DOCKET FILE COPY ORIGINAL

[redacted]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

RECEIVED

JAN - 5 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	)	MM Docket No. 92-266
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	)	MM Docket No. 93-215

PETITION FOR RECONSIDERATION

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

TABLE OF CONTENTS **PAGE**

SUMMARY ii

INTRODUCTION 3

I. THE CURRENT "TIER NEUTRAL" REGULATORY FRAMEWORK PROVIDES NO MECHANISM FOR OFFERING NEW REGULATED TIERS OF CABLE PROGRAMMING SERVICE 10

II. THE RATES FOR DISCOUNTED PACKAGES OF A LA CARTE SERVICES SHOULD NOT BE REGULATED 14

III. THE COMMISSION SHOULD PERMIT LIMITED MIGRATION OF EXISTING SERVICES TO UNREGULATED NEW PRODUCT TIERS 19

CONCLUSION 23

SUMMARY

As technological advances enable cable operators to increase the channel capacities of their systems, the result should be to expand the range of programming options available to consumers. But the Commission's new going forward rules will hinder this development. The rules severely constrain the ability of cable operators to add more than a handful of new programming services to their systems, and they effectively prevent operators from creating new, optional tiers of programming instead of simply adding programming to a single, regulated cable programming service tier.

The options available to a cable operator who wants to add channels of programming are very limited. The new rules (unlike the old) provide incentives to add some new program services to existing regulated cable programming service tiers -- but those incentives are purposely designed to limit such channel additions to seven over the next three years. Alternatively, a cable operator may create "new product tiers," which may include an unlimited number of channels at unregulated rates -- so long as none of the channels have been moved to the tiers from existing regulated tiers. Finally, any new or existing services may be offered on an unregulated, à la carte basis -- but operators may no longer offer discounted packages of such services at unregulated rates.

If an operator creates a new, optional tier that consists, in whole or in part, of services that have "migrated"

from existing regulated tiers, that tier will be deemed a "cable programming service tier," which is subject to rate regulation by the Commission. But the rules currently provide no mechanism at all for establishing regulated rates for newly created tiers. Under both the rules for establishing the initial, tier-neutral rates for a regulated tier and the "going forward" rules for determining allowable rate increases when channels are moved to a tier from an existing tier, the maximum permissible rate depends on the number of subscribers to the tier. But a new tier has no subscribers before it is offered; there is no way to know how many subscribers will opt to purchase the new tier -- and, indeed, the number will depend upon the rate that is set.

Until the Commission revised its rules in the *Sixth Reconsideration Order*, cable operators had an alternative means of creating optional new tiers that included at least some services that were migrated from existing tiers. The Cable Consumer Protection and Competition Act of 1992 exempts from rate regulation any services that are offered on a per-program or per-channel basis, and the Commission had ruled that rates for discounted packages of such services would also not be subject to regulation -- provided that the à la carte availability of the services was realistic and not a sham. Both the language of the statute and the legislative history supported this wholly reasonable ruling. Moreover, as a practical matter, as the Commission had previously determined, the availability of services on a realistic à la carte basis gives consumers adequate

protection against unreasonable pricing of packages that include such services.

But the Commission has now concluded -- erroneously -- that the statute compels a different result, and it has ruled that discounted packages of à la carte services are to be regulated as cable programming service tiers. The result is that cable operators cannot add programming options by creating new, optional tiers that include existing services even if the services are also available on an à la carte basis. And, while the Commission indicates that any such tiers would be subject to regulation, there is, as shown above, no way to determine the regulated rates for such new programming options.

The Commission's concept of unregulated "new product tiers" might have offered an alternative way of creating new, optional packages, but the Commission vitiated the effectiveness of this approach by prohibiting operators from including any migrated services in such tiers. The Commission theorized that the rates for new tiers would be constrained to reasonable levels by the availability of existing tiers at regulated rates. This theory is correct -- as far as it goes. But there is no reason to conclude these constraining effects would disappear if a limited number of services were migrated to the new tiers. Indeed, the Commission has indicated that adding or deleting a small number of services to a tier does not fundamentally change that tier. And it has allowed systems that migrated a small number of services to à la carte packages in reliance on its

former rules to treat such packages -- which, as cable programming service tiers, must be priced reasonably -- as unregulated new product tiers.

Preventing operators from including even a small number of migrated services in new product tiers is unreasonable, unnecessary and unfair. As a practical matter, offering optional tiers that include only new programming is not a viable way to add programming to a system. This is particularly true for systems that, like Cox, have been at the forefront in expanding channel capacity and adding programming services -- and that, like Cox, did not create à la carte tiers that they can now treat as new product tiers. Although systems that have lagged behind in adding channels might be able to market tiers of services that, while new to the systems, have already established brand name recognition, very few subscribers will purchase packages that include only unknown services. New program services can be nurtured only by offering subscribers an opportunity to sample them in packages that include existing services with established viewership.

In order to create viable mechanisms for adding new, optional packages of programming, the Commission should, for all these reasons, reconsider its decisions that discounted packages of à la carte services are subject to regulation and that new product tiers may not contain any migrated services. The rates for discounted packages of à la carte services should not be

regulated, and the Commission should permit limited migration of existing services to unregulated new product tiers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	)	MM Docket No. 92-266
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation	)	MM Docket No. 93-215

PETITION FOR RECONSIDERATION

Cox Communications, Inc. ("Cox") hereby petitions the Commission to reconsider the rules and decisions adopted November 10, 1994, in its *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Sixth Reconsideration Order")* in the above-captioned proceeding.

Cox owns and operates 23 cable systems, serving 1.9 million subscribers in 18 states. Cox has participated throughout the various stages of this proceeding, which has been concerned with implementing the rate regulation provisions of the Cable Consumer Protection and Competition Act of 1992. For the reasons described herein, the effect of the Commission's decisions and rule changes in the *Sixth Reconsideration Order* is to constrain the packaging flexibility of -- and prevent the offering of new programming options by -- precisely those cable

operators who, like Cox, have been most advanced and most innovative in the provision of cable service to subscribers. And these constraints take effect at precisely the time when maximum flexibility is needed to meet the changing demands of consumers.

INTRODUCTION

Cable television is in a constant state of evolution. Technological changes and consumer demand have driven the industry to upgrade facilities and increase the quantity and quality of services available to subscribers on a continuing basis. These dynamic characteristics of the cable industry create profound problems in connection with the way in which the Commission has implemented the regulation of cable rates pursuant to the Cable Consumer Protection and Competition Act of 1992.

The Act directs the Commission to ensure that rates for a set of defined basic services are "reasonable" and that the rates for the remaining cable programming service tiers are not "unreasonable." Rates for services that are available to subscribers on a per-channel or per-program basis are required to be unregulated altogether.

Cox fully appreciates the challenges the Commission has faced in developing a regulatory framework that ensures not only that *initial* rates are reasonable, but also that rates *remain* reasonable as the industry continues to grow by adding channels and rearranging the manner in which those channels are packaged and sold to subscribers. Cox further recognizes that, assuming

that the initial benchmarks accurately identify reasonable rates, the easiest way (from an administrative standpoint) to ensure that rates remain reasonable for the level of service provided is to freeze that level of service. This is, for all intents and purposes, what the Commission's new going-forward rules will do.

As explained in detail below, operators have little incentive under those rules to add new services to the basic tier, thus ensuring that this level of service will remain essentially static. The new rules also are designed to provide operators with incentives to add no more than seven additional channels to their existing cable programming service tiers over the next three years -- a limit that is based on cable's past practices and capacity, not its future. And, operators who wish to add new tiers of channels may do so only if they agree not to include migrated channels in those tiers *and* if they agree not to change the fundamental nature of their existing tiers.

Cox believes, however, that consumers will pay a price for the Commission's decision to minimize the risk of excessive rate increases by minimizing the changes that can be made to the packages of services provided by cable systems. First, as explained below, by prohibiting the inclusion of existing services in new product tiers, the Commission has seriously undercut the viability of those tiers and thus curtailed the number of new services that operators using the benchmark approach will add to their systems. The downside of limiting the number of new channels that can be added to a system is obvious.

Adding new services to a system increases viewing options and enhances the value to subscribers of cable service. This became especially clear in the aftermath of rate deregulation pursuant to the Cable Communications Policy Act of 1984. During that period of deregulation, the number of new programming services added to cable systems increased more rapidly than ever before -- and so did cable subscribership and penetration, not withstanding a substantial increase in rates during this period. The increased rate of penetration indicates that subscribers prefer greater programming options at higher rates to the more constricted array of programming that was available when local franchising authorities made low rates their highest priority.

Second, the new rules fail to recognize that consumer choice is also diminished when cable operators are prevented from changing the manner in which services are *packaged* for purchase by subscribers. When the Commission conducted its survey of rates in effect on September 30, 1992, in order to establish benchmark "competitive" rates, most systems packaged non-premium channels in either a single basic package or in a basic package and one optional package (although some operators had already been offering additional optional "mini-tiers"). But there is no reason to believe that, as channel capacity and the number of available cable networks continue to increase -- and as alternatives to cable become more widely available -- this will in all cases continue to be the best approach for fostering new programming and maximizing consumer satisfaction.

Long before it became entangled in the implementation of the 1992 Act, the Commission recognized the importance of affording cable operators flexibility in the packaging of cable services. Thus, in explaining its decision to preempt state and local regulation of non-basic tiers and services, the Commission noted in 1983 that

> the ranks of competitive alternatives have swelled to include video cassette, video disc, video games, home computers, low power television, multi-channel MDS, SMATV, and DBS, most of which enjoy great pricing flexibility.
>
> These vigorous and growing competitors in the video services market pose a new challenge to nonbroadcast programming entrepreneurs and cable system operators. This challenge is not, as it formerly was, simply to find new services that subscribers would find attractive, but rather to package and combine services to maximize attractiveness to consumers in different markets and in anticipation of the penetration of those local markets by other, new services. . . . The current situation requires that system operators and nonbroadcast programming entrepreneurs retain maximum flexibility in the marketplace to experiment with types of program offerings and methods to pay for such programs, *i.e.*, advertisers, subscriber fees, network compensation, or a combination.[1/]

Ironically, this is even more true today than it was in 1983. The growth in channel capacity, in the number of programming options, and in the availability of addressable technology has increased both the potential and the need for additional packaging options. In 1983, the average system had 21

1/ *Community Cable TV, Inc.*, 95 F.C.C.2d 1204, 1216-17 (1983).

channels.[2] Today, average channel capacity is 45,[3] 94% of Cox's systems have a channel capacity of at least 54 channels, and the average Cox customer receives 72 channels of programming. In 1983, there were 43 available satellite-delivered program networks.[4] Today, there are more than 100 national video services, 37 regional video services (providing, for the most part, news and sporting events), 10 audio services, and nine text services available, and 69 planned services that have been announced but are not yet available.[5] While many systems might still choose to provide only a single tier of cable programming service, those with the largest channel capacities (such as Cox) have many more practical packaging options, particularly if their systems make use of addressable technology that facilitates the provision to subscribers of only selected packages of services.

Moreover, the competition that the Commission foresaw in 1983 turned out to be less imminent and vigorous in the years following enactment of the 1984 legislation -- but it is certainly present today. The emergence of DBS, in particular, has been much delayed, but it did appear last year as a very real competitor, with complete addressability and packaging

---

2/ Paul Kagan, *Cable TV Programming*, July 31, 1991, p.1 December 30, 1992, p.2.

3/ *Id.*

4/ National Cable Television Association, *Cable Television Developments* (Fall, 1994).

5/ *Id.*

flexibility. Moreover, home computers -- now with all the trappings of "multimedia" -- are no longer a niche product but have become an increasingly popular source of home entertainment and information services. And, of course, the provision by telephone companies of video dialtone service -- subject to none of the burdens and requirements that Title VI of the Communications Act imposes on cable operators -- is a very real competitive threat.

All these factors -- changes in the quantity and types of available program services, changes in the technology available for delivering such services, and changes in the competitive marketplace (as well as unpredictable but inevitable changes in viewers' tastes and demands) -- require flexible marketplace responses by cable operators with respect to not only their pricing but also their packaging of services. Efforts to regulate the rates of non-basic tiers of programming, as the Commission previously has recognized, inevitably thwart, such flexibility and result, in "artificial and unnecessary skewing" of the tiering options available to cable operators.[6/] Some

---

6/ *Community Cable TV, Inc., supra,* 95 F.C.C.2d at 1217. In particular, the Commission identified the problems that will occur when à la carte service are unregulated but tiers are subject to regulation:

> For example, it may be efficient for prospective subscribers to be able to sample a bundle of services by making a single transaction. Likewise, tiering may simplify and reduce the costs of billing subscribers. If tier prices are regulated, new programming may be discouraged by the fear that

(continued...)

regulation of non-basic tiers, of course, is required by the 1992 Cable Act. But the regulatory framework that is now in place, following the adoption of the *Sixth Order on Reconsideration*, is much more constraining than is necessary to implement the Act, to achieve the Commission's objectives, or to serve the public interest.

In particular, the combination of the Commission's "going forward" rules for adding channels to regulated tiers, its limitation on the composition of "new product" tiers, and its treatment of packages of "à la carte" services unduly restrict the ability of cable operators to grow by stifling their ability to package services in a manner that maximizes the value of cable service to subscribers. Cox believes that greater flexibility can be afforded to cable operators -- to the benefit, not the detriment of consumers -- by returning to the Commission's original determination that non-evasionary, discounted packages of à la carte channels are not subject to rate regulation under any circumstances, and by allowing cable systems to migrate a set and limited number of channels to unregulated new product tiers.

6/ (...continued)
regulation would prevent its marketing at a compensatory price. Programmers may be moved to avoid tiering of those channels that are offered, sacrificing the transactions and billing efficiencies, and cable operators would be restricted in the marketing tools they can use to bring new services to the attention of subscribers.

Id., n. 27.

I. THE CURRENT "TIER NEUTRAL" REGULATORY FRAMEWORK PROVIDES NO MECHANISM FOR OFFERING NEW REGULATED TIERS OF CABLE PROGRAMMING SERVICE.

The Commission's going forward rules provide cable operators with a very limited range of options for adding to and repackaging their service offerings:

- *First*, an operator may choose to add an unlimited number of channels to its basic service tier or its cable programming service tiers under the "old" formula adopted in the Second Reconsideration Order, which allows rates to be increased, for each channel, by the associated programming costs, plus a 7.5 percent mark-up, plus (for most systems) one or two cents. As the Commission itself recognized, this formula provides only limited incentives to add new program services.[7/]

- *Second*, an operator may add channels to existing cable programming service tiers under the "new" formula adopted in the *Sixth Order on Reconsideration*, which allows increases of up to 20 cents per channel, plus programming costs. But the number of channels that may be added in the next three years under this approach is effectively limited to seven by an "operator's cap," which limits rate increases to no more than $1.20 over two years and $1.40 over three years, plus an additional "license fee reserve" of $0.30 to cover actually incurred programming costs.

- *Third*, an operator may, under certain conditions, create a new cable programming service tier that consists solely of services that have not been removed ("migrated") from an existing basic or cable programming service tier. This tier may include "cloned" services that have been and continue to be available on an existing tier. The rates for such a "new product tier" will be presumed by the Commission to be reasonable.

7/ *See Sixth Reconsideration Order*, ¶ 22.

- *Fourth*, an operator may offer individual channels on an à la carte basis, and the rates for such channels will not be subject to regulation. But a package that includes only channels that are also available on an à la carte basis *will* be subject to regulation as a cable programming service tier.

What these options do not include is the creation of new tiers of programming that include program services that have migrated from existing regulated tiers. The problem is not simply that these tiers would be subject to the Commission's tier neutral regulatory approach -- which would be bad enough, given the constraining effects that tier neutral rate regulation has on innovation in the packaging of cable services. The problem is also that it is impossible even to offer such tiers on a *regulated* basis, because the rules provide no mechanism for determining the maximum permissible rate that the operator may charge.

There are two distinct sets of rules that conceivably might apply to the creation of a new regulated cable programming service tier -- the rules that establish *initial* rates for a tier, and the "going forward" rules that determine allowable rate *increases* when new channels are added to a tier and when channels are moved from one tier to another tier. But neither set of rules is helpful with respect to a newly created tier, because, under each set of rules, the maximum permissible rate for a tier depends on the number of subscribers to the tier.[8/] For a newly

---

8/ Thus, in calculating maximum permissible *initial* rates for a tier under the Commission's benchmark approach, an operator must (continued...)

created tier, the number of subscribers is unknowable -- and obviously depends upon the rate at which the tier is offered.

To the extent that the rules completely prevent cable operators from repackaging existing services by creating new non-basic tiers, whether on a regulated *or* an unregulated basis, they are fatally flawed. Nothing in the Act empowers the Commission to limit the manner in which cable operators package their non-broadcast services; the Commission's task is solely to ensure that the rates for services that are within the definition of cable programming service are not unreasonable. Moreover, limiting the ability of cable operators to provide additional tiers disserves consumers (and raises serious First Amendment problems) by limiting their purchase options and by preventing operators and programmers from determining the optimal means of fostering the development of new programming.

8/ (...continued)
first calculate its overall regulated revenue per subscriber, using the benchmark formula and then allocate that revenue among regulated tiers on the basis of the number of channels and subscribers to each tier. *See* Form 1200. Similarly, under the going-forward rules, when a channel is moved from one regulated tier to another,

> it shall be treated as if it was dropped from one tier and the residual and programming cost associated with the shifted channel shall be shifted to the other tier. The residuals associated with the shifted channel *shall be adjusted by reference to the number of subscribers on each tier* to ensure aggregate revenues remain the same.

Sixth Reconsideration Order, ¶ 86 (emphasis added).

There are only two solutions to this problem. One is to undertake a fundamental revision of the tier neutral methodology for establishing initial rates, since the current approach has no way of accommodating the creation of new tiers. The other is to create reasonable exceptions to the basic methodology, under which the rates of new tiers that include migrated services will either be deregulated or presumed reasonable. The former solution would be a welcome one, since, as Cox and others have shown since the outset of this proceeding, Congress did not intend that rates for cable programming service tiers be deemed unreasonable whenever they were set above "competitive" levels -- and it certainly did not expect that the rates of *all* systems would be deemed unreasonable and subjected to rate reductions. To the contrary, Congress believed that only a "minority" of "renegades" had raised rates unreasonably.[9/]

The Commission, of course, has consistently rejected this construction of the Act. Nonetheless, as we now show, the Commission need not change its mind on tier neutrality to enable systems to create viable new tiers if, instead, it reconsiders its decisions regarding discounted packages of à la carte channels and new product tiers. By recognizing that the rates for à la carte packages and new product tiers that consist, at least in part, of migrated services should, in certain circumstances, either be deregulated or presumed reasonable, the

---

9/ H.R. Rep. 628, 102d Cong., 2d Sess. 30, 33, 86 (1992).

Commission can enable operators to create the sort of new tiers that the current rules essentially prohibit.

II. THE RATES FOR DISCOUNTED PACKAGES OF A LA CARTE SERVICES SHOULD NOT BE REGULATED.

One way that cable operators might, under the terms of the Act and the Commission's initial rules, have offered multiple packages and mini-tiers of programming with the requisite degree of flexibility was scotched by the Commission on reconsideration. Specifically, the Commission reversed course and held that packages consisting entirely of services available to subscribers on an à la carte basis were within the statutory definition of "cable programming service" tiers, so that their rates had to meet the Commission's tier-neutral standards. The Commission felt compelled by the statutory language to reach that conclusion, but, in fact, that language fully supports the Commission's initial, opposite construction. In any event, even if à la carte packages were subject to regulation, the availability of services on an à la carte basis is likely to constrain the rates at which packages of such services can be offered, so that, as in the case of "new product tiers," the Commission ought to rule that such package rates are presumptively not unreasonable.

The Act directs the Commission to establish criteria "for identifying, in individual cases, rates for cable programming services that are unreasonable" and to establish procedures for resolving complaints of subscribers and

governmental entities alleging that particular rates for cable programming services are unreasonable.[10] The critical provision of the Act for purposes of determining the scope of the Commission's regulatory authority is the definition of "cable programming services":

> The term "cable programming service" means any video programming provided over a cable system, *regardless of service tier*, including installation or rental of equipment used for the receipt of video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.[11]

This language clearly exempts from the definition of "cable programming service" any video programming that is "offered on a per-channel or per-program basis." It does not define the term to include any *packages* or *tiers* of programming except for packages that consist solely of a single channel or a single program. To the contrary, it defines "cable programming service" in terms of the *programming*, "regardless of service tier." If certain video programming is offered on a per-channel or per-program basis, that programming does not constitute cable programming service and may not be regulated as such. And it follows that if all the programming on a tier or in a package consists of programming that is offered to subscribers on a per-channel or per-program basis, then none of the programming on

---

10/ 47 U.S.C. § 543(c)(1).

11/ 47 U.S.C. §543(l)(2) (emphasis added).

that tier or in that package is "cable programming service" -- and there is no basis for regulating it as such.

The Commission ignored this wholly reasonable construction of the statutory language and concluded that the only valid reading of the language is one that compels regulating all tiers and packages of programming as "cable programming service," even if all the programming is available to subscribers on an à la carte basis:

> A package of channels, whether or not the channels also are offered a la carte, plainly is "video programming provided over a cable system," and hence is a "cable programming service." *The package is not "video programming offered on a per channel or per program basis;" the individual channels are.* Accordingly, it is apparent from the statutory language that a la carte packages are cable programming services . . . .[12/]

But it is precisely because the individual channels *are* offered on an à la carte basis that the package *does* consist solely of "video programming offered on a per channel or per program basis" -- and that programming does not, by definition, constitute cable programming service.

Nothing in the legislative history, which, according to the Commission, "focused on the fact that bundled offerings of cable programming would be subject to rate regulation,"[13/] points to an opposite conclusion. The fact that bundled tiers are generally subject to regulation as cable programming service

---

12/ *Sixth Order,* ¶ 47 (emphasis added).

13/ *Id.*, ¶ 49.

is not at issue. The question is whether, when the operator has unbundled certain programming, any discounted rates for packages of such programming remain subject to regulation. The House Energy and Commerce Committee's "belief that greater unbundling of offerings leads to more subscriber choice and greater competition among program services," cited by the Commission, suggests that Congress meant to encourage such unbundling -- and its way of encouraging unbundling was to deregulate tiers of programming where subscribers had the option to purchase the programming on an unbundled basis.

Furthermore, the availability of programming on an à la carte basis can itself constrain the rate that can be charged for a tier or package containing such programming. This may not be the case if the à la carte prices are set at unreasonably high levels in relation to the tier rates. But the Commission, as it previously recognized, has the power to prevent cable operators from establishing sham à la carte options in order to evade rate regulation.[14/]

Where à la carte is a "realistic service offering," it will serve as a competitive check on tier rates. The Act directs that tiers containing only services that are available on an à la carte basis not be subject to regulation.[15/] But even apart

---

14/ *See, e.g., Report and Order and Further Notice of Proposed Rulemaking*, ¶ 328 n.808 (May 3, 1993).

15/ As the Commission noted when it initially held that tiers of services "realistically" available on an à la carte basis

(continued...)

from the Act's mandate, the constraining effect of à la carte offerings on tier rates warrants treating tier rates as reasonable where such offerings are realistically available -- just as the Commission has concluded with respect to "new product tiers" and with respect to discounted packages of premium services.[16/] Freeing such à la carte tiers from the constraints of the Commission's tier neutral rate regulation approach is one way to enable cable operators to offer multiple tiers of programming in lieu of either forcing subscribers to purchase larger and larger single tiers of programming or limiting the amount of programming available on the system.

15/ (...continued)
should not be regulated, Congress implicitly determined

> that market forces, rather than regulation, will ensure that rates for unbundled services are reasonable. *It follows logically that the rate for a collective offering of such services will also be reasonable to the extent that it does not exceed the sum of the charges for the component services.*

Id., ¶ 327 (emphasis added).

16/ As the Commission previously recognized, the availability to subscribers of "the component parts of the package to subscribers separately in addition to the collective offering" will "guard against potential harm to subscribers by ensuring that they will continue to be able to choose 'only those program services they wish to see' and are not forced to pay for 'programs they do not desire.'" *Id.*, ¶ 328, (*quoting* S. Rep. 92, 102d Cong., 1st Sess. 77 (1991).

III. THE COMMISSION SHOULD PERMIT LIMITED MIGRATION OF EXISTING SERVICES TO UNREGULATED NEW PRODUCT TIERS.

The Commission, while reversing itself on à la carte tiers, has not wholly ignored the need to provide operators with a flexible means of offering subscribers multiple tiers of programming. But its mechanism -- the "new product tier" -- is not likely to achieve this objective. If multiple tiers are to be a realistic and viable alternative, they are going to have to include at least *some* established program services with which subscribers are familiar.

If there is one thing at which cable operators have excelled in the 20 years since the advent of satellite delivery of programming, it is the creation and nurturing of program networks and viewing alternatives. The manner in which this has been achieved is no trade secret. New program networks are rarely if ever born with an established audience and advertiser base eager to flock to their programming. Every new network faces competition from established services -- including, of course, the dominant broadcast networks -- that have loyal viewers and brand-name recognition. In this competitive environment, subscribers are unlikely to purchase, on a stand-alone basis, a new program service or a tier of new services that they have never seen and about which they have never heard. Therefore, cable operators have typically launched new services on tiers that include established and popular services, so that these new services might gradually be sampled and desired by viewers.