Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of *A La Carte* and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems	MB Docket No. 04-207

To: The Commission

JOINT COMMENTS OF:

ALTITUDE SPORTS & ENTERTAINMENT
CASINO & GAMING TELEVISION
COMCAST SPORTSNET
COMCAST SPORTSNET MID-ATLANTIC
E! ENTERTAINMENT TELEVISION
G4techTV
THE GOLF CHANNEL
INSPIRATIONAL LIFE TELEVISION
THE INSPIRATION NETWORK
MARTIAL ARTS CHANNEL
OUTDOOR LIFE NETWORK
SíTV
STYLE NETWORK
THE TENNIS CHANNEL
WISDOM TELEVISION

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SUMMARY OF COMMENTS

Over the last twenty-five years, American television viewers have experienced a transformation in the quality and quantity of television viewing choices that is nothing short of revolutionary. The hundreds of multichannel networks that today serve unique niche audience segments or provide niche programming content have carried the banner for this revolution – the beneficiaries of which have been American television viewers. No longer is the American television consumer tied to the lowest common denominator programming of mass market networks such as ABC, NBC, CBS and other broadcast networks. Nor are they held prisoner to the "day-part" schedules of the broadcast networks that were created to maximize revenues, not consumer convenience or choice.

Today, American MVPD customers have a diversity of programming choices and viewing schedules that is unparalleled and that continues to expand in the current environment. MVPD customers need not wait until 6:30 PM for the national news, or until Saturday afternoons for music programming, or until Sunday mornings for public affairs programming. Today, niche networks serving the diverse tastes of American television viewers provide programming options on a 24 x 7 basis. Commenters are part of the cadre of niche networks that has made this enormous choice possible, and that stand united against any form of government imposed *a la carte* or themed-tier distribution requirement.

As the method by which it generates revenue, a niche network's distribution arrangement is inexorably linked to ***every aspect*** of the network, including the content of its programming and its overall format. The foundation for Commenters' current success and future survival is the current marketplace, which allows niche networks to compete for carriage on MVPDs' widely distributed tiers.

In the multichannel television world, broad distribution of a niche network's programming permits it to thrive under a business model that is driven by two revenue streams – license fees paid by MVPDs and the sale of advertising. Once broad distribution on MVPD tiers is obtained, not only do a niche network's license fee revenues increase proportionately to distribution, its viewership also increases. This, in turn, results in advertising revenue growth. With this dual revenue stream, niche networks are able to invest revenues in original programming, which increases viewership and brings more advertising revenues to the network. In subsequent years, these revenues also enable niche networks to launch progeny services that further add to the diversity of programming options enjoyed by MVPDs and their subscribers. The increase in advertising revenues not only supports additional program development but also reduces the pressure for license fee increases, which in turn makes the niche network more competitive and able to further grow distribution on MVPD platforms. This "upward spiral" of success is fueled principally by broad-tiered distribution on MVPD platforms.

There can be no doubt that tiered distribution of niche networks has provided tremendous consumer benefits through the rich diversity of programming that is now available. The fact that penetration of MVPD tiers continues to grow, and viewership of niche networks continues to increase (at the same time viewership of broadcast networks is steadily declining), reveals the value that MVPD subscribers obtain in a multichannel universe. As the General Accounting Office ("GAO") recently noted, "subscribers place value in having the opportunity to watch networks that they typically do not watch." The ability to "channel surf," and discover or sample programming, is an important part of the value proposition. Indeed, 63 percent of analog cable tier and 65 percent of digital cable tier customers employ channel surfing as the most-used means to ***find out*** what is on television. Moreover, nearly 50 percent of cable customers rely on channel surfing to ***decide*** what to watch. The value of the tier, therefore, derives not only from those channels that viewers regularly watch, but also from the opportunity to experiment and discover new programming to which they otherwise never would have been exposed.

Any governmentally imposed *a la carte* mandate or requirement for themed-tiers will irreparably disrupt the linkages between niche networks' distribution, license fee and advertising sales revenue growth. This, in turn, would impair programming innovation and investment. Such a move from tiered to *a la carte* distribution would cause a precipitous drop in subscribership for niche networks by as much as 90 percent. The effect on both license fee and advertising sales revenues from such a dramatic loss in distribution would be, at a minimum, linear, resulting in a corresponding or greater loss on a percentage basis in revenues. An *a la carte* mandate in any form, therefore, would launch niche networks into a "downward spiral" that not only would threaten their economic viability, but also would adversely impact the content and format of Commenters' networks.

The impact of a "voluntary" *a la carte* regime in which niche networks would be required to *allow* MVPDs to offer their programming on an *a la carte* or themed-tier basis if the MVPD chose to do so would be equally disastrous. By allowing the MVPD to choose the method of distribution for a niche network, it would fundamentally alter the most important element of a distribution agreement to the advantage of the MVPD without any corresponding and offsetting change to the other complicated and intertwined provisions of such agreements.

This imbalance would result in niche networks losing the ability to control their distribution destiny and hence the stability of their business plans. To offset the loss in distribution and revenue that would inevitably result from a "voluntary" *a la carte* mandate, niche networks would be required to alter their content and format to increase distribution on those MVPD systems where they are offered *a la carte* while at the same time maintaining the content and format that successfully serves their niche audiences on those MVPD systems where they the are carried on widely distributed tiers. This places niche networks in the untenable position of trying to please everyone and pleasing no one at all.

Such a "voluntary" *a la carte* regime presumes that government intervention is necessary because the current marketplace is not working. But this presumption misses the reality that niche networks and MVPDs share a symbiotic relationship in which improving the quality of programming on a tier maximizes distribution for both the program distributors and suppliers. Moreover, such a unilateral change in the niche network/MVPD relationship ignores the complexities of distribution agreements and would create an inefficient imbalance that places the niche network squarely on the horns of a dilemma. In order to recover from the loss of subscribers and viewership brought on by *a la carte* distribution, niche networks would be required to move out of the niche that was so attractive to tier subscribers in order to broaden their programming appeal to attract more *a la carte* customers. But because of the "content" guarantees in most distribution agreements, which are very carefully and aggressively negotiated, the niche network might not be able to travel too far outside of its original niche without risking a claim of breach by the MVPD.

Given the extreme and unnecessary market disruptions, the loss of program diversity and the adverse impact on programming innovation, what possible benefit could *a la carte* or themed-tier requirements bring the public? Proponents of an *a la carte* mandate claim that it will be "cure all" for a host of alleged problems including media concentration and vertical integration, indecency, and increasing cable rates. In fact, an *a la carte* mandate will cure none of these problems, and will exacerbate some. There are already a host of laws that directly address antitrust and media concentration issues. Government intervention, therefore, is not necessary to address perceived ownership issues. Furthermore, most niche networks offered as part of MVPD bundles contain no "indecent" material, and MVPDs offer effective tools for screening out such programming. Moreover, as none of Commenters' programming carries a television rating higher than "TV-14," resort to an *a la carte* requirement as a solution for perceived indecent programming undeniably paints with too broad of a brush. Further, although *a la carte* distribution is held out by its proponents as a way to lower cable rates, it actually would have precisely the opposite effect, a conclusion that the GAO independently reached.

Finally, while it is impossible to fully analyze the constitutional implications of an *a la carte* mandate in its current abstract form, it is abundantly clear that an *a la carte* mandate in ***any form*** stands little chance of passing constitutional muster. An *a la carte* mandate would force niche networks to change the content and format of their programming and hence impact their First Amendment rights to free speech. The purported problems that the *a la carte* proponents assert would be cured cannot serve as sufficiently compelling governmental interests when balanced against the niche networks' speech rights. Furthermore, an *a la carte* mandate in any form would have a devastating economic impact on niche networks, and would cause billions of dollars in value in niche networks to vaporize instantly. For this reason, is unlikely that a regulation could be crafted that would not interfere with the "reasonable investment backed expectations" of the niche networks and that would not, therefore, violate the Takings Clause of the Fifth Amendment. Finally, if Congress or the Commission were to mandate *a la carte* distribution of niche networks while at the same time preserving the preferred carriage status of broadcast networks and television stations (some of whom may be offering digital multicasts that compete directly with multichannel networks carried by MVPDs) through must carry and retransmission consent, any such mandate would likely prove to be irreconcilably in conflict with the Equal Protection guarantee of the Constitution.

Commenters do not believe that either the Congress or the Commission intend to eliminate the enormously valuable and diverse programming options created by niche networks, although such may be the effect of a governmentally imposed *a la carte* mandate. Such an outcome would be antithetical to one of the core principals of communications law and policy – promoting a diversity of information sources. For these reasons, and as stated more fully below, Commenters urge the Commission to report to Congress that mandating *a la carte* or any other version of *a la carte* distribution of satellite multichannel network programming is not necessary, would raise, not lower, prices to consumers, is of questionable legality, and indisputably is not in the public interest.

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Altitude Sports & Entertainment (“Altitude”), Casino & Gaming Television (“CGTV”), Comcast SportsNet (“CSN”) and Comcast SportsNet Mid-Atlantic (“CSN-MA”), E! Entertainment Television (E!), G4techTV (“G4techTV”), The Golf Channel (“Golf”), Inspirational Life Television (“iLifetv”), The Inspiration Network (“INSP”), Martial Arts Channel (“Martial Arts”), Outdoor Life Network (“OLN”), SíTV (“SíTV”), Style Network (“Style”), The Tennis Channel (“Tennis”), and Wisdom Television

("Wisdom") (collectively referred to herein as "Commenters"),[1] submit these comments in response to the Public Notice issued by the Federal Communications Commission ("Commission") on May 25, 2004 ("*A La Carte* Notice"),[2] in the captioned proceeding.

I. INTRODUCTION

Twenty-five years ago, most television viewers in the United States had access to only three broadcast networks, a public broadcasting channel, and perhaps an independent station. Programming then was targeted to mass market audiences and developed to appeal to the lowest common denominator tastes. Today, in addition to broadcast stations and networks, television viewers have access to over 400 national and regional multichannel networks available over cable and direct-to-home satellite platforms. These multichannel networks deliver a robust array of programming that appeals to niche targeted audiences and provides content on discreet subject matters that – far from the homogenized programming that reflected television's first 30 years – mirror the rich cultural diversity that is today's television audience in the United States.

Commenters are comprised of fifteen niche networks that collectively employ over 2,000 people in high skill "knowledge" jobs and thus far have invested billions of dollars to develop, launch and operate their networks. They cover virtually the entire spectrum of niche networks and epitomize the remarkable programming choices that multichannel video

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[1] The corporate entities of Commenters include: KSE Media Ventures, LLC, d/b/a Altitude Sports & Entertainment; CGTV Media Group, Inc. d/b/a Casino & Gaming Television; Philadelphia Sports Media, L.P., d/b/a Comcast SportsNet and Comcast SportsNet Mid-Atlantic; E! Entertainment Television, Inc. d/b/a E! Entertainment Television and The Style Network; G4 Media, Inc.; The Golf Channel, Inc.; The Inspirational Network, Inc. d/b/a The Inspiration Networks (INSP™ and i-Lifetv™); Breakthrough Communications, LLC., d/b/a Martial Arts Channel; SíTV, Inc.; Outdoor Life Network, LLC; The Tennis Channel, Inc.; and Wisdom Media Group.

[2] Public Notice, *Comment Requested on A La Carte and Themed Tier Programming and Pricing Options For Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, DA 04-1454, MB Docket No. 04-207 (rel. May 25, 2004).

subscribers have available to them. Commenters' programming ranges from sports to religion, from lifestyle to entertainment, from educational to inspirational.

Commenters are in all stages of development, with some already having wide distribution and strong, well recognized brands, others having launched and now being in various stages of executing their business plans to achieve broad distribution, and still others moving through the final stages of development and planning for launch in the near future. Some of Commenters are affiliated with MVPDs, while others are wholly independent. As a group, Commenters display a tremendous diversity of programming subject areas and specific audience segments. Commenters reflect, in the thousands of hours of programming they make available to the public, that the governmental goal of diversity of programming choices – a purpose of the "highest order" – has been achieved in a very grand way.

Although Commenters are an extremely diverse group of networks, they have come together here with a common and important purpose: to voice their strenuous opposition to any form of a government-imposed *a la carte* or themed-tier mandate on either niche networks or MVPDs. The competitive market of multichannel networks is fully functioning, and there can be little doubt that government intervention would have extreme, and perhaps even fatal, economic consequences for Commenters and other multichannel networks. But beyond the economic consequences, government imposition of an *a la carte* or themed-tier mandate would have a profound adverse impact on the content and format of the networks' programming, raising grave policy and legal implications as well. An *a la carte* or themed-tier mandate would reverse the two-and-a-half decade march towards diversity of programming and return the multichannel video market to the bland, less responsive and considerably less innovative programming of days gone by. Surely, that would not be in the public interest.

II. COMMENTERS ARE THE TYPE OF DIVERSE PROGRAMMING NETWORKS THAT CONGRESS AND THE COMMISSION HAVE SOUGHT TO PROMOTE, AND THAT CONSUMERS WANT TO WATCH

A. Program Diversity Is A Government Interest Of The "Highest Order"

Congress and the Commission have long sought to promote diverse and high quality television programming, and the Supreme Court has recognized the goal of program diversity as a government purpose of the "highest order."[3] One of the primary objectives in enacting Title VI of the Communications Act was to "assure that cable communications provide and are encouraged to provide the widest possible *diversity of information sources and services* to the public."[4] In adopting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress reiterated its policy objective to "promote the availability to the public of a *diversity* of views and information through cable television and other video distribution media."[5] In addition, Congress directed the Commission to adopt regulations in order to promote "the public interest ... by increasing competition and *diversity* in the multichannel video programming market and the continuing development of communications technology."[6]

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[3] *Turner Broad. Sys., Inc. v. United States*, 520 U.S. 180, 190 (1997).

[4] 47 U.S.C. § 521(4)(emphasis added).

[5] 1992 Cable Act, Section 2(b)(1), Pub. L. No. 102-385, 106 Stat at 1463 (codified at note to 47 U.S.C. § 521)(emphasis added).

[6] 47 U.S.C. § 548(c)(1) (emphasis added); *see also* § 548(c)(4)(D). In 1996, Congress sought to promote program diversity in its rules governing Open Video Systems. *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems*), 11 FCC Rcd. 20227 at ¶ 224 (1996) (citing Conference Report at 172, 177-78). The Commission itself has recognized that the 1992 Cable Act program access-exclusivity restrictions were intended to "promote diversity by providing incentives for cable operators to promote and carry a new and untested programming service." *Cablevision Industries Corp. and Sci-Fi Channel*, 10 FCC Rcd. 9786 at ¶¶ 27-29 (1995).

Congress and the Commission have expressly acknowledged, and sought to guard against, the potential chilling effect of regulation on the development of new programming services. For example, in adopting the horizontal ownership limitations in Section 613, Congress directed the Commission not to impose "limitations that will impair the development of diverse and high quality video programming."[7]

The Commission also has exhibited a history of concern regarding the effects of regulation on the development of diverse programming. For example, the Commission has exempted programming networks from certain of the Commission's regulations when program diversity was threatened.[8] In 1999, the Commission addressed the importance of diversity in assessment of the rules providing horizontal ownership limits.[9] The Commission later modified its "dual network rule" to eliminate the major network/emerging network merger prohibition, finding that relaxation of the rule would promote diversity in the video marketplace.[10]

Most recently, when the Commission affirmed its earlier decision to limit access to the reserved "public interest" capacity on each DBS system to one channel per qualified program supplier, the Commission reasoned that the limitation would "promote the

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[7] 47 U.S.C. § 533(f)(2)(G).

[8] *See Waiver of The Commission's Rules Regulating Rates For Cable Services*, 11 FCC Rcd. 1179 at ¶ 33 (1995) ("the Commission is guided by the goal of reducing unnecessary burdens on cable operators and providing the cable operators incentives to innovate and promote program diversity in response to competition")*; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order*, 10 FCC Rcd. 1226 at ¶ 22 (1994) (modifying the going-forward rules to ease the burden on establishing new networks). *See also Closed Captioning and Video Description of Video Programming, Order on Reconsideration*, 13 FCC Rcd. 19973 at ¶ 54 (1998) (expanding exemption "to include numerous nascent networks that are continuing to experience growing difficulties").

[9] *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits, Third Report and Order*, 14 FCC Rcd. 19098 (1999).

[10] *See Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule, Report and Order*, 16 FCC Rcd. 11114 at ¶ 44 (2001).

development of quality educational and informational programming" and noted that the limitation "comports with Congress's intent to foster robust and editorially diverse programming on the reserved channels."[11] Today, as much as ever, Congress and the Commission are intent on increasing the diversity of programming choices available to consumers.[12]

Given this clearly articulated and consistently applied policy to promote "diversity in ideas and speech,"[13] the Commission and Congress should refrain from taking any action that would ***decrease*** the diversity of programming choices for the American viewing public.

B. Identification Of Commenters

Commenters are a group of fifteen "niche" programming networks that offer diverse genres of programming targeted to specific audiences, and provide a level of in-depth coverage of each of their respective subject areas that is not offered by any broadcast network or "premium" network. While a synopsis of each Commenter is provided in Appendix A, the following overview will help to capture the breadth and diversity of the group as a whole.

Commenters cover virtually the entire universe of niche networks and reflect the rich diversity that multichannel programming has brought American television viewers.

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[11] *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations; Sua Sponte Reconsideration, Second Order on Reconsideration of First Report and Order*, 19 FCC Rcd. 5647 at ¶ 53 (2004).

[12] *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd. 1606 (2004) (Separate Statement by Commissioner Powell: "The United States has the most competitive and diverse media market place the world has ever seen and we must continue to bring the benefits of that competition and diversity to our citizenry.") ("*Tenth Competition Report*").

[13] *Time Warner v. FCC,* 240 F.3d 1126, 1130 (D.C. Cir. 2001).

Commenters' programming ranges from sports to religion, from lifestyle to entertainment, from educational to inspirational.

Some of Commenters – such as **CSN**, **CSN-MA**, **E!**, **Golf** and **OLN** – are well-known and have strong, well-recognized brands. Each of these networks, after years of effort, has successfully achieved wide distribution on MVPDs' most popular program tiers.

- **CSN,** the regional sports network for the Philadelphia area, has grown to approximately 3 million customers since its 2001 launch. CSN, a 24-hour network, televised over 300 professional regional sports events in 2003, and provides sports fans with original sports-talk programming such as *SportsRise* and *Daily News Live*.
- **CSN- MA,** the regional sports network for the Baltimore/Washington area, launched in 1984 (as "Home Team Sports") and now is distributed to 4.4 million viewers. In addition to live coverage of sporting events, **CSN-MA** produces original shows such as *Spotlight* and *SportsNite,* and offers select games in high-definition.
- **E!** is the premier entertainment news network and is distributed to approximately 84 million subscribers, ranking it among the top niche networks in total distribution. E! offers compelling celebrity interviews, talk shows, news, behind-the-scenes specials, and comprehensive coverage of the entertainment industry's awards shows.
- **Golf** is distributed to approximately 60 million viewers nationwide. **Golf** provides coverage of live professional golf tours around the world, instructional programming with world-renowned professionals, as well as award winning original shows, such as *Golf Central*, on the game and the golf lifestyle.
- **OLN** is distributed to approximately 58 million subscribers. **OLN** brings the outdoor adventure and action sports lifestyle to its viewers through exclusive

programming, including coverage of *The Tour de France* and OLN's Emmy Award winning shows *Adventure Quest* and *Raid Gauloises.*

Several of Commenters – such as **G4techTV**, **iLifetv**, **INSP**, **SíTV, Style, Tennis** and **Wisdom** – have launched and are now in various stages of executing their business plans to achieve widespread distribution to the public.

- The G4 and TechTV networks merged in May 2004 to create **G4techTV**. **G4techTV** is the only network plugged into video gamers and tech savvy computer enthusiasts, and provides its programming to over 44 million MVPD subscribers.
- **iLifetv** is a network designed to bring unique, fresh and distinct programming on better finances, health, families, and other inspirational programming. The network launched in 1997 and reaches 6 million households.
- **INSP** launched in 1991 and has more than 20 million subscribers on 2,000 cable systems around the country. **INSP** targets viewers who care about inspirational values, providing them with children's programs, original and exclusive music, and a wide variety of different ministry programming.
- **SíTV,** which launched in February 2004, is the first and only English-Language Latino network with crossover appeal, created for the 18-34 year old television audience. Providing culturally diverse programming is at the core of **SíTV's** mission.
- **Style**, a channel dedicated to fashion, design, interior décor and trendy urban lifestyles, launched in 1998 as a brand extension of **E!**, and currently is distributed to 36 million U.S. households.

- **Tennis** launched in May 2003, and currently has cable distribution in 34 states. **Tennis** provides original series and special programs centered around the game and the tennis lifestyle, and provides coverage of major tennis matches and tournaments.
- **Wisdom** launched in 1997 and serves nearly 7 million subscribers, providing them with empowering programming about healthy lifestyles, personal care, alternative medicine and personal development.

Three of Commenters – **Altitude, CGTV** and **Martial Arts** – are in the final stages of development and are planned for launch in the near future.

- **Altitude**, a Denver-based regional sports and entertainment network, is scheduled to launch this fall with programming from professional and collegiate teams from the Rocky Mountain region, as well as other local and regional sports and entertainment programming.
- **CGTV** is a network that will provide entertainment, news, information and educational programming about the gaming industry and community, and lifestyle events surrounding the industry.
- **Martial Arts** will provide programming designed to entertain, inform and educate the viewing public about the martial arts lifestyle, including programs on health, personal development, events and competition, training, movies and entertainment.

Some of Commenters are affiliated with MVPDs, while others are not. For example, several of Commenters are principally owned by multiple system cable operators, one is partly owned by EchoStar, and others, such as **Altitude**, **CGTV**, **iLifetv, INSP**, **Martial Arts**, **Tennis** and **Wisdom**, are wholly independent.

As a group, Commenters display a tremendous diversity of programming subject areas and specific audience segments. The kind of niche-focused programming provided by Commenters exists only on niche networks, and is not provided either by broadcast television networks or by premium networks, which target mass market audiences. While Commenters are an extremely diverse group of networks, they have come together here with a common and important purpose: to voice their strenuous opposition to any form of a government-imposed *a la carte* or themed-tier mandate on either niche networks or MVPDs.

III. TIERING IS THE PLATFORM THAT ALLOWS DIVERSE, NICHE PROGRAM NETWORKS TO EXIST

In its *A La Carte* Notice, the Commission posed a series of questions relating to the ability of MVPDs to provide television programming to subscribers via *a la carte* or themed-tier distribution "on a voluntary basis."[14] Many of those questions address the economic underpinnings of the broad-tiered relationship that currently exists between MVPDs and niche programmers. There is little doubt that an *a la carte* mandate of any sort would have an enormous impact on the fundamental ***economic*** elements of the niche programming industry. But in addition, laws or regulations that attempt to re-shape the distribution of niche programming would have an enormous impact on the ***content*** and ***format*** of the programming itself. The issues raised by Congress and the Commission entail far more than take-rates[15] and license fees because the economic and creative elements of television programming cannot be separated.

[14] *A La Carte* Notice at 1.
[15] The term "take-rate" refers to the percentage of potential MVPD customers that actually select and pay for the *a la carte* programming service.

A. Distribution Drives A Network's Content And Format

As the method by which it generates revenue, a network's distribution arrangement is inexorably linked to ***every aspect*** of the network, including the content of its programming and its overall format. For instance, consider three national television programming networks: NBC, HBO and **Golf**. Each network delivers television programming to viewers throughout the country over MVPD platforms. But that is where the similarities end. The programming and format of each network are vastly different, and each class of the networks has developed unique programming formats constructed to fit with its particular form of distribution. NBC carries general interest programming and advertising. **Golf's** programming is entirely devoted to golf topics and is accompanied by advertisements. HBO carries general interest high-value programming with no advertisements. A regular viewer of **Golf** would be shocked to tune in and see an episode of "Friends"; HBO viewers would be quite surprised to see live coverage of the Dubai Classic golf tournament; and viewers of NBC would never expect to see a recent-release movie of the type licensed for limited release to HBO.

Over time, video programming networks have attempted a variety of combinations of distribution arrangements and programming formats. Some have been successful, while others have not. Through this trial and error process, three distinct and, essentially, mutually exclusive, classes of national video programming networks have evolved: broadcast networks, niche networks and premium networks. These network classes are defined by the manner in which each is distributed to viewers.

1. Broadcast Networks

The broadcast networks include the original "big three" – ABC, NBC, and CBS – and four more recently developed networks – Fox, PAX, UPN and WB. These entities derive virtually all of their revenue from advertising, rather than license fees paid by MVPDs or subscription fees paid by viewers. Given their total dependence on advertising revenues, broadcast networks typically deliver general interest programming (*e.g.*, sitcoms, crime dramas and the like) in order to attract a mass market audience, rather than a particular niche audience or niche programming segment.[16]

Broadcast networks have the ability to reach a massive audience. Virtually all of the 108 million television households in the United States[17] – even the eleven percent that do not subscribe to an MVPD service[18] – can receive at least the four dominant broadcast networks (ABC, NBC, Fox and CBS), and most television households can receive all seven. The broadcast networks are carried on virtually every MVPD platform in the United States, where typically they are placed on preferred channel positions and benefit from established viewer habits.[19]

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[16] *See FCC Releases Twelve Studies on Current Media Marketplace*, 2002 FCC LEXIS 4932, (2002), Part 8 at * 28 (describing broadcast networks as "general interest channels") ("*FCC Media Studies*"). Of course, a network may design its programming, or certain segments of its programming, to attract a particular audience segment. *Id*., Part 10 at * 11 ("there is a greater tendency [among broadcast networks] to target their programming to particular demographic groups."). Nonetheless, the "broadcast networks continue to cater to the mass audience." *Id.*

[17] National Cable & Telecommunications Ass'n, *Cable Developments 2004* at 7 ("*Cable Developments*").

[18] There are 96 million MVPD subscribers and 108 million television households in the U.S.. *See Cable Developments* at 7, 18.

[19] As the Commission noted: "[i]t appears that many cable subscribers watch broadcast channels in part out of habit and in part due to lack of good information on cable program availability.… [M]ost changes in viewer habits are largely evolutionary, versus revolutionary …." *FCC Media Studies*, Part 8 at * 32.

The broadcast networks' massive audience-reach allows them to command high advertising rates,[20] which support enormous programming budgets.[21] These high advertising rates allow the broadcast networks to have a business model that consists of a single revenue stream – advertising revenue.

The broadcast networks are "vigorous survivors" despite the proliferation of hundreds of competitors – primarily niche networks – and the slow but consistent migration of viewers to these programming alternatives.[22] Nonetheless, because of their mass market orientation, broadcast networks are unable to focus their service on a particular niche audience or offer extensive, in-depth programming about any specialized subject matter. In addition, the broadcast networks sometimes have been accused of offering "lowest common denominator" programming.[23]

2. Premium Networks

Premium networks, such as HBO, Showtime, Cinemax, STARZ! and The Movie Channel, generally derive revenue from a single source – subscription fees paid by

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[20] *Closing the Ad Gap*, CABLEFAX DATABRIEFS, March 29, 2004, available at: www.omeda.com/cfx, viewed on June 28, 2004 ("CABLEFAX DATABRIEFS") (in the 2003-2004 television season, seven broadcast networks commanded 71 percent of the advertising revenues while cable networks received only 29 percent); *see also FCC Media Studies*, Part 9 at * 117 ("The small per network audiences for cable are one important reason why broadcasters have been able to increase their advertising revenues over the past decade in the face of viewing share declines.").

[21] In 2000, the average programming expenditure for each of the seven broadcast networks was $1.47 billion, an amount that dwarfs niche networks' average programming expenditures of $32 million. *See FCC Media Studies*, Part 9 at * 111 (total programming expenditures for the seven broadcast networks were $10.3 billion compared with $6.5 billion in programming expenditures for approximately 200 niche networks). As the Commission found, "on a per-network basis, broadcast networks spend far more than cable networks on programming." *Id.* at * 116.

[22] *Id.*, Part 10 at * 13.

[23] *See, e.g.*, Newton N. Minow, Speech Before the National Association of Broadcasters (May 9, 1961), *reprinted* in 55 Fed. Comm. Law Journal 395, 400 (2003) (describing broadcast network programming as a "vast wasteland").

subscribers.[24] These networks are distributed *a la carte* by MVPDs.[25] Indeed, premium networks typically are the *only* programming services offered *a la carte* by MVPDs.

The typical distribution agreement between an MVPD and a premium network will specify a narrow range of distribution options available to the MVPD because these networks are designed expressly for *a la carte* distribution.[26] Thus, while premium networks commonly are marketed as "purely" *a la carte* or as mini-tiers of premium networks,[27] premium networks almost never are distributed in a tier with numerous niche networks. Such distribution is prohibited by the distribution agreement and, in any event, would make little economic sense for either party.[28]

Premium networks charge subscription rates generally in the range of approximately $10 - $15 per month, which are far higher than Commenters' license fees.[29] High subscription rates are necessary to support a premium network's expenditures for high-value content, which is costly to either produce or acquire, and to allow the network to operate on a single revenue stream. The high subscription rates also

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[24] *FCC Media Studies*, Part 8 at * 19 (premium networks "rarely include advertising and derive revenue primarily through the subscription fee charged for each service").

[25] *Id.*

[26] A typical distribution agreement between an MVPD and a premium network entails a "revenue split," with each party receiving a negotiated percentage of the subscription fees paid by subscribers for the network, which are channeled through the MVPD. This is in contrast to the generally fixed-rate "per subscriber" license fee arrangement between MVPDs and niche networks, discussed below.

[27] *Id.*, Part 8 at * 19.

[28] Thus, HBO and Cinemax are never found in an expanded basic service tier, and a "CNN/HBO mini-tier" would be like mixing classical music with acid-rock, *i.e.*, it would be commercially unthinkable, even though both networks are very popular with viewers and are owned by Time Warner, which could itself offer such a mini-tier on its cable systems and hypothetically could demand that other MVPDs do the same.

[29] National Cable & Telecommunications Ass'n, *The Pitfalls of A La Carte: Fewer Choices, Less Diversity, Higher Prices*, at 12 (May 2004) ("*NCTA A La Carte Policy Paper*"). This is a broad estimate of the range of premium networks' *a la carte* monthly subscription fees. The "per network" rate of bundled premium tier offerings would be lower, and the range would vary considerably based on the number of networks in the bundle.

are necessary because *a la carte* networks historically have had low take-rates.[30] On the other hand, high subscription fees allow premium networks to operate with a relatively small base of subscribers. For instance, currently the established premium network STARZ! has only 12 million subscribers, and even HBO (and its sister network, Cinemax), the largest premium service provider, has just 39 million subscribers, or less than half the subscribers of the largest niche networks.[31]

Premium networks display a distinct programming format. They deliver general-interest "high-value" content (*i.e.*, either original content or recent-release movies), presented advertising-free and subject to no regulatory indecency restrictions. This programming is designed to have broad appeal among viewers, rather than target a niche audience.[32]

A sub-category of premium networks consists of those that serve a micro-niche ethnic group or foreign-language speakers.[33] Pricing for these networks is similar to, or even higher than, other premium networks.[34] However, this business model is suitable only for a micro-niche audience with an intense interest in programming that is not available from any other source or combination of sources, and that therefore delivers a

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[30] For instance, even the most highly-acclaimed and popular premium network, HBO, achieves a take-rate of only 30 percent among cable subscribers, while the average take-rate among premium networks is only approximately 10 percent. R. Katz, K. Manglis, and G. Radeff, *A La Smart? Bear Stearns Research Report* at 4 (March 29, 2004) ("*Bear Stearns Report*").

[31] *Cable Developments*, at 105, 167.

[32] One limited exception to this general rule appears to be Black STARZ!, which is oriented toward African-Americans. But even this network appears to be distributed primarily as a bundled offering with other STARZ! networks. For instance, Comcast offers Black STARZ!, but only in conjunction with other STARZ! networks. *See* http://www.comcast.com/Buyflow/default.ashx?LinkID=251.

[33] Examples of these networks are ART – Arab Radio and Television (pan-Arab), RAI International (Italy), Filipino Channel (Philippines), TV Japan, TV5 (French language), TV Asia (South Asia), Zee TV (India), and Zhong Tian (Mandarin-Chinese).

[34] For example, Cox Communications offers Zhong Tian for $11.95 per month, TV Japan for $24.95 per month, and Filipino Channel for $11.95 per month. *See* http://www.cox.com. Dish Network offers TV Japan for $25.00 per month. *See* http://www.dishnetwork.com.

high take-rate among the target audience (although not among general audiences). Indeed, for many viewers of these networks, particularly those with limited English-language skills, the network may be their only practical television programming option.[35]

3. Niche Networks

Niche networks are comprised of a large group of extremely diverse networks that first began to be carried by cable operators in 1979, and later by DBS providers when that distribution platform evolved.[36] Before that time, television viewers had essentially only three national television network options: ABC, NBC and CBS. As more modern cable television systems were constructed, cable operators found that these systems had additional capacity that could be used to deliver alternative programming sources to viewers. New networks developed, catering to specialized, niche programming needs and interests that previously were unserved, or underserved, by the broadcast networks. Viewers quickly embraced these new networks, which offered innovative programming formats, such as a 24-hour "all news" network (CNN), an all-sports network (ESPN), a women's television network (Lifetime Television), and a network targeted toward African-Americans (BET), and the number of such networks has increased by leaps and bounds ever since. Whereas there were six national niche networks in 1980, and 49 niche networks in 1990, there now are 229 national niche networks that supply a staggering

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[35] In addition, some micro-niche networks, such as Russian Television Network of America, are advertiser-supported and many, such as RAI International, have limited programming costs because their programming is produced for the network's broad domestic market, rather than for a limited number of U.S. viewers. *See Cable Developments* at 148, 149.

[36] C-SPAN, ESPN and Nickelodeon launched in 1979, and CNN, BET and Bravo launched in 1980. *See* http://www.cablecenter.org/history/timeline/decade.cfm?start=1970.

array of diverse programming that caters to virtually every conceivable taste or audience segment.[37]

MVPD subscribers have long displayed strong demand for alternative programming sources and innovative programming concepts. As MVPDs responded to this demand by increasing their system channel capacity, niche networks developed innovative programming to take advantage of this new capacity. For instance, in the mid- to late-1990s, with many cable systems at full channel capacity, cable operators upgraded their systems in order to offer subscribers more programming options, including new "digital tiers", and to respond to their DBS competitors, who had greater channel capacity.[38] Niche networks proliferated to take advantage of this new opportunity. Indeed, many of the business models of niche networks launched since the late 1990s assume that their distribution on cable systems will largely be through a digital tier. Today, penetration of these digital tiers is at 30 percent and steadily climbing,[39] as cable subscribers have embraced the wide variety of new programming options available. As the Commission recently found:

> The advent of DBS, cable investment in increased capacity, and the application of digital compression technology, means that MVPD subscribers now have access to a far larger menu of programming choices than they did in 1990. The growing share of cable subscribers choosing the digital tier suggests that they are taking advantage of the expanded range of programming on offer [*sic*].[40]

While both premium and broadcast networks have a mass market orientation, niche networks provide in-depth, 24-hour coverage of a wide array of ***niche*** subject areas,

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[37] *See Cable Developments* at 43-206.
[38] *FCC Media Studies*, Part 8 at * 18.
[39] National Cable & Telecommunications Ass'n, Statistics and Resources (2004), available at: http://www.ncta.com/Docs/PageContent.cfm?pageID=86.
[40] *FCC Media Studies*, Part 10 at ** 5-6.

including art, music, business, specific sports, nature, history, foreign affairs, ethnic programming, cooking, travel, health, science, physical and spiritual well-being, religion, and weather, with whole networks being devoted to each of these subject areas.[41] These networks are highly valued by, and uniquely important to, their viewers, whose specific needs and interests are not, and cannot be, satisfied by broadcast or premium networks.

Many of the more recently launched networks serve a particularly narrow audience or provide highly specialized programming. For example, **Tennis,** which caters to tennis enthusiasts, has created many original series programs such as *Inside Tennis with the Koz, Center Court with Chris Meyers, One Minute Clinic, Glam Slam, Match Point America* and others. Similarly, **G4techTV**, which serves a ***niche audience*** interested in games, gear, gadgets and gigabytes, has created innovative programming such as *G4TV.com*, *Arena*, *Pulse*, *The Electric Playground*, *Fresh Gear*, *Screen Savers*, *X Play* and *Unscrewed with Martin Sargent*. And **SíTV,** a niche audience network that will serve the English-speaking Hispanic and multi-cultural market, will particularly aim to serve young viewers whose culture is an integral part of their identity, providing original programming such as *The Drop, The Rub, Styleyes,* and *Latino Laugh Festival-The Show.* Viewer demand for niche networks like these is not yet sated, with additional networks being launched periodically and still others waiting in the wings. Thus, in addition to these two start-up networks, 37 new niche networks are scheduled to launch in 2004, including **CGTV**, **Altitude** and **Martial Arts**.[42]

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[41] *Id.*, Part 9 at ** 91-93 (noting that, while that there are some general interest multichannel networks, such as TNT and USA Network, "the majority target niche audiences").

[42] *Cable Developments* at 247-76 (an additional fifteen niche networks are scheduled to launch in 2005, and 78 more are under development although they have not announced an official launch date).

As niche networks have matured, they have produced a steadily increasing amount of diverse programming that viewers watch and enjoy. Niche networks invest, on average, approximately 40 percent of their revenue in programming, a figure equivalent to that of broadcast networks.[43] Moreover, niche networks spend, on average, over 55 percent of their programming budgets on original, rather than acquired, programming, a figure that is significantly higher than that spent by premium networks (33 percent).[44] Original programming by a network is created expressly to serve the particular needs and interests of the network's target audience, and generally costs more to produce than repurposed programming.[45] Nonetheless, niche networks invest heavily in original programming because it enables a network to establish brand identity among viewers.[46]

These investments in quality programming are yielding results. As niche network programming improves, consumers are demonstrating an intense interest in, appreciation of, and loyalty to this programming through increased viewing. For instance, in the most recent period, niche networks captured a combined 49 percent share of the viewing audience, compared with the 48 percent and three percent share of broadcast and premium networks, respectively.[47] Clearly, viewers increasingly are attracted to the unparalleled diversity of innovative programming that can be found only on niche networks.[48]

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43 *FCC Media Studies*, Part 9 at * 111.
44 *Id.*
45 *See generally, id.* at ** 102-104 (discussing the relative costs and risks associated with original and repurposed programming).
46 *Id.* at ** 102-104.
47 *See* CABLEFAX DATABRIEFS.
48 Indeed, the Commission recently found that "[t]he availability of larger quantities of desirable programming on [niche networks] surely … plays a role" in the increased viewership of niche network programming. *FCC Media Studies*, Part 7 at * 43; *see also id.*, Part 8 at * 26 (referencing the "increased quality of programming" on niche networks).

Niche networks have been a significant economic success story, and are an important and growing segment of the U.S. economy.[49] Niche networks offer high-paying "knowledge industry" jobs for their employees. For example, Commenters collectively employ over 2,000 people, and that number is growing steadily and rapidly. Moreover, by commissioning the production of original programming, multichannel networks are also helping to create jobs at companies that produce this new programming. Finally, television programming is one of the increasingly rare markets in which the United States is a net exporter,[50] and niche networks play an important role in this market.

Niche networks are the ***only*** networks that supply the staggering array of diverse, targeted programming for any particular niche subject area or audience segment. These networks have dramatically improved the overall diversity and quality of television programming available to the public by creating and distributing original programming with a level of depth and coverage not offered by broadcast or premium networks. In the words of the Commission, "[t]hese services are very valuable to viewers because they provide highly targeted programming not otherwise available."[51]

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[49] In 2001, niche networks generated $18.2 billion in revenue. This figure is expected to rise to $25.9 billion in 2004, and to $32.5 billion in 2006. *See* Kagan World Media, *Economics of Basic Cable Networks 2003*, at 20 (9th ed.) ("*Kagan*").

[50] *See Television in the United States* at ¶ 6 (2004), available at: http://encyclopedia.thefreedictionary.com/Television%20in%20the%20United%20States ("The U.S. is the largest exporter of television in the world.); Chris Smith, *A Single ITV Will Create Better Television*, Financial Times at 1, May 30, 2003 ("Britain is the second largest exporter of television programmes in the world, way ahead of the rest of the field - but also far behind the US.").

[51] *FCC Media Studies,* Part 8 at ** 33-34.

B. Niche Networks Are Financially Viable Only When Distributed As Part Of A Broad Tier of Networks

1. The Business Model Of Niche Networks

The foundation of the business model of virtually every niche network is a dual revenue stream: ***advertising revenues*** and ***license fees*** paid by MVPDs for the right to carry the network's programming. On average, niche networks' revenues are split roughly 50-50 between advertising and license fees.[52] As demonstrated below, both streams of revenue are ***essential*** to the survival of a niche network because neither is sufficient standing alone, and both revenue streams are tied directly to the network's distribution level – *i.e.*, the total number of subscribers who can view the network.

a. Advertising

Audience size is the currency of advertising media, and ratings drive advertising revenue. But national advertisers (to varying degrees, depending on who they are) consider either (i) actual viewers, (ii) potential audience size, (iii) demographic characteristics of the audience, or (iv) some combination of the above.[53] Generally speaking, a national niche network needs to achieve a threshold level of at least 30 million to 40 million subscribers in order to be considered as a possible advertising vehicle for national advertising.[54] In other words, a niche network must achieve a

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[52] *See* U.S. General Accounting Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate at 35 (Oct. 2003) ("*GAO Report*").

[53] *Kagan* at 12, 35, 77. Because of their national distribution, multichannel networks generally do not sell local advertising time. While a network may contractually grant an MVPD the right to insert local advertisements into the network's feed in "local ad avails," the revenue from such advertisements generally flows to the MVPD.

[54] *Id.* at 10, 23. Of course, some niche networks, depending on their business plan, programming model and investment, may require more or less distribution. Furthermore, regional sports networks, such as **Altitude**, **CSN**, and **CSN-MA**, do not need to reach tens of millions of subscribers to be successful. Rather, their benchmark is based on the size of the regional market

"critical mass" of subscribers on MVPD systems throughout the country ***and*** attract a sufficient number of viewers with quality programming in order to be a viable medium for national advertisers. The lynchpin is that a niche network must achieve widespread distribution above some threshold level of subscribers to be "in the game" as a potential medium for national advertisers.

Standing alone, however, the advertising revenue a niche network can generate is insufficient to support its operations because the advertising *rates* these networks can charge are limited. Broadcasters still garner the highest ratings and, thus, take in a much larger percentage of available advertising dollars. While niche networks' "collective share of viewing audience has been increasing over the years, ratings for individual networks (and programs) remain quite low."[55] These lower ratings correspond directly to the amount advertisers are willing to spend.[56] Of course, the niche focus of these networks is an inherent limitation on their potential audience size.[57] But in the end, although advertising revenues are essential to a niche network, they are also limited and cannot be its sole revenue source.

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they serve. Nevertheless, even within a much smaller regional base of households, the regional networks still require widespread distribution across the region.

[55] *FCC Media Studies*, Part 8 at * 27. For instance, the most recent aggregate prime-time ratings data for the four major broadcast networks were: CBS 8.43, NBC 7.29, ABC 5.92 and Fox 5.49. The corresponding figures for the top four rated niche networks were: TNT 1.66, USA 1.51, Nickelodeon 1.57 and ESPN 1.38. (http://www.tvb.org/rcentral/viewertrack/weekly/std-b-c/std-b-c.asp?ms=2003-2004.asp). The viewing share figures of less-established niche networks or those with a particularly narrow niche focus tend to be considerably lower.

[56] For example, in the 2003-04 television season, the seven broadcast networks collected 71 percent of national advertising dollars, while niche networks garnered only 29 percent. *See* CABLEFAX DATABRIEFS.

[57] The broadcast networks are able to remain above the fray of a fragmented television market because they are the only medium through which an advertiser can simultaneously reach the entirety of a mass market television audience. This unique capability allows broadcast networks to command "premium" advertising rates -- *i.e.*, rates that are disproportionately higher than those of niche networks beyond the difference in viewer shares. The "cable discount" in advertising rates has been estimated to reduce niche networks' advertising rates by 30 to 60 percent below the already lower relative share levels. *See FCC Media Studies*, Part 7 at * 53.

b. License Fees

Because their advertising revenues are limited, license fees paid by MVPDs also are an essential revenue stream for niche networks. License fees usually are established on a fixed-rate "per subscriber" basis that is negotiated as part of the affiliation agreement between the MVPD and the network. As such, this revenue stream is directly contingent upon the number of subscribers to which the programming is distributed. Accordingly, niche networks seek distribution on MVPD platforms as part of the most widely-penetrated service tier possible (*i.e.*, the one with the most subscribers).[58] On cable systems, the most widely-penetrated service tier carrying niche networks is almost always the broadest service tier (*i.e.*, the one with the largest bundle of networks), and typically includes the expanded basic service tier.[59]

There are far more niche networks seeking distribution on MVPD platforms than capacity available to support this programming.[60] As a result, in most cases, these market dynamics severely limit the license fees a niche network can charge an MVPD.

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[58] If viewed strictly through the lens of subscription fees, without regard to elasticity of demand issues, a niche network would be indifferent to the level of distribution, so long as it could receive a higher license fee ***rate***, which proportionately accounted for lower distribution. But as demonstrated below in Section III(B)(1)(c), the effect of reduced advertising revenue changes the equation entirely. Lower distribution translates into reduced advertising revenues, which cannot be replaced with higher license fees. And as distribution falls, the impact on advertising revenues is ***more*** than linear. As a result, the goal of virtually every niche network is the same – to achieve the widest distribution possible.

[59] DBS providers market their service tiers differently than cable operators, but the point remains the same. For instance, DISH Network's "America's Top 60" tier (its most widely penetrated) includes 60 networks for $29.99 per month, while its "America's Top 80 Plus" package includes 80 networks (the "America's Top 60" networks plus 20 others) for $ 34.99 per month. This can be viewed as an "expanded basic" offering and a separate tier of 20 networks, but it is not marketed as such. But just as a niche network generally would prefer analog, rather than digital, carriage on a cable system, a network would prefer to be part of DISH Network's more widely distributed "America's Top 60" tier rather than its "America's Top 80" tier. On either DBS or cable platforms, wide distribution is a niche network's principal objective.

[60] As a rough measure of this disparity, while there are now 339 national and 79 regional networks vying for carriage on cable systems (and another 131 planned for launch), the average

c. Widespread Distribution Is The Key To *Both* Revenue Streams

While some networks may rely slightly more on advertising, and some may rely more on license fees, virtually every niche network that exists today operates on this "standard" dual revenue stream business model in some form.[61] And whether a network relies more heavily on advertising or on license fees, or equally on both, ***every*** niche network strives to establish widespread distribution.

Widespread distribution is essential for niche networks because it (a) makes the network a medium for national advertising, and in the case of regional networks, regional and local advertising as well; and (b) creates a significant revenue stream from license fees. A niche network must be able to achieve at least its target "critical mass" distribution level in order to be economically viable. While the range of "critical mass" distribution levels found among all niche networks may vary,[62] unlike premium

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cable system has a capacity of only 70 analog video channels and 120 digital video channels, a significant number of which must be devoted to broadcast stations, PEG channels and commercial leased access programming. *See Tenth Competition Report* ¶ 18; *see also Cable Developments* at 1, 207-42, 247-76. Niche networks also compete with non-video services, such as high-speed Internet access and telephony, for cable operators' system capacity.

[61] There are limited exceptions, of course, such as Disney Channel, which does not sell advertising and relies entirely on license fees to fund its operations (although even Disney devotes substantial air-time to promoting other Disney products and services). *See Bear Stearns Report* at 5.

[62] For instance, an established national niche network's business model may call for a "critical mass" distribution level of 70 million subscribers in order to sustain its significant investment in original programming. On the other hand, the business plan of a recently launched network may call for a "critical mass" distribution level of "only" 35 million subscribers, which can be achieved (over a number of years) through distribution as part of DBS providers' expanded tiers and carriage on cable operators' broad digital tiers, which are assumed to become increasingly penetrated over time. Of course, the newly launched national network's revenue stream will be significantly lower than the established network, but its business plan may allow it to be economically viable with "only" 35 million subscribers due to lower programming costs, lower overhead, combined production and administration with other networks, or a variety of other factors. Furthermore, in the case of regional networks, a critical mass of two to five million is generally sufficient to create the "critical mass" to attract national, as well as regional and local, advertisers.

networks, no niche network can expect to have a business over the long term without widespread distribution. Thus, while a premium network like STARZ! may be economically viable in the long term with 12 million subscribers, a niche network with the same distribution level never would be.

The reasons flow directly from the significant costs associated with creating and distributing television programming, and the price the viewer is willing to pay. A niche network requires a tremendous level of initial capital investment,[63] and a substantial continuous revenue stream to sustain its operations and provide funds for investment in programming. Some of the major cost categories include programming, talent, salaries for managers, studios and equipment, marketing, satellite transponder distribution, rent, financing and other "overhead" costs.

These fixed costs must be spread as widely as possible in order for the network to be economically viable, because the "per subscriber" license fees paid by MVPDs are quite low. For instance, data in the recent *GAO Report* shows that the average monthly wholesale per subscriber license fee among 79 niche networks in 2002 was only **13.5¢** per network.[64] And, as discussed above, advertising revenue only becomes a significant revenue stream if the network is able to achieve widespread distribution.

[63] *See generally, Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Report and Order*, 13 FCC Rcd. 3272 at ¶ 146 (1997) ("new programming networks face significant start-up costs").

[64] This figure is computed based on a weighted average of 72 non-sports networks, with an average license fee of 10 cents per subscriber, and seven sports networks, with an average license fee of 50 cents per subscriber (reflecting sports networks' generally higher program acquisition costs). *See GAO Report* at 23.

2. *A La Carte* Distribution Has Been Proven To Be Incompatible With Niche Programming

History has demonstrated time and again that *a la carte* distribution simply does not work for niche audiences. Over the years, a number of networks have attempted to combine *a la carte* or mini-tier distribution with programming that is either specialized (*e.g.*, **Golf,** and **CSN** and many other regional sports networks) or focused on a niche audience segment (*e.g.*, Disney Channel). Every effort to serve niche audiences via *a la carte* distribution has failed, with the networks either migrating from *a la carte* distribution to distribution within a broad tier of networks or being marketed as part of a bundle of premium networks.[65]

What experience has shown is that when a niche network attempts to operate without advertising revenues,[66] it cannot achieve sufficient revenue from subscription fees to become economically viable. This is the case even when there is very strong interest among the target audience in the programming – as with sports fans generally and golf fans in particular – or when a network combines a broad niche audience with a sterling brand name, as in the case of Disney Channel). These networks found that the combination of a narrow base of potential subscribers coupled with the general resistance among most consumers to pay *a la carte* for a single channel of programming produced a very low take-rate and insufficient revenues to operate. For instance, the take-rates for

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[65] As discussed below, an example of this migration is Sundance Channel.

[66] The hybrid – and essentially theoretical – distribution model that attempts to combine *a la carte* distribution and advertising, termed "mini-pay," has never been successful. Viewers have come to expect ***either*** per channel subscription fees ***or*** advertising, but not both. *See, e.g,* Linda Moss, *Viacom Plans a Gay-Themed Mini-Pay*, MULTICHANNEL NEWS, Jan. 14, 2002 ("services that started out as mini-pays offered à la carte – such as [**Golf**] and Sundance Channel – had trouble building distribution under that model and migrated away from it. 'It's a pretty dicey proposition, just from an economic view,' the ex-cable operator said. Noted a second ex-operator, 'Mini-pays either melted down to ad-supported tiers or were grafted onto paid premium packages.'").

regional sports were almost always less than 10 percent.[67] Moreover, given that viewers have come to expect (quite reasonably) high-value and advertising-free content in exchange for premium subscription fees, it becomes clear why all attempts to create an economically-viable *a la carte* niche network have failed.

Even Congress and the Commission have recognized the importance of inclusion of programming services within a broad tier of networks, and the damage that banishment to an *a la carte* or mini-tier world predictably will cause to programmers. For instance, cable operators are required to distribute must-carry broadcast signals on the basic service tier, and cable subscribers are required to purchase the basic tier as a condition to purchasing other cable services.[68] In establishing this requirement, Congress recognized that mandatory carriage would be meaningless if stations were placed "on a channel location that subscribers rarely view or cannot view without added equipment."[69]

Similarly, cable operators must carry commercial leased access ("CLA") on tiers with greater than fifty percent penetration.[70] According to the legislative history of the 1992 amendments to leased access requirements in Section 612,

> if programmers using these channels are placed on tiers that few subscribers access, the purpose of this provision [to promote competition in the delivery of diverse sources of video programming and to assure the widest possible diversity of information sources are made available to the public from cable systems, 47 U.S.C. § 532(a)] is defeated. The FCC should ensure that these programmers are carried on channel locations that most subscribers actually use ... to ensure that these channels are a genuine outlet for programmers.[71]

[67] *Bear Stearns Report* at 4.
[68] 47 U.S.C. § 534(b)(7); 47 U.S.C. § 535(h).
[69] S. Rep. No. 102-92 at 45, n. 116 (1991) ("*Senate CLA Report*").
[70] 47 C.F.R. §76.971(a)(1).
[71] *Senate CLA Report* at n. 187-88.

Indeed, in establishing the CLA penetration requirement, the FCC rejected pleas from several cable operators to offer CLA programming *a la carte*:

> Leased access programmers would not be assured access to most subscribers if cable operators were permitted to require leased access channels to be sold on an individual or a la carte basis. … We therefore disagree … that cable operators should be permitted to force leased access programming onto channels that subscribers must purchase on an a la carte basis.[72]

In the *A La Carte* Notice, the Commission asked whether "MVPDs currently have the option to … if they chose, offer programming to consumers on an *a la carte* or themed-tier basis?"[73] As the GAO correctly noted in testimony to Congress, "[m]ost contracts negotiated between cable networks and cable operators specify the tier that the network must appear on. We were told that cable networks include these provisions in their contracts because their business models are developed on the basis of a wide distribution of their network."[74] For a niche network, tier placement on the MVPD platform is the ***essence*** of the agreement. Thus, niche networks always seek to negotiate carriage on the broadest tier possible, and to deny MVPDs the right to distribute their programming *a la carte.* Given that distribution drives every aspect of a network's operations, including its business model, program content and overall format, it is absolutely essential that a niche network be allowed to negotiate the manner by which the network will be distributed to subscribers.

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[72] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, 12 FCC Rcd. 5267 at ¶ 85 and n. 210 (1997).
[73] *A La Carte* Notice at 1.
[74] U.S. General Accounting Office, Telecommunications: Subscriber Rates and Competition in the Cable Television Industry, Testimony Before the Committee on Commerce, Science, Transportation, U.S. Senate, Statement of Mark L. Goldstein, Director Physical Infrastructure Issues at 15 n. 15 (March 25, 2004).

3. Broad Network Tiers Are The *Only* Viable Form Of Distribution For Most Niche Networks

In stark contrast to the many failed efforts to distribute niche networks *a la carte*, "broad tiers"[75] of diverse, niche networks have proven to be very popular with viewers. In essence, a broad tier of diverse, niche networks ***is*** the business model that enables such networks to exist. A niche audience network, such as **iLifetv**, or a niche program network such as **CGTV**, that would not exist today if distributed *a la carte*, can thrive if distributed as part of a broad tier. This means ***more*** and ***better*** programming choices for the viewing public.

While any particular niche network (by definition) will not appeal to everyone, if that network is packaged as part of a broad tier of diverse niche services, the package of networks is sure to contain some number of networks that ***do*** appeal to almost everyone. The networks, which have developed "content packages" that appeal to core segments of viewers, add value to MVPDs' programming tiers, and attract advertisers seeking to target their messages to particular markets. Thus, MVPDs and networks have created broad, diverse tiers of networks that will appeal to the widest array of viewers in order to drive penetration of the tier and allow the MVPD to compete effectively with other MVPDs.

A broad tier consisting of a wide array of diverse, niche networks is much more valuable than the sum of its parts. The popularity of broad tiers of networks (reflected in their extraordinarily high take-rates) means that each network in the tier is widely distributed. This wide distribution allows each network to spread its fixed costs broadly,

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[75] By use of the term "broad tiers," Commenters refer to large bundles of niche networks contained in tiers sometimes referred to as CPST, Expanded Basic, Digital Basic, Digital Plus or Expanded Digital Basic.

thus reducing its “per subscriber” license fee to MVPDs and creating the critical mass of viewers needed to attract advertisers.

Advertising revenues are critical because they further support the network’s costs. In essence, advertising revenues create the “value added” aspect of a broad tier. The net result of wide distribution and advertising revenues is that each network in the broad tier can be delivered to subscribers at very low retail cost (on average, 86¢ per customer per network).[76] By comparison, the monthly *a la carte* retail price range of premium networks is $10 to $15 per network.

4. Broad Network Tiers Are A Value For Consumers

This data demonstrates the value that broad tiers of networks deliver to subscribers. Their value is further demonstrated by the fact that the overwhelming majority of cable subscribers choose to purchase either an expanded basic or CPST offering, and 30 percent subscribe to an additional broad digital tier of networks.[77] Of course, no cable subscriber is required to purchase an expanded basic service package (unlike the basic service tier, which is mandated by federal law), so each subscriber who elects to do so demonstrates that he or she values the programming in the package more than its monthly price. As the Commission recently recognized, “[c]onsidering the ***enormous value*** that consumers continue to place on cable television viewing options, it is no wonder that … viewership shares of non-premium cable networks have continued to

[76] *See Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices,* FCC 03-136 at ¶ 30 (Table 5). The “per network” retail prices for DBS operators are even lower. DISH Network’s America’s Top 60 tier offers 60 networks for $29.99 per month – or 50¢ per network, while DirecTV’s Total Choice package offers 91 networks for $36.99 per month – or 41¢ per network.
[77] *NCTA A La Carte Policy Paper* at 21.

grow over the past decade, while viewership shares of broadcast television stations have steadily declined."[78]

Subscribers also value the enormous diversity of programming options that a broad tier of networks makes available to them. As the *GAO Report* indicates, experts "noted that subscribers place value in having the opportunity to watch networks they typically do not watch."[79] For instance, a viewer who does not regularly watch news programs may value the fact that CNN, Fox News, Headline News, MSNBC and CNBC are available when a major news story breaks. Or a viewer who never watches outdoor sports programming may value the fact that **OLN** provides 16 hours of daily coverage of Lance Armstrong at *The Tour de France*. And a television viewer who doesn't have a game console in his or her home may discover and enjoy **G4techTV's** *Nerd Nation* – a humorous program exploring the collision of humans and technology. In short, a broad tier gives viewers the ability to "surf," or sample, programming from among a wide variety of programming options available, and the cost to have access to each channel for a month is less than a cup of coffee.

Even some networks with relatively high license fees offer a net benefit to subscribers who purchase the broad tier – even those subscribers who do not watch these services. Regional sports networks generally have relatively high license fees due to the high cost of their programming, principally the cost of acquiring sports rights.[80] Another such example is Disney Channel, which charges a relatively high license fee (74¢) but does not run advertisements.[81] Because these types of networks generally are very

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78 *FCC Media Studies*, Part 8 at * 26 (emphasis added).
79 *GAO Report* at 37.
80 *GAO Report* at 22-23.
81 *Bear Stearns Report* at 5.

popular with subscribers, they help to greatly increase penetration of the broad tier, which increases the advertising revenues of ***all*** networks in the tier. Thus, although some subscribers do not watch children's or sports programming, many other subscribers purchase the broad tier package ***in large part*** to obtain such programming. In the end, all of the subscribers have the same diverse programming options available to them at a low price.

Proponents of an *a la carte* mandate commonly assert that it is needed because subscribers should not be required to "subsidize" networks they do not watch. However, this argument overlooks the "added value" created by a broad tier of networks. A broad tier of networks enables third parties – namely, advertisers – to provide a separate revenue stream to the networks in the tier. As a result, the primary "subsidy" at work in a broad tier of networks is one that *benefits* subscribers – advertising revenues that enable extraordinarily low license fees and retail prices for ***all*** networks included within the tier. Indeed, the dramatic impact of advertising on retail prices becomes apparent when it is observed that:

- broadcast networks, which are 100 percent "subsidized" by advertising, are received off-air for ***free***; and
- in general, niche networks, which, on average, are 50 percent "subsidized" by advertising, and cost on average ***less than $1*** per month per network; whereas
- premium networks, which are 0 percent "subsidized" by advertising, cost ***$10 to $15*** per month.

In the end, a broad tier of networks is a good value for a subscriber even though he or she may place little or no value on some of the individual networks comprising the tier.[82]

5. Entertainment And Information Services Often Must Be Sold As A Bundle

Television programming networks, whether broadcast, niche or premium, are copyrighted information and entertainment services. They are not commodity items like milk, broccoli, cereal or other items that a consumer picks off a shelf one at a time. As the following examples illustrate, information and entertainment services often are virtually impossible to sell without bundling in some manner.[83]

- **Books**. If a publisher sells a volume of previously unpublished essays of ten contemporary writers, which are not commercially available through any other source, a consumer has no right to force the publisher or the book store to unbundle the book and sell only one, or another, of the essays *a la carte*. It matters not that the consumer does not want the works of other writers who are featured in the volume, or that he finds them offensive, politically corrupt or even indecent. If the publisher has chosen to sell the works as a bundle, whether for artistic, political or even merely commercial reasons, the consumer is left with the choice to either buy the entire bundle or choose not to buy it.

- **Magazines**. Consumer's Union, which publishes "Consumer Reports" magazine, does not sell articles from the magazine, or from its website, *a la carte*, even though there is no technological impediment to it doing so. A reader who wishes to read only the two-page article on air conditioners in the July 2004 edition must purchase the entire magazine.

- **Internet Access**. AOL is an Internet access and content provider. It does not sell *a la carte* Internet access without its proprietary portal and content.

- **Amusement Parks**. Disney World does not permit visitors to ride Space Mountain *a la carte.* Visitors must purchase access to all of Disney World in order to ride Space Mountain.

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[82] *See NCTA A La Carte Policy Paper* at 9; *Bear Stearns Report* at 4.
[83] *See* Arnold Kling, "Pandora's Bundle," April 5, 2004, available at: (http://www.techcentralstation.com/040504A.html).

- **Cruise Ships and "All Inclusive" Resorts**. These entities bundle lodging, meals, entertainment, recreational activities, and even air transportation to the port of departure. They do not sell the components *a la carte.*

- **Satellite Radio**. Both satellite radio providers, XM and Sirius, offer only a standard broad bundle of radio channels, a combination of some original production channels and some national radio networks. They do not sell their channels *a la carte.*

As with the foregoing examples, bundling, or tiering, is an economic necessity for the sale of niche network services. A broad tier of niche networks is analogous in many ways to a daily newspaper, which is only sold as a bundle of diverse, niche components and not *a la carte.* For instance, *The Washington Post* is a collection of articles and images created by journalists and photo-journalists, some of whom are the newspaper's employees and some of whom are syndicated content providers. *The Post's* editors assemble and package this material into five themed sections of the daily edition (the "A" section, Style, Metro, Sports and Business), which are sold as a tiered or bundled product.

The Post employs the standard format found among daily newspapers. And for the same reason that niche networks are not distributed *a la carte*, *The Post* does not – and cannot – sell the Style section, or any section, *a la carte* or as mini-tiers. A local, Style-only daily newspaper simply is not economically viable – as demonstrated by the fact that none exists. Presumably, if there were a business model for an economically viable local daily Style newspaper, an entrepreneur would step in to meet an unmet consumer demand – but none has.

As with niche networks, widespread circulation is *The Post's* revenue engine. There are not enough daily "Style-only" readers to create the critical mass of readers needed to attract advertising. As with niche networks, advertising is the "value added" that makes the bundled offering economically viable, even though the various sections would not be if sold piecemeal. Just as very few viewers watch all of the networks on their cable or satellite system, very few people read a newspaper from cover to cover. But the bundled product has something for everyone – and there is enough value in at least one or another of the sections to induce great numbers of people to purchase it. This creates wide circulation, which makes *The Post* an attractive medium for advertisers and permits the newsstand price to remain at a sufficiently low level that will deter few people from buying the product, while generating a second revenue stream for *The Post*.

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NBC occasionally covers the final two rounds of a major professional golf tournament, but if NBC proposed to change its programming to an "all golf" format, its advertisers would quickly abandon it for other media. If HBO changed its programming to an "all golf" format, its take-rate would drop from 30 percent to less than three percent within a month. Yet, **Golf** -- which has precisely the same programming format that would lead either NBC or HBO to financial ruin – is a highly successful and popular niche network. Nearly 60 million subscribers receive **Golf** as part of a package of other services for an effective retail channel price of well below $1.00 per month. Some of these 60 million subscribers love **Golf** and watch it regularly, some never watch it, and some tune in occasionally and appreciate the fact that they can. **Golf** could not, and would not, exist as a broadcast network. Nor could **Golf** exist as an *a la carte* premium network; indeed, it started out as an *a la carte* network and nearly perished. But **Golf** thrives as a multichannel network distributed as part of a broad tier of other networks.

There are no "all news" broadcast television networks or "all news" premium networks, but there are a host of national and regional "all news" niche networks.

Similarly, there are no broadcast or premium networks devoted exclusively to tennis, or martial arts, or fashion, or weather, or music, or video gaming. And there are no broadcast or premium networks with their entire programming format targeted specifically to children, or English-speaking Hispanics, or women, or young men, or NASCAR dads.

But such networks – and many more – ***do*** exist as niche video networks. These networks survive, and many thrive, only because there is a platform – the broad tier of bundled networks – that makes it economically possible for them to do so. Congress and the Commission are inquiring about whether this platform should continue to exist in its present form. The question must be put in its proper perspective – do Congress and the Commission want to impose *a la carte* or themed-tier requirements that could cause ***this entire class of networks*** to cease to exist?

IV. AN *A LA CARTE* MANDATE IN ANY FORM WOULD HARM NICHE NETWORKS AND CONSUMERS

A la carte distribution of television programming has superficial appeal to some segments of the public. Some consumer groups appear to believe that subscribers should be able to purchase a limited number of networks *a la carte* from a broad bundle of networks, and that those networks could be purchased at a price "per network" that is roughly proportionate to each network's share of the overall price of the bundle. Under this theory, if consumers currently subscribe to a tiered offering of 40 networks for $30, they instead should be able to subscribe to only their favorite networks for 75¢ each.[84] This perception is based on economic fallacy, but it does much to explain the superficial, and uninformed, appeal of *a la carte* distribution among a part of the public.

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[84] Concerned Woman for America, *Cable Choice is Channel Choice*, poll conducted April 16-19, 2004), available at: http://www.cwfa.org/channelchoice.asp.

The reality and consequences of an *a la carte* requirement would be far different from those advertised by it proponents. An *a la carte* mandate imposed on either MVPDs, or niche networks, or both would have disastrous results for both networks and consumers. These impacts are neither speculative nor conjectural. Rather, Commenters' prediction is based on the decades of experience that their management teams have in developing, launching and operating niche networks. They know the business. They know their viewers' interests and buying patterns. They know what has worked, what will work, and what won't work. Many of them are independent of cable or DBS ownership, and have no vested interest except as programmers who want to see their networks succeed. As a result, the Commission should give great weight to Commenters' analysis of the probable consequences of government intervention in the niche network marketplace.

A. An *A La Carte* Mandate Would Result In Diminished Revenues For Niche Networks

The various proposals for an *a la carte* mandate that have been presented in preliminary form in Congress and elsewhere have been vague and widely disparate. Nonetheless, it is clear that an *a la carte* requirement would not merely "tweak" the economic relationship between MVPDs and networks, but rather would destroy the fundamental business model of niche networks.

In an *a la carte* world, each MVPD subscriber who might choose to subscribe to a network *a la carte* would no longer subscribe to the MVPD's broad tier of services in order to obtain that same network's service. Significantly, each time a subscriber no longer subscribed to the broad service tier, ***all*** of the networks that comprise the tier would lose a subscriber. Thus, as the penetration rate of the broad tier falls, the distribution level of each network in the tier would fall as well.

Networks would not be able to make up this lost distribution through sales of *a la carte* subscriptions. The projected take-rates for networks distributed *a la carte* are remarkably low. Even the ***highest*** *a la carte* take-rates are projected to be only 10 to 20 percent,[85] and those apply only to well-established networks that appeal to a broad audience. A new network or a narrow niche network would have a much smaller take-rate. Indeed, several of Commenters, including some of the most established networks among them, have estimated that they would lose anywhere from ***75 to 90 percent*** of their subscriber base if forced to make their programming available *a la carte* or in themed tiers.

This would result in niche networks suffering a substantial loss in license fee revenue. The natural response of the networks would be to raise their wholesale license fee rates to MVPDs. However, MVPDs, facing strong pressure from subscribers and competitors, not to mention from Capitol Hill and consumers groups, to avoid increases in retail rates, likely would resist attempts by networks to increase their wholesale license fee rates commensurately. Consequently, niche network license fee revenues almost certainly would be reduced, most likely by a significant measure.

The loss of distribution in an *a la carte* world also would dramatically impact the niche networks' second revenue stream – advertising sales. As the Commission has recognized, "[a]dvertising is an important source of revenue for [niche] networks."[86] This conclusion, while true, considerably understates economic reality: advertising

[85] *Bear Stearns Report* at 4, 5.
[86] *FCC Media Studies*, Part 8 at * 26 n. 76.

revenue is ***crucial***. For example, in the case of regional networks, such as **Altitude**, **CSN**, and **CSN-MA**, the loss of both advertising revenues and license fees necessarily would require the regional networks to migrate to premium services. And, as premium services, they would as a general rule not be able to sell advertising because subscribers would not tolerate advertising in premium programming.

Some networks would also suffer a reduction in various ancillary revenues. These would include, for example, revenues from sales of merchandise, home videos, infomercials and web-based product sales.

It is axiomatic that a network cannot survive with only half of the revenue on which its business model was built, especially if that network has planned to invest (on average) 41 percent of its revenue in programming, in addition to its other significant fixed and operating costs. As stated in the *GAO Report*:

> To receive the maximum revenue possible from advertisers, cable networks strive to be on cable operators' most widely distributed tiers. In other words, advertisers will pay more to place an advertisement on a network that will be viewed, or have the potential to be viewed, by the greatest number of people. According to cable network representatives we interviewed, ***any movement of networks from the most widely distributed tiers to an à la carte format could result in a reduced amount that advertisers are willing to pay for advertising time*** because there would be a reduction in the number of viewers available to watch the network.[87]

Moreover, if a network were to drop below a threshold distribution level, it would no longer be a viable medium for national advertisers, and its advertising revenues would become *de minimis*, for several reasons.

For example, an *a la carte* requirement would create "churn" problems for niche networks, a condition that would directly impact a niche network's advertising sales. In an *a la carte* environment, churn is likely to occur for some niche networks based on

[87] *GAO Report* at 35.

seasonal viewing patterns or based on the specific scheduling of special events. The early regional sports networks that launched as *a la carte* services experienced seasonal churn at the end of a successful local professional team's season. Networks such as **Altitude** and **CSN** would not be immune from this, as *a la carte* subscribers might drop the channel at the end of a popular team's season and await the beginning of the next season to re-subscribe. Even a network such as **E!** could be impacted by seasonality. For example, during the "Red Carpet" Season, when **E!** is covering the Golden Globe awards, Grammies, SAG and Oscars in January and February, its viewership is very high. In an *a la carte* world, viewers might "cherry-pick" **E!** just during the Red Carpet Season, and then churn out of the service after two months.

Seasonal viewing and the ongoing churn of *a la carte* subscribers would wreak havoc on the current system of advertising sales for niche networks. Like all national media, advertising on niche networks is sold well in advance of the scheduled flight of spots. Sales are based on the network's prior ratings and the ***predictable*** pattern that on-going research identifies for viewership. Fluctuation of viewership in an *a la carte* world would make it difficult, if not impossible, for Nielsen Research to measure accurately the viewer ratings, *i.e.*, performance of niche networks. Lacking audience predictability, advertising agencies and media buyers likely would move to other media where the results of ad placements, and therefore the reasonableness of 30-second spot rates, could be more accurately predicted and evaluated. Unable to sell ads out into the future, the advertising system for niche networks would be undermined. And what limited advertisements might still be placed on niche networks would likely go to only the very largest of those networks. This problem would be a direct consequence of a niche network's shift from broad tier distribution to *a la carte* distribution.

Finally, based on Commenters' experience in the national advertising business, it can be expected that media buyers and advertising agencies seeking to purchase time on behalf of their advertising clients would find buying ads on *a la carte* niche networks to be too cumbersome and costly. This is because media buyers would have to purchase time on multiple *a la carte* networks to achieve the same level of viewership as on other, more widely distributed media. As a result, ad agencies and media buyers likely would simply seek out other media that could, with one stop, provide the desired audience reach and "impressions." Here too, this problem would be a direct consequence of a niche network's shift from broad tier distribution to *a la carte* distribution.

The Commission has posed questions about both a "pure" *a la carte* mandate and/or a "themed-tier" mandate. However, as the GAO recognized, a "themed-tier" requirement essentially is an "*a la carte*-lite" mandate, and the same harms that would be suffered from an *a la carte* requirement also would be inflicted by a "themed-tier" mandate, only perhaps to a slightly lesser degree or over a somewhat longer time. The GAO reported that "all of the issues associated with an à la carte regime would also apply to minitiers" and that "increasing the number of tiers would result in the same outcome as an à la carte system: a decline in cable network advertising revenue."[88]

In the end, while some increases in networks' wholesale rates probably would occur, they undoubtedly would be insufficient to offset the loss of both subscription and advertising revenues suffered as a result of an *a la carte* requirement. This would result in significantly diminished revenues for niche networks. As explained in the following

[88] *GAO Report* at 37-38.

sections, the effects of this reduced revenue would be felt not only by niche networks but also by consumers in a variety of harmful ways.

B. An *A La Carte* Mandate Would Adversely Impact Niche Networks' Access to Capital Markets

The forced conversion of niche networks to *a la carte* distribution could cause them particularly destabilizing problems in the financial markets. Because early-stage niche networks operate at a loss, generally for anywhere from three to eight or more years from launch, access to capital markets is essential. Indeed, even established and profitable networks often require on-going access to the capital markets to obtain financing for major original programming initiatives, development of new technological enhancements (such as "Video-On-Demand"), or the launch of new, progeny networks.

An *a la carte* mandate would slam the door shut on capital markets and force many niche networks into bankruptcy. Billions of dollars have been invested in these networks, and this sunk capital would be lost if these networks were to fail. The melt-down of the CLEC industry during 2000-2002 provides a recent and vivid image of what can happen to a nascent industry when it no longer has access to capital.[89]

Even a relatively "modest" *a la carte* mandate would drive capital away from niche networks because: (a) *a la carte* distribution would lack the "guarantee" of revenues provided by a network's current distribution contracts (with tier and penetration requirements and/or incentives); (b) without such a guarantee, investors could not be assured of any level of future performance of the network, or even whether an asset would continue to exist for the predictable future; (c) at the very least, the projected return on investment would be reduced; and (d) the investment would become

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[89] *See, e.g.*, Simon Romero, *Investor Jitters for Phone Start-Ups*, N.Y. TIMES ON THE WEB (Dec. 10, 2001).

significantly more unpredictable and risky, causing institutions to flee niche networks for safer havens. Thus, capital that would have gone to niche networks would be diverted to other businesses offering either less risk or higher potential returns, or both. Indeed, even the looming possibility that Congress or the Commission may adopt such a requirement will begin to make it more difficult, and more expensive, for niche networks to attract capital, at a time when capital acquisition for new and established networks already is a daunting proposition, and some proposed networks are being entirely frozen out of the capital markets.

In such circumstances, networks would, at best, find capital more expensive and difficult to obtain, thus raising the cost of networks' development and operations in what already is universally viewed as a challenging and difficult business environment. At worst, niche networks would run out of cash, and would be forced to close up shop. Again, this problem would be a direct consequence of the shift from broad tier distribution to *a la carte* distribution.

C. An *A La Carte* Mandate Would Reduce The Amount Of Original Programming Produced By Niche Networks

The loss of revenue and inability to attract capital are quantifiable consequences of an *a la carte* regime. However, migration to an *a la carte* environment also would have qualitative, more intangible consequences for niche networks and their viewers. Because television networks – whether they are broadcast networks, premium networks or niche networks – spend, on average, approximately 40 to 50 percent of their revenue on programming,[90] there can be little doubt that a reduction in revenues and capital flight caused by an *a la carte* mandate would result in reduced investment in all programming.

[90] *FCC Media Studies*, Part 9 at * 111.

But more importantly, expenditures for ***original*** programming likely would suffer a disproportionate impact.

Niche networks currently spend, on average, over 55 percent of their programming budgets on original, rather than repurposed, programming, and that figure is expected to rise to 64 percent by 2010.[91] But as the Commission has recognized, original programming is both risky and expensive to produce:

> ***Repurposed programming is less risky*** [than original programming] because its relative popularity has been proven during its initial run .… There is a significant risk in developing an original concept and producing it in a way that will appeal to viewers. Program producers often find it difficult to recoup their initial investments in program development. Since ***original production is deficit financed***, the programming must be developed first before it can begin to generate a return on investment.[92]

Given these dynamics, an *a la carte* mandate would likely require a network to forego innovative (but expensive) original programming in favor of less expensive, "safe," repurposed programming – *i.e.*, more re-runs and more "evergreen" programming. This effect would be compounded by the fact that networks, unable to get rating points because of the lack of predictable future audiences in an *a la carte* system, would find it difficult to justify – to their own management, let alone to investors and financial institutions – expenditure of the large amounts often required to produce new, original television series.

For instance, **Golf** currently has more coverage of professional golf tournaments than all other television networks ***combined***. Would a severe reduction in **Golf's** programming budget allow it to continue to cover the LPGA Tour, or the PGA Champions Tour, or the PGA Nationwide Tour? **Tennis** would face similar problems

[91] *Id*.

[92] *Id*. at ** 102-03 (emphasis added).

with coverage of tennis tournaments. Even if **Golf**, for example, could afford to continue to purchase the rights for such events, it nonetheless might face the situation that the significant loss of distribution sustained from *a la carte* carriage – from about 60 million subscribers, down to 5 to 15 million, or even as few as five million, subscribers -- would lead tournament sponsors to deny licensing rights to **Golf** and instead to look for program outlets with greater reach, *i.e.*, mass market networks. Likewise, once it launches, **Martial Arts** would face similar problems with licensing major martial arts tournaments and popular movies. Indeed, each of Commenters would encounter the very same problem in securing the rights to its "marquee" programming. Here again, this problem would be a direct consequence of the mandated shift of niche networks from broad tier distribution to *a la carte* distribution.

Even networks that obtain some of their programming on a barter basis would be impacted by an *a la carte* requirement. In such circumstances, the value to the program supplier of distribution on an emasculated network might be inadequate incentive to continue to provide such programming on such terms, causing it either to demand payment to offset the reduced distribution or simply to take its programs to other television outlets that can guarantee greater distribution. Likewise, in situations where, for example, the promoters of local or regional sports and entertainment events, in order to get larger regional or national exposure, grant regional sports networks such as **Altitude**, **CSN** or **CSN-MA** the right to exhibit the programming for free, reduced viewership due to *a la carte* distribution might drive such promoters either to begin to demand payment for such events or to move the events to television outlets with broader distribution.

In addition to affecting the creation of new national programming, an *a la carte* regime would adversely impact the development of original local and regional programming as well, something entirely contrary to the objectives of Congress and the Commission in promoting and preserving localism.[93] For example, after its launch, **Altitude** intends to produce original local and regional sports programming. With a significantly smaller audience brought on by an *a la carte* regime, **Altitude** simply would not have the resources to create this community-targeted programming.

The impact, industry-wide, of this reduction in spending on original programming would be staggering. In 2003, niche networks invested ***$10.3 billion*** in programming,[94] and much of this was created for networks by program suppliers on a commissioned basis. Over the next seven years, when all niche networks are expected to invest over $111 billion,[95] an *a la carte* mandate would put this investment in jeopardy, and both the quantity and quality of original programming being produced for, and distributed to American viewers by, niche networks would decline radically. Viewers would lose the benefit and enjoyment of new, original programming, and networks would lose the "honey" by which they attract and retain viewers. Beyond the niche networks themselves, the impact would reverberate along the entire supply chain of television

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[93] *See, e.g., FCC Chairman Powell Launches "Localism in Broadcasting" Initiative*, Press Release (rel. Aug. 20, 2003) (establishing a "Localism Task Force" to explore the issue of localism in broadcasting); *Broadcast Localism, Notice of Inquiry*, MB Docket No. 04-233, FCC 04-129 at ¶ 4 (rel. July 1, 2004) (initiating proceeding to explore the localism issue in detail); 47 U.S.C. §. 534(h)(1)(C)(ii) (directing the Commission to "afford particular attention to the value of localism" in market modification proceedings to determine the must carry rights of broadcast stations in particular cable communities); 47 U.S.C. § 531 (giving local franchise authorities right to impose PEG obligations on cable operators, which serves the interest of localism).

[94] *Kagan* at 20.

[95] Cable Television Advertising Bureau, *Cable Networks Will Continue To Invest Heavily In Quality Programming*, available at: http://www.onetvworld.org/?module=displaystory&story_id=783&format=html

production, as networks would have far less money to purchase new, original programming. Here again, this problem would be a direct consequence of the shift of niche networks from broad tier distribution to *a la carte* distribution.

The ability of niche networks to create original and innovative programming would be affected in other ways as well. For example, an *a la carte* mandate would adversely impact a network's resources and ability to attract and hire ***talent.*** By substantially reducing a niche network's revenues, an *a la carte* regime obviously would reduce the amount that the network could spend to hire or attract high-profile athletes, entertainment stars or expert commentators to develop attractive original programming. But the effect of the loss of distribution that an *a la carte* requirement would cause would be more insidious. For, even if a network could continue to pay enough money to retain the desired talent – talent that is essential to the network's efforts to attract and retain viewership – such on-air personalities might choose to no longer be associated with the network. Thus, even if money were not the issue, lower distribution could lead a niche network's high profile talent to forego working with an *a la carte* network in favor of directing their promotional efforts at appearances in other fora, including more widely distributed national mass market television networks. Here again, this problem would be a direct consequence of niche networks' mandated shift from broad tier distribution to *a la carte* distribution.

D. An *A La Carte* Mandate Would Cause Many Niche Networks To Fail

The loss of more than half of their revenues, the flight of capital to finance their development and operations, the loss of key talent, and the inability to fund the production of the original programming necessary to attract and retain viewers, inexorably would, at best, weaken and destabilize most niche programmers and, at worst, cause many of them to fail. As stated in the *GAO Report*,

> programming diversity would suffer under an à la carte system because some cable networks, especially small and independent networks, would not be able to gain enough subscribers to support the network. For example, one network told us that under an à la carte system, fewer networks would remain financially viable and new networks would be less likely to be developed. Three of the cable operators and four of the five financial analysts we interviewed said that smaller networks or those providing *specialty* programming would be hurt the most by an à la carte system.[96]

For example, if a network targets African-Americans, who make up only thirteen percent of the population,[97] how could such a network hope to remain viable as an *a la carte* offering? Black Entertainment Television, which launched in 1980, became one of the great minority media business success stories of the Twentieth Century. BET could not have succeeded without the carriage on widely distributed MVPD tiers that it secured. Even networks directed toward broad niches, such as sports or children's networks, have been found repeatedly to be unsustainable when distributed *a la carte*.[98]

Nor would networks in "best case" scenarios – well-established niche networks that target broader audiences – be spared the devastating effect of a forced shift to *a la carte* distribution. For even those networks would have to become "less niche" and more like mass market broadcast networks in order to attempt to increase their take-rates. The result could well be displacement of the wonderfully diverse array of specialized niche networks that we have today by an entire class of "me too" networks providing general-interest programming that mimics the major broadcasting networks. For instance, **E!**

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[96] *GAO Report* at 36 (emphasis in original).

[97] U.S. Census Bureau, *The Black Population in the United States: March 2002*, issued April 2003, available at: http://www.census.gov/prod/2003pubs/p20-541.pdf.

[98] *See* Section III(B)(2), *supra*.

now reaches 84 million subscribers and is very well established. But **E!**'s programming is designed to appeal largely to young, educated, affluent adults ages 18-49, who make up approximately 67 percent of its "core" viewing audience. **E!** likely would have to broaden its focus to include programming that appeals to adults over 50 and teenagers. Other networks would suffer the same homogenization in the event of adoption of an *a la carte* regime.

For networks targeting more narrow niches, the problem likely would be insurmountable. Tennis enthusiasts make up only 9.6 percent of the adult U.S. population. Moreover, fewer than 85 percent of tennis enthusiasts are MVPD subscribers.[99] Given this very targeted audience, would **Tennis** have any chance of becoming economically viable under an *a la carte* regime? For example, along with the loss of license fees, *a la carte* would put at risk categories of general product advertisers such as General Motors and Coca-Cola. While **Tennis** could perhaps retain "endemic" advertisers, such as Prince and Wilson sports equipment manufacturers, it is very possible that GM and Coca-Cola would seek other avenues for their national advertising because **Tennis'** audience reach in an *a la carte* world might not achieve their marketing objectives. Yet endemics, alone, would not be enough to sustain **Tennis** or any other niche network. A narrow niche program network such as **Tennis** likely would have to overhaul its programming substantially in order to have any chance of survival. Even assuming, for the sake of argument, that it could accomplish such a feat, it would no longer ***be*** **The Tennis Channel** in its present form but, instead, would be a very different network targeting a broader audience segment. Tennis enthusiasts would then have only the same limited programming choices that were available to them before **Tennis** came

[99] Simmons Market Research Bureau, Fall 2003.

along – sporadic coverage of the "Grand Slam" tennis tournaments on the broadcast networks, and occasional coverage of other tournaments on other networks.

In undermining networks' revenue base, an *a la carte* mandate would cause scores of networks to fail, and result in enormous industry disruption. Certainly, some networks would survive the transition – likely the largest, most established and most widely-penetrated, and, in particular, those that appeal to the broadest demographic base. For instance, in 2001, the top ten niche networks generated more than 50 percent of all advertising revenue, while the bottom 80 networks received less than ten percent.[100] These economic resources may give a very select group of networks, among the industry's top-20, the ability to adapt, change and survive, although their dependence on large amounts of advertising dollars may also signal their own particular vulnerability to the effects of *a la carte* distribution.

The prognosis for smaller niche networks, including "digital networks" that launched in the mid- to late-1990s and are carried primarily on cable systems' "digital tiers,"[101] would be particularly grim. Just as the expanded basic service tier was the primary "incubator" of analog networks in the 1980s and 1990s, the digital tier is the primary incubator of digital networks today. Digital networks tend to have a more narrow, niche focus, and many are barely subsisting today on very limited advertising revenues and virtually no license fees. These networks' survival depends upon the long-term viability of the digital tier. Their business plans assume that, as the penetration levels of the digital tier increase, and as the networks become established with viewers, they increasingly will be able to attract advertising revenues to supplement whatever

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[100] *Kagan* at 5.
[101] By the use of the term "digital tiers," Commenters are referring to both digital basic and expanded digital basic tiers offered by MVPDs.

license fees they have been able to negotiate. As they become established with viewers and advertisers, and increasingly able to invest in programming, they will become financially viable and even more valued sources of programming for viewers.

Digital programming tiers are now, on average, 30 percent penetrated and steadily rising.[102] Any regulatory *a la carte* action that erodes the penetration level of digital programming – or even modestly slows its growth rate – would derail the business plans of all of these digital networks, and even those of many analog networks, causing numerous niche networks to fail.

E. An *A La Carte* Mandate Would Render It Virtually Impossible To Launch A New Niche Network

In 1980, many thought the notion of a 24-hour news network was absurd. But by 1991, the entire world was glued to CNN to watch Operation Desert Storm unfold live. Likewise, in 1994 the idea of a network devoted entirely to golf seemed far-fetched to many. But **Golf** is now available to nearly 60 million viewers and golf enthusiasts scarcely can remember life without it.

In the 1980s and the 1990s, the path to success for a niche network was clear: obtain as much distribution as possible on the expanded basic service tier (or DBS equivalent), build an audience with unique but inexpensive programming, attract advertisers with low advertising rates and inexpensive access to a niche audience, invest those advertising revenues in original programming and incrementally higher value programming to expand the audience size, and eventually, after many years, become an established, profitable network. Today, with digital tiers having become the primary "incubators" of new networks, the path is the same, but much more daunting as

[102] *Cable Developments* at 7, 11.

competition has increased, MVPD bandwidth has grown increasingly unavailable, and networks have become targeted toward smaller and smaller niches. Nonetheless, while starting a new programming network has never been easy, or cheap, or safe, or fast, it always has been, and remains, ***possible*** for a network with good ideas and a sound business plan to become successful. An *a la carte* mandate would change that entirely. Two reasons stand out in particular.

First, if niche networks are subjected to an *a la carte* or an "*a la carte*-lite" requirement, it will be difficult, for the reasons stated above, for new ventures to construct business plans that work (*i.e.*, that can develop sufficient revenues to predictably yield a reasonable return on investment without undue risk) and, therefore it will be well nigh impossible to attract capital investment on reasonable terms.

Second, in the broad-tier distribution world that niche networks have populated for the past three decades, a network's strategy always has been to secure carriage on the broadest tiers possible, and then to establish itself with viewers as a trusted brand name. That strategy is challenging but possible when a network is part of a broad tier of networks, and viewers who habitually "surf" channels are able to drop in to sample the network's programming.[103] The overwhelming majority of cable and DBS subscribers are not "appointment viewers," but rather, creatures of interest who treat their multichannel system like a shopping mall, window shopping (or "grazing") until they find something they want to sample. When they do – in the words of one of Commenters' seasoned programming executives – they "tune in, find it, and fall in love"

[103] For example, a 2002 research study by the Cable & Telecommunications Association for Marketing found that 63 percent of analog tier and 65 percent of digital tier customers use channel surfing as the most used method to ***find out*** what is on television. Moreover, nearly 50 percent of cable customers rely on channel surfing to ***decide*** what to watch.

with a program, which then brings them back to the network time-after-time. This is especially important for networks that have not yet broadly established their brand or even their programs' brands. Such drop-in visits, combined with a satisfying viewing experience, lead to the "upward spiral" on which successful networks are built: brand recognition and loyalty, increased distribution, greater "reach" and "impressions," higher advertising and licensing revenues, and more resources to build the network's programming and marketing activities. In contrast, that upward spiral would be virtually ***impossible*** in an *a la carte* distribution universe, where the take-rates of new networks would be extraordinarily low, as few viewers would pay to subscribe to unknown and untested products, and "surfing" or "grazing" would be impossible.

A concrete example of these harms befalling a network is obvious in **SíTV's** business plan. **SíTV** is currently perceived as a narrow niche network. However, it plans to build its distribution to serve what will some day be a multi-ethnic majority viewing audience.[104] Any government intervention leading to an *a la carte* or themed-tier mandate will make that important goal impossible for **SíTV** to achieve.[105] This is

[104] In the top-40 Hispanic television markets, 41 percent of the television viewers are Latino or African-Americans between the ages of 18 and 34, the target audience of **SíTV**. In the top-10 Hispanic television markets, over 47 percent of viewers fall within **SíTV's** target audience demographic. *See Sí What You've Been Missing!*, (research prepared by **SíTV** based on 2000 U.S. Census Data (2003)).

[105] An *a la carte* mandate would have other adverse impacts on **SíTV**, on other ethnic niche networks, and on diversity in America, including minority hiring and minority television production. Ethnic-oriented program networks tend to have higher than average minority representation in their work force. In the case of **SíTV**, more than 70 percent of their employees are Latino, African-American or Asian. Networks such as **SíTV** are also important venues for minority produced programming, which sadly is underrepresented in television programming today. For example, the hiring records for the top 40 prime-time drama and comedy television series for 2002-2003 reveal that only two percent were directed by Latinos, five percent by African-Americans and one percent by Asian-Americans. An *a la carte* mandate would close the door on new venues for minority creative expression, such as **SíTV**.

because as a new network, **SíTV** cannot survive as an *a la carte* service on its own. It must be part of a widely distributed bundle of other niche networks that draws in viewers.

Apart from the consequences of this phenomenon to new niche networks, the real victim would be the American viewing public. With the pipeline for new niche networks closed, the public would be deprived of the vibrant diversity of voices and viewing sources that increasingly has characterized the multichannel programming industry for three decades and that, but for an *a la carte* mandate, would have been expected to continue to provide new, diverse niche program networks.

F. An *A La Carte* Mandate Would Put Upward Pressure On License Fees

Because their business models are premised on widespread distribution, the monthly license fees that niche networks charge MVPDs are remarkably low.[106] Moreover, as the *GAO Report* found:

> Cable operators offset some of the cost of programming through advertising revenues. In fact 3 cable networks with whom we spoke said that they believe at least *half* of the license fees cable operators pay to carry their networks are recouped through the sale of local advertising time that cable networks allow the cable operators to sell, which typically amounts to 2 minutes per hour.[107]

An *a la carte* mandate would change this equation dramatically. The reduction in distribution that would follow from a network's conversion to *a la carte* necessarily would reduce the usefulness (*i.e.*, value) of "local ad avails" given by the network to a cable operator. To offset this loss, the operator would be compelled either to raise its retail rates for the service, causing fewer subscribers to select that network, or to reduce

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[106] *GAO Report* at 23; *see infra*, Section III(B)(1)(c).
[107] *Id.* at 24 (emphasis in original).

the wholesale price it pays to the network, thereby cutting into the network's available funds for programming and other essential activities.

Moreover, as the GAO observed, networks themselves would have to raise their license fees.

> To compensate for any decline in advertising revenue, network representatives contend that cable networks would likely increase the license fees they charge to cable operators. In particular, we were told by many cable networks that under an à la carte system, the cost burden of cable television would become less reliant on advertising revenues and much more reliant on *license fees* that would likely be passed on to consumers.[108]

In addition to being required to raise per-subscriber license fees to offset lost subscription volume and lost advertising revenues, niche networks would also likely find it necessary to gravitate to more expensive general entertainment programming, of the sort offered by premium networks, in order to capture and retain viewers, putting further upward pressure on license fees. In the case of regional sports networks, which already pay high rights fees to obtain high value sports programming, they either would have to cut back on the number of games televised or even reduce the number of teams covered from the region.

Of course, the government might attempt to step in and regulate niche networks' wholesale license fees or MVPDs' retail rates, or both. Indeed, there is no question that an *a la carte* mandate is a very short, and very slippery, slope to price regulation in some form. In 1992, Congress ventured into the quagmire that is cable television price regulation. It quickly (and wisely) retreated, but only after it inflicted considerable harm on cable operators, niche networks and ***consumers***.

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[108] *Id*. at 35 (emphasis in original).

Price regulation in the niche programming market would be equally unmanageable. The dollar figure prescribed for license fees in a distribution agreement is only a small part of the "consideration" exchanged between MVPDs and networks. For instance, MVPDs and networks exchange other cash payments, such as launch support and marketing incentives, and non-cash incentives, such as local ad avails, periods of free service, preferred tier and channel positioning, and the like. How could Congress or the Commission conceivably regulate "prices" in such a relationship? *A la carte* pricing would require the Commission to return to the same morass as the cost-of-service regulation that it used to regulate cable operators' CPST rates in the 1990s, a direction that we suspect neither Congress nor the Commission wants to move in light of past lessons learned.

G. An *A La Carte* Mandate Would Cause Niche Networks To Incur Enormous Administrative and Marketing Costs

In its *A La Carte* Notice, the Commission inquired about the costs that ***MVPDs*** might bear if an *a la carte* mandate were imposed.[109] The Commission failed to inquire about the costs that ***networks*** would be forced to bear, or the enormous upheaval that would result from an *a la carte* mandate. In fact, the costs would be enormous, and the industry upheaval would be unprecedented.

1. Marketing Costs

Niche networks presently market their services primarily to corporate MVPDs, as opposed to directly to individual viewers who presently find new networks primarily through surfing and grazing, which cost a network nothing. MVPDs, in turn, promote broad packages of networks to their subscribers, making direct marketing by networks to

[109] *A La Carte* Notice at 2.

subscribers considerably less important. Networks' marketing to MVPDs is a relatively inexpensive undertaking when compared to direct consumer marketing.

In an *a la carte* environment, however, instead of working with several hundred MVPDs, a national niche network would be required to market itself directly to more than ***96 million MVPD households*** in order to increase its take-rate. Given that surfing and grazing no longer would be possible, networks would be forced to resort to magazines, newspapers, radio, billboards, television, bill-stuffers, telemarketing, direct mail, commissioned sales, and local grass roots promotions, all of which are terribly expensive forms of marketing compared to what niche networks presently need to do to reach potential subscribers. It goes without saying that a network's marketing costs would skyrocket.[110] Whereas marketing costs presently make up only a small fraction of a network's operating budget, that figure could be expected to increase monumentally as a result of an *a la carte* regime. Funds for these new marketing costs would likely either be diverted from a network's programming budget – thereby reducing the quality and quantity of programming the network could deliver – or be derived from higher wholesale license rates, which ultimately would be passed on to the consumer. Of course, consumers also would face mass marketing and direct advertising efforts from an entirely new class of advertisers, one that has remained fairly quiet to date.

An *a la carte* requirement also would subject niche networks to huge churn-related marketing costs. A network would be forced to bear the additional cost of

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[110] Although some regional niche networks already pay for tune-in advertising within the market, in an *a la carte* world, consumer advertising expenditures would have to increase dramatically for regional niche networks in the migration from advertiser/license fee supported tiered distribution to a per channel premium services regime. In addition to tune-in advertising for existing customers, regional niche networks would have to spend significant sums on customer acquisition.

constantly ***reacquiring*** subscribers who "churned" out of the network's service. One of Commenters estimated that, with a national churn rate of perhaps two percent per month, *a la carte* niche networks essentially would be forced to replace 24 percent of their subscribers each year. The cost of marketing to, and acquiring, such customers on a continuing basis would be too heavy for most networks to bear.

Added to this would be the "back office" costs that MVPDs would incur in having to keep track of, and process orders for, subscribers who frequently churned in and out of *a la carte* networks. Still additional costs would be incurred in dealing with inevitable viewer confusion over how to deal with an *a la carte* regime, given the inadequacy of existing set-top boxes and electronic program guides ("EPGs") to enable subscribers to easily navigate through the process of selecting scores of individual channels from among hundreds of *a la carte* networks. This undoubtedly would lead to a far greater number of calls by subscribers, forcing MVPDs and networks to hire many more customer service representatives to staff massive call centers, which neither the networks nor the cable operators can afford to support. In the end, all of these additional expenses would lead to higher wholesale and/or retail rates, the burden of which ultimately would be passed on to networks and subscribers.

2. Renegotiation of Distribution Agreements

The affiliation agreements that govern Commenters' relationships with their MVPD distributors, like those of virtually all other niche networks, are founded upon a basic assumption of broad distribution. Many of the most important provisions of those agreements are tied, in one way or another, to that assumption. Adoption of an *a la carte* requirement would interfere with the parties' performance of their obligations under, and enjoyment of the benefits of, these agreements, and throw the parties' relationships into chaos.

For example, these agreements generally provide for some kinds of up-front consideration – whether in the form of launch support payments, periods of free service, or marketing support – that have already been paid by networks to MVPDs in contemplation of carriage on a broadly distributed tier for a period of years, including renewal periods. If adoption of an *a la carte* mandate were to interfere with the remaining performance of such agreements, including contemplated renewal periods, billions of dollars in value for the niche networks built on long term distribution would vaporize. The parties would be forced to resolve extraordinarily difficult and controversial issues regarding the refund of such consideration. Arbitrations and/or litigation could well be involved. This scenario would be played out for each niche network with every one of its MVPD distributors, and across the entire industry for hundreds of niche networks who have agreements with hundreds of MVPDs. The cost to any one network would be very substantial, and the industry-wide cost of such proceedings would be staggering, with such costs ultimately being passed on to consumers.

Apart from untangling past agreements, all niche networks would be forced to negotiate new, entirely different, agreements with their MVPD distributors based on an assumption of *a la carte* distribution. Negotiation of the rates and terms governing distribution is inherently complicated, often contentious, and always time-consuming. Here too, the cost to individual networks of negotiating brand new agreements with every one of its MVPD distributors would be substantial. Moreover, in many instances, where networks' distribution agreements with cable MSOs were only "hunting licenses" pursuant to which networks had negotiated individual carriage deals at the system level, networks would have to renegotiate such arrangements on a system-by-system basis. Under either scenario, the cost to the industry as a whole would be gigantic, with such costs again being passed on to consumers.

Even if an *a la carte* requirement were to be initiated on a rolling basis as existing affiliation agreements expired, niche networks and their MVPD distributors would not be spared of these huge administrative and transactional burdens. For, in contrast to merely renewing existing broad-tier affiliation agreements with MVPD distributors, niche networks would have to negotiate with each of their distributors brand new *a la carte* agreements with different economic terms and related provisions, a task of substantially greater magnitude and cost that would have to be repeated by every one of the several hundred niche networks with each of their MSO distributors and, in many cases, with their cable affiliates' individual systems.

At the end of the day, an entire industry would have to be restructured, and consumers would bear the ultimate cost of that unnecessary task.

V. A "VOLUNTARY" *A LA CARTE* MANDATE IS UNNECESSARY AND WOULD FUNDAMENTALLY ALTER THE RELATIONSHIP BETWEEN NETWORKS AND MVPDS, TO THE DETRIMENT OF NETWORKS AND CONSUMERS

The Commission has inquired about the possible impact of a law mandating that "programmers, in addition to the currently offered packages, [be] required to allow MVPDs to offer their programming on an *a la carte* or themed-tier basis if the MVPD chose to do so?"[111] In addition to such a requirement being unnecessary and unworkable,

[111] *A La Carte* Notice at 2.

the consequences of such a mandate would be disastrous for niche networks and detrimental to consumers.

A. Niche Networks Cannot Be Offered Both *A La Carte* And As Part Of A Broad Tier Of Networks

In the *A La Carte* Notice, the Commission asked: "Can the same universe of channels be offered on an expanded basic basis, as well as an *a la carte* or themed tier basis?" The simple answer to this question is "no." A change in a network's distribution is not merely a matter of "tweaking" the economic relationship between a network and an MVPD. Rather, as discussed in Section III, a network's distribution arrangement directly impacts every aspect of its operations, including its business model, content and format.

For instance, if Showtime were offered both *a la carte* and as part of expanded basic tier, Showtime's program content would have to be changed fundamentally. Some of Showtime's programming, while suitable for distribution as a premium channel, might be considered too mature for inclusion on a channel carried on the expanded basic tier. Furthermore, the recent-release movies that Showtime carries generally are not licensed to be displayed on an expanded basic service tier. The same problems would apply whether Showtime was offered either (a) by a single MVPD both as part of expanded basic and *a la carte*, or (b) by some MVPDs *a la carte* and other MVPDs as part of an expanded basic tier. In either case, Showtime's existing content package would have to be modified in order to make it suitable, or economically viable, for distribution both as an *a la carte* service and on an expanded basic tier. Yet, in doing so, that would impair its value as an *a la carte* premium network. Thus, imposition of a new distribution requirement by government edict would force a change in the format and content of the network, and a fundamental change in its relationship with its MVPD distributors.

The same would be true if niche networks like Commenters had to make their programming, which is geared for widespread distribution on broadly penetrated tiers, suitable for *a la carte* distribution as well. For example, **Wisdom** is a niche audience network designed to be distributed as part of a broad tier of services. **Wisdom's** programming appeals to a niche audience of viewers interested in programming about spirituality, health, empowerment and better living. If the government were to give MVPDs the right to unilaterally dictate **Wisdom's** manner of distribution, **Wisdom** would face great difficulty in creating a content package that ***simultaneously*** would appeal to its niche audience ***and*** attract a mass audience, which it would need in order to increase its take-rate as an *a la carte* service. In other words, **Wisdom** would face difficulty in creating a single content package that is economically viable for simultaneous distribution in both modes.

Indeed, it is for this very reason that, with very rare exception, a network will employ a universal (or virtually universal) distribution format not only on each MVPD platform but on all MVPDs across the country. Just as HBO universally is a premium *a la carte* network, **Wisdom** is a tiered niche audience network on every MVPD that distributes its programming. If **Wisdom** were to attempt to simultaneously be a premium and a niche service, it would be a classic example of trying to please everyone and pleasing no one at all.[112] The notion that Congress or the Commission, by mandate,

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[112] The hybrid distribution model that attempts to combine *a la carte* distribution and advertising, termed "mini-pay," has never been commercially successful, although it has been attempted a number of times, including by **Golf**. Such networks had "trouble building distribution under that model and migrated away from it … Mini-pays either melted down to ad-supported tiers or were grafted onto paid premium packages." Linda Moss, *Viacom Plans a Gay-Themed Mini-Pay*, MULTICHANNEL NEWS (Jan 14, 2002). Viacom plans to launch a gay-themed mini-pay network under the name "Logo" in 2005. *See* Mike Reynolds & R. Thomas Umstead, *MTVN's Logo a Go in February*, MULTICHANNEL NEWS (May 25, 2004). However, Viacom has selected a specific and

could "create" an entirely new class of networks that must simultaneously operate (and be economically viable) in both distribution modes is completely unrealistic.

B. Government Intervention Is Unnecessary

Networks and MVPDs have a symbiotic relationship: networks need MVPDs to distribute their content to subscribers, and MVPDs need quality programming to make their offerings attractive to subscribers and to compete effectively with other MVPDs. But while MVPDs and niche networks share the common goal of making programming available to subscribers at affordable rates, both networks and MVPDs operate in competitive markets that constrain their actions.

A legislative mandate that would empower MVPDs to require niche networks to allow simultaneous *a la carte* and broad tier distribution of their services is premised on the erroneous assumption that niche networks hold an imbalance of power over MVPDs and that government intervention is needed to "protect" MVPDs from niche networks. This simply is not the case. While many niche networks would argue that it is in fact MVPDs, as gatekeepers to viewers, who have the leverage, the market for programming is extraordinarily competitive and fully and effectively functioning.

Of course, from time to time, negotiations between MVPDs and programmers break down and a high-profile "battle of press releases" ensues.[113] Even in these extraordinary situations, after the dust has settled, the parties reach a mutually-beneficial

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universal distribution plan. Viacom will not attempt to be a premium network on some MVPD platforms and a niche network on others. Rather, it will attempt to launch Logo as a mini-pay network on all MVPD platforms. Moreover, Logo will be marketed to a demographic – gays and lesbians – that feels particularly excluded by broadcast, premium and niche networks, and is more akin to ethnic and foreign language groups who are much more willing to purchase a channel – indeed, the only channel that is -- addressed to their very particular demographics.

[113] *See, e.g., ESPN, Cox Go Head To Head Over Rates As NCTA Tries To Referee*, COMMUNICATIONS DAILY, Oct. 24, 2003.

agreement (and each declares victory). Although such battles are quite rare, their high-profile nature may give the misleading impression that the negotiation process between niche networks and MVPDs is generally "broken." That is not the case. Indeed, for each high-profile battle, literally thousands of distribution agreements are negotiated between MVPDs and niche networks. This is not surprising, given the symbiotic relationship between niche networks and MVPDs, and the market constraints that generally keep programmers and distributors from imposing unreasonable conditions on one another.

The distribution chain for video programming is not "broken." On the contrary, dynamic competitive forces have allowed MVPDs and niche networks to negotiate mutually-beneficial distribution agreements that enable niche networks to produce diverse, high-quality programming that MVPDs can distribute to the public at affordable prices without government intervention. This process of market-based negotiations is working, and working remarkably well. Under these circumstances, it is inconceivable that Congress or the Commission could devise a law or regulation that would improve this process and would not create a host of unforeseen and destructive consequences.

C. A "Voluntary" *A La Carte* Mandate Would Fundamentally Alter The Relationship Between Networks And MVPDs, To The Detriment Of Networks And Consumers

Distribution agreements between niche networks and MVPDs generally are extraordinarily complex. The negotiation process generally involves "give and take" on a variety of issues until the parties settle on a mutually-beneficial relationship.

One of the most important terms to be negotiated between a niche network and its MVPD distributor is the tier placement of the network's service on the MVPD platform; indeed, this provision is the ***essence*** of the distribution agreement. If Congress and the

Commission intervene in the contractual distribution relationship to establish a regulation requiring that niche networks allow MVPDs the option to "voluntarily" carry the network either exclusively on an *a la carte* basis, or simultaneously as an *a la carte* service and as part of a broad distribution tier, they would be altering, from the niche networks' perspective, the most material element of consideration in the distribution agreement – the manner of carriage clause. Yet the remaining terms of the bargain seemingly would go unchanged by this regulation and would create an imbalance in the contractual relationship that is simply unworkable.

Moreover this adjustment in the original balance of the contract would put the programmer firmly between a rock and a hard place. For example, if an MVPD "voluntarily" elected *a la carte* carriage of a network, in turn, the network, because of the lost distribution, might feel compelled to alter its programming format to attract a larger audience in order to survive. However, in doing this the niche network could be putting itself in breach of the content guarantee provisions of the distribution agreement. These provisions are very precisely drawn in negotiations with MVPDs, who insist that the network with whom they bargained stay true to its origins.[114]

Clearly, neither Congress nor the Commission should enact a law or regulation that would create so serious an imbalance in the marketplace that it inevitably would cause the market to fail.[115]

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[114] Indeed, even a subtle shift in programming sometimes can lead to litigation. *See, e.g.,* R. Thomas Ulmstead, *Time Warner Counters AMC*¸ MULTICHANNEL NEWS, Dec. 8, 2003 (Time Warner filed countersuit against AMC saying it was within its rights to terminate AMC under the distribution agreement, "which said the channel would consist of 'classic motion picture films' and related programming. In recent years, the network has added more contemporary movies such *as Alien Resurrection* and *An American Werewolf in Paris*.").

[115] Indeed, such laws would be a dramatic shift from the position taken in the 1992 Cable Act, when Congress sought to protect niche network programmers and to encourage the growth of

D. A "Voluntary" *A La Carte* Mandate Is At Odds With The Fundamental Principles Of Copyright Law

Niche networks such as Commenters have created copyrighted audiovisual works – television programming – intended to be distributed as part of a broad tier of other niche networks, and have entered into distribution agreements with MVPDs around the country that specify that their programming will be distributed only as part of a broad tier of services.

If, for example, an MVPD were to sell **OLN** *a la carte*, or sell individual programs shown on **OLN** as a video-on-demand service, or package **OLN** with two other networks as a sports-themed mini-tier, it would be either changing the content of **OLN's** programming or depriving **OLN** of the ability to profit from its work. Such actions would violate **OLN's** rights under copyright law and its distribution agreement.

The right of a content creator to specify the manner in which its work is distributed to the public and to profit from its efforts is a fundamental principle of copyright law. As the Supreme Court has found, "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."[116] And federal copyright law specifies that owners of copyrighted audiovisual works have "the exclusive right to do and to authorize" others to "display the copyrighted work publicly."[117]

A "voluntary" *a la carte* mandate would deprive niche networks, who are copyright owners or licensees, of the right to decide how their content is distributed and

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independent, niche networks by adopting Section 616 of the Communications Act, 47 U.S.C. § 536. This provision prohibits vertically-integrated program networks from discriminating by giving affiliated MVPDs more favorable terms than unaffiliated MVPDs.

[116] *Harper & Row v. Nation Enterprises*, 105 S. Ct. 2218 (1985).

[117] 17 U.S.C. § 106.

displayed to the public, and as such, is at odds with fundamental principles of copyright law.

VI. AN *A LA CARTE* MANDATE IS THE WRONG SOLUTION AND WILL BE COUNTER-PRODUCTIVE

An *a la carte* mandate is advertised by its proponents as a "cure all" for a host of alleged problems. In fact, an *a la carte* mandate will cure none of these problems, and will exacerbate some. Moreover, an *a la carte* mandate actually would ***restrict*** consumer choice at a time when "on demand" video programming is on the horizon.

A. Media Concentration And Vertical Integration

While an *a la carte* mandate is presented by one organization as a tool to combat the "abuse of market power" by "media giants,"[118] the reality is that it is not the answer to concerns about media concentration or vertical integration. As an initial matter, there already are a host of laws and regulations that directly address these issues.[119] It is ironic that an *a la carte* mandate, a giant step toward price regulation, is being touted as a solution to vertical integration. In fact, vertical integration of programming networks has significantly declined since Congress began to phase-out rate regulation of the expanded basic tiers in 1996.[120]

More importantly, an *a la carte* mandate would harm ***all*** niche networks – even those that are not vertically-integrated or owned by a "media giant." Indeed, such a

[118] *ACA Supports Action on Media Conglomerates*, American Cable Association Press Release at 2 (May 20, 2004) ("*ACA Press Release*").

[119] *See, e.g.*, 47 U.S.C. § 548 (which ensures that MVPDs have non-discriminatory access to vertically-integrated programming and prohibits unfair practices in programming agreements); 47 U.S.C. § 533(f) (which imposes limits on the number of subscribers reached by a single MVPD, and the number of channels that may be occupied by affiliated programming); and 47 C.F.R. § 76.504 (which limits carriage of vertically-integrated video programming services to 40 percent).

[120] In 1995, 51 percent of premium and niche program networks were vertically-integrated, but in 2003, only 33 percent were vertically integrated. *Tenth Competition Report* at ¶ 142.

mandate would harm independent networks disproportionately as those networks, without the backing of an MVPD, would likely find it exponentially more difficult, if not impossible, to secure financing and negotiate distribution agreements in an *a la carte* world. Given this reality, it is reasonable to ask whether Congress or the Commission should enact a law or regulation that likely would have the effect of ***increasing*** media concentration, by reserving to large media companies the ability to launch a new network.

Some proponents of an *a la carte* mandate assert that it is needed to shield against the alleged "forced carriage of programming networks."[121] But what is termed "forced carriage" actually is no more than incentives given by established networks to an MVPD to distribute its progeny network, a common strategy known as "brand extension." The Commission has recognized the value of brand extension in launching a new network:

> A recent trend in cable origination programming is brand extension. Brand extension helps cable networks, ***and ultimately operators***, create significant additional value from new networks by extending the brand of existing networks. As such many cable operators have decided to carry derivative or "multiplex" programming of the established cable networks. The Commission first reported this trend in the 1998 MVPD Competition Report, when it noted that there was a trend by existing programming service providers, regardless of whether they were vertically integrated with MSOs, to create derivative programming services or brand extensions of their program offerings.[122]

Brand extensions have assisted Discovery to launch several new "digital" Discovery networks (*e.g.*, Discovery Kids, Discovery Science, etc.), which have helped to increase penetration of cable operators' digital tiers. **Style** is a brand extension of **E!**, and **iLifetv** is a brand extension of **INSP**. If niche program networks had been denied the ability to offer MVPDs incentives that make it more attractive for an MVPD to carry an

[121] *ACA Press Release* at 2.
[122] *FCC Media Studies*, Part 9 at ** 105-06 (emphasis added; footnote omitted).

established network's progeny network, many new networks might not have been launched, and many planned networks might be shelved.

To be sure, distribution negotiations can become contentious and "hardball" tactics sometimes are employed. The system is certainly not perfect. But there are 229 national niche program networks today, and only a handful with the clout even arguably to dictate distribution terms to MVPDs. To the extent that any network could achieve "market power" and engage in anticompetitive conduct, MVPDs have ample remedies before this Commission and under antitrust laws. An *a la carte* mandate, which would harm ***all*** niche program networks, clearly is not the appropriate solution.

B. Indecency

It is inconceivable that the federal government would enact – or even seriously consider – legislation that would mandate that *The Washington Post* distribute – in addition to its regular edition – a "family friendly" edition, yet an *a la carte* mandate is seen by some as a "step toward protecting the American family from indecency" and "objectionable" programming."[123] The enormous First Amendment implications of such a mandate are addressed below in Section VII(A).

An *a la carte* mandate is not the answer to indecency concerns. Television viewers already have the ability to block any channel of programming they do not want to receive,[124] and a variety of tools at their disposal to do so. Cable operators make channel and program blocking technology available to subscribers at no additional

[123] *Rep. Deal's Statement on "A La Carte" Television Programming Options for Families*, Press Release of Rep. Nathan Deal, at ¶ 2, 2004 ("*Rep. Deal Statement*").

[124] In fact, very few cable television subscribers wish to block channels with "objectionable" programming, even though they can do so at no additional cost. However, one cable operator in Los Angeles had approximately 1,500 requests for channel blocks: *nearly two-thirds for public and government access channels*, and only 100 for MTV.

charge,[125] and both DBS providers offer the same capability.[126] Parents also have V-chip technology available to them if they prefer to block specific types of objectionable programming, rather than an entire channel. Furthermore, in addition to existing technological means to block programming, consumers have access to the television rating system with on-screen and encoded ratings to assist viewers in choosing suitable programming.[127]

Proponents of an *a la carte* mandate assert that "the consumer is still being required to pay for something he does not want to receive."[128] However, as discussed in Section III(B)(4), this argument ignores the powerful effects of advertising revenues as external funding that enables extraordinarily ***low*** retail prices for all networks included within the tier. Thus, although some subscribers would choose not to order or pay for some niche networks' programming in an *a la carte* world, the advertising revenues generated by having a broad tier of diverse networks result in the subscriber not actually paying any more for the entire bundle (including the unwanted channels) than he would if he bought only the desired channels on an *a la carte* basis. Moreover, these same advertising revenues allow niche networks to deliver a wide variety of family friendly programming at a low price.

Given that most networks', including Commenters',[129] programming does not contain adult, indecent or TV-MA content, the indecency issue is inapt to them. Yet ***all*** niche networks would suffer harm as a result of an *ala carte* mandate. Is it fair or

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[125] National Cable & Telecommunications Ass'n, *Cable Puts You In Control*, April 2004, available at: http://www.ncta.com/pdf_files/IssueBriefs/CPYiC.pdf.
[126] *Id.*; *see also* "*Sachs Announces Initiative to Ensure Availability of Controls*," COMMUNICATIONS DAILY (March 24, 2004).
[127] *See, e.g.*, www.tvguidelines.org/ratings.asp.
[128] *Rep. Deal Statement* at ¶ 3.
[129] The highest content rating of any of the Commenters' programming is TV-14.

appropriate to burden the majority of networks, such as **INSP** and **Wisdom**, who do not present indecent programming, with an "overkill" solution apparently targeted at only a handful of networks – especially when parents already have the complete ability to block any objectionable programming or networks at no cost?

C. MVPD Retail Prices

While proponents of an *a la carte* mandate frequently present it as a way to control rising costs of cable and satellite programming,[130] as mentioned previously, the GAO found that monthly license fees average only 13.5¢ per network – a figure that includes license fees of sports networks – and that cable operators are able to recoup approximately half of these fees through "local ad avails."[131] Moreover, the *GAO Report* strongly rebuffed the notion that an *a la carte* requirement would curb increases in MVPD retail rates; rather, the GAO found in its careful analysis of the issue that an *a la carte* mandate could have ***precisely the opposite effect***:

> Adopting an à la carte approach … could require additional technology and ***impose additional costs on both cable operators and subscribers***. Additionally, this approach could alter the current business model of the cable network industry wherein cable networks obtain roughly half of their overall revenues come from advertising. A move to an à la carte approach could result in ***reduced advertising revenues and might result in higher per-channel rates*** and less diversity in program choice.[132]

In other words, an *a la carte* mandate would have the effect of forcing niche program networks from an "inexpensive television" business model (50 percent advertising subsidized) to "expensive television" business model (0 percent advertising subsidized).

[130] *See, e.g.*, Letter from Sen. John McCain to FCC Chairman Michael Powell, May 19, 2004.
[131] *GAO Report* at 23, 24; *see* Section IV(F), *supra.*
[132] *GAO Report* at 30 (emphasis added).

D. The Market Will Expand Consumer Choice If Not Impeded by Government Action

When viewed in proper perspective, it is clear that consumers have abundant choices through which they can receive niche program networks. Consumers have a choice of at least three MVPDs – a cable provider, DirecTV and DISH Network – and an increasing number have an alternative wireline or wireless alternative provider.[133] Each MVPD, in turn, has a variety of programming packages. For instance, DISH Network's America's Top 60 package costs only $29.99 per month (approximately $1.00 per day) and DirecTV's Total Choice package costs $39.99 (approximately $1.30 per day). Cable customers can choose to subscribe to a basic service tier, or even a basic service tier and premium channels. Broad tiers of niche networks are entirely optional, although the overwhelming majority of cable customers choose to subscribe. Indeed, as quickly as cable operators have deployed broad digital tiers, in response to DBS competition and consumer demand, consumers have quickly embraced these offerings, even though they typically do not include the most popular niche program networks. The success of these digital tiers is a vivid demonstration of the effects of competition among MVPDs – rather than government intervention – working to benefit consumers.

Furthermore, absent government intervention, niche networks will be able to contribute to the development of innovative new programming options such as HDTV

[133] *Tenth Competition Report* at ¶¶ 88-90. Indeed, the two largest telephone companies, SBC and Verizon, have both announced plans to provide video services. *See* SBC Communications, Inc., SBC Communications Announces Advances In Initiative To Develop IP-Based Residential Network For Integrated Video, Internet, VoIP Services (Jun. 22, 2004). *See also Petition Of Verizon For Declaratory Ruling Or, Alternatively, For Interim Waiver With Regard To Broadband Services Provided Via Fiber To The Premises* in WC Docket. No. 04-242, at 2 (filed Jun. 28, 2004).

and Video-On-Demand, which niche program networks, including Commenters, are embracing. On the VOD front, for example:

- **G4techTV** currently has two separate VOD services it offers. The first consists of two to three hours each week of short segment programming for video gamers. The network refreshes 10 to 15 percent of this programming every week. The second consists of 10 hours per week of general category programming for the technology enthusiast that is refreshed 20 percent each week.
- **Golf** currently offers 10 hours per week of VOD programming that is refreshed 20 percent each week. The programming consists of instructional shows and **Golf's** classic programming such as *TGC Academies, Celebrity Golf*, *Profiles of a Pro* and *Playing Lessons.*
- **OLN** provides 10 hours of VOD programming per month, which is refreshed 25 percent per week. **OLN's** VOD offerings are provided with a new theme each month. For example, February 2004 focused on *Field and Stream* content, and March 2004 was "Timber Month," including programming such as *Lumberjack Challenge* and *Lumberjack and Ironjack WC.*
- **SíTV** plans to offer VOD services over MVPD platforms. In anticipation of deploying HDTV, VOD and other new technology services, all of **SíTV's** original programming is produced in HDTV format. Since it's launch earlier this year, **SíTV** built a library of 114 hours of original HDTV programming.

At this point, VOD is not a profitable business for niche networks. Many networks have agreed to give MVPDs content at no charge for VOD platforms. Niche networks recognize that on-demand distribution – be it VOD over an MVPD platform or "video streaming" over the Internet[134] – holds great promise. Heavy-handed regulation of the manner in which networks distribute their content to the viewing public will only limit the ability of MVPDs and networks to respond to consumer demands. Specifically, an *a la carte* mandate likely would disrupt this process and ***delay*** the development of VOD and other new services by depriving niche networks of the resources needed to fund these new opportunities.

VII. AN *A LA CARTE* MANDATE WOULD NOT PASS CONSTITUTIONAL MUSTER

While it is impossible to analyze fully the constitutional ramifications of a legislative or regulatory proposal in the abstract, it is abundantly clear that an *a la carte* mandate ***in any form*** stands little chance of passing constitutional muster. Given the enormous ramifications of such a mandate on niche networks, it is inconceivable that Congress or the Commission could devise an *a la carte* mandate that would not violate, in some combination, either (a) the First Amendment, (b) the Equal Protection Guarantee, or (c) the Takings Clause.

A. First Amendment

An *a la carte* mandate would not constitute mere economic regulation, but would instead compel niche networks to change the ***content*** of their speech.[135] Content-based

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[134] *See Tenth Competition Report* at ¶ 106.

[135] For example, **Style** has chosen to primarily speak about issues of fashion, design and lifestyle, and to do so as part of a broad bundle of other niche networks. An *a la carte* mandate would force **Style** to choose between either abandoning its programming format entirely or suffering inevitable financial ruin: **Style** either would have to become an HBO-like service, featuring more general entertainment programming, or **Style** would perish. Without question, an *a la carte* mandate is ***content-based*** regulation.

regulations are subject to strict scrutiny,[136] and will be upheld only if the government can demonstrate ***both*** a ***compelling governmental interest*** and that the regulation is the ***least restrictive means*** to accomplish this interest. None of the grounds advanced in support of an *a la carte* mandate (*e.g.*, rising cable prices, indecency, or alleged abuses by "media giants") remotely approach a compelling governmental interest. Moreover, an *a la carte* mandate, which could eliminate an entire class of television networks, is arguably the ***most restrictive*** means to accomplish any of these alleged interests. An *a la carte* mandate, in any form, would violate the First Amendment.

B. Equal Protection Guarantee

The Equal Protection Clause requires that similarly-situated persons receive equal treatment.[137] An *a la carte* mandate presumably would apply to a distinct class – niche networks – and not to broadcast and premium networks, despite the fact that all provide television programming to the public primarily over MVPD platforms. A law that creates a distinct class of persons and regulates those person's fundamental (*e.g.*, First Amendment) rights, will be upheld only if it is ***necessary*** to promote a ***compelling*** governmental interest.[138] An *a la carte* mandate would survive neither prong.

In addition, how could Congress conceivably justify expressly ***granting*** broadcast networks the right to dictate their manner of distribution on MVPDs' platforms (*i.e.*, must-carry or retransmission consent rights[139]), while expressly ***denying*** that same right

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[136] *See, e.g., United States v. Playboy Entertainment Group*, 529 U.S. 803, 814 (2000) ("As we consider a content based regulation, the answer should be clear: The standard is strict scrutiny.").
[137] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).
[138] *See, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968).
[139] *See* Sections 325, 614, and 614 of the Communications Act, codified at 47 U.S.C. §§ 325, 534, and 535, respectively. *See Equity Bcstg. Unveils Ethnic Multicast Service*, 24 COMMUNICATIONS DAILY 132, Warren Communications News, July 12, 2004, at 6 ("Equity Bcstg. is launching a new TV service offering digital multicast programming for Hispanic and Asian-

to niche networks? Likewise, how could Congress conceivably justify requiring a niche network such as **Style** to be sold *a la carte*, while not requiring a premium network such as STARZ!, which generally is sold as a bundle of fourteen multiplexed channels, to do the same?

C. Takings Clause

The Supreme Court consistently has recognized that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[140] Where, as here, a regulation affects property rights, courts evaluate a takings claim by assessing three factors – the economic impact of the regulation, its interference with reasonable investment backed expectations, and the nature of the governmental action.[141] In the context of an *a la carte* mandate, this analysis is straight-forward: many niche networks cannot, and will not, exist if they are forced to be distributed *a la carte*.[142] Even those networks that manage to survive would suffer a fundamental change to their current business plans and a devastating economic impact.[143] An *a la carte* mandate would impair the niche networks' "reasonable investment backed expectations,"[144] in violation of the Fifth Amendment's Takings Clause.

American viewers. The service is set to bow officially next month on Univision affiliates in Ore. and Amarillo, Tex., and on an ABC affiliate in Wyo.").

[140] *Bernier v. Bernier*, 176 B.R. 976, 989 (D. Ct. 1995) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

[141] *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979).

[142] *See* Section IV(D), *infra.*

[143] *Id*.

[144] *See Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) ("a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to constitute a 'taking'"); *see also Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984)(Supreme Court considered whether the disclosure of trade secret information submitted under statute that guaranteed confidentiality "formed the basis of a reasonable investment-backed expectation" so as to constitute a taking).

VIII. CONCLUSION

Niche networks, in general, and digital networks, in particular, are a growing and vibrant industry. These networks have flourished since 1996, when Congress signaled the phase-out of expanded basic tier pricing regulation. Together with their analog ancestors, digital cable services have revolutionized television and brought choice and diversity to television consumers.

An *a la carte* mandate would transform this industry overnight, with disastrous consequences: billions in sunk capital would be lost; thousands of high-salary "knowledge industry" jobs would evaporate; ripple effects would be felt along the entire supply chain of television programming; and an industry that once was dynamic and expanding would contract. Sadly, television viewers would have available to them far fewer networks, offering far less programming, and far less diverse niche programming in particular, than they once enjoyed. Such an outcome is unthinkable, not only because it would be antithetical to core First Amendment principles promoting a diversity of voices and ideas, but also because it would represent a one-hundred-eighty degree shift in fundamental communications law policy, which over the last seventy years has encouraged the development of diversity of program choices for American consumers.

In a recent essay, Alfred Liggins, Chairman of TV One Network, concisely stated the value of diverse programming:

> One of the great promises of cable is that with its multi-channel universe, we subscribers would not only have programming designed for us but we would also have the ability to share other cultures, communities, styles and viewpoints. Would I order Lifetime, Fox News and HGTV in an a la carte world? Probably not, but I am glad I don't have to make that decision. I love the fact that my cable company makes those channels available to me now to watch when I choose. Such is the case with TV

> One. While our programming is designed primarily for African-Americans, the rest of society would enjoy watching us as well.[145]

The United States is a nation of niches, eclectic tastes and widely divergent interests. Every person has his or her own niche, and most have at least several. Niche networks, by definition, do not appeal to everyone, but each is enormously valuable to its target audience. These networks, in essence, mirror the image of our society's unique and varied cultural interests and backgrounds.

Niche networks – and ***only*** niche networks – have a business model that allows them to offer niche programming and remain economically viable. Most of these networks could not, and would not, exist if they were forced, either by Congress, the Commission or MVPDs, to depart from that business model and be distributed on an *a la carte* basis. Does Congress or the Commission really want to eliminate this enormously valuable and diverse class of networks?

The answer to that question must be "no." Accordingly, for the foregoing reasons, Commenters request that the Commission report to Congress that mandating *a la carte* distribution, or any version of *a la carte* distribution, is not necessary, would raise,

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145 Alfred Liggins, *Destroying Diversity*, Washington Times, Apr. 12, 2004, available at: http://www.washingtontimes.com/op-ed/20040411-103924-6431r.htm.

not lower prices to consumers, is of questionable legality, and indisputably is not in the public interest.

Respectfully submitted,

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July 15, 2004

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THE GOLF CHANNEL
INSPIRATIONAL LIFE TELEVISION
THE INSPIRATION NETWORK
MARTIAL ARTS CHANNEL
OUTDOOR LIFE NETWORK
SíTV
STYLE NETWORK
THE TENNIS CHANNEL
WISDOM TELEVISION

Altitude Sports & Entertainment
1000 Chopper Circle
Denver, Colorado 80204
www.altitude.tv

Altitude Sports & Entertainment (Altitude) is a regional sports and entertainment network based in Denver, Colorado. Scheduled to debut in September 2004 as a 24-hour a day service, Altitude will serve approximately all or portions of 10 states in the Rocky Mountain region. Programming will include coverage of the Colorado Avalanche, Denver Nuggets, Colorado Mammoth, Colorado Rapids, Colorado Springs Sky Sox, Colorado Eagles, Big Sky Conference and the Air Force Academy, as well as other local and regional sports and entertainment programming.

- Programming to include: Local and regional professional, collegiate and amateur sporting events (live and taped); local and regional community and entertainment programming.
- Professional sports programming to include: Colorado Avalanche (NHL); Denver Nuggets (NBA); Colorado Rapids (MLS); Colorado Mammoth (NLL); Colorado Springs Sky Sox (PCL); Colorado Eagles (CHL)
- Collegiate and amateur sports programming to include: Air Force Academy; Big Sky Conference; Big XII Conference; Mountain West Conference; Rocky Mountain Athletic Conference; Western Athletic Conference; University of Northern Colorado; Metropolitan State University; Colorado High School Athletic Association.
- Other programming to include: Studio shows; highlight shows (sports-oriented); community and entertainment productions (ballet, concerts, festivals, travelogues, etc.).
- Percentage of Original Programming: 50%
- Percentage of Acquired Programming: 50%

- Founded and owned by: KSE Media Ventures, LLC
- CEO Jim Martin
- Service will launch in September 2004
- Current Number of Employees: 42
- Other Forms of Media: Internet, Radio

Casino & Gaming Television
3960 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89109
www.cgtv.com
"Your Best Bet for the World of Gaming!"

Casino & Gaming Television (CGTV) is the first 24-hour entertainment and information channel devoted to the millions of gaming lifestyle enthusiasts. CGTV is a mirror on the leisure phenomenon of this generation, an all-day VIP pass to the fun, excitement and aspirational lifestyle that is on every American's doorstep. CGTV will launch in late 2004 and offer original programming on casino and gaming events and tournaments in exciting destinations worldwide as well as instruction and information about games. The Network will also bring the music, magic, variety and specialty shows found on casino stages and open the world of casino resort destinations to its viewers and share experiences and entertainment that viewers might not otherwise experience.

- Original shows include: *Gaming Central*, *Main Stage* (broadcasts of stage shows and behind-the-scenes features), *The Player* (viewer makeover by professional gambler), *Second Stage*, *Sammy Maudlin @ the Movies*, *Indulgence*, *Who Wants to Be a Show Girl*, *Dusk til Dawn*, *Defending Your Night*, instructional shows on games such as *C.G.U.*, *Great Casinos of the World* and *CGTV Sports Book*
- Target Audience: 21-34 year old males

- Founded by: Co-Chairmen Robert A. Carlsson and David P. Hawk
- President and CEO: Nickolas J. Rhodes
- Service to launch in late 2004
- Services include: Cable, Internet

Comcast SportsNet
3601 Broad Street
Philadelphia, Pennsylvania 19148
http://philadelphia.comcastsportsnet.com

Comcast SportsNet is a 24-hour basic regional cable sports network, offering fans comprehensive coverage of professional teams, local sports news and more sports talk programming, with an unprecedented eight to ten hours of live sports programming per day. Comcast SportsNet is televising over 300 live professional events in 2004, including Philadelphia Flyers, 76ers and Phillies games, as well as coverage of local college football and basketball, and professional boxing.

- Current shows include: *SportsRise*, *SportsDay*, *Spotlight*, *Daily News Live*, *SportsNite*, *The Angelo Cataldi Show*, and *Golf Shots.*

- President and CEO: Jack L. Williams
- Date Service Began: October 1997
- Service includes: Comcast SportsNet (Mid-Atlantic) and launch of Comcast SportsNet (Chicago) in October 2004, Internet
- Number of Subscribers: 3 million (as of December 2001)

Comcast SportsNet (Mid-Atlantic)
7700 Wisconsin Avenue
Bethesda, Maryland 20814
http://midatlantic.comcastsportsnet.com

Comcast SportsNet (Mid-Atlantic) is a 24-hour a day regional sports network serving the Mid-Atlantic, featuring unsurpassed coverage of Orioles baseball, Capitals hockey, Wizards basketball, DC United soccer, collegiate events (the ACC and CAA), and other events of regional and national interest, in addition to Fox Sports Net programming. Select games are also offered by the Network in high definition. Comcast SportsNet (Mid-Atlantic) is located in the Mid-Atlantic region and understands the importance of being a part of the community, undertaking the initiative to interact with viewers by providing and sponsoring community events.

- Current programming includes: *SportsRise*, *SportsNite*, and post-game shows such as *PostGame Live*.

- Owned by Comcast Corporation
- Executive Vice President and General Manager: Sam Schroeder
- Date Service Began: April 1994
- Services include: Cable, Internet
- Number of Subscribers: 4,400,000 (as of October 2003)

NETWORKS

E! Entertainment Television
5750 Wilshire Boulevard
Los Angeles, California 90036-3709
www.eonline.com
Enjoy the Show!

E! Entertainment is the world's largest producer and distributor of entertainment news and lifestyle-related programming. The Network operates E! Entertainment Television, the 24-hour network with programming dedicated to the world of entertainment; The Style Network, the 24-hour network where life gets a new look; and E! Online, located at www.eonline.com. E! Entertainment Television features programming dedicated to the world of entertainment, offering compelling celebrity interviews, talk shows, news, docudramas, behind-the-scenes specials, comedy, movie previews and the most comprehensive coverage of the entertainment industry's awards shows.

- Current programming includes: *The E! True Hollywood Story*, *E! News Live*, *It's Good To Be, Love Chain, 101 Entertainment Specials, Live from the Red Carpet*, *High Price of Fame*, *Howard Stern*, and *Wild On*.
- New shows for 2004 include *Dr. 90210*, *What the…? Awards*, and *Scream Play*.
- Percentage of Original Programming: 100%
- Acknowledgements and Accolades include: Five Daytime Emmy nominations and one win for "*Talk Soup*" for the 1994-1995 season; Prism Award, (spotlighting an entertainment industry company/organization for its efforts to support not-for-profit anti-drug programs or projects) in 1998, 1999, 2002, 2003; Gracie Award, (honoring electronic media for positive and realistic portrayal of women in entertainment programs) – 1998, 1999, 2000, 2001, 2003; Telly Award, 2002, 2003; Mobius Award, 2003; Primetime Emmy Nomination for *The E! True Hollywood Story* in 2001 and 2002, and numerous Daytime Emmy nominations, as well as an IMOGEN nomination in 2000.
- Target Audience: Adults 18-49
- Ratings Information: TV-14, TV-PG

- Owned by a joint venture between subsidiaries of Comcast Communications Corporation and The Walt Disney Company
- President and CEO: Ted Harbert
- Date Service Began: June 1990
- Number of Employees: Together with the Style Network, 1,000
- Brands include: the Style Network, E!Online and E! Entertainment Radio
- Number of Subscribers: 85 million as of July 2004

G4techTV
12312 West Olympic Boulevard
Los Angeles, CA 90064
www.g4techtv.com

G4techTV is the only 24/7 television network plugged into every dimension of games, gadgets, gear and gigabytes. The channel was formed by the May 2004 merger of two television channels - G4 and TechTV. G4 was originally launched in April, 2002. Available to more than 44 million cable and satellite homes nationwide, G4techTV's target audience is young adults 12-34 who are passionate about the ever changing world of entertainment and technology.

The G4techTV network features all original programming dedicated to the games, gear, gadgets, and geniuses behind the top video, computer, online and wireless games. Shows include tips and tricks for the latest games; an interactive talk show; a news show that separates hoaxes from the hype; and a lifestyle program that features celebrity gamers from film, TV, music and sports.

- Current programming includes: *X-Play*, *Filter*, *Cheat!*, *The Screen Savers, Players, Sweat, Anime Unleashed, Unscrewed with Martin Sargent, Icons and Pulse*.
- Special Programming includes: Each year, G4techTV produces a blockbuster video game award show. Called, "*G-Phoria – The Award Show 4 Gamers*," the 2004 television event will be hosted by celebrity pin-up Carmen Electra and her rock-star husband Dave Navarro. The 90-minute show honors the year's hottest video games, stars, music and trends that define the gamer lifestyle.
- Percentage of Original Programming: 100%
- Acknowledgments and Accolades include: Promax & BDA Award for on-air design – 2004.
- Target Audience: 12-34 year olds

- G4techTV is majority owned and managed by Comcast Corporation
- Charles Hirschhorn, former President of Walt Disney Television and Television Animation, is the President and CEO of G4techTV.
- Date Service Began: May 2004
- Number of Employees: approximately 300
- Types of Service: Cable, Internet
- Number of Subscribers: 44 million

The Golf Channel
7580 Commerce Center Drive
Orlando, Florida 32819-8947
www.thegolfchannel.com

The Golf Channel is the first and only television network devoted exclusively to golf, 24 hours a day. Golf Channel viewers have access to more live golf coverage than all other networks combined in addition to private instruction from golf's top teaching professionals and up-to-the minute golf news and statistics every day.

The Network brings an extensive blend of PGA Tour, Champions Tour, LPGA, Nationwide Tour, USGA, PGA of America, European Tour, Canadian Tour and PGA Tour Australasia competition; instruction with world renowned teaching professionals; *Golf Central*, an award-winning nightly golf news show; *Golf Talk*, a show featuring today's and yesterday's golf heroes and personalities, such as Arnold Palmer; *The Sprint Pre and Post Game*, a personality driven show featuring a preview and recap of the week's tournament action; celebrity interviews; video tours of the world's great courses and specials.

- Current shows include live golf coverage of the Champions Tour, LPGA, Nationwide Tour, USGA, PGA of America, European Tour, Canadian Tour and PGA Tour Australasia competition, *Golf Central*, *Golf Talk* and the Sprint Pre and Post Games.
- Average Original Programming Hours Per Day: 18
- Average Acquired Programming Hours Per Day: 6
- Target Audience: Golfers of all ages
- Ratings Information: 100% TV-G

- Owned by Comcast Programming Holdings, division of Comcast Corporation
- Founded by: Joseph E. Gibbs and Arnold Palmer
- President: David Manougian; CEO: Jeff Dilley
- Date Service Began: January 1995
- Number of Employees: 350
- Types of Service: Internet
- Number of Subscribers: 60,379,000 as of July 2004

Inspirational Life Television
7910 Crescent Executive Drive, 5th Floor
Charlotte, North Carolina 28217
www.ilifetv.com

Inspirational Life Television is a 24-hour a day Christian lifestyles network bringing its viewers practical and inspirational programs on better finances, health, families, relationships, marriages and more. Inspirational Life Television is the best in programming for children of all ages, and includes a special block for teens, exclusive and original music concerts, movies, sports, documentaries and exciting family entertainment. The Network additionally dedicated 45 hours a week to the growing Hispanic community.

- Current programming includes: *Artists Talent Search*, *Battle for Marriage – Imminent Vote*, *Finger Food Café*, *Sportsweek*, *The Wait of the World*, and *Tennessee's Wild Side*.
- Target Audience: Viewers who embrace inspirational values
- Ratings Information: TV-G

- Parent Company: The Inspirational Network, Inc.
- President and CEO: David Cerullo
- Date Service Began: June 1997
- Number of Employees: Together with The Inspiration Networks, 250
- Number of Subscribers: 6 million (as of January 2004)

The Inspiration Network
7910 Crescent Executive Drive, 5^{th} Floor
Charlotte, North Carolina 28217
www.insp.com

The Inspiration Network is a 24 hour-a-day Judeo-Christian network with unique programming for viewers who embrace inspirational values. The Network features original and exclusive music, children's programs and a wide variety of different ministry programming with a true diversity and ethnic balance. The Inspiration Network features programming on marriage and family, and life-enriching programs that positively impact people's lives emotionally and spiritually.

- Current programming includes: *The Bedbug Bible Gang*, *The DJ Club*, *Steelroots*, *Replay*, *The Al Denson Show*, *Gaither Homecoming*, *Gospel Music Southern Style*, *Celebration Series,* and *Reel INSP*.
- Target Audience: Viewers who embrace traditional family values
- Ratings Information: TV-G

- President and CEO: David Cerullo
- Date Service Began: September 1991
- Number of Employees: 250
- Parent company to The Inspirational Life Television
- Services include: Cable, Internet
- Number of Subscribers: 21 million (as of January 2004)

Martial Arts Channel
P.O. Box 20
Columbus, New Jersey 08022
www.martialartscentral.com

The Martial Arts Channel (MAC) is a new 24-hour, advertiser supported, digital television network that connects viewers to the world of Martial Arts like never before. MAC provides a comprehensive connection to personal development through an "info-tainment" medium that heightens awareness of Mind, Body and Spirit for viewers of all ages. This dynamic multimedia platform promotes the diverse styles, cultures and historical perspectives behind the Martial Arts, while providing a consistent stream of programming that inspires, instructs, motivates and entertains millions of people worldwide.

MAC's objectives also include promoting the diverse styles, cultures and historical perspectives behind the Martial Arts, while providing a consistent stream of programming that inspires, instructs, informs, enlightens and entertains millions of people worldwide.

- Programming will include: *Fit 4 Life*, *MAC Live*, *Spirit of the Dragon*, *Self Defense 101*, and *Inside Martial Arts*.
- Target Audience: 12-49 year olds

- The Martial Arts Channel is a subsidiary of Breakthrough Communications, LLC
- Founded by: R. Anthony Cort
- Chairman and CEO: R. Anthony Cort
- Service will launch in late 2004
- Services include: Martial Art Channel, MAC Live (live theatrical performances), and MAC Gear (merchandising).
- Associated with other Breakthrough Communications entities such as MAC Live, Martialartscentral.com, The Dragon's Den, MACares, and Breakthrough Management Group.

The Outdoor Life Network
281 Tresser Boulevard, 9th Floor
Stamford, Connecticut 06901
www.OLNtv.com
Out You Go!

Outdoor Life Network is the leader in outdoor adventure and action sports television and is the only network dedicated to people who appreciate the outdoors: the drama, the escapism, the competition of outdoor adventure sports. Now in more than 59 million homes, OLN is the home of the Tour de France and the ultimate resource for people interested in the outdoor lifestyle. The Network offers exclusive programming in areas including Outdoor Adventure, Action Sports, Field & Stream and Bulls & Rodeo.

- Current programming includes: the *Tour de France*, *Summer Gravity Games*, *Winter Gravity Games*, *ASP World Championship Surfing*, *Bill Dance Outdoors*, *Fishing with Roland Martin*, *Professional Bull Riders*, NASCAR *Outdoors*, *Fly Fishing Masters*, and *The Lance Chronicles*.
- New shows in 2004 include: *Outside Magazine's Ultimate Top Ten*, *Saturn's Gravity Files*, *Countdown Courage 25* and *Cowboy 101*.
- Acknowledgments and Accolades include: 2004 Brand Builder Award, Emmy Awards for *Adventure Quest* and *Raid Gauloises*
- Target Audience: 18-49 year old males

- Outdoor Life Network is a division of Comcast Corporation
- President: Gavin Harvey
- Date Service Began: July 1995
- Number of Employees: 132
- Service includes: Cable, Internet
- Number of Subscribers: 59 million as of July 2004

SíTV
3030 Andrita Street, Building A
Los Angeles, California 90065
www.sitv.com

SíTV is a fresh irreverent, English-language Latino cable network that connects with young viewers through vibrant and relevant programming made just for them. This 24-hour network delivers a mix of original and acquired programming including the latest in entertainment, lifestyle, talk, comedy, classic series and feature films, as well as irreverent reality programming that pushes the boundaries of the genre. SíTV goes beyond tradition by catering to today's English-speaking Latinos who consume English media, but still want shows that speak to their Latino roots.

The Network's mission is to deliver authentic and original programming in English while portraying Latinos in non-stereotypical roles. SíTV delivers entertaining programming on subjects that are important to young Latino and multicultural audiences whose culture is an integral part of their identity.

- Current Programming includes: Original: *The Drop*, *The Rub*, *Latino Laugh Festival: The Show*, *Urban Jungle*, *Styleyes*; Acquired: *American Family*, *Resurrection Blvd. Greetings From Tucson, Urban Latino, Malcolm & Eddie, Queen of Swords, New York Undercover, Senior Year*
- Shows Under Development include: *Spin Control*, *Inside Joke*, *Not-So-Foreign Filmmaker's Showcase*, *Breakfast, Lunch & Dinner*
- Acknowledgments and accolades include: 1998 NCLR Alma Award for Special Achievement, 1998 Imagen Foundation Award finalist for Café Ole, 2001 Imagen Foundation Award for Primetime Television Comedy, 2001 Nosotros Golden Eagle for Outstanding Comedy Series, 2003 Imagen Foundation Best Children's Non-Animated Television and 2004 Education Foundation's Award for Valued and Continued Support of Education and Cultural Appreciation.
- Percentage of Original Programming: 50%
- Percentage of Acquired Programming: 50%
- Target Audience: Adults 18-34

- Co-Founded by: Jeff Valdez, Chairman and Bruce Barshop
- Date Service Began: February 2004
- Number of employees: 120
- Services include: Cable, Internet
- Number of Subscribers: 7.8 million

The Style Network
5750 Wilshire Boulevard
Los Angeles, California 90036
www.stylenetwork.com
"Where Life Gets a New Look"

The Style Network, as part of the E! Networks, is the only 24-hour network that features a full slate of original series and specials that run the gamut of the lifestyle genre. The Network brings to its viewers the very latest looks in fashion, the newest trends in hair and makeup, top designers, models of the moment, the most beautiful homes, and unique ideas for entertaining and travel. Based in Los Angeles, the Style Network currently counts 36 million subscribers.

- Current programming includes: *A Second Look*, *Area*, *The Brini Maxwell Show*, *Clean House*, *Fashiontrance*, *Guess Who's Coming to Decorate?*, *How Do I Look?*, *Modern Girl's Guide to Life*, *New York Nick*, *Style Court*, *Style Star*, *The Look for Less*, *Whose Wedding Is It Anyway*, and *You're Invited*.
- New programming in 2004 includes: *Ultimatum*, *Hotspot*, *Love's a Trip*, and *Diary of an Affair*.
- Percentage of Original Programming: 90%
- Percentage of Acquired Programming: 10%
- Target Audience: Adults 18-49
- Ratings Information: TV-14, TV-PG

- Owned by a joint venture between subsidiaries of Comcast Communications Corporation and The Walt Disney Company
- President and CEO: Ted Harbert
- Date Service Began: October 1998
- Number of Employees: Together with E! Entertainment, 1,000
- Brands include: E! Entertainment Television, E!Online and E! Entertainment Radio
- Number of Subscribers: 36 million (as of July 2004)

The Tennis Channel
2850 Ocean Park Boulevard, Suite 150
Santa Monica, California 90405
www.thetennischannel.com

The Tennis Channel is the 24-hour cable television network devoted to tennis and other racquet sports, and provides unparalleled coverage of the game, its elite championships and its superstar athletes. The network's comprehensive coverage includes telecasts of the US Open Series, ATP Masters Series, top-tier WTA Tour championship competitions, Davis Cup by BNP Paribas, Fed Cup and Hyundai Hopman Cup. The Tennis Channel also showcases instruction from the finest teachers, legendary matches, in-depth profiles of the greatest players, analysis and news, the latest on equipment, and tennis getaways.

The network has been supported throughout the tennis industry since its inception, including such leaders as global sports company IMG, the TIA (Tennis Industry Association), the ATP (men's professional tennis), the WTA Tour (women's professional tennis), the International Tennis Federation, the United States Tennis Association, the United States Professional Tennis Association, Wilson Sporting Goods and *Tennis* magazine.

- Current programming includes: live tennis tournaments, news, classic matches, one-on-one interview programs, game analysis, skills instruction and more comprehensive coverage of badminton, racquetball, platform tennis and squash than anywhere else in the United States. Original series include: *No Strings*, *Center Court with Chris Myers*, *Open Access* and *Tennis Insiders*. The network also features regular documentary series, *Net Films*, and instructional programming such as *On Court with USPTA.*
- Target Audience: Adults 18-49

- Founded by: Steve Bellamy, President, and David Meister, CEO and Chairman of the Board
- Date Service Began: May 2003
- Number of Employees: 70
- Partnerships with TIA, USTA, ATP, WTA Tour, ITF, USPTA, *Tennis* magazine, International Table Tennis Federation, U.S. Paddle Association, Professional Squash Association, badminton's team cups, Intercollegiate Tennis Association and World TeamTennis, among others.
- Number of Subscribers: Tracking toward 8 to 10 million households in fourth quarter 2004.

WISDOM TELEVISION

mind body spirit earth

2481 John Nash Boulevard
Bluefield, West Virginia 24701
www.wisdommedia.com

WISDOM Television is the first and only 24-hour television network offering information and entertainment to the expanding worldwide community interested in personal and professional growth, health and wellness, global issues and a variety of spiritual and intellectual viewpoints. The Network brings together a broad array of thought-provoking and entertaining programming that guides viewers through their own personal discovery of self and the world around them.

Regardless of age, gender, race or geography, people are looking to enrich and improve their lives – this is the audience that WISDOM Television knows and serves.

- Current shows include *Wai Lana Yoga*, *FoodWise*, *Health Choices*, *Conversations With Remarkable People*, *INNERVIEWS*, *WISDOM Workshops*, *WISDOM at Work* and *Saving The Endangered Species*.
- New shows for 2004 include: *Wisdom's Way with Guy Finley*, *Sedona Now*, *Inside Wisdom*.
- Percentage of Original Programming: 56%
- Percentage of Acquired Programming: 44%
- Acknowledgments include: The Museum of Broadcast Communications' 2001 addition of WISDOM Television documentary, *A Gathering of Shamans,* to its DocuFest series. The Museum also included other original WISDOM Television documentaries in its documentary archives such as *Eye of the Spirit*, *The Power of Silence, Rhythm of the Heart* and *Saving Grace: Children and Spirituality*.
- Target Audience: 18-34 year olds
- Ratings Information: 10% TV-PG, 90% TV-G

- Founded by: Bill Turner
- President and CEO: Cindy Sheets
- Date Service Began: July 1997
- Number of Employees: 32-35
- Service provided by WISDOM Media Group includes: WISDOM Television, WISDOM Radio and WISDOM Internet
- Number of Subscribers: 6,500,000

CERTIFICATE OF SERVICE

I, Debra Holland, Secretary of Cole, Raywid & Braverman, L.L.P., do hereby certify that on this 15th day of July, 2004, true and correct copies of Joint Programmer A La Carte Comments have been sent as follows:

1. By electronic filing with the Federal Communications Commission via the internet at http://www.fcc.gov/e-file/ecfs.html.

2. By messenger on the 16th day of July, 2004 to the following:

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Chairman
Federal Communications Commission
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Washington, D.C. 20554

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Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jonathan S. Adelstein
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445 12th Street, S.W.
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Debra Holland

Debra Holland, Secretary