STATE OF NEW JERSEY
DIVISION OF THE RATEPAYER ADVOCATE
31 CLINTON STREET, 11TH FL
P. O. BOX 46005
NEWARK, NEW JERSEY 07101

JAMES E. McGREEVEY
Governor

SEEMA M. SINGH, Esq.
Acting Ratepayer Advocate and Director

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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: In the Matter of A La Carte and Themed Tier Programming and Pricing Options For Programming Distribution On Cable Television And Direct Broadcast Satellite Systems
MB Docket No. 04-207

Dear Ms. Dortch:

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits these reply comments in response to comments filed by interested parties in the above-captioned proceeding. A review of the initial comments filed by the respective parties in response to the *Public Notice* reveals a glaring dichotomy. On one side of the issue, there are the cable operators, cable programmers, and cable industry organizations, who voice strong opposition to *a la carte* offerings because they contend it will add substantial costs to the production, provision and price of cable services and will undermine the quality, diversity and economic viability of the cable programming available to customers. While on the other side of the issue, consumer advocates and regulatory authorities assert that *a la carte* pricing will drive down cable bills and offer customers more control over the channels they watch. The Ratepayer Advocate maintains its position that consumers must be allowed to have the option of choosing the channels they want to watch instead of being forced to buy a tier of channels, some of which they never watch.

It comes as no surprise that the cable industry would so fervently oppose any form of *a la carte* pricing but the fact remains that cable prices have been increasing at an alarming pace since the deregulation of the cable industry in 1996 and *a la carte* pricing, if applied appropriately, is the first step in controlling these escalating cable prices. The Ratepayer Advocate submits that the "optional" or "mixed" bundling approach to *a la carte* pricing is the most feasible because it allows all currently tiered programming (except broadcast and PEG channels) to be available on an *a la carte* basis, but also gives consumers the option of continuing to purchase the currently available tiers. This approach was also recommended by the Consumers Union/Consumer Federation of America ("CU/CFA") and the New Jersey Board of Public Utilities ("Board"), the local franchising authority for New Jersey. The Board also suggested that rate regulation was necessary to ensure that *a la carte* prices do not exceed the actual costs associated with providing the channel.[1] The mixed bundling approach will allow consumers who are light viewers of television to have the option of purchasing the channels they watch regularly instead of purchasing a tier of channels.

The National Cable & Telecommunications Association ("NCTA") and Comcast Corporation ("Comcast") opined that even under the "optional" or "mixed" bundling scenario, consumers would be paying more on average to receive those programs they currently watch regularly and consumers who choose to continue buying the tiered services would end up paying significantly more than they currently pay because cable networks would be forced to increase their subscription fees which would be passed along to consumers in the form of higher prices.[2] However, NCTA refuted its own claim that consumers would experience increased cable prices under the "optional" or "mixed" bundling scenario when it admitted that consumers "who only care to watch a handful of the most popular networks, and rarely if ever watch any other networks – might conceivably end up paying less under an a la carte approach."[3] Therefore, the conclusion can be drawn that *a la carte* pricing allows consumers with very specific viewing tastes to purchase channels that interest them without being required to purchase other channels that they never watch, thereby reducing their cable bills.

Charter Communications ("Charter") states in its comments that bundling of services makes good economic sense for programmers because it helps hold down programming costs and it equally makes sense for multichannel video programming distributors ("MVPD") because it allows them to charge more for cable subscriptions.[4] However the supposed benefit of offering a bundled service – lower cost—has not been realized for cable consumers because instead of paying less for the bundled service they are paying more. According to the CU/CFA, "large cable operators, mega-broadcast programmers and advertisers have become comfortable with the current system because the inefficiencies and excess profits of the system are shifted onto the backs of consumers."[5] The bottom line is the cable industry's practice of bundling

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1/ Comments of the New Jersey Board of Public Utilities, at 2-3.

2/ Comments of NCTA, at 23; Comments of Comcast, at 28.

3/ Comments of NCTA, at 9.

4/ Comments of Charter, at 6-10.

5/ Comments of CU/CFA, at 10.

services cannot be allowed to continue under the pretext that it is the only cost-efficient option for cable consumers because according to the American Cable Association ("ACA"), retail rates would be lower for consumers if some channels were offered on an *a la carte* basis.[6]

Despite the claims of a majority of the cable operators, the ACA who represents the interests of small cable operators and Echostar Satellite L.L.C., ("Echostar") a satellite provider, state that they would welcome the opportunity to provide *a la carte* channels which would bring greater flexibility and choice and lower costs for consumers.[7] Although not in favor of mandatory *a la carte*, the ACA asserts that voluntary *a la carte* will allow them to better serve their customers by allowing them to move higher cost programming from the expanded basic tier to a themed tier or make the programming available on an *a la carte* basis, thereby reducing the cost of the expanded basic tier.[8] *A la carte* will also allow small cable operators to address their customers' concerns about the content of some of the programming that is currently a part of the expanded basic tier by offering these channels on a themed tier or as an *a la carte* channel in select markets. The Ratepayer Advocate submits that cable operators must be given the flexibility to tailor their programming to their specific markets and in the process give consumers more meaningful choice in the channels they view.

The Ratepayer Advocate maintains its position that consumers should not only have access to information concerning the price of the entire bundled service offering but the price for each component of the bundled service as well. With access to such information, the consumer can assess what discounts they are receiving for purchasing the bundled service versus the price of the bundled service if each component was purchased separately (the "separately priced component"). The disclosure of the "separately priced component" will assist consumers in deciding to purchase a bundled offering or a basic service tier package with other services purchased on an *a la carte* basis. The disclosed "separately priced component" should serve as the benchmark ceiling price when such service is offered on an *a la carte* basis. If a cable operator wants to charge a price higher than the "separately priced component" price, the cable operator must submit a cost of service showing to the local franchising authority ("LFA").

The cable industry also contend that bundling of services have led to more diversity in programming because cable operators often include programming that addresses special interests and promotes dialogue and understanding on important cultural, political, and religious issues in their expanded basic tiers.[9] NCTA asserts that if *a la carte* pricing is implemented many emerging networks would fail and the programming quality of the existing networks would fall

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6/ Comments of the American Cable Association, at 23-25.

7 / Comments of ACA, at iii; Comments of Echostar, at 1.

8 / Comments of ACA, at 23-25.

9/ Comments of Comcast, at 32.

significantly.[10] However, contrary to the assertions of the cable industry other commenters suggest that the current practice of excluding the programming of independent, diverse programmers from the basic and expanded basic tier of channels constitutes the real harm to programming diversity, and impedes the ability of smaller cable companies to carry independent niche, religious, and ethnic channels.[11] As pointed out by CU/CFA in its comments, six companies (Disney, Viacom, Time Warner, General Electric, NewsCorp, and Liberty Media/Comcast) currently control all the programming for the basic and expanded basic tiers, accounting for three-quarters of the programming and writing budgets of the industry.[12] According to ACA, the market power possessed by these six companies enables them to require the carriage of many additional affiliate channels on the basic or expanded basic tiers, leaving no room for independent programming.[13] This is yet another example of how the cable industry has used bundled services to further its own financial interests instead of those of the consumer. There is however no reason that independent programming should be excluded because digital upgrades undertaken by the cable operators permit more services to be offered. The limiting factor is not capacity but whether programming is available. *A la carte* offerings can give consumers the ability to try out new channels provided by independent programmers.

The cable industry has voiced many concerns about the operational difficulties associated with implementing an *a la carte* pricing regime and they cite to customer service as a key concern because customer interactions would become more burdensome under an *a la carte* regime.[14] The cable industry foresees problems with order taking which could lead to longer customer service calls and increased customer inquiries about the cost associated with particular channels, thereby increasing the burden on existing customer service resources.[15] The Ratepayer Advocate submits that all these potential problems can be alleviated by sufficient consumer education on *a la carte* pricing and its implementation. Another way cable operators could reduce the duration of service calls is to make the *a la carte* price for each channel available to consumers (via a bill insert) so that they are more knowledgeable and better equipped to make proper purchasing decisions when ordering *a la carte* channels. Although some customers may experience longer service calls at the initial stages of ordering *a la carte* channels, it is arguably a small price to pay for reducing their monthly cable bills.

10/ Comments of NCTA: Booz Allen Hamilton Report, "The a la Carte Paradox: Higher Consumer Costs and Reduced Programming Diversity: An Economic Analysis of the Implications of a la Carte Pricing on Cable Customers" at 35-37 (July 2004).

11/ Comments of CU/CFA, at 4; Comments of ACA, at 37.

12/ Comments of CU/CFA, at 4.

13/ Comments of ACA, at 37.

14/ Comments of NCTA, at 28 ; Comments of Comcast, at 34-37; Comments of Charter Communications, at 12-14.

15/ Comments of Charter, at 12.

Many cable industry commenters have stated that consumers will derive no benefit from *a la carte* because it will ultimately lead to higher prices for cable services. Charter, for example, asserts that consumers' interests are already reflected in MVPD licensing fees and tier placements and cable companies basically act as the consumer's agent when negotiating with programming networks.[16] Charter claims that it has no incentive to carry unaffiliated programming that it believes to be counter to its customers interests because "passing through increased programming costs to the subscriber . . . does not enhance Charter's profitability."[17] The Ratepayer Advocate finds Charter's argument specious because cable operators who are also large purchasers of programming are forcing programmers to lower their fees while at the same time increasing consumer prices for basic and expanded basic tiers.[18] This type of behavior by cable operators illustrate the manner in which cable customers are taken advantage of and this practice must not be allowed to continue.

The Ratepayer Advocate reiterates its position that the Commission must require the cable industry to provide specific information about all programming costs, programming launch fee revenue, and corporate allocation of volume discounts to determine if programming costs are in fact the leading contributor of rising cable prices. Furthermore, the Commission should follow the recommendation of the Consumers Union and Consumer Federation of America and examine programming contracts in order to evaluate who has the balance of power in the negotiations and if the cable industry is preventing *a la carte* pricing from being implemented.[19]

The Ratepayer Advocate submits that an *a la carte* pricing option will be a definite improvement over the current tier pricing system if it provides consumers direct control and choice over the channels they buy and the content that is coming into their homes while affording consumers a lower cost alternative to the current bundled offerings. The Commission must also carefully consider how to integrate *a la carte* channels into the existing tier system of rate regulation because in the past, cable operators have used their control over *a la carte* tier pricing as a means to charge more, not less per channel.

Respectfully Submitted,

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

By: Ava-Marie Madeam

Ava-Marie Madeam, Esq.
Assistant Deputy Ratepayer Advocate

16/ Comments of Charter, at 15.

17/ *Id* .

18/ Comments of CU/CFA, at 27.(explaining that Comcast is both reallocating rents from programmers to itself and increasing the rents collected from consumers.)

19/ Comments of CU/CFA, at 10.