

I am a concerned citizen who has been following the state of the broadcast industry and previously filed reply comments in the matter of the 2014 Quadrennial Ownership Review, where I argued that many broadcasters, and their trade association in the National Association of Broadcasters (NAB), had a shortsighted view of their own interests, one that, if followed, would ultimately result in their industry's complete obsolescence.¹ Nothing better illustrates this short-sighted view than the consequences of broadcasters' dependence on retransmission consent revenue, which renders broadcasters as little more than another type of cable channel and thus puts them in the position of disdaining their own nominal method of distribution, seeking to keep as many people tied to their cable subscription as possible, to the point of threatening to abandon the technology of broadcasting if anything were to happen to deprive them of retransmission revenue.² It is through this lens that we must look at NAB's opposition to Mediacom Communications Corporation's "a la carte" television proposal.

Personally, I am of the opinion that it is impossible to look at this issue without considering the impact of the Internet on the video marketplace, which promises to radically alter the role of all of linear television if not render it entirely obsolete. In this light, it is likely that the linear television marketplace is already badly oversaturated, the mass shutdown of the vast majority of existing cable networks would not be a complete tragedy, and the principles underlying carriage of the remaining networks would likely be very different. However, the fact remains that for the vast majority of Americans cable television remains their primary source of video content, and as such the existence of more channels is always a good thing insofar as it improves Americans' access to content. Despite this, I believe a strong case can be made that some variation of the Mediacom proposal is very much in the public interest, and that carried out right such a proposal could very well restore broadcasters' incentive to support their own medium and actually make "cord-cutting" more viable for both consumers and broadcasters. To see why, we need to look at some of the reasons why the retransmission consent regime exists and why broadcasters have come to be so dependent on it.

Background

For decades, broadcast television was the only kind of television for most Americans, available under the terms of the Communications Act of 1934 free over-the-air to anyone with a television set and an antenna, supported by the commercials interspersed throughout the programming. So fundamental was this notion to the identity of television that the notion of "pay TV" was absolute poison for many years.³ Cable television was initially developed as "community antenna television", delivering over-the-air signals to people in areas where the terrain rendered those signals impossible to receive.⁴

The technology of CATV allowed cable providers to include more channels than was possible over the public airwaves using analog technology. Broadcasters were able to secure a rule forbidding the importation of "distant signals" that remained on the books until 1974, and Ted Turner began distributing his station in Atlanta, the forerunner of today's TBS, to cable operators across the South and eventually across the nation a few years later. By then, though, satellite transmission technology allowed for the establishment of wholly cable-exclusive national services, the first of which was the

¹ Reply Comments of Morgan Wick in the matter of MB Docket 14-50 (2014 Quadrennial Ownership Review), 8 Sep 2014.

² *Ibid.*, pp. 12-13.

³ Calabro, Marian, Zap!: [A Brief History of Television](#), New York : Four Winds Press, 1992, pp. 134, 139.

⁴ See, e.g., *ibid.*, p137.

commercial-free premium service HBO.⁵ Services like HBO, TBS, and the numerous services that followed in their wake made CATV attractive to people in areas that could pick up over-the-air signals perfectly well. It was reasonable to pay a fee to receive a greater variety of options beyond what over-the-air television provided.

During the 1980s, cable networks began collecting their own fees from cable providers. According to at least one story, ESPN was the first such network to collect a subscriber fee from a major cable provider in 1983, having previously paid cable operators for carriage, and other networks followed suit.⁶ The following year, Congress deregulated the rates cable operators could charge subscribers, allowing the fees networks like ESPN could collect to rise without limit.⁷ Such subscription fees played a critical role in allowing ESPN to obtain the rights to marquee programming such as National Football League games; ESPN imposed a roughly nine-cent surcharge on cable operators on top of what they were already charging when it first acquired the NFL package in 1987.⁸ Even then, many were upset at the prospect of having to pay for big-time sports.⁹ Over ten years later, in 1998, ESPN secured annual 20 percent increases in its subscription fees to pay for a full season of NFL rights (it had previously had only a half season),¹⁰ allowing ESPN to eventually become by far the most expensive nationally-distributed channel on cable, at \$6.04 per subscriber as of August 2014, well beyond second-place TNT (another network benefitting from big-time sports programming) at \$1.48.¹¹ ESPN has long paid close to double what the broadcast networks pay for its NFL package despite a weaker schedule of games and (until this year) no playoff games, because of how having NFL games makes ESPN indispensable to cable operators and subscribers and thus allows ESPN to charge so much.¹²

The 1992 Cable Act established the retransmission consent marketplace. Congress had found that cable operators had derived considerable benefits from rebroadcasting broadcast television stations “without the consent of the broadcaster or any copyright liability”, and now, with the growth of cable-exclusive channels, were starting to compete with those same stations for “programming, audience, and advertising”.¹³ Finding that “there is a substantial governmental interest in ensuring [the] continuation [of the local origination of programming]” and in “promoting the continued availability of...free television programming”,¹⁴ Congress allowed stations to choose between their automatic must-carry rights or receiving retransmission consent compensation from cable operators.¹⁵ But while Congress recognized that cable operators were putting broadcasters in the position of aiding their own nascent competition, the 1992 Act said nothing of cable’s more direct competitive advantage over

⁵ Ibid., p139.

⁶ Miller, James Andrew, and Tom Shales, *Those Guys Have All the Fun: Inside the World of ESPN*, New York : Little, Brown, 2011, pp. 109-114.

⁷ 47 U.S.C. §543; Calabro, p141.

⁸ Miller and Shales, pp. 140-144.

⁹ Calabro, p141.

¹⁰ Miller and Shales, pp. 393-398.

¹¹ Molla, Rani, “How Much Cable Subscribers Pay Per Channel”, Wall Street Journal, 5 Aug 2014, retrieved from <http://blogs.wsj.com/numbers/how-much-cable-subscribers-pay-per-channel-1626/>.

¹² Miller and Shales, pp. 552-556, 610.

¹³ Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, §2(a)(19).

¹⁴ Ibid., §2(a)(10) and (12).

¹⁵ Ibid., §6.

broadcasters when it came to acquiring “programming” and “audience” and the “advertising” that was attracted to the two.

For a long time, over-the-air television maintained its prestige advantage over cable. The idea of not having to pay for TV still had a certain aura about it, and broadcasting still allowed you to reach a larger audience than cable. As cable achieved greater rates of penetration, however, and as more and more people grew up not knowing a world without cable television, this advantage disappeared, and it became apparent that cable’s dual revenue streams of advertising and subscription fees gave it an advantage over broadcast’s reliance on advertising alone when it came to acquiring and funding programming. This was especially the case when it came to sports, which has become incredibly valuable and has seen a boom in contract values over the past decade-plus.

In 2008, ESPN acquired the rights to the Bowl Championship Series, which then consisted of the largest and most popular college-football bowl games and the sport’s national championship game. These were the sort of events that had always aired on broadcast television as a matter of course, and for the most part still do, and ESPN could have easily elected to air the games on ABC, its corporate sibling within the Walt Disney Company, as it had from 1998 to 2006. Then-president George Bodenheimer assured the press that cable providers wouldn’t be charged more to show the BCS, so subscription fees couldn’t explain it entirely, but didn’t provide much of any answer as to why they didn’t put the game on ABC other than citing ESPN’s “100% commitment to serving sports fans”, instead downplaying the significance of the move by citing the high penetration ESPN already enjoyed in American households (especially among people watching the title game) and the large number of high-profile sports events that had already moved to cable, as did the people in charge of the BCS.¹⁶ Perhaps it came down to lingering bitterness and resentment towards the former ABC Sports division and a desire to cut down on sports on ABC to the biggest extent possible.¹⁷ Whatever the reason, ESPN decided not to air the BCS on free over-the-air television, and without ESPN’s lucrative revenue stream from subscriber fees, none of the other broadcast networks could compete.¹⁸ Indeed, ESPN took an existing contract for ABC to air the venerable Rose Bowl and invoked a clause that allowed it to move that game to ESPN.¹⁹ Given this, it seems likely that the main reason other major sports and their big events have not moved from broadcast to cable to the same extent has been to avoid the PR consequences (or obtain a PR boost), as well as, in some cases, the threat of losing their anti-trust immunity. Any actual, concrete advantages from appearing on over-the-air television seem immaterial.

The dawning realization that cable now had a palpable, concrete advantage over broadcast explains the explosion in retransmission consent revenue in recent years, the efforts of networks to enact “reverse compensation” schemes to capture some of it, and NAB’s desperation to preserve retransmission consent at all costs. Retransmission consent is the broadcast station’s equivalent to cable’s subscriber fees; it is broadcast’s best hope to even mitigate this advantage of cable over

¹⁶ Weir, Tom, and Michael Hiestand, “BCS officially headed to ESPN starting in 2011”, *USA Today*, 19 Nov 2008, retrieved from http://usatoday30.usatoday.com/sports/college/football/2008-11-17-bcs-fox-espn_n.htm.

¹⁷ Miller and Shales, pp. 370-373, 429-430, 561-564; Fang, Ken, “Is ESPN Forcing ABC to Get Out of the Sports Business?”, *Fang’s Bites*, 12 Nov 2008, retrieved from <http://fangsbites.com/abc-sports/is-espn-forcing-abc-to-get-out-of-the-sports-business.html>.

¹⁸ Weir and Hiestand, *op. cit.*

¹⁹ Dufresne, Chris, “Rose Bowl game moving to ESPN in 2011”, *Los Angeles Times*, 13 Jun 2009, retrieved from <http://articles.latimes.com/2009/jun/13/sports/sp-rose-bowl-espn13>.

broadcast. The Cable Act was intended to address the problems caused by a lack of competition among cable operators, and was passed at a time when cable operators were widely seen as the originators of programming, especially following a period of vertical integration between operators and programmers.²⁰ Congress' failure to appreciate the impact of the ESPN-style dual revenue model explains why retransmission consent has failed to preserve "local origination of programming" as intended and instead served as "a subsidy for the national broadcast networks and their affiliated cable channels" – though it is hardly a subsidy if it is vital for the networks' ability to compete, unless one takes the position that there is no compelling reason for them to exist in today's marketplace.²¹

Meanwhile, although premium-cable networks like HBO collect substantial fees from people who choose to subscribe to it, basic-cable networks collect money from everyone who receives the channel as part of their bundle, whether or not they actually watch it. Every household that receives ESPN or any other basic cable network is paying for it, regardless of whether or not they have any interest in sports or have ever even watched a second of ESPN or any other network.²² Increasingly, consumer groups and others have expressed outrage at this seemingly fundamentally unfair system and suggesting the adoption of an a la carte system, similar but not necessarily identical to Mediacom's proposal, to rectify it²³ – perhaps especially, paradoxically, the very sports fans that, more than any other category of consumer, benefit from the current system,²⁴ reflecting their greater knowledge of the situation and suggesting that this sense of unfairness is felt on a very deep level, one that transcends the claims of programmers that a la carte would not actually save consumers any money. ESPN in particular

²⁰ Cable Television Consumer Protection and Competition Act of 1992, §2(a)(1-5).

²¹ Ibid., §2(a)(19); Whitner, Melinda, Testimony for Senate Committee on Commerce, Science and Transportation Hearing on "The Cable Act at 20", 24 Jul 2012, p10, retrieved from http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=bd33c7c9-bd4d-43c0-93d5-091e1fd3328b.

²² Miller and Shales, p743.

²³ See, e.g., Sullivan, Andrew, "Why Pay For Channels You Don't Watch? Ctd", *The Dish*, 8 Dec 2011, retrieved from <http://dish.andrewsullivan.com/2011/12/08/why-pay-for-channels-you-dont-watch-ctd-2/>; "Editorial: Why pay for channels you don't ever watch?", *Charleston Daily Mail*, 3 Oct 2014, retrieved from <http://www.charlestondaily.com/article/20141003/DM04/141009839>; Kafka, Peter, "Hate Paying for Cable? Here's Why.", *All Things D*, 8 Mar 2010, retrieved from <http://allthingsd.com/20100308/hate-paying-for-cable-heres-the-reason-why/>; Stelter, Brian, and Amy Chozick, "Paying a 'Sports Tax', Even if You Don't Watch", *New York Times*, 15 Dec 2011, retrieved from <http://www.nytimes.com/2011/12/16/business/media/for-pay-tv-clients-a-steady-diet-of-sports.html?pagewanted=all&r=0>; Kang, Cecilia, "Cable forces more channels down unwilling viewers' throats", *Washington Post*, 7 May 2014, retrieved from <http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/07/cables-forced-bundles-are-getting-fatter-but-no-one-is-watching-more-channels/>; Drum, Kevin, "It's Time to End the Cable Sports Tax", *Mother Jones*, 18 Feb 2014, retrieved from <http://www.motherjones.com/kevin-drum/2014/02/its-time-end-cable-sports-tax>; Thompson, Derek, "If You Don't Watch Sports, TV is a Huge Rip-Off (So, How Do We Fix it?)", *The Atlantic*, 3 Dec 2010, retrieved from <http://www.theatlantic.com/business/archive/2012/12/if-you-dont-watch-sports-tv-is-a-huge-rip-off-so-how-do-we-fix-it/265814/>; Weiner, Evan, "United States Congress Needs to Change Cable TV Law", *MCN Sports*, 23 Jul 2009, retrieved from <https://web.archive.org/web/20090727192044/http://www.mcnsports.com/en/node/7469>.

²⁴ See, e.g., Hruby, Patrick, "The Sports Cable Bubble", *Sports on Earth*, 12 Jul 2013, retrieved from <http://www.sportsonearth.com/article/53498716/the-sports-cable-bubble-refers-to-how-much-consumers-pay-for-sports-on-tv---even-those-who-dont-watch-them>; Fang, Ken, "Is how much sports networks cost too much for us?", *Awful Announcing*, 9 Mar 2014, retrieved from <http://awfulannouncing.com/2014/how-much-sports-networks-cost-is-too-much-for-us.html>; Warner, Dave, "The Sports Tax Charged by Cable TV", *What You Pay For Sports*, 1 Apr 2013, retrieved from <http://www.whatyoupayforsports.com/2013/04/the-sports-tax-charged-by-cable-tv/>.

makes so much more money than any other network that even competitors, which benefit from the system to some degree themselves, chafe at it.²⁵

All told, subscriber fees account for \$28.32 of the average American's cable bill.²⁶

Properly Implemented, A La Carte is In the Public Interest Because it Will Reduce Americans' Cable Bills and Revitalize Free Over-the-Air Broadcasting

NAB opposes Mediacom's proposal to grant MVPDs the right to offer broadcast and cable stations a la carte that 1) the MVPD did not offer as of January 1, 2014, 2) has a per-subscriber cost that puts it in the top 20% of services provided in the basic or expanded basic tier of service, or 3) increases its price by more than the rate of inflation. NAB claims that it would be unlawful for the FCC to involve itself in any of these areas, because the marketplace is supposed to determine whether a channel is carried or at what price. Moreover, any a la carte proposal the commission adopted would run afoul of law requiring certain programming to be offered on the basic tier to the extent that programming would be encompassed by the proposal.²⁷

Further, NAB argues that the commission has regularly declared that Congress did not intend it to interfere in the retransmission consent marketplace, which the a la carte proposal would amount to; that the good faith provision of retransmission consent law does not call on the commission to subject retransmission consent negotiations to detailed scrutiny; that requiring placement on a certain tier or at a certain spot in the channel lineup is presumptively consistent with good-faith negotiations; that Congress expressly allowed broadcasters to enter into different agreements with different MVPDs and vice versa, both further supporting the notion that Congress intended the market, not the commission, to determine retransmission consent prices and calling into question Mediacom's proposal to require all MVPDs to be charged equally; and that conditioning a la carte carriage on per-subscriber costs ignores the many other factors that go into retransmission consent negotiations and is therefore impractical as a trigger for an a la carte right.²⁸

Most importantly, however, NAB argues that Mediacom's proposal is contrary to the public interest, by discouraging the development of new programming services by "explicitly allowing MVPDs to discriminate against" them, by "establish[ing] arbitrary caps on the prices programmers can seek from MVPDs" without facing the prospect of being shunted to a la carte, and by "grant[ing] a windfall of negotiating leverage" to MVPDs without any obligation "to pass along any savings to their subscribers".²⁹

I will come back to these public interest points later, but first let me address the basic tier restrictions. Current law mandates that cable operators provide to all customers, first, "[a]ll signals carried in the fulfillment of the requirements of sections 534 and 535 of [Title 47 U.S.C.]"; public, educational, and governmental access (PEG) channels required by the local franchising authority; and

²⁵ See, e.g., Miller and Shales, p700.

²⁶ Molla, op. cit.

²⁷ Opposition of the National Association of Broadcasters to MB Docket RM-11728 (Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors), 29 Sep 2014, pp. 7-8.

²⁸ Ibid., pp. 8-13.

²⁹ Ibid., p13.

the signals of any television stations cable operators provide to any subscribers, except satellites.³⁰ Sections 534 and 535, in turn, govern the carriage of must-carry commercial and noncommercial television stations, respectively.³¹ Thus, of the three categories of channels guaranteed placement on the basic tier, two consist of over-the-air television stations, and thus NAB's interest in this category in particular becomes obvious.

The obvious thing to do in light of this would be to exempt these three categories of channel from any a la carte regulation the commission passes. Cable operators do not pay for must-carry commercial or noncommercial stations, so that category would only be affected insofar as the launch of new channels. PEG channels are a means of serving the public interest and are generally noncommercial and run either by nonprofit or governmental institutions or the cable operator itself; for them to be carried a la carte would produce little benefit and considerable harm to the public interest. The most problematic category to be excluded from a la carte carriage would be stations that elect retransmission consent; by allowing broadcast stations to collect money from all subscribers but not cable networks, such a rule would seem to reverse the unfair advantage currently enjoyed by cable networks into an unfair advantage for broadcast stations, and cause considerable chaos to the retransmission consent marketplace, especially since, as NAB points out, non-monetary compensation for retransmission consent such as carriage of certain cable channels is explicitly legal and common.

However, I would raise the possibility that if retrans stations were *not* excluded from an a la carte system, the thing for NAB's members to do, especially those that do not also own cable networks, would be to *not* elect to take retransmission consent and instead enjoy must-carry rights, knowing that, as it was before the 90s and 2000s, they would have a substantial audience advantage over those channels offered a la carte, and as we have seen, the loss of this audience advantage is the proximate cause for the loss of major programming to cable.³² Indeed, a case could be made that if an a la carte system were imposed by Congress rather than the commission, the entire retransmission consent marketplace would no longer be necessary, even for its intended purpose. Access to broadcast programming would still be an attractive reason to subscribe to cable, but it would no longer serve as a method of bringing audience and advertising to cable operators and programmers unless the consumer explicitly consented to it, except for the aforementioned PEG channels – and I would argue that following the digital transition, those PEG channels could themselves be delivered over the air rather than relying on cable operators, thanks to the increased spectrum efficiency of digital.³³

That said, there would be good reasons to place non-broadcast commercial channels on the basic tier, most notably NAB's concern about discrimination against new programming services. As described above, the major impetus for public support of a la carte television is the fundamental unfairness of "paying for channels you don't watch", and as such Mediacom's proposal to grant an a la carte right to any new channels, regardless of whether or not they charge a fee, is ultimately unnecessary and could easily be discarded. A new commercial programming service may elect not to take fees and in exchange receive carriage on as broad a tier as they wish. This would allow the service

³⁰ 47 U.S.C. §543(b)(7)(A), as cited by the Opposition of the National Association of Broadcasters, p8, note 18.

³¹ 47 U.S.C. §534-535.

³² See Wick, Morgan, "The Future of Sports and Broadcast Television", MorganWick.com, 20 Aug 2013, retrieved from <http://sports.morganwick.com/2013/08/the-future-of-sports-and-broadcast-television/>.

³³ Indeed, some such channels are already doing so, such as Washington State's TVW, airing on KBTC 28.3 in the Seattle area (KBTC Public Television, "Digital Broadcasting", retrieved from <http://www.kbtc.org/page.php?id=35>).

to attract an audience and establish its popularity on its own terms before asking for a fee and to be offered a la carte.

Situations like this would mean that broadcast television would once again be attracting audiences to its own competition. However, with retransmission consent no longer necessary just for broadcast to compete, it would be much less of an issue. Given the reasons why retransmission consent was enacted in the first place, I would be inclined to exempt retrans stations from a la carte carriage, on grounds that it is no longer strictly analogous to cable networks' subscription fees; broadcasters are more like partners with the cable operators that can extend their reach in exchange for serving as a conduit for non-over-the-air programming. Retransmission consent's tendency to discourage stations from investing in their broadcast infrastructure, however, gives me pause. If it is necessary to compensate stations for their platform being used to attract audiences to competing programming, perhaps some sort of entirely new system for granting such compensation is needed.

Given the reduced importance of retransmission consent, it may be that Mediacom's second and third conditions, granting an a la carte right only if the price is too high or rises too fast, should at least reduce the potential of retransmission consent putting a station at risk of being moved to a la carte. However, Mediacom's second condition would seem to be self-contradictory, at least to the layman: any station in the top 20% of the basic or expanded basic tier of service would, presumably, be eligible for a move to a la carte, and it would be difficult for a channel available a la carte to be considered an "expanded basic" channel by any stretch of the imagination. Thus, the top 20% would be removed from the expanded basic tier, and the channels left would include another top 20%, and the process would repeat ad infinitum until there were no channels left. As a whole, what Mediacom's proposal would amount to is nothing less than the dissolution of the expanded basic tier, and indeed of any distinction between any channel on a higher tier than basic and a premium channel. The main distinction would seem to be that some premium channels would now carry ads, but when ESPN would reportedly cost \$30 in an a la carte universe³⁴ – nearly twice as much what the nation's largest satellite provider charges for HBO³⁵ – that distinction would seem to ring hollow.

Any entity that would impose an a la carte system – and at this point it seems like it would probably need to be Congress more than the commission – would need to reckon with the implications of this. However, it is easy to see that it could lead to a self-reinforcing spiral improving broadcast's reach advantage beyond the initial imposition of a la carte, as highly popular programming left cable-only channels, reducing the desirability of those channels, resulting in more programming leaving, and so on. Certainly HBO and other premium channels are known for their provision of popular, high-quality programming, and a channel that could also collect revenue from advertising would be all the better at attracting such programming. But at least in the world of sports, so central to cable's popularity, no one wants to suffer the fate of boxing, whose decline in popularity after the 70s has been widely attributed in part to the move of most of the biggest fights to premium cable or pay-per-view.³⁶ If ESPN were to have more in common with a premium channel like HBO than what it is today, it might still be able to

³⁴ Spangler, Todd, "Would You Pay \$30 Per Month for ESPN?", *Variety*, 16 Jul 2013, retrieved from <http://variety.com/2013/biz/news/would-you-pay-30-per-month-for-espn-1200563396/>.

³⁵ DIRECTV, "DIRECTV Premium Channels", retrieved from <http://www.directv.com/premiums/overview>.

³⁶ See, e.g., Diaz, George, "Boxing Hits Canvas as Mainstream Sport", *Orlando Sentinel*, 10 Aug 2003, retrieved from http://articles.orlandosentinel.com/2003-08-10/sports/0308100299_1_la-hoya-boxing-sport-today.

attract some high-profile events, but anything on the level of the BCS would not be inclined to limit its audience so dramatically. Since the quality of events ESPN airs is the most important factor in how much it could charge, ESPN could suffer defections and/or be forced to lower its price if it lost too many events, reducing the amount it could pay sports entities and losing more potential audience. In fact, those sports entities could reach the conclusion that the only way to avoid ultimately pricing out the casual fan, the backbone of the widespread exposure they seek, would be to put games on free, over-the-air television.³⁷ Thus, even if a la carte did not reduce and even increased the average American's cable bill in the short term, it is likely to reduce them in the long term, and though Mediacom's proposal may be intended to avoid losing customers, it may actually make it easier to drop cable entirely in the long term, mitigating any fear that cable operators may seek to keep the benefits of reduced fees to themselves.

Further, the effect of Mediacom's third condition, combined with the first one, would seem to be to grandfather in any channels charging less than the ephemeral 20% threshold, since any channel not presently charging anything that started charging would be increasing its rates by an infinite percentage. Any remaining channels would effectively be forced to only ever keep its rates flat or decrease them in real dollars to avoid being thrown into an a la carte system. Although the rate of inflation is hardly "arbitrary" as NAB claims, the effect of the third condition would seem to be either immaterial or needlessly harmful given what else has been established.

If the choice facing cable networks is to not charge anything or be offered a la carte, the notion that cable operators are being given a negotiating leverage "windfall" also rings hollow. A la carte would be an all-or-nothing proposition, and once a cable network has decided to take the plunge into becoming an a la carte offering, they are not just negotiating with cable operators but with potential customers as well. The "local choice" system recently proposed by certain Senate Republicans, which would have asked broadcasters to name their price and let consumers choose whether to pay it, would have neutralized retransmission consent's ability to level the playing field with cable networks and instead would have added another unfair advantage by requiring broadcast stations, but not cable networks, to be offered a la carte.³⁸ The mechanism was sound, however, and could be applied to cable networks fairly easily. Rather than give cable networks both the advantages of subscription fees and not being subject to a la carte, a sound proposal would balance them, with cable getting subscription fees and broadcast getting a la carte immunity.

A La Carte is In the Public Interest Because It is More Consistent with the Nature of the Medium Taking Over the Video Market

All this should be sufficient to demonstrate that, absent the influence of the Internet, an a la carte system for cable networks is good for consumers, good for broadcasters, and good for the public interest. As mentioned earlier, it is possible if not likely that the Internet could eventually render all of linear television, broadcast and cable, obsolete, thus rendering the entire issue moot. However, leaving this aside, when the video market is seen as a holistic unit with the Internet's role in it fully taken into account, we will find there is still more reason to support an a la carte model of cable television.

³⁷ Wick, *op. cit.*

³⁸ See, e.g., Frederick, Brian, "Local Choice is a Simple Solution to End Broadcast TV Blackouts Once and for All", *Multichannel News*, 12 Aug 2014, retrieved from <http://www.multichannel.com/blog/capital-letters/local-choice-simple-solution-end-broadcast-tv-blackouts-once-and-all/383134>;

Consider net neutrality, the issue so occupying the attention of the FCC and the media these days. Recently cable providers have been engaged in high-profile carriage disputes, not only over broadcasters' retransmission consent payments but with cable networks as well, especially regional sports networks that can charge rates approaching those of ESPN.³⁹ On the Internet, the content you can access is not arbitrarily determined by who happens to deliver the service to your house like it is with cable. In fact, the Internet service provider has nothing to do with the content; you simply request it and it shows up. This implies that the cable provider should not be in the business of negotiating with content providers at all. If content providers want to charge you, they should do it directly.

The commission is considering a proposal that would classify online video providers providing linear programming over the Internet as MVPDs.⁴⁰ Many have already started working on online-based MVPDs, including Dish's NuTV service.⁴¹ That the commission is considering recognizing the value of such services is laudable, but it would effectively mean that there would be a bundle of linear television services – and presumably, their other associated TV Everywhere and on-demand services – from a bunch of different content providers, offered from a variety of sources. Such services would co-exist with services like Netflix that exist outside of the bundle, as well as “over-the-top” linear services such as the WWE Network.⁴² Certainly many of these same content providers offer content on a bunch of different platforms and share those platforms with each other, but it seems difficult to justify, to someone born today that knows nothing of the history, why so much of the providers' most valuable content is offered through this mechanism, through channels wholly owned by them but offered through these disparate middlemen, when other services that seem superficially similar exist outside this mechanism. If the FCC is admitting that being an MVPD is more about the content being delivered than the infrastructure through which it is delivered, it is essentially admitting that the very concept of an MVPD is meaningless and obsolete in this day and age.

If the concept of the MVPD is obsolete and were to be removed from existence, leaving content providers to distribute their content on their own, the result would be a system most similar to an a la carte marketplace, with some bundles grouped by the content owners. Most benignly, linked groups of channels, such as ESPN alongside its sibling networks like ESPN2 and ESPNU, could be offered as a single package, similar to how premium “multiplex” channels are offered now, such as HBO, HBO2, and HBO Signature. On the other extreme, some content providers could bring together all their disparate channels and offer them as a single bundle, so that in order to get ESPN, you would have to get ABC

³⁹ Ozanian, Mike, “The Most Expensive Regional Sports Networks to Watch”, *Forbes*, 15 May 2014, retrieved from <http://www.forbes.com/sites/mikeozanian/2014/05/15/the-most-expensive-regional-sports-networks/>; Baker, Geoff, “Are regional sports networks a bubble waiting to burst?”, *Seattle Times*, 11 May 2014, retrieved from http://seattletimes.com/html/mariners/2023587712_bakercolumn12xml.html.

⁴⁰ The relevant Notice of Proposed Rulemaking has not yet been circulated. See Eggerton, John, “FCC Proposing Defining ‘Linear’ OVDs as MVPDs”, *Broadcasting and Cable*, 29 Sep 2014, retrieved from <http://www.broadcastingcable.com/news/washington/fcc-proposing-defining-linear-ovds-mvpds/134392>.

⁴¹ Weiner, Allan, “Dish Network appears to be readying its Internet TV service”, *The Daily Dot*, 3 Sep 2014, retrieved from <http://www.dailydot.com/entertainment/dish-network-nutv/>.

⁴² Flint, Joe, “WWE launching over-the-top network”, *Los Angeles Times*, 8 Jan 2014, retrieved from <http://articles.latimes.com/2014/jan/08/entertainment/la-et-ct-wwe-network-20140108>; Solomon, Michael, “Vince McMahon's Over-the-Top Move: Why The Billionaire CEO Is Betting Big on the New WWE Network”, *Forbes*, 26 Mar 2014, retrieved from <http://www.forbes.com/sites/msolomon/2014/03/26/vince-mcmahons-over-the-top-move-why-the-billionaire-ceo-is-betting-big-on-the-new-wwe-network/>.

Family, the Disney Channel, and all of Disney's other channels. On the other hand, it's not clear that such disparate bundles would actually sell against all the other competition on the Internet and the various similarly rebundled content providers. Those things are for the free market to decide. Regardless, it is clear that an a la carte system is more true to the way the Internet works than the bundling system in place now.

Conclusion

There are many issues with the Mediacom proposal, which seems to have been designed mostly to line their pockets, protect their customer base, and undercut over-the-air television stations, and in all likelihood runs afoul of Congressional intent in the process. Although a well-designed a la carte system that fixed these issues would also likely require Congressional action, such could not only provide considerable benefits to consumers but also cause a resurgence in the broadcast space. I hope the Commission will take into consideration the public interest benefits of a la carte regardless of the specific system developed, and that NAB and its members not be so blinded by their attempt to protect and grow their retransmission consent revenue that they miss the considerable benefits that a la carte could bring to them. I fear if they do not, they may end up irreparably marginalized if not driven to extinction.

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October 14, 2014