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 OVATION, INC.

Robert Corn-Revere
Ronald G. London
DAVIS WRIGHT TREMAINE, L.L.P.
1500 K Street, N.W., Suite 450
Washington, D.C. 20005-1272
(202) 508-6600

August 13, 2004

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EXECUTIVE SUMMARY

As one of the few truly independent cable programmers operating in the multichannel market, Ovation, Inc. ("Ovation"), is troubled by several of the themes running through the comments on the Commission's inquiry into how cable and direct broadcast satellite ("DBS") multichannel video program distributors ("MVPDs") acquire programming and why they offer it primarily in bundled tiers rather than as stand-alone channels. Though the Commission solicited the comments under the rubric of considering prospects for "voluntary" *à la carte* and tiering options for cable and DBS, there is nothing "voluntary" about dictating to programmers like Ovation how they may sell content to MVPDs and/or develop carriage strategies for succeeding in the multichannel market. Moreover, given the extent to which *à la carte* would fail to deliver the benefits its proponents and some consumers presuppose, Ovation is deeply concerned about the extent to which some commenters used the present inquiry as a convenient vehicle to advocate a return to the now-discredited regime of cable rate regulation that prevailed – and had to be quickly dismantled – a decade ago.

There is no doubt, nor has there been, that *à la carte* will not lower prices for consumers other than outliers wishing to partake of only a very few favorite channels, and that it will undermine programmer efforts to continue producing compelling programming and offering the diverse range of channels and content now available. Accordingly, no *à la carte* regulatory system would make sense without some form of rate control, especially if all *à la carte* does is force programmers to increase licensing fees – and MVPDs to pass them along to consumers – in order to support continued programming. This point is not lost on commenters that openly call for a return to full-blown rate regulation, for new authority for local governments to regulate the expanded basic tier, and for fundamental restructuring of the multichannel business.

But the point also is not lost on Ovation, which had to struggle past the government's last attempt to manipulate the multichannel market via cable rate regulation. Though Ovation identified an underserved space in the market for arts programming and developed compelling content to meet this unfulfilled demand by offering unprecedented access to programs on visual arts, theater, opera, music, architecture, design, literature and dance, and even though it had all but secured affiliation agreements with a number of major cable operators a decade ago, cable rate regulation stalled Ovation's efforts to launch for several years. The rules created a bottleneck that brought launches to a standstill and stifled evolution of programming on existing networks. They necessitated going-forward rules and other regulatory constructs just to get the market back on track, ultimately culminating in repeal of the rules after just four years because they were such an innovation and investment killer.

The Commission should not consider going down that road again. *À la carte* requirements would fundamentally undermine the economic framework on which multichannel programmers and the MVPD market rely by harming both of the dual income streams of ad sales and license fees needed to pay for programming and sustain operations. Precluding the bundling of independent, less well-known networks like Ovation among MVPD powerhouses is critical to providing cable and DBS subscribers a broad array of programming choices from a variety of sources. Bundling allows channels to build a substantial subscriber base, such that even if not all potential viewers tune in regularly to a network – or even watch at all – they are *able* to do so, and that ability has value to advertisers. Bundling also makes it easier for subscribers to discover a channel like Ovation (and ultimately to build familiarity with and loyalty to it), and a presence on subscriber cable and DBS "dials" is indispensable in this age of channel "surfing."

The extent to which bundling is critical to being able to launch and sustain program services – particularly niche programmers like Ovation that strive not to appeal to all tastes but rather are targeted to the arts, minorities, women, speakers of foreign languages, and children – means that the loss of the right to insist on bundled carriage will torpedo program diversity. The record overwhelmingly demonstrates that the economic upheaval *à la carte* portends would force reduced programming budgets, diminish program quality, threaten the existence of established networks, and impede the launch of new networks. It also would impose considerable burdens on truly independent programmers in particular, such as Ovation, including the need to spend even more on marketing to persuade subscribers to receive the network's programming. Claims by *à la carte* advocates that it will not harm program diversity, or that it will help independent and/or niche programmers, are belied by those programmers' staunch and virtually uniform opposition to *à la carte*. All told, *à la carte* will not save consumers money, it will disrupt the basic fundamentals of a media business for both programmers and distributors, and it will do away with diversity and threaten independent networks such as Ovation that present unique and consistent arts and cultural programming.

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REPLY COMMENTS OF OVATION, INC.

Ovation, Inc. ("Ovation"), by its attorneys, hereby submits reply comments in the above-captioned proceeding.[1] Ovation is compelled to file this reply in the wake of comments on the *Public Notice* that reveal several disturbing themes running through the Commission's inquiry. The *Public Notice* sought input on the historical, economic, and structural dynamics underlying how cable and direct broadcast satellite ("DBS") multichannel video program distributors ("MVPDs") acquire programming, and their migration toward offering it in bundled tiers rather than stand-alone channels. The stated goal of the *Public Notice* was to study how choices and prices might change for consumers if government action compels delivery of *à la carte* multichannel programming. *See id*. at 9292-93. Though the comments manifest confusion about exactly what type of government action is at issue and precisely what *à la carte* promises, and while *à la carte* does have its handful of proponents, the record overwhelmingly demonstrates that adoption of any *à la carte* requirement would be extremely ill-advised.

[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").

I. CONFUSION ABOUT WHAT "VOLUNTARY" *À LA CARTE* MEANS OR CAN ACCOMPLISH CANNOT OBSCURE THAT IT WOULD DEPRIVE OVATION OF CONTROL OVER HOW IT SELLS PROGRAMMING AND WOULD HARM ALL PROGRAMMERS

The comments reflect substantial uncertainty about exactly what kind of government incursion is contemplated with respect to how multichannel programmers make content available and how MVPDs acquire it and sell it to consumers. [2] This might be expected to some extent as the *Public Notice* did not describe any well-defined regulatory schemes that might be considered. *But see* Deal Amendment to H.R. 4501, http://energycommerce.house.gov/108/mark-ups/04282004/amendment3.pdf (Apr. 28, 2004). Even so, there is a pronounced lack of consensus about even the basic parameters of what government-mandated or -facilitated *à la carte* would entail, and no clear understanding of what purported benefits it could deliver.

A. Nothing is "Voluntary" About *À La Carte* for Programmers Like Ovation

The ambiguity in this proceeding is perhaps most palpable regarding what it means when the Commission speaks of MVPDs providing *à la carte* services to consumers on a "voluntary" basis. *See Public Notice*, 19 FCC Rcd at 9291; *see also id*. at 9292 (inquiring into effect of "voluntary" *à la carte* on program diversity). For some, the *à la carte* concept means allowing

[2] *Compare* Comments of Univision Communications, Inc. ("Univision") at 2-9; Comments of Alliance for Community Media ("ACM"), *passim*; Comments of Christian Television Networks ("CTN") at 2-3; Paxson Communications Corp. at 4-5 (all contemplating *à la carte* system that would reach basic service tier), *with* Comments of Time Warner Cable, Inc. ("Time Warner") at 4; Comments of The Walt Disney Company ("Disney") at 4-6, Comments of Viacom ("Viacom") at 7-8, Comments of Advance/Newhouse Communications ("Advance/Newhouse") at 3-4; Comments of the City of Seattle, Department of Information Technology, Office of Cable Communications ("Seattle") at 7; Comments of Charter Communications, Inc. at 1-2; Joint Comments of Altitude Sports & Entertainment, *et al.* ("Altitude") at 10 (all commenting on *à la carte* system that would include expanded basic tier), *with* Comments of Consumers Union and Consumer Federation of America ("CU/CFA") at 8-9; Comments of the National Cable & Telecommunications Association ("NCTA") at 7; Comments of LAtv Holdings, Inc. ("LAtv") at 8 (all acknowledging *à la carte* is technically feasible only on digital service tiers).

consumers to "voluntarily" choose channels one-by-one or in bunches of any size and combination, while MVPDs make all the channels that currently exist available for such purchases.[3] For others, it seems to mean MVPDs will decide for themselves whether to "voluntarily" make channels on bundled tiers also available for subscription *à la carte*, either singly or in smaller sub-tiers.[4] Notably, the latter is not far removed from the current state of affairs, as there are no legal, statutory, or marketplace impediments that preclude MVPDs from negotiating with programmers to gain the right to offer – and to pay market prices that reflect programmer costs of – channels provided on an *à la carte* basis.[5]

One thing is crystal clear, however. No matter what notion of *à la carte* the government may consider imposing on programmers or MVPDs, there is nothing "voluntary" about it. The *Public Notice* alone makes this quite obvious by asking what would happen "if *program-*

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[3] *E.g.*, Univision at 2-9; ACM at 2-4; Joint Comments of Smaller Operators ("Joint Operators") at 8 n.11. *See also* Comments of Alexis Barry ("Barry") at 1 ("I am taking as a given that a la carte channel choice would come form the entire body of existing channels, rather than just [those] the cable and satellite providers currently choose to carry"). *Cf.* CTN at 2 (equating *à la carte* and video-on-demand program-by-program purchases).

[4] *See, e.g.*, Comments of CT Communications Network, Inc., *et al.*, ("CT") at 12 (voicing "desire [for] freedom to offer services on a themed-tier or a la carte basis" but arguing "Congress should not mandate that all or even some programming be offered on an a la carte basis"); Comments of the DirecTV Group, Inc. ("DirecTV") at 1-2 (discussing *à la carte* system where "MVPDs would be allowed to provide their services to customers on an *à la carte* basis but would not be required to do so"); Disney at 3 ("this proceeding is more of a hybrid a la carte proposal … [that] would require programmers to permit distributors to sell their programming a la carte or through themed tiers that would allow distributors to choose whether to do so"); Comments of Bloomberg Television ("Bloomberg") at 3. The distinction is important, as it dictates in part the level of government involvement in manipulating how programming is bought, packaged and sold, and the extent of its intervention into the editorial discretion of MVPDs. *See* NCTA at 37-42; Viacom at 30-34; Time Warner at 15-22; Comments of Turner Broadcasting System, Inc. ("TBS") at 9-10.

[5] 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.

mers were *required* to offer their programming … exclusively on a stand-alone basis," or "if programmers, in addition to the currently offered packages, *were* *required* to allow MVPDs to offer" their programming *à la carte*. 19 FCC Rcd at 9292 (emphases added). This leaves no question about the constraints that would be imposed on programmers in any *à la carte* regime. *See* Joint Operators at 12 ("even proposals that purport to eschew government mandates and instead claim simply to be aimed at promoting 'voluntary' à la carte … represent a dangerous intrusion into the marketplace").

The decidedly involuntary nature of *à la carte* for programmers is confirmed by their outcry at the potential loss of control over how they may sell and package programming they have labored to develop, and at the economic havoc it would wreak on their business plans and ability to produce compelling programming.[6] It is folly, therefore, for some commenters to suggest there is a "clear distinction between Mandatory A La Carte and Voluntary A La Carte." Comments of Broadband Service Providers Association ("BSPA") at 3. The reality is "there is no such thing as a *truly* voluntary a la carte rule." Comments of Discovery Communications Inc. ("Discovery") at 19 (emphasis original). *Accord*, AETN at i. That reality must inform any economic, regulatory or constitutional *à la carte* analysis the Commission undertakes, just as it does this reply.

B. *À La Carte* is Not a Magic Bullet for Consumers

Another area where there is considerable confusion lies in what benefits, precisely, could be delivered by the deceptively simplistic notion of forcing "[p]rogram providers … [to] open their doors" via *à la carte* and "hope that their products and services entice customers."

[6] *E.g.*, Viacom at 12-21; Discovery at 4-16; TBS at 6-9; Comments of GSN – The Network for Games ("GSN") at 2; Bloomberg at 11-13; Comments of Courtroom Television ("Court TV") at 9-34; Comments of A&E Television Networks ("AETN") at 15-25. *See also* Comments of The Motion Picture Association of America ("MPAA") at 4-5.

Comments of www.commonsensemedia.org at 1. It has long been clear that *à la carte* will not lower prices for consumers other than outliers wishing to partake of only a very few favorite channels, and that it will undermine the ability of programmers to continue producing compelling programming and offering the diverse range of channels and content now available.[7] The comments confirm *à la carte* will not lower prices for consumers and would harm programming diversity,[8] and even *à la carte*'s proponents implicitly recognize its inability to yield savings for the vast majority of consumers.[9] These points appear to have been lost on or unclear to consumers who responded favorably to the prospect of *à la carte* in surveys proffered by its advocates or to the *Public Notice*.[10] This lack of understanding of *à la carte*'s true and

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[7] *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."); *How Bundling Cable Networks Benefits Consumers*, Economists Incorporated, July 23, 1998, filed by ABC, Inc., CS Docket No. 98-102, July 31, 1998; *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*").

[8] NCTA at 29-32; Time Warner at 7-11; Comments of Comcast Corporation ("Comcast") at 23-33; Disney at 28-29; Advance/Newhouse at 9-10; Joint Operators at 14-16; Oxygen at 8-9; Univision at 15-16; AETN at 19-22; Court TV at 29-31; Comments of the Hallmark Channel ("Crown") at 9; Comments of International Channel Networks ("International Channel") at 6-9; GSN at 5-6, 8; LAtv at 2-3, 7-8; MPAA at 6-7.

[9] CU/CFA at 8-9 (arguing *à la carte* can lower prices, but acknowledging it is not "economically feasible" for "large majority of cable households [that] purchase analog," that make up sixty percent of U.S. households); NATOA at 16 ("a la carte may not prove to be a suitable substitute to address consumer's concerns about rising cable rates"). *See also GAO Report* at 81 (noting Consumers Union 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," *i.e.*, 60 percent would not see a reduction); Comments of Mathew Murphy ("It is entirely possible that *a la carte* service would be more expensive for most consumers[.]").

[10] *See* CFA/CU (71 percent of consumers would not choose fewer channels via *à la carte* than they currently take now if their bill did not decline proportionally, and 41 percent indicated they would not pick fewer channels when informed of channel selection and price drawbacks);

full implications may explain in large part the popular support that this "facile solution" enjoys even though it "is anything but a panacea." AETN at 6.

A not insignificant number of commenters also fail to grasp that even under a total *à la carte* regime, where subscribers make channel-by-channel elections, the maximum number of channels available to consumers does not increase. [11] Some commenters suggest that, if only the government would preclude MVPDs from "forc[ing] customers to pay for channels they do not want," Seattle at 2, they would enjoy more choice, not only because they could dictate the number and/or mix of channels they purchase, but also because they would be free to select channels not available to them now. [12] Ovation, for one, can report this is far from the case.

Seattle at 2 (claiming consumers are "willing to pay for the ability to customize their channel selection," though they are unwilling to "pay a higher total package cost"). Seattle's conclusion is based on a single question in a survey otherwise having nothing to do with *à la carte* that asked "if you could add on additional channels or programs for an additional cost to create your own customized package, how likely would you be to do so," without describing the extent of additional cost or *à la carte*'s other consequences. Some consumer support for *à la carte* not only fails to recognize its inherent weaknesses, but also is untethered from reality and basic economic principles. *E.g.*, Comments of John Emerson ("Channels with advertising should be forced to be free just like [over-the-air] television").

[11] To be sure, channel lineups may change in composition as networks unable to survive in an *à la carte* environment go dark, and the total number of channels may *decrease* if losses outnumber possible replacements, but the total number of channels will not increase.

[12] *E.g.*, CU/CFA at 7 ("cable company won't have to worry about mainstream acceptance of niche and targeted content … because both cable operator and programmer can earn revenue from selling consumers as many channels as they want to watch" and "cable companies are free to serve those niches with as many channels as a consumer could want"); Barry at 1 ("Consumers would be able to choose from channels that their cable providers do not currently bother to carry[.]"). *Compare also* Urban Broadcasting Company ("Urban") at 2 (claiming "too many consumers are not willing to pay for minority cable networks to be added to their cable packages"), *with* CU/CFA at 6 ("if we had *à la carte*, more African-American themed and owned channels could be created and offered to consumers of color")

No matter what form a potential *à la carte* system might take, MVPD system capacity remains finite,[13] and cable and DBS providers will retain ultimate control over what networks are available – *à la carte* or otherwise – on their systems.[14] There are well over four hundred national and regional MVPD channels in existence, *see 2003 Video Comp. Report*, 19 FCC Rcd at 1617 & App. C, but no MVPD comes anywhere close to offering them all. Indeed, Ovation presently is not carried by DirecTV or EchoStar (though it is negotiating carriage with the latter). No matter how many subscribers there are to DBS or cable systems that do not offer Ovation who might wish to receive its programming, even government-mandated *à la carte* will not make it so. The same holds true for any other network that subscribers wish to receive but currently lack because their MVPD declines to carry it.

Suggestions to the contrary ignore not only the reality of finite MVPD capacity, but also that market forces would motivate MVPDs to shift capacity to other uses if delivery of multichannel programming does not make economic sense.[15] It also ignores the roles capacity

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

[14] The only way this would not be true is if the government created some kind of must-carry right for not only broadcast, PEG and local channels, but for every multichannel network that seeks a distribution platform to reach viewers. Putting aside that this would require suspension of the laws of physics to avoid the impediment of finite system capacity, it is an implausible supposition (so much so that it would go without comment here but for *à la carte* advocates' suggestion that all known channels somehow suddenly become available under *à la carte*). Such an approach would undermine competitive incentives, render cable operators common carriers in violation of the Cable Act, *see* 47 U.S.C. § 541(c), and never would survive constitutional scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

[15] *See*, *e.g.*, Comcast at 40-41 (noting tension between *à la carte* and advanced services). *Compare* Urban at 2 (claiming that "[i]f consumers were able to purchase minority cable television networks on an à la carte basis, cable carriers would have no excuse not to enter carriage deals with minority … networks" even though "too many consumers are not willing to pay for minority cable networks"), *with*, *e.g.*, LAtv at 8 (noting "cable providers are able to [use] the same bandwidth [for] high-speed cable, video on demand and HDTV").

limitations and editorial discretion have in establishing the playing field on which video programming providers compete, though it seems the point is not lost on all *à la carte* advocates. *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.").

II. *À LA CARTE* WOULD REVERSE HARD-FOUGHT GAINS OVATION HAS ACHIEVED OVER THE LAST DECADE

Ovation, the sole cable network devoted exclusively to the arts, is exactly the kind of specialized cable programmer that stands to see its hard-won gains in the multichannel programming marketplace undermined by *à la carte* requirements. Ovation provides unprecedented access to programs on visual arts, theater, opera, music, architecture, design, literature and dance, 24 hours a day, 7 days a week, with a schedule featuring approximately 60 percent documentary and 40 percent performance programming. Its documentaries on the arts include behind-the-scenes coverage of important events, tours of museums and exhibitions, exploration into the arts of world cultures, profiles of best-loved and up-and-coming artists, current cultural news, and children's arts programming. It also provides a wealth of performances, including live telecasts of operas, dramas, and dance, as well as of classical, jazz, pop and world music. Notably, Ovation offers this programming while at the same time maintaining its status as a truly independent programmer.

Ovation's mission is to be the premier provider of televised arts and cultural programming. It was founded in response to marketplace demands – both for the arts and for quality programming – and offers its growing audience access to content that is unavailable elsewhere. Ovation's resources allow it to enter unique collaborations with prominent cultural institutions to co-produce outstanding original programming, and to secure groundbreaking U.S. premieres for programming originally produced outside the country. The strength and originality of Ovation's

programming has been recognized with a host of international industry accolades.[16] In addition, like C-SPAN, Ovation provides a special service to thousands of schools in the communities where cable systems carry Ovation's programming. Ovation's ArtZone offering is a special video and Internet platform that develops special programs for junior and senior high school students in art and music to supplement – and to sometimes provide the only – arts programming available in their schools. As part of this effort, Ovation has produced, for example, programs on Bill Gates, Da Vinci's Coda, the Music of Cuba, and the Treasures of Kabul.

Ovation is among the multichannel programming marketplace's true success stories. It identified an underserved space in the market for arts programming and set about developing compelling content and building brand recognition to meet this unfulfilled demand. Ovation first undertook the challenge of initiating programming service in 1994. Though it is difficult to launch any new programming service, Ovation initially was hard hit, as discussed below, by rate regulation rules adopted in the early 1990s. *See infra* Section III. After weathering that and other early regulatory roadblocks, Ovation launched in mid-1996, to an estimated 400,000 households. It now reaches over 32 million households located in 95 of the top 100 markets. However, notwithstanding the growth in viewers and the merit of its programming, Ovation's push to improve penetration is an ongoing challenge. As noted, it has yet to establish a foothold

[16] Among its most notable awards are Peabody and BAFTA Best Documentary Awards for *Howard Goodall's Big Bangs*, and Best Documentary Awards from Vienne TV for *Chaliapin – The Enchanter*, and from the National Association of Minorities in Cable ("NAMIC") for *The Afro-Cuban All Stars at the Salon of Dreams*. Ovation also has received an International Emmy Best Documentary for *The Phil*, a Banff Rockie Best Documentary for *The Lost Frescoes*, an International Film and Video Festival Silver Screen Award for *Pollack!*, and a Muse Award for *The Museum on the Mountain*. It also won a Cable Ace for Best Art and Cultural programming for *New York, New York*. Ovation's commitment to diversity in its programming has received recognition in the form of Vision Awards, also from NAMIC, for not only the *Afro-Cuban All Stars* documentary, but for Best Music and Variety Program *Chico Hamilton: Dancing to a Different Drummer* as well.

with DirecTV or EchoStar, and both DBS and cable system capacity is finite, with expansion being more than matched by the growth of program services.

Ovation, like virtually every other MVPD programmer that submitted comments on the *Public Notice*, depends on dual income streams of advertising sales and licensing fees from MVPDs to pay for programming and sustain operations, and relies upon placement among bundled programming services to attract viewers and sell the network's reach to advertisers. [17] This bundling, which gives cable and DBS subscribers a broad array of programming choices from a variety of sources, is particularly important. It allows channels to build a substantial subscriber base, such that even if not all potential viewers tune in regularly to a network – or even watch at all – they have *ability* to do so. The ability to reach these subscribers has value to advertisers and supports a network's advertising revenue stream in a manner that allows it to launch, then to refine its programming and build ratings.

It also makes it easier for subscribers to discover a channel (and ultimately to build familiarity with and loyalty to it) if it is already available to them among networks they regularly watch, rather than if they must subscribe sight unseen. Such presence is indispensable in this age of channel "surfing," where viewers flit around the dial until they find something to catch their attention. *See* Court TV at 11. It is particularly important for Ovation, which is still building brand-name recognition and may go unnoticed by viewers until they happen across its quality programming. But it is also true for well-recognized brands, however, such as C-SPAN, which notes "[o]ne of [its] strongest appeals … as a niche programming service, and particularly as a public affairs service, is that it is now widely enough available to easily capture the full breadth

[17] *See*, *e.g.*, Viacom at 8-10, 17-21; TBS at 6-9; AETN at 7, 13-14; Lifetime at 3-4; Oxygen at 3-7; 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; LAtv at 4-8.

of occasional audiences created by the constantly changing national debate," especially since its "audience changes as the issues change." Comments of the C-SPAN Networks ("C-SPAN") at 4 ("A la carte pricing destroys the ease with which those occasional audiences are able to see their government in action."). Other commenters dependent upon occasional viewing also note its importance and the economic hardship that *à la carte* therefore portends. *See, e.g.*, Comment of Victory Television Network at 1.

The only other way to attract subscribers would be marketing to teach consumers about the channel – and to convince them to subscribe – without being able to show it to them. The ability to avoid this allows revenues that would be spent on this kind of marketing to be redirected to making programming more attractive to subscribers, and thus to advertisers, thereby achieving higher ratings that in turn beget additional ad revenue. *À la carte* mandates would undermine this paradigm and make it much more difficult, if not impossible, for programmers like Ovation to launch networks and remain viable. *See, e.g.*, Time Warner at 10; Turner at 6-9; Discovery at 15; AETN at 21; Bloomberg at 4-7; Court TV at 26; Weather Channel at 2; Comments of MBC Network ("MBC") at 2-4, 6-8; Crown at 7.

It is noteworthy in this regard that Ovation already has some experience with being offered in *à la carte* tiers and can report that it is a far less favorable mechanism for reaching subscribers and attracting licensing fee and advertiser revenues. Though Ovation appears on the basic expanded tier and/or the digital basic tier with respect to over eighty percent of its penetration, nearly twenty percent comes from its availability as part of an optional program tier (usually a "family" tier) in some markets. In these markets, Ovation has experienced lower revenues and less growth than in the markets where it is available on the expanded basic and/or digital basic tiers. If Ovation were reduced to modifying its entire business model to being

offered only in this manner, or worse, as a completely stand-alone *à la carte* channel, it would not have anywhere near the success it has had to date, and might not even be able to sustain its viability as an independent arts network.

III. *À LA CARTE* MANDATES MUST NOT BECOME AN OPPORTUNITY TO RELIVE PAST MISTAKES OF CABLE RATE REGULATION

Ovation is especially troubled by the extent to which the comments reveal that reinstatement of cable rate regulation is the evident goal of many *à la carte* advocates. Some commenters suggest no regulatory system of *à la carte* purchases of multichannel programming would make sense without some form of rate control. *E.g.*, CT at 12 ("no one will seriously argue that purchasing a package of cable services will ever cost more than purchasing each of those services individually"). Others openly call for a return to full-blown rate regulation. *E.g.*, Comments of the New Jersey Board of Public Utilities at 2 ("rate regulation of some type is necessary to ensure that real and actual choice is made available to the consumer"). One national association of local government agencies and public officials that regulate cable alleges an "absen[ce] of marketplace constraints" and calls for "renewed Congressional authority for local governments to regulate" the expanded basic tier. National Association of Telecommunications Officers and Advisors ("NATOA") at 13-14. Even commenters suggesting only that the government facilitate *à la carte* trials also propose "mandated pricing," a "freeze on current cost structures," "maximum cost differential[s]," and "shared margins." BSPA at 16.

There is agreement on both sides of the issue that *à la carte* alone means little with regard to controlling cable rates (though it still would be devastating in other respects) if all it does is force programmers to increase licensing fees, and MVPDs to pass them along to con-

sumers, in order to support continued programming. [18] The net result would be that, at best, *à la carte* services would be priced so unattractively that few if any subscribers would switch to *à la carte* selections in lieu of continued bundled service. [19] There is no doubt that "A La Carte, even on a test basis, implicates program price[ ]" controls. BSPA at 15.

Placed in the context of *à la carte* necessarily implicating some form of rate control, and of commenters making no secret of their agenda to reinvigorate such regulation, it is chilling to hear calls for "Congress and/or the Commission … to initiate a fundamental restructuring of the multi-channel … business." Comments by Pioneer Telephone Association ("Pioneer") at 4-5. Government dabbling in such market manipulation almost always is a bad idea. This is borne out by the history of rate regulation, which was an unmitigated disaster for the health and growth of the cable industry, program diversity and consumer options, as Ovation's experience attests.

The Commission's initial rate regulations, which limited operators to recovering costs of adding new channels under cost-of-service methodology, created an artificial bottleneck that brought new launches to a standstill and stifled evolution of programming on existing networks. These failings necessitated adoption of going-forward rules in 1995 to encourage "appropriate incentives for adding new channels" in order to advance "the statutory goal of 'promot[ing] the

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[18] New Jersey Division of the Ratepayer Advocate at 4 ("The disclosed 'separately priced component'" for channels on a tier under a proposed system of such mandatory disclosure "should serve as the benchmark ceiling price when such service is offered on an a la carte basis."); NATOA at 16 ("In the absence of … rate regulation … à la carte may not prove to be … suitable … to address consumer's concerns about rising cable rates."); BSPA at 15 ("Different pricing structures could be used to either enhance or destroy the possible success of a[n *à la carte*] offering."); NCTA, Booz Allen Study at 5-7; AETN at 28; Court TV at 30.

[19] Discovery at 19-21. At worst, *à la carte* threatens subscriber base defections, diminishment of the saleable asset of programming reach, and thus loss of advertiser value and ad revenues, *even if no one actually elects à la carte*. *Id*. at 17-21; Comments of Fox Cable Networks Group at 10-13; NCTA, Booz Allen Study at 7-8.

availability to the public of a diversity of views and information.'"[20] The Commission agreed, even then, that the rules inadvertently had thwarted development of new networks, and that it would serve the public interest to remove such impediments. *Id*. at 1231, 1248. Rate regulation also necessitated offshoot rules, including "new product tier" provisions, *see id*. at 1234-36, and the notion of flexible "social contracts" as an exercise in regulatory forbearance, including creation of "migrated product tiers."[21] The Commission also had to issue a series of rulings and waivers to facilitate new program service launches.[22] Ultimately, Congress and the Commission saw the adverse impact of the government's (mis)adventures in market engineering and took steps to allow rate regulation to lapse. *See generally Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296 (1999).

Ovation experienced the harmful effects of these machinations firsthand. As noted, Ovation took initial steps to launch in 1993-1994 – the same time the FCC was beginning to impose new rate regulations. Prior to the new rules, Ovation had contacted many operators to discuss its launch. Reaction was very favorable, and Ovation anticipated having signed affiliation agreements with a number of major cable operators. Before those plans could materialize, the Commission released the new rate regulation rules.

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[20] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 1226, 1231 (1995). *See also id*. at 1248.

[21] *See, e.g., Cox Communications, Inc. Social Contract*, 11 FCC Rcd 1972 (1996); *Comcast Cable Communications, Inc.*, 11 FCC Rcd 4029 (1996).

[22] *See, e.g., Letter to Robert Corn-Revere from Alexandra M. Wilson* (Apr. 19, 1994) (waiver to allow cable operators to immediately pass through launch costs for new service where rules otherwise required waiting period before cost recovery by operators); *Letter to Frederick Kuperberg from Kathleen M. H. Wallman*, 9 FCC Rcd 7762 (CSB 1994) (marketing expenses for which operators were reimbursed by programmer did not have to be offset against program cost increases in calculating external cost pass-throughs); *Letter to Michael Ruger from Meredith J. Jones*, 10 FCC Rcd 3207 (CSB 1995) (relaxed notice requirements). *See also* Thomas W. Hazlett, *Prices and Outputs Under Cable TV Reregulation*, 12 J. OF REG. ECON. 173 (1997).

Almost immediately, cable operators put their plans to add Ovation on hold. Like many planned new services, Ovation found that as it continued to seek investors and discuss prospects for cable carriage, the uniform response was that investment and expansion plans were postponed until the impact of rate regulation was resolved. Surveying the landscape, Ovation found few, if any, new networks would be going forward in any meaningful way, and that all of them were in danger of being derailed. Several start-up networks delayed launches because of uncertainties created by the new rules, including the Golf Channel, World African Network, Planet Central, Parasol 4, Recovery Network, FIT, Booknet, Romance Classics and CNN International.[23] Even networks that had contracts in place with established launch dates agreed to postpone in the face of the regulatory environment created by the new rules,[24] as cable operators hesitated to follow through with new channel plans under rate regulation.[25]

The *à la carte* comments confirm Ovation's experience was by no means unique, and that *à la carte* raises anew the specter of rate regulation's many pitfalls. As C-SPAN notes, "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." C-SPAN at 5. Cable operators who found their hands tied by rate regulation agree that any return to that regulatory paradigm in the form of *à la carte* promises the same desultory outcome. *See* Comcast at 11-14; Time Warner at 13-14; Joint Operators at 12.

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[23] *See* Kim Mitchell & Rod Granger, *Operators Give New Networks Little Attention*, Multichannel News, March 7, 1994, at 3. Notably, some of these networks never did launch.

[24] *See* Kim Mitchell, *Multimedia Tries to Talk Way into Ops' Line-ups*, MULTICHANNEL NEWS, March 14, 1994, at 10.

[25] *See* Christopher Stern, *Programmers*, BROADCASTING & CABLE, April 11, 1994, at 51.

The only response *à la carte*'s advocates have for the prospect of a return to the "bad old days" of cable rate regulation – to the extent they address it at all – is to engage in revisionist history or, worse, simply deny they ever occurred.[26] NATOA states it "does not agree with the positions of some that rate regulation has had … counterproductive effects on the cable industry." NATOA at 14. But the refusal to believe in something in the face of overwhelming evidence of its existence is hardly grounds for deeming it fiction. NATOA claims "[r]ate regulations have not eroded investment or prevented the advancement of technology or the deployment of more programming networks," and for proof it offers findings in the recent tenth annual video competition report regarding how much cable subscribership, revenues, and audience share have grown in the last decade.[27] The extent of such growth over a ten-year period, however, says little about what transpired during the shorter period rate regulation was in place. More importantly, it ignores that the vast majority of cited growth occurred only *after* – and to some extent due to – rate regulation's demise. Hazlet, *supra* note 22 at 193-94. In the end, the evidence is overwhelming that *à la carte* mandates would serve only as a new vehicle for retraveling the rate regulation path that wisely has been left behind, and the Commission should not advocate going down that road again. *See* Comments of Adam D. Thierer, Director of Telecommunications Studies, Cato Institute, at 9 ("If [some sort of price control is needed as a method of keeping per-channel prices in check] then we will have essentially regressed … back

[26] For example, CT characterizes rate regulation only in terms of the industry's response to government interference with normal market forces, and limits any recognition of the adverse impact described above to a passing reference to "regulatory burdens faced by the cable industry." CT at 6. Consumers Union and Consumer Federation do not mention the perils of rate regulation at all. *See* CFA/CU at 10-11.

[27] *Id*. at 14-15 (citing *2003 Video Comp. Report*, 19 FCC Rcd at 1613).

[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.”).

IV. *À LA CARTE* IMPERILS DIVERSITY, PARTICULARLY NICHE AND ARTS PROGRAMMING LIKE OVATION

À la carte advocates also take a head-in-the-sand view of the devastating toll it would have on program diversity, the survival of smaller, niche MVPD programmers, and in particular women’s, minority, foreign language, religious, and arts programming. The record is replete with evidence that the economic upheaval *à la carte* threatens would force reduced programming budgets, diminish program quality, threaten the existence of established networks, and impede the launch of new networks.[28] It would also impose considerable burdens on truly independent programmers in particular, such as Ovation, including the need to spend even more on marketing to persuade subscribers to receive the network’s programming. As the comments indicate, there are relatively few wholly independent programmers in the multichannel programming market today.[29] Though a handful of *à la carte* proponents hypothesize that *à la carte* requirements will somehow clear the way for independent programmers, *see*, *e.g.*, CU/CFA at 7, Urban at 2, CCCV at 4-13, the great weight of the evidence demonstrates otherwise.[30] As one of the minority of independent programmers to whom *à la carte* would pose a particularly onerous burden, Ovation harbors no illusions that it will in any way “remove many consumers’ ‘barrier to purchase’” with respect to “smaller unaffiliated already established networks.” CCCV at 13.

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[28] *See supra* comments cited at note 6. *See also* NCTA at 22-32; Charter at 15-17.

[29] *See*, *e.g.*, Comments of the Center for Creative Voices in Media (“CCCV”) at 4-7; MBC at 1; Comments of Goodlife TV Network (“Goodlife”) at 2.

[30] *See*, *e.g.*, Goodlife at 1, 3; MBC, *passim*. *See also* Oxygen at 1-3, 8; Crown at 7; Univision at 17. Though some independent programmers have attracted investment by larger entities, they nevertheless operate as autonomous units and maintain their “independent” status. *Compare*, *e.g.*, Oxygen at 2 *with* CCCV at 11.

The threats posed by *à la carte* requirements are especially perilous for niche programmers that, by definition, target only a subset of the cable and DBS audience.[31] For example, Oxygen states that it "is the type of independent programming service that would be affected most directly and adversely by any government mandate promoting mini-tiers or a la carte carriage," in that "[a]bsent tiered carriage [it] would have no reasonable means to induce consumers to make the initial purchase decision for the service a la carte or on a mini-tier, sight unseen." Oxygen at 2, 4. Univision concurs, noting that "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 and broadcast stations…." Univision at 9, 10. And LAtv fears that "[u]nder 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." LAtv at 1-2.

À la carte proponents are appallingly apathetic to this considerable threat to programming diversity. Some are prepared to sacrifice it as a mere result of their failure to recognize *à la carte* mandates are not "voluntary" for programmers, as shown above. *See supra* at I.A. For example, CT suggests it would be acceptable if "a federal requirement that all or even specific

[31] Comment of Rainbow/PUSH Coalition at 1 ("imposition of an a la carte pricing model could bring … efforts to [serve audiences of African-Americans, Hispanics, Asians, and other ethnic groups] to a screeching halt."); Comment of Cuban American National Council at 1 ("The explosion of cable programming over the past 20 years has provided numerous channels that reflect … diversity[.] The a la carte system would destroy all progress we have made …."); Comment of Hiram Monseratte, Co-Chair of Black, Hispanic and Asian Caucus of New York City Council ("Channels with niche audiences will find it difficult to attract new viewers, as their principal method of advertising – the remote control – is ripped from their hands."); Comment of Arab American Institute at 1 ("Pay-per-channel pricing will mean that channels with smaller audiences will not have the necessary revenue streams to continue and only the most popular channels will become available to consumers."); TV One ("A la carte would lead to less choice and dwindling program options. It would have a chilling effect on program diversity ….").

services be offered on an a la carte basis … ha[d] substantial negative effects on program diversity," so long as "a la carte is permitted, though not required," which, as noted, could be true only for MVPDs, not programmers. CT at 15. The short shrift CT gives to the threat of lost program diversity is hardly surprising, however, given how cavalier it is about the possibility. *See id*. at 16 ("Some programming may not survive, but this is not necessarily a negative.").

Other commenters would leave preservation of program diversity simply to chance. Pioneer at 7 (supporting *à la carte* even though "the effect of a la carte pricing and network viability of independent and niche programming cannot be determined"). Alternatively, NATOA offers that diversity is all but the sole province of local broadcast and PEG channels, and even suggests multichannel programmers wishing to contribute to program diversity be "willing to forego licensing fees to reach a broader audience." [32] Another commenter presumes to know better than minority programmers themselves what risks they face, even though it acts as neither an MVPD or as a programmer, nor plays any direct role in program distribution. CCCV at 13. It asserts without any support that "we believe the threats" that "incumbent cable networks now targeting underserved and minority audiences … foresee to their business models are overstated." *Id*.

Claims that concerns about lost program diversity are "overstated" are belied by the staunch and virtually uniform opposition to *à la carte* by niche and minority programmers. The concerns cited above represent but a sample from dozens of programmers, interest groups, and public officials that have decried *à la carte* as a threat to viability of new and existing minority,

[32] NATOA at 11. NATOA offers no suggestion, however, as to how such programmers are supposed to pay for compelling programming to attract underserved audiences after having foregone half their revenue base.

women's, foreign language, religious and arts programming.[33] In this regard, arts programming such as that Ovation offers is at no less of a risk. *See* AETN at 20-21. Ten years ago, at the height of rate regulation's stranglehold on the cable industry, Ovation told the Commission that the prospect of being launched *à la carte* rather than on a tier with established networks is a singularly unattractive alternative. Ovation noted that relegation to only *à la carte* opportunities is especially unappealing because advertisers have indicated that niche programmers launched into relatively low-penetration *à la carte* service face correspondingly low advertising revenues.[34] Now that *à la carte* is threatening to come back into vogue despite its obvious flaws, Ovation finds itself in the same position.[35]

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[33] Only a few minority programmers support *à la carte*, *see* Urban at 1-2; Black Entertainment Network, Inc., *passim*, and the best thing one commenter purporting to advance minority programmer interests seems to be able to say in *à la carte*'s favor is that anything is better than the status quo. Comments of Mattox Woolfolk, LLC ("Mattox") at 1-2 (citing "Old Boy's Cable system" and claiming "African Americans will take their chances with a la carte"). *See also* CTN at 3 (suggesting "A La Carte could be the answer!" but not for CTN programming secure on the basic tier). *Compare* Mattox at 3 (suggesting CTN could benefit from *à la carte*), *with* CTN at 2 (opposing *à la carte* for CTN programming on basic tier).

[34] *See On Air; Cable Television 1993-94*, Erica Gruen, Saatchi & Saatchi Advertising (1994), filed with Comments of Programming Providers, MM Docket No. 92-266, May 16, 1994. *See also* Linda Moss, *Re-Regulation May Spark Shakeout, Saatchi Says*, MULTICHANNEL NEWS, Apr. 25, 1994, at 34.

[35] In view of the shortcomings outlined above, it is clear that government-imposed *à la carte* mandates would violate the First Amendment due to inability to advance a compelling government interest under strict scrutiny, inability to materially advance a substantial interest under intermediate scrutiny, and gross overbreadth under both. *See* NCTA at 27-42; Time Warner at 15-22; AETN at 35-47; Court TV at 34-53; TBS at 9-10; Viacom at 30-34; Altitude at 74-76 (all citing, *inter alia*, *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004); *United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803 (2000); *Turner II*, 520 U.S. 180; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Time Warner Entmt. Co. v. FCC*, 56 F.3d 151 (D. C. Cir. 1995); *Time Warner Entmt. Co. v. United States*, 240 F.3d 1126 (D. C. Cir. 2001)). The comments on file thoroughly document *à la carte*'s constitutional shortcomings. By contrast, to the extent that *à la carte* advocates provide any constitutional analysis at all it is exceptionally superficial. *See, e.g.*, CCCV (suggesting *à la carte* is better solution than indecency regulation to unwanted program content because it is less unconstitutional than FCC's indecency regime); CU/CFA at 8-9; Comments of the Parents Television

CONCLUSION

In sum, *à la carte* will not save the consumer money, and it will disrupt the basic fundamentals of a media business, for both programmers and distributors, in which millions of citizens have invested. It also will do away with diversity and threaten independent networks such as Ovation that present unique and consistent arts and cultural programming to millions of viewers and thousand of schools as a profitable business. The Commission should not lightly undermine these mutual goals long sought and heavily financed by the cable industry, by Congress, and by communities across the country.

Respectfully submitted,

OVATION, INC.

By /s/ Robert Corn-Revere

Robert Corn-Revere
Ronald G. London
DAVIS WRIGHT TREMAINE, L.L.P.
1500 K Street, N.W., Suite 450
Washington, D.C. 20005-1272
(202) 508-6635

Its Attorneys

August 13, 2004

Council at 4-5 .Most *à la carte* proponents offer no constitutional showing whatsoever. *E.g.*, Telecom Coops, Seattle, NATOA, BSPA. It is thus unnecessary for Ovation to add more First Amendment analysis to the record, other than to note its agreement with commenters who have shown *à la carte* to be constitutionally indefensible.