

Ninth Circuit Grants FTC Request for Rehearing En Banc of AT&T Throttling Case, Setting Aside Earlier Opinion

May 10, 2017

On May 9, 2017, the U.S. Court of Appeals for the Ninth Circuit issued an [order](#) granting a Federal Trade Commission (FTC) [request](#) for rehearing *en banc* of the court's [earlier decision](#) to dismiss an FTC case against AT&T Mobility over allegedly "unfair and deceptive" throttling practices in connection with wireless data services provided to AT&T's customers with unlimited data plans. In a brief order, Chief Judge Thomas noted that "[t]he three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit."

The original Ninth Circuit decision was notable because it held that the "common carrier exemption" in section 5 of the FTC Act—which excludes common carriers from FTC jurisdiction—was "status based" rather than "activity based," and as such AT&T was not subject to the FTC's jurisdiction even for non-common-carrier activities. The original decision had the effect of resetting the jurisdictional boundaries between the FTC and the Federal Communications Commission (FCC) and removing a wide swath of the telecommunications and technology ecosystem from the FTC's jurisdictional reach.

In a [statement](#), FCC Chairman Ajit Pai applauded today's order, noting that it will make it "easier for the FTC to protect consumers' online privacy" and "strengthens the case for the FCC to reverse its 2015 Title II Order," which classified broadband Internet access service (BIAS) as a common carriage "telecommunications service" and established the FCC's current open Internet rule framework. The 2015 Title II Order is now the subject of a [draft Notice of Proposed Rulemaking](#) scheduled for a Commission vote at its May 18, 2017 open meeting.