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FCC Endorses a la Carte Menu Cable

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the stable flow of milk to a variety of markets. At the same time, other oddities persist. For example, federal regulations require that milk produced at Cedar Grove Cheese in Wisconsin must be trucked 180 miles south to the Oberweis Dairy in North Aurora, Illinois, where it is pumped into a holding tank, then pumped back onto a truck, and sent back to Cedar Grove before it can be processed into cheese. Additionally, studies suggest that the federal milk market acts as an artificial incentive for dairy farmers, who are in turn subsidized by US consumers to the tune of $2.7 billion a year. Rather, according to Hettinga, the DFA is simply trying to push competitors out of business, all while gouging consumers. He notes that were it not for him, a gallon of milk in Arizona would cost $0.50 more than the current price.

Whether that savings is a result of Hettinga's vertical integration is beyond the scope of this article. What is clear is that Hettinga is forcing Dean Foods and the DFA to justify the continuation of an inefficient regulatory system which forces consumers to pay inflated prices. Perhaps the milk orders are justified and Hettinga is just a freerider undermining the integrity of the system. If so, parties as big as Dean Foods or the DFA should have little difficulty funding research to illustrate the regulations' necessity. Or perhaps, as Hettinga explains, it is an "un-American" system whereby "the consumer is getting ripped off."

### FCC Endorses à la Carte Menu Cable

In a report released February 9, 2006, the Federal Communications Commission ("FCC") went on record in support of so-called "à la carte" cable programming. The FCC report

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47 Id.
48 Martin, supra note 16.
49 Petit, supra note 46.
51 Lobeck, supra note 50.
52 Martin, supra note 4.
effectively reversed a similar November, 2004, FCC report and concluded that à la carte programming would combat rising rates as well as lower consumers’ bills. An à la carte system is one in which consumers would purchase unbundled programming from providers. In other words, consumers could subscribe to any number of channels they desire — either in the form of individual channels or smaller programming bundles (or tiers) created for specific interests such as sports, news, or family — instead of purchasing many unwanted channels offered by the distributor. Predictably, the FCC report set off a new round of debate and posturing by both consumer groups and cable industry.

Consumers have pushed à la carte pricing as a way to combat rising cable service rates, which have risen 60% over the past decade. If the cable rates in Chicago are representative, consumers can expect to see bill increases between 4.5% and 8% in 2006 alone. They argue that à la carte pricing will allow consumers to pay only for the programming they actually watch, rather than the entire network lineup. Furthermore, such a system would be beneficial to independent networks who could reach consumers directly rather than having to compete for a slot in the most popular program tiers. Moreover, à la carte pricing is viewed as a way by which consumers can restrict household access to potentially offensive programming channels. On the other hand, the cable industry has fought à la carte pricing proposals. The industry argues

56 Whitworth, *supra* note 55.
61 Wiley, *supra* note 60.
that à la carte pricing would dramatically increase prices for most consumers while reducing the number of available channels. Their reasoning is that by bundling many channels into one large package, it lowers the cost of offering all the channels. In addition, cable companies spent billions of dollars to increase the capacity of their networks and allow them to carry hundreds of channels, high-speed internet, and phone services. An à la carte system would leave these companies with a lot of unused capacity.

The idea of à la carte cable programming has been floated since Senator John McCain drafted a letter to then FCC Chairman Michael Powell inquiring into the subject. Senator McCain, who was then Chairman of the Senate Committee on Commerce, Science, and Transportation, implored Chairman Powell to "explore all available options within your authority to promote à la carte cable and satellite offerings as soon as possible where such offerings would benefit consumers." The authority Senator McCain wrote of was given to the FCC by Congress and it allows the FCC to control service rates where the FCC concludes that the service is not subject to effective competition. Senator McCain went on to note that à la carte digital cable pricing is currently available to consumers in Canada and questioned why such options were not available for American consumers.

In response to Senator McCain's letter, the FCC issued a public notice, asking for comments from the cable industry and


66 Belson, supra note 65.


68 2004 FCC report, supra note 67, at 104.


70 2004 FCC report, supra note 67, at 104.
consumer groups regarding the prospect of an à la carte pricing structure.\footnote{Public Notice, Comment Requested on a la carte and theme tier programming and pricing options for programming distribution on cable television and direct broadcast satellite systems, May 25, 2004, 2004 WL 1152126} Many of the initial comments generated by the public notice supported the à la carte plan.\footnote{Whitworth, \textit{supra} note 55.} However, other responses were less optimistic. These included the views of some well-known economists\footnote{\textit{Id.}} and a report generated by the global consulting firm Booz Allen Hamilton ("Booz Allen") at the request of the National Cable & Telecommunications Association ("NCTA").\footnote{See Booz Allen Hamilton, \textit{The À La Carte Paradox: Higher Consumer Costs and Reduced Programming Diversity}, July 2004, available at http://www.ncta.com/pdf_files/Booz_A llen_a_la_Carte_Report.pdf (last visited Feb. 27, 2006) (Hereinafter "Booz Allen Report"). The NCTA, formerly the National Cable & Television Association, "is the principal trade association of the cable television industry in the United States," representing the majority of the nation's cable suppliers and over 200 programming networks. More information on the NCTA can be found at http://www.ncta.com/Docs/PageContent.cfm?pageID=165.} Specifically, the Booz Allen report concluded that an à la carte system "would reverse recent benefits of programming diversity, while increasing prices for the vast majority of consumers."\footnote{Booz Allen Report, \textit{supra} note 74, at 1.} The Booz Allen report noted that for consumers to trim their monthly cable bills, they would have to select as few as six cable networks.\footnote{\textit{Id.}} At the same time, according to a study conducted by the United States General Accounting Office, the average U.S. household watches approximately seventeen channels.\footnote{United States General Accounting Office, \textit{Issues related to Competition and Subscriber Rates in the Cable Television Industry}, Oct. 2003, at 31, available at http://www.gao.gov/new.items/d048.pdf (last visited Feb. 27, 2006).} The Booz Allen report also concluded that simply by offering à la carte service, rates for the basic tier of programming offered by providers would actually increase seven to fifteen percent.\footnote{Booz Allen Report, \textit{supra} note 74, at 1.} Additionally, à la carte service would increase the costs to produce programming, reduce the number of available channels, and reduce the number of emerging networks,
including ethnic and niche programming.\textsuperscript{79} After considering the above, the FCC issued a report in November, 2004, concluding that à la carte pricing would be harmful to consumers.\textsuperscript{80} Consumer groups blasted the report for studying only a mandatory à la carte model, rather than the voluntary one they had proposed.\textsuperscript{81} Senator McCain’s echoed consumer groups’ displeasure with the report stating “the industry has been successful once again in distracting policymakers with a ‘parade of horribles’ that they allege would result from a mandatory à la carte offering.”\textsuperscript{82}

McCain’s spirits may have been lifted less than a year later when new FCC Chairman Kevin Martin indicated that newly obtained research undermined the credibility of the earlier Booz Allen and FCC reports.\textsuperscript{83} Rather than increasing rates, Chairman Martin suggested that à la carte pricing would actually reduce rates by 2\%.\textsuperscript{84} Gene Kimmelman, senior public policy director for Consumers Union said that Chairman Martin’s comments had “blown a huge hole” in the “fortress of deceit” erected by cable industry.\textsuperscript{85}

The revised FCC report concludes that à la carte pricing will reduce consumer bills by as much as 13\%.\textsuperscript{86} It goes on to state that such a system would make cable programming accessible to those

\textsuperscript{79} Id. at 2. The report goes on to declare that “new network launches would become extremely unlikely.”

\textsuperscript{80} 2004 FCC report, supra note 67, at 6.


\textsuperscript{83} David Ho, In Reversal, FCC Backs à la carte cable options, AUSTIN AMERICAN-STATESMAN, Nov. 30, 2005, Business, C-1.

\textsuperscript{84} Suzukamo, supra note 58.


who currently cannot afford it and provide consumers with the ability
to pay only for the programming they value. In addition, à la carte
pricing would allow consumers to purchase individual channels
outside of their current bundle without having to purchase an
additional programming bundle.

The revised FCC report was greeted with enthusiasm from
consumer groups. Brent Bozell of the family-advocacy group Parents
Television Council said that the report "confirms common sense" and
went on to note that "the cable industry no longer has any arguments
left." Senator McCain said the report confirmed what he had felt for
years and promised to initiate legislation that would give cable
providers incentives for voluntarily offering à la carte pricing.
McCain could not resist one parting shot at the industry and quipped
"I hope that the cable industry will appreciate the ability to choose
despite their failure to provide meaningful choices to their
customers." The NCTA was disappointed "that the updated Media
Bureau report relies on assumptions that are not in line with the
reality of the marketplace." Also dissatisfied with the report were
some smaller independent religious broadcasters, who feel that given
the choice, consumers would simply ignore them. Rod Tapp, an
executive with The Inspiration Networks said à la carte pricing could
be the "death knell for much of the wholesome programming
available today."

Most of the cable industry is desperately seeking to avoid à la

87 2006 FCC report, supra note 53, at 47.
88 Id.
89 Leslie Cauley, Study: A la carte cable would be cheaper, USA TODAY, Feb.
90 Press Release, Senator John McCain, McCain Hails FCC Re-Evaluation,
ontent_id=1657 (last visited Feb. 27, 2006)
91 McCain Press Release, supra note 90.
92 Press Release, National Cable & Telecommunications Association,
Comments of Kyle McSlarrow, NCTA President & CEO, Regarding the Updated
FCC Media Bureau Report on A La Carte Programming, (Feb. 8, 2006), available
at http://www.ncta.com/press/press.cfm?PRid=668&showArticles=ok (last visited
Feb. 27, 2006).
93 Van, Jon, Cable a la Carte Endorsed, CHICAGO TRIBUNE, Feb. 10, 2006, 3-
1, available at 2006 WLNR 2303660.
carte pricing.94 Part of the reason may lie with the industry’s business model. Networks charge cable companies to deliver their channel to each consumer’s home.95 For example, ESPN charges the cable companies more than $2.50 per subscriber, while the cartoon network charges only $0.15. The networks that own these channels bundle popular channels with unpopular channels and force the cable companies to carry all of their channels.96 An à la carte system would destroy that model.97 Nevertheless, some cable companies are voluntarily pushing for à la carte pricing. Comcast and Time Warner made news in December, 2005, when they unveiled a plan to offer a “family tier” of programming.98 During that same month, Charles F. Dolan, of Cablevision Systems Corporation, called for à la carte pricing in the industry.99 Also breaking with the industry was RCN, a cable provider in the Midwest and the Northeast, who applauded the new report, but asked Congress to address the unilateral contracts created by the large programming networks, which, according to RCN, make à la carte pricing unfeasible.100

If the cable industry refuses to voluntarily implement any form of à la carte pricing, it will be up to the FCC to force such changes onto the industry. Yet many observers question whether the FCC has the authority to effectuate that change.101 Some have even suggested that only Congress can order à la carte pricing.102 The FCC is reportedly looking at the statutory language of the Cable Act that gives it the authority to “promulgate any additional rules that may be necessary to promote the diversity of information sources.”103 But this provision does not apply until cable programming with thirty-six

94 Suzukamo, supra note 58.
95 Id.
96 Id.
97 Id.
99 Belson, supra note 65.
100 Timothy Barmann, Cox has no plans to alter service, PROVIDENCE JOURNAL, Feb 11, 2006, page unavailable, available at 2006 WLNR 2450263.
101 Norman M. Sinel, Norman M., Recent Developments in Cable Law, 853 PLI/PAT 355, 374 (Feb-March 2006).
102 Suzukamo, supra note 58.
103 Sinel, supra note 101, at 374.
or more channels is delivered to 70% of U.S. homes, and only then when 70% of those households are subscribers.\textsuperscript{104} Past reports indicate that only the first prong of this analysis has been satisfied.\textsuperscript{105}

Exactly how these developments will play out over the next year is difficult to predict. Some analysts suggest that the cable industry will create some form of voluntary \textit{à la carte} pricing scheme to avoid the implementation of a mandatory one.\textsuperscript{106} Whatever the result, it seems clear that consumers will gain more control over the programming they choose to purchase. Whether this new-found control actually saves them money remains to be seen.

\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} Suzukamo, \textit{supra} note 58.