

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

In the matter of :
ALTRIO COMMUNICATIONS, INC.
v.
ADELPHIA COMMUNICATIONS
CORPORATION
Complaint Regarding Rate Uniformity and
Predatory Pricing
CSR 5862- R

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 2002

Released: November 15, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Altrio Communications, Inc. ("Altrio"), a cable operator in the Arcadia, California, filed a complaint against Adelphia Communications Corporation ("Adelphia") alleging that Adelphia violated the geographic rate uniformity requirement of Section 623(d) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.984 of the Commission's rules which require that cable operators maintain a uniform rate structure throughout their franchise area.

II. BACKGROUND

2. Section 623(d) of the Communications Act requires cable operators to maintain a uniform rate structure in their franchise area. This requirement does not, however, apply to cable operators subject to effective competition as defined by Section 623(l) of the Communications Act. Section 623(d) provides, in relevant part:

(d) UNIFORM RATE STRUCTURE REQUIRED. A cable operator shall have a rate structure, for the provision of cable service, which is

1 Adelphia operates its Arcadia system through a subsidiary, Century-TCI California, L.P., in which Adelphia acquired a controlling interest in 1999.

2 47 U.S.C. § 543(d); 47 C.F.R. § 76.984.

3 Because we dispose of Altrio's complaint on other grounds, we need not determine whether or not to accept the additional submissions.

4 47 U.S.C. § 543(d).

5 47 U.S.C. § 543(l); 47 C.F.R. § 76.905.

uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis.⁶

Thus, should the Commission find that a cable operator is subject to effective competition in its franchise area, a complaint alleging violation of the uniform rate structure requirement will be dismissed.⁷

III. DISCUSSION

3. Altrio's complaint alleges that Adelphia is engaged in uniform pricing violations to the detriment of Altrio's emerging cable operations. Altrio was formed during the year 2000 with the purpose of providing a competitive cable, telephony and broadband ISP alternative in the greater Los Angeles area.⁸ Altrio indicates that it commenced offering cable services in Arcadia in December 2001, and that, at the time of its complaint, provided service to several hundred customers.⁹ In response to its entry as a new cable provider in the franchise area, Altrio asserts that Adelphia sought to eliminate Altrio as a competitor. According to Altrio, in November 2001, immediately before Altrio began its service launch and advertising campaign, Adelphia's rates were \$33.33 for analog expanded basic service, and an additional \$10.00 for digital expanded basic service and \$39.99 for cable modem service.¹⁰ In addition, Adelphia offered expanded basic service at \$19.95 per month, as well as cable modem service for \$19.95 for the first three months of service, as a special promotion to new customers.¹¹ Altrio indicates that after the launch of its service in December 2001, Adelphia offered an "extraordinary deal" to its existing customers for one year in which Adelphia increased its analog channels by twelve (57-69 channels), its digital channels by 81 (8-89 channels), dropped its rates to \$19.95 for analog expanded basic service, charged only an additional \$5.88 for digital expanded basic, and offered cable modem service for \$19.95.¹² Altrio also asserts that Adelphia customer service representatives engaged in "minute-by-minute" changes in its offers and short-term price cuts to retain existing customers contemplating a switch to Altrio, and to attract new customers.¹³ Altrio argues that Adelphia's conduct and the apparent price variations are not price differences that fall within a reasonable promotion exception to the uniform price requirement.¹⁴ By engaging in such conduct, Altrio states that Adelphia's actions violated and continue to violate the uniform pricing requirement of Section 623(d) of the Communications Act and Section

⁶ 47 U.S.C. § 543(d); 47 C.F.R. § 76.984.

⁷ See e.g., *American Cable Company and Jay Copeland v. Telecable of Columbus, Inc.*, 11 FCC Rcd 10090 (1996); *Cross Country Cable, Inc., v. C-TEC Cable Systems of Michigan, Inc.*, 12 FCC Rcd 2538 (1997).

⁸ Altrio Complaint at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 4. Altrio points out that examples of rate variations which the Commission has found may be reasonable, depending upon the circumstances, include differences in rates between seasonal and full-time subscribers, introductory or promotional rates universally applied at a given time but subsequently discontinued, and reasonable discounts to senior citizens or other economically disadvantaged groups. See *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992 – Rate Regulation*, 8 FCC Rcd 5631, 5897 (1993).

76.984(a) of the Commission's rules.¹⁵ To address Adelphia's violation, Altrio requests that the Commission order Adelphia to immediately cease and desist from charging rates that are not uniform, establish and maintain rates that are not predatory, and pay a forfeiture in the amount of \$275,000 for willful and repeated failure to comply with the Communications Act and the Commission's regulations.

4. In its opposition, Adelphia defended its conduct arguing that it is subject to local exchange carrier ("LEC") effective competition and therefore exempt from the uniform pricing requirement of Section 623(d).¹⁶ In particular, Adelphia argues that, because Altrio provides local exchange telephone service in Arcadia, Adelphia is subject to LEC effective competition.¹⁷

5. Subsequent to the filing of Altrio's complaint in this proceeding Adelphia filed a separate petition for a determination of effective competition in its Arcadia franchise area.¹⁸ In that petition, Adelphia asserted that it was subject to competing provider effective competition since before the inception of Altrio's competing cable service in the Arcadia franchise area.¹⁹ After examining the evidence filed with Adelphia's petition, the Bureau found that Adelphia was subject to effective competition under the competing provider test in Arcadia, California, as of October 1, 2001.²⁰ The Bureau determined that Adelphia demonstrated that at least two unaffiliated MVPDs, namely DirecTV, Inc. and EchoStar Communications Corporation, offered comparable programming to more than 50 percent of the households in Arcadia in satisfaction of the first prong of the competing provider test. With respect to the second prong of the competing provider test, the Bureau determined that Adelphia satisfied that prong by showing that the competing MVPDs served more than 15 percent of the households in Arcadia in 2001.²¹

6. In view of the Bureau's disposition of Adelphia's effective competition petition, the Commission's rules governing uniform rates are inapplicable to Adelphia.²² Therefore, Altrio's petition

¹⁵ Altrio Complaint at 4.

¹⁶ Opposition at 3-4. The LEC test provides that a cable system is subject to effective competition when: a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area. *See* 47 U.S.C. § 543 (1)(1)(D).

¹⁷ Opposition at 3.

¹⁸ *See Century-TCI California, L.P.*, DA 02-2391 (MB rel. Sept. 26, 2002). Altrio was served with a copy of Adelphia's effective competition petition.

¹⁹ *Id.* Adelphia's petition was unopposed. The competing provider test provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multichannel video programming distributors ("MVPDs") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area. *See* 47 U.S.C. § 543(1)(1)(B).

²⁰ *Id.*

²¹ *Id.*

²² *See Texas Cable Partners, L.P.*, 17 FCC Rcd 4377, 4380 (2002) ("The Communications Act expressly permits cable operators that are determined to be subject to effective competition to maintain non-uniform rates."); *Coxcom, Inc.*, 14 FCC Rcd 7134, 7143 (1999) ("The U.S. Court of Appeals for the District of Columbia has held that all rate regulation-related rules, including the uniform rate requirement, cease to apply where the Commission has determined . . . effective competition exists."); *see also Time Warner Entertainment Co. v. FCC*, 56 F. 3d 151, 191 (D.C. Cir. 1995).

must be dismissed.²³

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the complaint filed by Altrio Communications, Inc. against Adelphia Communications Corporation pursuant to Section 623(d) of the Communications Act, 47 U.S.C. § 543(d), and Section 76.984 of the Commission's rule, 47 C.F.R. § 76.984, **IS DISMISSED.**

8. **IT IS FURTHER ORDERED** that the request for sanctions filed by Altrio Communications, Inc. against Adelphia Communications Corporation in CSR 5862-R **IS DENIED.**

9. This action is taken by the Deputy Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Media Bureau

²³ If Altrio believes that Adelphia is no longer subject to effective competition at some time in the future and has the same concerns as discussed in its filing, it is free to bring a new uniformity complaint.