



Perspectives from FSF Scholars
February 17, 2026
Vol. 21, No. 9

**The FCC Should Not Allow Its Process to Be Abused to
Avoid Legitimate Investment-Backed Expectations**

by

Randolph May *

A central public policy objective of the current Federal Communications Commission is to encourage and facilitate the build-out of America's broadband infrastructure, including, of course, the deployment of 5G advanced wireless networks. This policy objective, which Free State Foundation scholars have enthusiastically supported, is rightly at the core of FCC Chairman Brendan Carr's "[Build America Agenda](#)" – the first plank of which is "Unleashing High-Speed Infrastructure Builds."

The success of the "Build America Agenda" is crucial to America's ability to maintain its global leadership in building and operating high-speed communications networks, again, including advanced 5G wireless infrastructure. And – this is key – the FCC has an essential role to play in maintaining a legal and regulatory environment that supports the investment-backed expectations of those entities that, in various capacities, invest the huge sums required to undertake the highly capital-intensive network infrastructure build-outs.

At a [conference in October 2015](#), now-Chairman Carr, when he was a Legal Advisor to then-FCC Commissioner Ajit Pai, said: "Broadband networks don't have to be built. Capital doesn't have to be invested. Risks don't have to be taken. The more difficult regulators make the business case for

deployment, the less likely it is that broadband providers big and small will invest the billions of dollars needed to connect consumers with online opportunities.” Thankfully, we know that his views in this regard haven't changed as he pursues his "Build America Agenda."

All of the foregoing, with which there can be little disagreement, is relevant to considering the current dispute pending before the Commission involving the [proposed assignment of certain spectrum licenses from EchoStar to AT&T Mobility and Space Exploration Technologies Corp.](#) In short, the Wireless Infrastructure Association (WIA), tower companies, and others are concerned that EchoStar, by virtue of engaging in a sort of corporate "shell game," is trying to use the agency's license transfer process as a means of escaping from contract obligations of its wholly-owned subsidiary, DISH TV. WIA and other interested parties have made clear that they do not oppose the proposed license assignments. Rather, it is their position that "the Commission's approval process should not be used as a means to shield EchoStar, including its wholly-owned subsidiary DISH Wireless, from fulfilling contractual obligations to the infrastructure partners whose work made these transactions—and their public-interest benefits—possible."

Like WIA and others, I certainly do not oppose the proposed assignments which would get the spectrum to entities that, presumably, would put it to productive use – something that EchoStar has never been able to do. But aside from the specific impact resulting from these particular proposed frequency assignments, there are important principles at play that will be affected by the way in which the Commission handles the proposed transactions. To the extent the Commission's action derogates from these principles, the consequences may be harmful and enduring.

Specifically, in the context of making the required public interest determinations, the Commission should find some means of ensuring that EchoStar will not be allowed to use the Commission's processes, as a practical matter, to escape from contractual obligations with tower companies and others that are integral to ongoing efforts to build-out broadband infrastructure. The enforceability of contracts, upon which investment-backed expectations are grounded, is essential to our free enterprise system in which private sector entities risk huge amounts of capital. If the Commission were to allow its processes to be abused in a way that allows those subject to its jurisdiction to enrich themselves by escaping from contract obligations, the precedent established likely would affect future decisions of private sector entities considering investing in communications infrastructure.

This is not to suggest that the Commission itself should adjudicate any disputes concerning the rights and obligations under EchoStar's contracts. Rather it is a matter of the Commission acknowledging that it is in the public interest for it to promote the enforceability of contracts and to prevent its processes from being used in a way that foreseeably defeats the prospect of such enforcement.

This has been the Commission's position for a very long time. For example, in 2003, in [Ryder Communications, Inc. v. AT&T Corp.](#), the Commission recognized, in the context of a case involving the principles of the Sierra-Mobile doctrine, that the agency may effectively alter the terms of a contract "only if there exists a compelling public interest in doing so." The Commission declared: "This [decision] preserves the integrity of contracts, which is vital to the proper functioning of any commercial enterprise, including the communications market. In fact, the long-term health of the communications market depends on the certainty and stability that stems from the predictable performance and enforcement of contracts." [Para. 24].

To the same point, in a 1999 case involving a contract dispute between [EchoStar and Fox Liberty Networks, LLC](#), in rejecting EchoStar's position, the Commission's Cable Services Bureau declared: "We affirm the conclusion in the *Order* that public policy requires minimal regulatory interference with private contracts entered into by consenting parties." [Para. 14.]

Thus, the Commission has long-standing precedent that recognizes that it should not take actions that adversely impact the integrity of contracts and their enforceability.

Given the centrality of the enforceability of contracts to the proper functioning of our free enterprise system, the Commission's position is not surprising. And you easily could find countless authorities to the same effect. As just one example, here is Kevin Warsh, in a [Hoover Institution essay](#) coauthored with John Cogan: "Chief among the responsibilities of governmental institutions is to enforce contracts impartially, without fear or favor" [Page 12]. Kevin Warsh, of course, is President Trump's nominee to be chairman of the Federal Reserve.

And, relatedly, there are many cases in which the FCC has "pierced the corporate veil" to ensure that corporate entities are not allowed to avoid liabilities by engaging in "shell games" with affiliated corporate entities. Here DISH TV is a wholly-owned subsidiary of EchoStar, which now is the holder of the licenses proposed to be transferred. In [John C. Spiller](#), a 2020 decision involving a forfeiture, the Commission said it "may pierce the corporate veil to 'prevent reliance on [the] corporate form to frustrate our efforts to implement core statutory provisions.' To pierce the corporate veil... , it must be shown that (1) there is a unity of interest and ownership such that 'the personalities and assets of the corporation and the individuals are indistinct[,]' and (2) 'adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.'" [Para. 42].

Even more recently, in 2024 in another case involving a forfeiture, the Commission had no problem whatsoever "piercing the corporate veil." In [K20 Wireless LLC and Krandon Wenger](#), the Commission stated it would do so, "when it is necessary to preserve the integrity of the Act and to prevent the entities from defeating the purpose of statutory provisions." [Para. 54]. These Commission declarations are pertinent to the agency's review of EchoStar's proposed assignment of licenses, and there are other Commission decisions to the same effect.

In sum, I do not contend – and, to my knowledge, no one else contends – that assuming no other legal infirmities, the Commission ultimately should not allow EchoStar to complete assignment of the spectrum licenses at issue to AT&T Mobility and SpaceX. Those entities almost certainly will put the spectrum to productive use. But as long as the Commission's public interest authority continues to exist – if it means anything at all – it surely must mean that parties will not be allowed to use the Commission's processes to engage in shell games in a way that contravenes public policy and the public interest. Using the Commission's transaction review process as a means of escaping contractual obligations that are integral to much needed communications infrastructure build-outs cannot be consistent with the public interest. Commission precedent is clear on this point.

Thus, in the context of the review process involving EchoStar's licenses, it is incumbent on the Commission to exercise its authority in a way – through requiring an escrow, surety bond, guarantee, or some other means – that ensures that funds ultimately will be available to satisfy EchoStar's contractual obligations to the tower companies and other infrastructure suppliers. By no

means is this important only, or perhaps even primarily, to protect those entities who may be impacted by the outcome of this particular matter. It is important because if the Commission acts in a way that defeats legitimate investment-based expectations created by contracts, as a result of the precedent established, it likely will become more difficult in the future to raise the capital necessary to fund the multi-billion-dollar broadband infrastructure build-outs that are the foundation of the "Build America Agenda."

Such a result certainly cannot be consistent with the public interest in securing America's economic prosperity and national security.

* Randolph May is President of the Free State Foundation, a free market-oriented think tank in Potomac, MD. The views expressed in this Perspectives do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.