

Streaming Poses Ultimate Catch-22

By Thomas Lenard and Lawrence J. White

(This piece was published in [Politico](#) on May 15, 2013)

Barry Diller's new Aereo venture may turn out to be the ultimate Catch-22. Aereo is possible only because of the existence of broadcast television, but broadcasters view it as a threat and have warned that they may stop broadcasting. If that happens, broadcast television and Aereo could both cease to exist.

Unlike the iconic fictional Catch-22, however, this outcome would yield benefits to society: Hastening the demise of broadcast television would accelerate the transfer of spectrum to higher-value uses.

Only a small fraction of TV viewers — about 10 percent — still rely on over-the-air broadcasts to receive their programs; the remaining 90 percent view their programs through subscription TV services like local cable or satellite transmissions.

The current over-the-air broadcasters occupy a large block of spectrum that would most likely be more valuable if converted to mobile broadband use. The effective supply of spectrum for such mobile broadband uses hasn't expanded sufficiently to keep up with the exploding demand, contributing to a growing and widely acknowledged scarcity problem. Using this spectrum for over-the-air broadcasting probably made good sense 50 years ago, when almost all viewers used their own antennas. Cable systems were rare and existed solely for households in remote rural regions where over-the-air signals were weak or nonexistent. And cellphones were still an experimental toy at the Bell Labs.

But in 2013, the use of this same spectrum for only 10 percent of viewers is an obviously bad use of a scarce — and growing scarcer! — resource. It is a testament to the continuing legacy of the inefficiencies of the command-and-control allocation policies that the federal government has traditionally applied to spectrum uses. Under a more rational spectrum-allocation regime, it is unlikely that broadcast TV or Aereo would exist today.

The developers of Aereo and similar devices claim they are just another form of TV antenna. The broadcasters claim that, because the devices allow storage and retransmission of programs to multiple receivers, the devices' use requires the copyright permission of the broadcasters.

The broadcasters have sued to stop the rollout of Aereo but recently suffered setbacks in the courts. If Aereo's interpretation of the law wins the day, the broadcasters are afraid that nothing could prevent cable and satellite companies from picking up the broadcasters' signals for free, as Aereo does, thereby avoiding billions of dollars of retransmission fees. This prospect has caused at least a few TV network leaders to threaten to cease their over-the-air broadcasts and to supply their programs to viewers solely through local cable companies and satellite services.

But this "threat" might well be an important part of the solution — perhaps unwittingly — to the mobile broadband spectrum scarcity problem.

Amid this brouhaha, the Federal Communications Commission is developing its plan for “incentive” auctions of broadcast spectrum, which the FCC expects to take place in 2014. The FCC hopes the auction will yield 120 MHz of prime spectrum. Other observers say this estimate is optimistic, and there is growing concern about potentially low participation rates on the part of the broadcasters. Perhaps the arrival of Aereo will make participation more attractive.

Arguably, it would have been better simply to give the broadcasters greater license flexibility, but the plan to pursue the auction is now firmly in place. Good public policy at this stage involves maximizing the broadcasters’ incentives to participate. Unfortunately, this doesn’t seem to be happening.

The first problem is the multiple objectives of the auction. The government wants funding for a public safety network and also for deficit reduction. Advocates for unlicensed spectrum want a significant amount of spectrum to be set aside for that purpose. Broadcasters may legitimately wonder what will be left for them. Not a good incentive to participate.

Second, the rules themselves may limit the proceeds from the auction. The Department of Justice’s Antitrust Division just submitted comments to the FCC suggesting that limitations should be placed on the amount of spectrum that the largest companies — AT&T and Verizon — could acquire at auction, because of the DOJ’s concerns about competition. The evidence shows that these companies are also the highest bidders. Limiting their participation in the upcoming auction would surely reduce — perhaps substantially — the proceeds available to the broadcasters and therefore their participation.

Broadcast TV will survive the incentive auction in some form, but it is hard to know how it will survive in the long run. Between subscription TV and the Internet, viewers will get their programs elsewhere, and the market will develop new ways to reward the creators of content.

But the scarcity of spectrum is a serious problem for the expansion of mobile broadband. Perhaps the arrival of Aereo can help solve that problem.

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