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9th CIRCUIT HOLDS TO BROADBAND CLASSIFICATION AS "TELECOM SERVICE"

***Brand X Internet Services et al. v. Federal Communications Commissions,*
No. 02-70518, rehearing en banc denied (9th Cir. Apr. 1, 2004).**

In a decision denounced by the Federal Communications Commission and praised by some consumer advocates, the 9th Circuit Court of Appeals has opted not to rehear its earlier decision that cable modem service is not an "information service" but rather a "telecommunications service." Cable modem service is a form of broadband Internet service.

The distinction is significant because the Telecommunications Act of 1996 places important competitive obligations on providers of "telecommunications services," but not on providers of "information services."

The Telecommunications Act of 1996, does not specifically address the classification of cable modem service, which led courts to determine the issue. The U.S. Court of Appeals for the 9th Circuit addressed the issue four years ago in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). At that time, it concluded that cable modem service did not qualify as a cable service, but was a hybrid that contained elements of both telecommunications and information services.

On March 15, 2002, the FCC issued a declaratory ruling in which it determined that cable modem service was properly classified as an "information service" as opposed to "telecommunication service." The consequence of that ruling was that cable operators would be subject to less stringent regulation. Different groups of petitioners filed seven separate petitions for review of the order in three different federal courts. These petitions were consolidated in this action.

The FCC argued that the ruling in *AT&T v. City of Portland*, was merely dicta, because it was not necessary for the court to have reached that issue. The 9th Circuit disagreed. According to a proponent of open access, the court's decision to stand on its prior precedent in *AT&T v. City of Portland*, means that cable customers must be allowed the choice of any Internet service provider that wishes to supply internet access, and that cable operators may not deny competing Internet companies access to their systems.

The FCC obtained a stay of the effective date of the 9th Circuit's ruling, in light of the anticipated effort by the cable industry to seek review by the U.S. Supreme Court. The stay will remain in effect until the U.S. Supreme Court either denies review or issues a final decision.