

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

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

To: Chief, Media Bureau

REPLY COMMENTS OF COURTROOM TELEVISION

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August 13, 2004

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SUMMARY

The vast majority of comments confirm that government requirements to provide à la carte or themed tiers would destroy existing cable networks, discourage the emergence of new networks, disrupt business models, and lead to higher prices for consumers. In the unlikely event that any consumers realize a benefit from à la carte or themed-tier carriage, it would be only those who view the least amount of cable television and who already have a low-cost lifeline option available. No commenter offered a substantive showing for how à la carte rules would pass constitutional muster, nor could any such showing be presented.

However, some commenters used this proceeding to advocate reinstatement of cable rate regulation, which was an utter failure during the time it operated. Proponents of an à la carte regime demand rate controls because otherwise the price for each channel set by the market is many times that of providing channels in a bundle. Such demands ignore the fact that rate regulations adopted under the Cable Act of 1992 had significant adverse effects on the development and launch of new programming services, ultimately requiring a series of remedial corrective measures. Following years of loosening, reworking, and otherwise restructuring its rate regulations to minimize their restrictive impact on cable systems and cable network development, the Commission ultimately allowed those regulations to lapse. It should not consider reinstating them here, or re-animating them under the rubric of à la carte rules.

Neither the fact that a version of à la carte was encouraged briefly by cable rate regulation in the U.S., nor that à la carte exists in a limited way in Canada support imposition or consideration of à la carte requirements. Examples of prior or existing à la carte offerings cited by à la carte proponents do not demonstrate that à la carte requirements are feasible or desirable. Nor is the fact that some cable operators experimented with à la carte in response to the market-altering impact of rate regulation an indication that adopting à la carte mandates is sound economic or regulatory policy. À la carte made sense only under rate regulation because the government had interfered with market forces to create an artificial environment in which cable operators were desperate and à la carte was worth considering.

The fact that à la carte options are available on a limited basis in Canada does not support an argument that government mandates to compel or facilitate à la carte and “themed-tier” services are feasible for the U.S. market. À la carte is available in Canada on the digital tier, and only after consumers subscribe to the equivalent of not only the U.S. basic tier, but also the U.S. expanded basic tier. Canada is also a poor example for the U.S. market for several reasons: it is a secondary market for U.S. programmers, the Canadian market is much smaller than the U.S. and divided along language lines, and Canadian cable operates under a regulatory scheme that differs significantly from the U.S. scheme and includes protectionist rules for Canadian-originated programming. It

is not surprising that, given the lack of value and limitations on choice found in Canada's à la carte alternatives, very few subscribers partake of the à la carte option.

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Courtroom Television Network LLC (“Court TV”), by its attorneys, hereby files its reply comments in the above-captioned proceeding. Court TV explained in its initial comments that the major economic issues raised in the Public Notice already have been explored thoroughly by the Commission, the Government Accounting Office (“GAO”), and independent economists, each of which concluded that à la carte rules would not help consumers and would seriously harm programmers. Court TV showed that rules affecting the distribution of multichannel programming are unnecessary in a market that works efficiently to offer consumers abundant, diverse video programming and that, even if adopted as a purportedly “voluntary” system, they would fail to survive constitutional review under either strict or intermediate scrutiny.

The vast majority of the comments confirm that requirements to provide à la carte or themed tiers would destroy existing cable networks, discourage the emergence

of new networks, disrupt business models, and lead to higher prices for consumers.¹ The comments also show that if any consumers realize a benefit from *à la carte* or themed-tier carriage, it will be only those who view the least amount of cable television and who already have a low-cost lifeline option available.² Moreover, not a single commenter offers a substantive showing for how *à la carte* rules pass constitutional muster.³

This paucity of economic, policy and constitutional support for *à la carte* rules leaves little more to be said on the so-called “solution” to what some view as “cable’s problems,” Comments of Consumers Union and Consumer Federation of America (“Consumers Union”) at 9, which as far as Court TV can tell, amount to “Americans enjoy[ing] more choice, more programming and more services than any time in

¹ See e.g., Comments of The Walt Disney Company (“Disney”); Comments of the National Cable and Telecommunications Association (“NCTA”); Comments of Time Warner Cable, Inc. (“Time Warner”); Comments of Scripps Network, Inc.; Comments of Univision Communications Inc.; Comments of Viacom; Comments of Adam D. Thierer, Director of Telecommunications Studies Cato Institute (“Cato”); Comments of TV One, Comments of National Urban League.

² See Comments of Discovery Communications, Incorporated at 14, 19-21; Comments of Viacom at 27-28; Comments of Charter Communications, Inc. at 15.

³ *But see* Center for Creative Voices in Media (“CCCV”) at 13 (constitutional “analysis” comprised wholly of suggestion that *à la carte* is less unconstitutional than broadcast indecency regulations); Reply Comments of Communications Workers of America (“CWA”) at 7 (supporting, without analysis, CCCV comment); Parents Television Council Comments signed by Concerned Women for America at 1, 4-5 (equating broadcast with cable for purposes of content-based regulations). To the extent parties advocating *à la carte* opted to wait until reply comments to make an initial proffer on the constitutionality of an *à la carte* regime, Court TV reserves the right to respond to the extent appropriate and/or necessary.

history.”⁴ Accordingly, this reply responds primarily to those commenters who have opportunistically used this proceeding as a vehicle to advocate reinstatement of the long-discredited prospect of cable rate regulation. As explained below, cable rate regulation was an utter failure during the time it operated before Congress and the Commission dismantled it, and it would be foolhardy to consider returning to a regime that by all accounts brought cable “growth ... to a standstill.” Comments of the C-SPAN Networks (“C-SPAN”) at 5. Moreover, neither the fact that a version of à la carte was encouraged briefly by cable rate regulation in the U.S., nor that à la carte exists in a limited way in Canada support imposition or consideration of à la carte requirements.

I. À LA CARTE PROPONENTS ARE USING THE PRESENT INQUIRY AS A CONVENIENT VEHICLE TO ADVOCATE AN ILL-ADVISED RETURN TO CABLE RATE REGULATION

Comments by the few proponents of à la carte carriage confirm that the true agenda underlying their participation in this proceeding is not to promote à la carte rules, but rather to advocate for the return of rate regulation. This is perhaps unsurprising, since à la carte necessarily “implicates program price[]” controls because “[d]ifferent pricing structures could ... either enhance or destroy the possible success” of à la carte, Comments of Broadband Service Providers Association (“BSPA”) at 15, such that “absen[t] ... rate regulation ... à la carte may not prove ... suitable ... to

⁴ *Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Services)*, 19 FCC Rcd 1606, 1705-06 (2004) (“2003 Video Competition Report”).

address ... concerns” about cable rates. Comments of National Association of Telecommunications Officers and Advisors (“NATOA”) at 16. Regardless of whether à la carte proponents support FCC reentry into rate regulation implicitly, or are explicit in their zeal for renewed or even expanded FCC intrusion into the multichannel programming market, any return to that misguided regime would be pure folly.

While several commenters favoring à la carte requirements allude to rate regulation as a mechanism they may advocate in the future,⁵ other commenters make no secret of their desire to resurrect or even expand upon the burdensome obligations of the former rate regulation regime. As one à la carte advocate urges, “rate regulation of some type is necessary to ensure that real and actual choice is made available to the consumer.” Comments of the New Jersey Board of Public Utilities (“NJBP”), at 2. The organization representing local franchise officials argues not only for regulation of basic service and equipment charges, but also for local regulation of rates for expanded basic service.⁶ One commenter would take this even further, urging that “Congress and/or the Commission ... initiate a fundamental restructuring of the multi-channel ... business,” Comments by Pioneer Telephone Association (“Pioneer”) at 4-5, while those

⁵ See BSPA at 7-8; Comments of the City of Seattle, Department of Information Technology, Office of Cable Communications (“Seattle”) at 3-4.

⁶ NATOA at 13-14. Notably, this would afford local regulators far greater authority over rates than they had in the heyday of cable rate regulation. See 47 C.F.R. §§ 76.910, 76.950 (authorizing local franchise authorities to regulate rates for a cable system’s basic service tier, while giving the Commission sole authority to regulate rates for the cable programming service tier).

advocating no more than à la carte trials confess that even experimentation requires “mandated pricing,” a “freeze on current cost structures,” “maximum cost differential[s],” and “shared margins.” BSPA at 16.

The fact that cable rate regulation is the “evil twin” of à la carte requirements is not lost on either the cable industry nor on commenters unwilling to engage in revisionist history. Such commenters point out that any call for rate regulation as an adjunct to an à la carte rule is little more than recognition that à la carte makes no sense from an economic perspective.⁷ Proponents of an à la carte regime inevitably would demand rate controls, they demonstrate, because otherwise the price for each channel set by the market – *i.e.*, that necessary to recover the costs of providing it – is many times that of providing it in a bundle.⁸ Some à la carte proponents acknowledge this fact. Comments of CT Communications Network, Inc. *et al.* (“CT”) at 12 (“no one will seriously argue ... a package of services will ever cost more than purchasing each ... individually on an a la carte basis”).

À la carte advocates overlook or misstate the negative impact of the most recent FCC effort to impose cable rate controls.⁹ They fail to recognize that if “some sort of

⁷ See Disney at 12; Cato at 9-10; Comments of Comcast Corporation (“Comcast”) at 11-15.

⁸ See NATOA at 14-15 NJBPU at 2-3.

⁹ While some à la carte proponents either seem to be guilty of selective amnesia regarding past shortcomings of cable rate regulation, *e.g.*, CFA/CU, *passim* (no mention of cable rate regulation), *but see id.* at 10-11, or try to downplay their significance, *e.g.*, CT at 6 (charac-

[footnote continues]

price control is needed in *à la carte* as a method of keeping per-channel prices in check” then “we will have essentially regressed ... back [to] a world of Cable Act-like price regulation, which proved to be such an innovation and investment killer that Congress repealed the rules [after] four years.” Cato at 9. Comments by those who lived through cable rate regulation confirm as much. See C-SPAN at 5 (“it seems that whenever Congress interferes with the free market of cable television, C-SPAN’s public service efforts are harmed in some way. It happened with rate regulation and with analog must carry. In both instances C-SPAN either lost audience reach or its growth came to a standstill.”). See also, e.g., Comcast at 11-14; Time Warner at 13-14.

Rate regulations adopted under the Cable Act of 1992 had significant adverse effects on the development and launch of new programming services, ultimately

terizing rate regulation as simply a “regulatory burden[] faced by the cable industry”), only NATOA, the members of which, not coincidentally, stand to gain the most authority under its proposal for new and expanded cable rate regulation, offers a conclusory denial that rate regulation was an abject failure. But the mere fact that NATOA “does not agree ... that rate regulation ... had ... counterproductive effects on the cable industry,” NATOA at 14, cannot alter history, or the mountain of evidence countering NATOA’s stance. See e.g., James G. Goodale, *Newt Gingrich, the 104th Congress and the First Amendment*, N.Y. Law J., Dec. 2, 1994, at 3; Edmund L. Andrews, *Looser Cable Pricing Rules Weighed to Spur Investment*, N.Y. Times, Oct. 8, 1994, at 39. NATOA’s citation to the 2003 *Video Competition Report* as evidence that rate regulation did not during its short existence hamstringing the industry says nothing, since that report describes cable’s growth over a ten-year period, *id.* at 14-15 (citing 19 FCC Rcd. at 1613), most of which occurred only *after* – and to some extent as a result of – the dismantling of the rate regulation regime. Thomas W. Hazlett, *Prices and Outputs Under Cable TV Reregulation*, 12 J. OF REGULATORY ECON. 173, 193-94 (1997) (“Hazlett”).

requiring a series of remedial corrective measures.¹⁰ Under the FCC's initial rate regulations, the only vehicle for operators to recover costs of adding new channels was an unwieldy cost-of-service methodology, which created an artificial bottleneck that stalled new launches and stifled existing service. When the Commission recognized this problem, it developed "going-forward" rules to provide greater economic incentives for cable operators to add channels.¹¹

As part of these changes, the Commission created "new product tiers" ("NPTs") which consisted of new services that could be offered in combination with other services already carried on other tiers. NPTs were designed to "provide additional incentives for operators to provide new services to consumers because operators will be permitted to price these tiers as they choose."¹² When the Commission modified its rules to allow for NPTs, it acknowledged the shortage of channel capacity for new services and found that the public interest would be served by policies designed to

¹⁰ Hazlett, *supra* note 9 at 193-94 (The growth rate of basic cable television subscribership fell sharply during the period of rate reductions. Only after rate controls were relaxed in response to concerns about their impact on programming networks did industry output measures return to the pre-regulation growth trends).

¹¹ *Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd. 1226, 1231 (1995) (revising rules "[b]ecause appropriate incentives for adding new channels serves the statutory goal of 'promot[ing] the availability to the public of a diversity of views and information.'"). Revised rules were designed to "benefit consumers by assuring that operators will have incentives to add new services." *Id.* at 1248.

¹² *Id.* at 1234.

“create additional capacity for new services” on cable systems. It also sought to help programmers “establish an audience for their new channels.”¹³

In addition to modifying the “going forward” rules to further the goal of promoting diversity, the FCC also issued a number of declaratory rulings and waivers to facilitate launches of new programming services. For example, the Commission waived the rules to permit cable operators to pass through immediately the launch costs for one new service where the rules would have otherwise required a waiting period before those costs could have been recovered by cable operators.¹⁴

In another effort to reduce the disincentives that its rate regulations created to add new programming networks to cable systems, the FCC developed the concept of flexible “social contracts” as an exercise in regulatory forbearance. The Commission then entered into social contracts with several cable operators for the purpose of resolving rate complaints, many of which provided for the creation of migrated product tiers (“MPTs”), which the Commission created along with NPTs “to expand the

¹³ *Id.* at 1235-36. In addition, small system operators were permitted to use a streamlined cost-of-service methodology to justify rate increases based on channel additions. *Id.* at 1257-59.

¹⁴ *Letter to Robert Corn-Revere from Alexandra M. Wilson* (released April 19, 1994). In another ruling, the FCC determined that marketing expenses for which cable operators were reimbursed by a programmer did not have to be offset against increases in programming costs for calculation of external cost pass-throughs. *Letter to Frederick Kuperberg from Kathleen M. H. Wallman*, 9 FCC Rcd. 7762 (CSB 1994). The FCC also relaxed notice requirements to facilitate launches. See, e.g., *Letter to Michael Ruger from Meredith J. Jones*, 10 FCC Rcd. 3207 (CSB 1995).

programming choices available for subscribers.”¹⁵ Following years of loosening, reworking, and otherwise restructuring its rate regulations to minimize their restrictive impact on cable systems and cable network development, the Commission ultimately allowed its rate regulations to lapse.¹⁶ It should not consider reinstating them here, or re-animating them under the rubric of à la carte rules.

II. À LA CARTE OFFERINGS THAT RESULTED FROM RATE REGULATION AND THAT EXIST IN CANADA DO NOT SUPPORT À LA CARTE REQUIREMENTS

Examples of prior or existing à la carte offerings cited by à la carte proponents do not demonstrate that à la carte requirements are feasible or desirable. *See* Comments of Mattox Woolfolk, LLC (“Woolfolk”) at 4-5; NATOA at 3-4. As a threshold matter, the fact that multichannel video operators “already offer[] a wealth of services in a la carte or tiered” configurations, does not prove that it makes sense for them to offer – or be forced to offer – all or most channels in that manner. Woolfolk at 5. Rather, the existence of such offerings shows that, where market forces support à la carte or “mini-tier” offerings, such services will evolve, and that nothing prevents industry participants from negotiating terms on which

¹⁵ *See, e.g., Cox Communications, Inc. Social Contract*, 11 FCC Rcd. 1972, 1985 (1996). Operators gain more flexibility with MPTs than with NPTs, because programming services may be moved from a regulated tier to an MPT, whereas NPTs consist only of new services and services carried duplicatively from other tiers.

¹⁶ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 5296 (1999). The Commission’s 1995 decision implementing rate regulation rules was revised by *thirteen* separate orders on reconsideration before the majority of the rules finally were repealed.

operators may provide – and pay the costs of – channels offered à la carte or in smaller tiers, as the record attests.¹⁷ Indeed, Woolfolk’s comments implicitly confirm that where market forces support it, multichannel video programming providers use à la carte and sub-tiering to serve niche and minority audiences, and to advance program diversity. Woolfolk at 5 (citing Comcast, Time Warner and Adelphia Latino and Spanish tiers and Asian programming available to some cable customers).

Nor is the fact that some cable operators experimented with à la carte in response to the market-altering impact of rate regulation an indication that adopting à la carte mandates now – or at any time – is sound economic or regulatory policy.¹⁸ If anything, prior à la carte experience under rate regulation shows that mandated à la carte will not lower prices. This fact is confirmed not only by experience with à la carte during rate regulation, but also by channels that were once à la carte offerings but migrated to bundled tiers to survive, such as Disney Channel, the Golf Channel and others. See Disney at 18-34; Joint Comments of Altitude Sports & Entertainment *et al.* at 26-27.

The move to à la carte during cable rate regulation was motivated by the fact that cable operators and programmers needed to collect more revenue to support

¹⁷ Comments of A&E Television Networks (“A&E”) at 27.

¹⁸ See Woolfolk at 4-5; NATOA at 3-4. To the extent commenters cite prior dalliances with à la carte under different regulatory circumstances to demonstrate that à la carte is technically feasible, *e.g.*, NATOA at 4, cable operators have never denied that à la carte is technically achievable, but rather only that its feasibility is limited to digital offerings, NCTA at 27, Comcast at 37-39, as à la carte advocates agree. Consumers Union at 8; Woolfolk at 3.

programming than the FCC's cost-of-service methodology would allow.¹⁹ Accordingly, offering some channels à la carte was pursued because it naturally tended to raise the price of the service involved. This in turn required that the FCC undertake a variety of efforts to ensure à la carte was not used to evade the cable rate regulations, even as it endeavored to alleviate rate regulation's dampening effects, *see supra* at 7-9, and the Commission ultimately decided to bar the practice of selling à la carte channels as a deregulated tier. *See Adelfia Communications Corp. v. FCC*, 88 F.3d 1250 (D.C. Cir. 1996). In the final analysis, à la carte made sense only under rate regulation because by interfering with market forces, the government created an artificial environment in which cable operators were desperate and à la carte was worth considering. That experiment ultimately was abandoned as a consumer-unfriendly construct deemed "generally unworkable" in the context of rules designed to keep cable prices low. *See id.* at 1257.

Finally, the fact that à la carte options are available on a limited basis in Canada by no means demonstrates that government mandates to compel or facilitate à la carte and "themed-tier" services are feasible for the U.S. market. À la carte is available in Canada on the digital tier,²⁰ only after consumers subscribe to

¹⁹ It should be noted as a threshold matter that only one cable operator entered heavily into provision of à la carte channels while some others only dabbled in it. This alone indicates that rate-regulation-era à la carte options were motivated not by market forces but by cable operators searching to try something – anything – to mitigate the effect of the government's intrusion into the proper functioning of the market. Other tiering experiments failed as unsupportable in the market. *See A&E* at 41-42 (citing former DirecTV "family pack").

²⁰ *See NCTA* at 34-37; *Disney* at 30-32; *Time Warner* at 12. The fact that Canadian à la carte is available only on the digital tier means that there is a significant buy-in cost, *i.e.*, that

[footnote continues]

the equivalent of not only the U.S. basic tier, but also the U.S. expanded basic tier that many à la carte advocates cite as being the biggest part of the problem, even as they admit that, as in Canada, à la carte is feasible only for digital channels.²¹ Canada is also a poor example for the U.S. market.²² Moreover, taking into consideration both the “buy-in” cost associated with adding digital to gain à la carte options, *see supra* note 20, and the per-channel prices for à la carte service, any consumer “savings” consumers under Canada’s à la carte regime are nominal, if they exist at all.²³

It is not surprising that, given this lack of value and limitations on choice found in Canada’s à la carte alternatives, very few subscribers partake of the à la carte option. *See* Time Warner at 12; NCTA at 35. In addition, digital cable penetration in Canada lags behind that in the U.S. by about 25 percent, *see* NCTA at 36, even though one would expect to find higher penetration for digital services – not lower – if à la carte

represented by purchase or rental of a digital set-top box, that inflates the cost of à la carte offerings at the outset. *Disney* at 32; NCTA at 35.

²¹ *Compare* Consumers Union at 7-8 *with* NCTA at 34-37; *Disney* at 30-32; and *Time Warner* at 12. *See also* at *Seattle* at 3.

²² *See* *Time Warner* at 13; *A&E* at 22 (Canada is a secondary market) ; *Time Warner* at 12; *A&E* at 22 (Canadian market is much smaller than the U.S. and divided along language lines); *Time Warner* at 12; *Disney* at 31 (Canadian cable operates under a regulatory scheme that differs significantly from the U.S. and includes protectionist rules for Canadian-originated programming). *See also* CCCV App. A at 2 (Canadian law requires that half of the channels in any combination of à la carte channels that subscribers choose must be Canadian).

²³ *See* *A&E* at 22-25; NCTA at 34-37; *Disney* at 32. *See also* CCCV App. A (breakdown of Vidéotron à la carte and bundled service showing price per channel of à la carte almost twice that of bundles, *i.e.*, \$16.49 for 20 à la carte channels compared to \$20.25 for 38-channel bundle; \$22.50 for 30 à la carte channels compared to \$27.75 for 65-channel bundle).

were as attractive as its proponents claim. *See* Consumers at 7-8; Seattle 2-3. This not only deflates those claims, but it also undercuts the argument that à la carte offerings might somehow tempt nonsubscribers to sign up for cable service. *See* Seattle at 4.

CONCLUSION

For the foregoing reasons, the Commission should decline to adopt any rules concerning à la carte or themed tier carriage, regardless of whether those rules are imposed as mandatory requirements or “voluntary” guidelines, and should also decline to reinstitute cable rate regulation in connection with any à la carte requirements that it may adopt.

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