28 Satellite Television And Radio

The government played a major role in the development of the satellite industry, as, over the course of several decades, NASA and the Defense Department invested tens of billions of dollars to develop the technology for satellites.[1] Congress also intervened mightily in 1992 by enacting the "program access" law that requires cable operators to make their programming available to their satellite competitors on non-discriminatory terms.[2] The FCC in 2007 extended those rules for five additional years.[3]

Set Asides

The Cable Television Consumer Protection and Competition Act of 1992 required the FCC to impose on satellite TV, also known as direct broadcast satellite (DBS), "public interest or other requirements for providing video programming."[4] Congress decreed that satellite TV operators must reserve between 4 and 7 percent of their channel capacity to carry "noncommercial programming of an educational or informational nature" at reduced rates.[5] Eligibility for this preferential access was limited to "any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions."[6]

With the flexibility to choose a noncommercial set aside of between 4 and 7 percent, in 1998 the Commission chose 4 percent on the grounds that the satellite industry was in its infancy and a larger set-aside requirement might "hinder DBS in developing as a viable competitor."[7]

Eligibility for set-aside channels is limited to nonprofit organizations that provide "noncommercial programming," defined largely by the absence of advertising.[8] The Commission envisioned that a wide variety of programming would be made available to DBS subscribers over the set-aside capacity, including distance learning, children's educational programming, and medical, historical, and scientific programming.[9] However, the satellite operators now reject most applicants because they already have hit the 4 percent mark. Among the stations rejected since 2007 because satellite companies had already hit their 4 percent quota were numerous religious stations (including CatholicTV, God TV, and Almavision Hispanic Network), the Connecticut Network (a public affairs network), The Documentary Channel, Classic Arts Showcase, Free Speech TV, New Abilities Television (a station for people with disabilities), TV Japan, CoLours TV, American Public Television, and California State University.[10] Although few satellite operators offer local programming, they do offer educational programming, programming for minorities and the disabled, and international programming.

Congress has left the FCC with leeway to reduce or eliminate fees for set-aside channels altogether. When determining reasonable prices, section 335(b)(4) instructs the Commission to take into account the nonprofit character of programming providers and any federal funds used to support the programming. It directs the FCC not to allow prices to exceed 50 percent of direct costs.[11] Educational programmers usually pay satellite operators significant monthly fees, in contrast to PEG channels, which do not pay cable operators and indeed earn fees from localities.]] (See Chapter 7, PEG.) In the past, some nonprofit broadcasters have suggested reducing or customizing fees, such as implementing a sliding scale for fees based on programmers' ability to pay.[12] DBS operators pushed for an expansive definition of "direct costs" that would include the cost of constructing and launching satellites. The Commission declined to adopt such a broad definition of "direct costs," arguing that to do so would go against Congressional intent:

> "If noncommercial educational or informational programmers are forced to share those expenses, the costs of leasing channels could keep many programmers out of the market, thus defeating Congress' desire to make noncommercial programming readily available."[13]

However, the FCC also decided that DBS operators should be given "flexible" regulatory treatment, and rather than agreeing to regulate rates the Commission decided to let DBS providers and noncommercial program-

mers negotiate rates themselves.[14]

Satellite providers are subject to disclosure requirements. They must maintain a file containing "quarterly measurements of channel capacity, yearly average calculations used to determine the four percent set aside, and a record of noncommercial programmers requesting and obtaining access to capacity."[15] However, they are not required to post these online.

Local Programming

Policymakers have considered increasing local programming, but so far have opted not to.

While section 335(a) directs the Commission to "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism…and the methods by which such principle may be served…." in 1998, the Commission noted that the statute provides no guidance on how to define "localism"—and that there were some technological limitations as to how much satellites could target local signals.[16]

But in 2004, the Commission revisited the issue, finding that "[m]any of the legal and technical impediments to the transmission of local television broadcasts are now eroding."[17] Indeed, by the middle of the last decade, increased satellite capacity, channel compression, and other technical advances had arisen to support the delivery of a limited number of local channels. In addition, a change in the law had removed the copyright obstacles to satellite carriage of local television broadcast signals.[18] In fact, the new law required DBS operators to carry the signals of *all* local broadcasters in any market that it chose to serve with *any* local signals.[19] At last count, DISH offered local-into-local service in 175 markets and DirecTV offered such service in all 210 markets.[20]

But provision of local coverage on satellites faces technical challenges. Local channels are carried on "spot beams" that focus coverage on a particular region of the country.[21] Satellite operators make this allocation in the satellite's design before it is launched (which typically happens every year or two). But in 2004 the FCC decided not to impose localism requirements "because it is not clear to what degree the satellite channel capacity may be limited by technical constraints, or whether market demand will result in local-to-local service in all parts of the country…."[22]

SPANs on Satellite

State SPANs report that the satellite companies have rejected their requests for carriage. (See Chapter 8, State SPANs.) Only one state SPAN channel is available through DBS—in Alaska.[23] In May 2010, President Obama signed into law the Satellite Television Extension and Localism Act of 2010, which permits satellite providers to reduce their public interest carriage obligations to 3.5 percent if they provide retransmission of the SPANs of at least 15 states.[24] However, officials at the National Association of Public Affairs Networks report that they do not expect this flexibility to increase carriage of SPANs.

Digital Audio Radio Services (Satellite Radio)

In 1997, the Commission granted licenses to American Mobile Radio Corporation (the predecessor of XM Radio) and Satellite CD Radio (the predecessor of Sirius Radio) to offer digital audio radio service by satellite (SDARS). (See Chapter 2, Radio.) The companies planned to use state-of-the-art satellite technology to provide CD-quality music and information to a nationwide audience.[25] Subsequently, both companies installed networks of terrestrial repeaters to retransmit information from the satellite in order to overcome signal blockage and reach subscribers who were not able to receive the satellite signal. Broadcasters, concerned that satellite operators would begin to provide locally originated programming and compete for local advertisers, urged the FCC to prevent them from airing locally originated programming. The satellite operators agreed, as a condition for authorization to use terrestrial repeaters, not to use them for locally originated programming that was not also carried on their satellites.

After XM and Sirius merged in 2008, the Commission adopted final rules for terrestrial repeaters, permitting the companies to use repeaters to transmit programming that they sent to all their subscribers by satellite, even if the programming was localized in nature (e.g., weather and traffic information in Los Angeles), but prohibiting them from using the repeaters to transmit locally *originated* programming that would reach only some of their subscribers.[26] In so doing, the Commission sided with the National Association of Broadcasters, which argued that allowing satellite radio to originate local programming would put them into competition with local broadcasters for listeners and local