STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FASTNET CORPORATION	:	DETERMINATION DTA NO. 819632
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Years 1998 through 2002.	:	

Petitioner, Fastnet Corporation, 3864 Courtney Street, Bethlehem, Pennsylvania 18017, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the years 1998 through 2002.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 2, 2004 at 10:30 A.M. with all briefs to be submitted by September 17, 2004, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Anderson, Gulotta and Hicks, P.C. (Michael A. Gruin, Esq., and Anthony C. Gulotta, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on its purchases of line access charges from the telecommunications providers Focal, XO Communications, Time Warner, Verio and Frontier on the basis that such purchases were of intrastate telephone services subject to tax pursuant to Tax Law § 1105(b)(1)(B).

II. Whether, assuming such purchases were subject to tax as purchases of telephony or telegraphy, such services are nonetheless exempt from tax on the basis that they were used by petitioner to provide its customers with Internet access which, by its very nature, is an interstate activity exempt from taxation.

III. Whether the Division of Taxation properly denied petitioner's claim for refund of sales and use taxes paid on its purchases of certain equipment as beyond the scope of the exemption afforded by Tax Law § 1115(a)(former [12]).

FINDINGS OF FACT

1. Petitioner, Fastnet Corporation ("Fastnet"), which began doing business in 1994 and is headquartered in Bethlehem, Pennsylvania, is an internet access service provider ("ISP") with customers located in New York, Pennsylvania and New Jersey. Petitioner, via its connected network of circuits, enables its customers to access the Internet. The "Internet" has been defined as "many large computer networks joined together over high-speed backbone data links ranging (in speed) from 56 Kbps to T-1, T-3, OC-1 and OC-3."[1]

2. The Internet works as a "packet switched network" based on a family of protocols known as "TCP/IP," that is Transmission Control Protocol/Internet Protocol, a system of networking protocols providing communication between computers with diverse hardware architectures and various operating systems across interconnected networks. Internet Protocol ("IP") defines how information is broken down into packets and routed. Transmission Control Protocol ("TCP") adds reliability to the IP packets, which helps the packets reach their

[1] To further explain, a T-1 (Trunk Level 1) line is a digital transmission link with a total signaling speed of 1.544 megabits per second (1,544,000 bits per second which may be divided into up to 24 separate voice-quality channels which may be utilized as a single two-way high speed data stream). In turn, a T-3 connection is a digital transmission link with a total signaling speed of 44.736 megabits per second with a capacity equivalent to 28 T-1 lines. OC-1 and OC-3 (Optical Circuit) connections are wireless connections which, over certain distances, are able to transmit data at T-1 speeds, with an OC-3 being approximately equivalent to three T-3 lines.

destination in the proper fashion. A packet switched network allows the same computer to send and receive data packets to and from multiple sources simultaneously. It is not necessary for a direct connection to be established in order for two computers to communicate with one another over the Internet. This network differs from circuit switched networks or traditional phone networks which require a continuous connection.

3. During the period in issue, December 1999 to February 2002, petitioner provided its New York customers with dial-up access to the Internet, dedicated T-1 access to the Internet, e-mail services, and web hosting services. Petitioner did not provide voice communication services during the period in issue.

4. In early 2000, petitioner acquired the assets of Cybertech, Inc. ("Cybertech"), a Rochester, New York based wireless Internet service provider, and thereafter petitioner offered wireless Internet access to some of its customers in certain locales in New York State. In 2001, petitioner acquired the assets of Applied Theory Corporation of Syracuse, New York, which allowed petitioner to provide an expanded dial-up Internet presence in New York State.

5. Petitioner had a primary network center in Bethlehem, Pennsylvania, and also maintained a network center in Philadelphia, Pennsylvania. Petitioner's connected network of circuits, or backbone, went from Buffalo to Rochester to Syracuse to Albany to Manhattan, with smaller spurs (i.e., connected circuits) out from all of those locations.

6. In order to function, an ISP must establish a network that spans from the point where the ISP's customer accesses the ISP to the point of presence ("POP"), which is the gateway to the global Internet. To provide this network, petitioner had to purchase access to three kinds of circuitry (either wireline or wireless), as follows:

> a) an assembled network of circuitry, referred to in the aggregate as the "Backbone," that connected all of petitioner's own facilities together, and

> that ultimately connected all of these facilities to petitioner's network centers in Bethlehem, Pennsylvania and Philadelphia, Pennsylvania.
>
> b) circuitry connecting petitioner's Backbone with the global Internet (at a POP), which occurred at either Bethlehem, Pennsylvania or Philadelphia, Pennsylvania.
>
> c) dial-access and dedicated access circuits which connected petitioner's customers to petitioner's backbone facilities. These circuits were either dedicated T-1 circuits or PRI ("Primary Rate Interface") circuits connected to local telecommunications carriers' central offices.[2]

7. All of the circuits described above carried data to and from petitioner's customers' locations in New York State. During the period in issue, all of petitioner's routers and e-mail servers were located in Bethlehem, Pennsylvania, and virtually all of petitioner's customers' data was routed through Bethlehem, Pennsylvania regardless of the location of its intended destination.

8. For its dial-access customers, petitioner purchased PRI lines from various telecommunications providers. Petitioner's customers would use their modems and home telephone service to dial into the telecommunications providers' central office, at which point the provider would connect the customers' data calls to petitioner's PRI circuits in order to carry the data traffic to and from the Internet, via petitioner's backbone network and its routers and servers in Bethlehem, Pennsylvania.

9. For its dedicated access customers, petitioner purchased point to point T-1 lines from various telecommunications providers. These circuits enabled petitioner's customers to have a constant connection directly to petitioner's backbone network with a data transfer capability of

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[2] Petitioner purchased PRI lines, representing an ISDN ("integrated services digital network") that carries digital data over the leased lines. Petitioner also purchased "customer access lines" from "incumbent local exchange carriers" which allowed petitioner's customers to gain connection to petitioner's modem pool. For its wireless (Cybertech) customers, petitioner purchased "access point equipment" providing an "access point which can feed a number of customers at the network end, and a subscriber unit at the customer end."

1.54 megabits per second. The data traffic from these customers was directed to and from the Internet in the same manner as with petitioner's dial-access customers, that is via petitioner's backbone network and its routers and servers in Bethlehem, Pennsylvania.

10. To connect petitioner's own backbone network to the global Internet, petitioner purchased internet access service from AT&T, UU Net, and Sprint.

11. On a monthly basis during the period in issue, petitioner purchased (via lease) circuit connections in order to connect its customers to the Internet. These circuits consisted of T-1 connections, PRI connections and internet access connections, and were purchased from the vendors Focal, XO Communications, Time Warner, Verio, and Frontier.

12. Petitioner paid New York State and local sales taxes to the above-referenced vendors in the aggregate amount of $40,418.05 during the period in issue on its purchases of access to these circuits.

13. During the period in issue, petitioner also purchased various pieces of equipment in order to provide Internet access service to its customers, that is, to direct data traffic to its intended destinations. This equipment, including routers, modems, servers, and wireless access points (large [23 gigahertz OC-3] radio transmitters), was purchased from the vendors Giganet, Dell, Adaptive Broadband, Grainger, Graybar, JPM, MPX, Tessco, and TCN.

14. Petitioner paid New York State and local sales taxes to the above-referenced vendors in the aggregate amount of $55,149.84 during the period in issue on its purchases of equipment.

15. On December 16, 2002, the Division received from petitioner an Application for Credit or Refund of Sales or Use Tax (Form AU-11) seeking a refund of the above-described amounts of tax paid by petitioner, aggregating $95,567.89, on its purchases of access and transport lines and equipment. Petitioner's refund claim was premised upon the exemption

afforded pursuant to Tax Law § 1115(a)(12-a) for tangible personal property purchased for use in providing Internet access for sale, the exemption afforded pursuant to Tax Law § 1115(a)(12) for machinery and equipment purchased for use in producing tangible personal property for sale, and the resale exclusion of Tax Law § 1101(b)(1).

16. By a letter dated April 21, 2003, the Division granted petitioner's claim to the extent of $866.39 (representing tax paid on certain equipment purchased after September 1, 2000), but denied the $94,701.50 balance of petitioner's claim. The Division's denial letter specified that the exemption in Tax Law § 1115(a)(12-a) applies to tangible personal property purchased for use directly and predominantly in providing Internet access for sale if such property was purchased on or after September 1, 2000, and further does not apply to purchases of telecommunications services whenever purchased. The Division's letter further explained that the exemption in Tax Law § 1115(a)(12) applies only to purchases of machinery and equipment for use directly and predominantly in the production of tangible personal property for sale, as opposed to items used in the provision of Internet access service. Finally, the Division's letter explained that telecommunications services purchased for use in providing Internet access services for sale, rather than for resale as a telecommunications service, do not qualify for the resale exclusion.[3]

17. The dollar amounts of tax paid by petitioner, and the dollar amounts of refund sought by petitioner for the period in issue, are not in dispute.

18. At hearing, petitioner distinguished the vendor Verio from the other vendors listed in Finding of Fact "11". As noted, in 2000 petitioner acquired Cybertech, a wireless Internet

[3] The Division's denial letter also noted that any tax paid on purchases made prior to September 1, 1999 would not be refundable as beyond the three-year statute of limitations for refunds per Tax Law § 1139. This assertion was not further addressed at hearing or by brief and appears, based on the dates of the purchases in question, to be no longer in issue.

service provider. Cybertech, in turn, had been purchasing its own Internet access (i.e., its POP access) from the Internet service provider Verio, and this practice continued for a period of time after petitioner's acquisition of Verio.

19. Petitioner provided in evidence invoices for all the purchases (both line access purchases and equipment purchases) for which refund is sought in this proceeding, including eleven invoices from Verio which set forth the charges paid by petitioner to Verio. These invoices differ from those of the other line access vendors in that they do not list line access charges or call count summaries (presumably since Cybertech was a wireless as opposed to a wireline provider), but rather list "Internet service charges." The "Internet service charges detail" portion of each of these invoices reflects the following descriptive information regarding the amounts charged:

DESCRIPTION	IDENTIFIER	AMOUNT
Equipment lease	Router	$0.00
Co-Location Co-Lo in Verio POP, Special Order	palma	[see chart below]

The amount charged in each instance for "Equipment Lease" was zero, while the amounts charged for "Co-Location; Co-Lo in Verio POP, Special Order" are specified in the chart contained in Finding of Fact "20" below.

20. The information from the eleven Verio invoices is set forth as follows

INVOICE NUMBER	AUDIT INVOICE REF. NUMBER	SERVICE DATES	INTERNET SERVICE CHARGE	TOTAL STATE AND LOCAL TAXES
50916163	1494	01/19/00 - 02/18/00	$2,085.00	$166.80
51130870	1495	02/19/00 - 03/18-00	$5,268.55	$4212.48
51989000	1496	06/19/00 - 07/18/00	$9,375.00	$750.00
52205963	1497	07/19/00 - 08/18/00	$9,375.00	$750.00

51564903	1498	03/20/00 - 05/18/00	$18,447.58	$1,475.81
51776566	1499	05/19/00 - 06/18/00	$9,375.00	$750.00
52441038	1500	08/19/00 - 09/18/00	$9,375.00	$750.00
52662520	1501	09/19/00 - 10/18/00	$9,375.00	$750.00
52889546	1502	10/19/00 - 11/18/00	$9,375.00	$750.00
53121517	1503	11/19/00 - 12/18/00	$9,375.00	$750.00
53370559	1504	12/19/00 - 01/18/01	$9,375.00	$750.00
TOTAL				**$8,064.09**

The Verio invoices do not specify or distinguish the portion of the charges attributable to Internet access service versus the portion attributable to rental of co-location space. As specified elsewhere in the record, "co-location" is described as "leased space within another data center to put our equipment and conduct our interconnects."

21. Petitioner's witness, Rafe Scheinblum, who was vice-president of operations during the period in issue, testified in explanation of the Verio invoices as follows:

> Verio is an Internet provider that sold two different services to Cybertech.
>
> Cybertech was a wireless Internet company which meant that instead of buying T-1's to get out to their customers, they would do so with radios, a wireless T-1 link-out to the customers.
>
> In order for Cybertech to connect to the Internet, they purchase their Internet access from Verio, and this invoice is for Internet access as well as rental of co-location space within one of Verio's network centers in Rochester.
>
> It looks like they also leased us use of a router at no charge to connect to.

22. Mr. Scheinblum confirmed that petitioner continued this purchase arrangement for some time after its acquisition of Cybertech, but eventually ceased purchasing Internet access from Verio and instead routed all of the Cybertech traffic to the global Internet through petitioner's network center in Bethlehem, Pennsylvania, thus saving the cost of purchasing

essentially unnecessary (i.e., third party) Internet access service as well as co-location lease charges from Verio.

23. With its brief, petitioner submitted 13 proposed findings of fact. Such proposed findings have been included in the foregoing Findings of Fact, excepting only so much of proposed findings numbered "11" and "12" which describe the data traffic as "interstate and international in nature." Such description is conclusory in nature, notwithstanding the undisputed fact that the data travels to and from petitioner's customers' New York locations via petitioner's network centers in Bethlehem, Pennsylvania or Philadelphia, Pennsylvania.

CONCLUSIONS OF LAW

A. Tax Law § 1105(b)(1)(B) imposes sales tax upon the receipts from every sale, other than sales for resale, of "telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph service . . . ."

B. Regulations of the Commissioner of Taxation at 20 NYCRR 527.2(a)(2) provide, in relevant part, that the words "of whatever nature" as contained in Tax Law § 1105(b) "indicate that a broad construction is to be given the terms describing the items taxed." Such regulations go on to provide as follows:

> The term *telephony and telegraphy* includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals.
>
> * * *
>
> Example 3: Message switching services, transmitted to a computer over lines leased from a communication carrier are telegraph services subject to the tax imposed under section 1105(b) of the Tax Law. (20 NYCRR 527.2[d][2].)

> A service is not considered telegraphy or telephony if either of these services is merely an incidental element of a different or other service purchased by the customer.
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> Example 6: A company offers its customers a protective service using a central station alarm system, which transmits signals telegraphically. The customer is purchasing a protective service. (20 NYCRR 527.2[4].)

C. Chapter 615 of the Laws of 1998 added a new section 179 of the Tax Law, effective October 8, 1998, which provides as follows:

> 1. For purposes of this article, Internet access service shall not constitute a telecommunications service, nor shall the provision of Internet access service constitute the carrying on of a telephone, local telephone, telegraph, or transmission business.
>
> 2. The term 'Internet access service' shall have the meaning ascribed thereto in subdivision (v) of section eleven hundred fifteen of this chapter.

Chapter 615 of the Laws of 1998 also added a new subdivision (v) to section 1115 of the Tax Law (as referred to in subdivision [2] above) which, effective October 8, 1998 and applying to sales and uses occurring on or after February 1, 1997, provides as follows:

> (v) Receipts from the sale of Internet access service, including start-up charges, and the use of such service, shall be exempt from the taxes imposed under this article. For purposes of this subdivision, the term 'Internet access service' shall mean the service of providing connection to the Internet, but only where such service entails the routing of Internet traffic by means of accepted Internet protocols. The provision of communication or navigation software, an e-mail address, e-mail software, news headlines, space for a website and website services, or other such services, in conjunction with the provision of such connection to the Internet, where such services are merely incidental to the provision of such connection, shall be considered to be part of the provision of Internet access service.

D. Prior to September 1, 2000, Tax Law § 1115(a)(12) provided, in relevant part, that receipts from the following shall be exempt from sales and use taxes:

> telephone central office equipment or station apparatus or comparable telegraph equipment *for use directly and predominantly in* receiving at destination or initiating and switching telephone or telegraph

> communication or in receiving, amplifying, processing, transmitting and retransmitting telephone or telegraph signals . . . . (Emphasis added.)

E. In 2000, chapter 63 of the Laws of 2000 removed the foregoing language from Tax Law § 1115(a)(12), and added a new paragraph (12-a) to such section which provided that, effective September 1, 2000, receipts from the following shall be exempt from sales and use taxes:

> Tangible personal property *for use or consumption directly and predominantly in* the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale *or* internet access services for sale or any combination thereof. Such tangible personal property exempt under this subdivision shall include, but not be limited to, tangible personal property used or consumed to upgrade systems to allow for the receiving, initiating, amplifying, processing, transmitting, retransmitting, switching or monitoring of switching of telecommunications services for sale or internet access services for sale or any combination thereof. As used in this paragraph, the term 'telecommunications services' shall have the same meaning as defined in paragraph (g) of subdivision one of section one hundred eighty-six-e of this chapter. (Emphasis added.)

F. Tax Law § 186-e(1)(g), in turn, defines 'telecommunications services" as follows:

> 'Telecommunication services' means telephony or telegraphy, or telephone or telegraph service, including, but not limited to, any transmission of voice, image, data, information and paging, through the use of wire, cable, fiber-optic, laser, microwave, radio wave, satellite or similar media or any combination thereof and shall include services that are ancillary to the provision of telephone service (such as, but not limited to, dial tone, basic service, directory information, call forwarding, caller-identification, call-waiting and the like) and also include any equipment and services provided therewith. Provided, the definition of telecommunication services shall not apply to separately stated charges for any service which alters the substantive content of the message received by the recipient from that sent.[4]

[4] This definition of 'telecommunication services' was added to the Tax Law by chapter 2 of the Laws of 1995, effective January 1, 1995.

G. The term "tangible personal property" means corporeal personal property of any nature having a material existence and perceptibility to the human senses (Tax Law § 1101[b][6]; 20 NYCRR 526.8[a]).

H. Petitioner claimed in its petition that its purchases of line access from Focal, XO Communications, Time Warner, Verio and Frontier were exempt from tax as sales for resale. This claim has not been further argued and appears to have been abandoned. In any event, it is undisputed that petitioner is an Internet access service provider and does not sell telephone or telegraph services to its customers, and thus its purchases would not be exempt as purchases for resale. In ***Matter of Phone Programs, Inc.*** (Tax Appeals Tribunal, April 6, 2000), the Tribunal explained that "the resale exclusion for utility services demands that the services be resold as utility services, i.e., telephone services (20 NYCRR 526.6[c]; 527.2[e])."

I. In denying petitioner's claim for refund on line access charges, the Division maintains that petitioner purchased intrastate telephone service from the noted providers. The Division asserts that petitioner's use of such lines thereafter has no impact on the taxability of such purchases at the time of purchase. In contrast, petitioner maintains that it purchases line access to provide its customers with Internet access via a packet switched network which is distinguishable from sound reproduction networks. Petitioner asserts that it did not use the lines to transmit signals, including voice traffic, and therefore did not use the lines to provide telephony or telephone service. In resolving this matter, it is important to note that the Tax Law draws a specific definitional distinction between the service petitioner sells to its customers, to wit, the sales tax exempt service of providing Internet access, and the service purchased by petitioner from the various telecommunications companies, to wit, the taxable provision of telecommunications services as defined.

J. As an initial matter, the testimony of petitioner's witness Rafe Scheinblum, coupled with the invoices detailing petitioner's purchases from the vendor Verio, reveals that petitioner was not purchasing line access services or equipment from Verio. Rather, petitioner was paying Verio for Internet access service relating to its Cybertech wireless customers and for the lease of space in which to locate ("co-locate") its equipment at Verio's network center in Rochester, New York. Tax Law § 1115(v) provides that receipts from the sale of Internet access service shall be exempt from sales and use taxes. Unfortunately, the invoices do not detail, and it is not otherwise possible to discern from the evidence in the record, the portions of the charges paid by petitioner to Verio which represented nontaxable Internet access (i.e., connectivity) fees versus the portions paid for leasing space for the co-location of petitioner's equipment. Thus, petitioner's request for exemption pursuant to Tax Law § 1115(v) on the specific charges it paid to Verio is denied.

K. Turning to the line access fees, Tax Law § 1105(b) imposes the tax "on receipts from intrastate communication by means of devices employing the principles of telephony and telegraphy." While petitioner did not use the lines to transmit traditional telephone signals, the lines admittedly could have been used for that purpose. 20 NYCRR 512.2(a)(2) clearly states that the words "of whatever nature" contained in the statute which imposes the tax indicate that "a broad construction is to be given the terms describing the items taxed." In addition, the sales tax is a "transaction tax," i.e., the liability for the tax occurs at the time of the transaction (***see,*** 20 NYCRR 527.2[d][2]). The fact that petitioner, subsequent to its purchase of the lines, used such lines to provide its customers with Internet access and did not utilize them for sound reproduction does not render the line access purchases nontaxable. In a memorandum of its

Technical Services Bureau (TSB-M-97[1.1]C, TSB-M-97[1.1]S) dated November 15, 1999, the Division stated, in relevant part, as follows:

> Thus, the purchase of telephone service from telecommunications providers (such as local exchange companies or long-distance companies) to access the Internet does not fall within the scope of this exemption.[5] For example, the charge for the telephone call to an ISP to initiate access to the Internet is still subject to both sales tax and the telecommunication excise tax, as is the charge to an ISP for leasing telephone lines from a telecommunications provider.

As made clear from the definitions set forth in Tax Law § 179(1), (2); § 1115(v); and § 186-e(1)(g), petitioner was not selling telephone or telecommunications services to its customers, but was purchasing telecommunications service (subject to tax) to be used in the provision of its own (nontaxable) service of Internet access. Hence, the Division properly determined that petitioner's purchases of line access from the noted providers were purchases of telephony or telephone service properly subject to the tax per Tax Law § 1101(b)(1)(B).

L. Petitioner has also argued that even if its line access purchases are held to be purchases of telephony or telephone services, the same are nonetheless exempt from tax because such lines are component parts of petitioner's interstate product known as Internet access. As noted, Tax Law § 1105(b)(1)(B) specifically excludes from tax interstate and international telephony and telegraphy and telephone and telegraph service. Petitioner asserts that in all cases the internet traffic on its network, while originating in and returning to New York, was routed through either Bethlehem or Philadelphia, Pennsylvania. Petitioner cites to ***Matter of Southern Pacific Communication Co.*** (Tax Appeals Tribunal, May 14, 1991), wherein the Tribunal stated that in determining whether a taxpayer's activities are involved in interstate commerce, it is

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[5] The exemption referred to in the memorandum is that set forth in Tax Law § 1115(v) which exempted from sales tax the receipts from the sale of internet access service and the use of such service, as added by chapter 615 of the Laws of 1998.

improper to isolate and individually examine the separate components of the overall activity being engaged in by such taxpayer. Petitioner argues that the access lines it leases are integrated with the other network components (servers, routers, modems, etc.) so as to form an interstate Internet network. Since the line access is just one component part of interstate Internet access, petitioner maintains that it cannot be subject to the tax.

M. For each of the purchases at issue herein, the line access service was delivered to and consumed by petitioner at various locations in New York State. The lines in question had terminal points in New York. Simply because the internet traffic on petitioner's network was routed out of state (i.e., through Pennsylvania) does not, in and of itself, lead to the conclusion that what petitioner purchased was interstate telephony or telephone service. Unlike the taxpayer in ***Southern Pacific (supra.)***, petitioner was not in the business of selling an interstate telephone service. Rather it sold no telephone service at all. Petitioner was the purchaser of line access, and it used the lines to provide an entirely separate service, Internet access service which, pursuant to Tax Law § 1115(v), was exempt from sales tax for the period at issue herein. Petitioner argues that if, as the Division contends, its line access purchases constitute telephony, then line access must be considered an interstate variety of telephony.

N. Petitioner's foregoing argument is rejected since the line access purchases at issue in this matter were all located within New York State. While the lines may well have been used to provide Internet access service of an interstate nature to petitioner's customers, the taxes for which petitioner seeks a refund were not imposed upon the Internet access service, but upon the intrastate line access charges only. In sum, what petitioner's arguments overlook is the fact that the tax is not being imposed on the Internet access service, which is an interstate activity and which, pursuant to Tax Law § 1115(v), is exempt from tax. Rather, the purchase of the line

access by petitioner from the various vendors was the act that triggered the imposition of the tax. The fact that petitioner subsequently used the line access to provide a nontaxable interstate service to its customers does not affect the taxability of the preceding transactions, i.e., the purchase of the line access by petitioner from its vendors.

O. Finally, support for the result reached herein may be found in ***Matter of Callanan Marine Corp. v. State Tax Commn.*** (98 AD2d 555, 471 NYS2d 906, ***lv denied*** 52 NY2d 606, 479 NYS2d 1026), where tax was imposed on scows traversing the Hudson River to deliver crushed stone to various locations in New York State (including New York City) from quarries located near Kingston, New York. For a portion of the trip (approximately 20 miles), the scows proceeded on the New Jersey side of the Hudson for navigational reasons, and the petitioner in that case argued that the scows were therefore engaged in interstate commerce because they crossed state lines. The Court disagreed, stating that the scows had a New York origin and a New York destination and that passage through New Jersey waters was merely incidental to what was clearly an intrastate journey. In ***Matter of Western Union Telegraph Company*** (State Tax Commission, February 4, 1983 [TSB-H-83(57)S]), the Commission held that telegraphic messages which originated and terminated in New York but which passed through a computer complex in New Jersey was intrastate telegraphy subject to sales tax under Tax Law § 1105(b).[6] Accordingly, petitioner's purchases of line access do not escape tax as purchases of interstate or international telephony and telegraphy or telephone or telegraph service.

P. Petitioner has also sought a refund for the tax it paid on its purchases of equipment used in connection with its delivery of Internet services. This equipment included routers,

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[6] Decisions of the former State Tax Commission, while not binding on this forum, are entitled to respectful consideration (***see, Matter of The Racal Corporation***, Tax Appeals Tribunal, May 13, 1993).

servers, modems, and large radio transmitters (***see*** Finding of Fact "13"). Petitioner seeks a refund of tax paid on this equipment pursuant to Tax Law § 1115(a)(former [12]). While noting that the Tax Law was changed effective September 1, 2000 such that the equipment in question was specifically exempted, petitioner maintains that such change was merely a clarifying amendment and that the equipment was implicitly exempt prior thereto. Petitioner also posits that if the line access charges constituted telephony or telegraphy charges properly subject to tax, then the equipment in question must be exempt as equipment used to receive and transmit telephone or telegraph communication, as specified in Tax Law § 1115(a)(former [12]).

Q. Petitioner's equipment enabled the movement of data so as to allow petitioner to provide the service of Internet access, that is, customer access into petitioner's network and on through petitioner's network (via relays) to access the world wide web at a point of presence (POP). In order to qualify for exemption prior to September 1, 2000, it was necessary that the equipment in question be used "directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication or in receiving, amplifying, processing, transmitting and retransmitting telephone or telegraph signals." (Tax Law § 1115[a][former (12)].) As determined above, although petitioner purchases line access from the various telecommunications providers, petitioner does not provide a telecommunications service, as defined at Tax Law § 186-e(1)(g), nor, pursuant to Tax Law §§ 179, 1115(v) and 186-e(1)(g), does petitioner carry on a telephone, local telephone, telegraph or transmission business. Instead, petitioner provided the service of Internet access, as defined by Tax Law § 1115(v), and the equipment in question was not used directly and predominantly (or, for that matter, at all) in initiating, switching, receiving, amplifying, processing, transmitting or retransmitting telephone or telegraph signals.

R. The amendment to Tax Law § 1115(a)(12) allowed, effective September 1, 2000, an exemption with respect to equipment used to provide telecommunication services for sale *or* equipment used to provide Internet access services for sale, or any combination thereof (Tax Law § 1115(a)(12-a). Use of the disjunctive "or," so as to include tangible personal property used in providing Internet access services was an expansion of the former exemption, and bears out that such equipment was not exempt prior to such amendment. The amendment itself was not made retroactive to earlier periods, nor is there any indication that such amendment was intended to be clarifying in nature as opposed to a substantive change by which the exemption afforded for tangible personal property used directly and predominantly in the provision of telephone or telegraph communications (***see,*** Tax Law § 1115[a][former (12)]) was expanded so as to apply to tangible personal property used in the provision of Internet access service (Tax Law § 1115[a][12-a]). This conclusion is consistent with the specific definitional distinction drawn between "telecommunications services," per Tax Law § 186-e(1)(g), and "Internet access service," per Tax Law § 1115(v) and Tax Law § 179(1), the latter of which specifies that Internet access service shall not constitute a telecommunications service nor shall its provision constitute the carrying on of a telephone, local telephone, telegraph or transmission business. Under this statutory framework, it cannot be concluded that the equipment purchased by petitioner was used directly and predominantly in providing telephone or telegraph communications so as to fall within the ambit of the exemption of Tax Law § 1115(a)(former [12]) before amendment. Simply put, the relevant portion of the exemption of Tax Law § 1115(a)(former [12]) required tangible personal property to be used in providing telephone or telegraph (i.e., telecommunications) service. Here, the equipment is used in providing (selling) Internet access service which is, by definition, not providing telephone or telegraph (telecommunication

service). Petitioner's claim for refund with respect to the equipment in question (i.e., equipment purchased prior to September 1, 2000) was therefore properly denied.[7]

S. The petition of Fastnet Corporation is hereby denied, and the Division's April 21, 2003 denial of petitioner's claim for refund, is sustained.

DATED: Troy, New York
March 10, 2005

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

[7] Petitioner has argued that if its purchases of line access are held to constitute purchases of telephony or telegraphy services (i.e., "telecommunications services"), then its equipment purchases must be exempt as tangible personal property used to transmit and receive telecommunications services. Petitioner's argument is premised on the assertion that it would be inconsistent to conclude that equipment purchased and used in conjunction with the leased access lines (telecommunications circuits) was not used to receive and transmit telephone and telegraph signals (telecommunications services). This argument, again, overlooks the fact that petitioner is providing an Internet access service and not a telecommunications service, as each are separately defined and treated, and thus the equipment in question was not used, as required during the period in question, in providing a telecommunications service (i.e., telephony or telegraphy) so as to qualify for exemption under Tax Law former § 1115(a)(12).