

The recognition of the ancillary authority of the FCC by the US Supreme Court: convergence with the application of the theory of implicit powers in Brazilian law

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Abstract

This report compares the institutes of ancillary authority and implicit powers in the development of theory on administrative competences of Brazilian regulatory agencies. The delineation of the ancillary competence of the FCC was described based on judgments of the Supreme Court of the United States and the Court of Appeals for the District of Columbia. Doctrinal lessons and manifestations of Ministers of the Brazilian Federal Supreme Court were presented on the recognition of implicit powers to the necessary fulfillment of legal duties. Results – The confluence of these two theoretical approaches for the recognition of competences not directly expressed by regulatory agencies was demonstrated. The work contributes to the recognition of competences of the Brazilian telecommunications regulatory agency which, although not expressly provided, emerge as an imperative for the fulfillment of responsibilities directly given by law to that autarchy. The article presents a current legal institute in the North American tradition whose application to the Brazilian telecommunications area has not yet been established, despite its compatibility with concepts already accepted in Brazilian law.

Keywords: regulation; ancillary authority; implied powers; Brazil; USA.



A. INTRODUCTION

In fields that are always in transformation caused by rapid technological and market changes, such as telecommunications, questions may arise about the powers of regulatory agencies in new sectors and activities not expressly provided for in the previous rules for the creation and attributions of these entities. There are precedents of the Supreme Court of the United States that recognized the competence of the Federal Communications Commission – FCC to regulate sectors and activities not directly and expressly mentioned in its law of creation and discipline of its powers and performance: the Communications Act of 1934. This authority was recognized as a necessary means and ancillary to the fulfillment of the responsibilities assigned to the Commission by that same law. The notion of competence whose exercise requires the recognition of powers implicitly required for the performance of administrative duties finds resonance in Brazilian law. This article deals precisely with the question of the similarity of the institutes of ancillary authority developed in North American law, and of the implicit powers present in the Brazilian legal literature, aware of the current doctrinal affirmation in studies of

Brazilian constitutional law, which correlate the doctrine of implicit powers to the doctrine of the inherent powers of the jurisprudence of the Supreme Court of the United States of America.

The Communications Act of 1934 preceded the advent of CATV and cable television. Thus, as expected, that act did not originally include express rules for the regulation of this means of telecommunication.⁴ This situation remained at the time of the cases presented here, as denoted by the manifestations of the rapporteurs ⁵ for the respective judgments. CATV systems received signals from free-to-air television and amplified them for retransmission via cable or microwave. These CATV systems did not remunerate the producers or distributors of open television programs and, in general, charged their customers a pecuniary consideration. In the beginning and in general, CATV did not produce its own programming. CATV systems were initially established non- commercially in 1949. However, the first commercial system was established in 1950. Since then, the sector has experienced explosive growth. By the late 1950s, there were 550 systems serving 2 million people. In 1965, there were 1,857 systems in operation, plus 758 already licensed and 938 license requests. Also, in 1959, only 50 systems operated in microwaves and their signals reached a maximum of 300 miles. In 1964, there were 250 using microwaves and the signals exceeded 665 miles. CATV systems fulfilled one or both of the following functions: a) supplied the reception of open television signals in places where this was not possible in any other way; b) transmitted signals from distant stations to local antennas. As the number and scope of CATV systems increased, the main function became the import of signals from distant stations. Thus, although originally serving as local distribution aids for isolated areas and terrain adverse to reception of open signals, CATV systems have spread to metropolitan areas. They were now on the way to becoming a new nationwide communications system in which television signals could be transmitted to metropolitan areas across the country. The FCC's willingness to regulate CATVs has changed over the years of service expansion. In 1959, the FCC understood that CATVs would not be broadcasters (broadcasters), like open television, nor holders of essential infrastructure (common carriers), therefore, they did not fit among the activities then expressly disciplined in the Communications Act of 1934 and subject to its regulation. It also considered that, notwithstanding the presumed impacts of CATVs on free-to-air television, it would not be possible to determine in advance the effects of this. He then suggested that the matter be disciplined by Congress, which did not happen despite an attempt to amend the Communications Act of 1934.

In 1962, reassessing the significance of CATVs to its regulatory powers, the FCC admitted that the likelihood of adverse effects of competition with CATVs on local free-to-air television audiences and revenues had become substantial and could no longer be ignored. The agency then imposed two rules: a) CATVs should retransmit the signals of all stations located in the areas to which they transmitted (carriage rule); b) CATVs could not duplicate the programming of these local televisions in the period of 15 days before and after the local transmission (non-duplication rule). Following hearings held in 1965 and after arguing that the Communications Act of 1934 gave it regulatory authority over all forms of CATV, whether microwave or cable, the FCC prohibited CATVs from carrying signals from distant stations to the top 100 markets. of open television. Exceptions would be made for services already in operation prior to 2/15/1966 or when the FCC deemed that broadcasting would be consistent with the public interest, particularly with

the establishment and maintenance of free-to-air television service in the area to be served by a CATV. At the time, the FCC created summary procedures for the application of these rules.

B. METHOD

Shortly after the rule restricting long-distance signals via CATV to major television markets was issued, Midwest Television filed a lawsuit with the FCC against the Southwestern Cable Co. of signs from Los Angeles to San Diego. As San Diego, at the time, was the 54th television market in the United States, the FCC, understanding that there would be no way to recognize public interest to justify the questioned importation of signals, restricted the possibility of CATV transmission by Southwestern Cable Co. to areas where it already operated this service through 2/15/1966, which would exclude the San Diego area. The case was brought before the 9th Circuit Court of Appeals, which held that, under the Communications Act of 1934, the FCC lacked the authority to implement such a restriction. The point to be highlighted, for the purposes of this work, resides in the analysis and responses of the Supreme Court to the question whether, under the Communications Act of 1934, the FCC had competence to regulate CATV services. Thus, arguing that the characteristics of CATVs, as recognized by the FCC itself, in 1959, did not fit perfectly into the categories of common carriers or broadcasters, then expressly mentioned in the Communications Act of 1934 as those subject to FCC regulation, they would not be covered by this statute and, therefore, could not be regulated by the FCC. The Supreme Court, however, recalled that the FCC's competence to regulate broadcasting services and other forms of telecommunications derived from the Communications Act of 1934, which, as expressly provided, was to apply to all interstate and international telecommunications. He also noted that the responsibilities that the diploma assigned to the FCC would not be narrower than the field of application of its rules, since the Commission would work to make telecommunications accessible to all the people of the United States, fast, efficient and on a national scale and worldwide.

The Supreme Court then highlighted that nothing in the text or in the history of the preparation of the Communications Act of 1934 limited the competence of the FCC to those activities and modalities of telecommunication specifically described therein and, moreover, the CATV systems would be included in the broad definitions of telecommunications by wire or by broadcasting established therein. For the Supreme Court, as shown in the message from President Roosevelt who forwarded the proposed legislation and in the reports of the committees that analyzed it in Congress, by editing the Communications Act of 1934, an attempt was made to give the FCC a unified and comprehensive authority over all the forms of telecommunications, in order to keep under appropriate administrative control the dynamic aspects of telecommunications. Thus, although, at the time, the rapid growth of CATV systems could not be foreseen, the Communications Act of 1934 gave regulatory processes enough flexibility to adjust to the rapid evolution of the sector. The Supreme Court also found that, in order to fulfill the Commission's responsibilities relating to the equitable distribution of broadcasting services under the Communications Act of 1934 and its role in the development and preservation of local broadcasting systems, it was imperative to recognize the FCC's regulatory authority over CATVs, as importing signals from distant televisions could discourage local broadcasting activity. The

Supreme Court concluded that the FCC's authority over all interstate telecommunications by wire or radio, conferred under the Communications Act of 1934, allowed it to regulate CATV systems, but emphasized that this authority should be restricted to what was reasonably ancillary to the effective fulfillment of the Commission's responsibilities to regulate broadcasting. This case also dealt with the FCC's competence to regulate Community Antenna Television (CATV) services and followed the guidance of the aforementioned precedent case, *United States v. Southwestern Cable Co.*, of 1968, when the Supreme Court recognized the FCC's regulatory competence over such services, provided that it was restricted to what was reasonably ancillary to the fulfillment of its legal duties.

At the time of this judgment, the continuous growth in the number of CATV systems was mentioned, which already totaled 2,678 in operation, 1,916 licensed although inoperative and 2,804 requests for licensing. It was also highlighted that the evolution of cable systems, already with multi-channel capacity, would allow the offer of new and varied services, such as fax, electronic mail and data transmission (facsimile reproductions of documents, electronic mail delivery, and information retrieval). It was then noted that, for these reasons, the FCC, still in 1972, but after the publication of the rule evaluated in this case, had adopted the term cable television instead of CATV. This time, the norm in question, in addition to reinforcing the requirement for CATVs to operate in the transmission and distribution of local content, aimed to impel these CATVs to also act as producers of new programs, insofar as it began to demand that they be equipped for creating new programs (program-origination rule). Shortly after the judgment of *United States v. Southwestern Cable Co.*, 1968, the FCC initiated procedures to explore alternatives for how CATVs could better serve the public, especially in terms of acting as vehicles for community self-expression through the production of local programs. At the end of the process, the Commission, on 10/24/1969, edited a rule, applicable to CATVs with 3,500 or more subscribers, which obliged them to operate as distributors of local content and to have equipment for the production of local programs, under Too bad they can't transmit the signals from open television. For the FCC, this rule would be in tune with the primary purpose of its creation, in accordance with the Communications Act of 1934, to make radio or cable communication services accessible to the entire American people, in addition to fulfilling other objectives also provided for in the aforementioned statute, to encourage the most effective use of radio in the public interest and to promote the equitable distribution of television services among the various states and communities. Upon provocation by Midwest Video Corp., the Court of Appeals for the Eighth Circuit annulled the rule, understanding that the FCC lacked the competence to impose it, since the provisions would be far beyond the limit given by the criterion of what would be reasonably ancillary to the responsibilities and objectives of creation of the Commission. As already noted, as the potential uses for the services of the then-known CATVs expanded, the FCC began to adopt the more comprehensive term cable television to refer to this activity that already presented itself as a new telecommunications industry. In May 1976, the FCC issued a rule imposing that cable television systems with more than 3,500 subscribers and that transmitted signals from open television to have capacity for at least 20 channels and to dedicate one to four of these channels for access by third parties, in particular, by public entities, educational institutions, local governments or access lessors (public, educational, local governmental and leased-access users), in addition to holding all the necessary equipment for

this purpose. Under these rules, cable television would have no choice over who would use the dedicated access channels or control over what would be broadcast on them. The amounts that could be charged for the use of these access channels and the installations and equipment of cable television operators were also regulated. The FCC understood that these rules would impose a lower burden than the rule of generating own programming to carry out legal purposes for which the Commission was created, among them those consecrated in the case *United States v. Midwest Video Corp.*, 1972, to increase the number of vehicles for self-expression in local communities as well as programs and types of services for the public to choose from.

For the Commission, the offer of access channels would represent a social good and the rules in this sense were guided by objectives that it should pursue in the activity of regulating radio broadcasting, similarly to those that were thus recognized by the Supreme Court in the previous cases *United States v. Southwestern Cable Co.*, 1968, and *United States v. Midwest Video Corp.*, from 1972. *Midwest Video Corp.* protested alleging that the requirements for access channels dedicated to users specified by the FCC and without the cable television operators being able to select these users or control the programming broadcast by them implied a considerable degree of subtraction of editorial autonomy and the imposition of obligations typically enforceable against holders of essential infrastructure (common carriers), which would be contrary to the express exclusion of broadcasters from the definition of holders of essential infrastructure (common carriers) given by the Communications Act of 1934¹⁵. of access configured an interference in the operations of cable television qualitatively different from those rules recognized as valid in the cases *United States v. Southwestern Cable Co.*, 1968, and *United States v. Midwest Video Corp.*, 1972. For the Commission, as the rules were related to achieving, in reasonable terms, the objectives for which its authority was established, they could not be considered as exorbitant of its competence just because they were identified with the nature of the rules affecting the regulation of common carriers. For the FCC, the clincher was that the adopted rules furthered its legal goals. As for the values of the First Amendment to the United States Constitution¹⁶, for the FCC, regarding the regulation of broadcasting and related activities, they would be honored by the measures that favored the circulation of ideas. The Court of Appeals for the Eighth Circuit invalidated the rules of access, capacity and installations under discussion, understanding that they were an affront to an express legal command, prohibiting the extension to activity related to that of broadcasters, such as, in this case, cable television, common carrier treatment. That said, the Court concluded that the rules discussed in *United States v. Midwest Video Corp.* of 1979 would not reasonably be ancillary to the FCC's authority to regulate broadcasting activity. For the Court of Appeals, such rules also amounted to serious offenses against the First Amendment.

In this case, the decision of the majority¹⁷ of the Supreme Court was to reaffirm the decision of the Court of Appeals, noting that the so-called ancillary authority would not be unlimited and could not disregard provisions of the Communications Act of 1934 that protected the editorial freedom of broadcasters and, by extension, also from cable television operators. The Supreme Court upheld *Midwest Video Corp.*'s argument. that the rules of access to cable channels extrapolated the field of competence of the FCC recognized in previous judgments on the activity of CATVs. For the Supreme Court, unlike those other norms, the access rules brought an elision

of the cable television operators' control over the programming content they should transmit, relegating them, in these situations, to the status of common carriers. The Supreme Court pointed out that, in the Communications Act of 1934, there was language unequivocally stipulating that broadcasters should not be treated as common carriers, which would be consistent with the purposes of the same statute, as recognized in a previous case, *Columbia Broadcasting System, Inc. v. Democratic National Committee*¹⁸, to preserve for the licensed broadcaster editorial control of programming without interference from the FCC. According to the Supreme Court's decision, such protection of journalistic freedom would not be applicable only to broadcasters and would not have its strength diminished by the technological innovation brought by cable television, which, like open television, should have preserved discretion as to the programming it broadcasts. would run. Called digital television and identified by the acronym DTV, digital television represented a significant technological evolution by allowing the transmission of more information through a channel of the electromagnetic spectrum than would be possible through analog television. In this way, the transmission of very high quality video signals, known as high definition television, or multiple and simultaneous video, voice and data content in the same frequency range traditionally used for a single transmission, was made possible . by analogue television. According to FCC and Congress rules , analogue transmission should be completely closed by the end of 2006. that all receivers of digital television signals, manufactured from July 2005, would recognize a code embedded in the transmission and that would prevent the redistribution of content. The code was designated broadcast flag, which is why the referred standards were named broadcast flag regulations or broadcast flag rules or Flag Order. The broadcast flag code is designed to only affect receivers after the entire transmission has completed.

C. RÉSULTAT ET DISCUSSION

Understanding that digital television technology carried a risk of massive unauthorized redistribution of broadcasters' signals and thus discouraging them from producing high-value content, the FCC issued the Flag Order on the grounds that it was necessary to preserve economic viability. of open television (over-the-air television) and would not harm the consumer's enjoyment of the services of these companies. When justifying the adoption of broadcast flag regulations, the FCC did not refer to any express provision and based its competence to edit broadcast flag rules only on its ancillary competence resulting from Title I of the Communications Act of 1934. The Commission, by majority²¹ , understood that the norms would be reasonably ancillary to its competence to guarantee the diversity of content in television programming and to promote the transition from analogue to digital transmission. In court, the Commission recalled that it had the authority to enact rules that would give effect to its legal objectives, even in the absence of an express provision on the specific regulated matter. Along these lines, the FCC has relied only on the provisions of Title I of the Communications Act of 1934 which gave it authority

over all communications by radio or wire and which included in the definition of radio communication not only the transmission of signals but also all instruments, equipment and apparatus related to the entire cycle of emitting and capturing signals, including digital television receivers. The American Library Association alleged that the broadcast flag rules did not deal with interstate broadcasting as defined in Title I of the Communications Act of 1934 since the code itself (the flag) was not required for transmission, and the way in which it was transmitted was not modified. would give reception and would not take effect until all transfer of digital signals was completed. The FCC's decision was contested with arguments to the effect that: 1) the FCC lacked competence to impose that reception devices be manufactured with a device for recognizing the broadcast flag; 2) the norms would clash with rules of intellectual property law; and 3) the measure would have been arbitrary. It was also alleged that the ancillary authority would not be unlimited and that the FCC could not regulate an activity that would not characterize interstate radio or cable communication and, furthermore, that the questioned rules did not deal with the transmission of digital signals, but with the use of the transmitted content after its reception is completed. Therefore, with these arguments, it was maintained that the FCC would have extrapolated the limits of its express or ancillary competences. Recalling the axiom that regulatory agencies (administrative agencies) can only regulate matters within the powers delegated to them by Congress, the Court of Appeals referred to other decisions of the Supreme Court that ratified the understanding that agencies can only act based on in express competences over, or in the reasonable exercise of authority ancillary to its legal objectives. However, the Court of Appeals emphasized that, according to the decisions of the Supreme Court described in this work, the lawful exercise of ancillary authority required the normative act based on it to meet two conditions: the regulated matter should fall within the competences and general objectives established in Title I of the Communications Act of 1934; and the content of the rules should be reasonably ancillary to the effective performance of the FCC's express legal responsibilities. For the Court of Appeals, the FCC's powers and general objectives defined in Title I of the Communications Act of 1934 would reach the regulation of devices for receiving television signals, but only with regard to the function of these devices in the reception process itself . Noting that, in the definition of radio communication, that statute would refer only to instruments, equipment and devices incidental to the transmission, the Court of Appeals stated that the FCC could not provide for the functioning of these devices after the transmission was completed. She also stated that the measure adopted by the FCC would have exceeded the scope of the authority delegated to it by Congress and, therefore, would not have met the first condition for the exercise of ancillary authority, since the Flag Order did not specifically deal with security services. radio or cable communication.

The Court of Appeals pointed out that its understanding was also supported by the content and wording of other telecommunications statutes, the Channel Receiver Act of 1962 and the Communications Amendments Act of 1982, by which it was clear that Congress never conferred on the FCC the power to to regulate consumer use of television reception equipment after the transmission of signals by broadcasters has ended. Finally, agreeing with the arguments of the American Library Association that the FCC would have exceeded the limits of its competences, the Court of Appeals annulled the broadcast flag rules. In this case, it was a matter of deciding whether or not the FCC had authority over network management practices by cable

internet providers. More specifically, the Commission's competence was taken care of to regulate the provider's interference in the use of the network by consumers in peer-to-peer²⁴ information traffic that occupies large amounts of bandwidth. In 2005, the FCC published its policies and principles on the internet in a document known as the FCC's Internet Policy Statement, in which it affirmed the right of consumers to choose the content accessed, as well as to run applications and enjoy services available on the network (consumers are entitled to access the lawful Internet content of their choice). In 2007, Comcast was found to be interfering with its subscribers' use of high-speed Internet service for applications designed to exchange peer-to-peer information. Associations defending collective interests filed a formal complaint with the FCC against Comcast's practice. In response, the company argued that its interference in the use of peer-to-peer programs was necessary to manage the limited capacity of the network. At the end of the administrative process, in 2008, the FCC declared that Comcast had violated its Internet Policy Statement, because: 1) it had significantly impeded the ability of consumers to access content and use applications from your choice; and 2) it had at its disposal several other options for managing network traffic in a way that did not discriminate against peer-to-peer communications. In addition to this statement, the FCC, in light of Comcast's commitment to adopt new ways of managing broadband demand, ordered the company to present in detail the measures it would adopt in this regard. The Commission also raised the possibility of punishment if Comcast did not fulfill its commitment or did not comply with the determinations to provide information. Comcast challenged this FCC order in the Court of Appeals for the District of Columbia, claiming, among other reasons, that the Commission failed to demonstrate its competence to govern network management practices. The arguments about the competence of the FCC, among those taken to court, were considered by the Court of Appeals as decisive for the resolution of the case and in them also lies the interest for this work. Finally, the FCC argued that it could act to give effect to any provisions of the Communications Act of 1934 that declare the legislature's will and that the Supreme Court would have recognized responsibility and, consequently, its ancillary competence to implement the various goals, objectives and policies envisaged by Congress and expressed in the Communications Act of 1934. Comcast, in preliminary, qualified as obtaining dictum, not part of the judgment on the merits of the cause, the outstanding manifestation of the Supreme Court in the *Brand X* case. , at the time, decided only on the legality of the framework given by the FCC to Internet access providers via cable as information services, without stating that its ancillary authority confers legitimacy on any rule it edits in this field. Comcast conceded that since its Internet services could be considered wireline communication and therefore fall within the general provisions of the Communications Act of 1934, the first condition for exercising the FCC's ancillary authority would be met. However, it alleged that the Commission had not demonstrated that the disputed order met the second requirement. For Comcast, the devices mentioned by the FCC to justify its acts would be statements of policy and, in addition to not being norms of concrete effectiveness (operative provisions), would not increase or confer powers to the agency, thus not constituting express responsibilities legal (statutorily mandated responsibilities). In its defense, the FCC also added other devices that, in its view, would not be political declarations, but texts expressly delegating authority, and would complement the grounds of its competence to regulate network management practices by access providers to cable internet.

The first of these provisions, present in the Telecommunications Act of 1996, establishes that the Commission must encourage the development, on a reasonable and timely basis, of advanced means of telecommunications for all Americans, using for this purpose price-cap regulation, or suspending the requirement of certain rules or other regulatory methods that remove barriers to investment in infrastructure. The Commission also argued that there is subsidiarity between the regulation of network management practices and the provision in Title II of the Communications Act of 1934 that prices charged by common carriers must be fair and reasonable. The Commission added that Comcast's practices interrupted some voice services over the Internet (voice over Internet Protocol - VoIP) and that this impaired the effect of these services on traditional telephony prices, subject to the terms of the. The FCC also alleged that the transmission of videos over the Internet affects the broadcasting industry, with influences on the generation of local programming, diversity of opinions and the attractiveness of bringing signals to certain markets. In that context, its order to Comcast would ancillary to its authority to regulate the intended broadcasting services. Finally, the FCC alleged that the order to Comcast would be related to its competence to ensure reasonable prices for cable television services, since, in the absence of obstacles to accessing videos over the Internet, the consumer would find an alternative to the video on demand offered by cable television, which would put downward pressure on cable television prices.

D. CONCLUSION

In short, the comparison of the ancillary authority institutes and the implicit powers outlines the development of a theory that could enable the recognition of administrative competences of the Brazilian regulatory agencies that, although not expressly disposed, emerge as an imperative for the fulfillment of responsibilities directly given by law, according to contours defined in the same governing legislation. It is, therefore, the proper translation of legal institutes for argumentative enrichment of the administrative tradition of functional link of competences for the purpose of proper interpretative explanation of the limits of powers not expressly stated in the legal documents authorizing regulatory action in general, and of the sector telecommunications in particular.

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