

January 10, 2006

Michael L. Morgan
Secretary - Department of Revenue
2135 Rimrock Rd.
P.O. Box 8933
Madison, WI 53708-8933

RE: Exempting Internet Access Services from Sales and Use Tax

Dear Secretary Morgan:

Thank you for your response (October 19, 2005) to the Wisconsin State Telecommunications Association's (WSTA's) inquiry regarding sales and use tax on internet access services over digital subscriber lines (DSL). Given the recent developments on this issue, your response is very concerning to WSTA members, which includes the 83 local exchange carriers in the state as well as 31 Internet Service Providers (ISPs), many of which offer high-speed internet access services over DSL.

As you are aware, earlier this year, there was significant debate about Wisconsin's ability to collect sales and use taxes on the sale of ANY internet access services. In December of 2004, the President signed the Federal Internet Tax Nondiscrimination Act (ITNA) into law, which prohibited states from imposing sales and use taxes on internet access services. The ITNA was aimed at several states, including Wisconsin, which had been collecting sales and use taxes on internet access services prior to a federal moratorium on such practices. According to the DOR, a technicality in the ITNA's language allowed the DOR to continue collecting sales and use taxes on internet access services, including services provided via cable modem and DSL.

As you note in your letter, the DOR's authority to collect sales and use taxes on internet access services stems from Wis. Stat. § 77.52 which provides for the collection of retail sales tax on "*telecommunications services...that either originate or terminate in this state.*" Wis. Stat. § 77.52 (2)(a)5.a. (emphasis added). Additionally, DOR has specifically identified "internet access services" as a taxable *telecommunications service* in its administrative rules. See Wis. Admin. Code § Tax 11.66(4)(a)15. In sum, the basis for DOR's authority to collect retail sales tax on internet access services requires that the service be characterized as a "telecommunications service."

Recent decisions by the Federal Communications Commission (FCC) have defined internet access services provided via a cable modem or DSL as “information services,” specifically rejecting the classification of these services as “telecommunications services.” *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, FCC Docket No. CC 02-33 (September 23, 2005) (“*DSL Order*”); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, FCC Docket No. GN 00-185 (March 15, 2002) (“*Cable Modem Ruling*”).

The *Cable Modem Ruling* was upheld by the United States Supreme Court in *National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.*, No. 04-277 Slip. Op. June 27, 2005. In that case, the Supreme Court addressed whether cable modem service is properly defined as a telecommunications service, or as an information service. Slip. Op. at 3 (“the question before the court is the proper regulatory classification under the Communications Act of broadband cable Internet service”). The Supreme Court upheld the FCC’s determination that cable modem service is an information service and not a telecommunications service. Slip Op. at 1-2.

The WSTA recognizes that the DOR has included “internet access services” in the definition of “telecommunications service.” Wis. Admin. Code § Tax 11.66(4)(a)15. This depiction of DSL and cable service as a “telecommunications service” stands in stark contrast to general regulatory approach to these services by the FCC, an agency that has expressed a strong desire to limit regulations on internet access to further encourage its availability and affordability. Juxtapose that with the DOR’s unenviable position of being one of the very few entities to classify broadband internet access as a “telecommunications service,” a classification that makes internet access more expensive in Wisconsin.

The DOR’s decision to continue taxing all internet access in light of federal legislation is curious. The classification of DSL and cable modem service as a “telecommunications service” in order to continue taxing it is also concerning in light of recent FCC action. Most troubling is the fact that these decisions stand in the way of the expansion of broadband deployment and access -- critical pieces of any policy plan to encourage the growth of the Wisconsin economy and increase the technological capabilities of Wisconsin residents and businesses.

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We sincerely hope that you will reconsider your position on this issue and remove all internet access from the state's sales and use tax. At the very least, this action should be done with respect to DSL and cable modem service to be consistent with the FCC's actions.

Sincerely,

William C. Esbeck
Executive Director

Christopher LaRowe
Manager of External Affairs

CC: Gov. Jim Doyle, Sherrie Gates-Hendrix, Tom Ourada and Blair Kruger