BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 04-1033 & 04-1109 (CONSOLIDATED)

ECHOSTAR SATELLITE L.L.C.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties, intervenors, and amici appearing in this Court are listed in the petitioner's brief. Parties appearing before the Commission are listed in Appendix A of the principal order on review (JA 471).

2. Rulings under review.

Implementation of Section 304 of the Telecommunications Act of 1996, Second Report and Order, 18 FCC Rcd 20885 (2003) ("*Order*") (JA 431), *on reconsideration,* 18 FCC Rcd 27059 (2003) ("*Reconsideration Order*") (JA 517).

3. Related cases.

This case has not previously been before this Court. We are not aware of any related case pending before this Court or any other court.

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GLOSSARY

CEA	Consumer Electronics Association
DBS	direct broadcast satellite; a form of multichannel video programming service provided via satellite
down-resolution	the ability to degrade the resolution of programming content from a higher to a lower level (*e.g.,* from high definition to standard definition)
DTV	digital television
HRRC	Home Recording Rights Coalition
MOU	Memorandum of Understanding; the document setting forth the details of the "plug and play" agreement between the cable and consumer electronics industries
MVPD	multichannel video programming distributor; defined by the Communications Act to include cable operators, DBS providers, and other entities that make "available for purchase, by subscribers or customers, multiple channels of video programming" (47 U.S.C. § 522(13))
NCTA	National Cable & Telecommunications Association
SBCA	Satellite Broadcasting & Communications Association
selectable output control	the ability to remotely shut off a particular output or connector on a program-by-program basis

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JURISDICTION

The petitioner in this case seeks review of two FCC orders: *Implementation of Section 304 of the Telecommunications Act of 1996,* Second Report and Order, 18 FCC Rcd 20885 (2003) ("*Order*") (JA 431), *on reconsideration,* 18 FCC Rcd 27059 (2003) ("*Reconsideration Order*") (JA

517).[1] The *Order* was published in the Federal Register on November 28, 2003. 68 Fed. Reg. 66278 (2003). DISH's predecessor, EchoStar, filed a timely petition for review of the *Order* in Case No. 04-1033 on January 27, 2004, within the 60-day deadline established by 28 U.S.C. § 2344. The *Reconsideration Order* was published in the Federal Register on January 28, 2004. 69 Fed. Reg. 4081 (2004). EchoStar filed a timely petition for review of the *Reconsideration Order* in Case No. 04-1109 on March 29, 2004, within the 60-day statutory deadline. The Court has jurisdiction to review these orders under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). As we explain in Part I of the Argument below, however, the Court lacks jurisdiction to consider DISH's statutory arguments because they were never presented to the Commission pursuant to 47 U.S.C. § 405.

QUESTIONS PRESENTED

Ten years ago, cable operators and consumer electronics manufacturers negotiated an agreement establishing technical standards for the design and manufacture of digital cable equipment. Pursuant to that agreement, the

[1] At the time it filed the petitions for review, petitioner was known as EchoStar Satellite L.L.C. ("EchoStar"). The company later changed its name to DISH Network ("DISH"). *See* Opening Brief ("Br.") of Petitioner at i n.1. When discussing petitioner's participation in the proceeding below, this brief will refer to petitioner as EchoStar. Otherwise, we will refer to petitioner as DISH.

parties jointly proposed that the Federal Communications Commission ("FCC" or "Commission") adopt encoding rules – *i.e.,* rules limiting the use of technologies that could block consumers from recording television programs. Under this proposal, the same encoding rules would apply to all providers of multichannel video programming service, not just cable operators.

In response to the agency's notice seeking comment on the proposed rules, providers of multichannel satellite video service argued that their service should not be subject to any encoding restrictions because they did not participate in the negotiations that produced the proposed rules.

Notwithstanding the objections of the satellite providers, the agency adopted rules that apply to all providers of multichannel video programming service. Citing its statutory mandate to "assure the commercial availability" of equipment used to access multichannel video programming service, 47 U.S.C. § 549(a), the Commission concluded that uniform application of the encoding rules would most effectively protect the interests of consumers and preserve competitive parity among all multichannel video programming distributors.

This case presents the following questions:

(1) Whether Section 405 of the Communications Act bars judicial review of DISH's statutory arguments because they were not first presented to the FCC;

(2) If those statutory arguments have not been waived, whether the Communications Act authorized the FCC to adopt the encoding rules; and

(3) Whether the Commission provided notice and an opportunity for comment before adopting the rules.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are attached as an addendum to this brief.

COUNTERSTATEMENT

A. Section 629 Of The Communications Act

Subscribers to multichannel video programming services use "navigation devices" (such as set-top converter boxes) to access those services. In the past, cable television subscribers could obtain a converter box only from their cable operator. *See Charter Commc'ns, Inc. v. FCC,* 460 F.3d 31, 34 (D.C. Cir. 2006); *General Instrument Corp. v. FCC,* 213 F.3d 724, 727 (D.C. Cir. 2000).

In the mid-1990s, Congress concluded that consumers would benefit from the development of a competitive retail market for navigation devices.

Accordingly, Congress amended the Communications Act in 1996 by adding Section 629, 47 U.S.C. § 549.

Section 629 directs the FCC to "adopt regulations to assure the commercial availability" of "equipment used by consumers to access … services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor." 47 U.S.C. § 549(a). The Act defines the term "multichannel video programming distributor" (or "MVPD") to include cable operators, providers of direct broadcast satellite ("DBS") service (such as DISH), and other entities that make "available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13).

The commercial availability mandate of Section 629 is broad. The statute applies to "converter boxes, interactive communications equipment, and other equipment used by consumers to access … services offered over multichannel video programming systems." 47 U.S.C. § 549(a). For purposes of implementing Section 629, however, the Commission is barred from prescribing regulations that "would jeopardize security" of MVPD services "or impede the legal rights" of MVPDs "to prevent theft of service." 47 U.S.C. § 549(b). This provision is concerned with "*system* security" (*i.e.,*

signal security and prevention of unauthorized access to MVPD service) rather than the protection of intellectual property rights. *Order* ¶ 50 (JA 453).[2]

B. The "Plug And Play" Agreement

Before a competitive market for navigation devices could take shape, "a number of practical issues" concerning the design of the devices had to be resolved. *Order* ¶ 4 (JA 434). The Commission recognized that some of those issues could best be addressed by inter-industry coordination rather than FCC regulation. For example, the formulation of uniform "engineering and technical standards" for mass-produced, nationally marketed navigation devices required close cooperation between equipment manufacturers and MVPDs. *Id.*

In addition, manufacturers and MVPDs worked to reach consensus on how much protection navigation devices should provide against

[2] The FCC first adopted rules to implement Section 629 in 1998. *Implementation of Section 304 of the Telecommunications Act of 1996,* 13 FCC Rcd 14775 (1998) (JA 1). At that time, the Commission adopted a rule requiring MVPDs, as of January 1, 2005, to discontinue the sale or lease of new navigation devices that integrate security and non-security functions. The Commission found that this integration ban was necessary because the continued availability of integrated devices – which only MVPDs could provide – would "imped[e] consumers from switching to devices that become available through retail outlets." *Id.* at 14803 ¶ 69 (JA 29); *see also Charter,* 460 F.3d at 35. In *General Instrument,* 213 F.3d at 730-31, this Court held that Section 629 authorized the Commission's integration ban.

"unauthorized redistribution or copying of programming content legally acquired for a limited use." *Order* ¶ 4 (JA 434). One of the "stumbling blocks" in inter-industry negotiations over navigation devices involved the parties' "inability … to agree on a comprehensive set of technical copy protection measures and corresponding encoding rules" to govern digital programming. *Order* ¶ 55 (JA 455). This impasse reflected a fundamental "disagreement over how to protect high value content while permitting consumers to watch and record [digital] programming as they had done with analog programming." NCTA Comments at 12-13 (JA 247-48). Resolution of this dispute took on special urgency due to the impending transition of over-the-air television broadcasts from analog format to digital television ("DTV").[3]

"With the encouragement of" the FCC's Chairman and other Commission officials, senior executives from the cable television and consumer electronics industries "engaged in five months of extensive negotiations" in the second half of 2002 in an effort "to resolve questions and

[3] Originally, Congress set December 31, 2006, as the deadline for completion of the DTV transition. *See* Balanced Budget Act of 1997, § 3003, Pub. L. No. 105-33, 111 Stat. 251 (1997). Congress twice extended that deadline. *See* Deficit Reduction Act of 2005, § 3002, Pub. L. No. 109-171, 120 Stat. 4 (2006); DTV Delay Act, § 2, Pub. L. No. 111-4, 123 Stat. 112 (2009). The DTV transition was ultimately completed on June 12, 2009.

concerns regarding the interoperability of cable systems and consumer electronics equipment." Letter from Carl E. Vogel, Charter Communications, to FCC Chairman Michael Powell, Dec. 19, 2002, at 2 (JA 90) ("MOU Letter"). These negotiations produced a major breakthrough: "a comprehensive agreement on a cable compatibility standard for integrated, unidirectional digital cable television receivers." *Order* ¶ 2 (JA 433). This agreement was crafted to accommodate the development of so-called "plug and play" devices: DTV sets that integrate reception and navigation functions, enabling cable subscribers to receive digital cable channels without a set-top box or other external navigation device. MOU Letter at 1 (JA 89).[4]

On December 19, 2002, the parties to the "plug and play" agreement submitted to the FCC a Memorandum of Understanding ("MOU") setting forth the details of the agreement. MOU Letter at 1 (JA 89). They explained that their "voluntary, private sector agreements about standards, testing, interoperability, and consumer support … assume and depend upon implementation by the Commission of certain regulations" proposed by the MOU. *Id.* at 2 (JA 90). The proposed regulations fell into three categories:

[4] This agreement covered only "unidirectional" equipment. Consumers using such equipment would still need a separate navigation device to access "bidirectional" (*i.e.,* interactive) services such as video on demand. *Order* ¶ 7 (JA 436).

technical rules; labeling rules; and encoding rules. *Order* ¶ 8 (JA 436). Only the proposed encoding rules are at issue in this case.

The proposed encoding rules had three parts: (1) a rule prohibiting MVPDs from encoding or modifying content to activate "selectable output control" – *i.e.,* "the ability to remotely shut off a particular output or connector on a program-by-program basis,"[5] *Order* ¶ 58 (JA 456); (2) a rule barring MVPDs from degrading the resolution of broadcast programs from a higher to a lower level (*e.g.,* from high definition to standard definition) – a practice known as "down-resolution," *Order* ¶¶ 62-63 (JA 458-59); and (3) "caps on the level of copy protection that may apply to various categories of MVPD programming," *Order* ¶ 65 (JA 459-60).

Under the proposed copy protection caps, (1) no copy restrictions could be imposed on unencrypted broadcast television; (2) consumers would be permitted to make at least one copy (for example, using a VCR or digital video recorder) of pay television, non-premium subscription television, and free conditional access delivery transmissions; and (3) copying of video on demand, pay per view, and subscription-on-demand transmissions could be

[5] An MVPD using selectable output control could, for example, block subscribers from recording the Super Bowl by shutting off transmission of the program to video recording devices that are connected to converter boxes.

prohibited, but "even when no copies are allowed, such content may be paused up to 90 minutes from its initial transmission." *Order* ¶ 65 (JA 460).

C. The Proceeding Below

In January 2003, the Commission sought comment on the MOU, its rule proposals, and their "potential impact" on "consumers, content providers, small cable operators and MVPDs other than cable operators." *Implementation of Section 304 of the Telecommunications Act of 1996,* 18 FCC Rcd 518, 519 ¶ 4 (2003) (JA 75, 76) ("*Further NPRM*"). The agency also requested comment on "the jurisdictional basis for Commission action in this area, including the creation of encoding rules for audiovisual content provided by MVPDs." *Id.* (JA 76)

The Commission received comments from a wide variety of parties, including equipment manufacturers, cable operators, consumer groups, content providers, and non-cable MVPDs. *See Order,* Appendix A (JA 471).

In their comments, neither EchoStar nor DIRECTV (the nation's other DBS provider) disputed the FCC's statutory authority to adopt the encoding rules set out in the MOU. Instead, the DBS providers and their trade association maintained that the agency should not apply the rules to DBS because no DBS providers had participated in the negotiations that produced the encoding proposals. For example, EchoStar asserted that, "in light of the

entire DBS industry's exclusion from the [MOU] talks," there is "serious question" concerning "the legality of adopting the draft rules in their entirety." EchoStar Reply Comments at 6 (JA 330).[6] The DBS providers also questioned the need for encoding rules as a policy matter. They posited that the best way to resolve copy protection issues was to allow each MPVD to establish its own encoding standards through private agreements with content providers. *See* SBCA Comments at 5 (JA 268); DIRECTV Comments at 6 (JA 217).

By contrast, the cable and consumer electronics industries urged the Commission to adopt the encoding rules. They assured the agency that it had jurisdiction to regulate encoding under two provisions of the Communications Act: Section 629, which directs the FCC to "adopt regulations to assure the commercial availability" of navigation devices from sources other than MVPDs, 47 U.S.C. § 549(a); and Section 624A, which mandates that the Commission adopt regulations to assure "compatibility

[6] *See also* Satellite Broadcasting & Communications Association ("SBCA") Comments at 4 (JA 267) (contending that the "exclusion" of DBS providers "from the MOU process resulted in" encoding proposals "that unfairly discriminate against DBS"); DIRECTV Comments at 3 (JA 214) (complaining that the proposed rules would impose encoding restrictions on DBS providers "without taking into account their unique interests").

between televisions and video cassette recorders and cable systems," 47 U.S.C. § 544a(b)(1).[7]

The parties to the MOU warned the FCC that their agreement would likely "unravel" if the agency did not adopt the encoding rules. Comcast Reply Comments at 5 (JA 276); *see also* CEA Reply Comments at 25 (JA 320). When the cable industry originally proposed to license the manufacture of navigation devices that met certain specifications, the consumer electronics industry pointed out that any such licensing regime "would be incomplete and unbalanced" without encoding rules. CEA Comments at 13 (JA 202). Manufacturers would not agree to make "cable-ready devices that read and respect[ed] copy protection signals" unless they obtained some "assurance that such signals would not be used to nullify home copying." NCTA Reply Comments at 12 (JA 374).

The proponents of the encoding rules opposed the DBS industry's request for an exemption. They contended that the proposed limits on copy protection "must apply to all" MVPDs: "[O]therwise," content owners could "snuff out settled consumer expectations" regarding home recording by providing high value content (such as recently released movies) only to

[7] *See* National Cable & Telecommunications Association ("NCTA") Comments at 17 (JA 252); Consumer Electronics Association ("CEA") Comments at 4-15 (JA 193-204).

MVPDs that "employ the most restrictive [copy protection] 'tools.'" CEA Reply Comments at 21 (JA 316). Movie studios had already "threatened to restrict the supply of [their video content] to cable" unless the cable industry adopted the more stringent copy protections afforded by DBS. NCTA Reply Comments at 13 (JA 375). If the proposed encoding constraints applied only to cable operators, content providers might choose to "provide their most highly-valued content *only* to DBS and other non-cable MVPDs." Comcast Comments at 14 (JA 182). Faced with this prospect, cable operators refused to agree to restrictions on the use of copy protection tools unless the same restrictions applied to all MVPDs. NCTA Reply Comments at 15 (JA 377).[8]

Various commenters also warned that the market for video recording devices could suffer unless the FCC adopted the MOU's proposal to bar *all* MVPDs (including DBS providers) from using selectable output control – "the remote signaling of home devices … to turn off consumer home interfaces on a program-by-program basis." Home Recording Rights Coalition ("HRRC") Comments at 8 (JA 230). According to advocates of home recording rights, the use of selectable output control would "discourage consumers from relying on an interface that supports … home recording,"

[8] *See also* Comcast Reply Comments at 9 (JA 280) ("it is essential that the encoding rules be imposed on all MVPDs in order to ensure that all MVPD customers will have equal access to high-value digital content").

CEA Comments at 18 (JA 207), and "would have the likely effect of driving from the market any home interface that supports home recording." HRRC Comments at 8 (JA 230).

D. The Orders On Review

With certain revisions, the FCC adopted the MOU's proposed encoding rules in October 2003. *Order* ¶¶ 42-74 (JA 450-64).

The Commission found that it had "explicit authority" under Section 629 to adopt the encoding rules. *Order* ¶ 45 (JA 451). Describing those rules as "an essential component" of the MOU, the Commission concluded that they "will assure the commercial availability of navigation devices and strike a measured balance between the rights of content owners and the home viewing expectations of consumers." *Order* ¶ 47 (JA 452). Consequently, the Commission decided that adoption of the encoding rules was "necessary to fulfill" the commercial availability mandate of Section 629. *Id.*

In addition to its direct authority under Section 629, the Commission determined that it had "ancillary jurisdiction" to adopt the encoding rules under Sections 629 and 624A – *i.e.,* authority reasonably ancillary to the agency's effective performance of its statutorily mandated responsibilities. *Order* ¶¶ 55-57 (JA 455-56) (citing, *inter alia, United States v. Southwestern Cable Co.,* 392 U.S. 157, 172 (1968)). It reasoned that the rules would

"increase consumer demand" for digital "navigation devices at retail" – and thus "significantly advance" Section 629's "mandate of commercial availability of navigation devices" – by ensuring that consumers have "access to high value digital content." *Order* ¶ 55 (JA 455).

Similarly, the Commission concluded that the encoding rules would "advance" the mandate of Section 624A: "to ensure that cable subscribers will be able to enjoy the full benefits of available cable programming and the functionality of their televisions and video cassette recorders." *Order* ¶ 56 (JA 456). Acknowledging that Section 624A "does not directly apply to MVPDs other than cable operators," the Commission found that its exercise of ancillary jurisdiction over non-cable MVPDs would "avoid the creation of a regulatory and marketplace imbalance between cable and DBS." *Order* ¶ 57 (JA 456). The Commission explained that unless the encoding rules applied to all MVPDs, "cable operators would be at a significant competitive disadvantage in obtaining access to content," and this market disparity "could frustrate the [FCC's] ability to satisfy Section 624A's mandate." *Id.* Therefore, the Commission concluded, application of the proposed encoding rules to all MVPDs would "further the goals of Section 624A." *Id.*

The Commission rejected the contention that Section 629(b) bars the FCC from adopting the encoding rules. *Order* ¶¶ 49-52 (JA 453-54). It

explained that because those rules concern the copying of content that MVPD subscribers have "legally acquired," they "do not implicate" the issues addressed by Section 629(b): "theft of [MVPD] service" and "harm to the MVPD network." *Order* ¶ 51 (JA 453). The Commission found "nothing in either the statutory language or the legislative history" to suggest that Section 629(b) bans the regulation of copy protection technologies for programming that subscribers have paid to receive. *Order* ¶ 50 (JA 453). The Commission determined that even if Section 629(b) applied to copy protection, the encoding rules would not violate the statute because they "will not jeopardize the security of copyrighted programming or impede the legal rights of MVPDs to prevent theft of programming." *Order* ¶ 52 (JA 453-54).[9]

The Commission further concluded that the MOU's specific encoding proposals would promote the commercial availability of digital navigation devices in accordance with the mandate of Section 629. *Order* ¶¶ 58-74 (JA 456-64); *see* 47 U.S.C. § 549(a).

[9] The agency also found no basis for the claim that "adoption of the encoding rules would impermissibly involve the Commission in copyright issues." *Order* ¶ 54 (JA 454). As the Commission pointed out, the encoding rules "are not directed at" copyright owners and will not alter content providers' rights and remedies under copyright law, which "are set by statute and interpreted on a fact-specific basis by the courts." *Id.*

The Commission expressed concern that selectable output control (the ability to remotely shut off a particular programming outlet or connector on a program-specific basis) "would harm" consumers "whose DTV equipment only has component analog inputs for high definition display, placing these consumers at risk of being completely shut off from the high-definition content they expect to receive." *Order* ¶ 60 (JA 457). The agency was also "concerned that consumer expectations regarding the functionality" of DTV products "would be frustrated by the use of down-resolution by MVPDs." *Order* ¶ 64 (JA 459). The Commission found that banning the use of selectable output control and the down-resolution of broadcast programming would "ensure that consumer expectations" concerning the capabilities of DTV products "are met," *Order* ¶ 11 (JA 437), and thereby help assuage "concerns over connectivity and functionality" that might dissuade consumers from buying DTV equipment, *Order* ¶ 61 (JA 458).

For similar reasons, the FCC largely adopted the MOU's proposed caps on copy protection for specific categories of programming.[10] The

[10] The caps adopted by the FCC differed from the MOU's proposal in one respect: the treatment of subscription video on demand. The MOU proposed to permit a prohibition on copying of subscription video on demand. The Commission chose to give MVPDs "discretion to determine whether specific" offerings of this service "merit different encoding terms." *Order* ¶ 74 (JA 464).

Commission concluded that the caps strike "a measured balance" between the desire of content providers "to prevent the unauthorized redistribution or copying of content distributed by MVPDs" and "the preservation of consumer expectations regarding the time shifting of programming for home viewing and other permitted uses of such material." *Order* ¶ 11 (JA 437). In the agency's assessment, this reasonable accommodation of the "competing interests" of consumers and content providers would "foster the development of a commercial market in navigation devices." *Order* ¶ 68 (JA 461).

The Commission declined to adopt the DBS industry's request to create an exemption from the encoding rules for non-cable MVPDs such as the two DBS providers, EchoStar and DIRECTV. The agency reasoned that "[u]niform application" of the encoding caps to all MVPDs was essential to "ensuring that consumers have equal access to content regardless of their service provider." *Order* ¶ 71 (JA 462). Likewise, the Commission concluded that "the ban on selectable output control logically should apply uniformly to all MVPDs in order to ensure that consumer expectations are not unreasonably frustrated regardless of the MVPD platform to which they subscribe." *Order* ¶ 61 (JA 457-58).

The encoding rules were designed to ensure "competitive parity among MVPDs in access to high value digital content" by requiring all MVPDs to

start from the same "baseline" when negotiating copy protection issues with content providers. *Order* ¶ 71 (JA 462). The Commission explained that if the encoding restrictions applied only to the cable industry, and if non-cable MVPDs could offer content providers copy protections that cable operators were legally barred from matching, the rules "would create a permanent competitive imbalance in the MVPD programming market," which "could negatively impact consumers." *Id.*

The Commission found no merit in the DBS providers' argument that they should not be subject to the encoding rules "because they did not participate in the MOU negotiations." *Order* ¶ 43 (JA 450). The agency observed that the *Further NPRM* gave interested parties an opportunity to comment on the MOU's proposals, and that both DBS providers filed comments explaining their objections to the proposed encoding rules. *Id.* (JA 450-51). The Commission concluded on the merits, however, that "the arguments advanced by the DBS providers" for exempting DBS from the

encoding rules were "insufficient to outweigh the need for competitive parity among MVPDs." *Id.* (JA 451).[11]

SUMMARY OF ARGUMENT

The FCC reasonably concluded that the *Order*'s encoding rules will assure the commercial availability of MVPD navigation devices, as required by Section 629 of the Communications Act, 47 U.S.C. § 549(a), and promote compatibility between televisions and video recorders and cable systems in accordance with Section 624A of the Act, 47 U.S.C. § 544a(b)(1). In the Commission's considered judgment, application of the encoding rules to all MVPDs, including DBS providers, best advances those statutory mandates.

I. DISH's principal arguments on appeal (that the Commission lacked statutory authority to adopt the encoding rules) have not been preserved for review by this Court because those arguments were not presented to the FCC. Therefore, the Court lacks jurisdiction to consider those claims under Section 405 of the Communications Act, 47 U.S.C. § 405.

[11] On reconsideration, the Commission on its own motion revised the encoding rules' definition of "Unencrypted Broadcast Television" to clarify that the same encoding restrictions apply to both encrypted and unencrypted broadcast programming. *Reconsideration Order* ¶ 2 (JA 517-18). Although DISH has petitioned for review of the *Reconsideration Order*, it does not make any arguments that pertain specifically to the Commission's action in that order.

II. Even if they had not been waived, DISH's statutory authority arguments lack merit. The Commission's adoption of the encoding rules plainly fell within its authority under Section 629 to "adopt regulations to assure the commercial availability" of navigation devices. *See* 47 U.S.C. § 549(a).

As the Commission explained in the *Order*, the encoding rules were an "essential component" of an agreement that was designed to jump-start the retail market for digital cable equipment. *Order* ¶ 47 (JA 452). The Commission reasonably found that the rules "will assure the commercial availability of navigation devices and strike a measured balance between the rights of content owners and the home viewing expectations of consumers." *Id.*

In particular, the encoding rules sought to guard against frustration of the legitimate "expectations of consumers regarding their home viewing habits and the functionality of their digital devices." *Order* ¶ 68 (JA 461). In the absence of encoding restrictions, the use of certain copy protection tools could seriously disrupt consumers' efforts to record – or even watch – their favorite television programs on DTV equipment. The resulting consumer frustration could severely hinder the development of the retail market for DTV products. The encoding rules addressed this concern by taking steps to

"ensure that consumer expectations regarding the functionality" of DTV devices "are met." *Order* ¶ 11 (JA 437).

DISH argues that the encoding rules fall outside the scope of Section 629 because they do not affect the design, manufacture, sale, or support for navigation devices. Br. 35-40. The statute places no such restrictions on the FCC's regulatory authority. Section 629 simply directs the agency to "adopt regulations to assure the commercial availability" of navigation devices. 47 U.S.C. § 549(a). Congress did not limit the FCC to regulating the design, manufacture, or marketing of navigation devices in order to carry out the Commission's responsibility to assure the commercial availability of those devices.

DISH also asserts that Section 629 is not an independent grant of authority. Br. 33-35. It bases that claim entirely on Section 629(f), which states that nothing in Section 629 "shall be construed as expanding" pre-existing FCC authority. 47 U.S.C. § 549(f). But the general rule of construction prescribed by Section 629(f) cannot override the specific grant of regulatory authority contained in Section 629(a). DISH's proposed reading would render Section 629(a) meaningless.

As an alternative and independent source of authority, the Commission found that the encoding rules fall within the Commission's ancillary authority

under Section 624A to assure "compatibility between televisions and video cassette recorders and cable systems," 47 U.S.C. § 544a(b)(1), by preventing the creation of a competitive imbalance between the cable and DBS industries and ensuring that consumer expectations regarding the functionality of their DTV devices are not frustrated. Contrary to DISH's contention (Br. 22-33), Congress's decision in Section 624A to mandate regulation of compatibility with respect to cable systems did not deprive the FCC of its discretion to extend regulation to non-cable MVPDs in order to preserve competitive parity and consumer expectations.

III. The only claim in this case that DISH did not waive is its contention that DBS providers were denied adequate notice and opportunity for comment in this proceeding. *See* Br. 43-46. But that claim is baseless. There is no dispute that (1) the FCC provided notice and an opportunity for public comment on the proposed rules, (2) it received comments from numerous parties, including EchoStar (DISH's predecessor), and (3) it considered those comments before adopting the encoding rules (with certain changes). Nothing more was required.

The Commission determined that it could most effectively protect consumer interests and maintain competitive parity by applying the proposed encoding rules to all MVPDs. That reasonable decision should be upheld.

STANDARD OF REVIEW

DISH's challenge to the FCC's interpretation of its authority under the Communications Act is governed by *Chevron USA, Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984). Under *Chevron,* if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question" for the Court is whether the agency has adopted "a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires the Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Covad Commc'ns Co. v. FCC,* 450 F.3d 528, 537 (D.C. Cir. 2006) (quoting *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980 (2005)). The Commission's "interpretation of its own statutory jurisdiction is entitled to *Chevron* deference." *See Sacramento Mun. Util. Dist. v. FERC,* 616 F.3d 520, 536 (D.C. Cir. 2010) (internal quotation marks omitted).

DISH's contention that the Commission failed to comply with the Administrative Procedure Act ("APA") is also subject to "highly deferential" judicial review. *See National Tel. Coop. Ass'n v. FCC,* 563 F.3d 536, 541

(D.C. Cir. 2009). Under the applicable standard, the FCC's action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

I. DISH'S STATUTORY CHALLENGES ARE BARRED BY SECTION 405 OF THE COMMUNICATIONS ACT

DISH principally argues that the FCC lacked statutory authority to adopt the encoding rules. Br. 22-40. In a similar vein, DISH contends that the agency's decision to apply the rules to DBS was based on factors that Congress did not intend the FCC to consider. Br. 46-48. Neither DISH nor any other party presented those claims to the Commission in this proceeding. Accordingly, the Court lacks jurisdiction to consider them under Section 405 of the Communications Act, 47 U.S.C. § 405.

Section 405 "requires that the Commission be afforded an 'opportunity to pass' on an issue as a 'condition precedent to judicial review.'" *Charter,* 460 F.3d at 39 (quoting 47 U.S.C. § 405(a)). Construing Section 405 "strictly," this Court has repeatedly held that it "generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission." *Globalstar, Inc. v. FCC,* 564 F.3d 476, 483 (D.C. Cir. 2009) (quoting *Qwest Corp. v. FCC,* 482 F.3d 471, 474 (D.C. Cir. 2007)). In this case, Section 405 precludes the Court from considering DISH's statutory arguments because

the Commission was never provided with an opportunity to address those claims.

In response to the *Further NPRM*, commenters raised only two challenges to the FCC's authority to adopt the encoding rules. Some copyright holders contended that the rules "would impermissibly involve the Commission in copyright issues." *Order* ¶ 54 (JA 454). And the Motion Picture Association of America argued that Section 629(b) prohibits the FCC from adopting the rules. *Order* ¶ 49 (JA 453). DISH does not raise either of those claims here.

Instead, DISH presents the Court with entirely different arguments concerning the FCC's authority. It argues that the agency cannot rely on ancillary jurisdiction under Section 624A to apply the encoding rules to DBS providers. Br. 22-33. DISH also contends that Section 629 cannot provide a basis for adopting the encoding rules because it is not "an independent grant of authority" (Br. 33-35), and because the statute limits the Commission to measures affecting the design, manufacture, or marketing of navigation devices (Br. 35-40). Finally, DISH maintains that the FCC improperly subjected all MVPDs to the encoding rules out of concern for competitive parity – a factor that (according to DISH) Congress did not intend the Commission to consider. Br. 46-48. None of these arguments were

presented to the Commission in this proceeding. Therefore, Section 405 bars DISH from raising any such claims here. *See Sprint Nextel Corp. v. FCC,* 524 F.3d 253, 256-57 (D.C. Cir. 2008).

We note that an attachment to an ex parte notice filed by EchoStar in August 2003 asserted without elaboration that the "Commission does not have clear authority to apply [the MOU] to DBS." Letter from David R. Goodfriend, EchoStar, to Marlene H. Dortch, FCC, August 27, 2003, Attachment at 3 (JA 426). That vague and equivocal statement does not suffice to satisfy Section 405, which requires that arguments be raised "with sufficient clarity" to give the FCC an opportunity to address them. *American Family Ass'n v. FCC,* 365 F.3d 1156, 1167 (D.C. Cir. 2004). EchoStar's ex parte notice did not present any of the statutory arguments that DISH makes here. As this Court has observed, "relying on [ex parte] notices to satisfy § 405 is a risky strategy," particularly when such notices contain no specific arguments. *Sprint Nextel,* 524 F.3d at 257.

As DISH notes (Br. 10 n.4), DIRECTV questioned the FCC's jurisdiction to adopt encoding rules in a petition for reconsideration. But DIRECTV made a different argument from the one DISH advances here. DIRECTV asked the Commission to reconsider whether the encoding rules were barred by Section 629(b), which prohibits the Commission from

adopting measures that would "jeopardize" the "security" of MVPD services or impede the legal rights of MVPDs to "prevent theft of service." DIRECTV Petition for Reconsideration at 2-3 n.5 (JA 524-25). DISH makes no such argument in this case. To the contrary, it concedes that the agency's interpretation of Section 629(b) "appears reasonable." Br. 39.[12]

In short, no party presented the FCC with an opportunity to address the statutory arguments that DISH presents to this Court. As a result, the Court lacks jurisdiction to consider DISH's statutory arguments under Section 405.

II. THE FCC REASONABLY CONCLUDED THAT IT HAD AUTHORITY TO ADOPT THE ENCODING RULES

Even if DISH's statutory arguments were not procedurally barred, they lack merit. The Commission identified three separate and independent jurisdictional bases for adopting the encoding rules under the Communications Act: direct authority under Section 629; ancillary jurisdiction under Section 629; and ancillary jurisdiction under Section 624A.

[12] Even if DIRECTV's reconsideration petition had raised the same statutory arguments presented by DISH's brief, those arguments still would be precluded by Section 405. Because DIRECTV's petition was filed *after* the FCC adopted the *Order*, it could not possibly have given the Commission an opportunity to pass on DIRECTV's arguments in the *Order*. To be sure, the agency received an opportunity to address those arguments when it denied DIRECTV's petition. *See Implementation of Section 304 of the Telecommunications Act of 1996,* 25 FCC Rcd 14657 (2010) (JA 544). But DISH did not seek review of the order denying DIRECTV's petition.

Order ¶¶ 45-57 (JA 451-56). If the Court finds any one (or more) of these jurisdictional grounds sufficient to authorize adoption of the rules, it must reject DISH's claim that the agency lacked authority.[13]

A. The Commission Had Authority To Adopt The Encoding Rules Under Section 629.

The Commission reasonably determined that it had authority to adopt the encoding rules under Section 629. "The mandate of Section 629 is broad." *Order* ¶ 46 (JA 451). The statute directs the FCC to "adopt regulations to assure the commercial availability" of navigation devices – *i.e.,* "equipment used by consumers to access" MVPD services – from sources that are "not affiliated" with any MVPD. 47 U.S.C. § 549(a). By its terms, Section 629 "applies to any type of equipment used to access MVPD programming and services" – not just set-top converter boxes, but a variety of other consumer electronics products, including television sets, personal computers, and video recorders. *Order* ¶ 46 (JA 451-52). Moreover, the

[13] *See BDPCS, Inc. v. FCC,* 351 F.3d 1177, 1183 (D.C. Cir. 2003) (when "an agency offers multiple" independent "grounds for a decision," the Court "will affirm the agency so long as any one of the grounds is valid").

statute covers "all MVPDs" – not only cable operators, but also DBS providers and other non-cable MVPDs. *Id.* (JA 451-52).[14]

1. The Commission reasonably concluded that its adoption of the encoding rules fell well within the agency's "explicit authority" under Section 629 to adopt regulations to assure the commercial availability of navigation devices. *Order* ¶ 45 (JA 451). The encoding rules were an "essential component" of the MOU – an agreement crafted to assure the commercial availability of the next generation of navigation devices. *Order* ¶ 47 (JA 452).[15] The Commission specifically found that the encoding rules "will assure the commercial availability of navigation devices and strike a measured balance between the rights of content owners and the home viewing expectations of consumers." *Id.*

[14] DISH does not dispute that Section 629 applies to all MVPDs. For that reason, when DISH contends that Congress did not intend for the FCC to consider competitive parity (Br. 46-48), it makes that argument only with respect to Section 624A. There is no question that Section 629 authorizes the Commission to apply the encoding rules to all MVPDs.

[15] The cable and consumer electronics industries indicated that without the encoding rules, "the compromise agreement reached in the MOU" would be "upset," and "their efforts to produce unidirectional digital cable products will falter." *Order* ¶ 47 (JA 452). The resulting harm, the Commission found, "would directly undermine the explicit goal of Section 629, to assure the commercial availability of navigation devices." *Id.*

As the Commission explained, the encoding rules help ensure that "consumer expectations regarding the functionality" of DTV products "are met." *Order* ¶ 11 (JA 437). The rules thus serve to "assure the commercial availability" of DTV products "from manufacturers, retailers, and other vendors not affiliated with any [MVPD]." 47 U.S.C. § 549(a). The Commission was justifiably concerned that consumers might be reluctant to purchase DTV equipment if they were unsure whether it would provide them with the same viewing and recording capabilities they had come to expect from their home entertainment systems. Such doubts could dampen consumer demand and stunt the growth of the nascent retail market for digital navigation devices. The encoding rules were designed to allay those doubts by accommodating the legitimate "expectations of consumers regarding their home viewing habits and the functionality of their digital devices." *Order* ¶ 68 (JA 461); *see also id.* ¶¶ 60-61, 64 (JA 457-59).

In particular, the Commission reasonably concluded that selectable output control and the down-resolution of broadcast television could erode consumer confidence in the performance of DTV equipment. *Order* ¶¶ 58-64 (JA 456-59). Down-resolution could upset DTV viewers by causing an unexpected degradation of the picture quality on their DTV sets. *Order* ¶ 64 (JA 459). Even worse, selectable output control could leave DTV viewers

with a blank screen, "completely shut off from the high-definition content they expect to receive," if their "DTV equipment only has component analog inputs for high definition display" (a common feature of DTV products at the time the *Order* was adopted). *Order* ¶ 60 (JA 457). By prohibiting these copy protection tools, the Commission sought to alleviate "concerns over connectivity and functionality" that might discourage consumers from purchasing DTV equipment. *Order* ¶ 61 (JA 458).

The record showed that the Commission's concern with consumer expectations was warranted. According to advocates of home recording rights, the use of selectable output control would "discourage consumers from relying on an interface that supports … home recording," CEA Comments at 18 (JA 207), and "would have the likely effect of driving from the market any home interface that supports home recording," HRRC Comments at 8 (JA 230). In light of this evidence, the Commission reasonably concluded that without encoding restrictions, disappointed consumer expectations could seriously hamper efforts to develop the then-incipient retail market for DTV equipment. That sort of predictive judgment is entitled to substantial deference. The Court is "particularly deferential" where (as here) the "FCC must make judgments about future market behavior with respect to a brand-new technology." *Charter,* 460 F.3d at 41 (internal quotation marks

omitted); *see also Consumer Electronics Ass'n v. FCC,* 347 F.3d 291, 303 (D.C. Cir. 2003).

DISH claims that the encoding rules "have no connection" to the purpose of Section 629 because they do not affect "the design, manufacture, sale, [or] support for navigation devices." Br. 35. The statute, however, does not require the FCC's implementing rules to regulate any particular characteristics of navigation devices. Section 629 simply directs the Commission to "adopt regulations to assure the *commercial availability*" of navigation devices from sources unaffiliated with MVPDs. 47 U.S.C. § 549(a) (emphasis added). By enhancing the availability of navigation devices in the retail market, the Commission's adoption of the encoding rules plainly served the statute's purpose.

DISH also asserts that the FCC's concern with consumer expectations was unrelated to "the availability of navigation devices." Br. 41. This Court rejected a similar argument in *Cablevision Sys. Corp. v. FCC,* 649 F.3d 695 (D.C. Cir. 2011). The Court there upheld the Commission's authority under Section 628(b) of the Communications Act to bar cable operators from unfairly withholding cable-affiliated terrestrial programming from rival MVPDs because such withholding would "hinder" competitors "significantly … from providing satellite … programming to subscribers." 47 U.S.C.

§ 548(b).[16] In particular, the Court affirmed the Commission's finding that if a competing MVPD could not obtain popular terrestrial programming (such as regional sports networks), its ability to provide satellite programming would be greatly diminished because it would be less commercially attractive than cable. *Cablevision*, 649 F.3d at 708-09.

Petitioners in *Cablevision* argued that "the Commission lacks authority to regulate terrestrial programming withholding under" Section 628(b) because "the effect of such withholding on the provision of satellite programming" was "too attenuated." *Cablevision,* 649 F.3d at 708. Specifically, petitioners contended that "commercial attractiveness has nothing to do with whether" a rival MVPD "can provide satellite programming." *Id.* The Court explained that petitioners' argument "wrongly assumes an MVPD's lack of commercial attractiveness will never prevent or significantly hinder it from providing satellite programming." *Id.*

Similarly, DISH in this case incorrectly presumes that consumer expectations have no effect on the commercial availability of navigation devices. To the contrary, the record contained evidence that the use of selectable output control, which would "discourage consumers from relying

[16] Satellite programming refers to "programming transmitted to MVPDs via satellite." *Cablevision,* 649 F.3d at 700. Terrestrial programming refers to "programming delivered to MVPDs over land-based networks." *Id.*

on an interface that supports … home recording," CEA Comments at 18 (JA 207), "would have the likely effect of driving from the market any home interface that supports home recording." HRRC Comments at 8 (JA 230). By prohibiting selectable output control, the Commission acted to assure the continued commercial availability of video recording devices pursuant to Section 629(a).

More generally, by adopting encoding restrictions that reflect consumers' reasonable expectations regarding home viewing and recording, the Commission sought to address consumer concerns that might stifle the growth of the nascent retail market for DTV navigation devices. In taking this action, the agency properly exercised its authority under Section 629 to "adopt regulations to assure the commercial availability" of navigation devices. 47 U.S.C. § 549(a).

2. The Commission also reasonably found that it had ancillary jurisdiction arising from Section 629 to adopt the rules. *Order* ¶ 55 (JA 455). This Court has held that the FCC may exercise ancillary jurisdiction when two conditions are met: "(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 responsibilities." *American Library*

Ass'n v. FCC, 406 F.3d 689, 691-92 (D.C. Cir. 2005). Both of these conditions are present here.

First, the subject regulated by the encoding rules – "MVPD content distribution" – falls within "the Commission's broad authorization" under Title I "'to make available to all Americans a radio and wire communication service.'" *Order* ¶ 55 (JA 455) (quoting 47 U.S.C. § 151).[17] Second, the encoding rules are reasonably related to the FCC's fulfillment of its mandate under Section 629. The Commission explained that the rules would help "increase consumer demand" for "digital cable products and other navigation devices at retail" by ensuring that consumers have "access to high value digital content." *Id.*; *see also* pp. 30-35, *supra*.

3. DISH contends that Section 629 "cannot be the basis for an assertion of either direct or ancillary jurisdiction" (Br. 33) because it "is not

[17] In that respect, the encoding rules differ from the FCC rules that the Court struck down in *American Library Association*. The Court ruled that those rules "exceeded the scope of [the FCC's] general jurisdictional grant under Title I" because the Commission in that case "impose[d] regulations on devices that receive communications *after* those communications have occurred." *American Library Ass'n*, 406 F.3d at 703 (emphasis added). Unlike those rules – which did "not regulate the communications themselves," *id.* – the rules at issue here regulate MVPDs' encoding of programs that they transmit to subscribers. This regulation of MVPD content distribution indisputably falls within the FCC's general jurisdiction under Title I. Moreover, in contrast to *American Library Association*, where the agency relied solely on its ancillary jurisdiction, the Commission here acted pursuant to an express grant of authority under Section 629(a).

an independent grant of authority from Congress" (Br. 35). In support of its claim, DISH points to Section 629(f). That provision states: "Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before [the date of enactment of the Telecommunications Act of 1996]." 47 U.S.C. § 549(f).

DISH's reading of the statute cannot withstand scrutiny. "Where the language of a statute is plain there is nothing to construe." *Hengesbach v. Hengesbach,* 114 F.2d 845, 846 (D.C. Cir. 1940). *See also Schlossberg v. Barney,* 380 F.3d 174, 182 (4th Cir. 2004) (because courts "must account for a statute's full text," they "cannot interpret one section of a statute in a way that would nullify the clearly worded language of other sections of the same statute") (internal quotation marks omitted). Consequently, a general rule of construction such as Section 629(f) has no power to invalidate a specific and unambiguous grant of authority such as Section 629(a).

The Supreme Court made this clear in *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999). Although Section 2(b) of the Communications Act provides that "nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to" intrastate telecommunications services, 47 U.S.C. § 152(b), the Court in *AT&T* held that Section 2(b) could not be read to "nullify" certain 1996 amendments to the Act because those

provisions "clearly 'apply' to intrastate service." 525 U.S. at 379-80. By the same reasoning, Section 629(f) cannot be read to nullify Section 629(a), which clearly directs the FCC to "adopt regulations to assure the commercial availability" of navigation devices. 47 U.S.C. § 549(a).

Moreover, it is well settled that the Court should "avoid interpreting a statute in such a way as to make part of it meaningless." *Abourezk v. Reagan,* 785 F.2d 1043, 1054 (D.C. Cir. 1986) (citing 2A N. Singer, Sutherland Statutory Construction § 46.06 (4th ed. 1984)). DISH's proposed reading of Section 629 violates this basic canon of statutory construction. Its interpretation of Section 629(f) "would deprive" Section 629(a) – an express directive to adopt regulations to assure the commercial availability of navigation devices – "of all substantive effect, a result self evidently contrary to Congress' intent." *See RCA Global Commc'ns, Inc. v. FCC,* 758 F.2d 722, 733 (D.C. Cir. 1985). "Congress cannot be presumed to do a futile thing." *Halverson v. Slater,* 129 F.3d 180, 185 (D.C. Cir. 1997).[18]

Finally, DISH's reading of Section 629 conflicts with this Court's decision in *General Instrument*. The Court there held that Section 629 provided statutory authority for the FCC to impose a ban on integrated

[18] DISH's interpretation of Section 629(f) is also at odds with Section 629(b), which plainly contemplates that the Commission has authority to "prescribe regulations under [Section 629(a)]." 47 U.S.C. § 549(b).

converter boxes. *General Instrument*, 213 F.3d at 730-31. DISH's brief does not even mention that case, let alone try to distinguish it. In light of *General Instrument*, DISH cannot plausibly argue (Br. 35) that Section 629 "is not an independent grant of authority from Congress."

DISH attempts to derive support for its reading of Section 629 from the Court's treatment of Section 256 of the Communications Act in *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010). That attempt fails because the two statutory provisions are very different from each other. Unlike Section 629's express grant of rulemaking authority to the Commission, Section 256 provides only that the Commission "shall establish procedures for Commission oversight of coordinated network planning by [service providers] for the effective and efficient interconnection of public telecommunications networks." 47 U.S.C. § 256(b)(1). In light of that statutory language, which can be read as directing only the establishment of internal FCC operating procedures, the Court in *Comcast* concluded that the FCC could not rely on Section 256 to prohibit discriminatory network management practices of an Internet access provider. By contrast, the encoding rules that the FCC adopted in this case are "regulations to assure the commercial availability" of navigation devices – precisely the sort of rules that Congress expressly directed the agency to adopt in Section 629(a).

B. The Commission Had Authority To Adopt The Encoding Rules Under Section 624A.

As a separate and independent ground for adopting the encoding rules, the FCC concluded that the rules would "advance the policies underlying Section 624A of the Communications Act." *Order* ¶ 56 (JA 456). Section 624A requires the Commission to issue regulations "assuring compatibility between televisions and video cassette recorders and cable systems." 47 U.S.C. § 544a(b)(1). The Commission reasonably found that the encoding rules would help achieve the "end goal" of Section 624A: "to ensure that cable subscribers will be able to enjoy the full benefits of available cable programming and the functionality of their televisions and video cassette recorders." *Order* ¶ 56 (JA 456).

The agency acknowledged that Section 624A "does not directly apply to MVPDs other than cable operators." *Order* ¶ 57 (JA 456). Nonetheless, the Commission reasonably concluded that it could "exercise ancillary jurisdiction over non-cable MVPDs in order to avoid the creation of a regulatory and marketplace imbalance between cable and DBS." *Id.*

The FCC's reliance on Section 624A satisfied this Court's two-part test for the proper exercise of ancillary authority. *See American Library Ass'n,* 406 F.3d at 691-92. First, the subject regulated by the encoding rules – "MVPD content distribution" – falls within the FCC's general jurisdiction

under Title I of the Communications Act. *Order* ¶ 55 (JA 455). Second, application of the rules to non-cable MVPDs is reasonably ancillary to the FCC's effective performance of its duties under Section 624A. The Commission explained that unless the encoding rules applied to all MVPDs, "cable operators would be at a significant competitive disadvantage in obtaining access to content." *Order* ¶ 57 (JA 456). In the agency's assessment, the resulting competitive disparity "could frustrate the [FCC's] ability to satisfy Section 624A's mandate." *Id.*

Congress enacted Section 624A because it found that cable compatibility issues made "consumers … less likely to purchase, and electronics equipment manufacturers … less likely to develop, manufacture, or offer for sale, television receivers and video cassette recorders with new and innovative features and functions." 47 U.S.C. § 544a(a)(2). The Commission was concerned that if its encoding rules did not apply uniformly to all MVPDs, consumers might come to doubt whether DTV receivers and digital video recording devices would provide the same functionality for cable subscribers as for DBS subscribers. Such doubts could undermine the FCC's efforts to promote the market for cutting-edge consumer electronics equipment in accordance with Section 624A. In light of that concern, the Commission reasonably took steps here "to ensure that consumer

expectations are not unreasonably frustrated regardless of the MVPD platform to which [consumers] subscribe." *Order* ¶ 61 (JA 458).

DISH contends that because Congress mentioned no MVPDs other than cable operators in Section 624A, it clearly intended to bar the FCC from applying the statute's requirements to non-cable MVPDs. Br. 22-33. This argument rests on "the expressio unius maxim – that the expression of one is the exclusion of others." *Mobile Commc'ns Corp. of America v. FCC,* 77 F.3d 1399, 1404 (D.C. Cir. 1996) ("*MCCA*"). As this Court has repeatedly observed, however, that maxim is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Martini v. FNMA,* 178 F.3d 1336, 1343 (D.C. Cir. 1999) (quoting *Cheney R.R. Co. v. ICC,* 902 F.2d 66, 69 (D.C. Cir. 1990)).

For example, long before the Communications Act was amended to provide express authority for FCC regulation of cable television, the Supreme Court held that the agency had ancillary jurisdiction to regulate cable in order to ensure "the effective performance of [its] various responsibilities for the regulation of television broadcasting." *Southwestern Cable,* 392 U.S. at 178; *see also United States v. Midwest Video Corp.,* 406 U.S. 649, 659-63 (1972).

The same sort of ancillary jurisdiction applies here. In the context of Section 624A, "the contrast between Congress's mandate" with respect to cable operators and "its silence" with respect to non-cable MVPDs "suggests not a prohibition" on FCC regulation, "but simply a decision *not to mandate*" regulation of non-cable MVPDs, *i.e.,* "to leave the question to agency discretion." *See Cheney,* 902 F.2d at 69. The FCC reasonably exercised its discretion here when it chose to apply the encoding rules to all MVPDs. The Commission saw no good reason to create a competitive disparity between cable and DBS by imposing encoding restrictions only on cable.

This Court has previously upheld the Commission's use of ancillary authority to ensure regulatory parity. In *MCCA,* 77 F.3d at 1404-07, the Court held that the FCC could rely on its ancillary authority to require Mtel to pay for a wireless telecommunications license obtained through the agency's "pioneer's preference" program. Although Mtel was not subject to any statutory payment requirement, all other wireless licensees were statutorily required to pay for their licenses at auction. The Court concluded that the Commission could require Mtel to pay for its license in order to prevent Mtel's "unjust enrichment" from "receipt of a free license." *Id.* at 1406.

The same considerations of regulatory parity justified the FCC's decision in this case to apply the encoding rules to non-cable MVPDs as well

as cable operators. The record showed that if only cable operators were subject to the encoding rules, content providers would likely supply their high value content only to non-cable MVPDs, which could offer more stringent copy protections. *See* Comcast Comments at 14 (JA 182); NCTA Reply Comments at 13 (JA 375); CEA Reply Comments at 21 (JA 316). On the basis of that record, the Commission concluded: "Application of the encoding rules to the cable industry alone would create a permanent competitive imbalance in the MVPD programming market that could negatively impact consumers." *Order* ¶ 71 (JA 462). To prevent this market distortion, the FCC reasonably chose to impose the same encoding restrictions on all MVPDs.

DISH maintains that "Congress had not intended the FCC to consider" regulatory parity when implementing Section 624A. Br. 47. It contends that Congress's principal concern in adopting the 1992 Cable Act was cable's dominance of the MVPD marketplace. Br. 47-48. As the Commission observed, however, times have changed. Over the past two decades, "the MVPD market has diversified greatly." *Order* ¶ 57 (JA 456). DBS, which "did not exist" when Section 624A was enacted in 1992, "has since grown to serve approximately twenty percent of the MVPD marketplace." *Id.*

Given the growth of substantial competition in the MVPD market, the Commission acted within its discretion in declining to adopt encoding rules that would favor one class of MVPDs over another. Nothing in the text or legislative history of Section 624A suggests that Congress intended to foreclose the Commission from seeking to achieve regulatory parity after the MVPD market became competitive.

III. THE COMMISSION PROVIDED ADEQUATE NOTICE AND OPPORTUNITY FOR COMMENT

Finally, the FCC complied with the rulemaking requirements of the APA by seeking "comment on the MOU and the proposed Commission rules contained therein." *Further NPRM* ¶ 4 (JA 76). The agency received comments from a wide array of interested parties, including equipment manufacturers, cable operators, consumer groups, content providers, and both DBS providers. *See Order,* Appendix A (JA 471). It considered those comments before adopting the encoding rules with certain changes. The APA requires nothing more. *See* 5 U.S.C. § 553; *Rural Cellular Ass'n v. FCC,* 588 F.3d 1095, 1101 (D.C. Cir. 2009).

DISH argues that it did not receive a "meaningful" opportunity to comment because the Commission gave "insufficient" consideration to the concerns of DBS providers. Br. 43. According to DISH, the FCC treated the proposed encoding rules as a "*fait accompli*." Br. 42. This Court rejected a

similar argument in *Rural Cellular*. Petitioners in that case claimed that notice and comment "served no purpose" because the Commission "rubber stamped" a rule change that had effectively been adopted in two earlier adjudications. *Rural Cellular,* 588 F.3d at 1101 (internal quotation marks omitted). But the Court found no indication that "the Commission improperly prejudged the issue." *Id.* (internal quotation marks omitted). It held that the agency satisfied the APA by giving notice of the proposed rule change, compiling a record of comments, and considering those comments before adopting the rule. *Id.* Here, as in *Rural Cellular,* the Commission fulfilled all of its procedural obligations under the APA.

DISH suggests that the Commission did not adequately consider objections to the encoding rules because those rules were proposed as part of "a private agreement." Br. 43. As this Court long ago recognized, however, "there is nothing objectionable about parties jointly submitting a proposed rule to an agency," even if the proposal is "the product of negotiation and compromise." *Baltimore Gas & Elec. Co. v. United States,* 817 F.2d 108, 117 (D.C. Cir. 1987) (internal quotation marks omitted). Moreover, the fact that the FCC sought "to preserve" the "compromise" reached in the MOU by adopting encoding rules that "differ little" from the MOU's proposals "does not itself establish" that the agency "elevated the effectuation of the

negotiated rules over its duty to protect the public interest." *See id.* (internal quotation marks omitted). To the contrary, the Commission explained that its efforts to preserve the "plug and play" agreement served the public interest by ensuring that efforts to make digital navigation devices commercially available would not be upended. *See Order* ¶ 47 (JA 452).

This is not the first case in which the FCC adopted rules that were originally developed through negotiations between private parties. In *Texas Office of Pub. Util. Counsel v. FCC,* 265 F.3d 313 (5th Cir. 2001) ("*TOPUC*"), a group of local and long-distance telecommunications carriers proposed a plan for reforming interstate access charges. Although local and long-distance carriers generally "held opposing views on telecommunications reform," they developed the access charge reform proposal through negotiation and compromise. *Id.* at 319. The FCC issued a notice of proposed rulemaking to solicit comment on the carriers' proposal. After reviewing the comments it had received, the agency adopted a modified version of the proposed reform plan. *Id.* at 319-20.

Much like DISH in this case, petitioners in *TOPUC* argued that "the FCC had given approval" to the proposed rule changes "before considering public comment." *TOPUC*, 265 F.3d at 325. They characterized the FCC's adoption of the access charge reform plan as "a tainted political compromise

between the FCC" and the carriers that proposed the plan. *Id.* The Fifth Circuit found no basis for these claims. It correctly held that the Commission satisfied the APA's rulemaking requirements by providing for notice and comment before adopting the carriers' proposal. *Id.* at 326-27.

The Commission followed the same approach in this case. After the parties to the "plug and play" agreement submitted their MOU to the FCC, the agency issued a notice of proposed rulemaking seeking comment on the MOU's rule proposals. The Commission received and reviewed comments from many interested parties, including DBS providers. Moreover, in response to the comments, the Commission modified the proposed rules (where it deemed appropriate) before adopting them. For example, although the MOU proposed to permit a prohibition on copying of subscription video on demand, the Commission decided to give MVPDs "discretion to determine whether specific" offerings of this service "merit different encoding terms." *Order* ¶ 74 (JA 464). The agency also adopted the MOU's proposed technical rules "with certain modifications." *Order* ¶ 10 (JA 437). These revisions to the proposed rules refute DISH's claim that its opportunity to comment in this proceeding was not meaningful.

DISH complains that because the two DBS providers "were shut out of the [MOU] process," they "could not negotiate in their own interest in order

to balance the restrictions inherent in the encoding rules." Br. 45. But both of the DBS providers and their trade association presented their objections to the proposed rules in comments filed with the FCC. The Commission considered those objections. It simply found them unpersuasive.

Specifically, the Commission concluded that "the arguments advanced by the DBS providers" for exempting DBS from the encoding rules were "insufficient to outweigh the need for competitive parity among MVPDs." *Order* ¶ 43 (JA 451). The record indicated that if the encoding rules applied only to cable operators, content providers would likely supply their high value content only to DBS providers and other non-cable MVPDs.[19] Such a "competitive imbalance in the MVPD programming market," the Commission reasonably found, could have a negative impact on MVPD consumers by depriving them of "equal access to content regardless of their service provider." *Order* ¶ 71 (JA 462).

The Commission also reasonably determined that application of the encoding rules to all MVPDs, including DBS providers, would most effectively "ensure that consumer expectations regarding the functionality" of DTV products "are met." *Order* ¶ 11 (JA 437). In particular, the

[19] *See* Comcast Comments at 14 (JA 182); NCTA Reply Comments at 13 (JA 375); CEA Reply Comments at 21 (JA 316).

Commission explained that "the ban on selectable output control logically should apply uniformly to all MVPDs in order to ensure that consumer expectations are not unreasonably frustrated regardless of the MVPD platform to which they subscribe." *Order* ¶ 61 (JA 457-58).

Simply put, the Commission found that the public interest in accommodating the expectations of consumers outweighed the private interest of DBS providers. DISH has given the Court no good reason to disturb this reasonable policy judgment.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ECHOSTAR SATELLITE L.L.C., PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NOS. 04-1033 & 04-1109 (CONSOLIDATED)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 10,472 words.

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STATUTORY APPENDIX

5 U.S.C. § 553

47 U.S.C. § 405
47 U.S.C. § 544a
47 U.S.C. § 549

5 U.S.C. § 553

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

§ 553. Rulemaking

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for

reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 544a

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART III. FRANCHISING AND REGULATION

§ 544a. Consumer electronics equipment compatibility

(a) Findings

The Congress finds that--

(1) new and recent models of television receivers and video cassette recorders often contain premium features and functions that are disabled or inhibited because of cable scrambling, encoding, or encryption technologies and devices, including converter boxes and remote control devices required by cable operators to receive programming;

(2) if these problems are allowed to persist, consumers will be less likely to purchase, and electronics equipment manufacturers will be less likely to develop, manufacture, or offer for sale, television receivers and video cassette recorders with new and innovative features and functions;

(3) cable operators should use technologies that will prevent signal thefts while permitting consumers to benefit from such features and functions in such receivers and recorders; and

(4) compatibility among televisions, video cassette recorders, and cable systems can be assured with narrow technical standards that mandate a minimum degree of common design and operation, leaving all features, functions, protocols, and other

product and service options for selection through open competition in the market.
(b) Compatible interfaces

(1) Report; regulations

Within 1 year after October 5, 1992, the Commission, in consultation with representatives of the cable industry and the consumer electronics industry, shall report to Congress on means of assuring compatibility between televisions and video cassette recorders and cable systems, consistent with the need to prevent theft of cable service, so that cable subscribers will be able to enjoy the full benefit of both the programming available on cable systems and the functions available on their televisions and video cassette recorders. Within 180 days after the date of submission of the report required by this subsection, the Commission shall issue such regulations as are necessary to assure such compatibility.

(2) Scrambling and encryption

In issuing the regulations referred to in paragraph (1), the Commission shall determine whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they encrypt or scramble signals, except that the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers' television receivers or video cassette recorders.
(c) Rulemaking requirements

(1) Factors to be considered

In prescribing the regulations required by this section, the Commission shall consider--

(A) the need to maximize open competition in the market for all features, functions, protocols, and other product and service options of converter boxes and

other cable converters unrelated to the descrambling or decryption of cable television signals;

(B) the costs and benefits to consumers of imposing compatibility requirements on cable operators and television manufacturers in a manner that, while providing effective protection against theft or unauthorized reception of cable service, will minimize interference with or nullification of the special functions of subscribers' television receivers or video cassette recorders, including functions that permit the subscriber--

(i) to watch a program on one channel while simultaneously using a video cassette recorder to tape a program on another channel;

(ii) to use a video cassette recorder to tape two consecutive programs that appear on different channels; and

(iii) to use advanced television picture generation and display features; and

(C) the need for cable operators to protect the integrity of the signals transmitted by the cable operator against theft or to protect such signals against unauthorized reception.

(2) Regulations required

The regulations prescribed by the Commission under this section shall include such regulations as are necessary--

(A) to specify the technical requirements with which a television receiver or video cassette recorder must comply in order to be sold as "cable compatible" or "cable ready";

(B) to require cable operators offering channels whose reception requires a converter box--

(i) to notify subscribers that they may be unable to benefit from the special functions of their television receivers and video cassette recorders, including functions that permit subscribers--

(I) to watch a program on one channel while simultaneously using a video cassette recorder to tape a program on another channel;

(II) to use a video cassette recorder to tape two consecutive programs that appear on different channels; and

(III) to use advanced television picture generation and display features; and

(ii) to the extent technically and economically feasible, to offer subscribers the option of having all other channels delivered directly to the subscribers' television receivers or video cassette recorders without passing through the converter box;

(C) to promote the commercial availability, from cable operators and retail vendors that are not affiliated with cable systems, of converter boxes and of remote control devices compatible with converter boxes;

(D) to ensure that any standards or regulations developed under the authority of this section to ensure compatibility between televisions, video cassette recorders, and cable systems do not affect features, functions, protocols, and other product and service options other than those specified in paragraph (1)(B), including telecommunications interface equipment, home automation communications, and computer network services;

(E) to require a cable operator who offers subscribers the option of renting a remote control unit--

(i) to notify subscribers that they may purchase a commercially available remote control device from any source that sells such devices rather than renting it from the cable operator; and

(ii) to specify the types of remote control units that are compatible with the converter box supplied by the cable operator; and

(F) to prohibit a cable operator from taking any action that prevents or in any way disables the converter box supplied by the cable operator from operating compatibly with commercially available remote control units.
(d) Review of regulations

The Commission shall periodically review and, if necessary, modify the regulations issued pursuant to this section in light of any actions taken in response to such regulations and to reflect improvements and changes in cable systems, television receivers, video cassette recorders, and similar technology.

47 U.S.C. § 549

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART III. FRANCHISING AND REGULATION

§ 549. Competitive availability of navigation devices

(a) Commercial consumer availability of equipment used to access services provided by multichannel video programming distributors.

The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor. Such regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, to consumers, if the system operator's charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.

(b) Protection of system security
The Commission shall not prescribe regulations under subsection (a) of this section which would jeopardize security of multichannel video programming and other services offered over multichannel video programming systems, or impede the legal rights of a provider of such services to prevent theft of service.

(c) Waiver
The Commission shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products. Upon an appropriate showing, the Commission shall grant any such waiver request within 90 days of any application filed under this subsection, and such waiver shall be effective for all service providers and products in that category and for all providers of services and products.

(d) Avoidance of redundant regulations
(1) Commercial availability determinations

Determinations made or regulations prescribed by the Commission with respect to commercial availability to consumers of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, before February 8, 1996, shall fulfill the requirements of this section.

(2) Regulations

Nothing in this section affects section 64.702(e) of the Commission's regulations (47 C.F.R. 64.702(e)) or other Commission regulations governing interconnection and competitive provision of customer premises equipment used in connection with basic common carrier communications services.

(e) Sunset
The regulations adopted under this section shall cease to apply when the Commission determines that--

(1) the market for the multichannel video programming distributors is fully competitive;

(2) the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive; and

(3) elimination of the regulations would promote competition and the public interest.

(f) Commission's authority
Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EchoStar Satellite LLC., et al. Petitioners

v.

Federal Communications Commission and the United States of America, Repondents

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on March 30, 2012, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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