

Placing new services on optional tiers that include no established services is antithetical to this tried and true method of creating additional programming. The Commission's economic reasoning is completely valid: The availability of tiers of established programming at regulated rates will, indeed, prevent operators from charging excessive rates for new product tiers. The problem is that operators will, in such circumstances, be constrained from charging any amount at all for the new tiers. Very few subscribers will purchase such tiers of unknown services at any price, and without the opportunity to be sampled by subscribers to established tiers, these new services will have little opportunity to develop the viewership and value that they need to attract significant revenues from advertisers and cable operators.^{17/}

This problem is most severe for cable operators like Cox who have been at the forefront of the industry in upgrading their channel capacity and adding new services. Operators who

^{17/} The rules permit cable operators to include on new product tiers services that also are included on existing regulated tiers, so long as the services continue to be available on the regulated tiers. But it is hard to see how this ability to "clone" services on a new product tier will provide any incentive to add new services. Adding a cloned service to a new product tier may attract additional subscribers to that tier -- but it will only add subscribers who decide *not* to buy the regulated tier on which the cloned service is also offered. In other words, offering a new product tier with cloned services will not augment the cable operator's revenues by enticing some of its regulated tier subscribers to sample additional new services. It will only entice some regulated tier subscribers to trade down to what, in most circumstances, will be a smaller, lower priced package -- a service that will cause the operator to lose money and thus not pursue it.

have lagged behind can, when upgrading their systems, create unregulated "new product tiers" that include established services that have already earned brand-name recognition, based on their carriage by other operators. But for Cox, the only services that can be added to new product tiers are truly new services -- because Cox's systems already carry most existing services. This result is not only unfair; it is counterproductive. It is precisely those cable operators who have led in implementing the most advanced technology and in upgrading their facilities who have also been most eager to create and nurture the development of new programming, in order to fill their constantly increasing channel capacity. The Commission's new product tier approach deregulates the provision of established programming by the least innovative cable operators. But it stifles the development of new program networks by those operators most likely to create or make room for such networks.^{18/}

In any event, while it is certainly true that the availability of tiers of established networks at regulated rates will adequately constrain the rates of tiers that include only new services, it is unreasonable to assume that the rates of tiers that included a limited number of services previously

^{18/} Nurturing the development of new services is, of course, not the only legitimate reason why cable operators might choose to migrate services to a new tier. There are, for example, no regulatory constraints on the fees that programmers charge cable operators. Allowing operators to migrate services to a optional tier will enable operators to keep prices for regulated tiers from becoming unreasonable. See *Sixth Reconsideration Order*, ¶ 32. It will also create additional capacity to add services to such regulated tiers.

carried on other regulated tiers would not be similarly constrained. There is no indication that consumer demand for any single existing network -- or any small group of existing networks -- is so inelastic that if such a network or networks were migrated from an existing regulated tier to a new tier, the regulated tier would no longer offer effective competition to the new tier.

To the contrary, the Commission has already concluded that the removal of "relatively few channels" from a regulated tier "will not change the fundamental nature of the tier," without regard to the specific channels that are removed.^{19/} Moreover, the Commission has determined that, notwithstanding the general prohibition on migration of existing services to unregulated new product tiers, cable operators who created à la carte tiers between April 1, 1993 and September 30, 1994 will, in certain circumstances, be permitted to treat such tiers as new product tiers.^{20/} The Commission saw "little reason to require an operator to 'reverse migrate' a package that was not clearly ineligible for unregulated treatment under our a la carte policy."^{21/}

If there is "little reason" to subject these à la carte tiers to rate regulation, it must be because there is little

^{19/} *Sixth Reconsideration Order*, ¶ 110.

^{20/} *Id.*, ¶ 51.

^{21/} *Id.*

reason to believe that the rates for such tiers will be unreasonable. Indeed, the Commission specifically suggested that competition from regulated basic and cable programming service tiers is constraining the rates of these à la carte tiers to reasonable levels.^{22/} Thus, the Commission has concluded that the risk that tiers that include no more than a small number of migrated services will be priced excessively in the absence of regulation is minimal -- for those systems that created such tiers prior to September 30, 1994. But for those systems that did not create such tiers, the risk of including even a single migrated service on a new product tier is deemed prohibitive, and the ability to offer mini-tiers and to incubate new program services in this manner is foreclosed.

This result is unreasonable, unnecessary and unfair. The Commission should afford *all* cable operators the flexibility to migrate a limited number of services from regulated tiers to an unregulated new product tier. By prohibiting operators like Cox from creating unregulated tiers that include established services, the Commission is denying those operators' subscribers the benefits of increased amounts of programming and more flexible purchase options.

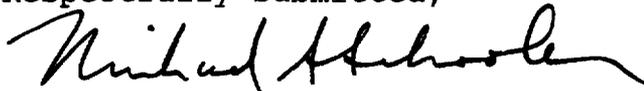
CONCLUSION

The Commission's regulatory framework, as amended by the *Sixth Order on Reconsideration* effectively freezes the

^{22/} See *id.*, n. 16*

quantity and packaging of cable programming, especially for operators like Cox, who have been among the first to upgrade their facilities and provide new programming to subscribers and who did not, while the Commission's rules were still unclear, create the sort of à la carte tiers that the Commission now views as rate evasions. For the foregoing reasons, the Commission should reconsider its decisions that à la carte tiers are subject to regulation as cable programming service and that new product tiers may not contain any services that have been migrated from regulated basic or cable programming service tiers.

Respectfully submitted,



Michael S. Schooler

DOW, LOHNES & ALBERTSON
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

Counsel for Cox Communications, Inc.

James A. Hatcher
Vice President, Legal and
Regulatory Affairs

COX COMMUNICATIONS, INC.
1400 Lake Hearn Drive, N.E.
Atlanta, Georgia 30319

January 5, 1995