

CONSUMER NEWS

By Ryan Eddings*

USDA Upset With Dairyman's Low Prices

The U.S. Department of Agriculture (“USDA”) recently decided that Hein Hettinga’s dairy business is competing unfairly with most of the other dairy farmers and producers in the nation.¹ It ordered Hettinga to fall in line with the industry or face substantial fines.² Undeterred, Hettinga pledged to continue his fight with Dean Foods and the Dairy Farmers of America (“DFA”) and the showdown could unravel the mysterious world of the American dairy industry that has existed since it was regulated by New Deal legislation in the 1930s.³

Hettinga is a Dutch immigrant who owns and operates his own dairy farm in the American southwest.⁴ Actually, he owns fifteen dairy farms that stretch from western Texas to the state of Washington, making him one of the largest dairy farmers in the country.⁵ He also owns three homes, a private plane, and employs his own pilot.⁶ What makes Hettinga unique – and thus troubling to the dairy industry – is that his Sarah Farms operation is vertically

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¹ Joyce Lobeck, *Dairyman biding time with USDA decision*, THE SUN (Yuma, AZ), Feb. 12, 2006, page number unavailable, available at 2006 WLNR 2448809.

² Lobeck, *supra* note 1.

³ Ian Brat, *Small Dairyman Shakes Up Milk Industry*, WALL ST. J., Feb. 2, 2006, B1, available at 2006 WLNR 1884328.

⁴ Andrew Martin, *He Sells Milk for Half the Price You Pay. The Feds Want Him to Stop. Why?*, CHI. TRIB., Feb. 19, 2006, A1, available at 2006 WLNR 2900900.

⁵ *Id.*

⁶ *Id.*

integrated.⁷ A business is vertically integrated where all of the goods and services necessary for the creation of a product are under the control of that business.⁸ In other words, Hettinga not only owns the dairies, he also owns two bottling plants, a plant to make his own plastic bottles, and a fleet of trucks to ship Sarah Farms products.⁹ The end result is that he can currently sell two gallons of Sarah Farms whole milk in California for \$3.99.¹⁰ By comparison, a single gallon of milk in Chicago carries a retail price of \$3.99.¹¹ However, vertical integration is not new. The concept was most likely first implemented in the American steel industry by Andrew Carnegie and remains prevalent in the petroleum industry.¹² Despite this, the model had been unknown to the dairy industry and it has since gained some powerful enemies.

Opposing Hettinga is the DFA.¹³ The DFA is the nation's largest dairy cooperative, claiming 21,946 members in 2004.¹⁴ In addition, the DFA maintains bottling plants and manufacturing plants that create dairy products for consumers.¹⁵ It is estimated that the DFA controls about one-third of the nation's raw milk.¹⁶ Joining the DFA is Dean Foods, the nation's largest processor and distributor of milk and other dairy products.¹⁷ Dean Foods bottles approximately

⁷ *Id.*

⁸ Mohab Tarek Khattab, *Revised Circular A-76: Embracing Flawed Methodologies*, 34 PUB. CONT. L.J. 469, 505 (Spring 2005).

⁹ Martin, *supra* note 4.

¹⁰ *Id.*

¹¹ *Id.*

¹² Irene Musselli, and Simonetta Zarrilli, *Oil and Gas Services: Market Liberalization and the Ongoing GATS Negotiations*, 8 J. INT. ECON. L. 551, 553 (June 2005).

¹³ Brat, *supra* note 3.

¹⁴ Information supplied by the Dairy Farmers of America, *available at* http://www.dfamilk.com/who_we_are/who_we_are_facts.html (last visited Feb. 28, 2006).

¹⁵ *Id.*

¹⁶ Andrew Martin, *System Controlled by Industry Giants*, CHI. TRIB., Feb. 19, 2006, A4, *available at* 2006 WLNR 3050546.

¹⁷ Information supplied by Dean Foods Company, *available at* <http://www.deanfoods.com/aboutus/aboutus.asp> (last visited Feb. 28, 2006).

35% of the nation's milk.¹⁸ These two organizations have pressured Congress and the USDA to close what they see as regulatory loopholes that Hettinga has exploited in building his business.

At the heart of the dispute lay the complex federal regulations controlling the price and supply of milk. Since the 1930s, the marketing of milk in the United States has been regulated by the Agricultural Marketing Agreement Act of 1937, a federal scheme designed to establish orderly dairy market conditions while maintaining constant and sustainable prices for farmers.¹⁹ Under the Act, the Secretary of Agriculture ("Secretary") is permitted to issue "orders" regulating the dairy market.²⁰ The regulations are designed to correct two unique phenomena present in the dairy industry.²¹ First, dairy farmers can receive higher prices if the milk they produce is ultimately used for fluid purposes than if that same milk were directed to non-fluid products like cheese and butter.²² Second, the supply of milk is not static. Cows produce significantly more milk in the spring and summer months.²³ On the other hand, consumer demand for milk is relatively steady year-round, with demand reaching a low point in the summer months when school is out of session.²⁴ Accordingly, dairy farmers maintain herds that are large enough to satisfy demand through the fall and winter months when milk production levels are at their lowest.²⁵ As a result, dairy farmers produce too much milk in the spring and summer and this surplus milk is known as the "spring flush."²⁶ This surplus milk is directed to non-fluid purposes, where it can better be stored and transported.²⁷ Yet, as previously noted, milk that is ultimately used for fluid purposes can command a higher price. Thus, dairy farmers in an unregulated market engaged in "cutthroat" competition for the more

¹⁸ Martin, *supra* note 16.

¹⁹ 7 U.S.C. §§ 601 (2006) *et seq.*

²⁰ 7 U.S.C. §§ 608c(5), 608c(7) (2006)

²¹ Jim Chen, *Around the World in Eighty Centiliters*, 15 MINN. J. INT'L L. 1, 6-7 (Winter 2006).

²² *Id.* at 7.

²³ *Id.*

²⁴ *Smyser v. Block*, 760 F.2d 514, 515-16 (3rd Cir. 1985).

²⁵ *Id.* at 516.

²⁶ *Id.*

²⁷ *Id.*

profitable fluid milk sales, which ultimately depressed prices, driving many out of business and destabilizing the milk market.²⁸

The federal system combats these problems by distributing the economic burden for the excess milk over all producers in a regional market.²⁹ It accomplishes this by classifying milk according to its ultimate use – fluid (Class I) and non-fluid (Class II and Class III).³⁰ The Secretary then fixes a price that each handler – middlemen who process and market the milk – must pay for the milk.³¹ While the handlers pay higher prices for milk destined for fluid purposes, the producers receive a single blended price for all the milk they produce, regardless of their milk's ultimate use.³² The blended price is roughly the average price for all milk in all classes sold in the region during a specified timeframe.³³ Thus, by paying the dairy farmer based on the market's use of all the milk in his region, rather than by what specific purposes his milk was used, the incentive for farmers to sell their milk for fluid use is eliminated.³⁴

Of course, there is an exception. These regulations do not apply to “producer-handlers” – dairy farmers who bottle their own milk.³⁵ By vertically integrating his operations, Hettinga is able to escape the federal regulations and pass some of the savings onto consumers.

The DFA and Dean Foods claim that Hettinga is exploiting a loophole that was designed to protect small, individual farmers who occasionally sold milk to their neighbors.³⁶ They argue that the reason Hettinga can sell his product at such discounted prices is because he does not have to pay the federally mandated price for milk.³⁷ Hettinga, they claim, is threatening to destroy the entire

²⁸ Chen, *supra* note 21, at 7.

²⁹ *Id.*

³⁰ 7 U.S.C. § 605c(5)(A) (2006)

³¹ *Id.*

³² 7 U.S.C. § 605c(5)(B) (2006)

³³ *Smyser*, 760 F.2d at 516.

³⁴ *Id.*

³⁵ Martin, *supra* note 4.

³⁶ *Id.* Marvin Beshore, a lawyer for the DFA said that the producer-handler exception was designed for “mom and pop dairies that bottled the little milk they produced and sold to their neighbors.”

³⁷ *Id.*

federal milk order system, which will result in wild price fluctuations and shut out smaller producers from the market altogether.³⁸

Dean Foods and the DFA convinced the USDA with the arguments and the USDA approved changes to the regulations, which limit the producer-handler exception to dairy farmers processing less than 3 million pounds of product a month.³⁹ The USDA changes will become law once they are approved by the local markets affected by Hettinga, something that will almost surely happen as cooperatives like the DFA have agreements to vote as a block.⁴⁰ Once approved, Hettinga and the other small producer-handlers⁴¹ must either join the local co-op or pay millions of dollars a year into the pool of other dairy farmers in their respective regions.⁴² Along the same lines, Congressman Devin Nunes, from California's dairy-rich San Joaquin Valley, introduced a bill in Congress in October, 2005, that parallels the USDA's decision.⁴³

Hettinga and others argue that the federal system is outdated and out of touch with the realities of the modern milk industry. When the regulations were enacted, half of all American dairy farmers were producer-handlers.⁴⁴ Today, only 1.5% can claim that status.⁴⁵ Transportation and refrigeration abilities are also much improved since the 1930s.⁴⁶ Furthermore, Wisconsin is no longer the main dairy production region in the nation, a fact that has contributed to

³⁸ See Geoffrey M. Adalian, *Solving California's Milk Crisis*, 11 SAN JOAQUIN AGRIC. L. R. 87, 102 (2001).

³⁹ Thomas Alex Tizon, *New Rules May Make Milk Farm Run Dry*, LOS ANGELES TIMES, July 11, 2005, page unavailable, available at <http://www.keepmilkpriceslow.org/news/news7112005.htm>.

⁴⁰ Martin, *supra* note 4.

⁴¹ There are at least three other producer-handler dairies that would be affected by the changed regulations. They are Mallorie's Dairy in Oregon, and Smith Brothers and Edaleen Dairy, both in Washington State. The new regulations might put these dairies out of business. Martin, *supra* note 4.

⁴² Lobeck, *supra* note 1.

⁴³ Milk Equity Act of 2005, H.R. 4015, 109th Congress (2005)

⁴⁴ Lobeck, *supra* note 1.

⁴⁵ *Id.*

⁴⁶ William Petit, *The Free Trade Area of the Americas: Is it Setting the Stage for Significant Change in U.S. Agricultural Subsidy Use?*, 37 Tex. Tech. L. Rev. 127, 138 (Winter 2004).

the stable flow of milk to a variety of markets.⁴⁷ At the same time, other oddities persist. For example, federal regulations require that milk produced at Cedar Grove Cheese in Wisconsin must be trucked 180 miles south to the Oberweis Dairy in North Aurora, Illinois, where it is pumped into a holding tank, then pumped back onto a truck, and sent back to Cedar Grove before it can be processed into cheese.⁴⁸ Additionally, studies suggest that the federal milk market acts as an artificial incentive for dairy farmers, who are in turn subsidized by US consumers to the tune of \$2.7 billion a year.⁴⁹ Rather, according to Hettinga, the DFA is simply trying to push competitors out of business, all while gouging consumers.⁵⁰ He notes that were it not for him, a gallon of milk in Arizona would cost \$0.50 more than the current price.⁵¹

Whether that savings is a result of Hettinga's vertical integration is beyond the scope of this article. What is clear is that Hettinga is forcing Dean Foods and the DFA to justify the continuation of an inefficient regulatory system which forces consumers to pay inflated prices. Perhaps the milk orders are justified and Hettinga is just a freerider undermining the integrity of the system. If so, parties as big as Dean Foods or the DFA should have little difficulty funding research to illustrate the regulations' necessity. Or perhaps, as Hettinga explains, it is an "un-American" system whereby "the consumer is getting ripped off."⁵²

FCC Endorses à la Carte Menu Cable

In a report released February 9, 2006, the Federal Communications Commission ("FCC") went on record in support of so-called "à la carte" cable programming.⁵³ The FCC report

⁴⁷ *Id.*

⁴⁸ Martin, *supra* note 16.

⁴⁹ Petit, *supra* note 46.

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

⁵¹ Lobeck, *supra* note 50.

⁵² Martin, *supra* note 4.

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

effectively reversed a similar November, 2004, FCC report and concluded that à la carte programming would combat rising rates as well as lower consumers' bills.⁵⁴ An à la carte system is one in which consumers would purchase unbundled programming from providers.⁵⁵ In other words, consumers could subscribe to any number of channels they desire – either in the form of individual channels or smaller programming bundles (or tiers) created for specific interests such as sports, news, or family – instead of purchasing many unwanted channels offered by the distributor.⁵⁶ Predictably, the FCC report set off a new round of debate and posturing by both consumer groups and cable industry.⁵⁷

Consumers have pushed à la carte pricing as a way to combat rising cable service rates, which have risen 60% over the past decade.⁵⁸ If the cable rates in Chicago are representative, consumers can expect to see bill increases between 4.5% and 8% in 2006 alone.⁵⁹ They argue that à la carte pricing will allow consumers to pay only for the programming they actually watch, rather than the entire network lineup.⁶⁰ Furthermore, such a system would be beneficial to independent networks who could reach consumers directly rather than having to compete for a slot in the most popular program tiers.⁶¹ Moreover, à la carte pricing is viewed as a way by which consumers can restrict household access to potentially offensive programming channels.⁶² On the other hand, the cable industry has fought à la carte pricing proposals. The industry argues

⁵⁴ 2006 FCC report, *supra* note 53.

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

⁵⁶ Whitworth, *supra* note 55.

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

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

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

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

⁶¹ Wiley, *supra* note 60.

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

that à la carte pricing would dramatically increase prices for most consumers while reducing the number of available channels.⁶³ Their reasoning is that by bundling many channels into one large package, it lowers the cost of offering all the channels.⁶⁴ In addition, cable companies spent billions of dollars to increase the capacity of their networks and allow them to carry hundreds of channels, high-speed internet, and phone services.⁶⁵ An à la carte system would leave these companies with a lot of unused capacity.⁶⁶

The idea of à la carte cable programming has been floated since Senator John McCain drafted a letter to then FCC Chairman Michael Powell inquiring into the subject.⁶⁷ Senator McCain, who was then Chairman of the Senate Committee on Commerce, Science, and Transportation, implored Chairman Powell to “explore all available options within your authority to promote à la carte cable and satellite offerings as soon as possible where such offerings would benefit consumers.”⁶⁸ The authority Senator McCain wrote of was given to the FCC by Congress and it allows the FCC to control service rates where the FCC concludes that the service is not subject to effective competition.⁶⁹ Senator McCain went on to note that à la carte digital cable pricing is currently available to consumers in Canada and questioned why such options were not available for American consumers.⁷⁰

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

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

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

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

⁶⁶ Belson, *supra* note 65.

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

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

⁶⁹ 47 USC § 543 (2006).

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

consumer groups regarding the prospect of an à la carte pricing structure.⁷¹ Many of the initial comments generated by the public notice supported the à la carte plan.⁷² However, other responses were less optimistic. These included the views of some well-known economists⁷³ and a report generated by the global consulting firm Booz Allen Hamilton (“Booz Allen”) at the request of the National Cable & Telecommunications Association (“NCTA”).⁷⁴ Specifically, the Booz Allen report concluded that an à la carte system “would reverse recent benefits of programming diversity, while increasing prices for the vast majority of consumers.”⁷⁵ The Booz Allen report noted that for consumers to trim their monthly cable bills, they would have to select as few as six cable networks.⁷⁶ At the same time, according to a study conducted by the United States General Accounting Office, the average U.S. household watches approximately seventeen channels.⁷⁷ The Booz Allen report also concluded that simply by offering à la carte service, rates for the basic tier of programming offered by providers would actually increase seven to fifteen percent.⁷⁸ Additionally, à la carte service would increase the costs to produce programming, reduce the number of available channels, and reduce the number of emerging networks,

⁷¹ Public Notice, Comment Requested on a la carte and theme tier programming and pricing options for programming distribution on cable television and direct broadcast satellite systems, May 25, 2004, 2004 WL 1152126

⁷² Whitworth, *supra* note 55.

⁷³ *Id.*

⁷⁴ See Booz Allen Hamilton, *The À La Carte Paradox: Higher Consumer Costs and Reduced Programming Diversity*, July 2004, available at http://www.ncta.com/pdf_files/Booz_Allen_a_la_Carte_Report.pdf (last visited Feb. 27, 2006) (Hereinafter “Booz Allen Report”). The NCTA, formerly the National Cable & Television Association, “is the principal trade association of the cable television industry in the United States,” representing the majority of the nation’s cable suppliers and over 200 programming networks. More information on the NCTA can be found at <http://www.ncta.com/Docs/PageContent.cfm?pageID=165>.

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

⁷⁶ *Id.*

⁷⁷ United States General Accounting Office, *Issues related to Competition and Subscriber Rates in the Cable Television Industry*, Oct. 2003, at 31, available at <http://www.gao.gov/new.items/d048.pdf> (last visited Feb. 27, 2006).

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

including ethnic and niche programming.⁷⁹ After considering the above, the FCC issued a report in November, 2004, concluding that à la carte pricing would be harmful to consumers.⁸⁰ Consumer groups blasted the report for studying only a mandatory à la carte model, rather than the voluntary one they had proposed.⁸¹ Senator McCain's echoed consumer groups' displeasure with the report stating "the industry has been successful once again in distracting policymakers with a 'parade of horrors' that they allege would result from a mandatory à la carte offering."⁸²

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

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

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

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

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

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

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

⁸⁴ Suzukamo, *supra* note 58.

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

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

who currently cannot afford it and provide consumers with the ability to pay only for the programming they value.⁸⁷ In addition, à la carte pricing would allow consumers to purchase individual channels outside of their current bundle without having to purchase an additional programming bundle.⁸⁸

The revised FCC report was greeted with enthusiasm from consumer groups. Brent Bozell of the family-advocacy group Parents Television Council said that the report “confirms common sense” and went on to note that “the cable industry no longer has any arguments left.”⁸⁹ Senator McCain said the report confirmed what he had felt for years and promised to initiate legislation that would give cable providers incentives for voluntarily offering à la carte pricing.⁹⁰ McCain could not resist one parting shot at the industry and quipped “I hope that the cable industry will appreciate the ability to choose despite their failure to provide meaningful choices to their customers.”⁹¹ The NCTA was disappointed “that the updated Media Bureau report relies on assumptions that are not in line with the reality of the marketplace.”⁹² Also dissatisfied with the report were some smaller independent religious broadcasters, who feel that given the choice, consumers would simply ignore them. Rod Tapp, an executive with The Inspiration Networks said à la carte pricing could be the “death knell for much of the wholesome programming available today.”⁹³

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

⁸⁷ 2006 FCC report, *supra* note 53, at 47.

⁸⁸ *Id.*

⁸⁹ Leslie Cauley, *Study: A la carte cable would be cheaper*, USA TODAY, Feb. 10, 2006, 01B, available at 2006 WLNR 2329108.

⁹⁰ Press Release, Senator John McCain, *McCain Hails FCC Re-Evaluation*, (Feb. 9, 2006) available at http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1657 (last visited Feb. 27, 2006)

⁹¹ McCain Press Release, *supra* note 90.

⁹² Press Release, National Cable & Telecommunications Association, *Comments of Kyle McSlarrow, NCTA President & CEO, Regarding the Updated FCC Media Bureau Report on A La Carte Programming*, (Feb. 8, 2006), available at <http://www.ncta.com/press/press.cfm?PRid=668&showArticles=ok> (last visited Feb. 27, 2006).

⁹³ Van, Jon, *Cable a la Carte Endorsed*, CHICAGO TRIBUNE, Feb. 10, 2006, 3-1, available at 2006 WLNR 2303660.

carte pricing.⁹⁴ Part of the reason may lie with the industry's business model. Networks charge cable companies to deliver their channel to each consumer's home.⁹⁵ For example, ESPN charges the cable companies more than \$2.50 per subscriber, while the cartoon network charges only \$0.15. The networks that own these channels bundle popular channels with unpopular channels and force the cable companies to carry all of their channels.⁹⁶ An à la carte system would destroy that model.⁹⁷ Nevertheless, some cable companies are voluntarily pushing for à la carte pricing. Comcast and Time Warner made news in December, 2005, when they unveiled a plan to offer a "family tier" of programming.⁹⁸ During that same month, Charles F. Dolan, of Cablevision Systems Corporation, called for à la carte pricing in the industry.⁹⁹ Also breaking with the industry was RCN, a cable provider in the Midwest and the Northeast, who applauded the new report, but asked Congress to address the unilateral contracts created by the large programming networks, which, according to RCN, make à la carte pricing unfeasible.¹⁰⁰

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

⁹⁴ Suzukamo, *supra* note 58.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

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

⁹⁹ Belson, *supra* note 65.

¹⁰⁰ Timothy Barmann, *Cox has no plans to alter service,* PROVIDENCE JOURNAL, Feb 11, 2006, page unavailable, available at 2006 WLNR 2450263.

¹⁰¹ Norman M. Sinel, Norman M., *Recent Developments in Cable Law,* 853 PLI/PAT 355, 374 (Feb-March 2006).

¹⁰² Suzukamo, *supra* note 58.

¹⁰³ Sinel, *supra* note 101, at 374.

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or more channels is delivered to 70% of U.S. homes, and only then when 70% of those households are subscribers.¹⁰⁴ Past reports indicate that only the first prong of this analysis has been satisfied.¹⁰⁵

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

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Suzukamo, *supra* note 58.