communities “whose actions are identified [in the petition] as warranting preemption.”¹⁶ ABS has not requested that the identified communities’ actions be preempted in this case. As explained above, they were noted as examples in order to support the petitioner’s assertion, and ABS’ and the other CLEC commenters’ concurrence, that delay is a widespread and serious problem (in the absence of which examples, NATOA would no doubt have claimed that ABS’ assertions were without support). Accordingly, ABS’ Comments should not be dismissed on service grounds.

CONCLUSION

NATOA’s request to strike is nothing more than an attempt to eliminate comments that provide the Commission with good reason to grant City Signal’s petitions. As discussed above, NATOA’s arguments are without merit, and its submission ultimately supports the points made in the comments it seeks to have eliminated. NATOA’s request should be denied.

Respectfully Submitted,



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February 23, 2001

¹⁶ *Id.*

CERTIFICATE OF SERVICE

I, Glendora Williams, hereby certify that I have this 23rd day of February, 2001, caused a copy of the foregoing Opposition To Motion To Strike of Adelphia Business Solutions, Inc., to be delivered by First Class Mail to the following:

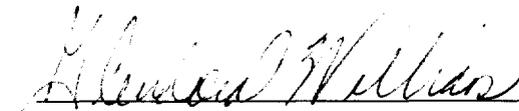
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