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

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

REPLY COMMENTS OF A&E TELEVISION NETWORKS

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EXECUTIVE SUMMARY

Comments on the Commission's Public Notice in this proceeding confirm that the notion of "voluntary" *à la carte* requirements is an oxymoron as far as multichannel programmers are concerned. They also confirm that while consumers may be confused or uninformed about what *à la carte* promises, there is little factual, economic or policy support for *à la carte*. Comments submitted by even *à la carte*'s staunchest supporters reveal that most consumer support dissipates once it is clear that, at best, *à la carte* can offer only limited savings to a few, and even then requires considerable sacrifice for everyone with respect to programming quantity and quality. Moreover, the record overwhelmingly shows *à la carte* requirements would *increase* prices for most subscribers.

The dissipation of consumer support once *à la carte*'s true impact becomes clear is significant, since comments confirm that *à la carte* rules would fundamentally undermine the basic economic model cable and DBS programmers rely upon to deliver more choice, more programming and more services than ever before. To the extent there is consensus on any issue, it centers primarily on recognizing that *à la carte* is technically feasible only in the digital realm. *À la carte* by definition thus cannot benefit the majority of consumers who do not subscribe to digital service, and even for those who do subscribe to a digital service, such subscription represents a significant expenditure for that upgrade and related equipment before the first *à la carte* channel is selected.

Given the above shortcomings, most proponents of *à la carte* do not even try to show how it will lower rates, and those making such attempts reaffirm the substantial uncertainty as to the expected outcome. These efforts also unwittingly help expose the fallacy that *à la carte* options available in Canada suggest *à la carte* would be a good

idea for the U.S. market. The record confirms that Canada is a poor analog for the U.S. market, and even the *à la carte* advocates' comments reveal that Canadian *à la carte* does not lead to cost savings for consumers there, and would not confer such savings in the U.S. market, either.

Given the ease with which notions of *à la carte* lowering prices are debunked, it is unsurprising that many proponents make no secret that their real aim is to revive the kind of early-1990's rate regulation that had to be dismantled after a few short years. *À la carte* advocates concede that rate regulation is the "evil twin" of *à la carte* rules, and some regulators supporting *à la carte* are eager to reassert or even expand their authority in this area. Such objectives clearly are misplaced, however, because by all accounts cable rate regulation was an unmitigated disaster that brought audience growth, new channel launches, and cable investment and innovation to a standstill, failings that should not be repeated here.

The other reason offered as purportedly necessitating *à la carte* – an alleged need for consumers to control programming that enters their homes – is equally without substance. *À la carte*'s proponents admit that consumers already have ample control over the video programming they receive, and that parents are aware of these controls, the need to make use of them, and their ultimate responsibility for doing so. Consequently, claims about "indecent" or "violent" programming are just a smokescreen for yet another brand of rate regulation where consumers claim they should not have to pay for channels that they block. But the prospect of such consumers avoiding costs by foregoing blocking options in favor of an *à la carte* regime is misplaced. The very bundling they rail against is what keeps per-channel prices low, so *à la carte* will mean

paying a premium to avoid unwanted content, which is anathema to those advocating *à la carte* as a means of content-control. Claims by those advocating *à la carte* that it is needed to enhance subscriber control are further undermined by the fact that many of them demand exemptions from *à la carte* requirements for broadcast, local origination, PEG and other channels, thereby depriving consumers of control over them.

À la carte would thus not only fail to advance its proponents' objectives, it also would ravage program diversity. Comments by programmers, especially those dedicated to niche, women's, minority, children's, foreign language, and arts programming, almost uniformly oppose *à la carte* and document the toll it would take on diversity. The very few programmers that favor *à la carte* do so based on unfounded assumptions about the effects such a regime would have, or do not support *à la carte* so much as express frustration with the status quo. Most remaining *à la carte* advocates simply claim to know better than programmers themselves how *à la carte* will affect diversity, but they offer no empirical support for their positions. Others simply throw concerns about program diversity aside by all but welcoming the prospect of some channels going dark. Still others claim that *à la carte* would break up alleged bottlenecks that purportedly stand in the way of some programmers, but at the same time reveal just how grim the economic landscape would be for niche and smaller channels under an *à la carte* regime.

Finally, *à la carte*'s First Amendment failings are so obvious that its proponents avoid any meaningful discussion of its constitutionality. Some even recognize that *à la carte* would inject government into programming decisions and thereby raise serious constitutional questions, while those sympathetic to content-based concerns still

caution against replacing the judgment of parents, communities and media markets with *à la carte* rules. Meanwhile, comments by programmers, operators and public interest groups offer forceful legal arguments showing *à la carte* would be a content-based regulation that dictates how programming is sold and distributed, and would flunk strict scrutiny due to a lack of compelling government interests and a failure to achieve them in the least restrictive way. *À la carte* also would fail intermediate scrutiny because the government could not show that it has a substantial interest, that the rules would directly and materially serve it, or that they would be narrowly tailored and restrict no more speech than necessary. The record confirms this because the best evidence *à la carte*'s advocates can offer is uncertainty, against a record replete with evidence that it would impede programmers from launching new services, continuing to produce compelling content, and sustaining diverse programming.

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REPLY COMMENTS OF A&E TELEVISION NETWORKS

A&E Television Networks ("AETN"), by its attorneys, hereby responds to the comments on the Public Notice in the above-captioned proceeding.[1] In its comments, AETN explained "[t]here is no such thing as a 'voluntary' *à la carte* requirement," Comments of A&E Television Networks ("AETN Comments") at i, and it set out the many reasons why government mandates to require or facilitate *à la carte* and "themed-tier" service by cable and direct broadcast satellite ("DBS") multichannel video program distributors ("MVPDs") would be misguided. The comments overwhelmingly concur.

Programmers agree "there is no such thing as a *truly* voluntary a la carte rule." Comments of Discovery Communications, Inc. ("Discovery") at 19 (emphasis in original). The comments also mirror reality in that the vast weight of evidence, and input from those intimately familiar with the MVPD marketplace, show an *à la carte* rule would be fundamentally unsound. Despite FCC, GAO, cable industry and economist findings that bundling optimizes choices and keeps prices reasonable, a small but vocal minority agitates for *à la carte* requirements notwithstanding their dubious benefits and certain

[1] *Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, 19 FCC Rcd 9291 (Med. Bur. 2004) ("Public Notice").

pitfalls.[2] Others, perhaps unaware of *à la carte*'s consequences, support such rules based on their superficial appeal. Comments suggest there is much confusion about what it means for *à la carte* rules to be "voluntary" or what benefits consumers might possibly hope to gain. But there is no doubt that an *à la carte* rule would devastate the MVPD market, or that while it might lower prices for (at best) a few consumers willing to accept substantially less service, it would assure higher prices for everyone else. *À la carte* rules also would torpedo program diversity, and violate the First Amendment.

The record thoroughly debunks some advocates' claims that "the regulatory intervention" *à la carte* "propose[s] is far from intrusive." CU/CFA, *Time To Give Consumers Real Cable Choices* at 6. Indeed, other *à la carte* advocates suggest "Congress and/or the [FCC] may be required to initiate a *fundamental restructuring* of the [MVPD] video and programming business." Comments of Pioneer Telephone Association, Inc. ("Pioneer") at 4 (emphasis added). As AETN made clear in its opening comments, "*à la carte* would scuttle the economic premise" of programmer business plans and MVPD services. AETN Comments at 9. This hardly seems a prudent course for an industry

[2] *Compare 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 Comp. Report*") ("Bundling programming channels … allows greater penetration … which lowers the per subscriber price MVPDs pay to programmers and benefits new or niche channels through subscriber awareness that is necessary for … survival … especially [for those] not associated with a 'brand name' entity."); *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, General Accounting Office, GAO-04-8, at 30-39 (Oct. 2003) ("*GAO Report*"); *How Bundling Cable Networks Benefits Consumers,* Economists Incorporated, July 23, 1998, filed by ABC, Inc., CS Docket No. 98-102, July 31, 1998, *with*, *e.g.*, Comments of Consumers Union and Consumer Federation of America ("CU/CFA") *passim*; Comment of www.commonsensemedia.org ("Commonsense"), *passim*; Parents Television Council Comments signed by Concerned Women for America ("PTC/CWFA") *passim*; Comment of John Emerson ("Emerson") at 1; Comment of Alexis Barry ("Barry") at 1.

providing "Americans … more choice, more programming and more services than any time in history." *2003 Video Comp. Report*, 19 FCC Rcd at 1608.

I. "VOLUNTARY" *À LA CARTE* IS AN OXYMORON

The comments confirm that, from the perspective of AETN and similarly situated programmers, it makes no sense even to pretend there is a "clear distinction between Mandatory A La Carte and Voluntary A La Carte." Comments of Broadband Service Providers Association ("BSPA") at 3. Yet the opening comments reflect substantial confusion on this point. Some commenters posit that "voluntary" *à la carte* means consumers would gain the choice, at their sole option, to select whatever number and combination of channels they wish. [3] Others think it means MVPDs should have the option of choosing whether to allow *à la carte* purchases of bundled channels in addition to offering them on tiers. [4] But for programmers, *à la carte* removes all choice. No matter what "voluntary" system is contemplated, programmers still forfeit the ability to control how content they have invested millions developing gets distributed. Most notably, they lose access to the best means of ensuring success in the market and

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[3] *E.g.*, Comments of Univision Communications, Inc. ("Univision") at 2-9; Comments of Alliance for Community Media at 2-4; Barry at 1 ("I am taking as a given that a la carte channel choice would come form the entire body of existing channels"). *Cf.* Christian Television Networks ("CTN") at 2 (equating *à la carte* and video-on-demand program-by-program purchases).

[4] *E.g.*, Comments of CT Communications Network, Inc., *et al.* ("CT") at 12; Comments of the DirecTV Group, Inc. ("DirecTV") at 1-2. Actually, this position is not all that different from the current state of affairs, in that no legal, statutory, or marketplace barriers prevent MVPDs from negotiating with programmers to gain the ability to offer – and the obligation to pay the costs of – programming that can be offered *à la carte*. *See* Comments of Turner Broadcasting System, Inc. ("TBS") at 6-8; Comments of the Weather Channel, Inc. ("Weather Channel") at 2-4, 6-7; Comments of Oxygen Media Corporation ("Oxygen") at 2-3; Supplemental Comments of TV One ("TV One") at 2; Comments of Scripps Networks, Inc. ("Scripps") at 11-12, 20-21; Comments of The America Channel, LLC at 1-2

recouping their investments, because they lose the right to have programming placed exclusively on bundled tiers. [5]

The *Public Notice* itself shows that debate about whether *à la carte* should be "voluntary" or "mandatory," and for whom, is academic. Some of the confusion – and the opening for debate – arises from the Commission's reference to MVPDs providing *à la carte* services to consumers on a "voluntary" basis, and its request for information on the effect of "voluntary" *à la carte* on program diversity. *Public Notice*, 19 FCC Rcd at 9291, 9292. That concept of voluntariness is at odds with the *Public Notice*'s inquiries into consequences that would arise "if *programmers were* <u>*required*</u> to offer their programming … exclusively on a stand-alone basis," or "in addition to the currently offered packages, *were* <u>*required*</u> to allow MVPDs" to take programming off tiers and offer it *à la carte*. *Id*. at 9292 (emphases added). This, coupled with the political pressure brought to bear on the issue, undermines any claim that *à la carte* could be "voluntary." [6] Thus, parties can endlessly debate the purported merits of voluntary versus involuntary *à la carte* or how voluntary *à la carte* should work, but for programmers the discussion is moot. To paraphrase Inigo in *The Princess Bride*, we don't think the word voluntary means what they think it means. *The Prince Bride*, William Goldman (MGM 1987).

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[5] Comments of Viacom ("Viacom") at 20-21; Comments of Fox Cable Networks Group ("Fox Cable") at 3-9; Comments of International Channel Networks ("International Channel") at 5-6; Comments of the Hallmark Channel ("Crown") at 5-7; TV One at 2; Weather Channel at 2-5; Joint Comments of Altitude Sports & Entertainment, *et al.* ("Altitude") at 26-30; Comments of GSN – The Network for Games ("GSN") at 2-5; Scripps at 11-14.

[6] *See* AETN Comments notes 2-4 and accompanying text. *See also* Fox Cable at 1-2; Comments of Advance/Newhouse Communications ("Advance/Newhouse") at 4; Comments in Opposition to *A La Carte* or Themed Tier Programming by American Center for Law and Justice, Inc. at 2; Pioneer at 4; Comments of the New Jersey Board of Public Utilities ("NJ BPU") at 1.

II. THE LIMITED SUPPORT *À LA CARTE* ENJOYS IS UNINFORMED OR DISINGENUOUS

Any suggestion that consumers are clamoring for *à la carte*, with all its pitfalls and shortcomings, is at best misplaced, or depends on consumer ignorance of the facts. The record reveals, even among commenters favoring *à la carte*, that some consumers have been lead to believe *à la carte* promises benefits it cannot deliver. It also shows that those gathering support for *à la carte* are not painting a true picture of what an *à la carte* world would look like – and that when they do, consumer reaction is quite different. There are also unrealistic expectations about what effect *à la carte* will have on consumer prices. Accordingly, much support for *à la carte* reflects only partial understanding from a consumer perspective, or misplaced assumptions by industry participants, regulators, and interest groups. Moreover, the extent to which *à la carte* makes no sense from a consumer price perspective reveals the true motivations of some *à la carte* proponents.

A. *À La Carte* Support Rests on Unrealistic Expectations

As a threshold matter, it is not even clear that those pushing the *à la carte* agenda have fully explained to consumers what *à la carte* can and cannot promise. It seems some consumers have been lead to believe *à la carte* can surmount not only the constraints that *à la carte* advocates allege about bundling and tiering, but also basic rules of physics and economics. For example, one consumer states, "I am taking as a given that a la carte choice[s] would come from the entire body of existing channels, rather than just [those] cable and satellite providers currently choose to carry." Barry at 1. But any belief that "[c]onsumers would be able to choose from channels that their

cable providers do not currently bother to carry," [7] overlooks that cable and DBS system capacity is limited, [8] and that MVPDs ultimately choose what networks will occupy that finite "shelf space," regardless if they are sold *à la carte*, as mini-tiers, or in bundles. *À la carte* cannot remove this impediment to fulfilling consumer desire for channels that MVPDs available to them choose not to carry, and rules intended to compel such carriage would be impermissible in any event. [9] Even were it possible for every MVPD to carry all channels any consumer could possibly want, that would not necessarily be a good thing – it would eliminate the incentives of capacity constraints and editorial discretion that force MVPDs to compete to produce attractive program options. *See* Telecom Coops at 4 ("If a carrier is unable to provide all of the programming a customer demands, that customer will likely jump to a competing carrier who can.").

Other unrealistic economic assumptions also play a role in the call for *à la carte*. One consumer argues that not only should *à la carte* options be available, all

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[7] *Id*. *See also* CU/CFA at 7 ("both cable company and programmer can earn revenue from selling to consumers as many channels as they want to watch" and "are free to serve … niches with as many channels as a consumer could want"); Comment of the Center for Creative Voices in Media ("CCCV") at 11 ("*A la carte* empowers the consumer to decide what networks get carriage by taking away the … bundle."); Reply Comments of Communications Workers of America ("CWA") at 3 ("independent networks would continue to have the option to pitch their programming for inclusion in the cable companies' packages [b]ut failing that … with à la carte options … they could take an entrepreneurial approach and go directly to consumers to build audience share").

[8] *See*, *e.g.*, Comments of the National Telecommunications Cooperative Association ("Telecom Coops") at 3-4 ("smaller carriers typically lack channel capacity"). *See also* Pioneer at 3-4; International Channel at 3; GSN at 8 n.3.

[9] *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") (compelled carriage regulations barred by First Amendment absent "unusually detailed statutory findings" showing carriage needed to preserve "benefits of free, over the air local broadcast television," support "widespread dissemination of information from a multiplicity of sources," and promote "fair competition in the television programming market"); 47 U.S.C. § 541(c) (cable operators may not be compelled to act as common carriers).

cable "[c]hannels with advertising should be forced to be free just like [over-the-air] television." Emerson at 1. While the notion that MVPDs can provide something for nothing ignores a weight of evidence that programmers cannot survive without *both* ad revenues and subscriber fees in about equal proportions, [10] it is not an isolated example of failure by *à la carte* advocates to recognize basic economic forces.

Even industry participants that might be presumed to know better get caught in this trap. For example, one of the only programmers that submitted comments in favor of *à la carte* posits that "[i]f consumers were able to purchase minority … networks on an à la carte basis, cable carriers would have no excuse not to enter carriage deals with minority … networks," while at the same time recognizing that "too many consumers are not willing to pay for minority cable networks." Urban Broadcasting Company ("Urban") at 2. If too few viewers are willing to pay for any type of network, it simply will not be offered. [11] Rather, MVPDs will use the capacity to carry programming that garners higher demand and produces more revenue (or, as noted, put the capacity to other uses). It is thus not as easy as simply saying "if we had *à la carte*, more

[10] GAO Report at 34; TBS at 6-9; Viacom at 8-10, 17-21; Comments of Lifetime Entertainment Services at 3-4; Oxygen at 3-7; Comments of Courtroom Television ("Court TV") at 3, 11-12, 17-18, 27; Weather Channel at 2-7; Scripps at 11-14; International Channel at 4-6; Crown at 5-7; Comments of LAtv Holdings, Inc. ("LAtv") at 4-8 (all showing cable programmers pay for programming via revenue stream comprised approximately of half advertising dollars and half subscriber fees). *But see* PTC/CWFA at 5 (suggesting, without support, that "[o]n average a cable network receives 30% of its revenue from advertising and 70% from subscriber fees").

[11] What's more, *à la carte* advocates seem to ignore that cable and DBS capacity dedicated to bundled video programming targeted for breakup into *à la carte* channels or mini-tiers is not necessarily committed permanently to its current use. If *à la carte* makes it less economically attractive to offer those services by rendering them not profitable, MVPDs simply will put the capacity to other uses that are more profitable. *See*, *e.g.*, Comments of Comcast Corporation ("Comcast") at 40-41 (noting tension between *à la carte* and advanced services); LAtv at 8 ("cable providers are able to [use] the same bandwidth [for] high-speed cable, video on demand and HDTV").

African-American themed and owned channels could be created and offered to consumers of color," or to any other group of viewers with specific tastes. CU/CFA at 6. For this reason, the vast majority of commenters – including those submitted by minority programmers – recognize that an *à la carte* requirement would be a disaster. *See supra* Section III.

The fact that *à la carte*'s full economic consequences does not inform the positions of its proponents is significant, because it undermines the survey and other "evidence" put in the record in support of *à la carte* requires. For example, one such advocate claims "46 percent of … survey respondents indicated that they would be very likely or somewhat likely to pay a little extra for" *à la carte*, and that two-thirds of over 600 respondents to an online survey "were either likely or very likely to chose … a la carte … if made available." Comments of the City of Seattle, Department of Information Technology, Office of Cable Communications ("Seattle") at 2. From this it makes the logical leap that "a high percentage of the population wants choice and would be willing to pay for the ability to customize their channel selection." *Id*. But his conclusion is flawed. First, it rests on a single question, and (at least for the online results) was only one of dozens about customer satisfaction with one cable system in a survey otherwise having nothing to do with *à la carte*. [12] The conclusion about what "a high percentage of the population wants" or is "willing to pay for" also overlooks that a *majority* of respondents to the phone survey – 54 percent – would <u>not</u> be willing to pay even "a

[12] *See* <u>http://www.seattle.gov/cable</u> (cited in Seattle at 6) at Question 10. Seattle gives no indication of the methodology of the phone survey or the context in which questions were presented.

little" for the putative benefits *à la carte*. [13] For the 66 percent favorable response in the online survey, the question indicated only an "additional cost" without explaining how significant that cost could be, and evidently without disclosing the likely adverse effects an *à la carte* requirement would have on the overall level of service.

These distinctions are critical, as the record reflects *à la carte* will increase costs for consumers much more than just "a little" (and would do so for both those electing *à la carte* and those who do not). [14] Indeed, Seattle admits consumers are not "willing to pay a higher total … cost for their cable." Seattle at 2. This, too, is significant since, as AETN showed and the record now overwhelmingly reflects, *à la carte* would require consumers to pay either a higher total cable bill or to forfeit all but a handful of channels they now receive to keep prices close to their present level. [15]

Similar statistical gamesmanship appears in CU/CFA's comments. It claims that "66 percent of subscribers would prefer … to pick only those channels they want to watch." CU/CFA at 9. At the same time, however, it downplays that most of the consumers queried – nearly three quarters of them – would not opt for an *à la carte* alternative if it did not reduce their cable bill *proportionally*, in other words, if the per-channel price did not stay the same for both the channels they elected to continue receiving and those they dropped. *Id*. According to CU/CFA, only twenty-nine percent

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[13] Seattle also fails to give a breakdown for the 46 percent minority between those who said they would be "very likely" to pursue *à la carte* option if it costs more and those that gave the far more ambivalent "somewhat likely" response.

[14] *See*, *e.g.*, Comments of the National Cable & Telecommunications Association ("NCTA") at 28-31; Advance/Newhouse at 10-11; Comcast at 23-25; Discovery at 4-6, 19-21; Fox Cable at 14-19.

[15] *See* AETN Comments at 7, 15-19, 29-30. *See also* NCTA at 30; Advance/New-house at 11; Comcast at 25-26; Viacom at 27-28.

would still choose fewer channels even if among the "possible drawbacks of unbundling, … including channel selection and price," it meant that "their cable bill didn't decline proportionally." *Id*. The fact that so many consumers would not select *à la carte* alternatives if they did not experience proportional savings is significant given that the record reflects that such one-to-one savings would *never* be the case, regardless what form *à la carte* might take, and some *à la carte* advocates recognize as much.[16] Accordingly, if there ever was a "cable fairy tale," as the CU/CFA slogan asserts, it is suggesting that, factoring in the likely "drawbacks," there would be any significant consumer support for *à la carte*.[17]

B. *À La Carte* Will Not Lower Prices For Consumers

The fact that the record reflects consumers largely do not favor *à la carte* if it cannot lower rates is significant, because comments overwhelmingly show per-channel

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[16] *See* 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"). *See also* NCTA at 19-20; Comcast at 25-26; Comments of the Walt Disney Company ("Disney") at 19-23; Discovery at 4-8; Altitude at 26-27, 36; Weather Channel at 3-4. As noted, costs would *increase* for most consumers.

[17] Another indicator of the lack of demand for *à la carte* is the paucity of consumer comments on the *Public Notice*. The Commission has made a point lately of citing the amount of consumer interest in an issue by noting the number of individuals that comment on it. *See FCC Finds That Broadcast of "F-Word" During Golden Globe Awards Was Indecent and Profane*, Public Notice, March 18, 2004 (separate statement of Adelstein, Comm'r) (citing "tens of thousands of emails, calls and letters that poured in"); *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13624 (2003) ("We received more than 500,000 brief comments and form letters from individual citizens"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14030 (2003) ("issues relating to the adoption and implementation of a national do-not-call registry generated extensive comment from consumers"). By comparison, the Commission's Electronic Comment Filing System shows that fewer than 20 individuals filed comments on or before the deadline in the *Public Notice*, and that a like number have made submissions since the comment date.

costs will increase for all consumers. Only consumers willing to forego most of the channels they now receive are likely to realize any savings at all, while all other consumers that continue to receive bundled service will have to pay more for it. *See supra* notes 14-15 and accompanying text. Most *à la carte* advocates, including some of its most vehement supporters, do not even try to show how *à la carte* will lower cable rates. *E.g.*, PTC/CFWA, CCCV, Comments of National Association of Telecommunications Officers and Advisors ("NATOA").

Those that do attempt a showing on this point fall well short of the mark. For example, CU/CFA repeats its prior conclusion that, at best, only about 40 percent of consumers can expect to see *any* benefit, including lower prices, from *à la carte*.[18] It concedes that "the large majority of cable households purchase analog [so] it might not be economically feasible … to offer *à la carte* to those consumers," and that *à la carte* makes sense only in the digital realm. CU/CFA at 8. CU/CFA thus admits that its call for *à la carte*, if heeded, would not help a "large majority of cable households" comprising *sixty percent* of consumers. Moreover, CU/CFA is not even clear on how *à la carte* can help the remaining forty percent, since they only "perhaps" will benefit.[19]

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[18] *See* GAO Report at 81 (noting CU/CFA's complaint that "GAO understates how many subscribers would benefit from an à la carte approach," because "perhaps as many as 40 percent … could see their monthly bill decline"). *See also* Comment of Mathew Murphy ("It is entirely possible that *a la carte* service would be more expensive for most consumers [but] for those who watch only a few channels, the[re could be] savings[.]").

[19] GAO Report at 81. *See* also CU/CFA, *Real Cable Choices* at 8 ("We use conditional words – would, could – to describe these possible effects …."); Seattle at 4 (speculating that "[i]f cable subscribers are given the ability to select their programs … they *likely would* be more satisfied, even if it meant paying more per channel") (emphasis added). Indeed, not only does the fact that per-channel prices certainly would rise significantly in an *à la carte* system undermine Seattle's speculation, it renders Seattle's position somewhat schizophrenic. Seattle admits it "is not to say … consumers would

CU/CFA's admission that *à la carte* makes sense only in the context of digital service is all the more significant given its belief that the "larger expanded bundle, which is taken by the majority of cable subscribers," *i.e.*, the analog service for which CU/CFA says *à la carte* is infeasible, "is the focal point of the current pricing policy debate." *Id*. at 1. *See also id*. at 24 (describing "'lunch bucket' cable group of "[e]ighty percent of … cable analog group [that] subscribes to only basic and expanded basic").

The limited effort that *à la carte*'s advocates undertake to show that it would reduce prices also debunks the notion that the Canadian experience with *à la carte* shows it could work in the U.S. Most comments explain why looking to what Canadian cable operators may be required to do is not a useful analog: Canada is a secondary market, it operates under a vastly different regulatory scheme with different objectives than U.S. law, and it is much smaller and divided by a language schism.[20] These comments also demonstrate that, unlike some proposals offered here for total *à la carte*,

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be willing to pay a higher total package cost for their cable services," Seattle at 2, but that would be the case given the extent to which per-channel prices must increase under *a la carte*. Seattle's supposition that *à la carte* could "enlarge the pie" of subscribers to the benefit of MVPDs is both equivocal and self-contradictory. *See id*. at 4 ("having the option to select only a few channels … *would likely* encourage nonsubscribers … to subscribe") *with id*. (only "[t]hirty-six percent (37%) [*sic*] of telephone survey respondents and 27% [for] the web-based survey indicated that the reason they did not subscribe was … price").

[20] *See* Remarks by Michael Hennessy, President and CEO, Canadian Cable Television Association, to Washington Metropolitan Cable Club, June 29, 2004, at 2-6, ("Hennessy Speech"), filed with Letter from Daniel S. Brenner, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, June 30, 2004, MB Docket No. 04-207 (notice of *ex parte* meeting); NCTA at 32-37; Comments of Time Warner Cable, Inc. ("Time Warner") at 11-13; Disney at 30-31.

it exists in Canada only on the digital tier, and does not reduce prices meaningfully, nor is it popular among consumers. [21]

Comments favoring *à la carte* rules unwittingly help expose the fallacy of relying on Canada as a model for the United States. CU/CFA concedes that *à la carte* in the U.S. (as in Canada) is feasible only with respect to digital (to which the majority of consumers do not yet subscribe). *See supra* at 11 (citing CU/CFA at 8). Comments also recognize that, before any putative benefits of digital *à la carte* may be enjoyed, consumers "must first subscribe to basic and digital and rent or buy a converter box." [22] This adds a buy-in cost before the first channel is even selected. CU/CFA at 7. Moreover, even using the assumptions of the *à la carte* advocates, the Canadian example shows little potential for savings. CU/CFA posits (and Seattle accepts) that the average consumer watches about 17 channels regularly, and that around a dozen are cable offerings. CU/CFA at 3; Seattle at 2 (both citing *The Continuing Abuse of Market Power by the Cable Industry*, CFA, February 2004, at 21). Putting aside the debatable aspects

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[21] Hennessy Speech at 9-12; NCTA at 34-35; Time Warner at 12-13; Disney at 31-32.

[22] CU/CFA at 7. Another "cable fairy tale" CU/ that CFA offers inheres in its demand that "digital set-top boxes should be made affordable to all consumers in an *à la carte* environment," as if this proclamation of affordability alone can make it so. *Id*. at 9. CU/CFA offers no suggestion for how to meet this objective, though it does cite the Canadian example, where boxes cost C$8.95 for every TV on which *à la carte* id desired. *Id*., *Real Cable Choices* at 26.

of this estimate,[23] even the lower figure of 12 cable channels would not result in cost savings under the Canadian model.[24]

Other efforts to show the Canadian example results in savings are equally unavailing. CCCV at 12 & App. A. The chart CCCV proffers, citing Vidéotron's cable service, confirms that *à la carte* saves little over bundling, and results in consumers receiving far fewer channels. It touts the fact that a consumer can receive 22 basic digital channels, plus 20 *à la carte* channels, for "only $36 US – all inclusive." *Id*. App. A at 1. It overlooks, however, this "savings" is less than 10 percent over Vidéotron's iTelemax package (its smallest digital bundle), which has 38 digital channels (in addition to the 22 "basic" digital channels). *Id*. Consumers may have the ability to pick among 93 channels in their *à la carte* bundle while Vidéotron sets the lineup for iTelemax, but the cost-per-channel is nearly twice as high *à la carte* as it is in the bundle.[25] And,

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[23] Given growth in cable viewing compared to declining broadcast share, it is likely that most viewers watch more cable networks. *See 2003 Video Comp. Report*, 19 FCC Rcd at 1613, 1615. Moreover, market research suggests that many viewers are not aware of it when they tune in to cable networks.

[24] Seattle, like AETN's initial comments, cites Rogers Communications as an example of *à la carte* in Canada. *Compare* Seattle at 3 *with* AETN Comments at 23-24. AETN already has shown how the Rogers example does not reflect significant savings generally, and that the better deal still is had with bundled service. AETN Comments at 23-24. The Seattle comments confirm the prices underlying AETN's showing. Moreover, using Seattle's estimate of average consumers viewing 17 channels, at least 12 of which are cable networks, the Rogers *à la carte* option is a far worse value than, for example, Comcast, the primary cable provider in Seattle. For consumers to receive the average 12 cable channels viewed using the Rogers *à la carte* option, they have to sign up for Rogers' 30-channel basic package for about C$24 per month, lease a digital box for about C$9 per month, *see* Seattle at 3, then pay for ten *à la carte* channels at about C$15 and two individual *à la carte* channels for about C$2.50 each, *see* AETN Comments at 23-24, for a total of C$53.00 (or approximately $39.77 (U.S.)) for 42 channels. By comparison, Comcast offers approximately *100 channels* for virtually the same price ($39.99 U.S.) on its expanded basic tier.

[25] A 30-channel *à la carte* option is *more expensive* than the 38-channel iTelemax option, and is only a $5.25 saving (off a total bill of $47.24 compared to 41.99) over the

CCCV plays down the fact that "Canadian law requires half the channels in any bundle you choose to be Canadian," thereby limiting the freedom Canadian viewers get for the additional investment. *Id*. App. A at 2.

C. *À La Carte* is a Stalking Horse for Rate Regulation

It is unsurprising, given the ease with which the notion of *à la carte* lowering prices is debunked, that several of its advocates make no secret that their real aim is to reinstate the kind of early-1990's cable rate regulation that Congress and the FCC had to dismantle after only a few short years because it was an absolute disaster. There is no doubt that "A La Carte … implicates program price[ ]" controls. BSPA at 15. Both commenters favoring *à la carte* and those opposed recognize that no *à la carte* system could avoid requiring an overlay of some kind of regulatory framework on prices for both bundled and *à la carte* service. *See id*. at 15 ("Different pricing structures could be used to either enhance or destroy the possible success of [*à la carte*] offering[s]."); Comment of the New Jersey Division of the Ratepayer Advocate ("NJ Rate Advocate") at 4 ("disclosed 'separate component'" in *à la carte* "should serve as [a] benchmark ceiling price"). *See also* NCTA, Booz Allen Study at 5-7; Discovery at 19-21; Court TV at 30. Such steps would be necessary to preclude market forces from driving *à la carte* prices to recover the true cost of programming, *i.e.*, to avoid it being priced so unattractively that few consumers make *à la carte* elections. NATOA at 16 ("absen[t] … rate

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iUltra offering, which has *over twice as many* channels (65) than the 30-channel option. While CCCV's chart does not show significant savings for Vidéotron's *a la carte* offerings, it does expose as misleading CU/CFA's claim that "Vidéotron offers … the option to purchase channels individually -- 38 channels for $20 per month … 65 channels for $28 and 106 channels for $40," which are the prices for *bundled* Vidéotron services.

regulation … à la carte may not prove … suitable … to address consumer's concerns"); NCTA, Booz Allen Study at 5-7; Discovery at 19-21; Court TV at 30.

À la carte's more pro-regulatory advocates take this basic economic shortcoming as an invitation to reimpose cable rate regulation. Local regulators in particular are eager to expand their authority this manner.[26] Even where potential *à la carte* proponents advocate a more cautious approach of undertaking extended trials before any decisions are made, talk turns quickly to "mandated pricing," a "freeze on current cost structures," "maximum cost differential[s]," and "shared margins." BSPA at 16.

The desire to reinvigorate rate regulation is mystifying given that virtually all informed observers agree it was a terrible idea while it lasted. There now can be no dispute, with the benefit of a decade's hindsight, that rate regulation strangled an industry that thrived and produced great public benefits in the periods before and after rate regulation. The effect on C-SPAN is both emblematic of the problems and particularly instructive:

> [I]t 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.

Comments of the C-SPAN Networks at 5. *See also* Thomas W. Hazlett, *Prices and Outputs Under Cable TV Reregulation*, 12 J. OF REG. ECON. 173 (1997). Several other commenters also chronicle the debacle quite thoroughly, and demonstrate that rate

[26] *See* NJ BPU at 2 ("rate regulation of some type is necessary to ensure that real and actual choice is made available to the consumer"); *id*. at 3 ("unregulated and therefore unlimited channel pricing would result in any consumer friendly elements being 'priced out of the market'"); NATOA at 13-14 (advocating "renewed Congressional authority for local governments to regulate" the expanded basic tier).

regulation dressed up as *à la carte* poses the same pitfalls. *See*, *e.g.*, Comcast at 11-14; Time Warner at 13-14; Small Operators at 12; Comments of Adam D. Thierer, Director of Telecommunications Studies, Cato Institute, at 9 ("If [some sort of 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.").

Those who refuse to learn from cable rate regulation's past and are eager to repeat it do so basically by denying history. NATOA simply states it "does not agree with the positions of some that rate regulation has had … counterproductive effects on the cable industry." NATOA at 14. It is unclear, however, how NATOA can maintain this position despite voluminous evidence to the contrary. We note, though, that it cites findings in the recent tenth annual video competition report regarding how much cable subscribership, revenues, and audience share have grown in the last decade as evidence that "[r]ate regulations have not eroded investment or prevented the advancement of technology or the deployment of more programming networks." *Id*. at 14-15 (citing *2003 Video Comp. Report*, 19 FCC Rcd at 1613). The extent of growth over a ten-year period, most of which occurred after rate regulations were relaxed or repealed, says little about what transpired during the shorter period rate regulation was in place.

Other *à la carte* proponents adopt more subtle forms of denial. The rate regulation fiasco goes completely unmentioned by CU/CFA, *but see* CFA/CU at 10-11, whereas CT characterizes it only in terms of the industry's response to government

interference with normal market forces,[27] and limits its recognition of rate regulation's adverse effect to an oblique mention of "regulatory burdens faced by the cable industry." CT at 6. Such "burdens," which hamstrung the industry in clearly demonstrable ways, should not be revisited in the name of lowering cable prices, or for any other reason.

D. *À La Carte* Is Not Necessary to Block Unwanted Programming

The comments reveal the hypocrisy and frivolousness of claims that adoption of an *à la carte* regime is necessary because "consumers need to haves [*sic*] the ability to control what comes into their homes." PTC/CWFA at 4. Comments by *à la carte*'s proponents show consumers already have ample means to control precisely what video programming they receive. For example, PTC/CWFA concedes the "cable industry … provide[s] free equipment to subscribers so they can block unwanted channels." *Id*. Similarly, CU/CFA admits that "technology such as the V-Chip allows consumers to block distasteful programming." CU/CFA at 4. The PTC/CWFA comments recount a

[27] There is no merit to suggestions that some cable operators' experimentation with *à la carte* during rate regulation supports adoption of *à la carte* mandates now. *E.g.*, NATOA at 3-4; Comments of the Public Cable Television Authority, California ("PCTA") at 3-4. Such forays were limited, and the fact that only one cable system ardently pursued *à la carte* while others attempted it only to a minor degree demonstrates the extent to which these dabblings were motivated not by market forces but government interference with them. In any event, if rate-regulation-era *à la carte* proved anything, it was that *à la carte* does <u>not</u> lower prices. Those endeavors were prompted by the need to mitigate the FCC's cost-of-service methodology in order to support the cost of programming, and *à la carte* was attractive because it naturally tended to <u>raise</u> prices. For this reason, the Commission took steps to ensure *à la carte* was not used to evade rate regulation. *See Adelphia Communications Corp. v. FCC*, 88 F.3d 1250 (D.C. Cir. 1996). To the extent commenters cite these prior flirtations with *à la carte* to show it is technically feasible, *e.g.*, NATOA at 4, the cable industry has never denied that *à la carte* is technically feasible, but rather only that it is limited to digital services, NCTA at 27, 30, 33-35; Advance/Newhouse at 12; Comcast at 37-39, Joint Comments of Smaller Operators ("Smaller Operators") at 5, as most à la carte advocates agree. CU/CFA at 8; Pioneer at 4, 10-11; PCTA at 2 n.1; NJ Rate Advocate at 3; Seattle at 3.

statement by one of its members that "digital cable … is very nice for getting info about programs, parental controls, etc." PTC/CWFA at 3. This comment also shows parents are aware of the controls, the need to make use of them, and the ultimate responsibility for doing so. *See id*. (admitting pre-teen son order of adult content was "[p]artly my fault since I hadn't changed the pin number from [the] default 0000"). *See also* Commonsense at 2 ("media literacy is the ultimate solution"). In this regard, we agree that the "solution to the decency debate is to let the marketplace decide." Commonsense at 1. Comments such as the foregoing confirm the multichannel programming industry's position on this issue. [28]

In light of the acknowledged content controls available to the public, claims about "indecent" and/or "violent" MVPD programming must be viewed as just a smoke-screen for yet another brand of rate regulation. *À la carte* advocates make no secret that their true aim is to "give consumers the ability to select *and pay* for [only] those cable channels they want in their homes." [29] But comments that show the true impact *à*

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[28] *E.g.*, Comments of the Religious Voices in Broadcasting ("RVB") at 6-7; DirecTV at 2-3; Smaller Operators at 16-17; Altitude at 60-71; Univision at 16-17. It is also noteworthy that, among the relative handful of comments from individuals responding to the *Public Notice*, *see supra* note 17, only a few even mention the desire to avoid programming they find objectionable (other than not being interested in watching it) as a reason why they believe *à la carte* rules could be beneficial. Moreover, to the extent that Commission's quarterly reports on consumer complaints reflect complaints about program content issues, the vast majority involve broadcast programming, <u>not</u> cable. *See*, *e.g.*, *Quarterly Report on Informal Consumer Inquiries and Complaints Released*, Public Notice, "Summary of Top Consumer Complaints Subjects," June 10, 2004, (showing single-digit cable complaints each month related to "Programming Issues" and no breakout of subcategories, compared to several times as many for broadcasters between categories "Programming – General Criticism" and "Other Programming Issues," and tens of thousands for "Programming – Indecency/Obscenity").

[29] Commonsense at 1 (emphasis added). *See also* PTC/CWFA at 1 ("Why should a parent who wants their child to benefit from education programming on the Disney Channel or the Discovery Network also have to pay for offensive material …?"). In this

la carte will have on prices for individual channels readily belie notions that parents seeking to pay only for certain channels they do not find objectionable will end up paying less than they currently pay. For example, the Disney Channel was originally offered as an *à la carte* "premium" service and cost about $10 per month. Now, however, the Disney Channel resides on the enhanced basic tier on most systems, where there average price per channel is $0.664. [30]

The fact that the very bundling that *à la carte* advocates rail against is what keeps per-channel prices low means that unbundling MVPD programming will require consumers to pay a premium for avoiding unwanted content they can block now for free. Given that comments favoring *à la carte* purely to advance pick-and-choose alternatives show consumers to be unwilling to pay more than "a little" to gain that putative advantage, *see*, *e.g.*, *supra* at 8-9 (citing Seattle at 2-4, 6), it is unlikely those who object to "subsidiz[ing] cable channels that undermine their core values and beliefs" are willing to pay *extra* to avoid the programming that offends them so. [31]

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regard, it is notable that CU/CFA offer a half-page nod toward "growing public concern about violent and indecent programming" CU/CFA at 4, but then only opportunistically use that concern as a vehicle for advancing misplaced calls for *à la carte* rules. In the remaining ten pages of its comments and the 50 pages of the *Real Cable Choices* report, CU/CFA never again mention any purported concern about program content.

[30] *Implementation of Section 3 of the Cable Television Consumer Protection Act of 1992*, 18 FCC Rcd 13284, Att. 2 (2003) ("*2002 Cable Pricing Report*").

[31] PTC/CWFA at 1. *See also* CU/CFA at 1 (objection to "forc[ing] consumers to pay a special 'cable tax' … in order to get the programming they … do want"). To the extent *à la carte* advocates might suggest that paying a bundled rate to receive content that may be blocked constitutes a "fee" for avoiding the unwanted channels, it is significant that the Supreme Court recently held that such fees are not only permissible, but are the constitutionally preferred means of reinforcing parental control over content children view. *Ashcroft v. ACLU*, 124 S.Ct. 2783, 2792-94 (2004).

Internal inconsistencies in individual *à la carte* advocates' comments further reveal that their demands for regulation are not about giving consumers control in any meaningful sense. In opportunistically paying lip service to "concern about violent and indecent programming," CU/CFA cites the "immense public furor" about certain broadcast programming. CU/CFA at 4. At the same time, CU/CFA opposes giving consumers *à la carte* rights to avoid that programming, and instead insists that "[l]ocal broadcast channels that serve community needs and interests … along with national broadcast networks" should be "preserved" from *à la carte* exclusion. *Id*. at 2. CU/CFA takes the same position with respect to "locally oriented public, educational and government programming (PEG)" cable fare, *id*., even though such channels may represent the only forum outside "premium" pay channels for nudity, and often include other content to which some consumers may object. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). This inconsistent take on empowering consumers is a common theme among *à la carte*'s proponents, many of whom advocate giving consumers "control" while seeking exclusions for broadcast, PEG, and local origination from any *à la carte* regime. NATOA at 9-11; Pioneer at 12; NJ BPU at 2. *See also* RVB at 1, 3-6; CTN at 2-3.

III. *À LA CARTE* WOULD RAVAGE PROGRAM DIVERSITY

The comments lay to rest notions that forcing *à la carte* on the multichannel programming market would in any way help program diversity. Comments by programmers, especially those dedicated to niche, women's, minority, children's, foreign language and arts programming, almost uniformly oppose *à la carte* and document the toll *à la carte* would take on program diversity. Such comments confirm that *à la carte* would undermine program diversity and frustrate statutory objectives in Sections 601(4)

and 601(6) of the Cable Act that call for, respectively, encouraging the widest possible diversity of information sources on cable and promoting competition while minimizing unnecessary regulation and undue economic burdens. *See* 47 U.S.C. §§ 541(4), (6). Notably, these effects would arise regardless of whether any proposed system was "pure" *à la carte* or "mixed bundling" that allows consumers to buy bundles or *à la carte* channels at their sole option. *See* Letter from Mark Cooper, Consumers Union, to Marlene H. Dortch, Secretary, FCC, Aug. 7, 2004, MB Docket No. 04-207 (notice of *ex parte* meeting) ("CU *Ex Parte*"). As AETN demonstrated, once programmers lose the ability to bundle, they can no longer project subscribership for purposes of garnering ad revenue, or internally budget based on license fees with any accuracy, because there is no way to predict how many consumers will subscribe at any given time to a specific tier or channel. [32]

Little more need be said on the subject, except to note the few commenters that disagree with the great weight of evidence on the adverse effect *à la carte* will have on diversity. Some represent entities that are not involved in multichannel programming distribution but somehow presume to know better than niche and minority programmers themselves what is good for them. [33] Others do not so much favor *la carte* as state

[32] AETN Comments at 13-21 (showing that, *inter alia*, "[s]ince new networks do not already have viewers, or ratings that go with them, the key asset they have to encourage investment is not the viewers themselves, but the *potential* to reach them through meaningful subscriber penetration commitments [and that] asset would be lost in an *à la carte* system"). Thus, regardless of whether "criticism" from the industry "focused on pure unbundling," forced partial *à la carte*, or any combination thereof, the comments are far from "irrelevant," CU *Ex Parte* at 1, as they all demonstrate that, no matter what form *à la carte* takes, it eradicates the ability to rely on bundling and its benefits and would scuttle the basic business model of most of the MVPD industry.

[33] CCCV at 13 ("we believe the threats" that "incumbent cable networks now targeting underserved and minority audiences … foresee to their business models are

frustration with the status quo, Mattox Woolfolk, LLC ("Mattox") at 1-2 (faulting "Old Boy's Cable system" and claiming "African Americans will take their chances with a la carte"), or suggest more global changes while at the same time stating an intent to pursue additional alternatives to reaching viewers beyond cable and DBS. [34] The other programmer supporting *à la carte* does so based on mistaken conceptions about its economics and those of the MVPD market generally. *See supra* at 7-8 (citing Urban at 2). However, the weight of the evidence shows that an *à la carte* requirement would devastate minority-owned networks. [35]

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overstated"). *See also* CWA at 2 ("CWA shares the goals of independent and minority programmers" but "the logic of their argument against à la carte fails"). However, CWA undercuts its case by claiming the "cable business has failed miserably to promote program diversity, particularly for minority and female-targeted audiences," *id*., but then making reference to "[m]any minority and women programmers" and noting that Time Warner has made major investments in Oxygen, that Time Warner and EchoStar back Si TV, that Viacom offers BET, and that Comcast offers and holds a minority interest in TV One. *Id*. at 2-3. *Cf.* BPSA at 12 (unsupported assertion that *à la carte* will not be detrimental to diversity because "MVPDs will use the … flexibility of digital systems in new ways to sustain or enhance the options for independent producers").

[34] Comment of the Black Education Network, Inc. ("BEN") at 2 ("urg[ing] Congress to ensure that the next generation of … laws makes access to distribution and enhanced consumer choice central principles" while noting BEN has struck a carriage deal with Paxson Communications Corporation and expects "[d]igital multicast [to] enable our company to pursue distribution channels").

[35] *See*, *e.g.*, TV One, Declaration of Larry D. Gerbrandt at 10-13; Oxygen at 2, 4 ("independent programming service[s] … would be affected most directly and adversely by any government mandate promoting mini-tiers or a la carte carriage," because without "tiered carriage [there is] no reasonable means to induce consumers to make the initial purchase decision … sight unseen"); Univision at 9, 10 ("specialty programming would lose out to programming with mass appeal," with "[t]he end result [being] loss of smaller, independent, niche, specialty, and minority-oriented programming channels"); LAtv at 1-2 ("Under the a la carte model, cable subscribers are likely to purchase only a few main cable channels. This will erode potential advertising support for … especially those who focus on minority audiences [and this] loss of advertising revenue … will dramatically reduce the diverse array of available cable programming options."); International Channel at 6 ("[I]n addition to generating subscriber fees and advertising revenues, International Channel plays a pivotal role in the marketing of … premium services. Tiered carriage … affords cable subscribers an opportunity to sample the full-

The remaining *à la carte* advocates, non-programmers all, are either silent on diversity, reveal their apathy to it, or undercut their own haphazard claims that *à la carte* can somehow aid diversity. For example, CT admits "a federal requirement that all or even specified services be offered … a la carte … could have substantial negative effects on program diversity," but is utterly ambivalent about this impact, noting blithely that "[s]ome programming services may not survive, but that is not necessarily a negative." CT at 15-16. *See* also Pioneer at 7 (supporting *à la carte* even though its "effect … on the viability of independent and niche programming cannot be determined"). In NATOA's view, diversity concerns are restricted to preserving local broadcast and PEG channels, and it would toss multichannel programmers contributing to program diversity to the economic wolves. NATOA at 9-11 (suggesting "niche [cable] programmers be willing to forego licensing fees to reach a broader audience").

But the coup de grace on the subject of diversity from *à la carte*'s advocates comes from CU/CFA. It repeatedly proclaims its support for independent, women's and minority programming, CU/CFA at 1, 5, 6, 7, while at the same time confirming how *à la carte* effectively will sink those programmers by fracturing the market in precisely the

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time foreign language programming available on [our] premium programming services by watching particular foreign language programs …. Shifting International Channel … into mini-tier or a la carte carriage will not only adversely affect [it], but it also will eliminate one of [the] most effective means of promoting the sale of [related] premium programming services."); Comments of MBC Network at 4 ("[R]etail marketing presents overwhelming problems to MBC. Among other things, a la carte … would dramatically increase costs so substantially that independent programmers, particularly those that appeal to minority audiences, would not survive."). *Compare also* Comments of Leadership Conference on Civil Rights at 4-6; MPAA at 5-6; *with* Anonymous Comment (from Birmingham, AL), filed Aug. 2, 2004 ("I HATE that I have to pay for … worthless … spanish [*sic*] channels that I would Never watch").

manner these programmers fear most.[36] As noted, CU/CFA claims the average consumer watches about 12-17 channels regularly. *See supra* at 13. It goes on to note "many of those channels are different for each person and family." CU/CFA at 3. Thus, were all these channels suddenly available on a stand-alone basis, the mass defections giving rise to higher costs and lost revenues cited by cable programmers would be substantial.[37] Under such a scenario, many predict they could be forced to make cutbacks that would harm the quantity and quality of programming they offer, and some could cease operating altogether. *See* NCTA at 31-32; Discovery at 12-15; Viacom at 25-28; Univision at 10-12; Altitude at 47-51.

The CU/CFA comments paint an even grimmer picture for niche and smaller channels at the same time it claims *à la carte* somehow "will prompt more diverse programming." CU/CFA at 6. It notes that for "the bottom 30 channels on the Nielsen scale … [f]or every one household watching approximately 250 … are not," and that 250 more cable networks do not capture enough viewers to even register." CU/CFA at 3. It is unclear how CU/CFA proposes that these programmers are supposed to survive when only a very small portion of subscribers are viewing and/or even aware of them. It is noteworthy, however, that CU/CFA notes, "ESPN is one of the most popular … cable networks, yet seventy-eight percent of [those asked] said they would not pay $2 per

[36] Other *à la carte* advocates complaining that the current system acts as a bar to minority programming undermine their own position by showing the availability of such programming that "has been so successful … cable and satellite companies have used these offerings to compete" with one another. Mattox at 5 (reporting on Comcast and Time Warner Latino tiers while noting that "Adelphia sells a 12-channel Spanish tier for $5.95 per month and a package of six different networks for $4 per month" and that "[f]or $10 to $20 per month some cable customers can access Asian programming").

[37] *See* NCTA at 31-32; Comcast at 18-23; Discovery at 4-12; Viacom at 13-20; Univision at 9-10; Altitude at 37-42.

month for it if they were given the choice." CU/CFA Economic Analysis at 41. If consumers are unwilling to pay $2 for "one of the most popular cable networks," how will smaller, less well-known niche programmers survive in a market where networks must charge, it is projected, far more than $2 to pay for programming? *See* Comcast at 26-29; International Channel at 6-8; Altitude at 30; Weather Channel at 3-4. Neither CU/CFA nor any of the other *à la carte* advocates proposed an answer.

IV. *À LA CARTE* IS CONSTITUTIONALLY INDEFENSIBLE

À La Carte's First Amendment failings are so obvious that its proponents avoid any meaningful discussion of *à la carte* rules' constitutionality. [38] Even *à la carte* advocates recognize that "[s]uch a mandate would inject government into content decisions and raise serious constitutional questions," CT at 12, while those empathetic to content-based concerns still caution against "replac[ing] the judgment of parents, communities, and media markets with … the blunt instrument of à la carte." Comment of Victory Television Network at 1 ("commending" PTC/CWFA for "speaking out" but opposing its position due to "unintended consequences"). All CCCV can say about *à la carte*'s constitutionality is to suggest that it poses fewer First Amendment problems than the FCC's indecency rule – faint praise indeed, [39] since the broadcast rules only barely survived Supreme Court review on a 5-4 vote. *FCC v. Pacifica Found.*, 438 U.S.C. 726 (1978). Even at that, *Pacifica* was an "emphatically narrow" holding, *Reno v. ACLU*, 521 U.S. 844, 866-67 (1997), and the Supreme Court has held that such indecency

[38] To the extent parties advocating *à la carte* opted to lie in wait at the comment stage and offer a constitutional justification for *à la carte* only on reply, AETN reserves the right to respond to those arguments once they are filed.

[39] CCCV at 13. *See also* CWA at 7 (supporting, without providing any constitutional analysis, CCCV position).

rules cannot be applied in the cable context. *Playboy Entmt. Group, Inc.*, 529 U.S. 803, 813-15 (2001). Even for pure "economic" regulations, the courts have held that heightened First Amendment scrutiny applies for cable. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661-62 (1994) ("*Turner I*"); *Time Warner Entmt. Co. L.P. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001); *Time Warner Entmt. Co. L.P. v. FCC*, 56 F.3d 151, 181-82 (D.C. Cir. 1995). Such holdings undermine CCCV's position. They also expose as baseless the whole of PTC/CWFA's constitutional argument, the full extent of which is a few lines equating broadcast with cable for purposes of content-based regulations, PTC/CWFA at 1, 4-5, a proposition the Supreme Court already has forcefully rejected. *See*, *e.g.*, *Playboy*, 529 U.S. at 813-15.

There accordingly is nothing in the record to refute AETN's thorough showing that a requirement for cable programmers and operators to provide "voluntary" *à la carte* offerings violates the First Amendment. AETN Comments at 42-47. It would be a content-based regulation that dictates how programmers sell and MVPDs distribute programming and is thus subject to strict scrutiny that it cannot survive due lack of compelling interests the government might advance and failure to be the least restrictive means of achieving them; it also fails intermediate scrutiny because the government could not show a substantial interest, that the rules would directly and materially serve it, or that they would be narrowly tailored and restrict no more speech than necessary. [40]

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[40] *Id*. (citing, *inter alia*, *Ashcroft*, 124 S.Ct. 2783; *Playboy*, 529 U.S. 803; *Sable Communications of Cal., Inc.* v. *FCC,* 492 U.S. 115 (1989); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Turner II*, 520 U.S. 180; *Denver Area Educ. Telecomms. Consortium*, 518 U.S. 727; *Turner I*, 512 U.S. 622). *See also* NATOA at 16 (*à la carte* advocate comment unwittingly confirming less restrictive alternative that "subscriber interests would be best served through polices that increase competition among providers of multichannel programming"). *Compare* AETN Comments at 47 ("fostering

All the constitutional analyses of any substance support this position. *See*, *e.g.*, NCTA at 27-42; Time Warner at 15-22; Court TV at 34-53; TBS at 9-10; Viacom at 30-34; Altitude at 74-76.

There is little to add on First Amendment issues, except to note briefly two further points: First, the record confirms AETN's observation that *à la carte* would flunk constitutional review because the best evidence its advocates offer is uncertainty. AETN Comments at 45-46. Comments by *à la carte*'s advocates confirm the speculative nature of their position. CU/CFA reaffirms its position recounted in the GAO Report that, even in a best-case scenario, *à la carte* would not benefit the majority (60%) of consumers, and that "tremendous uncertainty" surrounding *à la carte* means it can be discussed only in "conditional [terms] – would, could – to describe [its] possible effects." [41] On the other side of the balance, the record is replete with evidence that *à la carte* would impede programmers from launching new services, continuing to produce compelling content, and sustaining diverse programming. *See supra* at 21-26. Second, the carve-out that some commenters seek from *à la carte* rules for the basic tier, *i.e.*,

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the already substantial competition between MVPDs, V-chip use, and channel-blocking … all are less restrictive means of meeting whatever interests the government might advance in support of *à la carte*"). *See also supra* at II.D (*à la carte* proponents confirm availability of less restrictive V-Chip and channel-blocking options).

[41] *See supra* note 19 and accompanying text. *See also* BSPA at 4 (*à la carte* presently "cannot be fully understood, evaluated or appreciated"); NATOA at 16 ("à la carte may not prove to be … suitable … to address consumer's concerns"). Seattle is similarly equivocal about *à la carte*'s purported upside. *See supra* note 19. *See also* Mattox at 1 (discussing what "a la carte *has the potential* to accomplish" and indicating some programmers might "take their chances" in the face of uncertainty only because they think any change is better than the status quo). *À la carte* rules also would fail to surmount equivocation on the part of the government given the findings GAO already has reached on the subject. *See Ashcroft*, 124 S.Ct. at 2793 ("not only has the Government failed to carry its burden … but also a Government Commission appointed to consider the question has concluded just the opposite").

local broadcast, network broadcast, PEG, local origination, etc., undermines their claims that *à la carte* will give consumers unfettered control over programming, *see supra* at 21, and adds another layer of content-based regulation to that already inherent in any *à la carte* system. [42]

CONCLUSION

The record confirms that *à la carte* rules cannot be imposed without dictating to programmers how they operate in the MVPD market, that such rules would require fundamental restructuring of that industry, and that they cannot achieve any of the goals *à la carte* proponents advance. Most consumers do not support *à la carte* unless it can deliver savings that the record overwhelmingly demonstrates are not possible, and few seem to be aware of or ready to embrace its shortcomings. Not only will consumers not save under an *à la carte* regime, most will experience *increased* prices and/or loss of services as some must be dropped to experience savings while others will go dark or offer diminished programming to counter *à la carte*'s impact. This would harm not just most consumers, but program diversity as well, given the roadblocks *à la carte* rules would erect for niche women's, minority, children's, foreign language and arts programmers. The FCC must recommend against allowing *à la carte* to have this ravaging effect, or to serve as a stalking horse for a return to the failures of rate regulation that similarly thwarted new programming services necessary to a diverse marketplace of

[42] This content-based preference is similar to that for mandated "family friendly" tiers, which AETN showed would be unconstitutional. AETN Comments at 39. We note that none of the *à la carte* proponents, even those seeking to use it for content control, specifically suggest mandating a family tier, except to the extent such a tier could be fashioned by consumers given free reign to select channels in an *à la carte* system, *see* Commonsense at 1-2; Seattle at 4, and no commenter even suggests how a "family friendly" preference could be constitutional.

program options. Even were the Commission inclined to retravel that road, no *à la carte* advocate has offered any showing that would withstand constitutional scrutiny. Even if they tried, the uncertainty surrounding *à la carte*'s effects, the toll it would take on the industry and on diversity in particular, and the content-based dictates and preferences any *à la carte* system would entail, preclude it from passing constitutional muster.

Respectfully submitted,

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