Cite as Det. No. 00-159E, 20 WTD 372 (2001)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Correction of Assessment of	)	F I N A L D E T E R M I N A T I O N
	)	No. 00-159E
. . .	)	Registration No. . . .
	)	FY. . ./Audit No. . . .
	)	Docket No. . . .

[1] RULE 245; RCW 82.04.065: RETAILING B&O AND RETAIL SALES TAX -- NETWORK TELEPHONE SERVICE -- DEFINITION -- TRUE OBJECT. Where Taxpayer's network provided a computer data protocol conversion service in addition to transmitting data and information over its network to another computer, the true object of the service was found to be the transmission of data and information.

[2] RULE 245; RCW 82.04.065, RCW 82.04.297: SERVICE B&O TAX OR RETAIL SALES TAX -- NETWORK TELEPHONE SERVICE -- INFORMATION SERVICE -- INTERNET SERVICE. The term "internet service" was held to not include a protocol conversion and transmission service that acted upon only the protocols of the transmitted data or information.

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Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this determination.

DEPARTMENT OF REVENUE: Janis P. Bianchi, Policy & Operations Manager
Randolph E. Okimoto, Administrative Law Judge

NATURE OF ACTION:

A shared wide-area network computer service provider protests its re-designation to a network telephone service provider that is taxed under retailing and retail sales tax classifications.[1]

FACTS:

. . . (Taxpayer)[2] operates a shared wide area network (WAN) headquartered [outside Washington]. Taxpayer's books and records were examined by the Audit Division (Audit) of the Department of Revenue (Department) for the period January 1, 1989 through December 31, 1993. This examination resulted in additional taxes and interest being assessed of $. . . . Document No. . . . was issued in that amount on July 20, 1995. Taxpayer protested the entire amount, and it remains due.

During the audit period Taxpayer operated two separate, shared wide area computer networks,[3] one utilizing the X.25[4] technology and another utilizing frame relay[5] technology. Each computer system on each WAN was linked by data transmission facilities utilizing either leased lines or packet-switched networks. In contrast to regular WANs, shared WANs share data transmission resources and may also share computer processing resources. Shared WANs are made up of logically separated[6] and subordinate WANs. Both shared WANs and regular WANs can be expanded to include systems on other WANs, through WAN-to-WAN interconnections called "gateways." Taxpayer gives the following explanation in its brief:

> To illustrate, the petitioner's customers, A and B, will each have at least one system on their premises (e.g., a host computer or router) comprising the edge of their proprietary networks and usually linked on a full-time basis to the petitioner's shared WAN.[7] A's remote users may form a temporary link with the network through remote (dial-up) access to A's host computer.[8] Users of A's host computer are typically denied access to

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[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

[2] Nonprecedential portions of this determination have been deleted.

[3] A computer network is a set of interoperable (i.e. each computer can communicate with each other computer) computer-related systems.

[4] X.25 was the first worldwide accepted standard defining the interface between end-user equipment and a packet-switched network. It was first introduced in 1976. Enterprises generally stopped building X.25 WANs around 1990 and most have shifted to newer technologies such as frame relay.

[5] The frame relay standard was approved in 1991. The frame relay WAN first produced revenue for the petitioner in . . . 1991.

[6] The logical separations between proprietary WANs are achieved through access controls (log-in routines and password protection), network management systems or separate facilities.

[7] The full-time link generally consists of leased line services purchased by the shared WAN provider (e.g., Taxpayer) from a local telephone company, together with associated facilities.

[8] The temporary link consists of dial-up services purchased by the remote users from their local telephone companies which temporarily connect them to the WAN's shared remote access centers. Taxpayer does not provide this service. Remote (dial-up) access is a feature of X.25 and IP networks, but is not feasible for frame relay or

B's host computer, and vice versa. In this way, individual proprietary subscriber networks are logically carved out of the shared WAN. The addition of a gateway may allow A's users to interoperate with B's host computer, and the addition of another gateway may allow A's host computer to interoperate with a third party's computer on another shared WAN.

TAXPAYER'S CONTENTIONS AND ARGUMENTS:

Schedule 2 – Unreported Service Income

In Schedule 2, Audit assessed tax under the service and other activities business and occupation (B&O) tax classification on income that the auditor believed had not been reported on Taxpayer's monthly B&O tax returns. The auditor examined a listing of sales for one month and based on that listing, estimated that an additional 25% of Taxpayer's reported income had not been properly reported under the service tax classification. The auditor made this estimate because Taxpayer did not provide Audit with the actual invoices. On the other hand, Taxpayer contends that it reported 100% of its Washington income under the retailing B&O tax classification and that no income was unreported on its tax return. Although Taxpayer concedes that a portion of that income should have been reported under the service or selected business services[9] tax classification, Taxpayer states that the actual percentage is significantly more than the 25% assessed by Audit. In fact, Taxpayer argues that all of its income should be taxed under the service and other business activities tax classification or the selected business services tax classification, because it is providing computer networking services or internet services.

Schedule 3 – Disallowed Sales Tax Deductions

In Schedule 3, Audit assessed retail sales tax on disallowed deductions taken from the retail sales tax classification, because Taxpayer could not substantiate or document a valid reason for the deduction.

Recurring Charges - Dedicated Access Facilities Charges and Network Usage Fees:

Included in the disallowed deductions were charges for "rental/maintenance." At the hearing Taxpayer presented sample invoice #. . . from October 93 and its accompanying "recurring charge summary" which broke down all charges under this heading. The "recurring charge summary" identified all recurring charges associated with a particular equipment location. It indicated that Taxpayer charged the sample customer $174 for DAF Dial Backup, $783 for

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ATM networks. However, remote (dial-up) access can be provided through an internetwork, e.g., an X.25 network with a gateway to a frame relay network.

[9] Effective July 1, 1993, RCW 82.04.290 was amended to create the selected business services tax classification. Chapter 25, Laws of 1993, 1st Special Session. The legislature repealed the selected business services tax classification in 1997 effective, June 30, 1998. Chapter 7, Laws of 1997 .

Dedicated Access, and $87 for ". . . ."[10] Taxpayer concedes that portions of these charges were for the rental of equipment and properly subject to retailing B&O and retail sales tax. Taxpayer states that it has properly remitted retail sales tax on those amounts. Taxpayer contends, however, that the majority of these recurring charges were actually for "Dedicated Access Facilities" (DAF). Taxpayer contends that these charges were received for data information services and not for the use of tangible personal property or network telephone services. Taxpayer further explained in its May 17, 1996 memo that the DAF charges on its X-25 network were primarily for protocol processing services performed by one of [Taxpayer's] "black box" specialized computers through its X-25 network.[11] Taxpayer did acknowledge, however, that the DAF service charges included the costs of a dedicated telephone line between the customer's computer and [the] black box. Taxpayer further clarified that the term "permanent network connection point" referred to the physical slot on [the] "black box" protocol processor.

The remaining charges on the sample invoice were network usage fees. These fees were charged to customers for utilizing Taxpayer's shared WAN and were computed based on the number of units processed. Taxpayer also argues that these charges were for information services, computer networking services or internet services and not network telephone services.

True Object:

Taxpayer makes several alternative arguments to support its contention that its shared wide area network services (DAF charges & network usage fees) do not constitute network telephone services within the meaning of RCW 82.04.065 and Rule 245. First, Taxpayer argues that the true object of its customer on the X-25 network, is to acquire protocol conversion services that allow a customer's originating computer to communicate with a host or other on-line computers. Taxpayer explains in its petition that:

> [Taxpayer]'s customers know there is widespread incompatibility between the protocols of the computers and terminal devices with which they may wish to provide for the exchange of information. The binary data generated by one device frequently is not in a protocol that is recognizable by another device. The data may be in an incompatible format, it may employ an incompatible binary code, and it may be in an incompatible protocol. They know that protocol conversion will be required in order for the devices to interoperate. Processing of the format, code and protocol, is generically referred to as "protocol processing." In the usual case where the protocol processing results in a net change in the binary form between the sending and receiving devices, that change is referred to as "protocol conversion."

Taxpayer further explains in its petition that:

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[10] We presume that this is a hardware charge, since Taxpayer billed and collected retail sales tax on this amount.

[11] Since Taxpayer does not provide protocol conversion services through its frame relay network, Taxpayer acknowledges that DAF charges on the frame-relay network could not have been for protocol conversion services.

> The required protocol changes are accomplished by special purpose protocol processors placed between (interfacing) the devices and the telephone lines. The sending device's protocol is stripped off at the first processing node and replaced with a binary form known as X.25. At the terminating node, the X.25 protocol is removed and replaced with the contractually pre-defined protocol recognized by the customer's host device.

Taxpayer further explains in its brief:

> WAN's like the petitioner's X.25 WAN filled a key need by offering services that reduced line costs through sharing of data transmission facilities, but more importantly offered customers a compelling value proposition in offering protocol conversion capabilities that made it much easier to connect cheaper ASCII terminals and PC's emulating these devices (e.g. Digital's VT-100) to IBM FE's (front ends) and by extension to applications resident on mainframes. These new protocol conversion capabilities offered over both shared WAN's and through dedicated protocol conversion hardware enabled corporations to extend the reach of their applications to new classes of users. For example, services based on protocol conversion made it practical to provide direct access to mainframe applications such as order entry and tracking to field sales personnel.

Taxpayer relies on WAC 458-20-245 (Rule 245) and Det. No. 90-128, 9 WTD 280-1 (1990) in support of its position.

Legislative Intent:

Next, Taxpayer points out that when the Washington State Legislature originally removed the telephone business from the public utility tax classification in 1983,[12] computer networking services were not considered part of the telephone business. Therefore, computer networking services were not subject to public utility tax but instead were taxed under the service and other business activities tax classification. Taxpayer argues that the Legislature intended that only the existing regulated telephone business (that was formerly subject to public utility tax classification) should be included under the newly defined "network telephone services" definition of a retail sale. Taxpayer argues that the Legislature did not intend to place any existing non-regulated businesses into the new definition and argues that all non-regulated existing businesses should remain in their respective B&O tax classifications.

Internet Service:

[12] Laws of 1983, 2nd Ex. Sess., ch. 3.

In the alternative, Taxpayer argues that its shared wide area networking services constitute "internet service" within the meaning of RCW 82.04.297[13] and, therefore, [are] specifically excluded from the definition of network telephone service. Taxpayer points to the definition of "internet service" contained in RCW 82.04.297 and states that it closely resembles the Federal Communications Commission's (FCC) definition of "enhanced services" that is codified in 47 C.F.R. § 64.702(a). Taxpayer states that the FCC treats enhanced services as a non-regulated activity.

Based on the definition of "internet service" contained in RCW 82.04.297, Taxpayer argues that its shared WANs (. . .) are part of the Internet and, therefore, when it allows its customers access to [its shared WANs], it is also allowing them access to the "Internet." Since providing access to the Internet is specifically included within the definition of "internet service," Taxpayer argues that its activities should be taxed as an internet service under either the service and other or selected business activities tax classifications.

Taxpayer also argues that even if [its shared WANs are] not actually the "Internet," its network is sufficiently similar so that its activities should be treated as internet services for taxation purposes. Taxpayer points out that:

> Computer networking has roughly five major facets. These include: (1) network interaction; (2) network reliability; (3) network security; (4) network services, and; (5) network connection methods. The . . . the Internet, [Taxpayer's shared WANs], and all other networking solutions implicate all five facets, albeit in slightly different ways.

. . .

Taxpayer also asks that extension interest be waived.

ISSUES:

1) Do Taxpayer's dedicated access facilities charges and network usage fees for its shared WAN services fall within the definition of network telephone services?

2) Are Taxpayer's shared WAN services "internet services" and, therefore, excluded from the definition of network telephone services?

. . .

DISCUSSION:

[13]The Washington State Legislature specifically excluded "internet service" from the definition of network telephone services in 1997. Laws of 1997, ch. 304. Although RCW 82.04.297 was enacted in 1997, it was intended to be a clarification of existing law, and, therefore, we apply it retroactively. *See*, Det. No. 98-193, 18 WTD 338 (1999).

Schedule 2 – Unreported Service Income

This issue involves whether Taxpayer has reported all of its taxable Washington income on its state and local combined state excise tax returns. The verification of gross income and the computation of tax for various tax classifications is primarily an issue of fact. The Audit Division is better suited to perform this task. Taxpayer is directed to provide all billing invoices to the Audit Division for the period October 1993 within 90 days of the issuance of this determination. Accordingly, this issue is remanded to the Audit Division. If Taxpayer fails to provide such invoices within 90 days or such longer period as the Audit Division may, in its discretion grant, the assessment shall be deemed upheld.

Schedule 3 – Disallowed Sales Tax Deductions
Recurring Charges - Dedicated Access Facilities Charges & Network Usage Fees:

RCW 82.04.050(5) defines a retail sale as including "the providing of telephone service, as defined in RCW 82.04.065, to consumers." RCW 82.04.065 defines "telephone service" as "competitive telephone service or network telephone service, or both." It further states:

> "Network telephone service" means the providing by any person . . . or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system.

In interpreting the above statute the term "network telephone service" is broadly defined. If Taxpayer's services fall within any one of the statutorily defined activities then it is taxable as a network telephone service provider and subject to retailing B&O and retail sales tax on its charges. If not, WAC 458-20-245 (Rule 245) and RCW 82.04.290 provide that Taxpayer's computer and data processing activities are taxable under the service and other activities or selected business services B&O tax classifications.

True Object:

Under RCW 82.04.065 "network telephone service" means "the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system." (Emphasis ours.)

We believe that Taxpayer's shared WAN services fall within this broad statutory definition of network telephone services.

First, Taxpayer clearly transmits data or information for hire. Taxpayer's customer supplies the data or information, and Taxpayer's shared WAN transmits that data from a computer in one location to a different computer in another location. The fact that Taxpayer may contract with an underlying telecommunications carrier for the telephone lines that actually transmit the data is not

determinative. What is determinative, however, is that the customer holds Taxpayer responsible for the eventual transmission of the computer data or information to its final destination. If the computer data is not received, the customer would look to Taxpayer for restitution and/or compensation and not the underlying carrier. Instead, we believe that Taxpayer purchases basic network telephone transmission services from an underlying telecommunications carrier and, for the X-25 network, Taxpayer further enhances the transmission by adding protocol conversion services. For the X-25 network the taxpayer sells the protocol conversion services and transmission services to customers under one fee. For the frame relay network the fee is for transmission services only.

Although Taxpayer cites Det. No. 90-128, 9 WTD 280-1 (1990) in support of its contention that the true object of Taxpayer's shared WAN services is to provide protocol conversion services or computer interoperability, not transmission of data for hire, Taxpayer's reliance is misplaced. Det. No. 90-128 involved a data processing service that performed data processing services for customers via computer terminals connected with its own data processing computers. In addition, the agreement between the data service provider and its customer only required the customer to "bear the cost of the same [leased lines] in connection with the 'on line availability' of the data processing services." Id at 280-4. The determination also noted that the contractual agreement repeatedly referred to "services" or "data processing services" when describing that taxpayer's obligations to its customer. The determination also emphasized that several pages of the agreement were "devoted exclusively to a detailed description of the types of data processing services to be rendered and the manner in which these services are to be performed." Id at 280-4. Under these circumstances, the determination found that the true object of the purchaser in the transaction was to acquire data processing services and that the billing for leased lines was essentially a recovery of one cost of providing that service.

In contrast, Taxpayer's marketing flyer . . . describes the services offered by Taxpayer to be primarily data transmission services . . . .

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[Similarly], the options and customer support features [listed in the flyer] primarily emphasize the quality or quantity of the data transmission services that Taxpayer provides to customers and not protocol conversion services.

We further note that Taxpayer does not separately invoice or itemize a charge for its protocol conversion services performed through its X-25 network. Instead, these charges are included with and billed as part of Taxpayer's entire charge for transmitting the customer's data or information to, from and through its X-25 shared WAN. Protocol conversion services are simply included in its DAF charges. In addition, Taxpayer has presented no evidence that it charges differently for transmission services provided through its X-25 network than for those provided through its frame relay network, even though protocol conversion services are provided only through its X-25 network. This omission reinforces our conclusion that the true object of Taxpayer's shared WAN services is data transmission.

In general, the Department does not allow a single billing or contract to be segregated or bifurcated unless there is a reasonable basis on which to do so. Det. No. 98-012, 17 WTD 247 (1998). As we stated in Det. No. 89-433A, 11 WTD 313 (1992):

> We do believe that bifurcation of a contract for taxation will be the unusual case. In most cases income from a performance contract will be taxed according to the primary nature of the activity. For example, income from processing for hire is taxed at the processing for hire rate even though some storage or other services are also involved.

In that case, we allowed bifurcation because the taxpayer's contract, which was negotiated before the work was performed, provided a reasonable basis for determining the value of the various activities performed. Generally, if a taxpayer engages in activities that are within the purview of two or more tax classifications, it will be taxable under each applicable classification. RCW 82.04.440. However, bifurcation is not allowed as a matter of law if the activity is essentially a single activity, even if the contract may provide a basis for determining the value of the various activities performed under the contract. If the services are functionally integrated, then the entire contract price is subject to tax at a single rate. *See Chicago Bridge and Iron v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983).[14]

In this case, Taxpayer's protocol conversion services are additional services that allow the customer's transmitted data or information to interact with the receiving computer. It is functionally integrated with the transmission activities performed by Taxpayer's shared wide-area computer network. As such, it is an integral part of the transmission activity and cannot be bifurcated from what is essentially a single activity. This is true, even though the contract may or may not provide a basis for determining the value of the protocol conversion activity alone.

Based on these facts, we conclude that the true object of Taxpayer's shared WAN business activities is to transmit computer data or information for hire. Although protocol conversion is important, it is not the true object of the services being provided.

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[14] In *Chicago Bridge*, the taxpayer sought a refund of a portion [of] the B & O taxes paid on the gross receipts from the sales of goods designed, manufactured, and installed for customers in Washington, but contracted for outside the state. It contended the tax was unconstitutional as a violation of due process (U.S. Const. amend. 14, § 1 and Const. art. 1, § 3) and the commerce clause (U.S. Const. art. 1, § 8, cl. 3). The contracts at issue bifurcated the design and manufacturing of three products from their installation. Hence, the taxpayer argued that the 3 contracts covering only the design and manufacturing phase had no nexus to Washington. The Washington Supreme Court did not recognize the bifurcation, stating:

> CBI generally performs all aspects of design, manufacture, delivery and installation of its products, and customers negotiate a single, lump-sum price for a finished, installed product. CBI's engineering, manufacturing, and installation operations are functionally integrated and coordinated from the first proposal to a customer through each phase of the design, manufacturing and installation process.

98 Wn.2d at 818. Accordingly, the design and engineering services were subject to B&O tax because the contracts were "functionally integrated."

Legislative Intent:

Next, Taxpayer contends that the 1983 Washington State Legislature only intended to place the existing telephone business that was formerly taxed as a public utility into the new network telephone service definition. We believe, however, that the legislature intended to complete what it had begun in 1981, i.e. the deregulation of the telephone business and the equalization of tax burdens on all businesses engaging in the telephone business without regard to whether the business was regulated or non-regulated. *See Western Telepage, Inc. dba AT&T Wireless Services v. Tacoma*, 140 Wn. 2d 599, 998 P.2d 884 (2000). To accomplish this purpose, the Legislature drafted a broad definition of network telephone services and excluded from that definition those existing businesses, i.e. cable, broadcast services by radio or television that the legislature wanted to continue to tax under a separate tax classification. Taxpayer's activities, because they are primarily focused on the transmission of information for hire, fall within the broad definition of network telephone services, not the excluded services.

Internet Service:

RCW 82.04.065(2) clarifies that certain services, even though they include some data or information transmission services, are not within the statutory definition of network telephone services. It states in pertinent part:

> . . . "Network telephone service" includes the provision of transmission to and from the site of an internet provider via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of internet service as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the internet service provider.

Taxpayer contends that its protocol conversion services in its X-25 network are "internet services" which are taxed as information services under RCW 82.04.055. We cannot agree.

RCW 82.04.290(1) imposes a B&O tax upon "every person engaging within this state in the business of providing selected business services." RCW 82.04.055 defined "selected business services" as including "information services." It further stated:

> (d) Information services, including but not limited to electronic data retrieval or research that entails furnishing financial or legal information, data or research, internet service as defined in RCW 82.04.297, general or specialized news, or current information unless such news or current information is furnished to a newspaper publisher or to a radio or television station licensed by the federal communications commission.

RCW 82.04.297(3) defines "internet service" and states:

> "Internet service" means a service that includes computer processing applications, provides the user with additional or restructured information, or permits the user to interact with stored information through the internet or a proprietary subscriber network. "Internet service" includes provision of internet electronic mail, access to the internet for information retrieval, and hosting of information for retrieval over the internet or the graphical subnetwork called the world wide web.

We first note that the legislature has included "internet service" within the broader term "information service" contained in RCW 82.04.055 and not within the term "data processing services." Information service implies that new information or data is obtained, whereas data processing service implies that existing data is merely manipulated. *See* RCW 82.04.055. In addition, RCW 82.04.297 states that the internet service provider must provide that information service through the use of computer processing applications that either 1) provide the user with additional or restructured information [through the internet or a proprietary subscriber network], or 2) permit the user to interact with stored information through the internet or a proprietary subscriber network.

Although Taxpayer's protocol conversion services include computer processing applications, the applications do not meet the second part of the statutory test for internet service. They do not provide the user with restructured data or information. Taxpayer's protocol conversion services only act on or change the protocols accompanying the data or information being sent and do not restructure the transmitted data or information itself. The data or information remains substantially the same as when it was originally received. The Model Telecommunications Act and the Federal Communications Commission's (FCC) definitions exclude from telephone services certain enhanced services. The FCC defines enhanced services to specifically include computer applications that:

> … act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber with additional, different, or restructured information, or involve subscriber interaction with stored information. 47 CFR § 64.702(a). (Underlining added.)

We find it noteworthy that the Washington State Legislature, when it enacted internet legislation in 1997, chose not to utilize this portion of the FCC definition. By not including in its definition of internet services the FCC language dealing with computer applications acting solely on format, content, code, protocol, the legislature must be presumed to have not included such applications within the definition of internet service. *Cf. Bird-Johnson Corporation, v. Dana Corporation* 119 Wn.2d 423, 833 P.2d 375 (1992). This conclusion is further supported by the fact that "internet service" is defined as an information service and not a data processing service.

Neither do Taxpayer's shared WAN services meet the second alternate type of internet service by permitting the ". . . user to interact with stored information through the internet or a proprietary subscriber network . . . ." RCW 82.04.297(2) contains the following definition of the "Internet":

> "Internet" means the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork called the world wide web.

Taxpayer's shared wide area network was a closed network limited to only Taxpayer's shared WAN users. Taxpayer has not presented evidence that gateways either existed or were utilized that permitted Taxpayer's user to interact with stored information through the Internet during the audit period. For these reasons, we find that Taxpayer has not established that [Taxpayer's shared WAN] was part of the Internet during the period in question.

We also do not believe that [Taxpayer's shared WAN] was a proprietary subscriber network within the meaning of RCW 82.04.297. In Taxpayer's supplemental brief, dated November 20, 1997, Taxpayer speculates:

> The Legislature was probably using the phrase "proprietary subscriber network" in the same sense in which that phrase was used by the Interactive Services Association (ISA) in its January 28, 1997 white paper entitled "*Logging On to Cyberspace Tax Policy White Paper*." There, the ISA defined a "proprietary subscriber network" in terms contiguous with the business operations of a typical Online Service Provider (OSP), e.g.; . . ., . . ., or . . ., in which proprietary information data bases, e-mail, chat and other services are made available only to their subscribers in exchange for a usage-based or fixed monthly fee. The ISA explained:
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> > '[A]n OSP is a business providing access to and content available on a proprietary subscriber network." "Content is made available to the public by OSPs…. It consists of information and services delivered to the public electronically via … proprietary subscriber networks.'

This identification of "proprietary subscriber networks" with OSPs is further supported by the House Bill Report filed by the House Committee on Energy & Utilities of the Washington State Legislature, regarding the passage of Substitute Senate Bill 5763 in 1997. Although Taxpayer states that its shared WANs currently provide e-mail services, and allow hosting of some other financial and medical information or data like other on-line service providers, it has not established that these services were offered during the audit period in question.[15] Therefore, we find that Taxpayer's shared WANs were not proprietary subscriber networks during the audit period.

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[15] In Taxpayer's supplemental letter submitted March 30, 2000, Taxpayer indicated that the Product Identification Codes for [Taxpayer's shared WAN]'s e-mail, e-commerce and medical and financial information services previously described in its brief, did not show up during the audit sample month, October of 1993. Consequently, Taxpayer is not certain that these services were offered during the audit period.

DECISION AND DISPOSITION:

Taxpayer's petition is conditionally granted in part, remanded in part and denied in part.

Dated this 12th day of February, 2001.