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Press Release

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NEW PHOENIX CENTER ANALYSIS PROVIDES LEGAL FRAMEWORK TO EVALUATE D.C. CIRCUIT REMAND OF POLE ATTACHMENT DISPUTE IN *MOZILLA v. FCC*

Analysis finds that dispute over pole attachment access should be viewed not as a question of jurisdiction but as a question of reliance interests

WASHINGTON, D.C. — In the recent case of *Mozilla v. FCC*, the D.C. Circuit evaluated the legal legitimacy of the Federal Communications Commission’s 2018 *Restoring Internet Freedom Order* (“*RIFO*”). 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* and to return the classification of broadband Internet access services back to a Title I “information” service. After review, the D.C. Circuit agreed. But 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” the Commission had essentially abdicated all legal authority — express and ancillary — over information services.

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*. One of these issues was the question of who is eligible to take advantage of the pole attachment regime contained in Section 224 of the Communications Act, ultimately remanding the issue to the FCC for further consideration.

In new PHOENIX CENTER POLICY PERSPECTIVE released today entitled *Stepping Back onto the Escalator: Answering the D.C. Circuit’s Remand of the Pole Attachment Question*, Phoenix Center President Lawrence J. Spiwak reviews the court’s reasoning and sets forth some suggestions about how the Commission should address the court’s concerns on remand.

As Spiwak explains, conspicuously absent from the Majority’s pole attachment discussion is the recognition that that prior to the 2015 *Open Internet Rules* broadband-only carriers were foreclosed from the statutory regime under Section 224. Thus, according to Spiwak, 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 choice to reverse the 2015 *Open Internet Order* two years later? As Spiwak points out, the answer to that question is a resounding “No.” According to the D.C. Circuit’s own opinion in *Mozilla*, to the extent the change in the FCC’s position “implicated serious reliance interests ... such reliance would have been unreasonable on the facts before us.”

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“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,” said study author and Phoenix Center President Lawrence J. Spiwak. “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.”

A full copy of PHOENIX CENTER POLICY PERSPECTIVE NO. 20-02, *Stepping Back onto the Escalator: Answering the D.C. Circuit’s Remand of the Pole Attachment Question*, may be downloaded free from the Phoenix Center’s web page at: <http://www.phoenix-center.org/perspectives/Perspective20-02Final.pdf>.

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