27 Cable Television

FCC POLICIES CONTRIBUTED IN SIGNIFICANT WAYS to the cable industry's evolution from a limited service that served rural areas to its current status as a major competitor to broadcasters.

Initially supportive of cable as a new communication medium, the FCC shifted its position in 1966 and began to regulate the cable industry due to its competition with over-the-air television broadcasters. In the mid-1970s, the FCC determined that cable was no longer a threat to broadcasting and eased up on the most restrictive regulations.[1]

Sometimes policy roads not taken are just as important as those that are. In previous chapters we have described how the breakup of the "bundle" in newspapers undercut the cross-subsidy model, which had allowed more profitable content to subsidize types of journalism that were more costly to produce or less popular. Cable TV currently bundles its offerings. Consumers pay a monthly rate for a basic collection and often premium rates for other packages, but do not have the option of picking only the shows or channels they want. Several FCC commissioners have proposed plans to introduce a la carte pricing that would allow consumers to pay only for the channels they want, but the Commission has never accepted this approach.[2] Geoffrey Cowan and David Westphal of the Annenberg School of Communication and Journalism argue that permitting bundling has had an important impact: "Cable news channels are the direct beneficiaries of FCC rules that allow cable operators to bundle services, requiring every cable subscriber to pay a fee to MSNBC, CNN and Fox News - whether they want them or not.[3]

Today, cable TV operators work under a complex set of rules regarding which broadcast programming they must carry and the process for securing rights to carry programming that is not required. Several of these rules have indirect, yet significant, effects on local news.

Must Carry and Retransmission Consent

Congress required major cable providers to set aside up to one-third of their channel capacity for local broadcast stations.[4] Broadcasters argued successfully that such a significant governmental intervention was required to protect them, insure more coverage of local issues, and promote broadcasters' ability to compete effectively against cable operators in their local markets. James B. Hedlund, head of the Association of Independent Television Stations, told Congress that failure to pass "must carry" would jeopardize "the number one source of news and information to the American public," namely local, over-the-air broadcasters.[5] Hedlund explained:

> "Why should the Congress care about the competitive relationship between cable operators and free off-air television? At stake is our long held national value of promoting a diverse and free information flow to all Americans. Studies confirm that local off-air television is the number one source of news and information to the American public. We may lose this lifeline in the next decade unless the unbridled power of cable is restrained today....
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> "On the other hand, off-air broadcasting will provide this universal service. The economics of broadcasting—indirect payment through advertising—will insure that all citizens have access to information. Our responsibility as public trustees will insure that all citizens have access to programming that responds to the needs of the community. Absent free off-air television, government policy makers will be confronted with the costs of providing some form of lifeline service for those not connected to the wire, a cost which must be borne by the taxpayer or subscribers...."[6]

Edward O. Fritts, then-president and CEO of the National Association of Broadcasters, went one step further: "By accepting 'must-carry' rules, the public is guaranteed local news, weather, public service and programming in the local market."[7]

Yet, as noted earlier, many local broadcasters do little or no local programming. About 30 percent air no local news, and of those that do, about one-third are contracting it from other stations in town. Despite the lack of local programming, all of those stations have government-enforced carriage on cable TV.[8] In other words, the current must-carry system is *not* currently set up to favor stations that do local programming about their communities over those that do not. (See Chapter 3, Television.)

Cable systems with 12 or more channels must devote up to one-third of their channel capacity to the carriage of local commercial television stations that are located in the same designated market area (with some exceptions to avoid duplication of signals).[9] These stations are given the choice every three years of being carried pursuant to the Commission's must-carry rules or of entering into retransmission consent negotiations with local cable operators.[10]

The election of "must-carry" status prohibits a station from demanding payment for its carriage; however, the retransmission consent option allows a commercial station to engage in direct negotiations with cable companies, asking for payment in return for the cable company's right to "retransmit" the broadcast signal over cable lines. (In contrast, local noncommercial educational (NCE) stations have no retransmission consent rights and therefore cannot seek compensation for their carriage on local cable systems.)[11] Changes in the marketplace have led to disputes over retransmission consent becoming more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.

While these retrans battles do not usually revolve around questions of news or local programming, some argue that their outcome may have indirect impact on local news. Most cable operators do not finance or carry local cable news operations, so local broadcasters provide almost all of the local news on cable. Broadcasters believe that if stations can increase the retrans revenue streams, they would be in a better financial position to invest in local news. Dave Lougee, president of Gannett's broadcast division, argues that if the FCC cares about local news it should disregard calls to arbitrate the disputes between broadcasters and cable operators and instead let broadcasters bargain for more revenue. The most under-compensated stations on the cable dial, Lougee maintains, are the network affiliates. "If we can't use retransmission consent, local news will die," Lougee says.[12] On the other hand, should cable operators become more aggressive in providing local news and public affairs—through local cable news networks, state SPANS, or PEG operations—the broadcaster argument that only their local news teams are providing community reporting might weaken.

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Leased Access

As cable grew in the 1980s, Congress feared that programming might be dominated by a handful of large media conglomerates.[13] In 1984, Congress began requiring cable operators to set aside up to 15 percent of their capacity for a "leased access" system designed to give access to independent programming.[14] In 1992, Congress broadened section 612's statutory scope to encourage "competition in the delivery of diverse sources of video programming," ostensibly allowing independent programmers (i.e., those not affiliated with major cable, satellite, or broadcast companies) to buy their way onto the cable dial, opening the door to a greater diversity of sources of information[15] and providing "public access to a wide variety of voices and viewpoints."[16]

Leased access has not worked as Congress intended. There has not been any significant independent programming on leased access channels.[17] A major obstacle is that prospective programmers seeking a national audience must reach agreements with thousands of separate cable systems. Independent programmers, such as the America Channel and members of the National Association of Independent Networks, have complained to Congress that they continue to face difficulties getting carriage on cable systems, and when they do get carriage they are placed on more expensive and less desirable tiers than networks controlled by cable operators.[18] In one case, a programmer estimated he would have had to pay $1 billion per year to reach 50 million customers.[19] At those rates, no programmer would be

able to get off the ground. On average, cable systems carry 0.7 leased access channels, less than one percent of capacity (they are supposed to be setting aside 15 percent).[20]

If no programmers have applied successfully for leased access, then the cable operators may use the channels for whatever they want. So they may have a disincentive to make the leased access system work well. In addition, cable operators have stated that most leased access programming consists of infomercials and religious programs, although the FCC has limited information about the makeup of this programming or how the rest of the unused capacity is being used.[21]

Though the leased access rules have not been effective in promoting independent programming on a national scale, they do have the potential to be used to promote the growth of local programming, including possibly news and public affairs. For this to happen, the FCC may want to streamline its access rules for programmers and revise the structure to make leasing more affordable. We note that the Commission has its leased access rules under review in a pending proceeding.[22]

Public, Educational, and Government (PEG) Channels

In 1984, the Cable Communications Policy Act[23] declared that local franchising authorities (LFAs) could mandate channel capacity for public, educational, and governmental use:[24]

> "A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public—the fundamental goal of the First Amendment—without the need to regulate the content of programming provided over cable.... Public access channels are often the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work."[25]

Though PEG channels could serve as an important means of enhancing the information flow to communities, numerous obstacles have prevented this from happening in many places.

First, PEG funding has been declining. In a survey of 165 PEG centers, half said their funding dropped from 2005 to 2010, and among those reporting a decline, the average drop was 40 percent. The survey stated that 100 community media centers shut down during that period.[26] For example, after the City of Dallas took over PEG funding in 2000, it reduced PEG allocations from $700,000 in 2001 to $246,000 in 2008, and in 2009 it cut the budget altogether for Dallas's public access system, which then had to shut down.[27] (See Chapter 7, Public Access Channels.) Many other LFAs are cutting PEG funding, pressed by economic realities, by state statutes that reorganize franchising, and by decreased franchise fees (from people cutting the cord or switching to satellite).

The current "must carry system" is not set up to privilege stations that do local programming about their communities over those that do not.

PEG advocates say that the increase in statewide franchising for cable companies has resulted in a significant downturn in funding for local PEG channels.[28] According to a 2008 survey of by the Alliance for Community Media (ACM), in which over 3,000 of its member PEG access center groups were interviewed, 17 communities in eight states have lost their PEG operations altogether; another nearly 25 percent have lost PEG channels or expect to lose them in the future; and 20 percent reported a decrease in PEG funding.[29] In 2011, ACM conducted an online survey with a smaller number of respondents (207) and found that PEG access stations in over 100 communities across the United States had closed since 2005, and hundreds more may be forced to close in the next three years.[30] Some examples:

- American Community Television estimates that by 2012, over 400 PEG channels could be lost in six states—Wisconsin, Florida, Missouri, Iowa, Georgia, and Ohio[31]—when funding ends.[32] In what the City of Pikeville, Kentucky, calls "a terrible blow to PEG funding in Kentucky," state franchising law forbids communities from requiring any in-kind payment of property or services from franchisees for PEG access.[33]

- A recent California state law allowing cable operators "the option of dropping their long-standing obligation to provide free studios, equipment, and training to the public," caused at least 45 PEG access centers across the state to shut down[34]—among them, at least 12 public access studios in Los Angeles alone.[35]
- Public access channels in Madison and West Allis Wisconsin shut down after a ban on PEG fees went into effect.[36]
- Kansas, South Carolina, Missouri, and Nevada do not require new cable TV entrants to provide any PEG support.[37]

PEG advocates also argue that cable and phone companies are making it harder and harder for viewers to find their channels. The FCC is currently considering whether AT&T should be permitted to locate all PEG outlets in a single media market on a single channel, for instance, channel 99.[38] AT&T argues that "U-verse TV is based on an all-IP architecture totally unlike that of traditional cable operators" and that the "[m]ethod of delivering PEG should not be frozen in time."[39] In some communities, this may amount to tens of channels that are accessible only through a drop-down menu. In addition, channels accessible through drop-down menus cannot be recorded for viewing at a later time.

New state laws are squeezing public access channels. American Community Television estimates that by 2012, over 400 PEG channels could be lost in six states.

Third, some states are increasingly mandating that PEG channels air a minimum number of hours of non-repeat programming per week. In Georgia, Texas, and Michigan, PEG channels are required to provide at least eight hours of non-repeat programming content daily.[40] On one hand, this seems like a reasonable minimum requirement. Since the point of PEG is to provide original local programming, if a station cannot provide that, perhaps a different group should be given a chance. But PEG operators are concerned that cable operators will seize on these requirements to unfairly eliminate PEG channels.[41] Indeed, in Texas, with the reduction of funding, some PEG channels "have dipped below the 8 hour programming requirement and were taken off the air."[42]

The FCC has no legal authority to require state or local governments to fund PEG channels, and many localities do not require disclosure of PEG funding either. As a result, there is no current national list of existing PEG channels, the nature of their franchising agreements, or what programming they air.

State Public Affairs Networks

Industry leaders often point to the creation of C-SPAN as the right way to achieve public interest goals. The industry voluntarily funded the creation of the network, and local operators pay C-SPAN a fee based on the number of subscribers to the overall cable system.[43] However, while 23 states and the District of Columbia have SPANs covering the operations of state government, in only four states have cable operators followed the C-SPAN pattern and funded the services. That has forced 12 of the SPANs to get funding from their state legislatures, making them less secure and more dependent on the institution they are ostensibly covering.[44] (See Chapter 8, State SPANs.)

At a minimum, states could help SPANs by allowing them to be part of the PEG system. In our view, section 611 of the Communications Act was not intended to entitle only "government access channels" operated by local governments to carriage as PEG channels. In providing for channel capacity for governmental use, Congress noted that "the governmental channel allows for a local 'mini-C-SPAN,' thus contributing to an informed electorate, essential to the proper functioning of government."[45] If SPANs qualified as legitimate forms of PEG programming, they might also then be eligible for fees from local franchising authorities. [46]