FCC's Authority to Regulate Receivers

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Introduction

The Federal Communications Commission ("FCC") is charged with managing interference between license holders of the radio spectrum. One way in which the FCC could potentially improve the ability of licensees to withstand harmful interference would be through the regulation of receivers. Three potential ways of regulating receivers are (1) direct regulation of receiver standards, (2) setting receiver protection limits,[1] or (3) licensing a limited number of receivers. However, there has long been debate about whether the FCC has the authority to regulate receivers at all. Whether the FCC has the authority to regulate receiver standards, protection limits, or licenses depends on the reading of the FCC's Title I ancillary jurisdiction in conjunction with the recent *Comcast* decision. The FCC has previously regulated receivers in the All-Channels Receiver Act and in the Part 15 rules. The only proposal to regulate receiver protection limits has been met with both cautious acceptance from industry and enthusiasm from government and public interest groups, as well as challenges to the FCC's authority to promulgate

[1] See, J. Pierre de Vries & Kaleb A. Sieh, *The Three Ps: Increasing Concurrent Operation by Unambiguously Defining and Delegating Radio Rights*, (October 6, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1704194.

such regulations.[2] In the end, the FCC probably does have the authority to regulate receivers but that a more explicit grant of authority given by Congress would make it much easier for the FCC to act.

The Receiver Standard NOI illustrates the FCC's claims to authority to regulate receivers

Interference Immunity Specifications for Radio Receivers, Notice of Inquiry (the "NOI") is instructive on how the FCC could illustrate its authority to regulate receiver standards or grant receiver licenses.[3] Paragraph 22 of the NOI cites sections 4(i), 301, 302(a), and 303(a), (e), (f), and (r) of the Communications Act of 1934 as giving FCC the authority to impose interference immunity specifications, although the NOI asks for comment on whether these sections do indeed give the FCC the desired authority.[4] When looking at the sections, it is clear that the FCC is invoking Title I ancillary jurisdiction. 47 U.S.C. 154(i) of the Communications Act of 1934 describes the powers of the FCC thusly: "The Commission may 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."[5] This language gives the FCC broad authority to regulate things not explicitly discussed in the act itself. The Supreme Court, traditionally, has upheld the FCC's ability to

[2] Interference Immunity Specifications for Radio Receivers, *Notice of Inquiry*, ET Docket No. 03-65 and MM Docket No. 0-39, 18 FCC Rcd 6039 (2003).
[3] Id. at ¶ 22.
[4] Id.
[5] 47 U.S.C. 154 (1996).

regulate things that were not explicitly granted in the Communications Act.[6] Recently, however, the FCC's power to invoke ancillary jurisdiction has been called into question. [7] In *Comcast v. FCC*, the United States Court of Appeals for the D.C. Circuit held that the FCC failed to justify its exercise of ancillary jurisdiction and that in order to invoke Title I ancillary jurisdiction the FCC must show that the jurisdiction is ancillary to some express authority granted elsewhere in the Act and not just ancillary to broad public policy goals.[8]

In the case of receiver standards, the express authority upon which to base ancillary jurisdiction that the FCC points to in the NOI is the authority to manage interference found in Title III, specifically sections 301, 302(a) and 303(a), (e), (f), and (r).[9] The language of section 302a(a) gives the FCC the authority to establish "minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy."[10] Section 303, entitled "Powers and Duties of Commission," gives the FCC the power to:

> (a) classify radio stations, … (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the

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[6] *See* United States v. Southwestern Cable Co., 392 U.S. 157 (1968)(affirming the FCC's ability to regulate cable television before Title VI added, found that the FCC had a statutory obligation to provide a "fair, efficient, and equitable distribution of television service"), United States v. Midwest Video Corp., 406 U.S. 649 (1972)(upheld FCC's authority to require cable systems to originate programming), FCC v. Midwest Video Corp., 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979) (rejected the FCC's assertion of ancillary jurisdiction, setting aside regulations requiring cable operators to set aside channels for public use.)

[7] Comcast v. FCC, 600 F.3d 642, (D.C. Cir. 2010).

[8] Id. at 123.

[9] 47 U.S.C. 301 grants the FCC the authority to maintain control over all the channels of radio transmission. 47 U.S.C. 302a grants the Commission the authority to make reasonable regulations that are consistent with the public interest, convenience, and necessity. 47 U.S.C. 303 outlines the powers and duties of the FCC.

[10] 47 U.S.C. 302a(a) (2000).

> emissions from each station and from the apparatus therein; (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with; … and (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.[11]

The issue is whether these are explicit enough grants of authority to justify ancillary jurisdiction.

Implications of the Comcast decision: a weakening of ancillary jurisdiction

By way of comparison, the *Comcast* decision is instructive. There the FCC had imposed network management standards of Comcast's cable Internet services through an adjudication process. The FCC principally relied on section 230(b) of the Communications Act entitled "Protection for private blocking and screening of offensive material."[12] The pertinent part, in the Commission's view, was the language "[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."[13] The court held that this was not an explicit enough grant of authority upon which to

[11] 47 U.S.C. 303 (2010).
[12] Comcast, at 120.
[13] 47 U.S.C. § 230 (1998).

base ancillary jurisdiction. The main problem the court saw was that this was a broad public policy statement and not a direct grant of authority to regulate.[14] The question then becomes are sections 302(a) and 303(a), (e), (f), and (r) granting the authority to regulate home electronic devices to be resilient to interference, etc. broad public policy statements? It seems not. Rather, it is a specific enough grant of regulatory authority upon which to base ancillary jurisdiction.

Objections to the FCC's authority in the NOI

There are objections in the comments to the NOI regarding the FCC's authority. AT&T Wireless claims that the FCC's lacks authority to impose receiver standards in the CMRS bands because (1) ancillary jurisdiction has not been properly established, and (2) the voluntary actions of industry standards setting bodies make further regulation unnecessary.[15] AT&T's main argument as it pertains to ancillary jurisdiction is that the authority granted in sections 302(a) and 303(a), (e), (f), and (r) is not broad enough to encompass regulating receiver performance in general. "The Act authorizes regulation of receiver performance standards only for specifically enumerated classes of licensees and devices, which do not include CMRS providers or equipment. As a result, the Commission has limited authority to set receiver

[14] Comcast at 123.
[15] AT&T Wireless Comments to the Interference Immunity Specifications for Radio Receivers, *Notice of Inquiry*, ET Docket No. 03-65 and MM Docket No. 0-39, 18 FCC Rcd 6039 (2003) at 14-18.

performance standards, and in any case does not have a legal basis to impose receiver performance requirements on CMRS equipment specifically."[16]

In its comments to the FCC, the Consumer Electronics Association ("CEA") also questions the FCC's ability to invoke ancillary jurisdiction over receiver standards.[17] The CEA makes a distinction between the Commission's ability to regulate immunity standards and performance standards.[18] Specifically, the CEA argues that the language in sections 301, 302, and 303 grant the FCC the ability to regulate immunity standards but not performance standards.[19] The CEA writes:

> The "immunity" to radio frequency ("RF") interference of a device, whether a receiver or other home electronic device, defines the ability of the device to reject signals outside of its intended frequency range. In the case of non-receivers, such as computers, recorded audio systems and telephones, the susceptibility to malfunction when in the field of RF energy defines the system's immunity. For receivers, immunity commonly is described in terms of objectionable interference caused by signals not related to the intended band, specific frequency, or signal intended to be received. By contrast, receiver performance relates to a receiver's operation when performing its intended functions, and includes considerations of signal-to-noise levels and sensitivity; spurious emission management; modulation type(s); and similar technical requirements.[20]

The CEA goes on to argue that the Communications Act gives the FCC authority to adopt immunity standards for devices whether they are receivers or not but does not give broad plenary authority to adopt receiver standards.[21] The CEA cites the fact that when given power to regulate receiver standards, it has always been in a very limited way. The CEA gives the example of broadcast receivers to illustrate the limited authority. "For

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[16] Id. at 14.
[17] CEA Comments to the Interference Immunity Specifications for Radio Receivers, *Notice of Inquiry*, ET Docket No. 03-65 and MM Docket No. 0-39, 18 FCC Rcd 6039 (2003) at 11.
[18] Id.
[19] Id.
[20] Id. at 12.
[21] Id.

television receivers, the Commission has been granted limited authority to regulate receivers to ensure that they receive all television channels; decode closed captioning information; and respond to transmitted content ratings information (V-Chip). Beyond these limited categories of authorization, the Commission would require a grant of Congressional authority to further regulate receiver performance."[22]

Most of the commentators did not address the FCC's authority. Many industry-side interests did not call the FCC's authority into question but rather encouraged the FCC to allow private industry standard setting bodies to figure out the best solution.[23]

In 2007, the Commission terminated the NOI claiming that the proceeding was outdated. The Commission stated that "to the extent receiver interference immunity performance specifications are desirable, they may be addressed in proceedings that are frequency band or service specific."[24]

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[22] Id.

[23] Nokia comments: "[]Nokia agrees with the Commission that improved receiver performance can help to improve spectrum efficiency, thus ensuring greater access to spectrum for all users. We also agree with the Commission's stated preference for relying on voluntary programs supported and managed by industry as the best method for ensuring improved receiver performance, particularly where market forces drive the need to use spectrum efficiently…Any standards fro receiver performance that are developed, preferably by industry and on a voluntary basis, should be based on the individual operating environment."

"In developing and implementing standards to improve receiver performance, Nokia urges the Commission to consider carefully how the benefits from such improvements are distributed. The benefits of improved capacity as a result of improved receiver performance should accrue to the existing users who have invested to improve their receivers. To do otherwise, creates a disincentive for existing users to maximize spectrum efficiency in their band."

[24] Interference Immunity Specifications for Radio Receivers, *Order*, ET Docket No. 03-65, 22 FCC Rcd 8941 (2007)

Precedent for regulating receivers

Of course, the FCC has regulated receivers in limited ways already. The All-Channel Receiver Act ("ACRA") was passed in 1961 to require television set manufacturers sets to include UHF tuners.[25] The FCC used the authority granted in the ACRA to later require manufacturers to make tuners capable of receiving digital television signals.[26] The Part 15 rules also allow the FCC to regulate receivers, although by way of regulating the unintended transmissions that receivers may emit.[27]

In 2002, the Spectrum Policy Task Force ("SPTF") weighed in on whether the FCC has authority to regulate receiver performance. The SPTF reported that the FCC probably does have the authority but that the Congress should enact legislation to make that authority more explicit.[28]

Authority to impose receiver standards, protection limits, or licenses

The question of whether the FCC has the authority to impose receiver standards, protection limits, or licenses turns on whether the FCC can massage ancillary jurisdiction out of the Communications Act. It may be indicative of Congressional intent that there is not an explicit grant of authority to regulate receivers in the Communications Act. When applying the case law and looking

[25] 47 U.S.C. 303(s) (2010).
[26] See Consumer Electronics Ass'n v. FCC, 347 F. 3d 291 (DC Cir. 2003)
[27] 47 C.F.R. 15.1 (2011).
[28] *See* Spectrum Policy Task Force, *Report*, ET Docket No. 02-135 (2002) at 31 and Appendix A ("While the Task Force believes that the Commission currently has the requisite statutory authority to promulgate receiver performance standards, it also recommends that legislation more explicitly granting such authority be enacted."

carefully at the statute, I think it is possible to find a legal justification for the FCC to exercise ancillary jurisdiction over receivers. It may, however, come down to popular opinion and many device manufacturers and industry players, while supportive of receiver standards, are only supportive to the extent that standards are voluntary and imposed by private industry standard setting bodies. I tend to agree with the SPTF that while it is possible to illustrate some authority it would be best to get legislation enacted that would grant the FCC explicit authority to regulate receivers.