

ADVISORY

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DC CIRCUIT FINDS FCC LACKED JURISDICTION TO ENFORCE NET NEUTRALITY PRINCIPLES

On April 6, 2010, the US Court of Appeals for the District of Columbia Circuit vacated a Federal Communications Commission (FCC or Commission) decision against Comcast on the grounds that the FCC lacked jurisdiction to regulate an Internet service provider's network management practices. The decision may impact how the FCC moves forward with its agenda, which includes a proposal to codify and expand network neutrality principles and the implementation of portions of its recently released National Broadband Plan.

Case Background. The DC Circuit Court's decision, *Comcast Corp. v. FCC*, grew out of a 2008 investigation by the FCC into whether Comcast had violated the FCC's 2005 Internet Policy Statement, which consists of four net neutrality principles. Public interest groups and several of Comcast's customers claimed that Comcast was selectively targeting and interfering with users' ability to download video material through peer-to-peer applications like BitTorrent. By a vote of 3 to 2, the Commission found that Comcast's network management practices were unreasonable in violation of the Commission's policy principles. In the absence of express statutory jurisdiction, the FCC found that it had "ancillary" jurisdiction over Comcast's network management practices. The Commission ordered Comcast to end those practices by the end of 2008, develop a compliance plan, and publicly disclose its future network management practices.

Comcast challenged the Commission's ruling in the US Court of Appeals for the DC Circuit, arguing, among other things, that the FCC failed to justify exercising jurisdiction.¹

The Court's Decision. In a 3-0 decision, the DC Circuit held that the FCC lacked the jurisdiction to issue the order regulating Comcast's network management practices. Specifically, the FCC failed to show it had "ancillary" jurisdiction to sanction Comcast. The court found that the Commission primarily had relied on congressional statements of policy that, by themselves, are insufficient to confer jurisdiction.

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¹ Comcast also argued that the Commission's action was flawed because it did not follow the rulemaking requirements of the Administrative Procedure Act and violated the notice requirements of the Due Process Clause and because the Commission's decision was arbitrary and capricious. The DC Circuit did not address these arguments and decided the case exclusively on jurisdictional grounds.

Ancillary Authority. Section 4(i) of the Communications Act of 1934 authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” A series of Supreme Court decisions has recognized that this provision gives the FCC “ancillary” jurisdiction in the absence of express statutory authority.

The DC Circuit has developed a two-part test to determine when the Commission may exercise ancillary jurisdiction:

- The Commission’s general jurisdictional grant under Title I of the Communications Act covers the regulated subject; and
- The regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.

Comcast conceded that the Commission’s action satisfied the first part of the test because Comcast’s broadband services qualify as “interstate and foreign communication by wire” under Title I of the Communications Act. Thus, the second part of the test was the main issue before the DC Circuit.

In arguing that its action met the second part of the ancillary jurisdiction test, the FCC primarily relied on the following Congressional policy statements within the Communications Act.

- Section 230(b) of the Act states that “[i]t is the policy of the United States...to promote the continued development of the Internet and other interactive computer services” and “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.” In the FCC’s enforcement order against Comcast, the Commission found that Comcast’s network management practices had frustrated both of these purposes.

- Section 1 of the Act sets forth the reasons for creating the FCC, including making available “a rapid, efficient, Nation-wide, and world-wide wire and radio communication service....” The Commission argued that its sanction of Comcast furthered the goal of making broadband Internet service both “rapid” and “efficient.”

The DC Circuit found both sections 230(b) and 1 to be insufficient by themselves as a basis for ancillary jurisdiction. Tracing the development of the ancillary jurisdiction doctrine, the DC Circuit held that “policy statements alone cannot provide the basis for the Commission’s exercise of ancillary authority.” Although policy statements contained in the Act may inform the FCC’s regulation of activities over which it has express statutory authority, the court found that the FCC had not linked the cited policies to any such express authority.

The DC Circuit then addressed whether various provisions that arguably contained express delegations of authority within the Communications Act could serve as a basis for ancillary jurisdiction. The court found that each of the many provisions of the Act cited by the Commission was insufficient to confer jurisdiction. For instance, the court found that:

- Section 706, which directs the Commission to “encourage the deployment” of advanced services, does not contain an independent grant of regulatory authority, noting that the FCC was bound by its prior decision finding that section 706 did not confer express authority.
- Section 256, which requires the Commission to promote nondiscriminatory access to public telecommunications networks, by its terms does not expand any authority that the Commission otherwise has under the law.

The court also found that the FCC had failed to demonstrate sections 201 and 623 conferred an express delegation of authority because the FCC had changed its justification for relying on section 201 before the court and had not mentioned section 623 in its underlying decision against Comcast. “[T]he Commission must defend its action on

the same grounds advanced in the [original] order.”

In conclusion, because the Commission relied only upon Congressional policy statements and failed to show a connection to “statutorily mandated responsibility” sufficient for ancillary jurisdiction, the DC Circuit vacated the FCC’s decision against Comcast.

Threshold Arguments by the FCC. Besides the jurisdictional issue, the court also considered and rejected two threshold arguments from the FCC.

First, the court rejected the argument that Comcast should not be permitted to challenge the Commission’s jurisdiction because Comcast had successfully obtained a stay of litigation in a California lawsuit over its network management practices by arguing that the FCC had subject matter jurisdiction. The DC Circuit found that Comcast’s position in the California case that the Commission possesses “subject matter jurisdiction” was not inconsistent with its position in the present case. Specifically, the court held that the prior argument simply recognized that the Commission’s action met the first part of the two-part ancillary jurisdiction test, a point already conceded by Comcast.

Second, the court rejected the FCC’s assertion that the Supreme Court’s recent decision in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, makes clear that the Commission has jurisdiction over network management practices. The FCC had pointed to *dicta* in *Brand X* suggesting the Commission likely could impose regulatory duties on Internet service providers through the FCC’s ancillary jurisdiction. The DC Circuit found that *Brand X* was not dispositive and that nothing in that case exempts the FCC from having to justify its exercise of ancillary authority on a case-by-case basis.

Implications for Future FCC Actions. The *Comcast* decision comes as the FCC seeks to codify and expand the 2005 Internet Policy Statement and looks towards implementing recommendations set forth in the National Broadband Plan. Following the release of the DC Circuit’s decision, the FCC said: “The FCC is firmly committed to

promoting an open Internet and to policies that will bring the enormous benefits of broadband to all Americans. It will rest these policies—all of which will be designed to foster innovation and investment while protecting and empowering consumers—on a solid legal foundation.” The FCC suggested that it views the court’s decision as “invalidating the prior Commission’s approach to preserving an open Internet,” rather than “clos[ing] the door to other methods for achieving this important end.”

We will be following this issue in future advisories. If you have any questions, please contact:

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