**Case Title:** Mozilla Corporation v. Federal Communications Commission and United States of America

**Case number:** No. 18-1051

**Law reference:**

**Date of decision:** October 1, 2019

**Region:** USA, North America

**Type of expression:** Electronic/Internet-based Communication

**Judicial body:** Appellate Body

**Type of law:** Administrative Law

**Main theme:** Licensing/Media Regulation

**Outcome:** Law or Action Upheld

**Status:** Closed

**Tags:** Internet, Internet Service Providers

**Excerpt:**

**Summary and Outcome**

The District of Columbia Circuit Court in the USA upheld rules issued by the US Federal Communications Commission (FCC) classifying broadband Internet access as an “information service” under Federal legislation, thereby liberating broadband providers from certain common carrier obligations. The case came about after the FCC changed its position after earlier classifying broadband service as “telecommunication service” in 2015, and in the process imposing onerous obligations on broadband providers. The court held that the question of classification was an policy one, and the FCC had permissibly exercised its powers under the applicable legal frameworks to change its policy.

**Facts**

This case concerns the power of the FCC to adopt policies to govern broadband Internet and mobile broadband. The history of the regulation of the internet in the USA is well documented in [*USTA*,](https://globalfreedomofexpression.columbia.edu/cases/united-states-telecom-association-v-fcc/)  another DC Circuit case dealing with largely similar issues. Briefly, the Communications Act 1934 (“the Act”) forms the legal framework for regulation of the internet. The Telecommunications Act of 1996 amended the Act to create two potential classifications for broadband Internet: “telecommunications services” under Title II of the Act and “information services” under Title I. A Title II classification entails common carrier status, activating a host of statutory requirements and restrictions on the services, such as furnishing “communication service upon reasonable request,” and doing so without “unjust or unreasonable discrimination in charges practices, classifications, regulations, facilities, or services,” while charging “just and reasonable rates.” (U.S., Communications Act of 1934, §§ 201(a), 202(a), 201(b)). Title I, on the other hand, exempts common carriage status. The Act empowers the FCC to classify broadband internet services into the appropriate statutory categories.

In 1998, the FCC classified DSL service – essentially broadband over phone lines – as “telecommunication services” under Title II. Four years later, in 2002, the FCC determined that cable modem service was as an “information service” exempt from common carrier status, a determination that was upheld by the Supreme Court in *Brand X*. Subsequently, in a 2007 order, the FCC classified other types of broadband services, such as DSL and mobile broadband service, also as “information services”. In 2015, after a Notice of Proposed Rulemaking and lengthy deliberations, the FCC ordered that broadband internet access is a “telecommunications service” and that mobile broadband is a “commercial mobile service”. The DC Circuit upheld that classification in *USTA.*

In 2017, the FCC issued another NPRM seeking to undo its 2015 order. The FCC subsequently issued the Restoring Internet Freedom order in 2018 (“2018 Order”), which:

1. classifies broadband internet as an “information service” and mobile broadband as a “private mobile service”; and
2. concludes that the benefits of a market-based, “light-touch” regime for Internet governance outweigh those of common carrier regulation under Title II; and
3. “preempt[s] any state or local measures that would effectively impose rules or requirements that [the FCC has] repealed or decided to refrain from imposing in [the] Order …”

Several petitioners, including Mozilla Corporation, challenged the FCC’s interpretation of the Act (collectively “challengers”) by petitioning the United States Court of Appeals for The District of Columbia Circuit to review the 2018 Order. The challengers argued that FCC’s the reclassification of broadband service as “information service” was arbitrary and capricious for not having adequately considered and addressed a number of issues, including its effects on public safety, consistency with existing regulation on pole attachments, and possibly eliminating the statutory basis for program – called the Lifeline Program – which relies on the inclusion of broadband services to ensure that low-income consumers have access to affordable internet services. The challengers also argued that the FCC was not authorized to issue its preemption directive.

**Decision Overview**

The court delivered a per curiam opinion. The main issues before the court were: 1. Whether the FCC lawfully classified broadband internet access service as an “information service” under the Act? 2. Whether the Order’s preemption directive was legitimate?

On the first issue, the FCC had made two arguments in its 2018 Order to defend its position had properly classified broadband service as an “information service”. First, the FCC reasoned that broadband service “*has the capacity or potential ability to be used to engage in the activities within the information service definition …*” [2018 Order para 30, quoted at p. 14]. Second, the FCC argued that if the Act requires the service itself (as opposed to enabling its users) to perform the activities typified in the definition of “information service”, broadband service meets that standard by having specific information-processing features like Domain Name Service (DNS) and caching that are functionally integrated within it.

The challengers relied on several plausible alternative interpretations of the Act to argue that the FCC’s classification of broadband service as “information service” was incorrect. The court rejected most of these arguments. Much of the court’s reasoning rejecting these arguments were guided by the two fundamental principles that govern the role of a reviewing court examining an agency’s administrative action: 1. that its role is limited to ensuring that the agency has acted within the bounds of its authority and 2. that it does not “inquire as to whether the agency’s decision is wise as a policy”, [at 16, quoting *USTA*]but that it only resolves legal questions related to the permissibility of the agency action in question.

The court relied on the US Supreme Court’s 2005 decision in [*Brand X*](https://globalfreedomofexpression.columbia.edu/laws/u-s-natl-cable-tel-assn-v-brand-x-internet-svcs-545-u-s-967-2005/)to conclude that “*DNS and caching themselves can properly fall within the ‘information service’ rubric*” and that they are “*sufficiently integrated with the transmission element of broadband that it is reasonable to classify cable modem service as ‘information service’*” [p. 17]. Even if some consumers obtain DNS and caching services form third-party sources, the court concluded that the FCC’s finding that “[a]pproximately 97 percent” “rely upon the DNS functionality provided by their ISP” [p. 41] met *Brand X’*srequirements for functional integration.

In examining the validity of the 2018 Order, however, the court found that the FCC had not adequately considered the implications of the order on three counts: public safety, the regulation of pole attachments, and the effects on the Lifeline Program. On those three limited respects, the court held that the 2018 Order was arbitrary and capricious, and remanded to the FCC to adequately address its impact on the three issues.

The next important issue was whether the FCC’s preemption directive was valid. The FCC had grounded the preemption directive on two arguments. First was the “impossibility exception” to state jurisdiction. As a general rule, the FCC is empowered to regulate only interstate communication, and cannot extend its jurisdiction on intrastate communications. The impossibility exception basically empowers the FCC to regulate when it is “not possible to separate the interstate and the intrastate components of the asserted regulation” [at 127]. The second ground of the FCC’s preemption direction was that the FCC was enforcing a “federal policy of nonregulation for information services”.

The court found that the Act does not confer either express or ancillary authority on the FCC to issue such a directive. The court rejected the FCC’s argument that the preemption directive fits within an “impossibility exception”, finding that a precondition for the application of the exception was express or ancillary authority, neither of which was present. The court also rejected the FCC’s second ground of enacting a federal policy, finding that statements of policy do not confer authority when there is none.

On the final analysis, the court found that the FCC had validly classified broadband Internet access as an “information service”. However, since the FCC had not adequately considered the effects of the 2018 Order on public safety, pole-attachment, and on the Lifeline Program, the court remanded to the FCC to reconsider its approach on those three issues. Finally, the court vacated the preemption directive.

Circuit Judge Millett concurred with the court’s opinion. Judge Millett reasoned that since *Brand X* was decided in 2005, “the market for broadband access has changed dramatically” [p. 147] and the “salience [of auxiliary services like DNS and caching] has waned significantly …” [p.148]. However, *Brand X* effectively made it clear that the provision of DNS and caching was enough to deem the FCC’s classification of broadband as an information service as reasonable. Accordingly, Judge Millett stated that the court was compelled to find the FCC’s classification valid, even if in doing so, the FCC “misses the technological forest for a twig” [p. 162].

Circuit Judge Wilkins joined the court’s opinion, but issued a separate concurring opinion emphasizing Judge Millett’s concurrence.

Senior Circuit Judge Williams concurred in part and dissented in part. The dissent stated that the court’s was wrong to declare the 2018 Order’s preemption directive to be invalid. The dissent stated that (1) the challengers have not contested the FCC’s theory that the preemption directive can be grounded under the impossibility exception; (2) the scope of the preemption directive is not overly broad; and (3) “*the statute, its history and its interpretation give ample reason to infer a congressional intent that the [FCC is] authorized to preempt state laws that would make it ‘impossible or impracticable’ for ISPs to exercise the freedom that the Commission meant to secure by classifying broadband under Title I.*” [p. 168].

**Decision Direction**

Contracts Expression

The FCC’s reclassification of broadband internet access effectively repealed the net neutrality and open internet protections that it had enacted in its 2015 order. Unhinged from common carrier obligations, internet service providers may possibly block or throttle internet traffic, create paid prioritization schemes, or otherwise interfere with lawful content from users and edge providers. The court’s decision upholding the FCC’s reclassification effectively opens the door for internet service providers to indulge in such activities.

**Significance**

**The decision establishes a binding or persuasive precedent within its jurisdiction.**

The United States Court of Appeals for the District of Columbia Circuit has jurisdiction to rule on challenges of the FCC’s regulations, and is binding. The D.C. Circuit also has strong national persuasive value, and even international persuasive value in certain cases.

**Table of Authorities**

**National standards, law or jurisprudence**

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* U.S., 2002 Cable Broadband Order, 17 FCC Rcd. 4798
* U.S., 2005 Wireline Broadband Order, 20 FCC Rcd. 14,853
* U.S., 2007 Wireless Order, 22 FCC Rcd. 5901
* U.S., Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010)
* U.S., 2010 Open Internet Order, 25 FCC Rcd. 17,905
* U.S., In re Protecting and Promoting the Open Internet, 29 FCC Rcd. 5561 (2014)
* U.S., 2015 Open Internet Order, 30 FCC Rcd. 5601
* U.S., 2018 Restoring Internet Freedom, 33 FCC Rcd. 311
* U.S., Entergy Corp. v. Riverkeeper Inc., 556 U.S. 208 (2009)
* U.S., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 827 (1984)
* U.S., Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014)
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* Virgin Islands Tel. Corp. v. FCC, 198 F.3d 921 (D.C. Cir. 1999)
* U.S., Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976)
* U.S., FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979)

**Official Case Documents**

**Ruling:** <https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf>

**Briefs**

Petitioners:

<https://blog.mozilla.org/wp-content/uploads/2018/08/As-filed-Initial-NG-Petitioners-Brief-Mozilla-v-FCC-20Aug2018-1.pdf>

Respondent:

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Petitioner Reply:

<https://blog.mozilla.org/wp-content/uploads/2018/11/as-filed-Mozilla-v-FCC-Joint-Reply-Brief-16Nov2018.pdf>

Amicus Briefs:

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* Electronic Frontier Foundation: <https://www.eff.org/files/2018/12/14/18-01051_mozilla_v._fcc_eff_amicus_brief-1.pdf>

**Reports, Analysis, and News Articles**

* Stan Adams, The D.C. Circuit’s Opinion in Mozilla v. FCC: What Does it Mean?, Centre for Democracy and Technology Blog (Oct 24, 2019)

<https://cdt.org/blog/the-d-c-circuits-opinion-in-mozilla-v-fcc-what-does-it-mean/>

* Tom Wheeler, California Will Have an Open Internet, N.Y. Times (Oct. 2, 2019)

<https://www.nytimes.com/2019/10/02/opinion/net-neutrality-fcc-wheeler.html>