

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Petition of Qwest Corporation for)
Declaratory Ruling Clarifying that the) WC Docket No. 02-77
Wholesale DSL Services Qwest Provides)
to MSN Are Not “Retail” Services Subject to)
Resale Under Section 251(c)(4) of the Act)

COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (SBC) files these comments in support of Qwest Corporation’s (Qwest) Petition for Declaratory Ruling.¹

In its petition, Qwest asks the Commission to articulate the rules applicable to offering, under tariff, bulk wholesale digital subscriber line (DSL) transport to Internet service providers (ISPs). SBC supports Qwest’s aims and urges the Commission to find that, under § 251(c)(4) of the Act and Commission rule 51.605(c), Qwest is not providing a retail service that implicates its duty to offer a telecommunications service for resale, or, in the alternative, if the Commission finds that Qwest is providing a retail service, that the service in question is an information service that does not fall under the § 251(c)(4) obligation.

A. Commission Rule 51.605(c)

Qwest has asked the Commission to clarify the meaning of Commission rule 51.605(c), which states that:

[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.²

¹ See *Public Notice*, DA 02-879 (rel. April 15, 2002).

² 47 C.F.R. § 51.605(c). In its petition, Qwest reiterates the rule as applying to inputs provided to “*unaffiliated* Internet service providers.” Qwest p. 1. Nowhere in the Commission rule or in the underlying order does the applicability of this rule hinge on the ISP being unaffiliated. SBC understands Qwest’s summary to reflect the specific facts of Qwest’s case, which involves the sale of inputs to Microsoft Network, L.L.C., an unaffiliated ISP.

The Commission adopted this rule in the *AOL Bulk Services Order*.³ In that proceeding, the Commission considered “whether the discounted resale obligation of section 251(c)(4) applies to incumbent LEC provision of advanced services without regard to their classification as telephone exchange or exchange access.”⁴ The Commission defined “advanced services” to mean a “high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology includ[ing] services based on digital subscriber line technology (commonly referred to as xDSL), including ADSL (asymmetric digital subscriber line), HDSL (high-speed digital subscriber line), UDSL (universal digital subscriber line), VDSL (very-high speed digital subscriber line), and RADSL (rate-adaptive digital subscriber line), and services based on packet-switched technology.”⁵ Section 251(c)(4) obligates LECs to offer for resale “any *telecommunications service* that the carrier provides *at retail* to subscribers who are not telecommunications carriers.”⁶ In a prior order, the Commission ruled that “advanced services” offered by ILECs — such as DSL service offered directly to end users on a standalone basis — were telecommunications services.⁷

In the *AOL Bulk Services Order*, however, the Commission recognized that certain ILECs were not just offering DSL services “directly to residential and business end-users,” but also to ISPs who “package it as part of a high-speed Internet service.”⁸ In its decision, the Commission

³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237 (1999) (*AOL Bulk Services Order*).

⁴ *AOL Bulk Services Order* at ¶ 3.

⁵ *Id.*, 14 FCC Rcd ¶ 1 n.2.

⁶ 47 U.S.C § 251(c)(4).

⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 ¶ 35 (1998).

⁸ *AOL Bulk Services Order*, 14 FCC Rcd at ¶ 6.

recognized that DSL services offered directly to end users are, by their nature, fundamentally different from DSL service sold to ISPs as an input component to the ISP's own retail Internet access product:

[W]e conclude that advanced services sold to residential and business end-users are subject to the section 251(c)(4) discounted resale obligation, without regard to their classification as telephone exchange service or exchange access service. Moreover, we conclude that advanced services sold to Internet Service Providers under the volume and term discount plans described above are inherently and substantially different from advanced services made available directly to business and residential end-users, and as such, are not retail services and are not subject to the discounted resale obligations of section 251(c)(4).⁹

The different treatment of these two kinds of services depended on the interpretation and application of the term "at retail" in § 251(c)(4).

The Commission's interpretation of the term "at retail" was the common, ordinary dictionary definition, which the Commission understood to involve "direct sales of a product to the ultimate consumer for her own personal use or consumption."¹⁰ As ISPs took the DSL service from ILECs, added value to it, and then offered it to the ultimate consumer, ISPs were not themselves found to be the ultimate consumer of the service.¹¹ Consequently, the Commission determined that DSL service offered to ISPs in this manner was not a telecommunications service provided *at retail* and, therefore, was not subject to the § 251(c)(4) obligation.

⁹ *Id.* at ¶ 8.

¹⁰ *Id.* at ¶ 13.

¹¹ *Id.* at ¶ 14.

This determination was bolstered by both the Commission's understanding of the nature of bulk services and intent of Congress in excluding non-retail offerings. As for the nature of bulk services, the Commission reasoned that, whereas the ILEC would offer the wholesale transport, the ISP would provide and be responsible for *typical retail services* to the ultimate consumer, such as marketing, ordering, installation, maintenance, repair and billing.¹² As for the intent of Congress, the Commission recognized that " Congress intended section 251(c)(4) to apply to services targeted to end-user subscribers, because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate."¹³ If the ISP is providing and is responsible for the services targeted to the end user, then the ILECs would not "avoid any appreciable level of retail costs associated with providing these typical retail functions for the ultimate end-user when offering these bulk services to the Internet Service Providers."¹⁴ Because the statute specifies that the wholesale discount must be based on the incumbent's retail rates less the "marketing, billing, collection, and other costs that will be avoided"¹⁵ when the incumbent sells at wholesale, an incumbent's inability to avoid such costs with respect to DSL service sold to ISPs indicates that Congress did not intend such services to fall within the scope of § 251(c)(4).

B. Qwest Petition

Under the particular facts of the petition, Qwest advises that it offers under tariff bulk DSL volume plans, under which an ISP can purchase at volume discounts DSL transport on a wholesale basis. One such ISP is Microsoft Network, L.L.C. (MSN). In addition to the

¹² *Id.* at ¶ 15.

¹³ *Id.* at ¶ 17.

¹⁴ *Id.*

¹⁵ 47 U.S.C. § 252(d)(3).

wholesale telecommunications product sold to MSN, Qwest also provides “MSN with certain sales, marketing, billing, and collection services.” From the allegations of the petition, it appears that the Minnesota Department of Commerce (DOC) has latched onto language in the *AOL Bulk Services Order* describing a particular bulk services offering that Verizon had designed for ISPs,¹⁶ and has concluded that Qwest must make the DSL transmission sold in bulk to MSN “available to competing telecommunications carriers for resale under the ‘retail minus avoided cost’ standard of sections 251(c)(4) and 252(d)(3)” of the Act because Qwest’s product is not substantively identical to that offered by Verizon.¹⁷ Qwest asks the Commission to rule that, under these facts, Qwest’s DSL transport service is still a wholesale offering that is not subject to the requirements of § 251(c)(4) of the Act.

In support of its contention that its arrangement with MSN is a wholesale offering that does not fall within the ambit of § 251(c)(4), Qwest makes essentially two arguments. *First*, Qwest argues that the Commission rule does not contain an “exception for cases in which the incumbent local exchange carrier serves as a billing, collection, and marketing agent for the unaffiliated ISP.”¹⁸ *Second*, Qwest argues that, if these non-transport services render the offering a retail service, then, under the Commission’s tentative conclusions reached in the broadband proceedings, that retail offering would be a bundled high-speed service that combines DSL with

¹⁶ Specifically, the Commission stated that:

DSL services sold to Internet Service Providers are not targeted to end-user subscribers, but instead are targeted to Internet Service Providers that will combine a regulated telecommunications service with an enhancement, Internet service, and offer the resulting service, an unregulated information service, to the ultimate end-user. As stated above, *in offering this information service, the Internet Service Provider will take on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer and accepting repair requests directly from the end-user.* Incumbents would not avoid any appreciable level of retail costs associated with providing these typical retail functions for the ultimate end-user when offering these bulk services to the Internet Service Providers. It is reasonable to conclude, therefore, that such services do not fit within the type of transaction Congress intended to include under the discounted resale obligation in section 251(c)(4).

AOL Bulk Services Order ¶ 17.

¹⁷ Qwest p. 2. See, 47 U.S.C. § 251(c)(4), 252(d)(3).

¹⁸ Qwest p. ii.

Internet access, which is an information service.¹⁹ As an information service, it is not a telecommunications service covered by § 251(c)(4).²⁰

Qwest demonstrates that, in the facts applicable to its case, MSN alone has the retail relationship with the ultimate consumers. Even though MSN performs some of the typical retail services through an agent — Qwest, in this case — MSN still provides and is responsible for those services. As Qwest notes, the Commission in the *AOL Bulk Services Order* “did not determine that, by providing such functions [retail services] on behalf of the ISP, a carrier automatically renders itself a provider of the ISP’s information service.”²¹ That Order in no way held that DSL transport sold to ISPs would only be considered a wholesale input to the extent that an incumbent carrier structured their DSL product in the exact same manner as Verizon. Indeed, the plain language of Section 51.605(c) is expressly to the contrary.

As Qwest points out, it is important for the Commission to clarify this matter. Fundamentally, the state action under scrutiny in the petition works to undermine the Commission’s efforts to establish “a comprehensive and consistent national broadband policy.”²² In a series of proceedings, the Commission is examining and ruling on critical aspects of that nationwide broadband policy.²³ In those proceedings, the Commission acknowledges that its aim is to foster its “primary policy goal [which is] to ‘encourage the ubiquitous availability of broadband to all Americans’ [and] ‘to preserve the vibrant and competitive free market that

¹⁹ *Id.*
²⁰ 47 U.S.C. § 251(c)(4).

²¹ Qwest p. 11.

²² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, FCC 02-42 ¶ 8 (rel. Feb. 15, 2002) (*Wireline Broadband NPRM*).

²³ See *Wireline Broadband NPRM*; see also, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Service*, Notice of Proposed Rulemaking, FCC 01-360 (rel. Dec. 20, 2001) (*LEC Broadband NPRM*); and, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. March 15, 2002) (*Cable Broadband Declaratory Ruling*). To date, for example, the Commission has ruled, among other things, that cable modem service is “an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs.” *Cable Broadband Declaratory Ruling*, ¶ 33.

presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”²⁴

Clearly, state action of the sort complained of by Qwest — even if well intended — acts to frustrate that policy goal by infusing doubt into the broadband marketplace. Providers thinking of investing in facilities to support broadband services will be deterred from committing funds if the regulations applicable to broadband are not both clear and consistent *nationwide*. While the Commission works to complete its examination of the policy, the states are acting. In SBC territory, for example, the Connecticut commission has recently ruled that SBC’s data affiliate, SBC Advanced Solutions, Inc. (ASI), which sells a wholesale DSL transport product to affiliated and unaffiliated ISPs, must provide DSL transport service at a 25.4% wholesale discount.²⁵ There have been similar rulings by the Indiana commission.²⁶ In brief, the acts of some states are jeopardizing the Commission’s decision with respect to § 251(c)(4), as well as its broadband policy, requiring a swift and sure response.

C. Argument

- 1. The services Qwest performs as an agent for MSN does not materially alter the nature of the wholesale offering MSN purchases out of the Qwest’s tariff and, therefore, is not a telecommunications service sold at retail.**

²⁴ *Id.* ¶ 4.

²⁵ *Petition of DSLnet Communications, LLC, Regarding Obligations of the Southern New England Telephone Company*, Department of Public Utility Control, State of Connecticut, Docket No. 01-01-17, Decision, (March 28, 2002).

²⁶ *Complaint of Midwest Telecom of America, Inc.*, Cause No. 41268-21RD01 (Ind. U.R.C. March 15, 2002), *appeal filed*, Case No. 93A02-0204-EX-306 (Ind. Ct. App.) *and complaint filed* No. IP 02-0606 C M/S (S.D. Ind.); *Petition of Indiana Bell Tel. Co., Inc. d/b/a Ameritech Indiana*, Cause No. 41657-EDR-1 (Ind. U.R.C. June 27, 2001), *afford*, *Indiana Bell Tel. Co. v. Indiana Util. Reg. Common*, 764 N.E.2d 734 (Ind. Ct. App. 2002), *rhea’s den.* Cause No. 93A02-0107-EX-00491 (May 2, 2002). Additionally, there was a ruling by the Public Utilities Commission of Ohio (PUCO) requiring the resale of DSL Transport at the 251(c)(4) discount, which was recently modified on rehearing by the PUCO to conform to applicable federal law to be determined by the FCC in its pending Title I proceeding. In *Investigation Into Ameritech Ohio’s Entry Into In-Region interrelate Service Under Section 271 of the Telecommunications Act of 1996*, The Public Utilities Commission of Ohio, Case No. 00-942-TP-COI, Entry on Rehearing, May 2, 2002.

In the question presented by the petition, the method by which the ISP provides the “typical retail services” to the ultimate consumer — through its own employees and facilities or through those of a third party — is a distinction without a difference. It would be an odd result indeed if the ISP were prohibited from offering the typical retail services at issue through a third party or if the determination of a wholesale bulk offering turned on how the ISP decided to provision the typical retail services. The rationale that underpins the Commission’s rule is still valid: the DSL transport services sold to ISPs as input components in the ISPs own retail Internet access products are inherently and substantially different from DSL transport services made available directly to business and residential end-users, and, as such, are not *retail services* subject to the discounted resale obligations of section 251(c)(4). This being so, the Commission should issue an order clarifying that Rule 51.605(c) means exactly what it says.²⁷ Accordingly, the Commission should declare that Qwest is not required pursuant to § 251(c)(4) of the Act to make the DSL transmission it sells to MSN available to competing telecommunications carriers for resale under the “retail minus avoided cost” standard.

That this is so and ought to be so is made clear when examining the ramifications of the Connecticut commission’s decision to require ASI to offer its DSL service at a 25.4% wholesale discount. If the Connecticut commission’s decision is upheld, then ASI faces the real possibility of losing all its ISP customers in that state. At present, those ISP customers purchase wholesale DSL transport out of ASI’s federal tariff. If other carriers can purchase the same product from ASI at an additional 25.4% discount, which they can then re-sell to ASI’s current ISP customers,

²⁷ “ [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).

ASI will be unable to compete for those customers. It will not be able to compete on price, because the other carriers receive an additional 25.4% discount unavailable to ASI, and it will not be able to compete on quality of service, because ASI will be providing that service.

The only way to “avoid” this dilemma would be for SBC to withdraw from providing any Internet access service. In short, in spite of the strides the Commission has made under the *Computer II/III* line of decisions to allow the Bell operating companies and other incumbent LECs to provide information services in competition with unaffiliated providers, SBC would have to withdraw from this line of business. What’s more, any incentive SBC would have in investing in new broadband facilities would vanish. Instead of promoting the universal deployment of broadband services to all Americans, such a decision would have the effect of delaying, if not eliminating, that goal. These absurd results cannot be what either the Congress or this Commission have in mind.

2. If the service in question were a retail offering, it would have to be an Internet access service, which is an information service, and would not trigger the incumbent LECs’ obligations under § 251(c)(4).

In the *Missouri/Arkansas 271 Order*, the Commission was confronted with the question of whether Southwestern Bell Telephone (SWBT), whose affiliated ISP (SBIS) purchases wholesale DSL transport from ASI on the exact same terms as all other ISPs, and uses that DSL transport as an input component of its own retail high-speed Internet access service, must also make the underlying DSL transport component available to competitive LECs for resale pursuant to section 251(c)(4).²⁸ In that order, the Commission wisely deferred addressing that issue in that proceeding, noting that “questions about the regulatory treatment of the underlying transmission facilities provided by incumbent LECs to their affiliate information service

²⁸ *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 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, Memorandum Opinion and Order, 16 FCC 20719 (2001) (*Missouri/Arkansas 271 Order*). SWBT also provided two other DSL-related services: (1) a retail telecommunications service, which it offers for resale at discount; and (2) wholesale telecommunications services, which it offers to unaffiliated ISPs. There were no questions raised about these two services.

providers could have far-reaching implications for a wide range of issues that would be more appropriately handled separately.”²⁹ In the same order, the Commission also observed that it had “typically deferred resolution of such novel interpretive issues to separate proceedings.”³⁰

The Commission initiated that separate proceeding when it issued its *Wireline Broadband NPRM*. Qwest’s petition, which asks the Commission to clarify the scope of Commission rule 51.605(c), raises a materially similar issue. For its part, SBC agrees with Qwest that, consistent with the Commission’s ruling in the *Cable Broadband Declaratory Ruling*, as well as the initial findings in the *Wireline Broadband NPRM*, if the Commission finds that, due to Qwest’s arrangement with MSN, the service Qwest is providing is *retail* in nature, the Commission should nevertheless conclude that Qwest is not providing a telecommunications service that could be subject to the section 251(c)(4) resale obligation. Rather, the Commission should conclude either that Qwest is providing mere *telecommunications* to MSN, not a *telecommunications service*, or that Qwest and MSN jointly offer a retail information service to end user customers.³¹ Either way, the product being provided by Qwest falls outside the scope of § 251(c)(4) of the Act.

D. Conclusion

The Commission should, in Qwest’s words, “act promptly to keep the ground rules for DSL clear, correct, and nationally consistent.”³² Only by articulating a national policy that gives providers a definitive roadmap for investment will the Commission reach its primary policy goal of expanding the reach of broadband services. SBC urges the Commission to clarify that, under the facts as presented by Qwest, it is not obligated by § 251(c)(4) to make the DSL transport product that it sells to MSN available to competing telecommunications carriers for resale under the “retail minus avoided cost” standard. Moreover, the Commission should clarify that

²⁹ *Id.* at ¶ 82.

³⁰ *Id.*

³¹ See Qwest p. 13; *Cable Broadband Declaratory Ruling*, ¶ 33; *Wireline Broadband NPRM*, ¶ 25.

³² Qwest, p. 8.

incumbent LECs who provide Internet access services through an affiliated ISP are providing an information service to retail customers, and not a telecommunications service. Accordingly, that arrangement does not implicate the resale obligations of § 251(c)(4).

Respectfully submitted,

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