



EX PARTE OR LATE FILED

April 29, 1999

**RECEIVED**  
**APR 29 1999**  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Staci Pies  
Attorney-Advisor  
Policy Division, Common Carrier Bureau  
Federal Communications Commission  
The Portals, 5<sup>th</sup> Floor  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20024

Re: Deployment of Wireline Advanced Services Offering Advanced  
Telecommunications Capability, CC Docket No. 98-147

Dear Ms. Pies:

As you know, in recent months America Online, Inc. ("AOL") has been negotiating with several incumbent local exchange carriers ("LECs") to purchase on a wholesale bulk basis high volume xDSL capability. This capability will be used as an input in our own separate retail Internet service offering to consumers. AOL believes that the ability to acquire these advanced services on a bulk basis will speed deployment to residential markets, furthering the goals of Section 706 of the Telecommunications Act of 1996 ("1996 Act"). We also believe that such arrangements will permit us to offer affordable, high-speed access to the Internet in a user-friendly manner, greatly facilitating wide-scale consumer access to advanced services. Incumbent LECs would tariff such offerings, and any other Internet Service Provider (ISP) or carrier would be able to obtain such services under the same tariff. This letter outlines the policy and legal arguments demonstrating that Section 251(c)(4) does not apply to this type of service offering.

- Allowing LECs to offer bulk advanced services to telecommunications carriers and ISPs is consistent with the objective of Section 251 of the 1996 Act because these services are not provided in the same manner (i.e., directly to consumers) as traditional retail offerings. Incumbent LECs must tariff such offerings, and any other ISP or carrier may obtain such services under the same tariff. Non-bulk, consumer-focused advanced retail services would still be available for resale at wholesale price under Section 251(c)(4).

No. of Copies rec'd 012  
List A B C D E



- If the Commission were to hold that bulk offerings of xDSL services that are designed as inputs for a separate retail offering are subject to an additional “wholesale discount” pursuant to Section 251(c)(4), it would risk tilting the competitive market for advanced services by favoring ISPs affiliated with telecommunications carriers over ISPs that are not affiliated with telecommunications carriers.
- Under these circumstances, regardless of the negotiating acumen an independent ISP possesses, it would not be rewarded in the marketplace since a carrier affiliated with an ISP could always receive an additional “wholesale” discount that it could then pass along to its affiliated ISP. This is not fair competition in the marketplace, but rather a government-created regulatory advantage.
- Subjecting bulk xDSL services used by ISPs and telecommunications carriers to additional “wholesale discounts” could potentially cause incumbent LECs to determine that they will not be able to offer these bulk xDSL services directly to ISPs.
- Should this occur, it is likely that xDSL services will not be deployed as rapidly as would otherwise be the case, or in a way that makes them as economically efficient as possible for the mass consumer market.

Section 251(c)(4) requires that incumbent LECs “offer for resale at wholesale rates any telecommunications service that the carrier provides *at retail* to subscribers who are not telecommunications carriers.” Where an incumbent LEC offers bulk xDSL services that are designed to be an “input” to a separate retail service offered to end-users, these xDSL services are not offered at “retail” within the meaning and scope of Section 251(c)(4).

- Section 251(c)(4) plays an important role in helping to promote competition in the local telecommunications service marketplace. The FCC should not, however, interpret this provision in a manner that would slow down the deployment and adoption of advanced services in the residential marketplace.
- While Congress clearly contemplated a wholesale discount for services traditionally offered to end-users, the FCC has recognized that services such as exchange access, even though they may be purchased at times by end-users, should not be subject to the resale obligation. (Interconnection Order, 11 FCC Rcd at ¶ 873.)
- Just as exchange access services are designed and sold “as an input component” for other services, so too will the bulk xDSL services be used as an input to services offered to consumer end-users. The offering of bulk xDSL services is analogous to offering of the exchange access services the Commission has previously found are not subject to Section 251(c)(4). (Interconnection Order, 11 FCC Rcd at ¶ 874.)

- When used as an input in the manner described above, bulk xDSL services are not “offered predominantly” to retail consumers in the sense the Commission has traditionally considered that term. In fact, the bulk xDSL offerings that AOL and others would purchase would already be priced at a “wholesale,” as the offering LECs will not incur costs for retail marketing, billing, collection and other expenses that are customarily associated with consumer retail offerings. Applying section 251(c)(4) to such offerings would result in an unwarranted “double discount” and discourage incumbent LECs from making such service available to ISPs at an economically efficient price.
- Interpreting the 1996 Act in this manner does not mean the FCC must conclude that ISPs are telecommunications carriers. As the FCC has recognized repeatedly, while ISPs use the services of telecommunications carriers in providing their enhanced/information services to customers, they are not telecommunications carriers themselves. (See In the Matter of Federal-State Joint Board on Universal Service, Report to Congress, CC Docket 96-45, FCC 98-67 (rel. April 10, 1998). The FCC should reaffirm this conclusion. But the Commission should also state that it will not interpret the 1996 Act so as to undermine the important goals of Section 706 by impeding the rapid, efficient, deployment of advanced services to consumers.

For these reasons, the Commission should clarify immediately that where an incumbent LEC offers bulk xDSL services that are designed to be an input to a separate retail service offered to end-users, these xDSL services are not offered at “retail” within the meaning and scope of the 1996 Act. Please do not hesitate to contact me should you have any questions regarding our views on this issue.

Sincerely,



Steven Teplitz  
America Online, Inc.

cc: Lawrence Strickling  
Carol Matthey  
Michael Prior  
Jane Jackson  
Jordan Goldstein