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A Recent Appeals Court Ruling on Ancillary Power Limits Could Curb Regulatory Overreach

by

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On January 15, the U.S. Court of Appeals for the D.C. Circuit ruled that the FCC exceeded its authority by imposing certain "encoding" regulations on direct broadcast satellite providers. The D.C. Circuit voided regulations banning "selectable output control," an encoding method allowing a video services or content provider to remotely disable viewing of particular programs over set-top boxes.

EchoStar v. FCC could have significant future implications for agency actions based on claims of ancillary power. If applied consistently, the non-deferential approach to ancillary authority claims embodied in the D.C. Circuit's opinion could curb agency power grabs. In particular, the principles enunciated to limit the exercise of ancillary power recognized by the D.C. Circuit possibly could seal the fate of the FCC's net neutrality regulations as well as the agency's "AllVid" proposal for regulating video devices.

In *EchoStar v. FCC*, the D.C. Circuit rejected the agency's claimed reliance on Sections 629 and 624A of the Communications Act as a basis for authority for its encoding regulations. Neither provision, the court ruled, provided direct authority for the FCC to

impose such regulations on direct broadcast satellite (DBS) providers. Just as important, the D.C. Circuit denied that the encoding regulations were "reasonably ancillary" to the FCC's effective execution of Sections 629 or 624A.

The D.C. Circuit was unwilling to read statutory terms in a loose way that would give cover to broad regulatory power. "[T]he FCC's interpretation of the reach of its ancillary jurisdiction is owed no deference," the D.C. Circuit said, "since *Chevron* only applies in instances in which Congress has delegated an agency authority to regulate the area at issue." With this non-deferential premise in place, the D.C. Circuit bristled at the FCC's overreaching ancillary power claims. If accepted, wrote the D.C. Circuit, such claims to authority "would leave the FCC's regulatory power unbridled - so long as the agency claimed to be working to make navigation devices commercially available." The D.C. Circuit instead "refuse[d] to interpret ancillary authority as a proxy for omnibus powers."

The D.C. Circuit's rejection of broad agency power claims based on the ancillary jurisdiction doctrine deserves special attention. In recent years, the FCC has staked expansive new regulatory controls over information technologies and services on its purported ancillary authority. So the D.C. Circuit elaboration on the limits to the FCC's ancillary power doctrine may be critical to the fate of the agency's other pro-regulatory undertakings.

The FCC's net neutrality order is staked, at least in part, on the agency's claimed ancillary power. Congress never expressly granted the FCC power to regulate broadband Internet services as such. The FCC invoked two-dozen statutory provisions primarily involving voice telephony, subscription video services, and broadcast TV – all the while claiming deference for itself in expansively implementing those provisions. Those net neutrality regulations are now the subject of another pending case at the D.C. Circuit. Consistent application of the non-deferential, limited formulation of the ancillary power doctrine contained in *EchoStar v. FCC* could doom the agency's net neutrality regulations on jurisdictional grounds.

Likewise, the FCC's "AllVid" proposal for subjecting video navigation devices to a comprehensive set of new regulations reaching down to the physical, protocol, and content layers appears premised in part of the agency's ancillary jurisdiction. However, a reading of *EchoStar v. FCC* suggests that the FCC's confidence in its jurisdictional power to impose sweeping new video devices regulations is misplaced.

Section 629 charges the FCC with ensuring there is a commercial market for retail devices that receive video subscription services. But it doesn't call for the FCC to set basic design parameters for how those devices operate and interact or to impose uniform standards regarding protocols or codecs such devices use. It's doubtful that the FCC's assertion of broad regulatory authority would receive deference if the standard set out by the D.C. Circuit in *EchoStar v. FCC* is applied consistently.

In sum, limitations on the ancillary power doctrine, as expounded and applied by the D.C. Circuit in *EchoStar v. FCC* could have an important disciplining effect on overreaching agency action. If adhered to, it would mean that future FCC actions would more closely follow the statutory directives set out by Congress and respect the inherent limits of the agency's authority.

FCC Lacked Express and Ancillary Power to Impose Encoding Regulation on All MVPDs

At issue in *EchoStar v. FCC* were encoding regulations adopted in 2003 to facilitate connection of digital navigation devices to cable TV and other multichannel video program distributors' (MVPD) systems, such as DBS. The disputed regulations banned so-called "selectable output control." That is, the regulations prohibited MVPDs or video programmers from encoding video programming with a signal permitting remote disabling of video content through set-top boxes. Content providers had sought the ability to use selectable outlet control as a means of preventing unauthorized copying and distribution of copyrighted video content. Nonetheless, the FCC concluded in 2003 that the regulatory prohibition on selectable outlet control was necessary to protect early adopters of HDTVs. The FCC's encoding regulations, which included that ban, essentially embodied a memorandum of understanding (MOU) that the agency reached with cable providers.

Rebuffing the FCC's expansive reading of its Section 629 directive to "adopt regulations to assure the commercial availability" of set-top box devices, the D.C. Circuit concluded that **"the statute's language is not as capacious as the agency suggests."** The D.C. Circuit pinned the FCC to its acknowledgment that the encoding regulations aren't necessary to sustain a commercial market for DBS devices. And the D.C. Circuit pointed to the FCC order's admission that devices for delivering DBS services are "already available at retail" and "portable nationwide."

In *EchoStar v. FCC*, the D.C. Circuit also spurned the FCC's far-reaching claim that imposing the regulations on DBS providers was justified as a means for enforcing a separate agreement regarding encoding that the agency reached with cable providers. **"To read § 629 in this way would leave the FCC's regulatory power unbridled - so long as the agency claimed to be working to make navigation devices commercially available**," the D.C. Circuit's opinion explained.

***EchoStar v. FCC* Emphasizes the Limits to the Ancillary Power Doctrine**

The FCC traces its ancillary power to Section 4(i) of the Communications Act. That section authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders … as may be necessary in the execution of its functions."

In *EchoStar v. FCC*, the D.C. Circuit summarized the ancillary jurisdiction doctrine as conferring regulatory power on the agency only when: "(1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated duties." But the D.C. Circuit denied that the encoding regulations were reasonably ancillary to the FCC's effective execution of Sections 629 or 624A.

Critically important in *EchoStar v. FCC* is the D.C. Circuit's emphasis on the limited nature of ancillary power. Explained the opinion: "**We note that the FCC's interpretation of the reach of its ancillary jurisdiction is owed no deference, since *Chevron* only applies in instances in which Congress has delegated an agency authority to regulate the area at issue**." By declining to expansively read the plain language of the statute to include powers *not* expressly granted, the D.C. Circuit therefore declined to show special deference to the FCC's ancillary claims.

In light of its recognition of the doctrine's limited scope, consider now the D.C. Circuit's takedown of the FCC's ancillary power claims under Section 629:

- **"Since we conclude Congress did not empower the FCC to apply the encoding rules to all MVPDs, deferring to the FCC's own assertion of its authority on this point would beg the question."**

- **"The FCC is not authorized under § 629 to take any action that lessens the competitive pressures posed by satellite providers in order to induce cable operators to ratify an MOU the agency favors."**

- **"[W]e refuse to interpret ancillary authority as a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal of commercial availability of navigation devices."**

Although 624A actually discusses encoding, the plain language of the statute limited its reach to cable systems. In no uncertain terms the D.C. Circuit again turned back the FCC's ancillary power arguments:

- **"The FCC is powerless to wield its ancillary jurisdiction, however, where 'there are strong indications that agency flexibility was to be sharply delimited.'"**

- **"Section 624A's textual delegation of authority to regulate cable systems, as opposed to all MVPDs, is precisely such an indication."**

- **"It is one thing for the FCC to invoke its ancillary authority in furtherance of express congressional directives. But it is quite another when the FCC invokes its ancillary jurisdiction to override Congress's clearly expressed will."**

Thus, it is easy to see that *EchoStar v. FCC* could have significant implications for all agency actions based on ancillary power. If applied consistently, the approach taken by the D.C. Circuit could curb excessive claims of agency regulatory power.

***EchoStar v. FCC*'s Emphasis on Ancillary Power Limits Undermines the Jurisdictional Basis for Network Neutrality Regulations**

Consistent application of the limitations on ancillary jurisdiction contained in *EchoStar v. FCC* could well doom the agency's net neutrality regulations on jurisdictional grounds. In attempting to justify its regulations, the FCC stretched its authority beyond what a disciplined understanding of the ancillary power doctrine would permit.

The D.C. Circuit previously rejected the FCC's claim that it had ancillary authority to intrude into network management decisions by broadband Internet access providers in *Comcast v. FCC* (2010). In that case, the D.C. Circuit rejected the FCC's claims to any proper exercise of ancillary power in conjunction with section 706 (encouraging deployment of advanced telecommunications capability), section 256 (establishing procedures for coordinated network planning and interconnection of public telecommunications networks), section 257 (granting 15 months to identify and eliminate market entry barriers for entrepreneurs and small businesses in provision and ownership of telecommunications and information services), Title III (authority over broadcasting), and section 623 (cable ratemaking authority).

Later that year, the FCC issued its order imposing a comprehensive set of net neutrality regulations. The agency claimed some 24 bases of authority in the Communications Act for its new regulations. The named provisions address services such as wireline telephony, cable video, broadcast TV, and wireless commercial radio. This includes the FCC's reliance on the apparent reinterpretation of Section 706 contained in its order.

The FCC has now defended its order's claimed jurisdictional authority for imposing net neutrality regulations in the *Verizon v. FCC* case pending in the D.C. Circuit. The agency asserted in its court briefs that the broadband network management "constitutes communication by wire or radio" and is therefore subject matter under Title I of the Communications Act. Its assertion of ancillary power essentially rests on the idea that because broadband Internet-based services like VoIP and online video delivery are substituting or potentially disrupting agency policies involving traditional telephony, MVPD services, and local broadcast TV, the agency's jurisdiction can therefore expand to draw in broadband networks that enable these newer Internet-based alternatives.

Of course, the terms of the Communications Act, which received its last substantial revision in 1996, hardly acknowledged the existence of the Internet, let alone broadband networks. To borrow the D.C. Circuit's phrasing in *EchoStar v. FCC*, since "Congress did not empower the FCC to apply" network neutrality rules to broadband Internet providers, "deferring to the FCC's own assertion of its authority would beg the question."

And to uphold such an assertion of regulatory authority over broadband networks "would leave the FCC's regulatory power unbridled – so long as the agency claimed" to be furthering objectives involving voice telephony, MPVD services, and broadcast TV.

It's probable that *Verizon v. FCC* may ultimately turn on the propriety of the agency's apparent reinterpretation of Section 706. But the FCC's invocation of Section 706 as a positive source of regulatory power involves an unreasonable twisting of a deregulatory-pronouncement of Congress. That deregulatory thrust is embodied in the very terms of Section 706(a). It directs the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" through "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." (FSF President Randolph May and I have criticized this misuse of Section 706 in comments to the FCC.)

Here too, any ancillary power claims tied to the FCC's pro-regulatory reading of Section 706 might likely fail to overcome the limits set out in *EchoStar v. FCC*. To again borrow from the D.C. Circuit's opinion, a plain reading of Section 706 indicates that "the statute's language is not as capacious as the agency suggests." The D.C. Circuit might likely "refuse to interpret ancillary authority as a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal of" encouraging deployment of advanced communications services such as broadband.

EchoStar v. FCC's Emphasis on Ancillary Power Limits Undermines Basis for Possible "AllVid" Regulation of Video Navigation Devices

Echostar v. FCC should also prompt further re-thinking about the legal basis for the FCC's "AllVid" proposal. Simply put, the D.C. Circuit's ruling undercuts the jurisdictional basis for the FCC's plan to subject all MVPDs to extensive new regulations regarding the design and operation of video devices.

AllVid is an FCC proposal to impose a comprehensive new set of controls on how all MVPDs design and operate the video navigation devices they make available to their subscribers. The AllVid proposal would require all MVPDs to make available to their subscribers a special "adapter." The AllVid adapter must operate as a "set-back" device – providing access, provision, decoding, and reception functions – to connect to all video navigation devices (including those manufactured by companies unaffiliated with MVPDs). Alternatively, AllVid would require MVPDs to use an AllVid adapter as a "gateway" device for allowing all consumer electronic devices throughout a subscriber's home network to access MVPD services. Included in the AllVid proposal are requirements for communications protocols, encryption and authentication standards, audio-visual codecs, as well as ordering and billing methods.

The FCC's AllVid proposal would also extend to the video programming menu and guide display as well as video content search functionality. AllVid regulation that would require disaggregation or unbundling of MVPD video programming and related content

undermines the speech selection and presentation choices of MVPDs. Undercutting the editorial discretion of MVPDs in their provision of a retail service, AllVid would force MVPDs into a wholesale role to enable third-party, unaffiliated consumer equipment manufacturers to rearrange and supplement MVPD content with their own content, displacing the content of MVPDs.

Prior *FSF Perspectives* papers and blog posts have addressed the serious pitfalls posed by the AllVid plan to control the design and operation of video devices in a competitive and dynamic market. In short, intrusive government design of video devices risks freezing into place bureaucratic preferences and predictions when the market is undergoing rapid change. Serious harm to the competitive and innovative forces prevalent in today's video market would likely result. And there is no case to be made for expansive new regulation because the video market is continuously generating new waves of innovative products and services. I have also previously addressed some of the First Amendment problems that AllVid would create if it were to be implemented.

Now *EchoStar v. FCC* points to the need for re-thinking AllVid's jurisdictional grounds.

In its *Notice of Inquiry* outlining its AllVid proposal, the FCC confidently contended that "[t]he D.C. Circuit has found that Section 629 gives the Commission broad discretion to adopt regulations to assure a competitive market for navigation devices." The *Notice* cited prior court decisions upholding the FCC's regulation of cable set-top boxes, including its "integration ban" that prohibits cable providers from offering devices that contain both channel navigation and security functions. The *Notice* likewise maintained that "the DC Circuit's review has been 'particularly deferential' in cases where the "FCC must make judgments about future market behavior with respect to a brand-new technology."

However, a reading of *Echostar v. FCC* suggests that the FCC's confidence in its jurisdictional power to impose sweeping new regulations for video devices is misplaced. While Section 629 charges the FCC to ensure commercial availability of third-party retail devices that receive MVPD services, it doesn't call for the FCC to set basic design parameters for how those devices operate and interact, or to impose uniform standards regarding protocols or codecs such devices use. To be sure, Section 629 nowhere authorizes the FCC to force MVPDs to unbundle their services and thereby make their video guide content separately available to third-party device manufacturers to repackage and redisplay to MVPD subscribers.

Since Congress never empowered the FCC to impose these kinds of intrusive regulations that go far beyond ensuring a market for video devices to receive MVPD services, it is doubtful that the FCC's assertion of its authority would receive deference if the Court's standard in *EchoStar v. FCC* is applied. In all likelihood, a future court ruling would follow *EchoStar* and "refuse to interpret ancillary authority as a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to the goal of commercial availability of navigation devices."

Conclusion

In recent years, the FCC has staked expansive new regulatory controls over information technologies and services on the ancillary jurisdiction doctrine. *Echostar v. FCC* could therefore have significant implications for future agency action. The non-deferential approach to agency ancillary power embodied in the D.C. Circuit's opinion, if consistently enforced, could limit regulatory overreach.

The limits to ancillary power recognized by the D.C. Circuit could seal the fate of the FCC's net neutrality regulations on jurisdictional grounds. And a reading of *Echostar v. FCC* suggests that the FCC's confidence in its jurisdictional power to impose sweeping new regulations for video devices is misplaced.

The limited nature of the ancillary power doctrine emphasized by the D.C. Circuit in *Echostar v. FCC* could have an important disciplining effect on overreaching agency action. It might induce the FCC to more closely follow the statutory directives made by Congress. And it might prompt greater respect for the inherent limits of the agency's authority, lest a future court ruling reassert the limited scope of ancillary power.

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