Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Altrio Communications, Inc. for a Certificate of Public Convenience and Necessity to Operate as Provider of Facilities-Based and Resale Local Exchange and Interexchange Telecommunications Service Within the State of California.	Application 00-10-044 (Filed October 20, 2000)

OPINION GRANTING FACILITIES-BASED LOCAL EXCHANGE AUTHORITY

By this decision, we approve the amended application of Altrio Communications, Inc. (Altrio or Applicant), filed September 8, 2003, for a full facilities-based certificate of public convenience and necessity (CPCN) as a competitive local exchange carrier (CLEC) to offer service within the territory of the City of Pasadena in accordance with the terms and conditions set forth below.

Background

On October 20, 2000, Altrio filed its initial application in the above-captioned proceeding for a CPCN to provide (1) competitive local exchange services in the local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and (2) nondominant interexchange carrier (NDIEC) services throughout the state. On May 10, 2001, Altrio amended its application asking that we consider its request in two steps. First, Altrio requested that the Commission immediately grant it limited facilities-based

(LFB) and resale authority to operate as a CLEC within the greater Los Angeles metropolitan area, and as an NDIEC statewide, along with authority to construct various facilities in the Los Angeles area.

Second, Altrio proposed at a later time to file a Proponent's Environmental Assessment (PEA) seeking full facilities-based authority to operate as a CLEC within the entire local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and as an NDIEC statewide.

On July 16, 2001, we issued Decision (D.) 01-07-022, granting Altrio LFB CPCN authority to provide competitive local exchange telecommunications services utilizing resale of other carriers' services or unbundled network elements and equipment installed solely within existing buildings or structures. We concluded, however, that the construction activities identified by Altrio in its amended application could not be included in its LFB CPCN and deferred this matter for further consideration pending Altrio's submittal of its PEA for full facilities-based authority. Under the terms of the LFB CPCN, we prohibited Altrio from constructing buildings, towers, conduits, poles, or trenches, as well as other facilities Altrio identified in its application.

We left open the application for the purpose of permitting Altrio to augment its showing to justify its request for full facilities-based authority, including required documentation in compliance with the California Environmental Quality Act (CEQA). After the issuance of D.01-07-022, however, Altrio proceeded to pursue construction of its OVS network facilities to offer cable television and cable modem data services, neither of which are regulated by this Commission.

On August 21, 2001, the City of Pasadena executed an agreement with Altrio in which it granted "nonexclusive rights to construct and to operate an

open video system in the City of Pasadena and setting forth terms and conditions relating to the exercise of those rights" (OVS Agreement). The Pasadena Neighborhood Coalition (Coalition) also filed a complaint before this Commission (*see* Case (C.) 02-11-053), claiming that Altrio violated its LFB CPCN by constructing a variety of facilities in Pasadena in order to provide its OVS network services.

A Presiding Officer's Decision (POD) in C.02-11-053, issued August 28, 2003, found that Altrio must have a full facilities-based CPCN to offer telephone service using its OVS facilities in Pasadena. Altrio disagrees with this conclusion and has appealed that POD. However, in an effort to expedite the offering of competitive telephone service in Pasadena while that appeal is pending, Altrio filed an amendment to its CPCN application for full facilities-based authority.

On September 8, 2003, Altrio thus filed an amendment to its CPCN application (which is the subject of this decision). Altrio seeks to withdraw its earlier request for full facilities-based authority for all parts of California, "except where it has built or will build its OVS network pursuant to agreements or cable franchises executed or granted with specific local jurisdictions." (Amendment to Application, page 1.)

Altrio currently offers cable television service and cable modem data service not regulated by this Commission using its OVS network under an agreement with the City of Pasadena and under its OVS certification from the Federal Communications Commission (FCC). Altrio's OVS network, as constructed and approved by the City of Pasadena (City), utilizes a shared broadband network that extends from Altrio's central facility to customers' homes and includes optical and coaxial cables, amplification and

redundancy-switching equipment in hubs and at each node to assure the reliability of all services. Altrio has completed a hub in the northern part of Pasadena and intends to add one hub and the distribution network running from it to subscribers' homes in the southern part of the City. Altrio's OVS broadband network is capable of delivering cable video, cable modem, and telephone services simultaneously. The individual subscriber chooses which service, or combination of services, to receive.

Altrio submitted documentation with its CPCN application amendment as described in Attachment A through C of its application amendment,[1] indicating that the City of Pasadena acting as the lead CEQA agency approved a franchise agreement with Altrio in August 2001 after determining that a Class 1 CEQA exemption applied to the construction of the OVS network in Pasadena. In turn, the City passed Ordinance No. 6873 approving the execution of the franchise agreement, provided that Altrio as the franchisee will be "in compliance with all applicable construction requirements and environmental procedures imposed by the Franchise Authority [the City of Pasadena]."[2]

No construction of additional facilities for telecommunications services is contemplated by Altrio other than that authorized by the City as part of the OVS network. Therefore, Altrio requests that the Commission, acting consistent with

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[1] The documentation appended to Altrio's amended application consists of: Attachment A, Open Video System Agreement Executed with the City of Pasadena; Attachment B, Pasadena City of Ordinance No. 6873 Approving the OVS Agreement; and Attachment C, Memorandum of Michele Beal-Bagneris, Pasadena City Attorney, Attesting to Grant of a Class 1 CEQA Exemption for Altrio's construction of its OVS System in Pasadena.

[2] Various construction and environmental requirements are provided in the OVS Agreement in Section 7 (Attachment A at 19-24) and Exhibit G thereto.

its duties as responsible agency under 14 Cal Code Reg. Section 15050, adopt Pasadena's CEQA exemption determination for purposes of this proceeding, and grant Altrio full facilities-based local exchange based authority in Pasadena.

Discussion

Altrio's amended application poses an unusual situation with respect to our responsibilities under CEQA. CEQA applies to discretionary projects that are undertaken by public agencies, as well as private projects that require a permit or other authority from a public agency. Under the provisions of CEQA, the Commission must consider the environmental consequences of a project that is subject to its discretionary approval. Here, the Commission must consider Altrio's request for a modification of its CPCN that would allow Altrio to use its existing OVS network to provide telecommunications service.

Typically, the Commission acts as a lead agency in performing CEQA review of telecommunications construction projects that require a CPCN or an amendment to the CPCN. In most cases, such review takes place <u>before</u> construction as a basis for approval of full facilities-based local exchange authority. Here, however, the City of Pasadena found that a Class 1 CEQA exemption applies to Altrio's OVS facilities, and Altrio constructed those facilities to provide cable television and cable modem data services. Altrio now seeks to use these same facilities for offering telecommunications services subject to the CEQA exemption, and indicates that no additional construction is contemplated other than that already authorized by the City, or limited installation of telecommunications equipment permitted under its LFB authority.

Thus, we are confronted with a request to use facilities that have already been found exempt from CEQA review by the City of Pasadena and placed in service for purposes other than providing telecommunications services.

CEQA does not require that a reviewing agency accept the exemption granted by a prior agency, if the reviewing agency does not believe the exemption is proper. Here, we have serious concerns about whether a Class 1 exemption under Rule 17.1 (h) allowing the "operation, maintenance, repair…or minor alteration" of existing facilities was properly granted for construction of the OVS facilities, particularly given some of the physical changes required (installation of back up generator boxes.)[3] However, it would serve no useful purpose at this point to perform new CEQA review of facilities that have already been installed or will be installed to provide OVS and high speed data transmission services. (i.e., services not under the jurisdiction of the CPUC)

Stated differently, at this point and time the "project" before us is not a request to construct telecommunications infrastructure, but a request to use existing and/or authorized infrastructure to provide telecommunications service in addition to OVS and high spend data transmission service.

We have discretion, however, to grant or deny the request of Altrio to extend its previously granted LFB authority to full facilities-based authority. Although the infrastructure has already been constructed, Altrio still must obtain this Commission's approval for full facilities-based CPCN authority to offer telecommunication services to customers. We retain authority to prescribe the terms and conditions by which Altrio may offer telecommunications service utilizing its OVS network facilities.

Given the circumstances before us here, we conclude that no useful purpose would be served by denying Altrio's request for full facilities-based

[3] We take judicial notice of the record in the complaint case, (C.02-11-053) re: Pasadena Neighborhood Coalition, Complainant vs. Altrio Communications, Inc., Defendant.

authority within the City of Pasadena. Since the OVS facilities were approved by the City of Pasadena and are used for services other than telecommunications, the facilities will continue in operation irrespective of how this Commission resolves the request for full facilities-based telecommunications authority. Even if we were otherwise inclined to deny full facilities-based authority, such denial would not prevent the use of Altrio's OVS facilities for purposes other than telecommunications services. Moreover, denial of Altrio's request would further limit the competitive telecommunications choices available to consumers in the Pasadena region.

Moreover, no party has presented a protest to the application nor offered any reasons why full facilities-based authority within the City of Pasadena should not be granted to Altrio.

Accordingly, we hereby grant Altrio full facilities-based authority within the boundaries of the City of Pasadena and limited to the scope of the OVS facilities authorized by Pasadena. To the extent Altrio seeks full-facilities based authority in places other than Pasadena, we deny that request. To the extent that Altrio offers local exchange service pursuant to the full facilities-based authority granted hereunder, it shall be subject to the same terms and conditions of service as adopted in D.01-07-022.

Section 311(g)(2) – Uncontested Decision Granting Relief Requested

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Public Utilities Code Section 311(g)(2), the otherwise applicable 30-day effective period for public review and comment is being waived.

Assignment of Proceeding

Carl W. Wood is the assigned commissioner and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Altrio applied for a CPCN on October 20, 2000, to provide competitive local exchange services in the local exchange operating territories of the state's four non-rural incumbent local exchange carriers, and NDIEC services throughout the state.

2. Altrio amended its application on May 10, 2001, to request the immediate grant of limited facilities-based and resale authority to operate as a CLC within the greater Los Angeles metropolitan area, and as an NDIEC statewide.

3. In its amended application, Altrio proposed that at a later time it would file a PEA and ask us to grant it full facilities-based authority to operate as a CLC within the entire local exchange operating territories of the state's four non-rural incumbent local exchange carriers and as an NDIEC statewide.

4. D.01-07-022 granted Altrio an LFB CPCN to provide competitive local exchange telecommunications services utilizing resale of other carrier's services or unbundled network elements and equipment installed solely within existing buildings or structures.

5. D.01-07-022 required Altrio to file a PEA before the Commission would consider granting authority for Altrio to construct new facilities.

6. After issuance of D.01-07-022, Altrio did not submit the necessary documentation to enable this Commission to complete a full facilities-based CEQA review of Altrio's facilities.

7. On August 21, 2001, Altrio and the City entered into the OVS Agreement, granting nonexclusive rights to construct and to operate an open video system.

8. Altrio's OVS network to serve Pasadena requires extensive construction, including pulling both fiber-optic cable and coaxial cable through existing utility conduits, attaching both fiber and coaxial cable to existing utility poles, installing distribution nodes containing optical/electrical interfaces, and installing cabinets containing both batteries and natural gas backup generators.

9. The City of Pasadena has determined that a Class 1 CEQA exemption applies to the construction of Altrio's OVS network.

10. Although Altrio disagrees with the findings of a Presiding Officer's Opinion in C.02-11-053, that full facilities-based CPCN authority is required for Altrio to use its OVS facilities for offering telecommunications services, Altrio amended its CPCN application to seek such authority in an effort to expedite its offering of telecommunications services.

11. On September 8, 2003, Altrio filed an amendment to its CPCN application to withdraw its request for full facilities based authority for all parts of California, but to limit its request for full facilities based authority only to those regions where it has built or will build its OVS network pursuant to OVS agreements or cable franchises executed or granted with specific local communities or jurisdictions.

12. Altrio has been offering cable television, cable modem, and limited facilities-based telephone services to customers in Pasadena through its OVS network.

13. Altrio's provision of local exchange service entails the use of approximately 2% of the bandwidth of the existing OVS network structure with new installation limited to customer premises equipment in the forma of network interface device on or in a customer's dwelling to process telephone-specific signals.

14. No construction of additional facilities for telecommunications service is contemplated by Altrio other than its OVS facilities covered under the categorical CEQA exemption authorized by the City of Pasadena.

Conclusions of Law

1. Altrio has previously satisfied the conditions for limited facilities-based local exchange authority as prescribed in D.01-07-022.

2. Altrio's outstanding request in its September 8, 2003 amendment for full facilities-based local exchange authority raises the issue of compliance with CEQA.

3. Since Altrio intends to use its OVS network to provision facilities-based telecommunications services, the focus of inquiry with respect to CEQA compliance relates to Altrio's OVS network.

4. Since Altrio has constructed or will construct its OVS system based on the exemption granted by the City of Pasadena, the project before the Commission is not construction of the OVS network, but use of that network to provide telecommunications services.

5. Granting full facilities-based CPCN authority to Altrio as authorized herein, however, is consistent with the goal of promoting competitive choice for telecommunications services among consumers.

6. Altrio's amended application should be approved to the extent that it requests full facilities based authority utilizing its OVS network facilities within the service territory covered by the City of Pasadena.

7. Any further requests by Altrio for expansion of its facilities-based authority beyond the boundaries of the City of Pasadena should be made by the filing of a new application.

O R D E R

IT IS ORDERED that:

1. Altrio Communications, Inc. (Altrio) is hereby granted full facilities-based authority for a certificate of public convenience and necessity to provide competitive local exchange telecommunications services within the City of Pasadena utilizing its OVS network facilities in accordance with the terms and conditions set forth in this order.

2. In any offering of full facilities-based service pursuant to this order, Altrio shall be bound by the terms and conditions of service as set forth in Decision 01-07-022 granting Altrio limited facilities-based authority.

3. The motion of Altrio filed May 10, 2001 is hereby granted for leave to file under seal Exhibit 1, attached to its amendment to application. The materials shall remain under seal for a period of one year from the date of this order unless Applicant makes a timely request for extension of the confidential treatment by filing a separate motion with good cause shown at least one month prior to the expiration of the confidential treatment.

4. Application 00-10-044 is closed.

This order is effective today.

Dated _____, at San Francisco, California.