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EX PARTE OR LATE FILED

July 26, 1999

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FEDERAL COMMUNICATIONS COMMISSION
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EX PARTE

BY HAND
Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation -- CC Docket No. 98-147

Dear Ms. Salas:

On July 26, 1999, we provided, on behalf of America Online, Inc., the attached written presentation to Staci Pies (Attorney Advisor – Policy and Program Planning Division, Common Carrier Bureau) in connection with the above-referenced docket.

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, two copies of this Notice are attached for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,

Mark J. O'Connor

No. of Copies rec'd 0+2
List A B C D E

Enclosures

cc:

Staci Pies (w/o encl.)
Kathryn Brown (w/o encl.)
Thomas Power (w/o encl.)
Linda Kinney (w/o encl.)
William Bailey (w/o encl.)
Sarah Whitesell (w/o encl.)
Kyle Dixon (w/o encl.)
Rick Chessen (w/o encl.)
Robert Pepper (w/o encl.)
Lawrence Strickling (w/o encl.)
Carol Mattey (w/o encl.)
Jordan Goldstein (w/o encl.)
Jason Oxman (w/o encl.)
International Transcription Service (w/encl.)

AMERICA ONLINE
INCORPORATED

RECEIVED
JUL 26 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 26, 1999

Ms. Staci Pies
Attorney Advisor
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 98-147; Ex Parte Presentation
"What is Offered 'At Retail:' Implications for the Offering of Bulk DSL Services"

Dear Ms. Pies:

Attached please find a White Paper entitled, "What is Offered 'At Retail:' Implications for the Offering of Bulk DSL Services," which is hereby submitted for consideration in the above-referenced docket. This White Paper provides an analysis of the resale discount obligation under Section 251(c)(4), 47 U.S.C. § 251(c)(4), including a discussion intended to address the meaning of the term "at retail" as used in this statutory provision.

The attached White Paper demonstrates that an incumbent local exchange carrier offering bulk DSL service to Internet Service Providers for use as an input for Internet access is not, in fact, providing a service "at retail." We believe that this conclusion is not only legally sound, but also furthers the directive set forth by Congress in the Telecommunications Act of 1996 that the Commission promote the deployment of advanced services.

We hope that this White Paper will be of assistance to the Commission as it considers the first impression issue of the Section 251(c)(4) resale discount obligation and its application to bulk DSL services. Please feel free to contact me if you would like to discuss the issue further, or if we can be of any other assistance.

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In accordance with the Commission's ex parte rules, two copies of this letter and the attached White Paper will be filed today with the Commission's Secretary's office.

Sincerely,

Steven N. Teplitz /mjc

Steven N. Teplitz
Senior Director, Telecommunications Policy

Attachment

cc: Kathryn Brown (w/encl.)
Thomas Power (w/encl.)
Linda Kinney (w/encl.)
William Bailey (w/encl.)
Sarah Whitesell (w/encl.)
Kyle Dixon (w/encl.)
Rick Chessen (w/encl.)
Robert Pepper (w/encl.)
Lawrence Strickling (w/encl.)
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Jordan Goldstein (w/encl.)
Jason Oxman (w/encl.)

Ex Parte Presentation
CC Docket 98-147

WHAT IS OFFERED "AT RETAIL?": IMPLICATIONS FOR THE OFFERING OF BULK DSL SERVICES

America Online, Inc.

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Dated: July 26, 1999

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EXECUTIVE SUMMARY

When incumbent local exchange carriers ("LECs") provide digital subscriber line ("DSL") service in bulk to Internet Service Providers ("ISPs"), that service is not "at retail" and thus is not subject to the resale discount obligation of Section 251(c)(4) of the Communications Act. The statutory framework of Section 251(c)(4) clearly limits the resale discount obligation only to those services that are offered "at retail." It is a well-established principle of statutory interpretation that these limitations to the statutory resale discount obligation must be interpreted to give meaning to every word or phrase of the statute. Thus, if the bulk DSL service is not offered to ISPs "at retail," then the resale discount obligation set forth in Section 251(c) (4) does not apply.

Because neither the Telecommunications Act of 1996, nor its legislative history, defines what services are "at retail," the Federal Communications Commission should apply a common sense interpretation, informed by other significant sources that have given the term "retail" meaning. This paper provides analysis of a range of other significant sources of the meaning of "at retail," including federal and state court cases, the U.S. Department of Commerce, definitions from dictionaries, as well as textbook and industry definitions. The following common set of attributes flows from these sources to provide meaning to "at retail:"

- Seller's Intention – A seller that is a *retailer* intends to sell primarily to the general public, and promotes particular products or services in a manner designed to attract and serve the general public.

- Buyer's Intention – A buyer in a *retail* transaction is the final consumer of the product, and typically purchases the product, in a relatively small quantity, for her/his own personal or residential use, or if the buyer is a business, for that business' own internal consumption.

- Post-Sale Use Of The Product – In a retail transaction, the buyer does not typically engage in processing, altering, re-assembling, or breaking down the bulk product for redistribution.

Underscoring all of the definitions, and key to the Commission's interpretation, is the need to apply a case-by-case approach and sound practical judgment when categorizing a given service as either "at retail" or not "at retail."

A bulk DSL offering directed at ISPs, in which the ISP takes on the role of interfacing with the final consumer in a variety of ways, meets none of the attributes of an "at retail" service. Incumbent LECs do not intend to sell bulk DSL service to the general public nor will they promote such services in manner designed to do so. Similarly, ISPs do not intend that this be a retail transaction because the ISP's end-user customer is the final consumer, and not the ISP. In short, the ISP is not buying DSL for its own personal or internal business use. Wholly unlike a buyer/consumer in a retail transaction, the ISP purchasing a bulk DSL arrangement takes the product for further processing to sell its information service with the DSL telecommunications components. The bulk DSL service also obligates the ISP to accept significant commercial risks (i.e., long-term commitment to DSL technology and possibly a large volume commitment prior

to market acceptance of DSL). In contrast, retail buyers simply do not engage in this sort of commercial risk. Finally, the bulk DSL service is not a retail service offering of the incumbent LEC because it allows the LEC to avoid the substantial costs associated with consumer-oriented retail services, such as marketing, billing and collections costs.

For these reasons, the FCC should apply the resale discount obligation only to those services sold by the incumbent LEC in an "at retail" transaction. The bulk, wholesale offering of DSL to ISPs are not such transactions.

INTRODUCTION

Today, Digital Subscriber Line ("DSL") services are being deployed throughout the United States by local exchange carriers ("LECs"), both competitive and incumbent. For consumers, the emergence of DSL high-speed broadband capabilities offers the opportunity to enjoy an enhanced Internet online experience that will stimulate the development and deployment of innovative, diverse broadband applications by Internet Service Providers ("ISPs") and others. As Congress, the Administration and the FCC have consistently recognized, widespread access to broadband capability can increase our nation's productivity, create jobs, and meaningfully improve our educational, social and health care services.[1]

DSL services are today offered on both a consumer-oriented and bulk basis. In contrast to the manner in which DSL services are offered generally to retail consumers, bulk DSL services are offered on a wholesale basis, with the expectation that entities obtaining the DSL service, whether ISPs or carriers, will perform key functions for their own end-users, including marketing, billing, ordering, installation, and repair. ISPs will be able to integrate the high-speed capabilities of DSL into the information services they now offer to consumers and build upon their existing relationships with end users to expand consumer awareness of DSL services generally, spurring increased penetration and market acceptance. Thus, when ISPs and others take DSL services on a bulk basis for use as an input into the information services they offer to their end-user subscribers, rollout of these services to consumers will proceed more rapidly.

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[1] See, e.g., *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket 98-149, FCC 99-5, at ¶ 2 (rel. Jan. 28, 1999).

Section 251(c)(4) of the Telecommunications Act of 1996 ("1996 Act") 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" (emphasis added).[2] Since bulk DSL services have been proposed,[3] some have asserted that these services, if offered by an incumbent LEC to ISPs, are subject to the wholesale discounts of Section 251 (c)(4).[4] Thus, it is critical to examine whether the bulk DSL services are offered "at retail." Once the Federal Communications Commission ("FCC" or "Commission") determines that bulk DSL services designed for carriers and ISPs are not "retail services," then as a legal matter, the analysis ends and no resale discount is applicable.

This paper explores the meaning of the words "at retail" as used in Section 251(c)(4), drawing upon a wide variety of legal, commercial and other sources to flesh out a common sense, practical interpretation that can guide the FCC as it grapples with the statutory meaning and Congressional intent.

I. ASSIGNING MEANING TO THE "AT RETAIL" PROVISION OF SECTION 251(c)(4): THE LIMITS OF THE STATUTE

It is well established that statutory interpretation begins with the language of the statute itself, and that meaning should be given to every word in a statute.[5] As the courts have consistently held, "[e]ffect must be given, if possible, to every word, clause and sentence of a

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[2] 47 U.S.C. § 251(c)(4).

[3] See, e.g., Tariff Transmittal No. 1138 to the Bell Atlantic Telephone Companies' Tariff F.C.C. No. 1 (filed May 19, 1999) ("Bell Atlantic Bulk DSL Tariff").

[4] See e.g., Petition of the Telecommunications Resellers Association to Reject Unlawful Resale Restrictions In Bell Atlantic Tariff Transmittal No. 1138 (filed May 26, 1999).

[5] Platt v. Union Pacific Railroad Company, 99 U.S. 48 (1878); United States v. Menasche, 348 U.S. 528 (1955); Tabor v. Ulloa, 323 F.2d 823 (9th Cir. 1963); National Ass'n. of Recycling Industries v. ICC, 660 F. 2d 795 (D.C. Cir. 1981).

statute . . . so that no part will be inoperative or superfluous, void or insignificant."[6] In the instant situation, therefore, it is not enough to determine that ISPs are "subscribers who are not telecommunications carriers,"[7] since Congress certainly meant to include every word of the statute, including the phrase "at retail."[8]

No Statutory Definition A review of the statutory language of the Section 251(c)(4), the related Section 252(d)(3) wholesale discount pricing provision, and the relevant legislative history all provide guidance on the meaning of the "at retail" terminology, as discussed below. The analysis also reveals, however, that the term "at retail" was not defined expressly by Congress, nor was it explained in the legislative history. In fact, there is no evidence to indicate that Congress considered how the "at retail" provision would apply in every case. Indeed, given the relatively recent advent of DSL technology as a generally deployable advanced service for Internet access, Congress could not have anticipated in February, 1996 the prospect of bulk DSL services designed primarily for ISPs and others to be used as an input into information services offered to consumers.

Ordinary Meaning Under these circumstances, it is therefore appropriate to interpret the term "at retail" by referring to other relevant and analogous sources, including other governmental interpretations, the general, commonly understood meaning of the term, and the commercial usage and meanings (described in Part II, below). As a matter of statutory interpretation, when a word is not defined by the statute itself, courts have long recognized that

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6 660 F. 2d at 799; American Radio Relay League v. FCC, 617 F.2d 875 (D.C. Cir. 1980).

7 47 U.S.C. § 251(c)(4)(A).

8 348 U.S. at 539.

Congress intended the ordinary usage of the word.[9] In this way, the Commission can give the "at retail" statutory limitation its proper and full meaning.

Statutory Context The statutory language of Sections 251 and 252 illuminates to some degree Congressional intent regarding its expectations of how the Commission would apply the resale discount obligation. Section 251(c)(4) obligates an incumbent LEC "to offer for resale at rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." This language limits the resale discount obligation to an incumbent LEC's telecommunications service that has two characteristics: it is (a) provided "at retail," and (b) provided "to subscribers who are not telecommunications carriers." Thus, even though ISPs are not telecommunications carriers, if the service is not provided "at retail," it is not subject to resale discounts under Section 251(c)(4).[10]

The resale discount price standard of Section 252(d)(3) of the Communications Act also provides some insight into the meaning of what services are "at retail."[11] It is clear that Congress meant for "at retail" services of Section 251(c)(4) to include those services that entail a substantial level of marketing, billing, and collections indicative of services offered to final consumers. As the Commission explained, "Congress clearly intended section 251(c)(4) to apply to services targeted to end user subscribers, because only those services would involve an

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[9] McBoyle v. United States, 283 U.S. 25 (1931); Sundstrand Corp. v. Commissioner of Internal Revenue, 17 F. 3d 965 (7th Cir. 1994); Nesovic v. USA, 71 F.3d 776 (9th Cir. 1995). See also Guess v. Montague, 51 F. Supp. 61, 64-65 (E.D. S.C. 1942) (where the term "retail" is not defined by the Fair Labor Standards Act, "[I]t is to be presumed . . . that Congress used such words in the senses in which they are used in ordinary trade or commercial transactions.").

[10] "The 1996 Act does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 98-96, 11 FCC Rcd. 15499, ¶ 872 (1996) ("First Order on Interconnection").

[11] Section 252(d)(3) applies to "retail" services subject to Section 251(c)(4), and establishes a price standard "on the basis of retail rates charged to subscribers for the telecommunication service requested, excluding the portion

(footnote continued)

appreciable level of avoided costs that could be used to generate a wholesale rate."[12] While not dispositive, these statutory provisions make it reasonable to infer that when the service of an incumbent LEC is designed such that the intended purchaser will take on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer, then it is not a service offered "at retail."

Legislative History As an initial matter, it is notable that the legislative history provides little specific guidance on congressional intent for the term "at retail."[13] It does suggest, however, that Congress' primary objective for the resale discount obligation of Section 251(c)(4) was to spur competition in the local voice consumer market by allowing resale-based competitive LECs to purchase, at a discounted price, those incumbent LEC services directed toward the large residential consumer market.[14] Indeed, the FCC itself apparently understood this motivation in initially defining the parameters of the resale discount.[15]

While this analysis demonstrates that Congress provided some meaning to the term "at retail," it is also evident that Congress did not specifically define the term in the statute. It is also apparent that Congress did not consider how "at retail" would apply in the context of a data-oriented service designed for ISPs who, in turn, use the service as an input to their information

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thereof attributable to any marketing, billing, collection, or other costs that will be avoided" by the incumbent LEC. 47 U.S.C. § 252(d)(3).

[12] First Order on Interconnection, ¶ 874.

[13] See H. Conf. R. No. 458, 104th Cong. 2nd Sess. at 122 ("Conference Report").

[14] The Conference Committee relied in part on the House Amendments, Section 242(a)(3), of the Senate Bill. Id., at 120. Section 242(a)(3) would have required ILECs to "offer resale at economically feasible rates to the reseller" for the purpose of spurring competition "in the local exchange market." H.R. Rep. No. 204, 104th Cong. 1st Sess. at 72.

[15] First Order on Interconnection, ¶ 907 ("[r]esale will also be an important strategy for small businesses that may lack capital to compete in the local exchange market by purchasing" unbundled network elements"), ¶ 331 ("section 251(c)(4) retains functional validity as a means to enter local phone markets").

service offering to the public.[16] Thus, to supply further meaning on the "at retail" limitation of the statute, it is necessary to use a common sense interpretation informed by the ordinary meaning of the words and their use in other contexts.

II. BEYOND THE STATUTE: USING OTHER SUBSTANTIAL SOURCES TO INTERPRET THE TERM "AT RETAIL"

Because the statute does not define the term "at retail," and there is no direct communications law precedent addressing this question, the Commission must logically look to other sources that have considered what is a *retail* offering. Historically, retail trade began in the Middle Ages with the fair, evolved through the market, to the trading post, to the general store, to the chain store.[17] Retail trade itself is the one of the primary ways that people engage in commerce today. Presently, retail trade generally connotes the exchange of goods between a "retailer" and the ultimate consumer.

As discussed below, however, the ordinary and commercial meaning of *retail* is fluid, and sometimes broad. Every meaning of *retail*, however, describes the same key attributes:

- **Seller's Intention** – A seller that is a *retailer* intends to sell primarily to the general public, and promotes particular products or services in a manner designed to attract and serve the general public.
- **Buyer's Intention** – A buyer in a *retail* transaction is the final consumer of the product, and typically purchases the product, in a relatively small quantity, for her/his own personal or residential use, or if the buyer is a business, for that business' own internal consumption.

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[16] Neither has the Commission considered the issue of the application of the "at retail" obligation. First Order on Interconnection, ¶¶ 865-877. This first-impression issue requires a careful scrutiny to the full meaning of the statute, including the limits expressed in the statute.

[17] N. Brisco, Retailing, 1-2 (1947).

- **Post-Sale Use Of The Product** – In a retail transaction, the buyer does not typically engage in processing, altering, re-assembling, or breaking down the bulk product for redistribution.

As these attributes suggest, to conclude that a given transaction is *retail* requires one to analyze the functional relationship between the buyer, the seller, and the final consumer of the product. It is an inherently fact-specific analysis. Further, in some cases, a given transaction may require one to weigh competing factors, some of which suggest a retail nature to the transaction while others do not. In the final analysis, then, the FCC must interpret the statute in a practical manner and so as to promote best the goals of the statute.

The following definitions of *retail* are chosen from a broad range of sources to demonstrate the commonality of meaning of the term.

A. Dictionary Meaning

The term "retail" is defined in Webster's Unabridged Dictionary as "the sale of commodities, goods, articles, etc. individually or in small quantities or parcels directly to the consumer."[18] A similar dictionary definition is "the sale of goods or commodities in small quantities directly to consumers."[19] Black's Law Dictionary defines retail as " [a] sale for final consumption in contrast to a sale for further sale or processing (i.e., wholesale) . . . to the ultimate consumer."[20] All of these definitions, therefore, reference the distinction between the ultimate consumer and the "wholesale"intermediary.

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[18] Webster's Deluxe Unabridged Dictionary 1545 (2nd ed. 1987).

[19] American Heritage College Dictionary 1164 (3rd ed. 1993).

[20] Black's Law Dictionary 1315 (6th ed. 1990). The word "ultimate" is defined as "final," or when "a process or series comes to an end." Webster's Deluxe Unabridged Dictionary 1982 (2nd ed. 1987).

B. U.S. Department Of Commerce Definitions

In 1992, the United States Department of Commerce released the census of retail trade. The report, relying on the Standard Industrial Classification Manual: 1987 ("SIC Manual")[21] defines "retail trade" as "all establishments primarily engaged in selling merchandise for personal or household consumption and rendering services incidental to the sale of the goods."[22] Supplementing this definition, the SIC Manual states that "some of the important characteristics of the retail trade establishments are: the establishment is usually a place of business and is engaged in activities to attract the general public to buy; the establishment buys or receives merchandise as well as sells; the establishment may process its products, but such processing is incidental or subordinate to selling; the establishment is considered as retail in the trade; and the establishment sells to customer for personal or household use."[23] Notably, the SIC Manual definition explains that "not all of these characteristics need to be present and some are modified by trade or practice."[24] The SIC Manual also characterizes the distinction between retail and the wholesale trade by noting that "establishments that sell these products only to institutional or industrial users and to other wholesalers . . . are classified [as] wholesale trade."[25]

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[21] The Standard Industrial Classification Manual is a United States Department of Labor publication written by the Occupational Safety and Health Administration.

[22] 1992 Census of Retail Trade 5 (1992).

[23] See SIC Division G: Retail Trade, *found at*, www.osha.gov/cgi-bin/sic/sicser3?G.

[24] Id.

[25] Id. According to SIC, the "wholesaler" of a service or product engages in different functions from the retailer, including "selling goods to trade establishments . . . ; and bringing buyer and seller together. In addition to selling, functions frequently performed by wholesale establishments include maintaining inventories of goods; extending credit; physically assembling, sorting, and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery; refrigeration; and various types of promotion and label designing." OSHA, SIC Division F: Wholesale Trade, *found at,* www.osha.gov/cgi-bin/sic/sicser3?F.

C. Legal Precedent: Case Law

Similarly, case law provides some basis to inform an interpretation of the term "at retail." For example, the Supreme Court, in Idaho Sheet Metal Workers, Inc. v. Wirtz, Sect. of Labor, analyzed the meaning of the term "retail" as it applied to the Fair Labor Standards Act of 1938.[26] The Supreme Court explained that "the typical retail transaction is one involving goods or services that are frequently acquired for family or personal use . . . . [E]xamples of sales that could qualify as retail . . . [are] those made 'by the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store, the furniture store, the drug store, the shoe store, the stationer, the lumber dealer, etc..."[27] The Supreme Court went on to note that "not every sale can be so classified [as retail] . . . and common parlance certainly suggest that the term retail becomes less apt as the quantity and the price discount increase in a particular transaction."[28]

Likewise, the Fifth Circuit has defined retail to mean "a sale in small quantity or direct to the consumer . . . ."[29] Similarly, the Seventh Circuit has classified retail sales as "sales in individual quantities for personal or household consumption . . . to the ultimate consumer."[30] In the commercial context, federal courts recognize that the final consumer need not be a residential customer: "[i]ndustrial consumers who purchase electric energy for their own use . . . are retail customers."[31]

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[26] 383 U.S. 190 (1966). Under the Fair Labor Standards Act, 29 U.S.C. § 202, et seq., a "retail or service establishment shall mean an establishment 75% of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry." 29 U.S.C. § 213.

[27] Id. at 745-46 (quoting H. Conf. Rep. No. 1453, 81st Cong., 1st Sess. at 24, 25).

[28] Id. at 746-47.

[29] White Motor Co. v. Littleton, 124 F.2d 92, 93-94 (5th Cir. 1942).

[30] Walling v. Consumer, 149 F.2d 626, 630-31 (7th Cir. 1945).

[31] Schuykill Energy Resources v. Pennsylvania Power & Light Co., 113 F.3d 405, 416, n. 15 (3rd Cir. 1997).

Further, in Guess v. Montague,[32] the U.S. District court interpreted "retail price" in the Fair Labor Standards Act, although the statute did not define the term, by using a practical and functional test. "A retail price is the price that the ultimate consumer is expected to pay, and a wholesale price is that price which the retailer pays in expectation of obtaining a higher price by way of profit from the ultimate consumer."[33]

D. Textbook and Industry Definitions

The term "retail" has also been defined and interpreted in various textbooks and in the context of industry transactions. Thus, a textbook on distribution law defines "retail" as "sales in small quantities or direct to consumers."[34] This source notes that "it is extremely difficult to define wholesaling and retailing clearly. After prolonged debate, a rather general agreement has been reached that retail trade includes all sales of goods for personal and household consumption."[35] The Dictionary of Marketing Terms defines retail as "a business mainly concerned with the selling to the consumer."[36] The Dictionary of Banking defines retail banking as "banking focused primarily but not exclusively on individual consumer banking relationships."[37]

As all of these definitions indicate, *retail* denotes a relationship with the ultimate consumer of the product. The term *retailer* suggests an establishment that is providing the service or the good directly to the final consumer. Typically, this consumer is likely to be the last in a long chain of wholesalers, middlemen and retailers to receive the product. Moreover,

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[32] 51 F. Supp. 61 (E.D.S.C. 1942).

[33] Id. at 65.

[34] See T. Banks, Distribution Law: Business and Litigation Aspects 915 (1990).

[35] Id.

[36] See I. Shapiro, Dictionary of Marketing Terms 215 (4th ed. 1981).

[37] See C. Woelfel, Dictionary of Banking (1994).

this final customer is not likely to redistribute the product to another consumer, but rather buys the service or good in smaller quantities for personal or household consumption, including internal business use.

III. THE CHARACTERISTICS OF BULK DSL SERVICES DESIGNED FOR CARRIERS AND ISPS ARE SIGNIFICANTLY DIFFERENT FROM RETAIL OFFERINGS

Several characteristics and features of bulk DSL service offerings designed for ISPs and carriers strongly indicate that these services are not "at retail," within the common usage of this term as described above. These characteristics make bulk DSL service offerings fundamentally different from the many services that incumbent LECs provide on a retail basis, including the incumbent LECs' retail offerings of DSL services sold directly to the consumer market.[38]

A. The Seller's Perspective: The Incumbent LEC Does Not Intend to Sell Bulk DSL Services to Final Consumers

The sellers – incumbent LECs – do not intend to sell bulk DSL services to the general public i.e., the final consumers of the product, such as residential and business customers who desire high-speed Internet access.[39] Bell Atlantic's VTDP tariff, for example, explains that the service is intended for entities (carriers and non-carriers) that will, in turn, obtain end-user customers with whom they will deal directly.[40] Thus, the incumbent LEC customizes its sale not for the general public or the final consumer of the product, but, rather, to the specific needs of another type of buyer – the ISP.

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[38] Thus, it is *not* our view that Section 251(c)(4) is inapplicable to all DSL services, or other advanced services. Rather, the features and characteristics of a given advanced service, just like any other service, should be evaluated carefully to determine if it is offered at retail.

[39] See, e.g., Idaho Sheet Metal Workers, Inc. v. Wirtz, Sect. of Labor, 383 U.S. 190 (1966) ("the typical retail transaction is one involving goods or services that are frequently acquired for family or personal use"); White Motor Co. v. Littleton, 124 F.2d 92, 93-94 (5th Cir. 1942).

[40] Bell Atlantic Bulk DSL Tariff, § 17.4.7.A.

In fact, the consumption of DSL by end-users is viewed as so inherently different by the offering LECs than the bulk supply of DSL to ISPs that some carriers have already set forth these offerings in different tariffs, characterized as different service offerings. In a very real sense, from the seller's perspective, there is a separate retail DSL service designed for individual residential and business user consumption, with the terms and conditions of those services contrasting sharply with the terms of service in a bulk, wholesale DSL arrangement to ISPs (such exemplified by Bell Atlantic's VTDP Tariff).[41]

B. The Buyer's Perspective: ISPs Purchase Bulk DSL Service As An Input Into Their Own Retail Service Offering, Not For Personal Or Internal Consumption

Just as the seller's perspective indicates that the service is not "retail," so too does the perspective of the buyer – the ISP. Thus, the ISP purchasing a bulk DSL offering is engaged in a commercial procurement of an essential input for its service, and is not functioning as a consumer in a retail transaction, i.e., obtaining the service in relatively small quantities for its own personal use or to meet internal business demand. In fact, the ISP may not even consume a single line for its own use, because its business purpose is to use the product in a different way by combining it with its enhanced information service and then offering the package to customers.[42]

Put another way, the ISP buys the bulk DSL offering because it possesses attributes that are specific to the ISP's needs as a retailer of Internet access service to the general public. The attributes are materially different from those of an incumbent LEC's retail DSL offering geared

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[41] We note that competitive LECs ("CLECs") lose no rights or service opportunities with the introduction of the incumbentLECs' wholesale DSL offering, since the CLECs are fully able to choose either a Section 251(c)(4) wholesale discount off of the retail service or to purchase service under the ILECs' wholesale DSL tariff.

[42] As articulated above, several commenters on the general definition of retail note that a purchaser in an industrial context, or one seeking to use a product for further processing, is unlikely to be found to be engaging in a retail transaction. See, e.g., OSHA, SIC Division F: Wholesale Trade; Black's Law Dictionary 1315 (6th ed. 1990).

toward the retail consumer (such as a residential or business purchaser). For example, the electronic ordering functions that may be available with a bulk DSL service would allow the ISP to streamline the process for ordering DSL for a given ISP customer, including, possibly the ability of an ISP to check loop qualification. Further, to the extent a bulk DSL offering entails volume commitments made by the ISP over a multi-year period, ISPs are provided with additional assurance that, with that buyer commitment, the incumbent LEC will commit to more rapid DSL deployment in the market. These attributes do not exist in the context of a typical retail offering for non-bulk DSL services, as consumers ordering a retail DSL service have no need for electronic ordering, widescale loop qualification, or assurances of widespread market deployment. Thus, from the ISPs' perspective, the bulk DSL offerings tailored to ISPs are materially different retail service offerings. While the individual attributes of particular bulk DSL service offerings may vary, the essential point is that from the buyer's perspective, the service is not "retail."

C. DSL As An Input: Unlike Retail Consumers, ISPs Engage In Significant Processing Of DSL Services

In addition to the above characteristics, the fact is that the ISP does not simply consume the DSL services – rather, it engages in significant "processing," characteristic of non-retail offerings. Once the ISP has purchased the bulk DSL services, the ISP adds value to the telecommunications in several ways before the Internet service is sold to the final consumer (e.g., the residential or business user that wants high-speed Internet access service to its existing telephone service). The ISP thus divides the bulk DSL services for individual consumer use and adds a range of Internet-based functionality, which builds upon and alters the initial DSL input. Indeed, the FCC has recognized that ISPs "use other providers' telecommunications networks to

provide the communications path underlying their own information services . . . ."[43] After the purchase of service from the incumbent LEC, the ISP uses the DSL service input in a manner that is markedly different from how the residential consumer uses a single-line, month-to-month DSL offering.[44]

Further, the ISP uses the bulk DSL services in a way that is fundamentally different from how non-ISP business customers use a retail DSL product. These customers, in contrast to ISPs, buy the product to meet their own internal telecommunications needs and do not synthesize the DSL into a product for direct sale to its customers.[45] As such, the ISP engages in a very different commercial endeavor when it buys bulk DSL services than does a residential or business consumer when it engages in a retail transaction with an incumbent LEC.

D. Retail Services and Risk: ISPs Acquiring Bulk DSL Services Engage in a Level of Risk That is Significantly Different From Retail Consumption

The ISP buying bulk DSL services also assumes a level of risk, responsibility, and commercial incentive that is fundamentally different from that of a retail buyer. The ISP buying a bulk DSL offering engages in a significant commercial risk. It must generally commit to purchase large quantities of DSL lines over a multi-year period at the same time that DSL faces a number of uncertainties, including: technology risk (DSL is relatively new and subject to the

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[43] See *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket 96-45, FCC 98-67, at ¶ 55 (rel. April 10, 1998).

[44] Note, however, that the ISP that uses DSL as an input is not engaging in telecommunications resale; "[a]n offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components." Id., at ¶ 58. Because the ISP offers "enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." Id. at ¶ 59. Further, as the Commission recently explained, "[s]ince *Computer II*, we have made it clear that offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced." Id. at ¶ 60.

[45] For this same reason, a discounted telecommunications offering to high-volume businesses may be deemed "retail." In those service arrangements, the business customers are the final consumers of the product. Further, unlike an ISP, those businesses are not employing the telecommunications as an essential input in a communications service offered to the public.

ongoing industry standards process); deployment risk (the integration of DSL into the incumbent LEC networks is far from complete); commercial risk (consumer demand for DSL is unknowable); and competitive risk (another technology may offer ISPs a better broadband solution). These risk factors, and the ISP's level of commitment, are simply not present in a retail transaction between an incumbent LEC and a retail end-user consumer. Of course, the ISP's incentives to accept the risks also underscore the difference from a retail transaction.

Some parties have alleged that a transaction is deemed to be retail in every case except when the buyer engages in resale "without substantial alteration of its form or content."[46] This is a false and unsupported premise. Indeed, as explained by Black's Law Dictionary, the term *retail* means " [a] sale for final consumption *in contrast to a sale for further sale or processing (i.e. wholesale)* . . . to the ultimate consumer."[47] Simple resale, with no value or information services added, is an overly restrictive limitation on the concepts of retail and wholesale that is inconsistent with the ordinary meaning of those terms.[48] Since ISPs unquestionably engage in further processing of the DSL service (indeed, it is what ISP do) and offer an information service

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[46] *In the Matter of The Bell Atlantic Telephone Companies Transmittal No. 1138 to Tariff F.C.C. No. 1, Introducing Volume and Term Plans for Infospeed DSL Services*, Petition of the Telecommunications Resellers Association, at 5 (filed May 26, 1999) ("TRA Comments"), *and attached*, "Resale of Advanced Telecommunications Services Pursuant to Section 251(c)(4)" at 4-5 (April 27, 1999) ("TRA White Paper").

[47] Black's Law Dictionary 1315 (6th ed. 1990) (emphasis added).

[48] Indeed, TRA argues by analogy that ISPs cannot purchase DSL on a wholesale basis because "when an automobile manufacturer purchases steel to be consumed in manufacturing an automobile, it is engaged in a retail transaction." TRA Petition at n.10. This is an improper syllogism, of course, because the analogy lacks the appropriate fact-based analysis of the transaction and simply assumes, without analysis, that the automobile manufacturer is engaged in retail purchase of steel. The Supreme Court, in explaining the meaning of "retail," exhorted against defining "retail" with self-interested industry conclusions: "courts are not incompetent to distinguish between a legitimized usage fixed by established practice and one recently instituted with the aim of avoiding the law." Idaho Sheet Metal Works, 383 U.S. at 199.

that includes a telecommunications component, they may well engage in purchases of telecommunications that are not "at retail."[49]

E. Avoiding Costs Through Bulk DSL Services: Costs Associated With Retail Sales that Are Eliminated for Incumbent LECs

Finally, an ISP engaged in a bulk DSL transaction is fundamentally not purchasing services "at retail" because the ISP takes on the same costs and functions relative to the final consumer recognized by the statute as the incumbent LEC's ordinary retail functions.[50] Specifically, the ISP would generally take on one or more roles performed by the incumbent LEC in a retail arrangement, including that: (a) the ISP may order the service for the customer through its electronic ordering processes with the offering LEC; (b) the ISP may be responsible for all customer premises equipment ("CPE") and inside wiring of the customer's premises; (c) the ISP, and not offering LEC, may responsible for all customer service issues (i.e., explaining and installing the product, service outages, service maintenance, service termination, etc.); and (d) the ISP may be responsible for billing and collecting its service fees from the end-user. On this basis, it is entirely reasonable to conclude that since the incumbent LEC is stepping aside and the ISP effectively takes the LEC's role as retailer to the end-user customer, the commercial relationship between the LEC and the ISP is not "at retail."

CONCLUSION

Congress carefully tailored the Section 251(c)(4) resale discount obligation to apply only to those incumbent LEC services offered "at retail." An incumbent LEC offering of bulk DSL

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[49] For the reasons discussed above at n.44, TRA also incorrectly suggests that an ISP in a wholesale transaction would somehow become a telecommunications reseller. TRA Petition at 5.

[50] As discussed above in Part I (at 6-7), the avoided costs listed in Section 252(d)(3) of the Act leads to a reasonable inference that Congress did not intend for services to be deemed "at retail" if the service allows the ILEC to avoid significantly the business costs associated with end-user consumer transactions, and to shift those consumer-oriented onto another retail provider.

services to ISPs, however, is not a retail offering. Instead, the ISPs are the retailers of high-speed Internet access services to the public, and they use the bulk DSL offerings as inputs for their final Internet product to the consumer. Therefore, as a matter of law, the resale discount obligation does not apply to an incumbent LEC's offering of bulk DSL services to ISPs. This result also satisfies the highest policy goals of the 1996 Act for rapid deployment of broadband capability to the American public. With bulk DSL service arrangements, ISPs can integrate the high-speed capabilities of DSL into the information services they now offer to consumers and build upon their existing relationships with end users to expand consumer awareness of DSL services generally, spurring increased penetration and market acceptance.