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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: CC Docket No. 98-147; Deployment of Wireline Services Offering Advanced Telecommunications Capability and CC Docket No. 99-201; Partial Suspension Order, Bell Atlantic Transmittal No. 1138

Dear Ms. Salas:

On May 19, 1999, Bell Atlantic filed a tariff with the FCC to offer Asymmetric Digital Subscriber Line (ADSL) service on a wholesale basis to Internet Service Providers (ISPs) and competing carriers. Because this is a wholesale offering intended for carriers and ISPs to use as an input to their retail Internet services, it is not provided by Bell Atlantic "at retail" and therefore is not subject to the Act's "avoided cost" discount for retail telecommunications services. This tariff became effective on June 3, but certain language of the tariff that refers to the wholesale nature of the tariff was suspended until November 2.

The attached three papers describe the wholesale nature of this ADSL service offering to ISPs and competing carriers, how this service is distinguishable from Customer Specific Arrangements, and the regulatory status of ISPs offering ADSL services to their customers.

Should you have any questions, please contact me at 202-336-7888.

Sincerely,

Attachment

cc: S. Whitesell
K. Dixon
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The Wholesale Discount Requirement In 251(c)(4) Of The Act Should Not Apply To Wholesale Offerings of xDSL Service

The Commission should confirm that xDSL services that are offered on a wholesale basis to Internet Service Providers and other carriers for resale are not subject to a wholesale discount under Section 251(c)(4) of the Act. This is true both for reasons of law and of sound public policy.

First, as a legal matter, the Section 251(c)(4) discount applies only to services that are provided “at retail” to “subscribers” of those services. The xDSL services provided to ISPs and other carriers, however, will be used as an input to their own retail Internet services and resold to their own subscribers. By definition, services that are provided for resale are not “retail” services, and are not, in common telecommunications parlance, provided to the ultimate “subscribers.” Moreover, the Commission already has concluded, in the context of exchange access service, that a service is not a retail service subject to Section 251(c)(4) where it predominantly is provided to entities that resell the service as part of their own retail product.

Second, as a policy matter, imposing a wholesale discount requirement on wholesale xDSL services would make it impossible to provide ISPs the lowest possible price. If any price made available to ISPs, no matter how deeply discounted, automatically would have to be available at a further 20 percent discount, the simple fact is that carriers will be unable to offer ISPs a price that is as low as they otherwise could. Ironically, the ultimate effect of such a requirement will be higher prices for ISPs and their customers, and slower deployment of high speed services to the home -- all directly contrary to the FCC’s policy objectives. And it would put ISPs (such as AOL) that are not affiliated with a carrier, and are unable to take advantage of a wholesale discount, in the untenable position of being unable to compete with ISPs (such as UUNet) that are affiliated with a carrier.

1. Wholesale xDSL services provided predominantly to ISPs for resale are not “retail” services subject to a wholesale discount. Under the express terms of the Act, a wholesale discount requirement applies only to telecommunications services that a “carrier provides *at retail to subscribers* who are not telecommunications carriers.” 47

U.S.C. § 251(c)(4)(A) (emphasis added). By definition, however, an xDSL service that is provided to ISPs for resale to their own subscribers is a *wholesale* service and is not being provided “at retail,” as required by the Act. Likewise, when ISPs purchase xDSL service for resale, they are not, in any common sense use of the term, a “subscriber” of that service, which typically refers to the end user of the service. Under the express terms of Section 251(c)(4), therefore, xDSL services provided to ISPs for resale are not subject to a wholesale discount.

Moreover, the provision of the Act that defines the standard for establishing a wholesale discount also makes clear that a “retail” service is one that a local exchange carrier provides to end users, and for which it performs the “marketing, billing, collection, and other” retailing functions necessary to do so. 47 U.S.C. § 252(d)(3). Indeed, the Commission itself has acknowledged that “Congress clearly intended Section 251(c)(4) to apply to services targeted to *end user* subscribers, because only those services involve an appreciable level of *avoided costs* that could be used to generate a wholesale rate.”

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 15931 at ¶ 874 (1996) (“*Local Competition Order*”)(emphasis added).¹ But when xDSL services are provided to ISPs for resale, it is the ISPs that sell the service to end user subscribers, and it is the ISPs that perform the marketing and other retailing functions contemplated by the Act.

Lest there were any doubt, however, the Commission itself previously addressed the same fundamental question at issue here. In the *Local Competition Order*, the Commission concluded, in the context of exchange access services, that when a service is

¹ Some may argue that ISPs qualify as “subscribers” under the so-called “enhanced service provider exemption.” They are wrong. As the Commission has made clear, that exemption merely allows ISPs to be treated as though they were “end users” solely “for purposes of applying access charges.” *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, n. 8 (1988). The FCC’s decision to *treat* enhanced service providers as if they were end users in order to exempt them from paying access charges does not mean these entities actually *are* end users or that they are “subscribers” for purposes of Section 251(c)(4). In fact, the Commission has recognized that enhanced service providers function more like carriers by noting that, absent the exemption, “facilities based carriers, resellers, ... sharers, privately owned systems, enhanced service providers, and other private line and WATS customers,” all would be subject to interstate access charges. *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 78 (1983).

provided predominantly to another entity to resell to end user subscribers as part of its own retail service, the wholesale discount does not apply. This is true, moreover, despite the fact that exchange access services also are (and under the FCC's rules must be) made available for purchase by end user customers as well as by carriers. As the Commission itself put it, however, "these services, are *predominantly* offered to, and taken by, IXCs, *not end users.*" *Local Competition Order* at ¶ 874 (emphasis added). As a result, according to the Commission, "access services are designed for, and sold to, IXCs as an input component to the IXC's own retail services." *Id.*

The same is true, of course, of wholesale xDSL services that predominantly are provided to ISPs for resale. Like exchange access services, wholesale xDSL arrangements predominantly will be offered to and taken by subscribers that are not end users (i.e. ISPs and other carriers). Like exchange access services, wholesale xDSL will be sold as an input to ISPs' and carriers' own retail services. And like exchange access services, ISPs will perform the retail-related functions when they sell xDSL service to their own end users.

Moreover, while this is true of any xDSL service that is provided predominantly to ISPs or others for resale, it is especially true of the type of bulk offerings that Bell Atlantic (and perhaps others) soon will tariff. These offerings specifically are designed for high volume purchasers of xDSL services, and are designed for use predominantly – if not exclusively – by ISPs and others (including other carriers) to purchase as an input to their own retail Internet services. Indeed, they involve the types of volumes that, as a practical matter, only can be used by entities that intend to resell the service to many separate retail customers. At a minimum, therefore, these types of bulk offerings -- which already are deeply discounted -- cannot lawfully be subjected to a further wholesale discount requirement under the express terms of the Act and the Commission's orders.

2. Applying a wholesale discount requirement to wholesale xDSL offerings would be contrary to sound public policy. Imposing a wholesale discount requirement on wholesale xDSL services provided to ISPs and others also would undermine the Commission's own public policy objectives.

Under these circumstances, imposing a wholesale discount would result in consumers paying more for advanced services they purchase from ISPs, and, by doing so, slow the widespread deployment of advanced services to all Americans. This is so for the simple reason that applying a wholesale discount to these services will effectively undermine the incentive that carriers otherwise would have to offer ISPs the lowest possible price for these services in order to promote their widespread adoption by consumers. In other words, carriers simply cannot afford to offer ISPs as low a price as they would otherwise if they know that they are at risk of automatically having to sell those services at a further discount of 20 percent (or more). And the risk is real. To date, states typically have applied a uniform discount to all services regardless of the level of costs that will actually be avoided in the case of that particular service (if any). Consequently, ISPs will pay higher prices for xDSL services that ultimately will be passed through to consumers.

In addition, it simply makes no policy sense to create a situation in which ISPs that are affiliated with a carrier can purchase xDSL services for resale at a lower price than ISPs who are not affiliated with a carrier. Both will perform the same functions. Both will purchase the service, resell it to retail customers and perform various retail-related functions. Yet the ISP that is not affiliated with a carrier will be put in the untenable position of having an artificial, regulatorily-created cost disadvantage compared to its competitor.

For all these reasons, the Commission should confirm that xDSL services that are provided predominantly to ISPs or other carriers for resale are not subject to a wholesale discount under Section 251(c)(4) of the Act.

Bell Atlantic's Wholesale ADSL Offering And Customer Specific Arrangements

Bell Atlantic has filed tariffs to offer Asymmetric Digital Subscriber Line ("ADSL") service on a wholesale basis to Internet Service Providers ("ISPs") and competing carriers. This tariff offering enables carriers and ISPs to obtain and use Bell Atlantic's ADSL service as an input to the bundled Internet services they provide on a retail basis to their end users. Carriers and ISPs purchasing under this tariff make volume and term commitments and pay wholesale rates that are below the rates for Bell Atlantic's retail ADSL service offering. Because this is a wholesale offering intended for carriers and ISPs to use as an input to their retail Internet services, it is not provided by Bell Atlantic "at retail" and is not subject to the Act's "avoided cost" discount for retail telecommunications services. 47 U.S.C. §§ 251(c)(4); 252(d)(3).

Bell Atlantic also provides certain telecommunications services at retail that are subject to the Act's "avoided cost" discount. In some cases, Bell Atlantic provides these services directly to end users under arrangements where the end user makes volume and term commitments and pays discounted rates. These arrangements, called Customer Specific Arrangements ("CSAs"), still involve the provision of telecommunications services "at retail" and therefore are subject to the Act's "avoided cost" discount for carriers that wish to resell these CSAs. These types of CSAs are easily distinguishable from Bell Atlantic's wholesale ADSL offering.

First, these CSAs are provided by Bell Atlantic directly to the end user. In fact, they are designed and tailored for use by a specific end user, rather than an intermediate carrier or ISP. They are not an input to a carrier's or an ISP's retail service.

By contrast, Bell Atlantic's wholesale ADSL offering is not intended for sale directly to an end user. It is instead designed for carriers and ISPs to purchase and use as an input to produce their own retail Internet services for their end users. It is the intermediate carrier or ISP that provides the bundled retail offering to the end user.

Second, these CSAs include retail functions that Bell Atlantic performs directly for the end user. For example, under a CSA, Bell Atlantic is responsible for accepting repair requests directly from the end user. If the end user of a CSA experiences a problem, that end user can call Bell Atlantic's service representative and Bell Atlantic will help the end user isolate the problem to the customer's inside wiring, telecommunications equipment, or the service provided by Bell Atlantic. And if the problem is with the service Bell Atlantic is providing, Bell Atlantic will make the necessary repairs.

Under Bell Atlantic's wholesale ADSL offering, Bell Atlantic does not perform retail functions directly for the end user. Using the same example, if the end user experiences an ADSL problem, that end user would call the carrier or ISP that provided the Internet access bundled offering. That carrier or ISP would help the end user isolate

the problem to the end user's computer, modem, software, inside wiring or the ADSL service. If the carrier or ISP determined that the problem is in the ADSL service, it would submit a repair ticket to Bell Atlantic and Bell Atlantic would then repair the service. Bell Atlantic's service representatives would not accept a repair call directly from end users of carriers or ISPs purchasing Bell Atlantic's wholesale ADSL offering.

For these reasons, Bell Atlantic's wholesale ADSL offering is distinguishable from CSAs.

7/26/1999

Regulatory Status of Internet Service Providers Offering ADSL Services to their Customers

Bell Atlantic has filed tariffs to offer Asymmetric Digital Subscriber Line (“ADSL”) service on a wholesale basis to Internet Service Providers (“ISPs”) and competing carriers. ISPs, such as FlashCom, purchasing under this tariff would use Bell Atlantic’s ADSL service as an input to produce a package of high-speed Internet access services that they would offer to their retail customers. ISPs would not offer Bell Atlantic’s ADSL service on a stand-alone basis without packaging it with their Internet access services and thus would not simply resell Bell Atlantic’s telecommunications service.

The fact that ISPs include telecommunications services, such as ADSL, as part of their package of Internet access services does not change their regulatory status from information service providers to telecommunications carriers. The Federal Communications Commission has already decided that ISPs are properly classified as information service providers, rather than telecommunications carriers, even though they use data transport services as an input to their Internet access services.

Under the express terms of the 1996 Act, information services are a separate and distinct class of services from telecommunications services. And as the Commission itself has repeatedly emphasized, this is equally true where an information service provider *uses* telecommunications as an input in providing its packaged information service.

The 1996 Act separately defines “telecommunications service” and “information service.” The term “telecommunications service” is limited to “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 3(43). By contrast, an “information service” is defined as “the offering of a capability for generating, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” 47 U.S.C. § 3(20).

The Commission explained the distinction between “information services” and “telecommunications services” in its Report to Congress on Universal Service. Report to Congress, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67 (rel. April 10, 1998). As the Commission stated, “[a]fter careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of ‘telecommunication service’ and ‘information service’ in the 1996 Act are mutually exclusive.” *Id.* at ¶ 39.

Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers “telecommunications.” By contrast, when an entity offers transmission incorporating the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,” it does not offer telecommunications. Rather, it offers an “information service” even though

it uses telecommunications to do so. *Id.*

An information service provider is *using* telecommunications, not *providing* it. It is the company engaged in the provision of transmission capacity *to* information service providers that is providing telecommunications:

[A]n entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not “change . . . the form and content” of the information. When an entity offers subscribers the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” it does not *provide* telecommunications; it is *using* telecommunications.

Id. at ¶ 41 (footnotes omitted) (emphasis added).¹

Based on these statutory definitions, the FCC has determined that Internet access services are information services, not telecommunications services.

The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers’ own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an “information service.”

In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), ¶ 80 (rel. April 10, 1998).

The FCC has further concluded that ISPs are information service providers – not telecommunications carriers – because they do more than just resell data transport services.

Internet access providers, typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers – interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and

¹ See *Report to Congress* at ¶ 43 (“The Senate Report stated in unambiguous terms that its definition of telecommunications ‘excludes those services . . . that are defined as information services.’ Information service providers, the Report explained, “do not ‘provide’ telecommunications services; they are users of telecommunications services.”) (quoting *Senate Report* [S. Rep. No. 23. 104th Cong., 1st Sess. (1995)] at 18, 28) (footnotes omitted) (emphasis added).

others. In offering service to end users, however, they do more than resell those data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service. We conclude that, under the 1996 Act, they are appropriately classed as information service providers.

Id. at ¶ 81.

ISPs are not unique in using telecommunications services as an input to the information services they provide to their customers. For example, voice mail companies may use telecommunications services, such as private lines, as an input to their services in order to reach their business customers' premises and to carry calls from those premises back to their voice mail equipment. These telecommunications services are part of the package of information services provided by voice mail companies and do not transform them from information service providers to telecommunications carriers.

Similarly, alarm companies typically use telecommunications services, such as dedicated data circuits, that are connected from the alarm company's office to their business customers' premises in order to monitor the status of their customers' alarm systems. Again, these telecommunications services are part of the package of information services provided by alarm companies and do not transform alarm companies from information service providers to telecommunications carriers.

The FCC has long held that information service providers may use telecommunications services to provide their information services and that doing so does not change them from information service providers to telecommunications carriers. Likewise, ISPs that purchase Bell Atlantic's ADSL service on a wholesale basis and use it to provide high-speed Internet access service packages to their retail customers are properly classified as information service providers, rather than telecommunications carriers.