STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRONTLINE COMMUNICATIONS CORPORATION	:	DECISION DTA NO. 819786
	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period November 1, 1999 through November 30, 2002.	: :	

Petitioner Frontline Communications Corporation, c/o Vasam Thatham, One Blue Hill Plaza, 7th Floor, Pearl River, New York 10965, filed an exception to the determination of the Administrative Law Judge issued on March 10, 2005. Petitioner appeared by Anderson, Gulotta and Hicks, P.C. (Michael A. Gruin, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Lori P. Antolick, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on September 27, 2005 in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner's purchases of line access were telephony or telegraphy services within the meaning of Tax Law § 1105(b)(1)(B).

II. Whether, if determined to be telephony or telegraphy, such services were nevertheless exempt from tax as interstate or international services within the meaning of Tax Law § 1105(b)(1)(B).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Frontline Communications Corporation ("Frontline"), which began doing business in 1995, and is headquartered in Pearl River, New York, is an Internet access service provider ("ISP") with customers located in New York as well as other states. 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."

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 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.

During the period in issue, November 1999 to November 2002, petitioner provided its New York customers with access to the Internet via dial-up lines, dedicated T-1 lines, satellite access and DSL access.[1] Petitioner did not provide voice communication services during the period in issue.

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"), a facility where local Internet traffic is aggregated, which is the gateway to the global Internet. To provide this network, and to carry out its business of providing Internet access (connectivity), petitioner had to purchase access to three kinds of circuitry, as follows:

> a) dial-access and dedicated access circuits which connected petitioner's customers to petitioner's facilities. These circuits were either dedicated T-1 circuits or PRI ("Primary Rate Interface") circuits connected to local telecommunications carriers' offices.[2]
>
> b) an assembled network of circuitry, that connected all of petitioner's own facilities together.
>
> c) circuitry connecting petitioner's facilities with the global Internet.

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[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. A DSL (Digital Subscriber Line) provides a faster technology for data transmission over telephone lines (compared for example to ordinary dial-up connections). A DSLAM, or DSL Access Multiplier, is a piece of equipment connecting DSL modems at a customer location to one or more high speed data circuits.

[2] Petitioner purchased PRI lines, representing an ISDN ("integrated services digital network") that carries digital data over the leased lines. A PRI is a configuration that is equivalent to a T-1 circuit, but faster, allowing the user to have access to 23 voice channels and one data channel. Petitioner also purchased "customer access lines" from "incumbent local exchange carriers" which allowed petitioner's customers to gain connection to petitioner's facilities.

Petitioner, a company which grew primarily by acquisitions of other companies, had network centers in New York, New Jersey and Virginia, and petitioner's system was a connected network of circuits to and from all of those locations. All of the circuits described above carried data to and from petitioner's customers' locations in New York State, and all of such data was routed through such locations regardless of the location of its intended destination. An ISP could ensure that its traffic is routed both inside and outside a particular state simply by locating servers or related equipment in at least two states.

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 network and its routers and servers in the noted network center locations.

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 network with a data transfer capability of 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 network and its routers and servers in the noted network center locations.

To connect petitioner's own network to the global Internet, petitioner purchased internet access service from AT&T, UU Net, Verio, Cable and Wireless, and Cogent.

On November 21, 2002, the Division of Taxation ("Division") received from petitioner an Application for Credit or Refund of Sales or Use Tax (Form AU-11) seeking a refund of sales and use tax paid by petitioner in the aggregate amount of $153,475.20. Such amount represented tax paid on petitioner's purchases of access and transport lines, on equipment (routers, modems, servers, etc.), and on other items including professional services, direct mailing and advertising.

By a letter dated April 21, 2003, the Division granted petitioner's claim to the extent of $12,688.53 (representing tax paid on certain equipment purchased after September 1, 2000, and other purchases including, presumably, petitioner's own Internet access purchases), but denied the $140,786.67 balance of petitioner's claim. Thereafter, further review and discussion between the parties resulted in petitioner's withdrawal of additional portions of its claim, including the portion pertaining to tax paid on equipment purchased prior to September 1, 2000, such that it is only the tax paid by petitioner on its purchases of line access which remains at issue, as described hereinafter.

During the period in issue, petitioner purchased (via lease) circuit connections (access lines) from the vendors Frontier, Focal, Intermedia, Network Access Solutions ("NAS"), Total Tel., and Citizen's Com. in order to connect its dial access and dedicated access customers to the Internet. Petitioner paid State and local sales tax on such line access purchases in the aggregate amount of $54,887.81. At hearing, petitioner agreed that its line access purchases from Intermedia and Total Tel. should be withdrawn from consideration for refund in this proceeding. Petitioner paid State and local sales tax on these purchases in the aggregate amount of $1,960.89 ($343.05 on its Intermedia purchases and $1,617.84, on its Total Tel. purchases), and elimination of such amount reduces the amount of tax with respect to line access purchases at issue and sought for refund in this proceeding to $52,926.92.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first found that the line access services purchased by petitioner from its vendors were purchases of telephony or telegraphy or telephone or telegraph service properly subject to tax under Tax Law § 1105(b)(1)(B).

The determination next considered petitioner's argument that its line access purchases were exempt from tax as interstate or international telephony or telegraphy "because such lines are component parts of petitioner's interstate product known as Internet access." The Administrative Law Judge rejected this argument reasoning that the lines in question were used to communicate between petitioner's customers located in New York and petitioner's "points of presence" also located in New York. The determination states, in part, as follows:

> 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 or traveled out of state 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*** [***Communications Co.*** (Tax Appeals Tribunal, May 14, 1991)], petitioner was not in the business of selling an interstate telephone service. Rather it sold no telephone service at all . . . . 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 . . . . 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 (Determination, conclusion of law "L").

The determination also finds support for its conclusion in cases holding that the delivery of crushed stone and telegrams from points in New York to destinations in New York lacked an interstate character notwithstanding incidental passage through New Jersey (***see***, ***Matter of Callanan Marine Corp. v. State Tax Commn.***, 98 AD2d 555, 471 NYS2d 906, ***lv denied***, 62 NY2d 606, 479 NYS2d 1026 [crushed stone]; ***Matter of Western Union Telegraph Co.***, State Tax Commn., February 4, 1983 [telegrams]).

ARGUMENTS ON EXCEPTION

Petitioner first argues that the subject of the transactions at issue here did not come within the statutory terms "telephony and telegraphy and telephone and telegraph service of whatever nature" because petitioner's services are limited to packet switching technology and related services and do not include "transmission" of data. It relies on our decision in ***Matter of Sprint Intl. Communications Corp.*** (Tax Appeals Tribunal, July 27, 1995) which concluded that providing services similar to those provided by petitioner did not constitute telegraphic services for purposes of the gross receipts tax. Petitioner also asserts that the Administrative Law Judge erred in drawing support from the fact that the line access purchased by petitioner could have been used for transmission of traditional voice communications.

Petitioner argues alternatively that even if the purchases of line access involved telephony or telegraphy it is exempt from tax because the line access constituted interstate and international telephony and telegraphy and telephone and telegraph service. Its brief states as follows:

> In the Matter of the Petition of Southern Pacific Communications Company, New York Division of Tax Appeals, Tax Appeals Tribunal (File No. No. [sic] 800275, May [14], 1991), the Tribunal considered whether long distance telephone services are subject to NY sales tax. The Tribunal found that long distance telephone

> services were not subject to tax because the portion of the long distance service the Division sought to tax was a component part of the overall interstate service. The Tribunal ruled, "[I]n determining whether a taxpayer's activities are in interstate commerce, it is improper to isolate and individually examine separate components of the overall activity being engaged in by the taxpayer." In the Southern Pacific case, the Tribunal relied on the NY Court of Appeals decision in Matter of Moran Towing and Transportation Co., Inc. v. New York State Tax Commission, 531 NYS2d 885, 72 NY2d 166 (New York Court of Appeals, July 12, 1988) finding that tugboat **services** (emphasis added) and supplies were exempt from tax even though the tugboats activities were conducted entirely in New York waters because the tugboats were engaged in interstate activities (Petitioner's brief in support, pp. 5-6).

Finally, petitioner asserts that the imposition of tax in these circumstances would discriminate against petitioner and other independent ISPs in violation of the Federal Internet Tax Freedom Act of 1998, as extended by the Internet Tax Nondiscrimination Act of 2003, because an integrated telecommunications company which owns its own lines can provide internet access to retail customers without incurring the tax at issue here.

The Division argues that the line access purchased by petitioner falls within the broad definitions of telephony and telegraphy set forth in the Tax Law and the regulations. Its brief reads, in part, as follows:

> Tax Law §1105(b) imposes sales tax on the receipts of telephony and telegraphy and telephone and telegraph service of whatever nature. The words "of whatever nature" indicate that a broad construction is to be given the terms describing the items taxed. 20 NYCRR 527.2(a)(2). Telephony and telegraphy and telephone and telegraph service is defined in the sales tax regulations as "communications by means of devices employing the principles of telephony and telegraphy." 20 NYCRR 527.2(d)(1). The Regulations go on to provide that "the term telephony and telegraphy includes use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." 20 NYCRR 527.2(d)(2). Under these definitions, the

> right to use a phone line from a telecommunications company is the purchase of telephone service (Division's brief in opposition, p. 6).

The Division also rejects petitioner's characterization of the purchased services as interstate because the line access services were delivered to and consumed by petitioner within New York. It states, "The phone service was used in New York. Petitioner used the lines in question to transmit signals between points in New York. The signals were transmitted outside New York only *after* leaving the terminal point of the intrastate New York line" (Division's brief in opposition, p. 7, footnote 2).

OPINION

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 . . . ." The regulations provide that the words "of whatever nature" contained in Tax Law § 1105(b) "indicate that a broad construction is to be given the terms describing the items taxed" (20 NYCRR 527.2[a][2]).

20 NYCRR 527.2(d)(1) states that "[t]he provisions of section 1105(b) of the Tax Law with respect to telephony and telegraphy and telephone and telegraph service impose a tax on receipts from intrastate communication by means of devices employing the principles of telephony and telegraphy."

20 NYCRR 527.2(d)(2) provides 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."

The first issue presented in this case is whether petitioner's purchases from its vendors–Frontier, Focal, Network Access Solutions, and Citizen's Com–were telephony or telegraphy or telephone or telegraph service. An important test for whether an activity constitutes telephony or telegraphy is whether the activity constitutes "transmission" of the type conducted by an ordinary telephone or telegraph company. In ***Quotron Systems v. Gallman*** (39 NY2d 428, 384 NYS2d 147, 149), the Court of Appeals described this activity as follows: "[A] telegraph company normally functions as a mere conduit, transmitting to third-party recipients messages given it by various originators."

In ***Matter of Sprint Intl. Communications Corp.*** (***supra***), we concluded that a corporation providing packet switching and electronic mail services in a way that appears to have been the technological predecessor of petitioner's operations in the present case was not engaged in telephony or telegraphy because its activities did not include the "transmission" of data. That decision stated, in part, as follows:

> All of Sprint's services are rendered to ensure the accurate transmission and receipt of data. However, Sprint does not actually transmit the data itself. The transmission is accomplished by the BTS (Basic Transmission Service) "which enables information to flow from one location to another" . . . . It was stipulated that a BTS is "just a conduit for the information" . . . . The testimony of Sprint's witness clearly established that its services were designed to overcome certain limitations inherent in the BTS. As a result, Sprint cannot be considered to be a "mere conduit" for the data, as is the BTS. Nor does Sprint provide the "mere transmission of communications." Therefore, as in ***Quotron***, it must be concluded that, while transmission of information is certainly an integral aspect of Sprint's business, "its transmissions cannot be likened to those made by an ordinary telegraph company" (***Quotron Systems v. Gallman***, ***supra*****,** 384 NYS2d 147, 149).

* * *

> As discussed above, Sprint's packet-switching services are rendered to ensure the accurate transmission of data. Sprint does not actually transmit the data that it manipulates. This is accomplished by the Basic Transmission Service (BTS). Likewise, Sprint does not actually transmit the E-mail messages of its customers. The messages are actually transmitted over telephone lines leased from the BTS.

Petitioner's reliance on our decision in ***Sprint*** is misplaced. The issue in the present case is not whether petitioner was engaged in telephony or telegraphy but whether the services it purchased from its vendors constituted telephony or telegraphy. To the extent that the services provided by those vendors resemble the services provided by the Basic Transmission Services in ***Sprint***, that case is unfavorable to petitioner's argument.

Petitioner also argues that it was not purchasing a transmission function from its vendors but was "only buying access to the circuits so that the customers could transmit data to and from the internet backup" (Oral Argument Tr., p. 5). According to petitioner, "the transmission function is performed at the individual user's computer . . . the circuits are mere pathways over which the data flows" (Oral Argument Tr., p. 5). Some support for this argument might be found in the Division's Advisory Opinion TSB-A-05(32)S (August 18, 2005) which distinguishes the provision of "dark" and "lit" fiber optic cable. It holds that providing "dark" fiber cable where the vendor provides only the physical cable without the equipment to activate it for the transmission of communications does not constitute telephony or telegraphy within the meaning of section 1105(b)(1) of the Tax Law. It seems clear from the record in this case that the services that petitioner was purchasing from its vendors were not mere leases of lifeless equipment but rather the acceptance and delivery of data in an active way that strongly resembles the role of the traditional telephone or telegraph company (***see***, Hearing Tr., pp. 26-

30). Moreover, we find nothing in the record establishing that the home computer is any more the engine of transmission than the traditional black rotary telephone. Accordingly, we conclude that the subject of petitioner's purchases falls within the statutory category of "telephony and telegraphy and telephone and telegraph service."

We next consider whether petitioner's purchases qualify for exemption as purchases of interstate and international telephony and telegraphy and telephone and telegraph service. We note that the exemption for interstate and international telephony and telegraphy is not an expression of a constitutional limitation on the authority of the State of New York to impose tax. The imposition of tax on interstate telephone calls is permissible as long as it satisfies the four-part test set forth in ***Complete Auto Transit v. Brady*** (430 US 274, 51 L Ed 2d 326) (***Goldberg v. Sweet***, 488 US 252, 102 L Ed 2d 607). Accordingly, the issue presented here is one of statutory interpretation only.

In ***Matter of Moran Towing & Transp. Co. v. New York State Tax Commn.*** (72 NY2d 166, 531 NYS2d 885, 886), the Court of Appeals considered the applicability of an exemption from sales tax for receipts derived from the retail sale of "commercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs." The vessels in question were tugboats operating entirely within New York waters but the vessels towed by the tugboats were traveling between New York and ports in other states and foreign countries. The court held that the exemption applied and stated its rationale as follows:

> Historically, interstate commerce has been defined by reference to the origin and destination of what is moved in commerce. That the taxpayer's activities were conducted entirely within the waters of the State of New York does not affect the

> interstate character of those activities [citations omitted]. The focus is on what the actor does, not where he does it. Indeed both this court and the United States Supreme Court have held that stevedoring, the business of loading and unloading ships, was part of interstate or foreign commerce provided that the goods loaded or unloaded were actually moving in foreign or interstate commerce [citations omitted]. If stevedores are engaged in interstate commerce when they provide service to a vessel on an interstate or international voyage, there can be no doubt that Moran's tugboats are engaged in interstate commerce when they propel or direct the interstate vessels into and out of New York harbor (***Matter of Moran Towing & Transp. Co. v. New York State Tax Commn.***, ***supra***, 531 NYS2d 885, 887).

In ***Matter of Southern Pacific Communications Co.*** (Tax Appeals Tribunal, May 14, 1991), we considered the application of the sales tax under section 1105(b) to various services provided by a long distance telephone company. In reliance on the Court of Appeals decision in ***Moran Towing***, we concluded that "the overall nature of the telephone service determines whether it is in interstate commerce and excepted from tax" and that it would be inappropriate to "segment an interstate service into components" for the purpose of isolating and taxing the purely intrastate elements of the service. The overall nature of the services provided was established by a stipulation of facts entered into by the Division and the petitioner which stated that the only service that the Federal Communications Commission had authorized the petitioner to provide was interstate long distance service. We also relied on ***Davidson v. Rochester Tel. Corp.*** (Sup Ct, Albany County, Apr. 10, 1989 [Prior, J.], ***affd*** 163 AD2d 800, 558 NYS2d 1009, ***lv denied*** 76 NY2d 714, 564 NYS2d 717) and ***Matter of Callanan Marine Corp.*** (98 AD2d 555, 471 NYS2d 906, ***lv denied*** 62 NY2d 606, 479 NYS2d 1026), stating, "If, as these opinions hold, an intrastate service retains a single intrastate identity in spite of an incidental interstate aspect, we can see no reason for a different rule which would segment an interstate service into components" (***Matter of Southern Pacific Communications Co.***, ***supra***; ***see also, Matter of M & G Convoy v. State Tax Commn.,*** 55 AD2d 204, 389 NYS2d 656, ***affd*** 42 NY2d 1017, 398 NYS2d 657 [intrastate aspect of interstate trucking business not isolated from overall business in applying franchise tax]). Based on the foregoing principles, we held that the telephone services involved in ***Southern Pacific*** were exempt from tax as "interstate and international," stating, in part, as follows:

> While it is true that portions of the components at issue included long distance service between points within the State, these components are clearly part of the overall interstate service provided by petitioner. Accordingly, the portions of petitioner's interstate service which the Division is seeking to tax must be treated as a component part or adjunct to the overall interstate service provided by petitioner. Therefore, we find that the charges at issue here are excluded from the imposition of sales tax pursuant to section 1105(b) of the Tax Law.
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> * * *
>
> Nothing in this decision is intended to address the application of the sales tax to an audit that identified and taxed only those services that took place entirely in New York State and which were not *an intrastate strand of an interstate service*. Examples of such services might include switched services for calls originating in New York State and going to New York State locations and private line circuits between points in New York State which were not *connected to a circuit going to another state* (***Matter of Southern Pacific Communications Co.***, ***supra***, emphasis added).

The services in ***Southern Pacific*** were the transmission of traditional voice communications. The principles applied in that case are equally applicable to the transmission of packet switched data for internet access that is presented in this case. Under the second quoted paragraph above, if the traditional long distance company bills the customer for each call, it is easy enough to add sales tax to the intrastate calls. If such identification is impossible or impractical, under the rule of the first paragraph we need to determine whether the predominant character of the service is interstate or intrastate. That characterization will determine the taxability of all the services involved even though a particular activity might be viewed otherwise if considered in isolation.

The Division of Taxation argues that the services in question simply link places within New York in the course of petitioner's business and the interstate character of that business does not cause the links to be interstate. In ***Matter of Phone Programs*** (Tax Appeals Tribunal, April 6, 2000), the petitioner purchased telephone links between sports events, *e.g.,* a racetrack, located in New York and its offices located in New York for the purpose of frequently updating a voice recording of sports information which could be heard by individuals who called the petitioner's office. The petitioner claimed unsuccessfully that the telephone services it purchased to connect the sports events to the office were exempt from tax as sales for resale on the theory that it was "reselling" telephone service to its customers who called for the latest sports information. There was no assertion that the purchased telephone service had an interstate character because some customers called its number from outside New York.

Although not directly relevant, the factual analysis applied in ***Phone Programs*** supports the conclusion that the character of the purchaser's business as interstate or intrastate should not control the characterization of the telephone service that it purchases. The local calls of an airline are no less intrastate than those of a grocery store. Unlike the provision at issue in ***Matter of Moran Towing & Transp. Co. v. New York State Tax Commn.*** (***supra***) which expressly treated local purchases as exempt if the purchaser's operations had an interstate character, Tax Law § 1105(b)(1)(B) requires that the thing purchased have an interstate character to qualify for exemption.

At oral argument, the Division sought to distinguish ***Southern Pacific*** on the following basis:

> [O]ne distinction that I did want to draw between this case and the ***Southern Pacific*** case is that the petitioners in ***Southern Pacific*** . . . were in the business of selling telephone service. Petitioners here are not in the business of selling telephone service. They are in the business of providing internet access (Oral Argument Tr., p. 23).

We do not find support in ***Phone Programs*** or elsewhere for the proposition that the purchaser's use of purchased telephony can affect the characterization of the telephony as interstate *vel non* only if the purchaser is itself engaged in telephony. The Division's argument in this regard seems to be importing a test for entitlement to a resale exemption – viz. whether the thing purchased has the same nature as the thing resold – as a standard for when we should look to the purchaser's use of the thing purchased in considering whether it has an interstate character.

Although the nature of the purchaser's business will not determine the character of telephone or telegraph service as interstate or intrastate, that character may be influenced by the use to which the purchaser puts the service. For example, as both parties agreed at oral argument, if a subscriber to traditional long distance service places a separately billed call from Albany to Buffalo sales tax will apply; a call from Albany to Boston will be exempt. The long distance service in ***Southern Pacific*** was found to qualify as interstate based on its predominant character even though the service was used to some extent to carry intrastate calls. It is consistent to characterize the telephony or telegraphy in the present case as interstate or intrastate by reference to the data traffic of the subscribers to petitioner's service and the destination of those communications.

The record, including the testimony of Nick Feinberg and Kevin Moriarty and petitioner's Exhibits "3" and "4," includes descriptions of the operation of the internet. It would be hard to imagine a communications activity more imbued with interstate and international characteristics than the use of the internet. Subscribers to the services of an internet service provider like petitioner may use the internet for a wide range of activities including sending and receiving electronic mail messages, visiting web sites for recreational, commercial, or academic information, and ordering goods and services which may be delivered through the mail or downloaded directly to the user's computer. In conducting these activities, it is impossible to avoid interstate communications. A subscriber in Albany, New York is as likely to have an electronic mail box maintained on a computer in Virginia as in his home state. If he sends an e-mail message to his grandmother who lives in Buffalo it might be received in her mail box maintained on a computer in California. She might read the message on a hand held wireless device while visiting Chicago or at an internet café in Istanbul. A message to a cousin in California might end up in an electronic mail box on a computer in New York State. If the subscriber goes to the world wide web site of a local newspaper to check the latest high school basketball scores, he might be surprised to be told that he is communicating with the computer of a web hosting business thousands of miles away. It seems that any intrastate aspect of access to the internet is merely random and incidental to an interstate and international service.

In some circumstances at least the lines at issue apparently carried communications between subscribers located in New York and petitioner's point of presence in New York. It is artificial, however, to treat the point of presence as the destination of these communications in the sense that a voice call to a telephone number at a residence in Buffalo has a destination in Buffalo. If these lines were not in some way "connected to a circuit going to another state," as contemplated in ***Southern Pacific***, the line access would be useless in accomplishing the purpose for which it was purchased by petitioner. The data originating in the key strokes on the subscriber's computer flow out to the internet through petitioner's point-of-presence facilities and data flows back in a continuous process that has no geographical reference that is perceptible to the subscriber or his interlocutors. Accordingly, the link in question is merely "an intrastate strand of an interstate service."

Applying the principles of ***Southern Pacific*** to the present facts leads us to conclude that petitioner's purchases of transmission services used for internet access by petitioner's subscribers is excluded from the application of sales tax as "interstate and international telephony and telegraphy and telephone and telegraph service" within the meaning of Tax Law § 1105(b)(1)(B).

In light of the foregoing, we need not consider petitioner's assertion that the imposition of tax would violate federal law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frontline Communications Corporation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Frontline Communications Corporation is granted; and

4. The claim for refund as modified consistent with the findings of fact contained herein is granted.

DATED: Troy, New York
March 16, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner