

Stepping Back onto the Escalator: Answering the D.C. Circuit's Remand of the Pole Attachment Question

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Introduction

In the recent case of *Mozilla v. FCC*,¹ the D.C. Circuit evaluated the legal legitimacy of the Federal Communications Commission's 2018 *Restoring Internet Freedom Order* ("RIFO").² The question at bar was the agency's decision to reverse the imposition of Title II common carrier regulation on the Internet dictated by the Obama-era 2015 *Open Internet Order*³ and to return the classification of broadband Internet access services back to a Title I "information" service. After review, the D.C. Circuit agreed.

[T]he current dispute over of how the RIFO affects pole attachment access should be viewed not as a question of jurisdiction but as a question of reliance interests.

But this victory came at a legal cost: while the court upheld the Commission's decision to place broadband back under the umbrella of Title I, the court also held that by deliberately placing "broadband *outside* of its Title II jurisdiction"⁴ the Commission had essentially abdicated *all* legal authority—express and ancillary—over information services.⁵ Stated another way, while the court recognized that removing information services from the potential of

express common carrier regulation under Title II was obviously the point of the exercise, the court also held that because Title I is not an affirmative grant of regulatory authority, reclassification meant that the Commission similarly abdicated any ability to exercise its ancillary jurisdiction over information services because there is no longer any specific statutory regulatory authority under Title II (along with Titles III and VI) to which the Commission could attach.⁶ According to the D.C. Circuit's logic, therefore, the Commission's jurisdiction over broadband Internet access services now resides in some sort of regulatory purgatory.⁷

It was only by the Commission's classification of broadband Internet access as a Title II telecommunications service in 2015 that broadband-only providers could avail themselves of Section 224—a statutory "right" that was created by the stroke of the agency's pen that lasted barely two years.

The D.C. Circuit's "statutory abdication" logic created a ripple effect across a wide variety of legal action items the Commission sought to resolve in its *RIFO*. These issues included,

among others, the blanket preemption of state regulation of the Internet, the continued ability to provide broadband as part of the agency's Lifeline program, and the question of who is eligible to take advantage of the pole attachment regime contained in Section 224 of the Communications Act—the court ultimately reversing the first issue out right and remanding the latter two topics for further consideration. As several of these topics have been already examined elsewhere,⁸ this PERSPECTIVE will focus on the discrete issue of how the Commission should respond to the court's remand of the pole attachment question.⁹

[T]he Commission must emphasize in its Order on Remand that the decision to structure a business plan to provide broadband exclusively was a deliberate choice by private actors and not a government mandate.

Background

Where it is impracticable to bury fiber, network operators must attach their transmission lines and equipment to utility poles.¹⁰ For the most part, the rates carriers must pay for pole attachments are regulated by default by the Federal Communications Commission,¹¹ but the Communications Act also allows any State to displace Commission regulation if the State certifies to the Commission that it is regulating pole attachments.¹² According to the Commission, approximately twenty States and the District of Columbia regulate pole attachments under this regime.¹³ Under the plain terms of the Communications Act, however, the ability to access poles at a federally regulated rate is expressly directed towards “a cable television system or provider of telecommunications service.”¹⁴

This statutory language did not go unnoticed. When the *RIFO* was appealed to the D.C. Circuit in *Mozilla*, several parties argued that because the Commission's reclassification decision “took broadband outside the current statutory scheme governing pole attachments,” the agency deprived carriers who exclusively provide broadband of their “statutory right, under federal law, to nondiscriminatory, just and reasonable access to the poles and conduit that cable providers and telecommunications carriers enjoy.”¹⁵

The Majority in *Mozilla* agreed. According to the court, the “Commission offered, at best, scattered and unreasoned observations in response to comments on this issue.”¹⁶

The court began its critique of the Commission's treatment of the pole attachment dispute by returning to its “statutory abdication” line of reasoning.¹⁷ According to the court,

[T]his whole regulatory scheme applies only to cable television systems and “telecommunications service[s]” —categories to which, under the [*RIFO*], broadband no longer belongs. Section 224's regulation of pole attachments simply does not speak to information services. Which means that Section 224 no longer speaks to broadband.¹⁸

The court also pointed out several glaring inconsistencies in the agency's discussion of the continued applicability of Section 224 in the *RIFO*, going so far as to note that the Commission's analysis “makes no sense.”¹⁹ For example, the court found that in some portions of the *RIFO* “the Commission candidly acknowledged that reclassification means that Section 224 no longer governs broadband” but in other portions of the *RIFO* “the Commission seemed to whistle past the graveyard, implying without reasoned basis that Section 224 would continue to govern reclassified broadband.” As the court bluntly stated, “Both cannot be true.”²⁰

That said, the court did express some sympathy towards the FCC's argument that so long as the same infrastructure is used to provide both

telecommunications and information services, the provisions of Section 224 governing pole attachments would continue to apply. While the court stated that this “dual use” rationale may be “all well and good for providers who ‘commingl[e]’ telecommunication and broadband services,” this argument does nothing to help those carriers who exclusively provide standalone broadband like Google Fiber.²¹ Thus, concluded the court, as “the plain text of Section 224 speaks only of telecommunications services and cable television services,” because the Commission voluntarily abdicated all of its authority under Title II in its *RIFO* the “statute textually forecloses any pole-attachment protection for standalone broadband providers.”²² The court therefore remanded this issue to the Commission “to confront the problem in a reasoned manner.”²³

Not a Question of Jurisdiction, but of Reliance Interests

If, as the court believes, access to pole attachments is crucial to broadband deployment and, ultimately, increased competition,²⁴ what path should the Commission take on remand?

One logical step would be for the Commission to formulate a theory of ancillary jurisdiction to fit broadband-only providers under the Section 224 umbrella—a path, incidentally, that the Commission refused to take in its *RIFO* and in its briefs to the court.²⁵ Given the court’s view on statutory abdication, however, developing such a theory would be tricky (though not impossible) and it would require an about-face in the Commission’s position.²⁶

Fortunately, we need not go there at this time because the current dispute over how the *RIFO* affects pole attachment access should be viewed not as a question of jurisdiction but as a question of reliance interests.

As the court legitimately points out, Section 224 clearly states that the ability to access pole

attachments at federally-regulated rates is limited to those carriers who provide either telecommunications service or cable service.²⁷ As the court also notes, this statutory regime is quite generous: for almost two decades it has been Commission policy—a policy which, incidentally, was upheld by the Supreme Court in *NCTA v. Gulf Power*—to allow a cable or telecommunications service provider nonetheless to avail themselves of the applicable federal rate even when that carrier also provides broadband Internet access service over the same network.²⁸ Still, the court took umbrage “with the lapse in legal safeguards that [the agency’s] reversal of policy triggered” for broadband-only carriers.²⁹

With all due respect to the court, its umbrage is misplaced.

[T]he the correct legal question on remand is not whether the RIFO deprived broadband-only carriers of inalienable “statutory rights” as the court suggests, but rather whether these carriers had valid reliance interests that were harmed by the Commission’s 2018 choice to reverse the 2015 Open Internet Order? According to the court’s own opinion, the answer to that question in this particular case is a resounding “No.”

Conspicuously absent from the Majority’s pole attachment discussion is any recognition of the important fact that that prior to the 2015 *Open Internet Rules* carriers that provided broadband-only services were similarly foreclosed from taking advantage of the statutory regime under Section 224. It was only by the Commission’s classification of broadband Internet access as a

Title II telecommunications service in 2015 that broadband-only providers could avail themselves of Section 224—a statutory “right” that was created by the stroke of the agency’s pen that lasted barely two years.

[B]ecause the risk that the 2015 Open Internet Order could be reversed was well-known to all—and thus provides no reliance interest—the court should have little legal sympathy for broadband-only carriers under these circumstances.

Thus, the correct legal question on remand is not whether the *RIFO* deprived broadband-only carriers of inalienable “statutory rights” as the court suggests, but rather whether these carriers had valid reliance interests that were harmed by the Commission’s 2018 choice to reverse the *2015 Open Internet Order*? According to the court’s own opinion, the answer to that question in this particular case is a resounding “No.”³⁰

As the court expressly held in *Mozilla*, to the extent the change in the FCC’s position “implicated serious reliance interests, we agree with the Commission that such reliance would have been unreasonable on the facts before us.”³¹ For example, the court noted that “the 2015 rules had been in effect ‘barely two years before the Commission proposed to repeal them,’ a limited period to engender reliance.” Similarly, the court found that “in light of the Commission’s approach to classifying cable modem service and Internet access since the late 1990s, the [*RIFO*] could reasonably have been viewed as a regulatory step that might soon be reversed.” Finally, the court observed that in “the two-year period between the [*2015 Open Internet Order*] and the Commission’s announcement of its intention to return to prior policies, the [*2010 Open Internet Order*] faced

persistent legal challenges” and, as such, any “reliance on the rules of the [*2015 Open Internet Order*] would not have been reasonable unless tempered by substantial concerns for legal or political jeopardy.”³² By the Court’s own logic in *Mozilla*, therefore, the pole attachment issue is no issue at all.

A More Fundamental Question

Like everything else in life, context is important. Before remanding the pole attachment issue, perhaps the court should have considered more carefully the fundamental question underlying the dispute: why do “broadband only” providers choose that business model in the first instance?

According to the court, the answer is one of consumer demand: “Americans have come to ‘increasingly * * * favor’” standalone broadband.³³ Perhaps so. But an arguably better explanation is *regulatory evasion*: by choosing to provide “stand-alone” broadband, carriers can avoid, among other things, onerous local cable franchise fees and buildout requirements,³⁴ local telecommunications taxes, and a host of other regulatory requirements.³⁵ It is axiomatic that firms are not passive recipients of regulation; thus, since time immemorial companies have deliberately structured their respective business plans specifically to evade³⁶ (and very often even to arbitrage³⁷) the regulations under which they operate.

Moving forward, the Commission must emphasize in its *Order on Remand* that the decision to structure a business plan to provide broadband exclusively was a deliberate choice by private actors and not a government mandate. As the court openly acknowledges, because the risk that the *2015 Open Internet Order* could be reversed was well-known to all—and thus provides no reliance interest—the court should have little legal sympathy for broadband-only carriers under these circumstances.

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¹ *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), *reh'g en banc denied*, (D.C. Cir. 18-1051) (February 6, 2020).

² *In the Matter of Restoring Internet Freedom*, FCC 17-166, DECLARATORY RULING, REPORT AND ORDER, AND ORDER, 33 FCC Rcd. 311 (rel. January 4, 2018).

³ *Protecting and Promoting the Open Internet*, FCC 10-201, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, 30 FCC Rcd 5601 (2015); *aff'd United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016); *pet. for rehearing en banc denied*, 855 F.3d 381 (2017); *cert. denied*, 139 S.Ct. 453 (2018) (hereinafter "2015 Reclassification Order"). For a thorough critique of the legal gymnastics used in these decisions, see L.J. Spiwak, *USTelecom and its Aftermath*, 71 FEDERAL COMMUNICATIONS LAW JOURNAL 39 (2019) (available at: <http://www.fclj.org/wp-content/uploads/2018/12/71.1-%E2%80%93Lawrence-J.-Spiwak.pdf>).

⁴ *Mozilla*, *supra* n. 1, 940 F.3d at 76 (emphasis in original). The court also observed that the Commission similarly placed broadband outside of the definition of "radio transmission" under Title III and a "cable service" under Title VI. *Id.* at 75.

⁵ *Mozilla*, *id.* at 75. For a full discussion of the court's "statutory abdication" theory in *Mozilla*, see L.J. Spiwak, *The Preemption Predicament Over Broadband Internet Access Services*, 21 FEDERALIST SOCIETY REVIEW 32 (2020) (available at: <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/TeweyQF9cQxzyAlQibuYChBrVIaxUF1fqZzNe7Wb.pdf>).

⁶ *Id.* at 75. For a broader discussion of the Commission's ancillary jurisdiction in the broadband space, see L.J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers? – A Review of the Recent Case Law*, 18 J. INTERNET LAW 1 (2015) (available at: <https://www.phoenix-center.org/papers/JournalofInternetLawBoundsofFCCAuthority.pdf>).

⁷ It should be noted that the Commission never viewed Title I classification as an abdication of its oversight authority over the Internet altogether. As the Commission noted in its seminal 2004 *Pulver Order*, even though "Congress has clearly indicated that information services are not subject to the economic and entry/exit regulation inherent in Title II," Congress has nonetheless provided "the Commission with ancillary authority under Title I to impose such regulations as may be necessary to carry out its other mandates under the Act." See, e.g., *Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, FCC 04-27, MEMORANDUM OPINION AND ORDER, 19 FCC Rcd. 3307 (rel. February 19, 2004) (hereinafter "*Pulver Order*") at ¶ 69. The Commission's problem is that for the last fifteen years it has yet to articulate a theory of ancillary jurisdiction that could satisfy a court. See L.J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?*, *supra* n. 6; Spiwak, *The Preemption Predicament Over Broadband Internet Access Services*, *supra* n. 5.

⁸ *Supra* n. 5.

⁹ See PUBLIC NOTICE: *Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit's Mozilla Decision*, DA 20-168 (rel. February 19, 2020) (available at: <https://www.fcc.gov/document/wcb-seeks-comment-discrete-issues-arising-mozilla-decision>).

¹⁰ T.R. Beard, G.S. Ford and L.J. Spiwak, *The Pricing of Pole Attachments: Implications and Recommendations*, 9 REVIEW OF NETWORK ECONOMICS ART. 3 (2010) (available at: <https://www.degruyter.com/view/journals/rne/9/3/article-rne.2010.9.3.1192.xml.xml>).

¹¹ 47 U.S.C. § 224(b)(1).

¹² See *id.* § 224(c)(1) ("Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions or access to poles, ducts, conduits, and rights-of-way * * * for pole attachments in any case where such matters are regulated by a State.").

¹³ See *States That Have Certified That They Regulate Pole Attachments*, 25 FCC Rcd. 5541, 5541-5542 (May 19, 2010); *RIFO*, *supra* n. 2 at ¶ 185.

¹⁴ 47 U.S.C. § 224(a)(4).

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¹⁵ *Mozilla*, *supra* n. 1, 940 F.3d at 66 (emphasis in original).

¹⁶ *Mozilla*, *id.* at 65.

¹⁷ Spiwak, *supra* n. 5.

¹⁸ *Mozilla*, *supra* n. 1, 940 F.3d at 66.

¹⁹ *Id.*

²⁰ *Id.* at 66-67.

²¹ *Id.* at 67.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 66.

²⁵ *Id.* at 76.

²⁶ *C.f.*, *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012) (upholding FCC's data roaming rule); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (upholding FCC's use of ancillary authority to require must carry rules).

²⁷ 47 U.S.C. § 224.

²⁸ *See National Cable Television Association v. Gulf Power*, 534 U.S. 327 (2002).

²⁹ *Mozilla*, *supra* n. 1, 940 F.3d at 67.

³⁰ Given the huge sunk costs required for entry into the telecoms business, reliance issues have their place. However, there is a significant difference between a change of regime which affects regulatory arbitrage opportunities (*see infra*) and, for example, committing billions of dollars to construct a wireless network only to have the FCC subsequently ignore interference externalities in adjacent bands. *See, e.g.*, T.R. Beard, G.S. Ford & M.L. Stern, *Interference, Sunk investment, and the Repurposing of Radio Spectrum*, INFORMATION & COMMUNICATIONS TECHNOLOGY LAW (09 February 2020) (available at: <https://www.tandfonline.com/doi/full/10.1080/13600834.2020.1726020>).

³¹ *Mozilla*, *supra* n. 1, 940 F.3d at 64.

³² *Id.*

³³ *Id.* at 67.

³⁴ *See, e.g.*, G.S. Ford, T.M. Koutsky and L.J. Spiwak, *The Economics of Build-Out Rules in Cable Television*, 28 HASTINGS COMMUNICATIONS & ENTERTAINMENT LAW JOURNAL 207 (2006) (available at: <https://www.phoenix-center.org/papers/CommEntEconomicsofBuildoutRules.pdf>).

³⁵ *See, e.g.*, *City of Eugene v. Comcast*, 359 Or. 528 (Oregon 2016); T.R. Beard, G.S. Ford and M. Stern, PHOENIX CENTER POLICY BULLETIN NO. 45, *Infrastructure Investment and Franchise Fee Abuse: A Theoretical Analysis*, (April 2019) (available at: <https://www.phoenix-center.org/PolicyBulletin/PCPB45Final.pdf>).

³⁶ *See, e.g.*, *The Curious Cases of Aereo, BarryDriller and FilmOn X*, @LAWANDECONOMICS BLOG (October 3, 2013) (available at: <http://www.phoenix-center.org/blog/archives/1495>).

³⁷ *See, e.g.*, *Connect America Fund et al.*, FCC 11-161, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, 26 FCC Rcd 17663, *pets. for review denied sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) at ¶¶ 33, 656, 820 (noting that some firms engage in at least three types of arbitration abuse of the FCC's intercarrier access charge regime: access stimulation which occurs "when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls;" phantom traffic, which occurs when "calls for which identifying information is missing or masked in ways that frustrate intercarrier billing;" and traffic or mileage pumping, which occurs when "service providers designate distant points of interconnection to inflate the

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mileage used to compute the transport charges”)); *see also In the Matter of 8YY Access Charge Reform*, FCC 18-76, FURTHER NOTICE OF PROPOSED RULEMAKING, 33 FCC Rcd. 5723 (rel. June 8, 2018).