

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

In the matter of)	
)	
MOUNTAIN CABLE COMPANY d/b/a)	DA 99-1434
ADELPHIA CABLE COMMUNICATIONS)	File No. CSB-A-0628
)	
BETTER TV, INC. OF BENNINGTON d/b/a)	
ADELPHIA CABLE COMMUNICATIONS)	
)	
YOUNG'S CABLE TV CORP.)	
)	
Appeal of Local Rate Order of)	
the Public Service Board)	
State of Vermont)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 2003

Released: August 27, 2003

By the Commission:

I. INTRODUCTION

1. Mountain Cable Company d/b/a Adelphia Cable Communications, Better TV, Inc. of Bennington d/b/a Adelphia Cable Communications, and Young's Cable TV Corp. (collectively "Adelphia"), the franchised cable operators in various cable communities in the State of Vermont, have filed an application for review of the Cable Services Bureau's Memorandum Opinion and Order, DA 99-1434 (released July 22, 1999) ("*Bureau Order*"),¹ in the above captioned proceeding. Adelphia challenges the portion of the *Bureau Order* which denied Adelphia's appeal with respect to late fees. The Vermont Department of Public Service ("Department") has opposed the application and Adelphia has replied.² For the reasons set forth herein, we deny Adelphia's application for review.

II. BACKGROUND

2. The Public Service Board of the State of Vermont ("Board") issued a rate order on May 3, 1999, that disallowed Adelphia's late fee of \$5.00 and ordered refunds of fees collected since July 23, 1998, because Adelphia did not show that the costs imposed on late-paying customers were not already reflected in its benchmark rates. The Board was concerned that authorizing late fees based on cost elements already used in establishing benchmark rates would permit double recovery of those costs.³

¹ 14 FCC Rcd 11807 (1999).

² Adelphia Application for Review (filed Aug. 23, 1999) ("Adelphia Application"); Department Opposition to Application for Review (filed Sept. 7, 1999) ("Department Opposition"); Adelphia Reply (filed Sept. 22, 1999) ("Adelphia Reply"); Letter from Seth A. Davidson, counsel for Adelphia Cable Communications, to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission (filed Sept. 29, 1999) ("Adelphia Supp. Response").

³ *Bureau Order* at 11809 ¶¶ 5-7.

While acknowledging that late fees generally fall outside the scope of the rate regulation provisions of the Communications Act and that a local order determining the reasonableness of a particular late fee ordinarily will not be subject to Commission review, Adelphia appealed the Board's order to the Commission and argued that the Board erred by concluding that late payment costs are recoverable through the Commission's benchmark methodology.⁴ The Board replied that while it discussed in its rate order the potential overlap between costs recovered by late fees and costs recovered through rates regulated under Commission rules, it did not confine itself to these matters and did not foreclose future consideration of a showing by Adelphia that late fees were appropriate on other grounds.⁵

3. The *Bureau Order* stated that

[t]he Commission has declined to adopt regulations governing late fees, providing, instead, that late fees are within the purview of the franchising authority and are appropriately dealt with through local negotiation or the application of state or local consumer protection and customer service laws. Local or state authorities may regulate the rates of late fees utilizing local or state laws, if these laws permit such regulation. Just as we determined in *Falcon Cablevision* that we will not rule on the reasonableness of a franchising authority's decision to require a cost justification with respect to late fee charges, we will not rule here on a franchising authority's decision to require a cable operator to show that the costs being recovered through late fees exceed the normal billing and collection costs recovered through its tier rates.⁶

4. Adelphia seeks review of the *Bureau Order* for clarification that the "costs uniquely associated with the pursuit of delinquent subscriber accounts are not part of the 'normal billing and collection costs' that are presumed to be covered by rates established pursuant to the federally mandated benchmark formula."⁷ Adelphia argues that local franchising authorities may regard the Bureau's decision as an invitation to reject late fee charges even where the operator is able to substantiate costs that are directly connected with the collection of delinquent subscriber bills because the Bureau chose not to repudiate the Board's finding that the benchmark methodology fully compensates cable operators for the costs of pursuing delinquent accounts and that operators therefore are barred from imposing a separate late fee charge.⁸ Specifically, Adelphia argues that the conclusion in the *Bureau Order* may be interpreted as a "declaration by the Bureau that the Commission lacks jurisdiction to address the 'double recovery' argument."⁹

5. Adelphia contends that Commission clarification is necessary for the following four reasons. First, Adelphia argues that "common sense and common industry practice" support the conclusion that "normal" costs of doing business do not include costs to recover delinquent subscriber payments.¹⁰ In support, Adelphia references the billing practices of EchoStar and DirecTV, "the cable industry's principal competitors," who have established separate late fee charges to cover the

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 11810-11 ¶ 9.

⁷ Adelphia Application at 2.

⁸ *Id.* at 5.

⁹ Adelphia Reply at 3.

¹⁰ Adelphia Application at 5.

administrative costs of pursuing delinquent accounts.¹¹ Second, Adelphia reiterates the arguments it proffered in its appeal, namely that the benchmark methodology does not account for costs the operator incurs for late payments¹² and that “the Commission’s own decisions and statements regarding late fee charges confirm the absence of any relationship between the benchmark rate formula and the recovery of late fee costs.”¹³ According to Adelphia, “if the costs associated with late fees were included in the benchmark rates, then the Commission’s decision to allow local franchising authorities to approve late fee charges on the basis of late fee-related costs would have been tantamount to a decision to allow such local franchising authorities to approve evasions of rate regulation.”¹⁴ Third, Adelphia asserts that, if the *Bureau Order* is not clarified, the Commission will “find itself drawn into a never ending succession of late fee cases” regarding the relationship between late fee costs and the benchmark rate methodology.¹⁵ Finally, Adelphia claims that public interest considerations warrant clarification because local franchising authorities may disallow separate late fee charges altogether, invariably resulting in higher rates for all subscribers.¹⁶

6. The Department opposes Adelphia’s application for review. First, the Department argues that Adelphia’s application fails on procedural grounds because it does not meet the specific factors that warrant Commission review, as outlined in Section 1.115 of the Commission’s rules.¹⁷ The Department also asserts that Adelphia is not seeking review of the Bureau’s action with respect to the Board’s denial of Adelphia’s cost based late fees; rather it is requesting that the Commission issue an “advisory opinion.”¹⁸ The Department contends that Adelphia’s arguments relate to “what the Bureau clearly recognized to be a collateral issue” and that its concerns over local franchising authority interpretations are “hypothetical” and “speculative.”¹⁹ In addition, the Department argues that the Board did not foreclose future consideration of a showing by Adelphia that the late fees were appropriate, and has acknowledged that a late fee may be imposed for reasons other than cost recovery.²⁰ Finally, the Department contends that the Commission correctly declined to rule on the Board’s denial of Adelphia’s proposed late fee and should reject the same arguments raised again, because the Board’s review of late fees falls outside the Commission’s statutory jurisdiction in rate regulation.²¹

¹¹ *Id.* at 6 (referencing DirecTV and EchoStar’s billing agreements attached as Exh. A to the Adelphia Application).

¹² *Id.* at 6-7.

¹³ *Id.* at 8. Adelphia states that the “Commission has repeatedly referred to the common industry practice of imposing late fee charges without ever suggesting that the rates produced by the benchmark formula covered late fee-related costs.” *Id.* Adelphia claims that this argument is supported by the Commission’s rejection of the “cable operator’s contention that the local franchising authority lacked the authority to require a cost justification for a separate late fee” in *Falcon Cablevision*. *Id.*

¹⁴ *Id.*

¹⁵ *Id.* For support, Adelphia provides copies of several court decisions from various jurisdictions. *See* Adelphia Application, Exh. B; Adelphia Reply Attachment; *but see* Adelphia Supp. Response at 1 (indicating that one of the cited cases had been vacated).

¹⁶ Adelphia Application at 9-10.

¹⁷ Department Opposition at 4-5.

¹⁸ *Id.* at 6.

¹⁹ *Id.*

²⁰ *Id.* at 6-7.

²¹ *Id.* at 7-9.

III. DISCUSSION

7. Section 623 of the Communications Act,²² adopted as part of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”),²³ governs the cable television rate regulation process. In its *Consumer Protection and Customer Service Order*, the Commission addressed arguments by local governments seeking federal limits on late fees by stating that “these types of issues are usually dealt with by state or local governments.”²⁴ Consequently, the Commission declined to “add this provision in the Federal standards” and recommended “that such concern be dealt with through local negotiation or application of local or state consumer protection and customer service laws.”²⁵ In several subsequent local cable rate appeal orders, the Commission held that late payment fees were not subject to regulation under the 1992 Cable Act but that local authorities may regulate late fees pursuant to local or state statutes.²⁶ The Commission also declined to rule on the reasonableness of local franchising authority decisions regulating or restricting late fees.²⁷ In *Falcon Cablevision*, for example, the cable operator argued that a prior Commission decision stood for the proposition that while local authorities may regulate the customer service aspects of late fees, they may not regulate the rates charged for such fees.²⁸ The Commission rejected the cable operator’s contention and declined to rule on the reasonableness of a local franchising authority’s decision to require a cost justification for the cable operator’s late fees.²⁹ Similarly, the Bureau did not rule on the Board’s decision to require Adelphia to show that the costs being recovered through late fees exceeded the normal billing and collection costs recovered through its tier rates.³⁰ We find that the Bureau correctly denied Adelphia’s challenge to the Board’s rationale for rejecting Adelphia’s late fees. The Bureau’s decision was consistent with applicable precedent and we therefore deny Adelphia’s application for review.

²² 47 U.S.C. § 543.

²³ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

²⁴ Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992: Consumer Protection and Customer Service, Report and Order (“*Consumer Protection and Customer Service Order*”), 8 FCC Rcd 2892, 2907 ¶ 68 (1993). The Commission stated that “[m]any local governments complain that cable operators charge a flat late fee which can be equal to well over standard interest rates.” *Id.*, citing Reply Comments of Metropolitan Dade County (“Dade County Reply”), MM Docket No. 92-263, filed Jan. 26, 1993 and Comments of The Northwest Municipal Cable Council (“Northwest Comments”), MM Docket No. 92-263, filed Jan. 11, 1993. Dade County argued that the Commission should adopt a reasonable limit for late fees because several cable operators in its “jurisdiction charged a flat rate of \$10, an amount sometimes approaching 40% of the past due amount.” See Dade County Reply at 7. Northwest proposed that late fees should be limited “from 1% to an absolute maximum of 5%” instead of the \$5 flat fee, representing “27% for a basic only subscriber, 15.5% for the average subscriber with only one pay service,” its cable operator charged. See Northwest Comments at 3-4.

²⁵ *Consumer Protection and Customer Service Order* at 2907 ¶ 68.

²⁶ See *Falcon Cablevision* (Thousand Oaks, CA), 11 FCC Rcd 10511, 10524-25 ¶ 31 (CSB 1996); *Cablevision Industries Corp.* (Bishopville, SC), 10 FCC Rcd 6624, 6625 ¶ 8 (CSB 1995); *Cablevision Industries Corp.* (West Columbia, SC), 10 FCC Rcd 10513, 10516 ¶ 13 (CSB 1995). The Commission, however, can consider whether late fees are used to evade the Commission’s rate regulation rules. This may occur, for example, where a cable operator uses billing practices that result in all or most of its customers being assessed a late fee, thereby giving the operator a higher effective rate than that permitted under the Commission’s rules. See Public Notice, Questions and Answers on Cable Television Rate Regulation, Q & A No. 20 (May 6, 1994).

²⁷ *Id.*

²⁸ *Falcon Cablevision* at 10524 ¶ 29.

²⁹ *Id.* at 10524-25 ¶ 31.

³⁰ *Bureau Order* at 11810-11 ¶ 9.

8. We also decline to issue the clarification Adelphia seeks – namely that its costs to recover delinquent subscriber payments are not “covered” by the benchmark rates. The benchmark rate process was not based on a direct accounting for the costs of cable system operation, but on a comparison of the rates of competitive and noncompetitive systems. The survey from which the benchmark rate process was derived did not separately account for late fee charges. In these circumstances, we do not find it inappropriate for a state or local authority, in attempting to determine an acceptable late fee, to demand some level of assurance that the operator is not seeking to recover the costs associated with late payments both as a component of the tier charge and as a separate late fee.

IV. ORDERING CLAUSES

9. Accordingly, pursuant to 47 C.F.R. § 1.115, IT IS ORDERED THAT the Application for Review filed by Mountain Cable Company d/b/a Adelphia Cable Communications, Better TV, Inc. of Bennington d/b/a Adelphia Cable Communications, and Young’s Cable TV Corp. on August 23, 1999 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary