



## SUMMARY

Pursuant to its federal tariff, Qwest Corporation (“Qwest”) provides bulk digital subscriber line (“DSL”) services to the Microsoft Network, L.L.C. (“MSN”), which MSN includes as an input in its Internet access offerings to end-user customers. More than two years ago, this Commission determined that bulk DSL services of this sort are provided on a wholesale basis, not “at retail,” and that those services thus fall outside the “retail minus avoided cost” resale requirements of 47 U.S.C. §251(c)(4). *See* 47 C.F.R. § 51.605(c). Nevertheless, the Minnesota Department of Commerce (“DOC”) recently suggested that federal law requires Qwest to make its wholesale DSL service available to competing telecommunications carriers for resale under sections 251(c)(4) and 252(d)(3). DOC appears to contend that, because Qwest performs under contract certain billing, collection, and marketing functions for MSN, Qwest itself offers these DSL services to end users on a “retail” basis for purposes of section 251(c)(4). DOC advances this view even though, under the federal tariff and the parties’ agreements, MSN, not Qwest, has the substantive retail relationship with those end users.

DOC’s position is irreconcilable with federal law in two independent respects. First, this Commission has already categorically determined that “advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers’ retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.” 47 C.F.R. § 51.605(c) (“Rule 605(c”). *See* Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237 (1999) (“AOL Bulk Services Order”), *aff’d*, *Association of Communications Enterprises v. FCC*, 253 F.3d 29 (D.C. Cir. 2001). This rule does not and should not contain any

exception for cases in which the incumbent local exchange carrier serves as a billing, collection, and marketing agent for the unaffiliated ISP.

Second, even if Qwest could be said to have offered MSN's end users a service at "retail," the only service those end users purchase is a bundled high-speed service that combines DSL with Internet access. As this Commission has tentatively concluded in the *Wireline Broadband NPRM*, that service is an information service, not a telecommunications service, and it therefore falls outside the scope of section 251. *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities*, FCC No. 02-42 (Feb. 15, 2002) ("*Wireline Broadband NPRM*"), at ¶¶ 24-25; accord 47 C.F.R. § 64.702(a); see also *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 02-77 (rel. Mar. 15, 2002), at ¶¶ 38-41, 53.

Finally, the resolution of the issues presented here will have potentially national significance, as other incumbent LECs develop and offer wholesale DSL services. The deployment of DSL services under Qwest's tariff, for example, affects not just Minnesota but each of Qwest's other 13 in-region states, where Qwest has the same arrangement with MSN. Disputes concerning such federally tariffed Internet access services are properly resolved not on a state-by-state basis, but on a national level. DOC's contemplated exception to Rule 605(c) and the *AOL Bulk Services Order* would undermine local exchange carriers' settled expectation that bulk DSL sales to ISPs do not trigger section 251(c)(4)'s resale requirements and would inject anticompetitive uncertainty into the national market for broadband Internet access.

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EXHIBIT A

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Qwest Corporation for	)	File No.
	)	
Declaratory Ruling Clarifying that the Wholesale	)	
DSL Services Qwest Provides to MSN Are Not	)	
“Retail” Services Subject to Resale Under	)	
Section 251(c)(4) of the Act	)	

To: The Commission

**PETITION FOR DECLARATORY RULING**

This Commission determined more than two years ago that the bulk digital subscriber line (“DSL”) transmission services an incumbent local exchange carrier (“LEC”) sells unaffiliated Internet service providers (“ISPs”) as inputs for the ISPs’ own retail offerings are provided on a wholesale basis, not “at retail,” and that those services thus fall outside the scope of the “retail minus avoided cost” resale pricing obligations of 47 U.S.C. § 251(c)(4). *See* 47 C.F.R. § 51.605(c). Pursuant to 47 C.F.R. § 1.2, Qwest Corporation respectfully seeks a declaratory ruling that that no exception to this principle is warranted where, as is the case throughout Qwest’s 14 in-region states, the incumbent LEC serves as a billing, collection, and marketing agent for the unaffiliated ISP.

Under the terms of its federal tariff, Qwest provides DSL transmission capacity in bulk to the Microsoft Network, L.L.C. (“MSN”). The Minnesota Department of Commerce (“DOC”),

which purports to “represent consumer interests” before the state public utilities commission,<sup>1/</sup> recently suggested that federal law requires Qwest to make that DSL service available to competing telecommunications carriers for resale under the “retail minus avoided cost” standard of sections 251(c)(4) and 252(d)(3).<sup>2/</sup> The apparent premise of DOC’s theory is that, because Qwest performs for MSN under contract certain billing, collection, and marketing functions, Qwest provides DSL services “at retail” to end users – even though, under the terms of both Qwest’s federal tariff and the parties’ agreements, MSN alone has the substantive retail relationship with those end users.

DOC’s position is irreconcilable with federal law on two levels. First, this Commission has already categorically determined that “advanced telecommunications services [specifically, DSL] sold to Internet Service Providers as an input component to the Internet Service Providers’ retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.” 47 C.F.R. § 51.605(c) (“Rule 605(c)”). Similarly, in the *AOL Bulk Services Order*, the Commission confirmed that, although DSL services sold to “residential and business end-users” are subject to section 251(c)(4) resale obligations, DSL services sold to ISPs for inclusion in high-speed Internet access service offerings are not. See Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237 (1999), *aff’d*, *Association of*

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<sup>1/</sup> See [www.commerce.state.mn.us/pages/AboutUs/AboutUs.htm](http://www.commerce.state.mn.us/pages/AboutUs/AboutUs.htm) (visited March 26, 2002) (describing DOC’s functions and responsibilities).

<sup>2/</sup> No competitive LEC has requested that Qwest provide its bulk interstate DSL service at an avoided cost discount, and the issue is not currently before the Minnesota PUC in an arbitration or other proceeding. The Commission thus need not decide whether state commissions are authorized to determine whether interstate services are offered to end users for purposes of sections 251(c)(4) and 252(d)(3).

*Communications Enterprises v. FCC*, 253 F.3d 29 (D.C. Cir. 2001). The wholesale arrangement under which Qwest provides DSL services to MSN falls squarely within the scope of Rule 605(c).

*Second*, even if Qwest could be said to have offered end users a service “at retail,” the only service actually offered to those end users is a bundled high-speed service that combines DSL with Internet access. As this Commission has now tentatively concluded in the *Wireline Broadband NPRM*, that service is an information service, not a telecommunications service, and it therefore falls outside the scope of section 251(c)(4) *whether or not* Qwest could be said to provide it (or any component of it) “at retail.” *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities*, FCC No. 02-42 (Feb. 15, 2002) (“*Wireline Broadband NPRM*”), at ¶¶ 24-25; accord 47 C.F.R. § 64.702(a); *see also Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 02-77 (rel. Mar. 15, 2002), at ¶¶ 38-41, 53 (cable modem service involves the provision of an “information service” and not a “telecommunications service”). Significantly, Qwest does not, and is not required to, provide raw DSL transmission services over *individual* lines under the same tariff provision or at the same discounted per-line price applicable to its bulk service.

Finally, the issues presented here affect the deployment of DSL service not just in Minnesota, but in each of Qwest’s other 13 in-region states, where Qwest has the same arrangement with MSN. Indeed, the resolution of these issues will have potentially national significance, as other incumbent LECs develop and offer wholesale DSL services. Disputes concerning these federally tariffed Internet access services are properly resolved not on a balkanized state-by-state basis, but on a national level by the federal agency that, for decades, has fueled the growth of the Internet by exempting it from disparate or burdensome state

regulation. DOC's wish to investigate the details of Qwest's relationship with MSN is both wrong on the legal merits and inimical to the commercial experimentation essential to the continued growth of innovative Internet access services. Indeed, since the *AOL Bulk Services Order* was issued, Qwest and likely other LECs have operated on the settled expectation that bulk DSL sales to ISPs do not trigger the resale discount provisions of section 251(c)(4). DOC's contemplated exception to that general rule would defeat that investment-backed expectation and inject anticompetitive uncertainty into the national market for broadband Internet access.

For all of these reasons, this Commission should promptly grant this petition and resolve the straightforward legal issue presented here: whether, as its plain text confirms, Rule 605(c) applies to an incumbent LEC that serves as a billing, collection, and marketing agent for an unaffiliated ISP.

### **BACKGROUND**

DOC's inquiries arise from proceedings initiated by the Minnesota Public Utilities Commission ("PUC") in January 2002. Those proceedings focused for the most part on unrelated and now-resolved disputes about Qwest's commercial arrangements with MSN. Nonetheless eager to intervene in the development of the national broadband market in general, and Qwest's unregulated relationship with MSN in particular, DOC seems interested in launching a new effort to require Qwest to offer its MSN-related DSL services at the "retail minus avoided cost" resale obligations of section 251(c)(4).

#### **A. Qwest's DSL Services Arrangement with MSN**

For a number of years, Qwest has offered a retail "Qwest DSL Service" directly to end users pursuant to section 8.4.1 of FCC Tariff No. 1. *See* Starliper Affidavit, ¶ 3 (attached as Exhibit A); *see also* Qwest Tariff F.C.C. No. 1, § 8.4.1. Under separate, recently adopted tariff

provisions, Qwest also offers bulk DSL volume plans, under which an ISP can purchase DSL on a wholesale basis at discounts principally based on the volume of DSL lines that the ISP commits to buy. *See* Starliper Affidavit, at ¶ 4; *see also* Qwest First Revised Tariff F.C.C. No. 1. Section 8.4.4 of the revised tariff requires ISPs that subscribe to Qwest DSL volume plans to provide “customer premises equipment” to end-users, deal directly with end-users “with respect to all matters relating to the service,” and direct end-users to contact it, rather than Qwest, “regarding any aspect of the [DSL] service.” *Id.* at § 8.4.4.

In 2001, MSN elected to purchase DSL from Qwest on a volume basis. Starliper Affidavit, at ¶ 8. Like other ISPs that have obtained DSL transmission services from an incumbent LEC under a federal tariff, MSN obtains DSL service from Qwest, combines that service with its own Internet access services, and sells the bundled package to its end-user customers as a new information service, known as “MSN Broadband.” *Id.* at ¶ 9. Qwest is responsible for establishing DSL lines on MSN’s behalf and for addressing any DSL service-related problems MSN reports. *Id.* Pursuant to a number of agreements separate from the federal tariff, Qwest also acts as MSN’s agent in some areas, providing MSN with certain sales, marketing, billing, and collection services. *Id.* at ¶¶ 10-12. But the retail relationship belongs to MSN. *Id.* at ¶ 13. MSN alone retains all customer information and data, supplies the customer premises equipment, assigns e-mail addresses, deals with customers on any repair issues, and takes customer disconnect orders. *Id.* at ¶¶ 9, 11-14. On rare occasions, Qwest interacts with end users on MSN’s behalf in order to resolve service-related problems on end users’ premises, but only after being asked to do so by MSN. *Id.* at ¶¶ 9, 13. Similarly, MSN has primary responsibility for resolving customer billing issues. *Id.* at ¶ 12. Qwest may make billing

statement adjustments in certain circumstances, but MSN, not Qwest, bears the entire risk of non-payment by end-user customers. *Id.*

**B. DOC's Inquiries Into Qwest's DSL Services Arrangement with MSN**

On January 16, 2002, a Minnesota-based group of ISPs, "Minnesota ISPs Working Together" ("MIWT"), filed a complaint with the Minnesota Public Utilities Commission ("PUC"), challenging the process by which Qwest has been phasing out its own bundled DSL/ISP service ("Qwest.net") for residential subscribers and transferring some of them to MSN Broadband. The parties soon entered into a settlement agreement with the Minnesota Attorney General's Office resolving MIWT's allegations.<sup>3/</sup> That settlement agreement became effective on March 5, 2002, and the PUC then dismissed MIWT's complaint.

DOC has nonetheless searched for some other ground on which to challenge the Qwest-MSN DSL arrangement. Before the March 5 agreement was signed, DOC filed public comments raising questions about, among other things, whether that arrangement triggers resale obligations under section 251(c)(4), an issue that was not raised in the MIWT complaint. DOC argued that Qwest was required to offer its DSL services to CLECs at a "retail minus avoided cost" discount on the theory that it is "providing a retail service." DOC Comments at 3. While acknowledging that this Commission had apparently reached the opposite conclusion in the *AOL Bulk Services Order*, DOC claimed that the characteristics of the Qwest-MSN arrangement present a special case. *Id.* According to DOC, Qwest's performance of certain marketing, billing, and collection functions makes Qwest a "retail" provider of the DSL input in MSN's information service, because, DOC reasoned, those are functions often undertaken by retail service providers. *Id.*

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<sup>3/</sup> Qwest filed an answer to the complaint that both addressed the merits of the ISPs' claims and challenged the PUC's jurisdiction to consider the issues raised by those claims. In entering into the settlement, Qwest did not concede PUC jurisdiction over the complaint.

Because DOC concluded that “Qwest [was] required to resell retail services,” but had failed to offer for resale the volume DSL services it sold to MSN, DOC encouraged the PUC to investigate “this potential violation of Qwest’s resale duty under section 251(c)(4) of the Telecommunications Act.” *Id.* The PUC made no reference to that issue when it dismissed the MIWT proceedings.

Since the execution of the settlement agreement, DOC has sought additional information to support its efforts to manufacture an exception to Rule 605(c). It recently asked MSN to provide it with all documents relating to its DSL-services arrangement with Qwest. MSN agreed to make those documents available under certain conditions designed to preserve their confidentiality, but DOC objected to the conditions. As a result, on March 15, 2002, DOC served Qwest with a formal request for documents relevant to its investigation. Qwest responded to that document request on March 25, 2002. DOC, however, has not yet taken any steps to commence a proceeding against Qwest to address its theory or to ask the Minnesota PUC to do so.<sup>4/</sup>

### ARGUMENT

Since 1999, when this Commission adopted Rule 605(c), incumbent LECs providing bulk DSL services to ISPs have operated on the expectation that, as the Rule provides, those services are “wholesale” rather than “retail” and thus fall outside the scope of the resale duty under section 251(c)(4). DOC seeks to defeat those investment-backed expectations through the creation of a poorly defined subcategory of bulk DSL services that would be classified for these purposes as “retail,” even though end users have no right whatsoever to purchase those services

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<sup>4/</sup> DOC has some enforcement powers in this area. It could, therefore, argue that it has the authority to commence proceedings against Qwest that is independent of the PUC’s enforcement authority.

at the same price on a line-by-line basis. Left unchecked, those efforts would not only penalize incumbent LECs for designing creative marketing arrangements for the roll-out of DSL, but complicate regulation of the market for broadband Internet access at precisely the same time this Commission is searching for ways to *remove* regulatory obstacles to that market's continued growth.

Moreover, the incongruous procedural premise of the DOC's position is that basic interpretive questions about the applicability of a *federal* statutory requirement (section 251(c)(4)) to *interstate* service offerings covered by a *federal* tariff should be decided on a *state-by-state* basis. And if DOC prevails in Minnesota, there is little doubt that "me too" proceedings will sprout up in each of Qwest's other 13 states on exactly the same issue of federal law. The resulting competitive uncertainty throughout Qwest's region, and potentially beyond, would be bad for carriers and consumers alike. This Commission should thus act promptly to keep the ground rules for DSL clear, correct, and nationally consistent.

**I. RULE 605(c) AND THE AOL BULK SERVICES ORDER PRECLUDE IMPOSITION OF SECTION 251(c)(4) RESALE OBLIGATIONS ON DSL SERVICES PROVIDED TO ISPs.**

Rule 605(c) provides: "[A]dvanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers." 47 C.F.R. § 51.605(c) (emphasis added). The legal issue presented in this petition is as straightforward as the language of that provision. The "retail minus avoided cost" resale obligation of section 251(c)(4) is limited to "any telecommunications service that the carrier provides *at retail* to subscribers who are not telecommunications

carriers.” 47 U.S.C. § 251(c)(4) (emphasis added). There is no dispute that, under the arrangement at issue here, Qwest sells an “Internet Service Provider” (*i.e.*, MSN) “advanced telecommunications services” (*i.e.*, DSL transmission) “as an input component to the Internet Service Provider[’s] retail Internet service offering.” 47 C.F.R. § 51.605(c); *see also* Starliper Affidavit, at ¶ 9. Thus, under Rule 605(c), those DSL transmission services “shall not be considered to be telecommunications services offered on a retail basis that [Qwest] must make available for resale at wholesale rates to requesting telecommunications carriers.” 47 C.F.R. § 51.605(c).

The *AOL Bulk Services Order* supports the same conclusion, confirming that, although the section 251(c)(4) resale obligation does apply to DSL services that an incumbent LEC sells directly to residential or business end-users, it does *not* apply to “advanced services sold to Internet Service Providers for inclusion in a high-speed Internet service offering.” *AOL Bulk Services Order*, at ¶ 3. The Commission observed that, as a group, services provided to ISPs are “inherently and substantially different from . . . services made available directly to business and residential end-users,” in that ISPs purchase the “DSL service for the sole purpose of combining the telecommunications service with [their] own information service and offering a new retail service, *i.e.* high-speed Internet service, to the ultimate end-user.” *Id.* at ¶ 14.

The Commission further found that excluding bulk DSL transmission services from the scope of the section 251(c)(4) resale obligation is necessary not just for consistency with the statutory language but also for the development of a sensible broadband policy. As the Commission explained, relieving incumbent LECs of any duty to make these bulk services available to competing carriers at a discount is necessary to “encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price.” *Id.* at ¶ 3. The

Commission concluded that “consumers will ultimately benefit” from that policy “through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services.” *Id.*

If adopted in Minnesota or elsewhere, DOC’s position would undermine those long-term consumer benefits in two ways. First, it would compromise any incumbent LEC’s incentive to provide low-cost DSL transmission services to ISPs, because it would renew concern that incumbents will be required to make those services available to other telecommunications carriers at a *further* discount determined by state regulators in the section 252 process.<sup>5/</sup> Second, because (as discussed below) DOC’s position turns on the details of an incumbent LEC’s commercial relationship with ISPs, it would invite widespread, fact-intensive litigation in multiple forums, injecting further anticompetitive uncertainty into the broadband sector. That sector badly needs settled rules, not ever more complicated legal disputes. Indeed, no matter how the Commission were to view this legal dispute on the merits, it should promptly provide clear, national guidance on the applicability of section 251(c)(4). State-by-state adjudication of such issues on a piecemeal basis would undermine the Commission’s efforts to develop a coherent national broadband policy.

Moreover, even on its own terms, the *particular* fact-intensive inquiry DOC champions here is wholly unjustified as a legal matter. DOC contends that, because Qwest acts as MSN’s billing and collection agent for MSN’s own bundled information service, and because Qwest has

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<sup>5/</sup> Quite apart from the new state-level regulatory obligation DOC seeks to impose, Qwest and other LECs must presently comply with the equal access requirements of the *Computer II* and *Computer III* regimes. See generally *Wireline Broadband NPRM*, at ¶¶ 39–42. Those requirements govern a carrier’s relationship with unaffiliated ISPs that wish to provide competing *information services* to end users, whereas the requirements of section 251(c)(4) govern a carrier’s relationship with *competitive carriers* that seek to provide *telecommunications services* to those ISPs. Only the latter requirements are at issue here.

agreed to help market that service, Qwest itself has somehow become a “retail” provider of MSN’s information service to MSN’s customers. It is true that, in the *AOL Bulk Services Order*, the Commission noted that “billing” and “marketing” are among the functions that companies often provide for their retail customers and can serve as indicia of a retail relationship. *AOL Bulk Services Order*, at ¶ 17. But the Commission did *not* determine that, by providing such functions on behalf of an ISP, a carrier automatically renders itself a retail provider of the ISP’s information service.<sup>51</sup>

Moreover, any such determination would be wholly untenable. Incumbent LECs commonly serve as billing agents for unaffiliated IXCs operating in their region, but no one would suggest that they are retail providers of long-distance service for that reason. To the contrary, the Commission has properly read the term “‘at retail’ to mean sale to an ultimate consumer.” *AOL Bulk Services Order*, at ¶ 17. Here, MSN alone has a retail relationship with “ultimate consumers”: it retains all customer information and data, is primarily responsible for resolving billing disputes, supplies the customer premises equipment, assigns e-mail addresses, deals with customers on any repair issues, takes end-user customer disconnect orders, and bears the entire risk of non-payment. *See Starliper Affidavit*, at ¶¶ 9, 11-14. Just as important, Qwest does not, and is not required to, offer “ultimate consumers,” on a line-by-line basis, the same low per-line rate it offers MSN for bulk DSL transmission services.

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<sup>51</sup> See *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996*, at 20,887 n. 22 (suggesting that split-billing arrangement -- “under which [a LEC] allowed customers of Internet service providers to pay [it] directly (rather than through the ISP) for [its] DSL transport service -- does not compromise the wholesale nature of th[e] DSL transport service”) (citing *AOL Bulk Services Order* at ¶ 17).

**II. WHETHER OR NOT QWEST'S ARRANGEMENT WITH MSN MAKES QWEST A "RETAIL" PROVIDER, THE ONLY SERVICE END USERS PURCHASE "AT RETAIL" IS A BUNDLED INFORMATION SERVICE FALLING OUTSIDE THE SCOPE OF SECTION 251(c)(4).**

Quite apart from whether Qwest could be said to offer *any* service to end users "at retail," DOC's efforts to subject Qwest to resale obligations are invalid on an independent ground as well. As this Commission recently indicated in the *Wireline Broadband NPRM*, the only service Qwest *could* be offering end users "at retail" is an information service, not a telecommunications service. For that reason as well, the service necessarily falls outside the scope of section 251(c)(4), which by its terms obligates incumbent LECs to provide only retail "*telecommunications services*" for resale.

DOC has presented no coherent account of *what* "retail" service it believes Qwest may be required to provide for resale at wholesale rates. The supposedly retail-oriented functions on which DOC relies for the proposition that Qwest is providing a retail service – *i.e.*, billing end users, collecting from end users, and marketing to end users – all involve limited interactions between Qwest, as MSN's agent, and *end users*. See Starliper Affidavit, at ¶¶ 11-13. Thus, any "retail" relationship here would have to be a retail relationship between Qwest *and end users*.<sup>21</sup> But the only relevant service *provided* to end users is a bundled DSL and ISP information service. Billing, collection and marketing services, as well as raw DSL transmission services, are provided by Qwest to MSN. *Id.* at ¶¶ 10-12. Moreover, Qwest does not, and has no legal obligation to, provide end users with DSL transmission capacity over individual lines at the same low per-line rate that it offers to MSN. Thus, even if Qwest could be deemed a provider of some

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<sup>21</sup> Again, Qwest could have no "retail" relationship with MSN. The *AOL Bulk Services Order* makes clear that, where an incumbent LEC provides an unaffiliated ISP with DSL services that the ISP uses as an input for the information service provided to end users, its relationship with the ISP cannot be described as "retail," because the ISP is not the "ultimate consumer." *AOL Bulk Services Order*, at ¶ 17.

end user retail service (or a component of it) along with MSN, which it cannot be, the service itself – the only conceivable subject of any resale obligation – would remain a bundled DSL and ISP *information service*.

As this Commission has now tentatively concluded in the *Wireline Broadband NPRM*, such services fall outside the scope of section 251(c)(4), *whether or not* an incumbent LEC offers them to end users “at retail,” for the wholly independent reason that they are not “telecommunications services” to begin with. *See Wireline Broadband NPRM*, at ¶ 25.<sup>8/</sup> Once again, they are information services. What DOC proposes here is thus an attack on the very foundations of this Commission’s proposed approach to national broadband policy. The Commission should grant this petition for declaratory ruling to ensure national consistency in the interpretation of federal law.

More generally, the Commission has consistently underscored the need for simplicity, clarity, and national uniformity in broadband regulation. Indeed, the Commission launched the *Broadband Wireline NPRM* and related proceedings precisely to “build the foundation for a comprehensive and consistent national broadband policy.” *Wireline Broadband NPRM*, at ¶ 8. The Commission’s preservation of national consistency in the regulation of information services stretches back to the earliest days of the Internet and is often credited for that medium’s explosive growth. The Commission has a particularly obvious role to play here, because the

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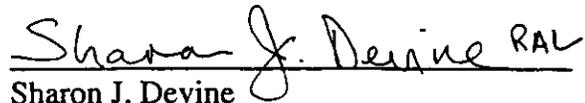
<sup>8/</sup> *Accord* 47 C.F.R. § 64.702(a) (defining “enhanced service,” which Commission has elsewhere equated with “information service,” as any service “offered over common carrier transmission facilities . . . , which employ computer processing applications,” and providing that such services “are not regulated under title II of the [Communications] Act”). This issue is distinct from the separate issue of whether even *unbundled* DSL transmission services provided to ISPs are “telecommunications services,” a question that turns on whether ISPs can be said to constitute “the public” for purposes of the statutory definition. *See Wireline Broadband NPRM*, at ¶ 26 (discussing 47 U.S.C. § 153(46)). Of course, if the Commission answers *that* question in the negative, that too would foreclose application of section 251(c)(4) in these circumstances.

information access service at issue – DSL – is tariffed at the federal level, and it would make no sense to subject that service to a proliferation of state-specific regulatory obligations. Qwest accordingly asks for prompt disposition of the issues raised in this petition.

**CONCLUSION**

For the foregoing reasons, Qwest respectfully requests that the Commission issue a declaratory ruling that Rule 605(c) applies to an incumbent LEC that serves as a billing, collection, and marketing agent for an unaffiliated ISP.

Respectfully submitted,

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April 3, 2002

# **EXHIBIT A**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
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Petition of Qwest Corporation for	)	File No.
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Declaratory Ruling Clarifying that the Wholesale	)	
DSL Services Qwest Provides to MSN Are Not	)	
“Retail” Services Subject to Resale Under	)	
Section 251(c)(4) of the Act	)	

To: The Commission

**AFFIDAVIT OF VICE PRESIDENT STEVEN K. STARLIPER**  
**IN SUPPORT OF QWEST’S**  
**PETITION FOR DECLARATORY RULING**

1. My name is Steven K. Starliper. I am currently Vice President of Consumer Product Management for Qwest Services Corporation (“Qwest”), a position I have held since October 17, 2001. I submit this affidavit in support of Qwest’s Petition for Declaratory Ruling.

2. As Vice President of Consumer Product Management, I have principal responsibility for product management for consumer portfolios, which include voice products and services, as well as long distance and DSL services. As a result, I have direct knowledge of the arrangement for DSL service that exists between Qwest and Microsoft Network, L.L.C. (“MSN”), an Internet service provider (“ISP”).

3. Qwest provides DSL services to ISPs and other users pursuant to its federal tariff. Before 2001, Qwest offered DSL on a retail basis only, selling its “Qwest DSL Service” directly to end-user businesses and other customers pursuant to section 8.4.1 of its tariff. See Qwest

Tariff F.C.C. No. 1, § 8.4.1. Under section 8.4.1, end users may choose among a variety of Qwest DSL services at monthly rates set forth in the tariff. Qwest provides these end users with a virtual point-to-point DSL connection through the qualified Qwest DSL Host ISP of their choice. These retail services are *not* at issue in Qwest's petition for declaratory ruling.

4. In December 2000, Qwest amended its federal tariff to provide for Qwest DSL Volume Plan, a bulk DSL product that Qwest offers in addition to its retail DSL product. *See* Qwest Tariff F.C.C. No. 1, § 8.4.4. At the present time, all purchasers of this bulk DSL product are ISPs, which use the product as an input in their own retail offerings to end users. Under section 8.4.4 of the revised tariff, ISPs can purchase DSL service on this wholesale basis under one of four volume plans: the Basic Commitment Option, which provides a discount based on the level of active and billable DSL lines used in a given year, or Volume Commitment Options I, II, and III, which enable the Volume Plan customer to receive a discount based on the volume of DSL lines they commit to buy. Basic Commitment Plan purchasers receive the lowest discounts because they commit to using the lowest number of DSL lines -- 15,000 by the end of the initial 12-month period -- while Volume Plan III purchasers receive the largest discount, having committed to a range of 120,000 to 500,000 lines over a five-year period. Under no circumstances does Qwest provide DSL services at any of these bulk discounts to individual end users on a line-by-line basis. End users seeking retail DSL service from Qwest must instead purchase that service from section 8.4.1 of the tariff, as described above.

5. Under section 8.4.4 of the tariff, ISPs combine Qwest's DSL service with their own Internet access services. They then sell the bundled package to their end-user customers as a new information service. Based on section 8.4.4, ISPs that subscribe to Qwest DSL Volume Plan have very clear obligations to the end users to whom they provide a bundled service.

Among other things, they must provide “customer premises equipment” (such as DSL modems) to end users, deal directly with end users “with respect to all matters relating to the services,” and direct end users to contact them, rather than Qwest, “regarding any aspect of the [DSL] service.” *Id.* at § 8.4.4. The ultimate responsibilities for these and other services falls on the Volume Plan ISPs, not Qwest.

6. In revising its tariff, Qwest took account of section 51.605(c) of the Commission’s rules. Under that provision, “advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.” 47 C.F.R. § 51.605(c). Both Rule 51.605(c) and the Commission’s *Second Report and Order* in CC Docket No. 98-147, *Deployment of Wireline Services Offering Advanced Telecommunications Capability* (1999), provide that DSL services sold to ISPs for inclusion in a bundled Internet access service fall outside the scope of the resale obligations of 47 U.S.C. § 251(c)(4). Qwest thus concluded that it was not obligated to make its bulk DSL service under section 8.4.4 available to competing carriers for resale at discounts greater than the ones already provided through the tariff itself.

7. Before 2001, Qwest offered its own Internet access service to residential end users. In 2001, however, Qwest made a business decision to exit the residential ISP market. Qwest’s former market is now served primarily through three large ISPs that purchase DSL from Qwest on a wholesale basis. Each of these ISPs combines Qwest’s DSL service with its Internet access services in order to produce a bundled information service that can be provided to end-user customers.

8. In 2001, MSN began purchasing DSL from Qwest on a volume basis, pursuant to the Volume Commitment Plan II set forth in section 8.4.4. Purchasers of the Volume Commitment Plan II typically commit, among other things, to purchasing a minimum of 200,001 subscription lines at the end of a five-year period.

9. Pursuant to section 8.4.4, MSN takes Qwest's DSL service, combines it with its own Internet access service, and sells the bundled package to its end-user customers as "MSN Broadband." Under that arrangement, Qwest is responsible for establishing DSL lines on MSN's behalf and for addressing any service-related problems MSN reports. When Qwest receives an order for DSL from MSN, Qwest technicians connect the identified telephone line to the DSLAM located in either the Central Office or in a remote terminal, and then notify MSN of the virtual circuit ID associated with that DSL service. Under the tariff, however, MSN, not Qwest, has ultimate responsibility for DSL service problems experienced by MSN's end-user customers. On rare occasions, Qwest has interacted with end users on MSN's behalf in order to resolve DSL-related service problems at end users' premises, but only at MSN's direction. If an MSN end user experiences a problem with MSN Broadband, the tariff requires that the end user call MSN, not Qwest, for help isolating and resolving the service problem. Where MSN is unable to resolve the problem or believes that the problem is located in Qwest's DSL lines, MSN, as Qwest's customer of record, is required electronically to submit a "trouble ticket" to Qwest, which will then address and resolve the service issue, e.g., by testing to ensure that the DSL circuit is fully operational through Qwest's facilities.

10. At the time they entered into their agreement under section 8.4.4, Qwest and MSN also entered into a number of agreements for services not covered by the federal tariff. Pursuant

to those agreements, Qwest serves as MSN's agent in several different respects, providing MSN with marketing, billing, and collection services related to its bundled MSN Broadband product.

11. First, Qwest helps MSN market and stimulate sales of MSN Broadband by helping to produce ads, commercials, and fliers regarding the MSN Broadband service. When a customer places an order for MSN Broadband, Qwest transfers the order to MSN, and, upon MSN's request, initiates the steps necessary to establish service. Once this process is complete, MSN configures the customer's system and provides the customer with user identification information and information regarding the use of the MSN Broadband service. MSN also handles any problems that occur once service has been initiated. Qwest receives a commission for each MSN Broadband customer it obtains for MSN.

12. In addition, Qwest provides MSN with billing and collection support. As in the long distance context, end-user customers who purchase MSN Broadband receive the billing statement for that service in their monthly Qwest telephone bill. Like the long-distance charges reflected in a local telephone bill, the charge for MSN Broadband -- a flat fee for the bundled DSL and Internet access service -- is listed separately from any regulated service (such as basic telephone service) that Qwest offers end users on a retail basis. Qwest reports the MSN Broadband charges to MSN's end users. If those end users have any billing questions or concerns, they are instructed to report them directly to MSN, not to Qwest. Where those end users nevertheless request Qwest's assistance with their billing problems, Qwest may make adjustments to billing statements. Qwest, however, does not handle non-payment by end users. MSN, not Qwest, bears the risk of customer non-payment -- *i.e.*, the risk that end users will default on their payment obligations to MSN after MSN has purchased Volume Plan DSL services from Qwest and has included DSL as an input in its MSN Broadband service. In those

circumstances, MSN remains obligated to pay Qwest for the Volume Plan DSL services even though MSN receives no compensation in turn from its end users.

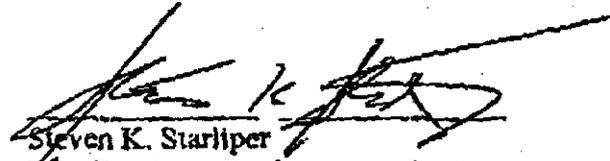
13. The agency agreements between Qwest and MSN do not alter the basic relationship between Qwest and MSN established under the federal tariff. Under those agreements, MSN is Qwest's customer of record, not the end users who purchase MSN Broadband. Those retail customers belong to MSN alone. Qwest has some contact with end users because of the marketing and billing duties it performs for MSN, and the installation status reports it is sometimes asked to provide end users as their MSN Broadband service is being connected. But, with the exception of rare instances in which it must interact with end users on MSN's behalf in order to resolve service-related problems on end-users' premises, Qwest has no contact with MSN end users once their MSN Broadband service is operational.

14. In contrast, MSN still has complete responsibility for its end-user customers once MSN Broadband service has been established, as the federal tariff contemplates. MSN establishes all of the terms for use of the MSN Broadband service. For example, it determines the amount of web space that will be allocated to MSN Broadband users, sets age limits for use of its service, and determines which operating systems must be used with MSN Broadband. MSN also retains all customer information and data, assigns all email addresses, and provides all service-related information to its customers. And, in addition to bearing all non-payment risk, MSN has sole responsibility for customer service and connection. Under the tariff, MSN handles all service-related questions and assists end users in resolving problems with their equipment and service. Similarly, only MSN, not Qwest, may take a disconnect order from an MSN Broadband end user.

15. Qwest's DSL agreement with MSN covers services provided to customers in 14 states. A determination that Qwest's DSL offering to MSN is subject to resale in one state could have an impact on the services Qwest provides MSN in the other 13 states, as the terms of Qwest's agreement with MSN are the same for each state in which service is provided.

I declare under penalty of perjury that the foregoing is true and correct.

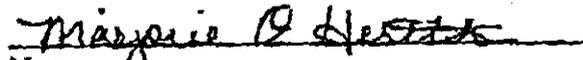
Dated: April 3, 2002

  
Steven K. Starliper  
Vice President for Consumer Product  
Management  
Qwest Services Corporation

STATE OF COLORADO )  
 ) ss.  
CITY & COUNTY OF DENVER )

Subscribed and sworn to before me, a licensed notary public, on this 3<sup>rd</sup> day of April 2002.



  
Notary 

My Commission expires: March 6, 2005

**CERTIFICATE OF SERVICE**

I, John Meehan, do hereby certify that on this 3rd day of April, 2002, I have caused true and correct copies of the foregoing Petition for Declaratory Ruling of Qwest Corporation to be served by hand delivery upon the following parties:

Chairman Michael K. Powell  
Federal Communications Commission  
445 12th Street, S.W., Room 8-201  
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy  
Federal Communications Commission  
445 12th Street, S.W., Room 8-A204  
Washington, D.C. 20554

Commissioner Michael J. Copps  
Federal Communications Commission  
445 12th Street, S.W., Room 8-A302  
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Commissioner Kevin J. Martin  
Federal Communications Commission  
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John Meehan