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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12 Street, S.W.
Washington, D.C. 20554

Re: Bell Atlantic Ex Parte Filing Concerning Application of Wholesale Discounts To xDSL Services (CC Docket No. 98-147)

Dear Ms. Salas:

This letter is submitted ex parte on behalf of MCI WorldCom, Inc. ("MCI WorldCom") in response to a recent ex parte filing by Bell Atlantic in the above-cited proceedings.¹ Bell Atlantic claims in its filing that Section 251(c)(4)(A) of the Telecommunications Act of 1996 should not be found to apply to Digital Subscriber Line ("DSL") services. In support of its position, Bell Atlantic argues that (1) DSL services are not provided "at retail," (2) Internet service providers ("ISPs") are carriers, not "subscribers," and (3) ILECs will be unable to provide ISPs with significant discounts on DSL service if those discounted rates in turn are subject to further wholesale discounts to carriers under Section 251(c)(4). The Commission should soundly reject Bell Atlantic's request as yet another chapter in the ILECs' never-ending campaign to undermine the pro-competitive provisions of the 1996 Act, as well as have ISPs treated as common carriers.

I. Bell Atlantic Is Wrong On The Law

Bell Atlantic's primary legal argument is that services provided predominantly to ISPs for resale are not retail services, and thus do not fall under the

¹ Letter from Susanne Guyer, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-147, filed March 4, 1999 (hereinafter "BA Letter"). The letter includes a "white paper" entitled "The Wholesale Discount Requirement in Section 251(c)(4) Of The Act Should Not Apply To Wholesale Offerings of xDSL Service" (hereinafter "BA White Paper").

wholesale discount requirement of Section 251(c)(4)(A).² To support this view, Bell Atlantic relies on its own notion that ISPs are not end users, or "subscribers," at all, but instead are really carriers; indeed, Bell Atlantic goes so far as to repeatedly refer to "ISPs and other carriers."³ Bell Atlantic explains that ISPs are not end users in reality, but instead are only "treated as though" they were end users by the FCC solely for purposes of applying interstate access charges. In all other ways, Bell Atlantic asserts, ISPs "function more like carriers."⁴ In particular, Bell Atlantic claims that ISPs will use DSL just like an interexchange carrier uses interstate access.⁵

The fundamental problem with Bell Atlantic's argument, of course, is that ISPs are not telecommunications carriers. The FCC's rules, first adopted in the Computer II proceeding in the early 1980s, are crystal clear that enhanced service providers ("ESPs") -- of which ISPs are a specific subset -- are end users, not carriers.⁶ This string of seminal decisions was the governing regulatory structure of the industry until 1996, when Congress explicitly embraced it in the Telecommunications Act of 1996. Now, it is the "law of the land" that ISPs are not communications common carriers, but remain end users which incorporate telecommunication services into the provision of separate information services. The Commission affirmed this tenet most recently in its Report to Congress on universal service issues last year, when it concluded that Internet service providers are not telecommunications carriers.⁷

Bell Atlantic also makes much of the fact that the Commission's Local Competition Order did not include interstate exchange access services within the resale requirement.⁸ However, while struggling to shoehorn DSL into its own new-

² Section 251(c)(4)(A) of the 1996 Act states that ILECs have a duty to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers...." 47 U.S.C. Section 251(c)(4)(A) (1998).

³ BA White Paper at 1, 3.

⁴ BA White Paper at 2, n.1.

⁵ Id.

⁶ 47 C.F.R. Section 64.702(a).

⁷ Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, issued April 10, 1998 ("Universal Service Report to Congress") at paras. 73-82.

⁸ BA White Paper at 2-3.

found definition of "non-retail" services, Bell Atlantic ignores the crux of the Commission's reasoning in the Local Competition Order: "the vast majority of purchasers of interstate access services are telecommunications carriers, not end users."⁹ Indeed, the Commission found interstate carrier access to be the prime example of "fundamentally non-retail services."¹⁰ Further, Bell Atlantic's claim that its provision of DSL to ISPs should be exempt from Section 251(c)(4)(A) because the ILECs do not avoid incurring retail costs is plain wrong. Obviously Bell Atlantic and other ILECs must perform numerous retail-related functions, including marketing, billing, and collection, when providing DSL to ISPs and other subscribers, including residential and business end users.

The Advanced Services Order squarely demolishes any lingering traces of legitimacy to Bell Atlantic's request. In that order, the Commission concluded that advanced services such as DSL are telecommunications services, and noted that Section 251(c)(4) applies broadly to all telecommunications services provided to non-telecommunications carriers.¹¹ The Commission further clarified that:

To the extent that advanced services are exchange access services, we believe that advanced services are fundamentally different from the exchange access services that the Commission referenced in the Local Competition Order and concluded were not subject to section 251(c)(4). We expect that advanced services will be offered predominantly to residential or business users or to Internet service providers. **None of these purchasers are telecommunications carriers.**¹²

Thus, there can be no doubt that ISPs are not telecommunications carriers, and must therefore be classified as "subscribers who are not telecommunications carriers."¹³

Further, the ILECs' current provisioning of DSL meets any fair definition of the term "retail." Hardly a week goes by that at least one of the major ILECs does

⁹ Local Competition Order at para. 873.

¹⁰ Id.

¹¹ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order, FCC 98-188, issued August 7, 1998, at paras. 35-37, 59 ("Advanced Services Order").

¹² Id. at para. 61 (emphasis supplied).

¹³ 47 C.F.R. Section 251(c)(4)(A).

not make a public announcement about its latest DSL deployment plans, including providing DSL to literally millions of new business and residential customers. In its own territory, Bell Atlantic is busily marketing and rolling out its "Infospeed" DSL service on a retail basis to its residential and business subscribers. Surely none of these consumers perceive themselves to be "wholesalers" of DSL service, let alone "telecommunications carriers." As the ISPs also are "end users" and "subscribers" generally, and of DSL services specifically, DSL is being "provide[d] at retail" by the ILECs.¹⁴

II. Bell Atlantic Is Wrong On The Policy

With federal law and rules unequivocally aligned against its position, Bell Atlantic is compelled to resort to unabashedly trumpeting its purported public policy benefits. Even putting aside the legal infirmities in Bell Atlantic's request, the basic public policy claim -- that ISPs and consumers will be harmed -- is demonstrably false.¹⁵ First, Bell Atlantic's complaint that the states should not be allowed to adopt a uniform discount for all resold ILEC services ignores the fact that the Commission already has signalled its acceptance of this very same rate structure. In the Local Competition Order, the FCC determined that an ILEC must establish "a wholesale rate for each retail service,"¹⁶ not a series of non-uniform rates based on factors of the ILEC's own choosing. At the same time, the Commission did not prohibit the ILECs from adopting volume discounts for different traffic levels, as long as the ILEC does not do so in a discriminatory manner. Indeed, the Local Competition Order declares any restrictions on the resale of ILEC volume discounts to be "presumptively unreasonable."¹⁷ Bell Atlantic has not articulated why it could not simply propose and adopt a non-discriminatory volume discount structure as a way to provide certain entities with more significant discounts; this way, all users and carriers could benefit from discounts, based on the amount of traffic they generate. In any case, there is no need for the Commission to take any action in this proceeding with respect to Bell Atlantic's request.

¹⁴ Of course, the mere fact that ISPs will be providing Internet access and other information services in conjunction with DSL transmission service does not somehow transform DSL into a wholesale offering. ISPs currently utilize ordinary, state-tariffed business lines in order to provide their customers with dial-up Internet access. To date, nobody has even suggested that use of these lines constitutes a non-retail offering to non-subscribers.

¹⁵ BA White Paper at 4.

¹⁶ Local Competition Order at para. 871.

¹⁷ Id. at para. 953.

Further, Bell Atlantic's assertion that ISPs not affiliated with carriers will have an "artificial, regulatorily-created cost disadvantage" ignores the fact that the resale requirement and wholesale discounts are not FCC constructs at all, but instead represent the plain meaning of the law as written by Congress. Congress intended that CLECs be able to acquire ILEC services via resale, with a wholesale discount, to help minimize the ILECs' numerous monopoly-derived advantages and significant "headstart" in the local market. Bell Atlantic's position, if adopted by the Commission, would serve to shut out competing carriers from the DSL marketplace by eliminating the ability to obtain a wholesale discount for DSL services. Without a wholesale discount, competing carriers are left in no better position than ISPs and other non-carriers -- which is precisely the anticompetitive, and anti-consumer, result that Bell Atlantic seeks.

Finally, it must be noted that Bell Atlantic's pleas on behalf of certain ISPs seems inconsistent with Bell Atlantic's public policy positions concerning the information services industry generally. From insisting that ISPs pay common carrier access charges and universal service contributions, to denying the CLECs reciprocal compensation for providing competing service to ISPs, to urging the demolition of the Open Network Architecture ("ONA") and Comparably Efficient Interconnection ("CEI") requirements, Bell Atlantic has sought repeatedly to hamper, rather than enhance, the workings of the robust and open information services marketplace.¹⁸

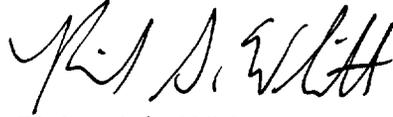
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Thus, the Commission should summarily dismiss Bell Atlantic's request as contrary to the law, inconsistent with Commission precedent and rules, and anticompetitive as a matter of public policy. Instead, the Commission should adopt its tentative conclusion in the Advanced Services proceeding that every ILEC has a

¹⁸ Certainly Bell Atlantic's position here that ISPs are really telecommunications carriers is flatly inconsistent with the ILEC view that ISPs do not have the same Section 251(c) rights that "other carriers" have to access unbundled network elements, collocate equipment, and acquire retail services at wholesale rates.

statutory duty "to offer for resale the advanced services that it generally offers to subscribers who are not telecommunications carriers."¹⁹

Respectfully submitted,



Richard S. Whitt
Senior Policy Counsel
MCI WorldCom

cc: Chairman Kennard
Commissioner Ness
Commissioner Furchtgott-Roth
Commissioner Powell
Commissioner Tristani
Larry Strickling, Chief, Common Carrier Bureau

¹⁹ Advanced Services Notice at para. 187.