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Holly Phillips

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**By Holly Phillips***

## I. A World Without Channel Surfing?

Everyone has had one of those moments—one of those moments where all you want to do is escape the reality surrounding you and watch television. You sit on the couch, grab the remote, turn on the TV, and then, to your shock and disappointment, realize that nothing, absolutely nothing of any value is on television. You flip through the sixty plus channels you pay for every month. You start with the usual channels: ABC, CBS, FOX, and NBC. Then you flip through your back-up channels: ESPN, CNN, and Discovery. Nevertheless, to your dissatisfaction, there is nothing. You become that channel surfer you have always denied you were. You catch yourself watching a cooking demonstration on the Food Network or some reality programming on, gasp, VH1. You find yourself watching some real life crime story on A&E or, even worse, you are mesmerized at some 1970s game show re-run on GSN.

Now imagine a night where the only channels you can "surf" are those you handpicked. It sounds nice, right? The shows you watch are on the channels you have specifically chosen. Soon, you could be saying goodbye to those nights on the couch watching what we would normally argue is sub-par programming. Soon you could be saying goodbye to being entertained by Bob Eubanks and what seems like the thousands of Law & Order re-runs on the USA Network.

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* Holly Phillips has a B.A. in political science and broadcast journalism from American University in Washington, DC, and is a JD Candidate at Pepperdine University School of Law. She will graduate in May 2009.

Now instead of searching through sixty plus channels of variety, you could search through only twenty or maybe even ten channels. Do you like your once-a-month late night rendezvous with Flavor Flav and a reality show about Hulk Hogan's family enough to pay for VH1 each month? Would you subscribe to a channel that just shows you the weather forecast repeatedly throughout the day? Proponents of an a la carte cable plan would like to see cable companies offer channels individually, which they argue will save consumers money and increase consumer choice.[1] Alternatively, opponents of the a la carte plan argue the exact opposite: buying channels individually will cause cable bills to soar.[2]

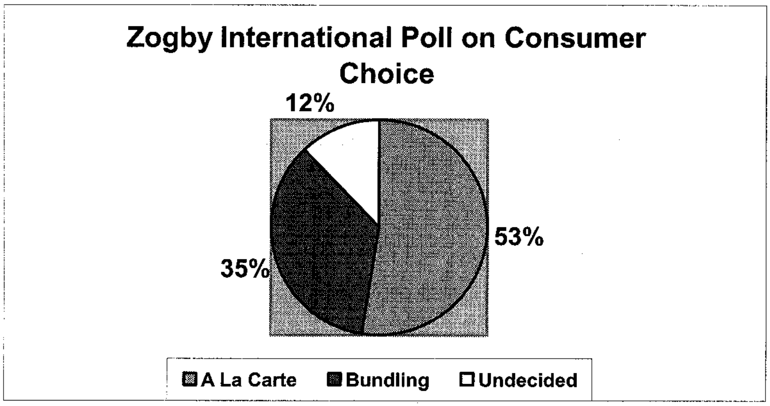
Many Americans agree with Chairman Kevin Martin of the Federal Communications Commission (FCC), one of the most vocal proponents of a la carte cable.[3] In an October 2007 Zogby International Poll, fifty-two percent of cable subscribers said they would prefer to buy channels on an individual basis, while only thirty-five percent said they would prefer to keep the current bundled system.[4]

1. Marc Gunther, *Why A La Carte Cable TV Is A Nutty Idea,* Feb. 13, 2006, http://money.cnn.com/2006/02/13/magazines/fortune/pluggedin_fortune/index.htm.

2. Letter from Geraldine Laybourne, Chairman and Founder, Oxygen Media, to The Honorable Ted Stevens and The Honorable Daniel Inouye, Co-Chairmen, Senate Committee on Commerce, Science, and Transportation (Mar. 10, 2006). There has been much debate over this argument. Data conjectures can be found to both support and oppose this conclusion. Until, there is more affirmative data which illustrates the consequences of a mandated a la carte system, conclusions regarding the prices of cable bills seem more like hopeful estimates rather than proven outcomes.

3. Zogby International, *Custom Cable: Most Americans Would Prefer to Pay For Just the Channels They Want to Watch,* ZOGBY'S AMERICAN CONSUMER VOL. 2,

**Figure 1**




Like many political issues, the point of contention is cost. In fact, seventy-one percent of Americans believe they should not have to pay for channels they do not watch and eighty-two percent of current cable subscribers believe the amount they currently pay for cable is too high.[5] Although most analysts of an a la carte system agree that individual choice and consumer freedom are important; there has been much debate over whether or not changing to an a la carte system would defray transitional costs to consumers. In 2007, the average cable bill for expanded basic programming packages was $42.76 a month.[6] How much more are Americans willing to pay? The FCC's "Further Report on the Packaging and Sale of Video Programming Services to the Public" (Further Report) states that a consumer who purchases eleven channels on an a la carte pricing system could face anywhere from a thirteen percent decrease to a four percent increase in their monthly cable bill.[7] With the average

5. *Id.* Thirty-seven percent of Americans believe costs would be greater under an a la carte system, while thirty-nine percent believe an a la carte system would lower cable bills. *Id.*

6. National Cable & Television Ass'n, *Average Monthly Price for Expanded*

American household watching seventeen channels,[8] cable bills could increase under an a la carte plan. The real issue is how much Americans are willing to pay for choice.

## II. THE CABLE DEBATE: INDIVIDUAL CHOICE VS. PRE-PACKAGED BUNDLES

### *A. A La Carte*

It is hard to imagine a time when cable television was not a mainstay in American life. In the late 1940s, cable television launched to provide television service to remote rural areas, where over-the-air television reception was sporadic.[9] In the 1970s, competition emerged between free over-the-air television and cable operators.[10] The emergence of new cable networks, such as, HBO, ESPN, and Showtime fueled the competition.[11] Now, because cable operators provide diverse programming to consumers, there is more competition than ever before.

In order to provide programming, "cable operators (1) acquire the rights to carry cable networks from a variety of sources and (2) pay license fees – usually on a per-subscriber basis – for these rights."[12] With more than 230 national cable networks and more than fifty regional networks, cable operators argue consumers have more choice today than was ever imaginable.[13] Although it is true that consumers have more options in programming today, many cable customers are dissatisfied with having to pay for more channels than they watch.

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8. *Id.* at 4 (citing *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 31 (Oct. 2003)).

9. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 7 (Oct. 2003).

10. *Id.*

11. *Id.* HBO emerged in 1972, Showtime was introduced in 1976, and ESPN was launched in 1979. *Id.*

12. *Id.* The three primary types of owners of cable networks are (1) large media companies, which own major broadcast networks (Disney); (2) large cable operators (Time Warner); and (3) independent programmers (Landmark Communications). *Id.*

13. Kevin J. Martin, *Family Friendly Programming: Providing More Tools for Parents,* 55 FED. COMM. L.J. 553, 555 (2003).

In 2004, the FCC issued a "Report on the Packaging and Sale of Video Programming Services to the Public" (First Report).[14] The First Report stated that an a la carte cable system could increase multichannel video programming distributors' (MVPDs) expenses, reduce advertising revenues, and increase marketing costs for cable networks, without providing any substantial benefit for consumers or cable operators.[15] The Report "implied that a la carte regulation is undesirable and focused its policy recommendations on methods to increase competition and investment in new technologies in the retail MVPD market."[16] Two years later and under the direction of Chairman Kevin Martin, the FCC countered the First Report by releasing the Further Report.[17] This Further Report contradicts the First Report's findings, arguing that the First Report was based on several flawed assumptions, studies, and analysis.[18]

Based on new studies and analysis, the 2006 Further Report concludes that an a la carte system *could* potentially benefit consumers more than the current bundled system.[19] In fact, the Further Report concludes, "A reexamination of the First Report indicates that many consumers could benefit from the ability to purchase network programming on an a la carte basis."[20] One of the

14. *Further Report* at 3.

15. *Id.*

16. *Id.*

17. *Id.* Chairman Martin is the most vocal proponent of mandating a la carte cable. The Further Report could be seen as a political countermove to the FCC's First Report, which was released under previous Chairman, Michael Powell. In May 2004, leaders in Congressional Commerce Committees asked the FCC to conduct a study on a la carte cable. Charles B. Goldfarb, *The FCC's "A La Carte" Reports,* Congressional Research Service Report for Congress, at 3 (Mar. 30, 2006). The result was the First Report. *Id.* Contrary to First Report findings, the Further Report shows the potential benefits an a la carte system could provide for consumers, but the timing and the content of the report are questionable at best.

18. *Further Report* at 3.

19. *Id.* One significant point about the Further Report is the lack of definitive answers. The Further Report goes no further than stating there are potential benefits and improvements with a transition to a la carte cable. Although it is hard to have any definitive statistics showing benefits of a plan not yet in place, it seems that the Further Report was a politically charged report issued to support a la carte cable – a goal of FCC Chairman Martin.

20. *Further Report* at 6. The First Report included analysis, which was "based on assumptions that are not properly supported and that, in some cases, appear unreasonable." *Id.* at 6. For example, the First Report over-estimated the

flawed calculations included in the First Report was that under an a la carte cable system, any consumer who purchases nine or more channels would likely see an increase in their cable bill.[21] The Further Report corrects the mistake by stating that if there are six broadcast stations, consumers could potentially purchase a maximum of twenty channels before seeing an increase.[22] Additionally, the Report found that switching from the bundled cable system to an a la carte system or increased themed tiers could potentially lower consumer cable rates, because consumers could opt to purchase fewer channels or fewer tiers.[23] If given the option of buying channels individually, would Americans limit the number of channels they subscribe to enough to reap any of the potential economic benefit asserted by the Further Report?

One of the most significant advantages of mandating a la carte cable is the potential for the increase in consumer choice. In fact under an a la carte system, consumers can choose how many channels they want and what kind of programming they prefer. Furthermore, consumers "could choose to purchase a large number of

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costs associated with transitioning from a bundled cable system to an a la carte system. *Id.* at 7. The report failed to look at mechanisms that could be used to minimize the transition costs. *Id.* at 7.

21. *Id.* at 4.

22. *Id.* A Booz-Allen-Hamilton study on which the First Report relied showed that the average consumer would see an increased cable bill anywhere from fourteen percent to thirty percent under an a la carte cable system. *Id.* The Further Report corrects for an error in the Booz-Allen-Hamilton study and found that a consumer purchasing only eleven cable channels would see changes in their cable bills ranging from a thirteen percent decrease to a four percent increase. *Id.* Furthermore, three out of four consumers would see a decrease under the aforementioned conditions. *Id.* In addition, Booz-Allen-Hamilton admitted to their error stating:

> We reviewed the July 2004 analysis in light of the Chairman's statement and found the following: To be consistent with the assumptions in our analysis, the anticipated charges for the basic tier of broadcast stations (which, under current law, must be purchased by all customers) should have been consistently removed from the calculation of the 'breakeven' number of cable channels that a customer could buy without seeing an increase in his or her bill.

*Id.* at 7 (citing Letter from John Frelinghuysen, Vice President, Booz Allen Hamilton Inc., to Dr. Leslie Marx, Chief Economist, Federal Communications Commission (Dec. 16, 2005)).

23. *Further Report* at 5.

less expensive channels, or a small number of more expensive channels, to maximize the benefit they receive from cable television viewing."[24] The question remains as to how the market will price the cable networks. If the most popular networks are the most expensive networks, a la carte might not be the most financially beneficial system for consumers.

A la carte systems have been successfully implemented abroad. In Hong Kong, consumers use an a la carte system to subscribe to cable television.[25] In 2006, for only $27.50 a month consumers received fifteen free channels plus eleven additional channels of their choosing (options included: Animal Planet, CNN Headline News, Discovery Channel, ESPN, HBO, and National Geographic Channel).[26] In Washington, DC, the exact same cable package would cost consumers $82.00 a month under the current bundled system.[27] This example shows the great potential a la carte cable has for consumers.

In 2003, the United States General Accounting Office (GAO) surveyed several cable companies and found that in modern times, cable operators sell programming in tiers due to contractual, economical, and technological considerations.[28] Consumers have

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24. *Further Report* at 8. The freedom in choosing channels under an a la carte system could raise viewership levels of popular channels. *Id.* at 8. There is a likelihood of overlap among consumers for the most popular channels. *Id.* at 8. The report explains, "if a large percentage of consumers choose to purchase a channel, then the channel's subscriber base would be relatively unchanged, and with fewer alternative channels to surf through, we would expect consumers purchasing the channel to watch it with greater intensity." *Id.* at 8.

25. John McCain & Kevin Martin, *TV Served A La Carte,* LOS ANGELES TIMES, May 25, 2006, at B11.

26. *Id.*

27. *Id.*

28. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 7 (Oct. 2003). The GAO stated several goals of "Issues Related to Competition and Subscriber Rates in the Cable Television Industry" including:

> Over 70 million American households receive television service from a cable television operator. In recent years, rates for cable service have increased at a faster pace than the general rate of inflation. GAO agreed to (1) examine the impact of competition on cable rates and service, (2) assess the reliability of information contained in the Federal Communications Commission's (FCC) annual cable rate report, (3) examine the causes of recent cable

little choice in the networks (or individual channels) they purchase, because they are required to buy an entire package including every network specified in the bundle.[29] A la carte cable could increase consumer choice by allowing consumers to pay only for the channels they want and will watch.[30] But how much are Americans willing to pay to individualize their cable television? Several concerns have been raised regarding the costs of a transition to an a la carte system. According to the GAO survey, under a mandated a la carte system new equipment would be required in order to unscramble networks each consumer selects to receive; thus, leading to increased spending for cable operators and higher rates for consumers.[31]

Today, cable networks obtain significant revenue from advertising.[32] Advertising revenue is determined by how much companies are willing to pay, which is directly linked to a network's

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> rate increases, (4) assess the impact of ownership affiliations in the cable industry, (5) discuss why cable operators group networks into tiers, and (6) discuss options to address factors that could be contributing to cable rate increases.

*Id.* at intro.

29. *Id.* at 6.

30. *Id.*

31. *Id.* According to the GAO, if all channels were offered on an a la carte basis, technology upgrades would be necessary in the short term. *Id.* at 32.

> Because most televisions in operation today are *cable ready*, a cable wire can usually be connected directly into the television and the subscriber can view all of the networks on those tiers. An addressable converter box – which serves to unscramble any scrambled networks – is only needed if the subscriber chooses to purchase networks that the cable operator transmits in a *scrambled* fashion, as is usually the case for networks placed on digital tiers, certain premium movie channels, and pay-per-view channels.

*Id.* at 32.

Additionally, cable operators would have to scramble all networks, so that subscribers would only have access to those, which they purchase. *Id.* In the last several years, converter boxes have become more common, due to the increase in digital tiers. *Id.* at 33.

32. *Id.* at 6. Three of fifteen cable network representatives stated that sixty percent of their profits are accrued from advertising revenues. *Id.* at 34. A 2002 study by Kagan World Media stated that of seventy-nine surveyed networks, the majority received nearly fifty percent of their profits from advertising revenue. *Id.* at 34.

potential viewership.[33] Critics argue that under an a la carte system, viewership levels would decrease because consumers would select fewer channels to purchase in comparison to channels currently included in their pre-packaged bundles, thereby leading to a decline in advertising revenues.[34] Furthermore, two of the most important factors taken into consideration when deciding advertising rates among cable networks are: (1) the demographics of the audience and (2) the degree of targeting certain ads toward certain consumer interests.[35] Because niche and independent networks have smaller audiences with similar interests, some analysts argue that these specialized networks could see an increase in advertising revenue.[36] Like much of the areas of contention in the cable debate between a la carte and bundled systems, under a new system, the amount of change in advertising revenue is yet to be conclusively determined. In fact, there is a possibility that advertising revenues may increase for the popular networks, which would see a rise in their subscriber numbers.[37]

In a report prepared for Sen. John McCain (R-AZ) and the Senate Committee on Commerce, Science, and Transportation, the GAO concluded:

> Technological, economic, and contractual factors explain the practice of grouping networks into tiers, thereby limiting the flexibility that subscribers have to choose only the networks that they want to receive. An a la carte approach would facilitate more subscriber choice but require additional technology and customer service. Additionally, cable networks

33. *Id.* at 6.

34. *Id.* It is assumed that if consumers can select their own channels in an a la carte system, they will purchase fewer channels; thereby resulting in a lower potential viewership of the networks. *Id.* Thus, advertising revenues would decline, because the network viewership rates would be lower. *Id.*

35. *Further Report* at 11-12.

36. *Further Report* at 12.

37. *Further Report* at 5. Like much of the debate between a la carte and bundling, the projections regarding the burdens and benefits to consumers, cable networks, and cable operators are potential and there is no definitive data. Until there is a switch to a la carte it is near impossible to tell whether advertising revenues or licensing fees would increase or decrease.

> could lose advertising revenue. As a result, some subscribers' bills might decline but others might increase.[38]

The best analysts can do is make a reasoned estimate. However, without further implementation of any changes to the nation's cable system, it is near impossible to have any definitive conclusions regarding whether advertising revenues would raise or fall in an a la carte regime.

Another potential drawback for a la carte cable is the possibility of increased license fees.[39] Similar to a decrease in advertising revenue, increased licensing fees could increase consumers' cable bills, because the cable operators are likely to defray some of the costs to consumers.[40] Despite industry concerns, the Further Report found that unless cable networks see a dramatic change in audience levels, advertising revenues and licensing fees likely would not decline.[41] In general, there are several factors that lead to increased cable bills, including: customer service costs; increased programming costs; and investments in improving the cable infrastructure.[42] An economic study of the Further Report

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38. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at Intro. (Oct. 2003).

39. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 6 (Oct. 2003). Cable networks may raise licensing fees for cable operators in order to make up for lost revenues due to a lower number of subscribers per network. *Id.*

40. *Id.* at 6. The FCC's Further Report counters the GAO study stating:

> Even if per-subscriber license fees increased under a la carte, this might not have a large effect on consumers, because under a la carte consumers would only be paying for the networks they watch or plan to watch and would not have to pay for the networks they do not plan to watch. Thus, under a la carte, the license fees could be charged for people who subscribe to the particular network, and therefore are presumably more likely to watch the network, while under bundling they are charged for people to have the network available.
> *Further Report* at 12-13.

41. *Further Report* at 5.

42. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 20 (Oct. 2003). "On the basis of data from 9 cable operators, programming expenses and infrastructure investment appear to be the primary cost factors that have been increasing in recent years." *Id.* The

found the cost of the transition could be more detrimental to consumers who use analog service.[43] The costs of providing digital set top boxes to analog consumers would have to be factored in the costs of a transition to a la carte.[44] While this is a true observation, the government has already mandated a digital transition in February 2009, meaning all consumers will have access to digital service by early 2009. Thus, the costs for the set top boxes could be diminished if the timing of changing to an a la carte system occurred simultaneously with the digital transition. Increased programming costs also affect cable rates and several cable operators interviewed by the GAO cited sports programming as a major factor in increased programming costs.[45] Using Kagan World Media data, the GAO found that the average license fee for an almost exclusively sports-related programming network increased by fifty-nine percent between 1999 and 2002.[46] Studies show that an a la carte system would not be implemented without creating an influx in costs to both consumers and cable operators; however, the amount of change in costs has yet to be determined.

One of the major economic concerns of implementing an a la carte system is the potential increase in marketing expenditures for

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majority of cable operators and cable networks surveyed by the GAO reported higher programming costs directly contribute to increased cable rates. *Id.* at 21. The cable operators' annual programming expenses increased from $122 per subscriber in 1999 to $180 per subscriber in 2002. *Id.* Not only did programming expenses increase forty-eight percent, but the average licensing fee increased by thirty-four percent during the same time frame. *Id.* at 22. Cable executives gave several reasons for increased programming costs: competition among networks has become more intense; the costs for writers and producers have risen, creating more investment in programming; increased costs of sports programming; and increased competition regarding rights to existing programming; an increased amount of original content; and improved quality of programming. *Id.* at 23.

43. Steven S. Wildman, *A Case For A La Carte and "Increased Choice"? An Economic Assessment of the FCC's Further Report,* professor, Michigan State University, Mar. 9, 2006 (on file with National Cable & Television Association), http://www.ncta.com/PublicationType/ExpertStudy/2821.aspx.

44. *Id.*

45. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 22 (Oct. 2003).

46. *Id.* During the same time period for 72 non-sports networks, the average licensing fee increase was twenty-six percent. *Id.* The sports networks analyzed in this survey included: ESPN, ESPN2, ESPN Classic, FOX Sports Net, The Golf Channel, The Outdoor Channel, and the Speed Channel. *Id.*

cable networks.[47] The First Report assumed marketing costs would increase, because cable networks would be striving to induce subscribers to purchase their networks; however, most, if not all, of the established networks would probably be able to rely on their brand name and existing reputation to retain subscribers and avoid increased marketing costs.[48] Despite exploiting their brand name and their reputation, cable networks are concerned an a la carte system would lower audience levels for networks.[49] They further argue that to subsidize these costs, the cable operators would pass on expenses to consumers through raising cable rates; however, the final effect on revenues and consumer cable rates has not yet been determined, because there is no data available to lead to any substantive conclusions.[50]

In an era where "reality" programming seems to be overtaking the nightly television spots, one well-founded question is whether programming quality would detrimentally be affected by a transition to a la carte. In the past, when established networks have been challenged by new competition or fledgling networks, instead of increasing spending on marketing and decreasing quality (like some fear), the networks respond by increasing the quality of their programming.[51] For example, ESPN has long been considered the premium sports network; yet, Timer Warner attempted to break into the sports market in 1996 by creating CNN/Sports Illustrated.[52] News Corporation also attempted to break into the sports market and has been semi-successful in acquiring regional sports networks.[53] ESPN responded to these competitive networks by acquiring exclusive rights to specific sporting events and creating original programming.[54] Other examples included CNBC, for financial

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47. *Further Report* at 11.

48. *Id.*

49. *Id.* at 12. Critics of a la carte cable often argue that a reduction in audience and subscriber levels would also lower advertising revenues and overall profits for cable networks. *Id.*

50. *Id.*

51. *Id.* at 13.

52. *Id.* at 13-14.

53. *Id.* at 14.

54. *Id.* ESPN worked to acquire exclusive rights to the National Football League and Major League Baseball. *Id.*

programming, and Lifetime for programming aimed at women.[55] In order to attract new subscribers, cable operators would have to maintain a high level of programming.

Under an a la carte system, if consumers are disappointed in the quality of the programming of a certain network, then they can cancel their subscription to that network.[56] This structure gives consumers more power in the cable industry, because if enough consumers drop a network, the cable networks will be forced to respond to market concerns.

The question remains about whether a la carte would benefit consumers to an extent, which would be worth the transition. An analysis of the Further Report found that at no point in the sixty-one page report does it actually state a transition to a la carte would benefit consumers.[57] Before the government interferes with the cable industry or mandates an a la carte system, there should be no doubt that the interference would produce greater benefits than harms.[58]

Moreover, the Further Report does not meet the Office of Management and Budget standards for potential regulatory action, including: it fails to describe the problem (market failure) the transition to a la carte cable would address; fails to describe how a transition to a la carte cable would be enforced and take place; and fails to provide a quantification of the benefits and costs of government interference or regulatory action.[59] Instead of proving the costs and benefits of a transition, the Further Report states some consumers could benefit under an a la carte system and some consumers could be harmed under a bundling system.[60] In addition nine out of ten studies submitted to the FCC evaluating the benefits and costs of an a la carte system, concluded a transition to a la carte would likely harm consumers and only one (jointly submitted by the

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55. *Id.* It is important to note that the Further Report also stated that it is impossible to know whether cable networks would respond to changes in audience levels or subscriber levels under an a la carte system by altering their quality of programming. *Id.*

56. *Id.*

57. Jeffrey A. Eisenach, *The FCC's Further Report on A La Carte Pricing of Cable Television,* at 6 (on file with National Cable & Television Association), Mar. 6, 2006.

58. *Id.* at 4.

59. *Id.* at 5.

60. *Id.*

Consumers Union and Consumer Federation of America) found consumers would likely benefit from the transition.[61] The Further Report ignored the nine studies, which found that the costs potentially outweigh the benefits, and instead focused on the Consumer Union study.[62] Not only is the Further Report a complete reversal of the FCC's First Report, but it raises serious concerns about whether a mandated a la carte system would be genuinely beneficial to the public interest.

### *B. Bundling*

Today most cable operators provide consumers with tiers of networks.[63] Generally, operators provide at a minimum a Basic Tier and an Expanded-Basic Tier.[64] The Basic Tier is required by the FCC to include local broadcast stations and educational, governmental, and public access channels.[65] Contracts between cable operators and cable networks specify which tier the network is included on and sometimes the contracts denote a minimum percentage of consumers who must have access or actually watch the network.[66] Many economists argue offering cable television in a

61. *Id.* at 13.

62. *Id.*

63. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 30 (Oct. 2003).

64. *Id.* First, there is a Basic Service Tier, which usually includes local stations and a minimal number of cable networks. Charles B. Goldfarb, *The FCC's "A La Carte" Reports,* Congressional Research Service Report for Congress, at 1 (Mar. 30, 2006). Second, there is an Expanded Basic Service Tier, which has an average of thirty-six cable networks. *Id.* The networks typically include the most popular networks. *Id.* About ninety percent of consumers purchase the expanded basic service tier. *Id.* Third, cable companies offer several premium tiers, which include packaged (or bundled) networks, such as HBO and Showtime. *Id.* Fourth, most cable companies include Pay-Per-View channels, which include movies, concerts and specialized sporting events. *Id.* Fifth, cable companies have begun to offer a family tier, which is fairly small and targeted to consumers with young

bundled system is efficient and pro-consumer, because bundling enables competition.[67] It is easier for a new channel to enter the market, when the channel is bundled with existing channels, which already carry a good reputation among consumers.[68]

Critics of the bundling system argue the tiers provide consumers with little choice in the networks they purchase and receive.[69] Politicians and consumers have vocalized concerns regarding the minimal choice the current bundling system provides consumers.[70] Adopting an a la carte approach in contrast to a bundled approach might provide consumers with more of an individual choice; however, it would require additional technology at additional costs.[71] Because most cable networks rely on advertising revenues for a large part of their profits, the networks encourage the cable operators to place their networks and programming on the most widely distributed and most widely watched tiers.[72] This practice increases audience levels; thus, maximizing potential advertising revenue. Under a bundling system, cable networks charge on

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these contracts stated that almost all of the top 40 to 50 networks require that their networks be included on the basic or expanded-basic tiers. *Id.* at 33-34.

67. Jeffrey A. Eisenach, *The FCC's Further Report on A La Carte Pricing of Cable Television,* at 7-8 (on file with National Cable & Television Association), Mar. 6, 2006.

68. *Id.* at 8.

69. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 30 (Oct. 2003).

70. *Id.* at 31. A 2000 Nielsen Media Research Report concluded that the average household watches only seventeen of the seventy channels they receive in a bundled cable system. *Id.*

71. *Id.* at 30. The GAO report stated that a change to a la carte could potentially require cable networks to change their business model. *Id.* Currently, cable networks obtain about half of their revenues from advertising. *Id.* The argument is that with a switch to a la carte, cable networks would see a decline in their advertising revenues. *Id.*

72. *Id.* In fact, to maximize revenues from possible advertisers, cable networks often require that their networks be placed on the most widely watched

subscribership rates, which generates more money than charging based on actual viewership rates.[73] Basically, this means cable companies can charge more for advertising in a bundled system compared to an a la carte system.[74]

Opponents of an a la carte system have argued that not only would a la carte reduce advertising revenue, but it could potentially raise per-channel rates and create less diverse network programming choices.[75] Many cable networks believe smaller networks would not survive under an a la carte system, because they would not be able to retain subscribers on a regular basis.[76] In a bundling system, it is not as crucial to maintain a high audience level, because the network is already reaching millions of viewers through the pre-packaged bundles.

The FCC's Further Report concluded a bundled cable system could actually increase retail cable prices and decrease programming choices.[77] The Further Report states:

> Offering programming only in very large bundles as has been the past practice in the cable industry may fail to provide consumers the programming they desire. Consumers may find that they are purchasing programming that they do not watch and that programming that they find valuable is not offered under bundling. A la carte could be preferable to

73. Joe Nocera, *Be Careful What You Wish For: Talking Business,* NEW YORK TIMES, Nov. 24, 2007, at C1.

74. *Id.*

75. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 30 (Oct. 2003). Contrary to the GAO study, the Further Report found that a la carte could lessen the burdens on networks entering the cable markets; thereby, leading to more diverse cable programming. *Further Report* at 5. The report explained, "Advertisers and MVPDs might find it easier to judge the value of smaller networks if consumers were able to express their interests through subscriptions." *Id.* at 5.

76. *Id.* at 36.

77. *Further Report* at 5. Additionally, the increased prices could lead to consumers not purchasing MVPD services, because the services would increasingly become less affordable. *Id.* at 5.

> bundling in providing diverse programming responsive to consumer demand.[78]

Although a la carte may provide consumers with more choices in the channels they watch, the extent to which consumer would benefit remains unclear. The GAO concluded:

> A variety of factors – such as the pricing of a la carte service, consumers' purchasing patterns, and whether certain niche networks would cease to exist with a la carte service – make it difficult to ascertain how many consumers would be better off and how many would be made worse off under an a la carte approach.[79]

Until there is more definitive data concluding a la carte is a better alternative, bundling seems to be the most effective and beneficial system for all involved.

## III. A CABLE COMPROMISE: THREE ALTERNATIVES TO A LA CARTE AND BUNDLING

The FCC's Further Report describes three a la carte cable options, all of which have the central goal of providing consumers an increase in choice. All three alternatives, Mixed Bundling, Themed Tiers, and Subscriber-Selected Tiers, would increase consumer options and would allow Multichannel Video Programming Distributors (MVPDs) to continue offering a bundled plan, along with an a la carte selection.[80] Despite high hopes for increased consumer choice, many critics argue the choice will come at a higher price for both the cable industry and consumers. A GAO Report in 2003 stated an a la carte system could result in higher per channel

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78. *Id.*

79. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 6 (Oct. 2003).

80. *Further Report* at 22-27.

rates.[81] The FCC's Further Report and proponents of a la carte have offered the following three options with the goal of providing consumers with an increased choice in programming at a potentially lower cost.

### *A. Mixed Bundling*

The first alternative is Mixed Bundling. Under this plan, "consumers could be allowed the choice of purchasing . . . channels either on an a la carte basis or as part of the bundles an MVPD chooses to provide."[82] This means consumers could purchase networks a la carte at specified prices or consumers could select to pay the packaged price for a pre-selected bundle of networks.[83] Currently, MVPDs have some familiarity with providing consumers cable options on a somewhat a la carte basis, through offering premium channels, video-on-demand, and pay-per-view options.[84] The Further Report states the Mixed Bundling option would be beneficial in comparison to the current pure bundling method.[85] Consumers that only want to watch just a few channels would have the option of buying those few channels on an a la carte basis, at what the FCC argues would be a decreased cost compared to the bundled price.[86] This would allow consumers in favor of a la carte to have individualized channels, but would appease some in the cable industry by allowing them to retain the bundled packages. Furthermore, it is possible that consumers who currently do not subscribe to a cable service would be enticed to subscribe to a MVPD service if they could individually select the channels they pay for and will watch.[87] In short, a Mixed Bundling offering would allow consumers to pay only for networks they are willing and wanting to

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81. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 1-46 (Oct. 2003).

82. *Further Report* at 37.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 37-38.

87. *Id.* at 38. In June 2007, there were 65,100,000 basic cable subscribers and 35,255,000 digital cable subscribers. National Cable & Television Association, *Basic Cable Subscribers,* NCTA (2007), http://www.ncta.com/Statistic/Statistic/BasicSubs.aspx.

watch and still provides consumers the option of retaining their current cable plan.[88]

Additionally, a Mixed Bundling plan could increase competition among MVPDs.[89] Under the current bundling system, the offerings of MVPDs tend to be similar in price and number; however, by opening up the number of alternatives an MVPD could offer, MVPDs might feel increased pressure to meet their consumers' requests.[90] The Further Report states, "Offering consumers additional options in programming packages could spur increased competition among MVPDs by opening up additional fronts on which MVPDs could compete to satisfy consumer demand."[91]

The Mixed Bundling alternative could potentially help networks gauge their popularity with consumers.[92] Although, the option would most likely not provide the exact number of viewers, networks could measure their popularity based upon the number of subscribers under the a la carte part of the alternative.[93] As far as consumers are concerned, the Further Report leaves the question regarding cost unanswered. The Further Report states:

> [W]e lack information about what a la carte prices would be for individual networks. Some a la carte network prices could be relatively low, but other network prices could appear relatively high to consumers. In any event, consumers would likely have the opportunity to lower their total programming bill by purchasing fewer channels.[94]

In conclusion, the Further Report describes Mixed Bundling as an option that could provide consumers with greater choice and

88. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 38 (Oct. 2003).

89. *Further Report* at 37-38.

90. *Id.*

91. *Further Report* at 38.

92. *Id.*

93. *Id.* This would not only be beneficial to the networks, but could prove to be a valuable tool for advertisers. *Id.* Further, it could lead increased ad revenue for the most popular networks, or those with the most a la carte subscribers, which potentially could lead to lower license fees for those networks. *Id.*

94. *Id.* at 39.

potentially decreased prices.[95] Mixed Bundling does not alleviate any of the concerns opponents of a la carte cable have expressed. There would still be issues with possible decreased advertising revenues, increased licensing fees, and escalating cable rates. To make matters worse, this alternative merely complicates the issue by combining the downsides of bundling with the downsides of a la carte.

*B. Themed Tiers*

The second option is Themed Tiers. Under this method, MVPDs would offer tiers of programming with a specific theme.[96] The MVPD could still offer a larger bundled package, much like what is offered today, but according to the Further Report, the bundled package could be more expensive.[97] A Themed Tier option would provide consumers increased choice, by allowing them to subscribe to channels in the genre of programming they want to watch.[98] Currently, there are several domestic cable operators that successfully offer tiered programming to their subscribers.[99] For example, Charter Communications offers a limited Basic Tier and four specified digital tiers with additional cable networks (the Family and Information Tier, the Movie Tier, the Sports Tier, and the Latino Tier).[100] With Charter's success in offering these tiers, the Further Report argues that a Themed Tier system is both technically feasible and an economical option.[101]

95. *Id.*

96. *Id.*

97. *Id.* at 39-40.

98. *Id.* at 40.

99. *Id.*

100. *Id.* Additionally, Bright House Networks offers their consumers a digital basic tier and a digital sports tier. *Id.* Further, Cablevision offers seven tiers of foreign language programming and sports tiers. *Id.*

101. *Id.* at 41. Many examples of themed tier programming, particularly family themed tiers, are popular around the world. *Id.* Rogers Cable in Canada offers a family themed tier for $5.99 (Canadian). *Id.* Furthermore, EastLink, also in Canada, offers an Educational Themed Tier for $6.95 (Canadian). *Id.* On a broader scale, NTL, a British operator, offers a family tier consisting of over 100 television networks and forty radio channels for £29. *Id.* In Singapore, Starhub offers subscribes three tiers for $20. *Id.*

Additionally, the Further Report states a Themed Tier plan could save consumers money, because consumers would only pay for channels they would watch and, thus, could potentially be cheaper than an existing bundle.[102] Furthermore, Themed Tiers allow consumers to pay for channels based on content classifications rather than on an individual basis. This means consumers would likely continue paying for networks they do not watch. For example, some consumers might purchase a sports tier, yet never watch the Golf Channel.

In conclusion, the FCC's Further Report supports a Themed Tiered system because it would be an inexpensive option, and the costs associated with implementing the program would be low for MVPDs.[103] It has already been proven by domestic cable operators that Themed Tiers are technically feasible and could be a successful offering in terms of an easy transition.[104] A move to smaller Themed Tiers might be a better option than an a la carte system; however, critics argue that many of the issues concerning a la carte also apply to a Themed Tier plan.[105] For example, some industry representatives have argued that by increasing the number of tiers, cable networks would experience a decline in advertising revenue similar to what would be expected in an a la carte regime.[106] The decline of advertising revenues would lead to a slippery slope of increased licensing fees and potentially higher cable rates.[107]

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102. *Id.* at 41.

103. *Id.*

104. *Id.*

105. *Id.* at 37. Eight out of the fifteen representatives of cable networks surveyed, stated that creating several tiers would be a disadvantage for the cable industry as a whole. *Id.* at 38.

106. *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8, at 38 (Oct. 2003).

107. *Id.* Some cable operators indicated in the GAO survey that Themed Tiers would be a viable option for sports programming, because fans are often loyal customers who could support the high costs of sports programming. *Id.* In the contrary, one objective of the sports leagues is to create and sustain the widest possible distribution of their sports, thereby creating a vast nationwide audience. *Id.* In order to ensure that their games are included in the widest distribution possible, leagues and cable networks often require the sports programming to be included on the basic or expanded-basic tiers. *Id.* The GAO found that:

> [R]epresentatives of the three leagues . . . said that if sports networks were on a sports-only tier, the leagues would not want

A coalition of professional and collegiate sports associations wrote a letter to Senator Ted Stevens (R-AK) arguing that any attempt to require a Themed Tier system could lead to several "statutory, regulatory, and Constitutional issues."[108] One major issue is who classifies the tiers and decides which channels would be included with each tier.[109] Some cable networks would fit more than one classification, so would they be available on each Themed Tier or restricted to just one? This alternative might be preferable for a la carte proponents, but it fails to alleviate any of the problems associated with bundling or a la carte cable.

### C. *Subscriber-Selected Tiers*

The third alternative is Subscriber-Selected Tiers. Under this alternative, a MVPD subscriber, instead of the MVPD itself, like in the Themed Tier alternative, would choose the content of the tier they are purchasing.[110] These tiers would likely be smaller than a pre-established bundle; therefore, consumers would likely purchase a smaller package of twenty or forty networks instead of a bundle of eighty networks.[111]

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> to sell the right to carry certain events on those networks since it would likely not be available to most viewers . . . sports-only networks might cease to exist and any sports on cable would only be placed on general entertainment networks that provide variety programming – similar to broadcast networks. *Id.* at 39.

108. Letter from the NFL, MLB, NBA, NHL, NCAA, and NASCAR, to The Honorable Ted Stevens and The Honorable Daniel Inouye, Chairman and Ranking Member, Senate Committee on Commerce, Science, and Transportation (Mar. 15, 2006) (on file with the National Cable & Television Association).

109. *Id.*

110. *Further Report* at 42. "For example, if a subscriber desired a mix of program network types, such as sports, movies, and children's programming, she would be able to select a prescribed number of channels for a set price from among the MVPD's digital offerings." *Id.*

111. *Id.* Additionally, subscribers could continue to buy the pre-established bundles if they preferred. *Id.*

Subscriber-Selected Tiers have been used successfully abroad.[112] Videotron, a Canadian operator, has allowed its subscribers to purchase themes of networks on an a la carte basis.[113] First, Videotron consumers must buy a Basic Tier, which includes twenty-two government-mandated channels.[114] Then consumers can purchase channels either individually, in small bundles of five channels, or in larger bundles of twenty or more channels.[115] The FCC's Further Report argues that these Subscriber-Selected Tiers, such as those used by Canadian cable operators, would allow consumers increased choice, while not paying for networks they do not watch.[116] This method provides additional choice, by lessening restrictions on what consumers are forced to buy.[117] With this plan, consumers are only buying channels they will watch, in contrast to the Themed Tiered plan where it would still be possible for consumers to buy a tier that includes a channel not of any interest to them.[118] Similar to the Mixed Bundling option, the Subscriber-Selected Tiers would provide feedback to the networks and advertisers as to what networks are most popular.[119]

One concern regarding a la carte options is that some networks have higher costs than others, thus making it near impossible to combine high and low cost networks in one package for a fixed price.[120] The Further Report refutes this argument stating:

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* Rogers Cable, also a Canadian cable operator, offers a similar plan. *Id.* Subscribers may purchase a thirty channel basic tier for $24.00 and then they must lease a converter box before they can purchase certain networks a la carte style for roughly $2.50 each. *Id.* Subscribers can also create their own bundle of five channels for a set price. *Id.*

116. *Further Report* at 43.

117. *Id.*

118. *Id.*

119. *Id.* The Further Report states, "having this information available about consumer preferences would help make programming more responsive to consumer demand, since networks that are more popular and that have invested in raising their quality would find it easier to demonstrate their success to MVPDs and advertisers under subscriber-selected tiers, as compared to pure bundling." *Id.*

120. *Id.*

> Networks that cost more and provide greater quality would get more viewers and subscribers and thus are compensated with more subscription fees and advertising revenues. In addition, the price of the bundle, and the proportion of the price that goes to each network, could be adjusted to account for the average take rate of the different kinds of networks.[121]

It is also hard to predict the amount of consumer savings or increased choice under this option, because the prices have not yet been determined.[122] The GAO argued that Subscriber-Selected Tiers pose the same problems as a la carte in terms of economical and technological concerns.[123] It seems that all three options are viable alternatives in increasing consumer choice, but without any specified pricing information, it is debatable as to how much consumers would have to pay for the increased choice. However, out of the three alternatives, Subscriber-Selected Tiers provides consumers with a greater choice at a lower cost to the cable industry. This alternative is not likely to be a perfect solution, but it is the most viable alternative of the three.

## IV. CONSUMER CHOICE AND A LA CARTE CABLE

### *A. Consumers Sacked While the NFL Network and Cable Companies Disagree*

On December 29, 2007, the New England Patriots were set to make history with their run at a 16-0 perfect season. The problem standing in the way of Tom Brady and the Pats: The New York Giants. The problem standing in the way of millions of Patriot and NFL fans: the NFL Network. The NFL Network charges subscribers for the network, which only airs eight regular season games a year.[124] Unfortunately for the millions of football fans across the nation, the

121. *Further Report* at 43-44.

122. *Id.* at 44.

123. GAO, *supra* note 106, at 30.

124. Evan Weiner, *NFL Network Can't Beat the Cable Industry,* THE NEW YORK SUN, Dec. 6, 2007, at 27.

NFL and cable operators have not been able reach a carriage deal.[125] The NFL, like many other cable networks, wants their network to be included on the cable companies' Expanded Basic Tier.[126] This means every cable customer who purchases the companies' Expanded Basic Tier would get the NFL Network—whether they watch it or not, they would pay for it.[127]

The cable companies are resisting the NFL's push to include the channel on their bundled tiers, arguing the NFL Network should be offered on a digital sports tier that would cost the consumers extra.[128] The reasoning is that not every consumer would watch the network, so not every consumer should have to purchase the channel. However, this rationale applies to nearly every network and cable companies have opposed this version of a la carte in the past. The battle has not been fought without some attempt at compromise. The nation's largest cable operator, Comcast, attempted to negotiate a deal in which the NFL Network's eight regular season games would be shown on Comcast's Outdoor Life Network.[129] The negotiations fell short, because the NFL refused to allow its games to be shown on any other network, but its own.[130]

After years of failed negotiations, the cable companies adamantly refuse to carry the NFL Network on their Expanded Basic Tier.[131] To counter the hardball being played by cable operators, the NFL is taking the battle to state legislatures.[132] The professional and

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125. *Id.*

126. *Id.*

127. *Id.* This is the exact situation customers are in now – paying for channels they do not watch. If the NFL Network was included on Expanded Basic Tiers, the NFL Network would greatly benefit. *Id.* First, the network itself, would experience a large increase in the number of subscribers to the network, because their network would automatically reach those households who subscribe to the Tier. *Id.* With larger audience levels, studies show the network would likely increase profits. *Id.*

128. *Id.*

129. *Id.* The negotiations took place in 2005. *Id.*

130. *Id.* To further frustrate Comcast's attempts at making a deal, the NFL sold its Sunday Package to DirecTV and "locked cable companies out of that franchise." *Id.* The deal was exclusive between the NFL and DirecTV. *Id.*

131. *Id.*

132. *Id.* "The NFL has decided that it's time to go to state legislatures and hope that lawmakers can put the screws to the multiple system operators and get the NFL Network on the basic expanded tier." *Id.*

collegiate sports associations do not want their games and channels to be forced to be bought a la carte. In 2006, professional and collegiate sports associations wrote an open letter to Sen. Ted Stevens (R-AK), who at the time was Chairman of the Senate Committee on Commerce, Science, and Transportation.[133] The letter stated that a mandatory a la carte system would "reduce distribution, viewing, and therefore advertising revenue of national and regional cable networks, including sports networks."[134] A decrease in advertising revenue could increase license fees for cable providers, which could lead to an increase in consumer rates.[135] Because of the influx in rates, small markets might not have access to a regional sports network under an a la carte system.[136]

The NFL is not stopping with the legislators; they are also trying to reach their current NFL Network subscribers.[137] Sports programmers aim to make their games available to the largest possible audience.[138] This includes not only the regular fans, but also those fans who want to watch an event last minute or have a sudden interest in the game.[139] Under an a la carte system, spontaneous viewing or last minute decisions to watch a game would be impossible.[140] Instead, consumers would have to contact their cable companies far in advance and set up an appointment in order to

133. Letter from the NFL, MLB, NBA, NHL, NCAA, and NASCAR, to The Honorable Ted Stevens and The Honorable Daniel Inouye, Chairman and Ranking Member, Senate Committee on Commerce, Science, and Transportation (Mar. 15, 2006) (on file with the National Cable & Television Association).

134. *Id.*

135. *Id.*

136. *Id.* The sports associations also said the same argument could apply under a themed tier system. *Id.* In addition, to offer a la carte channels, subscribers would have to use set top boxes for each television. *Id.* The associations estimate the cost for these boxes to be $4 to $5 a month. *Id.* The newfound pressure on subscriber rates plus the costs of these boxes, could dramatically increase cable rates. *Id.*

137. Weiner, *supra* note 124, at 27.

138. Letter from the NFL, MLB, NBA, NHL, NCAA, and NASCAR, to The Honorable Ted Stevens and The Honorable Daniel Inouye, Chairman and Ranking Member, Senate Committee on Commerce, Science, and Transportation (Mar. 15, 2006) (on file with the National Cable & Television Association).

139. *Id.*

140. *Id.*

install set top boxes.[141] The NFL urges their subscribers to purchase the network through DirecTV and to completely cut out the cable operators; thus, avoiding the problem altogether.[142]

In the Midwest, where the game is more than just a sport played on Sundays, but rather a part of life, the battle over sports programming has become even more of a fervent issue.[143] In Ann Arbor, Michigan; Columbus, Ohio; Indianapolis, Indiana; Iowa City, Iowa; and Minneapolis, Minnesota among other cities, football fans are not just upset over their inability to watch the eight regular season NFL games – in these cities, the battle has hit even closer to home. The Big Ten Network has locked college sports fans out of watching their alma maters and favorite teams play, unless these fans are willing to pay extra to watch a few games a year.[144] In Madison, Wisconsin, badger fans were unable to see Wisconsin take on Ohio State in a Big Ten football game.[145] The problem was all too familiar to sports fans—Charter Communications and the Big Ten could not reach a deal which would have allowed Charter to carry the Big Ten Network.[146] The stalemate between cable companies and the networks, such as the Big Ten Network and the NFL Network, has

141. *Id.* In addition to the consumer downsides, the loss of viewership for major sporting events would lead to decreased advertising revenues for the sports programmers and cable networks. *Id.*

142. Weiner, *supra* note 124, at 27

143. *Id.*

144. Jeff Richgels, *TV Buffet? A La Carte Programming May Not Satisfy All Appetites,* THE CAPITAL TIMES (Madison, Wis..), Nov. 2, 2007, at A1.

145. *Id.*

146. *Id.* It may seem unimportant and insignificant—football fans can not watch one game on a Saturday afternoon. I know there are much more vital issues legislatures and lawmakers should be dealing with; however, what is the point of television —entertainment? People subscribe and pay to receive entertainment and programming that meets their interests. I have never been a business person, but I know that the customer is always right, right? Should consumers be able to watch their alma mater play on a Saturday afternoon or should one specialized network be given carriage rights and be allowed to charge exorbitant prices. The Big Ten Network was created to provide better coverage of Big Ten sporting events. The goal was to aid fans in watching their teams. The cable stalemate between the Big Ten Network and cable companies is hurting those customers the network was created for. Sure, there are bigger issues to debate, but to a Wisconsin fan that Saturday afternoon there was nothing more important than cheering on their Badgers against the Buckeyes.

pushed a la carte cable to front-page news.[147] Some sports fans are becoming so frustrated that they are tempted to switch to satellite television.[148]

In Ohio, state lawmakers do not want to see consumers forced to subscribe to satellite television just to watch their teams play.[149] State Representative Louis Blessing (R-Cincinnati) introduced legislation, which would "require cable operators to participate in arbitration regarding disputes with providers of competing video programming."[150] Blessing would like to see both networks: The Big Ten Network and the NFL Network included on an Expanded Basic Tier.[151] The introduced legislation had twenty-one bipartisan co-sponsors.[152] In addition, two other states: Indiana and North Carolina are either preparing to hear debates or introducing legislation on the same issue.[153]

Despite the legislative efforts, cable operators are not too concerned.[154] On November 28, 2007, the FCC commissioners relieved the cable operators.[155] The five-member commission voted

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147. *Id.*

148. *Id.* One example is Madison, Wisconsin resident George Esser:

> If a la carte were an option, Esser said he's probably buy BTN [Big Ten Network], although he's somewhat 'conflicted' because he's 'irritated' that the conference is 'trying to squeeze additional revenue from the fans' through BTN.
>
> Since a la carte is not an option, the Madison resident is considering switching from Charter to satellite providers DirecTV or DISH Network, both of which carry BTN and the NFL Network.
>
> 'This is the first time I've ever gotten to this point in all the years I've been a Charter subscriber,' Essers said. *Id.*

149. Weiner, *supra* note 124, at 27.

150. *Id.* (quoting Louis Blessing).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

against the proposed rules, which probably would have forced cable operators to carry the NFL Network.[156]

To put the debate in perspective: the NFL Network is currently available to thirty-five million households.[157] The NFL's goal for 2007 was fifty million households.[158] The NFL's competition—ESPN—has anywhere between ninety-five and ninety-seven million subscribers.[159]

Those in favor of an a la carte plan argue this is the precise problem a la carte resolves. Consumers who want the NFL Network or the Big Ten Network would purchase the channel and those who could not care less about the Patriots going 16-0 would not have to pay for a channel they would not watch. The most vocal opponents to a la carte, cable networks, contend their revenues could plummet.[160] In fact, currently "sports operators get huge sums of money from cable TV, because subscribers' fees are fixed under the current basic expanded rules."[161]

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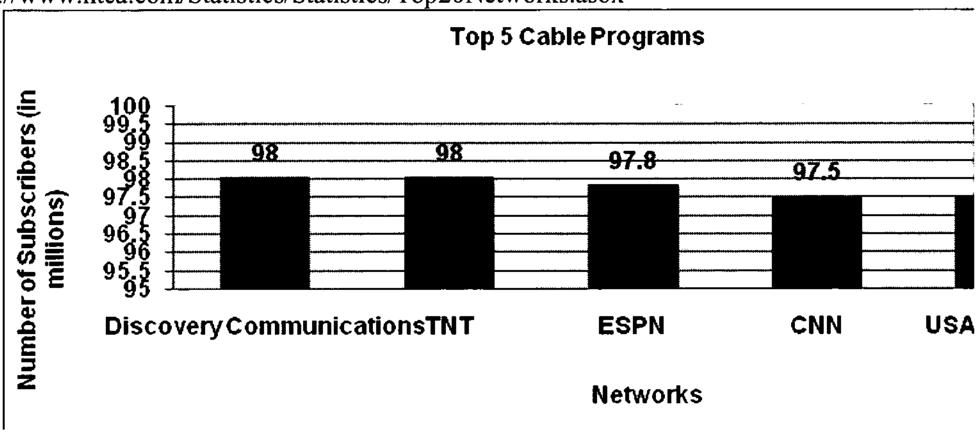
156. *Id.* This would have been a result of mandated arbitration. *Id.* It also would have likely forced cable operators to carry the Hallmark Channel. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* Fig. 2, available at
http://www.ntca.com/Statistics/Statistics/Top20Networks.asox




National Cable & Television Association, *Top 20 Cable Programs,* NCTA, (2007), http://www.ncta.com/Statistic/Statistic/Top20Networks.aspx.

160. Evan Weiner, *NFL Network Can't Beat the Cable Industry,* THE NEW YORK SUN, Dec. 6, 2007, at 27.

161. *Id.*

Analysts argue that ESPN, which receives at least $250 million a year due to subscriptions, would see subscriber fees drop under a mandated a la carte plan.[162] In the sports debate regarding a la carte cable, there is no doubt that if channels like the NFL Network and The Big Ten Network were offered a la carte, fans would have access to the programming they desire. But the question still remains: Are consumers better off buying channels individually or sharing in the cost by purchasing channels through pre-packaged arrangements? The argument can be made that all consumers share in the cost of bundled systems. Non-sports fans might pay for a bundle that includes sports networks they do not watch, but households without children pay for a bundle that includes children's programming. In the end, everyone pays the same amount and watches what they want. The system is not perfect, but is paying for each channel individually the best solution?

### *B. When Sesame Street and K Street Intersect: Family-Friendly Programming and A La Carte Cable*

Lobbyists, special interest groups, and politicians come out in full force over "family-friendly" issues. In the cable debate, a parent's right to restrict what their children have access to often takes center stage. One of the main supporters of a la carte cable is the Parents Television Council.[163] According to Parents Television Council President Tim Winter, the main reason the council supports a

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162. *Id.* The NFL Network is not expecting ESPN money, instead their goal is to have a larger number of subscribers for their network. *Id.* The NFL Commissioner, Roger Goodell told reporters:

> The league might consider selling an equity share in the network to cable operators, much in the same way Major League Baseball did with its own cable TV Channel. The MLB Channel will launch in 2009 and should be available in 47 million cable and satellite homes, thanks to equity deals with Time Warner Cable, DirecTV, Cox, and Comcast. MLB will own 66.67% of the network. *Id.*

163. Joe Nocera, *Be Careful What You Wish For: Talking Business*, NEW YORK TIMES, Nov. 24, 2007, at C1. The Parents Television Council is "a nonprofit organization dedicated to 'protecting children and families from sex, violence and profanity in entertainment,' according to its president, Tim Winter." *Id.*

la carte cable is for decency regulation.[164] The Parents Television Council is not alone in the debate, Evangelical and family groups also support a mandated a la carte system.[165] Lanier Swann, Government Relations Director for Concerned Women for America, said, "Unfortunately, the number of inappropriate programs far outweighs the number of good. Our issue is to protect families."[166] In fact, those in favor of a la carte cable see it as a way to protect families, because a la carte gives parents the direct ability to control which channels are available in their households.[167]

Under an a la carte system, parents would have the option of only subscribing to channels airing family-friendly programming.[168] In the summer of 2007, in a congressional hearing on the impact of TV violence on children, several senators requested that a tape showing some of the violent programming that is available on television on a regular basis, be turned off before five minutes had aired.[169] Proponents of a la carte argue that television has become more violent. By allowing parents to individually choose the channels coming into their homes, a la carte cable equips parents with the most effective tool to filter their children's programming, including programming which parents feel is unsuitable due to violent and graphic content.

In May 2003, Chairman Martin encouraged cable companies, networks, and politicians to provide more tools for parents:

> Since then-Chairman of the Federal Communications Commission Newton Minow dubbed television a 'vast wasteland' in 1961, the medium has changed dramatically. Consumers today have so many

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164. *Id.*

165. Piet Levy, *Evangelicals vs. Christian Cable; Under 'A La Carte' Plan, Viewers Could Bar Certain Channels,* WASH. POST, June 10, 2006, at B09. This is one method for families to avoid paying for channels and shows in which they feel are inappropriate for their children to watch. *Id.*

166. *Id.*

167. Jeff Richgels, *TV Buffet? A La Carte Programming May Not Satisfy All Appetites,* THE CAPITAL TIMES (MADISON, WISCONSIN), Nov. 2, 2007, at A1.

168. *Id.*

169. Kevin Martin, Newton Minow, & Dan Lipinski, *For Kids' Sake, TV Must Go A La Carte: A La Carte Pricing Would Give Cable Subscribers Meaningful Programming Choices,* CHICAGO TRIBUNE, July 20, 2007, at C27.

> programs from which to choose that the complaint is rarely a lack of high-quality television shows. Rather, the concern for many consumers is how to navigate these teeming waters. This course-plotting can be a particular challenge for parents who desire to watch television together with their children. I therefore encourage the television industry to provide these parents more navigational tools.[170]

The argument is not that cable does not offer family-friendly channels; rather, parents must purchase sixty or seventy channels, some of which are notorious for carrying shows that would not be described as family-friendly.[171] Chairman Martin stated:

> For families, the situation can be somewhat of a catch-22. If you subscribe to a MVPD, you can get a significant selection of high-quality, family-friendly programming, but you are also forced to buy some of the most family-*un*friendly programming produced for television. If you take the route of allowing only broadcast television into your home, you avoid some of the programming that may concern you the most,

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170. Kevin J. Martin, *Family Friendly Programming: Providing More Tools for Parents,* 55 FED. COMM. L.J. 553, 553 (2003).

171. *Id.* With the advent of the Cartoon Network, Disney Channel, ABC Family, Nickelodeon, and several other children-oriented channels, parents have more options than ever before. The argument is that parents cannot monitor every program or channel their children watch on a regular basis due to the high number of cable channels, which are available. *Id.* However, there are tools available for parents. In 1999, the Violence Chip (V-Chip) was introduced and since January 2000, has been included on television sets of thirteen inches or greater. *Id.* at 561. It was hailed as the invention that will end parents' concerns. *Id.* The chip "allows parents to use a rating system to block a significant set of programs with violent or sexual content." *Id.* The problem with the V-Chip is that few parents know how to use it and even fewer actually use it. *Id.* Despite the V-Chips potential as an effective tool for parents, it has not proven to be extremely useful, because of its lack of use. *Id.*

In addition to the V-Chip, another tool available to some parents is password protected software, which enables parents who subscribe to digital cable and satellite systems to "limit access to whole channels through use of a password." *Id.* Because few parents have access to this technology, it is still too early to know whether this technology will be the tool that many parents are asking for. *Id.*

> but your primetime viewing options as a family may be few and shrinking, and you will have missed out on the great programming that cable and satellite have to offer.[172]

In 1975, the National Association of Broadcasters (NAB) Code of Conduct for Television was expanded to include a family viewing policy.[173] The Code provided, "entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour."[174] In addition, if programming is considered inappropriate for the audience, networks should use an advisory, which should be both audio and visual.[175] Ultimately, the Department of Justice brought an antitrust suit.[176]

Now proponents of a la carte cable argue that without any industry mandated regulations, giving parents the right to choose which channels come into their homes is the best tool to ensure parents have complete control over what their children watch. In addition, what is defined as family-friendly programming or appropriate for children differs from household to household and from community to community, a la carte allows people to make choices based on their own values and beliefs without encroaching on the values of others. If one person does not feel a channel is suitable for children, they do not have to buy the channel; however, their action of not purchasing the channel does not affect the overall programming options offered to other families with differing belief systems.[177]

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172. *Id.* at 556-57.

173. *Id.* at 558. The policy was added to combat the growing concern over changing television content. *Id.*

174. *Id.* at 559.

175. *Id.* (quoting *Writers Guild of Am., West, Inc. v. Am. Broad. Co.,* 609 F.2d 355, 358 n.2 (9th Cir. 1979)). The advisories should be issued at the beginning of the inappropriate programming and thereafter wherever they feel it is needed. *Id.*

176. *Id.* The suit only dealt with restrictions the code placed on commercials and not on the restrictions that were applied to the programming. *Id.*

177. Chairman Martin stated, "Cable and satellite operators carry a significant amount of high-quality family friendly programming including the Disney Channel, Discovery and the ABC Family Channel, but parents should not have to

In addition, a la carte cable provides a content-neutral solution to violent television. Chairman Martin has consistently reiterated the importance a la carte cable could play for parents stating, "We need a content-neutral solution that puts power in the hands of America's parents and avoids first amendment concerns. As I have said before, there is a right to free speech, but there is no constitutional right to be paid for speech."[178]

The hope that a la carte cable could provide more tools for parents is a hope of more than just lobbyists and politicians. An Arbitron Cable Television Study found most consumers would prefer

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buy channels with programs rated TV-MA (Mature) to get these channels." Kevin Martin, Chairman, Fed. Comm'n, Address at the U.S. Capitol, *Providing More Tools for Parents,* (June 14, 2007). In addition, if a family is forced to pay for programming, despite their own objections to the programming, the networks have no incentive to improve the quality. Kevin Martin, Newton Minow, & Dan Lipinski, *For Kids' Sake, TV Must Go A La Carte: A La Carte Pricing Would Give Cable Subscribers Meaningful Programming Choices,* CHICAGO TRIBUNE, July 20, 2007, at C27.

In order to make programmers responsible to their subscribers, there should be some sort of implications embedded in the marketplace to ensure that the quality is of the highest caliber possible. *Id.* Under an a la carte system the marketplace would have control. *Id.* This notion makes sense, if cable networks and operators are forced to react to consumer and subscriber objections to the programming or risk losing their own profits and revenues from subscribership fees, they are more likely to be responsive to the complaints they receive. A la carte cable definitely has the potential of giving the power to consumers and using the market to force cable networks and operators to respond. The contrary could be stated that in today's system, under a bundled or tier cabled system, consumers still have control. If consumers object to a network or find it inappropriate, they do not have to watch that network; thereby, lower audience and rating levels for such programming. If the ratings drop, the networks will experience a decline in ad revenue, thus forcing them to respond to the consumers' complaints and recommendations.

178. Kevin Martin, Chairman, Fed. Comm. Comm'n, Address at the U.S. Capitol, *Providing More Tools for Parents,* (June 14, 2007). The benefits a la carte cable could have on families have yet to be clarified. However, analysts contend that a la carte has the potential of providing parents with more control over the programming their children have access to and also could lower costs. *Id.* The problem with this assertion is that it seems the argument of lower cost stems from the argument that under an a la carte system, parents would opt not to purchase as many channels as those which are included in a bundled or tiered plan. This notion is unfounded. Due to the lack of any sort of concrete statistics, which point to this conclusion, there is no reason to assume parents would buy a substantially less amount of channels, thus decreasing their cable bills.

to have an a la carte cable system and that about half of cable consumers feel that cable programming is not family-friendly.[179] A la carte cable is a viable option for individuals who are seeking a way to filter the programming coming into their homes.

### *C. Hello, Goodbye: The Potential Problems for Niche and Independent Networks*

Would you purchase a channel strictly about how to beautify your yard or how to improve your house? Would you purchase a channel, which had 24-hour coverage of thunderstorms, blizzards, and the national weather? Would you purchase a channel consisting entirely of cartoons? Years ago consumers never would have imagined a time when Home and Garden Television, the Weather Channel, and the Cartoon Network would not only be cable networks, but also be three of the top twenty most popular networks in the United States.[180] It is easy to question whether these three networks along with hundreds of others would have been able to break into the average households top watched networks under an a la carte system. How appealing is a 24-hour weather channel?

Today, competition among networks drives the quality of programming.[181] In fact, some argue, including Chairman Martin, that this competition has resulted in some of the highest quality

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179. Carol Edwards & Diane Williams, *The Arbitron Cable Television Study: Exploring the Consumer's Relationship with Cable TV,* Arbitron Cable, p. 3 (2006) (on file with the National Cable & Television Association). Arbitron interviewed almost 2000 people to conduct their study on cable television and American consumers. *Id.* at 1. They conducted telephone interviews of a random sample of Americans aged 12 and over from January 13, 2006, to February 12, 2006. *Id.* The study found that forty-nine percent of cable subscribers argue that the content is too explicit. *Id.* at 3. In addition, fifty-four percent of consumers surveyed stated they would prefer an a la carte system to a bundled system. *Id.* at 3. Arbitron is a media and marketing research firm, known for surveying and studying media patterns and analyzing consumer and audience information. *Id.* at -9.

180. National Cable & Television Association, *Top 20 Cable Programs,* NCTA, (2007), http://www.ncta.com/Statistic/Statistic/Top20Networks.aspx. The Weather Channel is number six with 97.3 million subscribers. *Id.* Home and Garden Television (HGTV) is thirteenth with 96.5 million subscribers. *Id.* The Cartoon Network is seventeenth with 96 million subscribers. *Id.*

181. Kevin J. Martin, *Family Friendly Programming: Providing More Tools for Parents,* 55 FED. COMM. L.J. 553 (2003).

programming ever produced.[182] In addition to the diverse programming and shows available, the competition has allowed niche networks, or networks serving smaller or more specific audiences, to flourish.[183] The best marketplace for cable television is one, which allows various perspectives and diverse programming.[184] There are several niche networks that have been successful over the years. Many of the networks which could be affected by the change devote their programming to topics in the sciences, arts, or history.[185]

Similar to the issue of family-friendly programming, Christian cable stations are in the center of this debate. The Christian stations fear a la carte would not only allow people not to subscribe to networks they deem offensive, but also, not subscribe to the Trinity Broadcasting Network or Pat Robertson's Christian Broadcasting Network.[186] In other words, a la carte might allow consumers to have the choice of not only to not subscribe to programming which they feel is inappropriate for their households, but also to not subscribe to those that do not match their beliefs or to networks they do not have any interest in watching. Colby May, an attorney for the Faith and Family Broadcasting Coalition states, "We do not believe that 'a la carte' is the cure for the disease. In fact, it is a cure that may very well kill the patient."[187] Despite the possibility that costs for each individual consumer could rise, May argues the main concern for their networks is that only Christians would subscribe.[188] The Christian networks hope to provide people having a hard time the opportunity to find faith in their time of need.[189] In fact May states that if a transition to a la carte takes place, "conversion experiences for alcoholics and people contemplating

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182. *Id.*

183. *Id.*

184. Press Statement, Kevin Martin, Chairman, Fed. Comm'n (Dec. 18, 2007) (on file with Fed. Comm'n).

185. *Id.*

186. Piet Levy, *Evangelicals v. Christian Cable: Under 'A La Carte' Plan, Viewers Could Bar Certain Channels,* WASH. POST, June 10, 2006, at B09.

187. *Id.* The Faith and Family Broadcast Coalition represents both the Trinity Broadcasting Network and the Christian Broadcasting Network. *Id.*

188. *Id.*

189. *Id.*

suicide or suffering from a crumbling marriage never would have happened."[190]

The issue is how are people to know what networks they are going to want tomorrow or one week or one month from now? May said:

> If you obligate viewers to pre-select religious service, you are essentially going to find yourself witnessing to the choir. In combination, all of these networks have literally thousands and thousands of anecdotal stories of people who were channel-surfing that came across one of their services and it changed their life for the better.[191]

This debate does not only apply to Christian stations. Under an a la carte option consumers can purchase the channels they want and can switch them on a fairly regular basis. Nevertheless, the issue remains as to how one will find smaller topic, specific programming, without having access to the network in their own bundled package first. There is no question that new networks would continue to be launched, but the question is whether they would be able to survive in an a la carte market based on consumer choice.

One major opponent of a la carte cable has been the Disney Channel. In 2006, Rich Ross, President of Disney Channel Worldwide, urged Congress to oppose any legislative effort to mandate an a la carte system.[192] Today, Disney Channel is known as the leading cable network for family and children's programming, but the channel was originally offered on an a la carte basis.[193] Disney Channel launched in 1983 and was unsuccessfully offered a la carte.[194] The channel was made available to consumers at a rate of $10 - $16 a month.[195] During the time the channel was offered under

190. *Id.*

191. *Id.*

192. Open Letter from Rich Ross, President, Disney Channel Worldwide, to Senators on the Senate Commerce, Science, and Transportation Committee, (Mar. 3, 2006) (on file with the National Cable & Television Association).

193. *Id.*

194. *Id.*

195. *Id.*

an a la carte system, the Disney Channel only had a cable penetration rate of about ten percent of households.[196] Another problem, Disney faced was churn.[197] Churn is subscriber turnover, which for Disney was about sixty to eighty percent a year.[198] This means that in order for Disney simply to maintain their distribution rates, they would have to attract roughly sixty to eighty percent of new consumers each year to make up for the lost subscribers.[199]

Due to the lack of success the Disney Channel saw as an a la carte offering, Disney executives decided to experiment with tiered programming in the late 1980s.[200] The channel was included on premium tiers with channels such as HBO and Showtime and initially this avenue resulted in success; however, even at the channel's peak penetration it only reached forty percent.[201] One of Disney's main challenges was marketing the channel to consumers. In fact, between 1990 and 1997, the Disney Channel spent about ten percent of their total revenue in sales on marketing techniques in order to maintain their subscriber rates.[202] By 2000, the channel began to be offered on Expanded Basic Service tiers and saw immediate success.[203] The Channel immediately decreased spending efforts aimed at advertising and at consumer outreach; instead, focusing on more quality and diverse programming.[204]

The new switch for investing in advertising to programming has caused the channel to triple its ratings for kids ages six to eleven from the time it was offered as an a la carte channel.[205] Rich Ross stated that since being offered on an Expanded Basic Service Tier, Disney has been able to reach a larger audience and participate in various public interest initiatives, such as Cable in the Classroom and Learning Together.[206] Ross said:

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*

> Based on the experience and history of Disney Channel, it is clear that Disney Channel's move from a la carte to expanded basic resulted in a far more robust network that is more reflective of the growing and diverse audience it serves. If Disney Channel were mandated to return to its a la carte beginnings, it could be forced to retreat from its current position as a leader in high quality and trusted, kid and family television programming that is responsive to and representative to and representative of its audience.[207]

The example of Disney shows the importance of having a system, which enables new channels to reach subscribers. If a channel with such a strong brand name is unsuccessful in an a la carte system, how can niche and independent networks not connected to larger companies ever break into the system and survive?

Geraldine Laybourne, chairman and founder of Oxygen Media, asserted an a la carte system could devastate independent networks.[208] A decrease in subscribers could in turn lead to a decrease in revenue.[209] In order to survive under a mandated a la carte system Oxygen Media would have to increase fees and cut programming spending.[210] In the end, Laybourne argues, consumers will get less quality and quantity of programming.[211]

With decreases in revenue, independent networks will have to cut original programming.[212] This means consumers will have even more Law & Order, Friends, and Everybody Loves Raymond re-runs to sift through to find new programs. If an a la carte system not only makes it harder for independent networks to launch but then greatly

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207. *Id.*

208. Letter from Geraldine Laybourne, Chairman and Founder, Oxygen Media, to The Honorable Ted Stevens and The Honorable Daniel Inouye, Co-Chairman, Senate Committee on Commerce, Science, and Transportation (Mar. 10, 2006).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

restricts their ability to provide original programming is it really the best alternative?

Additionally, Laybourne argues that a la carte would decrease diversity.[213] Laybourne launched Oxygen by promising investors that the network was guaranteed an audience and there would be a large population, which would have access to the network, because Oxygen was going to be bundled together with other channels.[214] Under an a la carte system, those promises could never be made. Laybourne proved that Oxygen could be accessed by consumers, because she negotiated with cable companies to include her network on the most widely distributed cable package.[215] Laybourne stated, "In an a la carte world, only the big media companies with deep pockets and mainstream programming will survive. Instead of a vibrant mosaic of diversity, cable TV will be a grey scale of sameness."[216]

In March 2006, the Congressional Research Service issued a report on the FCC's reports regarding a la carte cable (including the First Report and Further Report) stating a tiered system would be more beneficial for those consumers who enjoy variety and niche programming.[217] In general, a la carte pricing would benefit consumers who view only a small number of networks on a regular basis.[218]

James McQuivey, an analyst with Forrester Research who has studied a la carte cable argued that many of the smaller networks are nervous of the idea that consumers will actually get to decide whether or not they will pay for the channel.[219] Executives who know their channels have a lower audience know they could be the

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213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Charles B. Goldfarb, *The FCC's "A La Carte" Reports,* Congressional Research Service Report for Congress, at Introduction (Mar. 30, 2006).

218. *Id.* In conclusion, the CRS states that not only would an a la carte system only benefit those consumers who regularly watch a few number of networks, but the consequences an a la carte system could place on niche programming and independent networks is dramatic. *Id.* Consumers could see a drop in diverse programming. *Id.*

219. Jeff Richgels, *TV Buffet? A La Carte Programming May Not Satisfy All Appetites,* THE CAPITAL TIMES (MADISON, WISCONSIN), Nov. 2, 2007, at A1.

first channel a consumer would cut out.[220] McQuivey argues that it is not the government or the consumer's job to subsidize niche or independent networks in order to have diverse programming.[221] McQuivey stated:

> If you want diversity, go turn on your computer. You've got millions of potential things you can look at - - from all races, all sexual orientations, all political views. It's not the world of scarcity it was 20 years ago where if your cable provider didn't bring you that channel you had no chance to connect with the outside world.[222]

With the recent proliferation of programming available on the Internet, niche networks have other available avenues to market their networks to consumers. However, launching a network via a pre-packaged bundle is a more desirable alternative than having to utilize non-traditional methods to advertise and market a network. If Disney could not successfully launch a channel under an a la carte system, is it even possible for an independent network to survive in an a la carte system?

## V. CONGRESS SHALL MAKE NO LAW: THE FIRST AMENDMENT AND A LA CARTE CABLE

Television is a medium for the communication of ideas and speech.[223] Similar to newspapers and other publications, cable television operators exercise editorial control to decide what programming will air.[224] Some critics of an a la carte system state that mandated a la carte would be in violation of the First

220. *Id.*
221. *Id.*
222. *Id.*
223. Geoffrey R. Stone & David A. Strauss, *The First Amendment Implications of Government-Imposed A La Carte and Themed-Tier Requirements on Cable Operators and Program Networks,* at p. 1 (unpublished report on file with the National Cable & Television Association).
224. *Id.* at 2.

Amendment.[225] In the past few years, the trend has been toward increased freedom of speech and away from government regulation.[226] As the Supreme Court of the United States held in *Miami Herald Publishing Co. v. Tornillo,* "it has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[227] Geoffrey Stone and David Strauss, both professors of law at the University of Chicago, argue a la carte and Themed-Tiers would violate the First Amendment.[228] They state an a la carte mandate would have to meet a heightened standard of justification, because it is a measure that would restrict editorial discretion and burden the television medium.[229] Additionally, they argue a Themed Tier option is similar to content-based restrictions, thus subjecting a Themed Tier approach to an even higher level of constitutional review.[230]

Cable operators communicate messages through various means, including original programming and through utilizing editorial discretion over which networks and programs to air.[231] Stone and Strauss stated a la carte would unconstitutionally restrict these rights, which are granted under the First Amendment.[232]

In the *Turner* cases, the Supreme Court decided the constitutionality of must-carry provisions.[233] Stone and Strauss

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225. *Id.* at 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. CONST. amend. I.

226. Adam Thierer, *The Right Way to Regulate Violent TV,* The Progress & Freedom Foundation, at p. 1 (May 10, 2007) (on file with the National Cable & Television Association).

227. Geoffrey R. Stone & David A. Strauss, *The First Amendment Implications of Government-Imposed A La Carte and Themed-Tier Requirements on Cable Operators and Program Networks,* at p. 2 (unpublished report on file with the National Cable & Television Association) (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

228. *Id.* at 3.

229. *Id.* at 3.

230. *Id.* at 3.

231. *Id.* at 3-4. (citing Turner Broadcasting System, Inc v. FCC, 512 U.S. 622, 636 (1994)).

232. *Id.* at 4.

233. *Id.*

compared the debate over a la carte cable to the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992.[234] The Supreme Court upheld the must-carry provisions and held that the provisions were to be reviewed under intermediate scrutiny.[235] The Court held must-carry provisions constitutional if they: (1) advance important government interests and (2) did not place any more than necessary burden on speech to further the aforementioned interests.[236]

Under the standard set forth by the Court in *Turner,* Stone and Strauss argued a government mandated change from a bundled cable system to an a la carte system would violate the First Amendment for four main reasons.[237] First, the interests served by an a la carte system do not advance important government interests.[238] Second, a la carte cable would not advance the important government interests it was proposed to serve.[239] Third, mandated a la carte unconstitutionally discriminates "against cable television because it cannot be justified in terms of the 'special characteristics of the cable medium.'"[240] Fourth, a mandated a la carte system would impose substantial burdens on protected speech.[241] In conclusion, there is strong doubt that a mandated change to an a la carte system would be unconstitutional under the heightened level of scrutiny laid forth by the Court in *Turner.*[242]

In addition to finding an a la carte system unconstitutional, Stone and Strauss said a Themed Tier requirement would also violate First Amendment protections.[243] They argued a Themed Tiered system would include a content-based element, because the tiers

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234. *Id.*

235. *Id.* (citing Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994)).

236. *Id.* (citing Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 189 (1997)).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* (citing *Turner Broadcasting System, Inc,* 512 U.S. at 661).

241. *Id.*

242. *Id.* In *Turner,* the Court held "laws that single out the press, or certain elements thereof, for special treatment" are held to a higher level of scrutiny under the First Amendment. *Id.* at 10

243. *Id.* at 16.

would be classified based on content.[244] The system could be problematic, because Themed Tiers basically allow the government to mandate cable operators to classify content, which in turn, allows consumers to avoid a certain class of content (constitutionally protected under the First Amendment), including content that some might deem to be offensive.[245]

Stone and Strauss stated proponents of a Themed Tier system often argue two justifications: (1) by classifying tiers on content, consumers can avoid content, which they find offensive and (2) consumers can avoid paying for content in which they find offensive.[246] Under the heightened level of scrutiny outlined above, neither of these justifications would be valid arguments for the constitutionality of Themed Tiers.[247] Stone and Strauss explained that "under the First Amendment, a content-based regulation of high-value speech is subject to the most exacting standard of review. 'A content-based speech restriction, can stand only if it satisfies strict scrutiny. It must be narrowly tailored to promote a compelling state interest.'"[248] In *Playboy Entertainment Group,* the Supreme Court of the United States held "where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right expression prevails, even where no less restrictive alternative exists."[249] It is not the government's role to decide how to classify content and which consumer's interests should succeed.[250]

Chairman Martin acknowledged cable operators have the First Amendment right to choose the content they provide to consumers.[251] Nevertheless, cable operators can make the choices to classify content and provide tiers, which would provide families

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244. *Id.* at 16.

245. *Id.*

246. *Id.* at 16-17.

247. *Id.* at 17.

248. *Id.* (quoting United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 804 (2000), citing Sable Commc'n, Inc. v. FCC, 492 U.S. 115, 126 (1989)).

249. *Id.* at 18 (quoting *Playboy Entm't Group,* 519 U.S. at 813).

250. *Id.* at 19.

251. Kevin J. Martin, *Family Friendly Programming: Providing More Tools for Parents,* 55 FED. COMM. L.J. 553, 553 (2003).

more tools in selecting the channels coming into their homes.[252] Chairman Martin argues an approach allowing consumer choice would maintain program diversity and does not censor content, but rather gives consumers the option to pay only for the networks they watch.[253]

In the case at hand, Stone and Strauss argue there are other constitutional methods that can be used to regulate cable television. In fact, there is already technology, which allows consumers to block unwanted channels.[254] This method would avoid government regulation issues and allows consumers the freedom to block the content they do not want to see. Today more than ever there are other means available to parents to protect their children from content, which they might find inappropriate. In *Playboy Entertainment Group,* the Court held:

> Targeted blocking [by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners – listeners for whom, if the speech is unpopular or indecent, the privacy of their homes may be the optimal place of receipt. Simply put, target blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.[255]

In addition, the Court held it is the parent's responsibility to block unwanted content and the government should not assume parents will fail to utilize the tools provided.[256]

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252. *Id.*

253. *Id.*

254. Geoffrey R. Stone & David A. Strauss, *The First Amendment Implications of Government-Imposed A La Carte and Themed-Tier Requirements on Cable Operators and Program Networks,* at p. 18 (unpublished report on file with the National Cable & Television Association).

255. Adam Thierer, *The Right Way to Regulate Violent TV,* The Progress & Freedom Foundation, at p. 3 (May 10, 2007) (on file with the National Cable & Television Association) (quoting *Playboy Entm't Group,* 529 U.S. at 815).

256. *Id.* at 3 (citing *Playboy Entm't Group,* 529 U.S. at 824).

The complaint of many consumers is that they do not want to have to pay for the channels they do not watch. Why pay for a channel you are just going to block? The available technology for parents to use in censoring the content their children have access to, such as V-Chips and television ratings, are viable tools to regulate content; however, they do not bring the same level of consumer control as an a la carte system would. The Court held that if there is a less restrictive means available, which would achieve the same interests, the government should use it.[257] In the battle over a la carte cable or bundling, there are other available alternatives, but they do not give consumers the same level of choice.

## VI. CONCLUSION: WHY NOT GET MORE FOR YOUR MONEY?

When you subscribe to a magazine, can you say you will only pay for the feature articles and commentary, but refuse to pay for the advertisements? When you buy a newspaper can you subscribe to just the news and sports sections, and pay less money for not including the art section? Every day in American life we pay for something we do not use. Whether it is a newspaper that we do not read completely, a magazine we skim, or food that we do not entirely consume. However, we cannot take back the unused sections and demand a refund. In today's cable debate regarding a la carte cable that is exactly what proponents are arguing: to specialize their cable channels and throw back the channels they do not use for a refund. It sounds like a great plan for many individuals, but as a collective society, it is not feasible. Advertising revenues could decline, license fees could increase, cable rates could escalate, niche networks could find it near impossible to survive, and the quality of programming could decline under a la carte cable. Although these downsides are all conjectures, the FCC's Further Report fails to include any conclusive data stating consumers would genuinely benefit under an a la carte system.

According to a Nielsen Media Research report, the average consumer is paying for about one-hundred channels and only

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257. Geoffrey R. Stone & David A. Strauss, *The First Amendment Implications of Government-Imposed A La Carte and Themed-Tier Requirements on Cable Operators and Program Networks,* at p. 18 (unpublished report on file with the National Cable & Television Association) (citing *Playboy Entm't Group,* 529 U.S. at 815).

regularly watches sixteen.[258] This definitely shows most Americans are not utilizing what they are paying for, but if the alternative is buying ten to twenty channels under an a la carte system at the same price, why not get more for your money? If there is not a huge decrease in cable rates under an a la carte plan, what real benefits are consumers getting?

Additionally, before any action is taken on the matter. The FCC should follow a similar format to what they have been using in the media ownership debate to gauge public opinions: hold nationwide hearings to get public input. When reconsidering media ownership rules, the FCC held six hearings in Los Angeles, California; Tampa Bay, Florida; Chicago, Illinois; Harrisburg, Pennsylvania; Nashville, Tennessee; and Seattle, Washington.[259] The goal, according to the Chairman, was to involve the American public in the process of deciding new media ownership rules.[260] How cable television is offered to the American public is another issue that requires public input. The FCC should take this debate to the road. What better way to find out what the public thinks of a la carte than by asking the public directly?

Although a la carte sounds great in an idealistic world, it simply is not the best option for the American public. Of the three aforementioned alternatives to bundling and a la carte, Subscriber-Selected Tiers is the best alternative. Under this option, consumers still have the right to choose the channels they purchase and yet cable operators would get the benefit of still being able to work in a tiered system. After February 2009, when the digital television transition takes effect it will be easier to implement a system that includes a la carte features. The reasoning is that Americans will no longer have analog service, which would require additional installation of set top boxes. This would be the preeminent time to institute any changes to the American cable industry.

However, after analyzing several reports on a la carte cable, including both the First and Further Reports issued by the FCC, the

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258. Kevin Martin, Newton Minow, & Dan Lipinski, *For Kids' Sake, TV Must Go A La Carte: A La Carte Pricing Would Give Cable Subscribers Meaningful Programming Choices,* CHICAGO TRIBUNE, July 20, 2007, at C27.

259. Written Statement, Kevin Martin, Chairman, Fed. Comm'n, before the Committee on Commerce, Science, and Transportation, U.S. Senate (Dec. 13, 2007).

260. Written Statement Dec. 13, 2007

lack of determinative data on the benefits and burdens of an a la carte transition alone is a reason not to make the switch. There has to be a way to determine how much consumers would save under a new system and price estimates regarding the costs of each individual network. Until that data is created, it seems impractical to change our entire cable television industry on mere suppositions.

In the end, transition to a la carte cable might benefit consumers or it might not. It might benefit the quality of programming or it might not. It might affect advertising revenues and licensing fees or it might not. All of these issues need to be resolved, before the FCC or Congress decides to overhaul the entire cable television industry. A la carte cable promotes individual choice, but unfortunately it is not a perfect solution. Until there is definitive data on the consequences of such a transition, the pre-packaged bundled cable system currently in use seems to be the best option.

The average American household has more televisions (2.73) than people (2.6), and on average people watch television for 2 hours 35 minutes a day.[261] That is a lot of time to spend surfing channels. Now imagine watching two and half hours of television every day, but only watching the ten to twenty, you have purchased. That is a lot of time watching the same channels and the same shows. In a society where getting more for your money is valued, it is surprising that people view bundled television as a waste of money. Instead of viewing bundled cable as buying sixty channels at a set price, people should view bundled cable as buying the twenty channels you watch at a fixed price and the other forty are just extra. Who does not like getting more for their money?

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261. Kristina Dell, *At Play. We Have Plenty of Free Time – We Just Fill it With Television,* TIME MAGAZINE, November 26, 2007, at 44.