

2006

FCC Endorses a la Carte Menu Cable

Ryan Eddings

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Ryan Eddings *FCC Endorses a la Carte Menu Cable*, 18 Loy. Consumer L. Rev. 394 (2006).

Available at: <http://lawcommons.luc.edu/lclr/vol18/iss3/7>

This Consumer News is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

the stable flow of milk to a variety of markets.⁴⁷ 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.⁴⁸ 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.⁴⁹ Rather, according to Hettinga, the DFA is simply trying to push competitors out of business, all while gouging consumers.⁵⁰ He notes that were it not for him, a gallon of milk in Arizona would cost \$0.50 more than the current price.⁵¹

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."⁵²

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.⁵³ The FCC report

⁴⁷ *Id.*

⁴⁸ Martin, *supra* note 16.

⁴⁹ Petit, *supra* note 46.

⁵⁰ Joyce Lobeck, *Public Rallies Behind Local Dairyman*, THE SUN (Yuma, AZ), Jun. 19, 2005, page unavailable, available at <http://www.keepmilkpriceslow.org/news6192005.htm> (last visited Feb. 28, 2006).

⁵¹ Lobeck, *supra* note 50.

⁵² Martin, *supra* note 4.

⁵³ Feb 2006 FCC report, at 47, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf (last visited Feb. 27, 2006) (hereinafter "2006 FCC report").

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.⁵⁴ An à la carte system is one in which consumers would purchase unbundled programming from providers.⁵⁵ 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.⁵⁶ Predictably, the FCC report set off a new round of debate and posturing by both consumer groups and cable industry.⁵⁷

Consumers have pushed à la carte pricing as a way to combat rising cable service rates, which have risen 60% over the past decade.⁵⁸ If the cable rates in Chicago are representative, consumers can expect to see bill increases between 4.5% and 8% in 2006 alone.⁵⁹ 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.⁶⁰ 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.⁶¹ Moreover, à la carte pricing is viewed as a way by which consumers can restrict household access to potentially offensive programming channels.⁶² On the other hand, the cable industry has fought à la carte pricing proposals. The industry argues

⁵⁴ 2006 FCC report, *supra* note 53.

⁵⁵ Ron Whitworth, *IP Video: Putting Control in the Hands of the Consumers*, 14 COMM.LAW CONSPECTUS 207, 214 (2005).

⁵⁶ Whitworth, *supra* note 55.

⁵⁷ Amy Schatz, *À la Carte Pricing May Cut Bills For Cable Customers*, *FCC Says*, WALL ST. J., Feb. 10, 2006, at B6.

⁵⁸ Leslie Brooks Suzukamo, *U.S. Consumers Ponder Cable Television Packages*, PIONEER PRESS, Nov. 30, 2005, page unavailable, available at 2005 WLNR 19249066.

⁵⁹ Mary Wisniewski, *Yearly Return: Cable Rates Up Again*, CHICAGO SUN-TIMES, Jan 1, 2006, A03, available at 2006 WLNR 22671.

⁶⁰ Richard Wiley, et al, *Communications Law 2004: Contentious Times in a Shifting Landscape*, 813 PLI/PAT 287, 442 (2004).

⁶¹ Wiley, *supra* note 60.

⁶² Howard B. Homonoff, *Programming Negotiation and Regulation 2005-2006: All in the Family (Tier, that is)*, 853 PLI/PAT 139, 148 (Feb-Mar 2006).

that à la carte pricing would dramatically increase prices for most consumers while reducing the number of available channels.⁶³ Their reasoning is that by bundling many channels into one large package, it lowers the cost of offering all the channels.⁶⁴ 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.⁶⁵ An à la carte system would leave these companies with a lot of unused capacity.⁶⁶

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.⁶⁷ 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.”⁶⁸ 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.⁶⁹ 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.⁷⁰

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

⁶³ Press Release, National Cable & Telecommunications Association, *Booz Allen Study Shows that A La Carte Pricing Would Increase Cost and Reduce Programming Diversity for Most Cable Consumer* (July 15, 2004), available at <http://www.ncta.com/press/press.cfm?PRid=518&showArticles=ok> (last visited Feb. 27, 2006).

⁶⁴ Market Watch, *FCC to reverse course on cable channels*, WALL STREET JOURNAL, Nov. 29, 2005, page unavailable, available at <http://www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=2531&topicId=100015123&docId=1:331648661&start=7> (last visited Feb. 27, 2006).

⁶⁵ Ken Belson, *Chairman of Cable Giant Urges Industry Shift to Flexible Pricing*, NY TIMES, Sec. C, p. 3, available at 2005 WL 19407457.

⁶⁶ Belson, *supra* note 65.

⁶⁷ Nov 2004 FCC report, at 104, (hereinafter “2004 FCC report”)

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

⁶⁹ 47 USC § 543 (2006).

⁷⁰ 2004 FCC report, *supra* note 67, at 104.

consumer groups regarding the prospect of an à la carte pricing structure.⁷¹ Many of the initial comments generated by the public notice supported the à la carte plan.⁷² However, other responses were less optimistic. These included the views of some well-known economists⁷³ and a report generated by the global consulting firm Booz Allen Hamilton (“Booz Allen”) at the request of the National Cable & Telecommunications Association (“NCTA”).⁷⁴ 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.”⁷⁵ 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.⁷⁶ 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.⁷⁷ 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.⁷⁸ 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,

⁷¹ 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

⁷² Whitworth, *supra* note 55.

⁷³ *Id.*

⁷⁴ See Booz Allen Hamilton, *The À La Carte Paradox: Higher Consumer Costs and Reduced Programming Diversity*, July 2004, available at http://www.ncta.com/pdf_files/Booz_Allen_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>.

⁷⁵ Booz Allen Report, *supra* note 74, at 1.

⁷⁶ *Id.*

⁷⁷ United States General Accounting Office, *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).

⁷⁸ Booz Allen Report, *supra* note 74, at 1.

including ethnic and niche programming.⁷⁹ After considering the above, the FCC issued a report in November, 2004, concluding that à la carte pricing would be harmful to consumers.⁸⁰ Consumer groups blasted the report for studying only a mandatory à la carte model, rather than the voluntary one they had proposed.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 horrors' that they allege would result from a mandatory à la carte offering."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.⁸³ Rather than increasing rates, Chairman Martin suggested that à la carte pricing would actually reduce rates by 2%.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.⁸⁵

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

⁷⁹ *Id.* at 2. The report goes on to declare that "new network launches would become extremely unlikely."

⁸⁰ 2004 FCC report, *supra* note 67, at 6.

⁸¹ See Press Release, Consumers Union, *FCC Misses Opportunity to Put a Lid on Skyrocketing Cable Rates by Skewing Cable Choice Report to Congress*, (Nov. 18, 2004), available at http://www.consumersunion.org/pub/core_telecom_and_utilities/001656.html (last visited Feb. 27, 2006).

⁸² Ted Hearn, *PTC, McCain Slam FCC on 'Carte' Report*, MULTICHANNEL NEWS, Nov. 22, 2004, at 48, available at 2004 WLNR 12790499.

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

⁸⁴ Suzukamo, *supra* note 58.

⁸⁵ Press Release, Consumers Union, *CU Commends FCC Chair for Supporting Cable "à la carte,"* (Nov. 29, 2005) available at http://www.consumersunion.org/pub/core_telecom_and_utilities/002902.html (last visited Feb. 27, 2006).

⁸⁶ Press Release, Consumers Union, *FCC "A La Carte" Report Says Consumer's Cable Bills Could Be Cut by 13%; McCain Pledges Legislation in Support*, (Feb. 9, 2006) available at http://www.consumersunion.org/pub/core_telecom_and_utilities/003152.html#more (last visited Feb. 27, 2006).

who currently cannot afford it and provide consumers with the ability to pay only for the programming they value.⁸⁷ 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.⁸⁸

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.”⁸⁹ 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.⁹⁰ 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.”⁹¹ The NCTA was disappointed “that the updated Media Bureau report relies on assumptions that are not in line with the reality of the marketplace.”⁹² 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.”⁹³

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. 10, 2006, 01B, available at 2006 WLNR 2329108.

⁹⁰ Press Release, Senator John McCain, *McCain Hails FCC Re-Evaluation*, (Feb. 9, 2006) available at http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_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.*

⁹⁸ Leslie Cauley, *Cable-TV Companies to Offer a 'Family Tier,'* USA TODAY, Money, 3B, Dec. 13, 2005, available at 2005 WLNR 19972557.

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.¹⁰⁴ Past reports indicate that only the first prong of this analysis has been satisfied.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 à la carte pricing scheme to avoid the implementation of a mandatory one.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.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Suzukamo, *supra* note 58.
