

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

NEW CINGULAR WIRELESS PCS LLC v. COMMISSIONER OF REVENUE

Docket No. C321816

Promulgated:
June 21, 2018

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue ("Commissioner") to grant an abatement and refund of sales tax on telecommunications services to New Cingular Wireless PCS LLC ("New Cingular" or "Appellant") for the tax periods November 2005 through September 2010 ("tax periods at issue").

Commissioner Scharaffa heard the appeal and was joined by Chairman Hammond and Commissioners Rose, Chmielinski, and Good in the decision for the Appellant.

These findings of fact and report are made pursuant to requests by the Appellant and the Commissioner under G.L. c. 58A, § 13 and 831 CMR 1.32.

Kathleen King Parker, Esq. and Margaret C. Wilson, Esq. for the Appellant.

Frances M. Donovan, Esq., Marikae G. Toye, Esq., Timothy R. Stille, Esq., and Jamie E. Szal, Esq. for the Commissioner.

FINDINGS OF FACT AND REPORT

On the basis of the record in its entirety, including testimony, a stipulation of agreed facts and exhibits, and trial exhibits, the Appellate Tax Board ("Board") made the following findings of fact:

I. Introduction

During the tax periods at issue, the Appellant was an AT&T Mobility, LLC ("AT&T") affiliate and conducted AT&T's mobile wireless business in Massachusetts.¹ The Appellant sold three primary lines of services – voice, text messaging, and data. The Appellant collected and remitted sales tax for these services and reported them as taxable telecommunications services in Massachusetts for the tax periods at issue.

II. Issues and the Parties' Contentions

The federal Internet Tax Freedom Act ("ITFA" or "Act"), codified as a note to 47 U.S.C. § 151,² generally precludes the taxing of Internet access by any state or political subdivision unless such tax falls within a grandfather clause or upon the failure to meet certain requisites, namely the accounting rule

¹ The Appellant used AT&T billing systems and services, and AT&T was the named party in a class action settlement agreement, as discussed, *infra*. Accordingly, these findings of fact and report reference either the Appellant or AT&T as the context so requires.

² Initially, this moratorium was to end three years after the date of enactment of the ITFA on October 21, 1998. It was repeatedly extended by subsequent legislation and made permanent on February 24, 2016. See P.L. 114-125.

and screening software provisions of the ITFA. See ITFA §§ 1101 and 1106.

At issue in this matter is whether the Appellant improperly collected and remitted Massachusetts sales tax on charges for data services ("charges at issue") in contravention of the ITFA. To reach this ultimate issue, the Board considered several subsidiary issues: whether Massachusetts generally imposed and actually enforced a tax on Internet access prior to October 1, 1998; whether the charges at issue constituted charges for Internet access; and, even if the charges at issue were charges for Internet access, whether the accounting rule and screening software provisions of the ITFA nonetheless permitted taxation of the charges at issue. The Board also considered whether an escrow mechanism instituted as part of a class action settlement sufficiently evidenced that the Appellant would provide a refund to any customer³ who incurred sales tax on the charges at issue, as required under G.L. c. 62C, § 37 and 830 CMR 62C.37.1.

The testimony and exhibits submitted, in the Appellant's view, were adequate to meet its burden of proof in establishing that the charges at issue were charges for Internet access and, therefore, exempted from taxation by the ITFA. The Appellant contended that it satisfied the ITFA's accounting rule provision by demonstrating that the charges at issue were separately

³ Excluding any customers who decided to opt out of the class action settlement, as explained, *infra*.

stated on customer invoices and its internal books and records. The Appellant refuted the applicability of the ITFA's screening software provision, specifically alleging: (1) that the screening software provision applies only to a tax imposed on an Internet access provider, and here the Massachusetts sales tax is imposed on buyers rather than providers; and (2) that the definition of "Internet access provider" contained in the screening software provision does not apply to the Appellant. Nonetheless, the Appellant asserted compliance with the screening software provision by its offering of relevant screening software to customers at the time that they had entered into an agreement for Internet access during the tax periods at issue. The Appellant also contended that the escrow mechanism ensured that refunds would be issued to customers who had paid sales tax on the charges at issue.

The Commissioner challenged whether the charges at issue comprised charges solely for Internet access or whether the charges at issue comprised an indistinguishable amalgam of charges for Internet access and taxable non-Internet access, all falling under the umbrella of data services. The Commissioner contended that the term "data services" is not synonymous with Internet access and, therefore, the charges at issue represent taxable telecommunications services pursuant to G.L. c. 64H, §§ 1 and 2, 830 CMR 64H.1.6, and Technical Information Release

05-8: *Taxation of Internet Access, Electronic Commerce and Telecommunications Services: Recent Federal Legislation*. The Commissioner disputed the Appellant's compliance with the ITFA's accounting rule and screening software provisions, and consequently disputed whether the Appellant was entitled to exemption from Massachusetts sales tax by the ITFA. The Commissioner also rejected the escrow mechanism as evidence of repayment, alleging that the various counsel expenses and fees that would be deducted from customers' refunds pursuant to the class action settlement are not permissible in meeting the repayment requisite under G.L. c. 62C, § 37 and 830 CMR 62C.37.1. The Commissioner also noted that the settlement was a private transaction to which the Commonwealth of Massachusetts was not a party.

III. Procedural History

The Appellant remitted Massachusetts sales tax that was imposed upon the charges at issue and paid by its Massachusetts customers. It filed a Sales and Use Tax on Telecommunications Services Return with the Commissioner for each of the tax periods at issue and reported the charges at issue as telecommunications services subject to the Massachusetts sales tax. Thereafter, the Appellant filed a Form CA-6: Application for Abatement/Amended Return ("Application for Abatement") for the tax periods at issue on November 15, 2010, seeking an

abatement and refund of the sales tax ("Massachusetts Abatement and Refund Claim").⁴

The Commissioner's Office of Appeals conducted a hearing on the Application for Abatement on February 5, 2012. By letter dated June 24, 2013, the Office of Appeals determined that the Application for Abatement should be denied. By Notices of Abatement Determination issued July 3, 2013, the Commissioner denied the Application for Abatement for the tax periods at issue. The Appellant filed a Petition Under Formal Procedure with the Board on August 29, 2013. On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

By Order dated April 8, 2015, the Board bifurcated this matter into two phases: a hearing to determine whether the charges at issue were taxable ("Phase I") and a hearing to determine the amount of the abatement and refund if the charges at issue were not taxable ("Phase II").

The hearing on Phase I took place over the course of five days, from April 6-10, 2015. By Order dated October 21, 2016, the Board ruled that the charges at issue in this appeal were not taxable.⁵

⁴ The Appellant and the Commissioner executed consents extending the time for assessment, which also extended the statute of limitations with respect to abatement claims. See G.L. c. 62C, § 37.

⁵ The parties filed various dispositive motions, which were either denied by the Board or withdrawn.

On November 4, 2016, the Board ordered that the hearing on Phase II - to determine the amount of the abatement - would be held on March 28, 2017.

On February 10, 2017, the Appellant and the Commissioner filed a Joint Motion requesting that the Board allow their "Stipulation of Agreed Facts and Documents Phase II" to be admitted into evidence. The Board allowed the Joint Motion by Order dated February 17, 2017. Item No. 24 of the "Stipulation of Agreed Facts and Documents Phase II" stated as follows: "The parties hereby stipulate and agree that the amount of the claim at issue is \$19,938,368, and the requirements of G.L. c. 62C, § 40 having been satisfied on January 5, 2017, interest shall begin to accrue on that date."

Also by Order dated February 17, 2017, the Board noted that the Appellant and the Commissioner had not waived the March 28, 2017 hearing on Phase II. The Board gave the Appellant and the Commissioner seven days to file either: "(1) a statement concerning the issues to be resolved at the March 28, 2017 hearing; or, (2) a waiver of the March 28, 2017 hearing and any further hearing on the merits and a request to submit the appeal to the Board for decision on the evidence currently in the record."

On February 22, 2017, the Appellant and the Commissioner filed a joint document entitled "Phase II - Submission Without

Oral Argument or Further Hearing," which stated as follows: The Appellant and the Commissioner, "pursuant to Rule 31 of the Rules of Practice and Procedure of the Board, hereby agree for the purposes of Phase II of this case to rely on the Stipulation of Facts and Documents filed with the Board on February 10, 2017 and allowed by Order of the Board dated February 17, 2017."

On March 3, 2017, the Board issued its Decision for the Appellant with an abatement in the agreed-upon amount of \$19,938,368, plus statutory additions.

IV. Testimony and Documentary Evidence

A. The Class Action Settlement

As testified to by Edward D. Robertson, Jr., a former Chief Justice of the Missouri Supreme Court, he and his law firm partners detected a billing variance when comparing their Sprint and AT&T bills. They attributed the anomaly to AT&T having imposed state sales tax on charges for Internet access whereas Sprint did not. Mr. Robertson testified about an AT&T customer invoice received by his law firm in which a charge for data services included a corresponding charge for Kansas sales tax, while a Sprint customer invoice received by his law firm for data services on a data card did not include a corresponding charge for such tax. According to Mr. Robertson's understanding, data services equate with the ability to access the Internet. Mr. Robertson was personally familiar with AT&T's data services

as his law firm was a customer and he personally used the data services to access the Internet and email.

Thereafter, Mr. Robertson's law firm and law firms in various states filed lawsuits against AT&T (including the Appellant as a subsidiary of AT&T) on behalf of AT&T customers across the country,⁶ alleging that AT&T had wrongly collected sales tax on charges for Internet access in violation of state tax laws and the ITFA. The lawsuits were consolidated into a class action in the United States District Court for the Northern District of Illinois, with Mr. Robertson appointed as Class Counsel.⁷ Subsequently, the class action was resolved with a settlement agreement,⁸ which included Massachusetts customers, with the exception of four Massachusetts customers who had opted out of the settlement. The Commonwealth of Massachusetts was not a party to the settlement agreement.

Mr. Robertson testified that notice to impacted individuals was provided by a variety of means, including postcard, email, and text message, as well as a notice published in *USA Today*.

⁶ A Massachusetts claim was filed in the United States District Court for the District of Massachusetts under **Rock v. AT&T Mobility, LLC**.

⁷ "On August 11, 2010, the Court granted in large part the parties' joint motion for class certification, preliminary approval of class settlement, approval of notice, and appointment of notice administrator." **In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.**, 789 F. Supp. 2d 935, 939 (N. D. Ill., E. Div., 2011).

⁸ The settlement agreement was entered into "between and among AT&T Mobility LLC . . . and the Class Plaintiffs." Paragraph 1.2 of the settlement agreement defined the term "AT&T Mobility LLC" as "AT&T Mobility LLC, AT&T Inc. and all of their predecessors in interest, successors in interest and any of their parents, subsidiaries, divisions or affiliates This shall include but not be limited to the list of affiliates attached as Exhibit A." Exhibit A included New Cingular Wireless PCS LLC.

The record included an exhibit of the notice language. According to Mr. Robertson and documentation in the record, a website was also created that provided information on the class action and settlement.

Mr. Robertson was involved in negotiating the settlement agreement and was a signatory on the settlement agreement as Interim Settlement Class Counsel. The United States District Court for the Northern District of Illinois approved the settlement agreement and an attendant escrow agreement and plan of distribution. The Court's decision "determines how the money is going to be distributed," noted Mr. Robertson. "It does not determine how much or whether the money is owed."

While it denied any liability as a term of the settlement agreement, AT&T agreed to stop collecting and remitting tax on charges for Internet access.⁹ AT&T also agreed to process and assist in abatement and refund claims nationwide, including the Massachusetts Abatement and Refund Claim.¹⁰

⁹ In the settlement agreement, AT&T reserved the right to resume collection and remittance if "federal, state or local laws, statutes, regulations, administrative decisions or pronouncements, or the interpretation of any of the foregoing specifically requires, authorizes or permits the collection and payment of" such taxes.

¹⁰ In Massachusetts, vendors must seek a refund of sales tax on behalf of purchasers. See *WorldWide TechServices, LLC v. Commissioner of Revenue*, 479 Mass. 20, 29 (2018) ("Vendors are responsible for collecting and remitting the sales tax and therefore are the party entitled to seek abatement.") (citing G.L. c. 64H, § 3; *First Agricultural Nat'l Bank of Berkshire County v. State Tax Comm'n*, 353 Mass. 172, 179 (1967), *rev'd on other grounds*, 392 U.S. 339 (1968)). But see Technical Information Release 16-12: *Purchasers Seeking a Refund of Sales/Use Tax under Power of Attorney from Vendor*.

The settlement agreement, escrow agreement, and plan of distribution outlined the escrow mechanism for the deposit and disbursement of any amounts refunded by states – any such funds are held by an independent third party until distribution of the funds. Mr. Robertson testified that the escrow mechanism was described in information provided to impacted individuals before the deadline for opting out of the settlement.

A master escrow account was created to receive all refund payments, with subaccounts segregated for separate taxing jurisdictions such as Massachusetts (master escrow account and subaccounts collectively “escrow account”). As testified to by Mr. Robertson, if there is a refund, “AT&T doesn’t get to keep a dime of this money. It all goes into these escrow accounts and ultimately to be paid out to the customers.”¹¹ He stated that “[s]ometimes the taxing jurisdiction will write a check directly into the escrow account. When that happens, we then distribute it according to the settlement agreement.”

If a taxing jurisdiction issues a refund directly to AT&T instead of to the escrow account, AT&T is required to transfer the funds to the escrow account within seven business days. If the taxing jurisdiction issues only a credit instead of a monetary refund, Mr. Robertson explained that “AT&T funds the

¹¹ According to Mr. Robertson, “What happens at the end of the day, we’ve sent out money in a lot of these states. And there are checks that don’t get cashed and those go under whatever unclaimed property laws are for that jurisdiction.”

escrow and then takes [a] credit against ongoing taxes going forward." Mr. Robertson testified that when cash goes into an escrow account "[t]hat's ultimately the federal court [that] supervises it. The management of it is a company in Washington, DC." He identified the company as Analysis Research Planning Corporation.

The plan of distribution outlined the disbursement of funds to impacted individuals as follows: "Unless otherwise ordered by the Court, each Settlement Class Member shall receive, on account of the Internet Taxes which that Settlement Class Member paid, a distribution in an amount equal to the Settlement Class Member's *pro rata* share of the Refund Payments made by, or on behalf of, the Taxing Jurisdictions that received Internet Taxes from that Settlement Class Member *less*" various costs such as counsel fees and expenses, administration expenses, distribution expenses, and class representative expenses.

B. The Refund Claims for Data Services

Scott Adams, the Director of Tax for AT&T Services,¹² testified that "approximately 1,000 refund claims" were filed across the country and "the responsibility was handed to me to coordinate the reviews that would come as a result of filing the claims." Mr. Adams was not involved in putting together the Massachusetts Abatement and Refund Claim itself, but was

¹² Mr. Adams explained that "AT&T Services is the administrative arm for the AT&T companies, of which one of them is New Cingular Wireless."

involved in the subsequent review of the Massachusetts Abatement and Refund Claim. He stated that "[f]rom a high level, I was part of the team that was working through these claims and overseeing that they were completed in a timely manner and all the information was provided to the auditors."

Mr. Adams testified that his position requires an understanding of and regular dealings with AT&T's customer invoicing practices, tax computation systems, billing records, electronic systems, and transaction tax reporting and compliance procedures. He performs his employment services in part for the Appellant and in his position, "I oversee the completion of audits and refund reviews that are conducted for transaction taxes, sales and use tax, [and] gross receipts tax." The approximately fifteen employees that he supervises, including contractors, are each "an audit manager. Their job is to work with the jurisdictions, the auditors from the jurisdictions, to make sure that they have all the documentation they need to support an audit. Providing records, sales invoices, purchase invoices, all the different aspects of an audit."

Mr. Adams testified that the Appellant provides three primary services - voice, text messaging, and data - and that the Massachusetts Abatement and Refund Claim sought a refund solely for sales tax on charges for data services, the charges at issue. He explained that data services are Internet access

services and that it is standard in the communications industry to refer to Internet access as data: "The data is the industry's term on how they're presented to customers, [they] sign up for a data plan. But in my experience, data is a synonym for internet access." He noted that the term "Internet access" is "not a term associated with the plans that are offered" and that "we didn't get any say [in] how it was presented" or whether the plan description comported with references to Internet access in "the tax rules." Mr. Adams stressed that "obviously in order for us to feel comfortable turning the tax off for 46 million customers . . . we have to feel pretty comfortable that it is internet access. . . and to explain to our bosses that the risk for AT&T is not there because we agree that the service we're providing is not taxable."

Mr. Adams analogized the Appellant's data services to "[a] pipe that can stream stuff to me and I can push stuff up. I can send e-mails. I can receive e-mails." He stated that "[w]ith the exception of [voice and text messaging], anything that's going to be downloading real time information, or going to individual servers, that's all part of the data internet access." He further explained that "we're charging you for how much you pull across that pipe. . . . The content that's being downloaded, the amount of content that you pull across is what we're charging for." He added that "[t]he reality is we don't own ESPN.com. We

don't own all these other apps. One of the most common videos is Netflix. We don't own Netflix. We can't sell movies, but we can give you access to the pipe so you can go to Netflix's server and pull across movies and pull across TV shows."

Mr. Adams testified that the Massachusetts Abatement and Refund Claim was generated by way of AT&T's proprietary billing systems, Care and Telegence, with Telegence being "more prevalent, the biggest biller we have." "Both of them," according to Mr. Adams, "were custom built for AT&T." The Appellant's transactions, including any transactions underlying the charges at issue, were captured and processed in these systems. He explained that Care and Telegence "contained all of the service revenue" upon which taxes were billed and "[s]o, those two systems that we maintain and store the detail in, were queried in order to come up with how much tax we over-collected."

Primarily focusing on the Telegence system, Mr. Adams described the level of detail that the system is capable of capturing: "It gets down all the way to the specific item that's being purchased." Using a \$30 iPhone plan as an example, he stated that "[t]he system goes in there for that \$30 iPhone data plan. The \$30 charge that we looked at. The system will go in and look at where the charge takes place, the place of primary

use¹³ for that charge, determine is it taxable in that location. And then if it is, it has to go through all of the different taxes; state tax, city tax, county tax, federal taxes, and make assessments or come up with amounts for all the various taxes for that individual line item on that invoice." He added that "inside of the Telegence system, all of that very detailed line item information is stored. And that was what was pulled together for this claim."¹⁴

All customers are assigned billing account numbers, according to Mr. Adams: "Corporate, individual, everyone has a billing account number and basically it determines [who is] going to be invoiced for the various phone numbers that fall underneath that billing account number."¹⁵ He added that "[t]his is who paid the tax. This [identifies] who would the checks be written to if the abatement was approved." Customers are inducted into the billing system when they sign up for a plan either in-store, online, or via telephone. "[T]hey can purchase a device if they didn't have their own device and as soon as they agree to which plan they want, we take down all their

¹³ Mr. Adams stressed the importance of the place of primary use in charging the correct state and local tax: "[E]very time a customer signs up for an account[,], a phone number if you will, they have to tell us where they're going to use the device. They have to indicate a place of primary use. And once they commit that to us, we enter that into the system and that will be the location where each phone number is charged the appropriate taxes."

¹⁴ While Mr. Adams has the ability to access individual records in the system, programmers and IT personnel assisted in querying the system to put larger bundles of information into an auditor-friendly format.

¹⁵ A single billing account number can have multiple assigned telephone numbers.

information and primary place of use as a key element," testified Mr. Adams. He stated that "all that information would be fed into [Telegence], our main biller, for the monthly service revenue."

Mr. Adams explained that billing codes "are really an internal coding that happens when a customer selects a plan." He became "intimately familiar with billing codes" as a result of the refund claims filed throughout the country. He personally examined upwards of 10,000 to 15,000 invoices containing 5,000 to 6,000 different billing codes in his review of the many refund claims filed nationwide. Billing codes are not specific to states, according to Mr. Adams. "We don't have a Massachusetts set of bill codes and Texas set of bill codes," he stated.

Up to 99 percent of the billing codes "deal with the three revenue sources I talked about before, voice, texting, and data," according to Mr. Adams. In addition to identifying refund claims, billing codes were used to identify sales tax on the charges at issue, which the Appellant has stopped collecting and remitting pursuant to the settlement agreement.¹⁶ Mr. Adams explained that billing codes comprise two components, a feature code and a service order code ("SOC") code, with the SOC code providing "more of the detail" of a specific plan. Documentation

¹⁶ See footnote 9, *supra*.

in the record – prepared by a member of Mr. Adams’ team using the Telegence system as the source – provided a breakdown of the codes underlying the Massachusetts Abatement and Refund Claim and indicated that the top twenty SOC codes accounted for 78 percent of the Massachusetts Abatement and Refund Claim, with iPhone and Blackberry data plans accounting for the majority.

Mr. Adams noted that SOC codes are standard across customers, *i.e.*, if a charge related to a particular SOC code is on one customer’s bill, it will be exactly the same on another customer’s bill: “It’s a standard code, what’s put on the invoice is exactly the same and the same price. You’re not going to have IPN1 and I’m charged 20 and you’re charged 30.” He added that “there’s a lot contained in that code but the good thing is it’s very standardized. Every time we see IPN1, it’s the same thing. So, if I have 10 million IPN1s in this claim, they’re all going to look the same, contain the same identical characteristics, same services being offered, all those different things.” Though the tax department provides input on the taxability of an SOC code “because each one has to be marked whether they’re taxable or not taxable,” Mr. Adams testified that the assigning of an SOC code to a product is a function of the marketing department.

During the tax periods at issue, Mr. Adams stated that 65,000 billing codes were in use, which “were reviewed with the

help of our billing group [and] marketing team, it was a big undertaking." Some billing codes represented bundled service plans, meaning such plans included "two of the three main revenue streams, voice, texting and data," according to Mr. Adams. He testified that bundled service codes were not included in the refund claims. "We reviewed to determine which of those plans were data and the result was about 14,000 bill codes¹⁷ nationwide that were identified as data only," he stated. When subsequent reviews revealed that refund claims filed nationwide had incorporated certain billing codes in error, Mr. Adams noted that a letter was sent to any impacted tax jurisdictions, including Massachusetts, amending the amount of refund requested to reflect a reduction based upon the removal of any tax charges associated with these billing codes.

Mr. Adams cautioned that the word "BUN" in a billing code did not necessarily lead to the conclusion that the code represented a bundling of more than one service. Mr. Adams explained that the billing codes are "our marketing description" but the codes do not always mean a bundling of "the three buckets of revenue [voice, data services, and text messaging] we've talked about." He further explained that when the

¹⁷ When asked whether some of these codes were immaterial to the Massachusetts Abatement and Refund Claim in particular, Mr. Adams testified that "probably 12,000, 13,000. The majority of those claims are one time little plans that we had at one point" and that "the vast majority of the dollars nationwide are only made up in a very small handful, less than 50 claims I can say safely nationwide, make up 95 percent of the dollars."

marketing department is "trying to decide how to sell a customer on a service . . . they'll call it a media bundle. And if I'm a consumer, what does that mean? It means . . . you can do this with this. You can access Safari. So it's a variety of media that you can access through this data plan." He added that "[w]hat they don't realize is the technology that's behind getting them all that content is all the same. It's all going out to a server, retrieving information and pulling it back down to them. So in marketing we may tell them it's a media bundle. But in reality, what are we really providing? Access to the internet. That's really what it is."

To illustrate his point, Mr. Adams provided a breakdown of an invoice for a customer with a "BUN" code, noting the itemized charge for data services versus other charges for text messaging and voice. "The bundle doesn't materialize in the invoice," Mr. Adams stated. "It's not a bundle of the three services that we talked about." Mr. Adams became aware of such "BUN" codes "[t]hrough our reviews. As I mentioned, tens of thousands of invoices that we've sat down and gone through. And it's the same process to review whether bundled or not."

Mr. Adams' "focus has been with the marketing team to sit down and say, what can you do with the data plan. And as you go down the list of things you can do with a data plan, they're all accessed through servers that are located on this thing we call

the internet." He added that "all these different services and the Yahoo accounts and the gmail accounts and the Google accounts. Those aren't ours. They're not sitting on our servers. Those are on outside servers that they access through the internet."

Mr. Adams also testified to numerous customer invoices pertaining to the Massachusetts Abatement and Refund Claim and corresponding spreadsheets detailing which itemized line items on the invoices matched with the specific charges at issue. Mr. Adams noted how the description for data services on a customer invoice matched with a proprietary SOC code on the spreadsheet – for instance, an SOC code of PDVU¹⁸ translated to PDACnctUntlAdd (PDA connect unlimited add on) on a customer invoice: "So, every time on our side we see PDVU, on the customer side they're going to see PDA [connect] unlimited add on and it's going to be 39.99, so, that's important so you don't have to look at a million of these to know that PDA is going to be the same in each case."

According to Mr. Adams, any services on the customer invoices other than stand-alone data services were not included in the Massachusetts Abatement and Refund Claim, such as voice, text messaging, bundled services, and the right to download software. Mr. Adams identified charges for Ms. PAC-MAN and PAC-

¹⁸ PDVU was one of the top twenty SOC codes accounting for 78 percent of the Massachusetts Abatement and Refund Claim, as discussed, *supra*.

MAN, for example, on an invoice. These charges were not included on the corresponding spreadsheet detailing the invoice charges included in the Massachusetts Abatement and Refund Claim. He explained that such charges were "payment for the content" and "independent of the internet access itself."

Mr. Adams emphasized that the various invoices and spreadsheets showed that tax was initially collected on these line items comprising the Massachusetts Abatement and Refund Claim. His confidence in these assertions comes from "the confidence in the system first. And the fact that we generate millions of records per day from our Telegence biller for every state plus international as well. So we have a very robust system in place to capture all this information."

Mr. Adams also emphasized his experience with "the audit side. Having been through so many reviews and reviewed so many lines of details, tens of thousands of lines of details on spreadsheets, looking at actual invoices to see what customers are being billed for, what they're receiving in exchange for their payments, extensive reviews."

Mr. Adams noted that twenty-four other states have already paid the refund claims on this same issue, determining that charges equivalent to the charges at issue were charges for Internet access and that the charges were separately stated on the company's books and records.

C. Screening Software

Though the Appellant contended that the screening software provision of the ITFA was inapplicable in this matter, it nonetheless provided testimony and documentation to establish compliance, including testimony from Kristen Leatherberry. Ms. Leatherberry was hired on May 8, 2006 as a Senior Marketing Manager¹⁹ and testified that she is "responsible for customer facing and communications to . . . employees and customers." She explained that customer facing "means any brochures, web sites, any kind of collateral, communications to customers." She stated that to develop a brochure, "I create all the copy and provide the assets, whether that be images or icons, value propositions, key benefits for the products and I write all the copy and then I give it to the marketing communications group or to AT&T.com or at that point it was Cingular.com and they create the material, it comes back to us." She added that "[w]e review it and proof it and then get leadership and legal approval and marketing communication goes ahead and prints it and distributes it."

Ms. Leatherberry described the Appellant's Parental Controls feature as "a tool that helps parents manage their kids' phone use." Though she was not involved in the functionality of Parental Controls in terms of how the feature

¹⁹ Ms. Leatherberry noted that, upon her initial employment, the company was called Cingular Wireless and subsequently became AT&T.

operated in a technical sense, she participated in the informational side of communicating the feature to customers, including responsibility for language content in brochures and a website. Ms. Leatherberry testified to numerous documents in existence during the tax periods at issue that provided customers with detail and instructions on Parental Controls.

Though some documents – such as a brochure with a copyright of 2005 entitled “With Cingular Parental Controls, know your kids are safe and avoid surprises” – preceded Ms. Leatherberry’s employment, she maintained such documents as part of the normal course of her position. This particular 2005 brochure explained that with Parental Controls, a consumer could “[r]estrict access to websites containing mature content that is not appropriate for children” and “[r]estrict purchase of downloads such as games, ringtones and graphics.” Other brochures and website pages in the record noted that a compatible handset was required for utilization of this feature. Similarly, a website extract described the Appellant’s Smart Limits choice as a feature that “[r]estrict[s] access to content inappropriate for children,” in addition to other controls. The Parental Controls feature was listed as no additional charge, while the Smart Limits feature was listed as costing \$4.99 per month, per line.

Ms. Leatherberry also testified to various website pages, bill inserts, box inserts, mailings sent after the purchase of a

new phone, and in-store brochures, all of which informed parents how to set up the Appellant's Parental Controls and Smart Limits features and restrict access to the Internet. Ms. Leatherberry noted that AT&T was the exclusive carrier of the iPhone during relevant time periods, and the record contained an iPhone User Guide²⁰ with a copyright of 2009, explaining how to restrict various applications and content.

D. The Commissioner's Expert Witness

The Commissioner presented the testimony of Mehran Nazari, a licensed engineer "in the field of electrical computing, computer and electronics" who is the Founder, President, and Managing Director of AdGen Telecom Group, an entity that provides "consulting services in the field of technology, wireless, and network design." Mr. Nazari testified that his consulting services encompass "[w]ireless network design, including voice and data. Program and project management." Additionally, his services include "[p]roviding voice and data, program and project management for network implementation, strategy, planning, spectrum acquisition, [and] network overlay

²⁰ The iPhone User Guide contained a section on "Restrictions," which stated as follows: "You can set restrictions for the use of some applications and for iPod content on iPhone. For example, parents can restrict explicit music from being seen on playlists, or turn off YouTube access entirely." The iPhone Safari application, which "lets you surf the web and view webpages on iPhone in the same way as if you were on your computer," was one such application capable of restrictions as detailed in the iPhone User Guide: "Safari is disabled and its icon removed from the Home screen. You cannot use Safari to browse the web or access web clips. Other third-party applications may allow web browsing even if Safari is disabled."

implementation." He also advises clients on cellular technology. Mr. Nazari explained that "cellular mobile technology has evolved from [] pure voice to [] data and broadband services. So, everything having to do with the network has been evolving ever since I got into this business back in 1982."

His purpose in being retained by the Commissioner for this matter was to provide a basic understanding of wireless technology, including the implementation of various services into a carrier's network, as well as the tracking of these services in the carrier's network and billing.²¹ "Each of those services are handled through [] specific equipment, as we call it, node on the network," he stated. "And each node has [its] own identification that gets recorded into the billing system for the carriers for post-processing and billing." In the course of his preparation for this matter, he "reviewed some of the exhibits that [were] provided by AT&T throughout the course of the hearing. I reviewed a few invoices. And I had done some research on my own."

Mr. Nazari discussed at length the generalities of how a cellular network operates. In his opinion, all cellular networks operate "[s]ubstantially the same. They have used different technologies but they do adhere to the common standards." He

²¹ The hearing officer "allow[ed] him to testify as an expert in telecommunications technology. But with respect to billing practices, it will go to weight."

explained that "at the basic level the carrier's network consists of what we call the radio network . . . and a core network which is actually where the brain of the network is." He further explained that "[t]he radio network consists of transmitter locations that are strategically located in a given area to provide the required coverage. And those radio network[s], otherwise called bay stations, interface with the core network[,] with a device[,] or a platform called base station subsystem which acts as a traffic cop."

According to Mr. Nazari, the base station subsystem determines whether a user originates a voice, text, or data service. He stated that "[t]he core network is basically responsible for customer provisioning, providing billing records, providing the interface to [an] outside network for call termination, [if] it's a voice call. It houses the voicemail, the short messaging center, content server, multimedia server, and the packet switch."

In Mr. Nazari's experience "carriers began to provide data services over their network to their subscribers [around 2003 to 2004]." He noted that "[o]bviously, Cingular was using a different technology than Verizon." He opined that carriers "had to add additional features to their network [to provide data services]. . . . And also, they had to make sure that their subscriber handsets [were] capable of providing [], or

accessing, the data side of the network. As well as making sure that the billing system is capable of providing or capturing the required information for the billing." He testified that carriers, handset manufacturers, and infrastructure manufacturers all adhered to common standards because "[i]f that was not true, you would not have been able to make calls from your network, or your network provider, to somebody else's network. Let's say [an] AT&T customer could not have made calls to a Verizon subscriber. So they all have to adhere to the same standards, even small carriers."²²

Mr. Nazari testified that carriers have the ability to bill a customer separately for services and that this technology is an integral part of the network design. "It's integral," he explained, "because if they can't measure it, they can't bill it. And if they can't bill it, they don't make enough money or revenue." Mr. Nazari admitted that billing codes are not mandated or regulated by the Federal Communications Commission; that there are no federal or state regulations informing carriers how to create billing codes; that there are no limits on the number of billing codes a carrier can utilize; and that carriers each create their own sets of billing codes.

²² Mr. Nazari identified "third generation partnership project" or 3GPP as "a body that develops, maintains, standards for various technologies that are used by mobile carriers throughout the world." He testified that in 2005, the start of the tax periods at issue, "carriers were using 2.5 [generation] and they were moving toward the third generation."

Mr. Nazari disputed that the Appellant's data services were synonymous with Internet access. He testified that based on certain documents in evidence and services offered by the Appellant, he did not believe that the charges at issue were solely charges for Internet access. Though he admitted that he is not an expert on the ITFA, he stated that he is "an expert when it comes to defining what is considered internet. What is not considered to be internet."²³ His opinion is that data services are not the same as Internet access: "Data is not internet. Data includes other services that [are] not all internet." He added that "[d]ata is a general term that's used for anything describing [] transmission of bytes, however you want to call it, from one computer to another. That falls into internet and intranet²⁴ and a few other data services that are also called data." He testified that the terms "Internet" and "intranet" have standardized definitions, but that he wasn't "in a position to tell you exactly where to go" to find those definitions.

²³ When asked what sources he relied upon for his standard of the term "Internet," he stated "[e]very text book, every standard that's written you could look at it and figure out what it is. If you want me to specifically mention it, I'd be happy to mention it. But I don't know it off the top of my head what I should point you to exactly say that."

²⁴ Merriam-Webster defines "intranet" as "a network operating like the World Wide Web but having access restricted to a limited group of authorized users (such as employees of a company)." *Intranet*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/intranet> (last visited March 16, 2018).

Based upon his review of billing codes that the Appellant identified as codes solely representing Internet access, Mr. Nazari testified that he could not say for certain on their face whether this was true. As to whether any codes on their face appeared to be codes for bundled services, Mr. Nazari noted items with a "Feature Description" of "Media Bundle," as well as items with a "Feature Description" of "VVM Media Bundle."²⁵ He admitted, however, that he has never examined AT&T's billing practices, systems, and codes until this matter, and has never reviewed AT&T's billing codes in consulting with other clients.²⁶

Throughout his testimony, Mr. Nazari attempted to distinguish between content germane to a carrier's network, such as a ringtone, game, or video only accessible on a carrier's network to customers, versus content accessible outside a carrier's network (intranet versus Internet access, in his opinion, both under the umbrella of data services): "If the subscriber is interested in some content[] that is provided

²⁵ As discussed, *supra*, Mr. Adams' testimony contradicted Mr. Nazari's interpretation of the billing codes, deflecting the notion that inclusion of the word "bundle" in a billing code necessarily leads to the conclusion that the code represents a charge for multiple services.

²⁶ The Board rejected the Commissioner's assertion that "Mr. Nazari has personal knowledge and an expert understanding of [the Appellant's] billing systems and network during the relevant time period." Mr. Nazari did testify that "there was a network that Cingular called AT&T Wireless and [] some of the network had to be divested." He stated that a client of his purchased one of the networks and he was involved in managing "the entire build-out and the entire carving off [of] the network, which . . . included voice, data, billing, customer transition, everything having to do with taking that market, that network into a new network." But when asked whether he looked at the old billing system as part of transitioning subscribers to a new billing system, his response was "[n]o."

strictly by the carrier's network, let's say ring tone or games or video that is strictly, again, provided by one carrier, not over the internet, then that would be considered a data not internet; it would be considered intranet, and, yes, they can have access to that." Mr. Nazari relied upon several documents for his assertion, such as a news release entitled "Cingular Goes Live With MobiTV,"²⁷ which he found to be significant because "[i]t proves that Cingular was providing TV broadcasting over their network" to subscribers. He further explained that "[i]t provides the internet TV or IP TV over the data network, over this data network to the subscribers that intended to receive it."

He also relied upon an AT&T document concerning Internet Protocol television, citing the following language in the document as relevant to his opinion that data services provided by the Appellant comprised more than just Internet access: "Think of Internet Protocol as a 'language' that devices use to communicate over a computer network. IP is not the same thing as the Internet. Rather, it's the same language used by the

²⁷ The news release stated in pertinent part as follow: "With MobiTV, Cingular subscribers can watch live news, sports and entertainment programming on 22 channels, including MSNBC, CNBC, ABC News Now, NBC Mobile, FOX Sports, Discovery, TLC, C-Span, and other music, sports, fashion, and comedy channels." It also stated that "[t]he fee for MobiTV on the Cingular network is \$9.99 per month. . . . Because MobiTV uses data, not voice, minutes, Cingular highly recommends that customers also subscribe to a Media Works Package to provide unlimited data services and help subscribers avoid unexpected charges."

Internet. IP technology allows information to be sent and received over any broadband or network connection."

Mr. Nazari also noted language in a document entitled "AT&T Media™ Personalize with Media," specifically that "Cellular Video" is "[n]ot available when off the AT&T-owned wireless network. 3G phone required. Monthly subscription to a package that includes unlimited MEdia Net usage highly recommended."²⁸ Additionally, Mr. Nazari opined that features referenced in an AT&T document entitled "Terms and Conditions" – such as ringtones, graphics, games, and alerts – were transmitted by using a data service, but not specifically by using Internet access: "The content that you see here is only transmitted and provided to the subscriber over a bigger pipe, if you want to call it that. And that is the data network." These services were not Internet access in his opinion. "Internet by definition is a data service that can be accessed regardless of which network you're on," he stated. He stressed that "[t]he distinction here is if the content stays in the carrier's content server and it's downloaded directly from that content server to the customer, then it does not constitute internet. It is intranet."

²⁸ The document also specified that "Cellular video is charged at stated monthly subscription rates or at stated pay per view rates." The same document described MEdia Net as "[y]our access to the mobile Web." Another document in the record entitled "MEdia™ Net Frequently Asked Questions" explained that "MEdia Net is the Internet on your AT&T wireless phone. It gives you access to all the cool things your phone can do – email, websites, games, and more."

Mr. Nazari also expressed the opinion that not all devices sold by the Appellant during the tax periods at issue were compatible with the Appellant's Parental Controls or Smart Limits features, though he admitted that he could not name any specific mobile device that he analyzed with respect to use of the device on the Appellant's network during the tax periods at issue.

Mr. Nazari testified that screening software "can be provided one of three ways. It could be either at the operating system that is used by the subscriber on a cell phone; it could be over a web browser that is used by the subscriber[;] or it could be blocked or filtered at the network level before it reaches the subscriber." He relied upon several sources for his assertion that not all devices sold by the Appellant were compatible with its Parental Controls or Smart Limits features. He noted that an online article from the Fox News website entitled "AT&T Puts Parental Control on Teens' Cell Phones" reported that AT&T's Smart Limits feature would not work on an iPhone. He also relied upon an article from the website InternetSafety.com entitled "InternetSafety.com Urges Parents to Child-Proof Apple iPhone, Coupling Apple's New Parental Controls with Online Content Filtering," quoting that "AT&T's wireless MEdia Net Parental Controls do not work with the iPhone at

all.”²⁹ He also cited an article on the website FierceWireless entitled “AT&T Adds to Parental Controls with New Mobile Web Settings,” quoting that “[s]ome AT&T Smart Limits for Wireless features may not be compatible on some wireless connection and mobile Internet browsing services.”³⁰ Mr. Nazari also testified that a search via “Wikipedia and a few other websites” showed that the iPhone did not introduce parental controls until 2008, and that his independent research (also via “Wikipedia and a few other sources”) concluded that two other operating systems “popular with the carrier . . . Symbian . . . and Droid . . . did not provide parental controls between 2005 and 2010.”

Mr. Nazari testified that he is the technical advisor to the Rural Wireless Association (“RWA”), formerly known as the Rural Telecom Group. He was appointed by the Federal Communications Commission’s Chairman to serve on the CSRIC Committee (which stands for Communications, Securities, Reliability, and Interoperability Council). It is an unpaid position. Mr. Nazari testified that “all the wireless carriers” participate on the CSRIC Committee. The Appellant contended that Mr. Nazari’s work with the RWA, which advocates in favor of

²⁹ InternetSafety.com is identified in the document as a “leading provider of web filtering solutions for consumers and businesses since 1999. The company’s flagship software, Safe Eyes®, . . . was rated as the #1 parental control solution by America’s leading consumer advocacy publication. Other products include Safe Eyes Mobile, the first family-safe browser for the iPhone.” The article in large part serves as an endorsement for the Safe Eyes Mobile browser.

³⁰ When asked by the hearing officer whether the quoted statement was accurate, Mr. Nazari replied that “I have no reason to dispute it.”

rural carriers' interests, evidences his bias against the Appellant.

A document in the record entitled "Communications Security, Reliability & Interoperability Council Members As of March 17, 2015" indicated that Mr. Nazari serves on the CSRIC Committee as a representative of the RWA and not in his own individual capacity. An RWA website excerpt in the record described the RWA as "a trade association representing rural wireless carriers who each serve fewer than 100,000 subscribers. Another RWA website excerpt in the record noted that RWA's "General Counsel, Carri Bennet, and Wireless Technical Advisor, Mehran Nazari, met with FCC Commissioner Clyburn's wireless legal advisor [and RWA] expressed concern that AT&T is suggesting that due to potential congestion on its network, it should be allowed to treat its roaming partners' customers differently than it treats its own customers by placing the roaming partners' customers on its 2G or 2.5G network rather than its 3G network when the 3G network reaches capacity."

In its briefs, the Appellant also challenged Mr. Nazari's qualifications and foundation as inadequate to present credible and reliable testimony, especially as he had no familiarity with the Appellant's billing practices. The Appellant alluded to his reliance on sources such as news articles and Wikipedia. The Appellant emphasized that "Wikipedia is a website providing a

'free encyclopedia that anyone can edit'" and that the "site itself warns, in bold, that 'Wikipedia cannot guarantee the validity of the information found here'" and that "[i]f you need specific advice (for example, medical, legal, financial or risk management), please seek a professional who is licensed or knowledgeable in that area.'"

V. The Board's Conclusions

Based upon the record in its entirety, the Board found that the charges at issue for data services were charges for Internet access as defined in the ITFA and that the Appellant provided sufficient evidence to prove that it satisfied the ITFA's accounting rule and screening software provisions, thus exempting the charges at issue from Massachusetts sales tax. The Board also found that the escrow mechanism ensured repayment to impacted Massachusetts customers as required by G.L. c. 62C, § 37 and 830 CMR 62C.37.1.

A. Data Services

The Board found that Mr. Robertson and Mr. Adams provided credible testimony establishing that the charges at issue were charges for Internet access. As a customer of AT&T and the impetus behind the class action that precipitated this matter, Mr. Robertson had first-hand knowledge of the data services and their capabilities, as well as the tax treatment of competitors and various jurisdictions in which he brought similar refund

claims. He personally used the data services to access the Internet and email.

Mr. Adams explained that it is common in the industry to use the label "data services" as an alternative for Internet access and that the label for a service is often influenced by how plans are presented to customers rather than tax considerations. His comparison of the Appellant's data services to a pipe used to stream content to and from a customer provided the Board with a constructive illustration and understanding of the capacity a customer purchases when it enters into an agreement with the Appellant for data services. This depiction aided the Board in finding that the charges at issue were indeed charges falling within the ITFA's definition of "Internet access," as discussed further below in the Board's Opinion.

The Board rejected the Commissioner's theory that using the data services to access content available only to customers, such as ringtones and video, or for accessing visual voice mail, precluded these charges from the ITFA's definition of "Internet access." Even if the Commissioner's assertions were true, the Board found this use of the data services to be incidental – as permitted by the ITFA in defining "Internet access" – and did not negate a finding that the charges at issue *in toto* were charges for Internet access.

Mr. Nazari, the Commissioner's expert witness, offered no rational basis for the Board to believe that he had any general expertise in either Internet or intranet access, let alone both, and he had no expertise in the relevant billing practices, systems, and codes pertaining to the charges at issue. When asked to provide a source for his understanding of the term "Internet," his reply was nebulous: "Every text book, every standard that's written you could look at it and figure out what it is." The Board found that Mr. Robertson's personal experience with the data services and Mr. Adams' in-house knowledge of what the data services allow customers to do were much more reliable indicators that the charges at issue constituted charges for Internet access.

B. Accounting for the Charges at Issue

The Board found that the Appellant presented substantial credible testimony and documentation regarding its billing systems and billing codes, as well as invoices issued to customers, all of which supported its compliance with the ITFA's accounting rule provision during the tax periods at issue by showing segregation of the charges at issue from charges for other services such as voice and text messaging.

Mr. Adams discussed AT&T's proprietary billing systems - Care and Telegence - and explained the detail captured by Telegence, the larger of the two systems and the one primarily

relied upon by the Appellant for the information presented in this matter. Telegence maintained records for each of the Appellant's Massachusetts customers, including monthly invoices and line items for individual services and associated tax. The system tracked charges to a level sufficient to segregate the charges at issue.

Mr. Adams spoke at length about billing codes, feature codes, and SOC codes. These codes facilitated identification of the charges at issue. He explained that thousands of codes were reviewed to segregate the specific codes for Internet access. Although thousands of codes were identified as encompassing the charges at issue, Mr. Adams stressed that at the end of the day all of these identified codes represented the same service – Internet access. Each transaction involving the charges at issue comprised transactions solely for Internet access.

Mr. Adams testified to numerous invoices and billing records to explain and demonstrate that the charges at issue were not packaged with charges for other services. When the Appellant realized it had erroneously incorporated certain billing codes as part of abatement and refund claims filed nationwide, including the Massachusetts Abatement and Refund Claim, letters were sent to apprise jurisdictions of this error.

Mr. Adams emphasized that if a customer used the data services to access content, this content was either (1) content

provided to the customer at no additional cost or from a website over which the Appellant had no control, or (2) the charge for such content, such as for a ringtone or game, was itemized separately from the charges at issue and was not included in the Massachusetts Abatement and Refund Claim.

The Board found that Mr. Nazari presented a wholly extraneous dissertation on network design and the need for carriers to incorporate common elements and standards so as to accommodate roaming customers and communications with customers on other carriers' networks. Even if a commonality of network design exists among carriers, carriers do not necessarily adhere to the same billing systems and codes. Care and Telegence are custom billing systems and the billing codes harvested from these systems (Telegence in particular) to track the charges at issue are native to AT&T. There is no industry-wide set of billing codes, as Mr. Nazari so acknowledged. He also acknowledged that he has never examined AT&T's billing practices, systems, and codes until his engagement for this matter, and has never reviewed AT&T's billing codes in consulting with other clients. His conclusion that codes containing the term "bundle" must mean a bundling of services was merely a superficial guess, disproved by Mr. Adams' explanation that a bundle could refer to a media bundle for marketing purposes rather than a bundling of services.

Improbably, Mr. Nazari's own testimony supported the Appellant, if either party at all. For instance, Mr. Nazari testified that carriers have the ability to bill a customer separately for services and that this technology is an integral part of the network design. "It's integral," he stated, "because if they can't measure it, they can't bill it. And if they don't bill it, they don't make enough money or revenue." The Board found this testimony more supportive of the Appellant's case than the Commissioner's, in effect corroborating that specific charges, such as the charges at issue, can be and were measured and billed separately.

C. Screening Software

The Board found that Ms. Leatherberry's testimony, along with exhibits in the record, established that the Appellant complied with the screening software provision of the ITFA during the tax periods at issue. Ms. Leatherberry, while not versed in the technicalities of how the Appellant's Parental Controls and Smart Limits features worked, was aware of the capabilities of these features and their function to assist customers in restricting device use. The Appellant relayed the availability of these features to its customers in myriad ways, from in-store brochures and box inserts to posting information on its website.

Though the Parental Controls and Smart Limits features were not compatible with every device sold by the Appellant and the restrictive features inherent to some devices sold by the Appellant – such as the iPhone – were not available during all of the tax periods at issue, the Board found this was not fatal to compliance with the screening software provision. The ITFA does not mandate that screening software be compatible with all devices, only that such software be offered to customers at the time that they entered into an agreement for Internet access, which the Board found occurred in this instance.

D. Escrow Mechanism

The Board found that Mr. Robertson's narration of the class action and the ensuing settlement agreement, escrow agreement, and plan of distribution underscored the escrow mechanism in place to ensure that impacted customers would be repaid if a jurisdiction, including Massachusetts, refunds sales tax on charges such as the charges at issue. Though the Commonwealth of Massachusetts is not a party to the settlement agreement, the settlement agreement's terms dictate that the Appellant will not retain any refund amount. If a refund is not paid directly to an escrow account, the Appellant must remit that amount into the escrow account held by the Bank of New York Mellon as the Escrow Agent. If a taxing jurisdiction issues only a credit instead of a refund, then the Appellant must fund the escrow account and

take a credit against tax going forward. The escrow account remains in the custody of the United States District Court for the Northern District of Illinois. Significantly, impacted Massachusetts customers were advised of – by multiple methods – and consented (except for the four customers who opted out)³¹ to the escrow mechanism as the means of repayment, as well as to the deduction of various fees prior to distribution. Distributions from the escrow account are handled by Analysis Research Planning Corporation, the named Settlement Administrator, not by the Appellant. The Board found this evidence sufficient to meet the repayment requisite of G.L. c. 62C, § 37 and 830 CMR 62C.37.1.

E. The Commissioner's Expert Witness and Bias

While recognizing Mr. Nazari's involvement with the RWA and its history of advocating for rural carriers' interests, the Board felt it unnecessary to make any finding of bias – as urged by the Appellant – because Mr. Nazari's testimony lacked credibility on its own standing. His testimony was largely speculative. He revealed no expert knowledge of or experience with the Appellant's network, billing practices, billing systems, or billing codes, or any devices used on the Appellant's network. Websites such as Wikipedia and

³¹ In a letter dated March 28, 2011, from counsel for the Appellant to the Massachusetts Department of Revenue, the Appellant submitted a revised claim, reducing the abatement and refund sought by \$1.47 based upon customers who had opted out of the settlement agreement.

FierceWireless do not carry more weight because Mr. Nazari cited them in his testimony. The Board could not rely upon an expert who lacked relevant knowledge and formulated his opinions upon a foundation of unverified Internet sources.

F. Conclusion

Accordingly, based upon the record in its entirety, the Board found that the Appellant met its burden of proof in establishing that it was entitled to the abatement and refund sought in this appeal.

OPINION

This appeal raises the question of whether the Appellant improperly collected and remitted Massachusetts sales tax imposed on the charges at issue for the tax periods at issue in contravention of the ITFA. The Board found and ruled that the Appellant collected and remitted such tax erroneously because the ITFA precluded taxation of the charges at issue. In reaching its ultimate conclusion, the Board determined that (1) Massachusetts did not generally impose and actually enforce a sales tax on Internet access prior to October 1, 1998, and so Massachusetts did not fall within the grandfather clause of the ITFA permitting the continued taxation of Internet access; (2) the charges at issue were charges for Internet access; (3) the Appellant complied with the accounting rule provision of the ITFA; and (4) the Appellant complied with the screening software

provision of the ITFA. The Board also determined that the escrow mechanism outlined in the class action settlement agreement and associated documents sufficiently demonstrated that any impacted Massachusetts customers³² would receive payment of the refund.

I. Massachusetts Did Not Generally Impose and Enforce a Tax on Internet Access Prior to October 1, 1998

The ITFA prohibits the taxation of Internet access by any state or political subdivision unless "a tax on Internet access [] was generally imposed and actually enforced prior to October 1, 1998."³³ ITFA §§ 1101 and 1104. See also Technical Information Release 05-8: *Taxation of Internet Access, Electronic Commerce and Telecommunications Services: Recent Federal Legislation*. The Act construes "generally imposed and actually enforced" as meaning that prior to October 1, 1998 –

(A) the tax was authorized by statute; and

(B) either –

(i) a provider of Internet access services had a reasonable opportunity to know, by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or

(ii) a State or political subdivision thereof generally collected such tax on charges for Internet access.

³² See footnote 3, *supra*.

³³ Passage of successive legislation has extended this grandfather clause, which currently sunsets on June 30, 2020. See P.L. 107-75, P.L. 108-435, P.L. 110-108, P.L. 113-164, P.L. 113-235, P.L. 114-53, P.L. 114-100, P.L. 114-113, and P.L. 114-125.

ITFA §§ 1101 and 1104.

General Laws c. 64H, § 2 states that

an excise is hereby imposed upon sales at retail in the commonwealth, by any vendor, of tangible personal property or of services performed in the commonwealth at the rate of 6.25 per cent of the gross receipts of the vendor from all such sales of such property or services, except as otherwise provided in this chapter. The excise shall be paid by the vendor to the commissioner at the time provided for filing the return required by section sixteen of chapter sixty-two C.

G.L. c. 64H, § 2.³⁴ In 1990, services were expanded to include telecommunications services for purposes of the Massachusetts sales tax. St. 1990, c. 121 and St. 1990, c. 150. See also Technical Information Release 90-8: *Taxation of Sales and Use of Telecommunications Services* ("Chapters 121 and 150 have extended the sales and use tax in G.L. c. 64H and 64I to the retail sale or use of telecommunications services in Massachusetts.").

Subsequently, telecommunications services were defined as

any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite, or similar facilities, but not including cable television. Telecommunications services shall be deemed to be services for purposes of this chapter and chapter sixty-four I.

G.L. c. 64H, § 1.

³⁴ The statute was amended on June 29, 2009, effective August 1, 2009, to read "6.25 per cent." St. 2009, c. 27, §§ 53 and 155. Previously, the statute read "five percent." G.L. c. 64H, § 2 (as in effect prior to St. 2009, c. 27, §§ 53 and 155).

Guidance issued by the Commissioner, anticipating the enactment of Massachusetts legislation concerning Internet access, clearly indicated that Internet access was considered a taxable telecommunications service under G.L. c. 64H, § 1:

This Technical Information Release [] is being issued to provide for a temporary moratorium on collection of sales or use tax on the following telecommunications services: Internet access services, electronic mail services, electronic bulletin board services, web hosting services or similar online computer services.

Technical Information Release 97-10: *Temporary Sales Tax Moratorium on Internet Access and Related Telecommunications Services* ("Bills approved by both the Massachusetts House (H.B. 4608) and Senate (S.B. 1912) and currently in Conference Committee exempt the above services from tax retroactive to 1990.").

In 1997, the Massachusetts Legislature passed St. 1997, c. 88, §§ 23, 102, and 114 ("Amendment"), amending the definition of "telecommunications services" in G.L. c. 64H, § 1 to specifically exclude "internet access services." St. 1997, c. 88, §§ 23, 102, and 114 ("Section 1 of chapter 64H of the General Laws, as so appearing, is hereby amended by inserting after the word 'television,' in line 194, the following words: - internet access services, electronic mail services, electronic bulletin board services, web hosting services or similar on-line computer services.").

The statute's definition of "telecommunications services" read as follows after passage of the Amendment:

[A]ny transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio, satellite, or similar facilities, but not including cable television, internet access services, electronic mail services, electronic bulletin board services, web hosting services or similar on-line computer services. Telecommunications services shall be deemed to be services for purposes of this chapter and chapter sixty-four I.

G.L. c. 64H, § 1. The Amendment retroactively took effect as of September 1, 1990, and expired on July 1, 1999. St. 1997, c. 88, §§ 23, 102, and 114.³⁵ Thus, while the Massachusetts definition of "telecommunications services" for purpose of imposing the sales tax reverted to its former version on July 1, 1999 – with Internet access not excluded as a telecommunications service – prior to October 1, 1998, there was no tax on Internet access "generally imposed and actually enforced" in Massachusetts. Consequently, the Massachusetts sales tax does not fall within the grandfather clause of the ITFA for purposes of imposing a

³⁵ The Amendment also suspended the abatement statute of limitations in G.L. c. 62C, § 37 for purposes of the excluded services. See St. 1997, c. 88, §§ 23, 102, and 114. See also Technical Information Release 99-2: *Taxation of the Internet, Electronic Commerce and Telecommunications Services: Recent Federal and Massachusetts Legislation* ("Abatement applications concerning tax on Internet access and similar on-line services are not subject to the time limitations contained in G.L. c. 62C, § 37, or the Abatement Regulation, 830 CMR 62C.37.1(2). Therefore, abatement applications for tax paid on or after September 1, 1990 will be considered, providing the taxpayer has adequate records and otherwise meets the requirements of 830 CMR 62C.37.1(4).").

sales tax on Internet access and the ITFA generally exempts the imposition of such tax. ITFA §§ 1101 and 1104.

The Board held, however, that in the absence of exemption by the ITFA, a taxpayer can properly be subject to Massachusetts sales tax on Internet access. ITFA §§ 1101 and 1106. With no further Massachusetts legislative intervention after the July 1, 1999 expiration of the Amendment, Internet access is a telecommunications service subject to Massachusetts sales tax. See *State Bd. of Retirement v. Boston Retirement Bd.*, 391 Mass. 92, 94 (1984) ("We follow a principal rule of statutory interpretation that we need not look beyond the words of the statute where the language is plain and unambiguous."); *New England Medical Center Hospital, Inc. v. Commissioner of Revenue*, 381 Mass. 748, 750 (1980) ("A statute is plain and unambiguous if 'virtually anyone competent to understand it, and desiring fairly and impartially to ascertain its signification, would attribute to the expression in its context a meaning such as the one we derive, rather than any other; and would consider any different meaning, by comparison, strained, or far-fetched, or unusual, or unlikely.'"). To hold otherwise would give no meaning to the Amendment, both the Legislature's particular cause to exclude Internet access from the definition of taxable telecommunications services and its decision to limit this exclusion to three years. See *Sullivan v. Town of Brookline*,

435 Mass. 353, 360 (2001) ("It is clear that the Legislature intended for retirees returning to work after five or more years of retirement to complete retraining before any reinstatement right should inhere in them.").

The Commissioner's guidance has tracked the impact of the Amendment and the ITFA. Technical Information Release 99-2: *Taxation of the Internet, Electronic Commerce and Telecommunications Services: Recent Federal and Massachusetts Legislation* states that "[t]he exclusion contained in the Massachusetts statute is retroactive to September 1, 1990; the terms of the legislation state that the exclusion expires on July 1, 1999" and that "[t]he Federal Act prohibits Massachusetts from taxing Internet access, as defined in the federal statute, for three years from October 21, 1998." Technical Information Release 05-8: *Taxation of Internet Access, Electronic Commerce and Telecommunications Services: Recent Federal Legislation* states that "[t]his Technical Information Release [] is being issued to explain the effect of recent federal legislation that extends the Internet Tax Freedom Act until November of 2007."³⁶

The Board construed this guidance, including any regulatory changes issued by the Commissioner, as the Commissioner's effort to incorporate and explain the impact of the Amendment and the

³⁶ See footnote 2, *supra*.

ITFA on Massachusetts tax practice and to advise the public that if the ITFA were to expire, Internet access charges would be taxable. The Board did not interpret this guidance as otherwise seeking to exempt the imposition of Massachusetts sales tax on Internet access as a telecommunications service under Massachusetts law.³⁷

II. The Charges at Issue for Data Services Were Charges for Internet Access Under the ITFA

As initially enacted and throughout the tax periods at issue, the ITFA has defined the term "Internet" as "collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any

³⁷ The Board interpreted changes made in 2003, for instance, to 830 CMR 64H.1.6 – after implementation of the Act in 1998 and after expiration of the Amendment in 1999 – that reference Internet access as a non-taxable service, or references in Technical Information Release 05-8: *Taxation of Internet Access, Electronic Commerce and Telecommunications Services: Recent Federal Legislation* to Internet access as a non-taxable service, as stemming directly from the Act's preemption of Internet access taxation. Technical Information Release 14-10: *Potential Expiration of Federal Internet Tax Freedom Act* and Technical Information Release 15-8: *Potential Expiration of Federal Internet Tax Freedom Act*, while issued after the tax periods at issue, also supported the Board's interpretation that Massachusetts can tax Internet access in the absence of the ITFA: "In light of the distinct possibility that Congress may allow ITFA to expire and then subsequently enact a retroactive extension of the Act, as it has done in the past, the Department is hereby advising vendors of Internet access to customers in Massachusetts that for purposes of sales tax collection and remission, those vendors may continue to rely on the lists of taxable telecommunications services and non-taxable and exempt services, including Internet access charges, as published in TIR 05-8, until further notice from [the Department of Revenue] . . . This TIR does not relieve purchasers of taxable services of potential use tax liability in the event that ITFA expires and Congress does not enact an extension; however, any such liability does not need to be reported until further notice from [the Department of Revenue] and no penalties would apply to late reporting or payment of such use tax."

predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio." ITFA § 1104 (renumbered as § 1105 by P.L. 108-435 on December 3, 2004).

The term "Internet access" was initially defined in the ITFA as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. Such term does not include telecommunications services." ITFA § 1104 (as originally enacted).

As amended on December 3, 2004, by the Internet Tax Nondiscrimination Act, P.L. 108-435, codified as a note to 47 U.S.C. § 609, the definition of "Internet access" in the ITFA was changed to read as follows:

[A] service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. The term 'Internet access' does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.

ITFA § 1105 (as amended by P.L. 108-435).

The definition of "Internet access" was further amended on October 31, 2007, by the Internet Tax Freedom Act Amendments Act

of 2007, P.L. 110-108, codified as a note to 47 U.S.C. § 609, to read as follows:

(A) [Internet access] means a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet;

(B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold -

(i) to provide such service; or

(ii) to otherwise enable users to access content, information or other services offered over the Internet;

(C) includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service, such as a home page, electronic mail, and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity;

(D) does not include voice, audio or video programming, or other products and services (except services described in subparagraph (A), (B), (C), or (E)) that utilize Internet protocol or any successor protocol and for which there is a charge, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E); and

(E) includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.

ITFA § 1105 (as amended by P.L. 110-108).

In the present matter, the Board found and ruled that the Appellant provided sufficient credible evidence to conclude that the charges at issue for data services were charges for Internet access within the ITFA's definition of the term. Mr. Adams explained that it was common for the Appellant and for the industry to refer to Internet access as data services, and that the naming of terms was often influenced by how plans were presented to customers rather than tax considerations. He described the charges at issue as akin to a pipe giving customers the ability to stream content and to send and receive emails, and that the charges at issue only comprised charges for the ability to access the content, *i.e.*, the amount of content, not for the content itself.

Mr. Robertson, a customer, understood data services as meaning Internet access and personally used these services to access the Internet and email. In contrast, Mr. Nazari's vague generalities about data services and Internet and intranet access provided no useful insight into the charges at issue, and the Board declined to credit his testimony. See ***General Mills, Inc. v. Commissioner of Revenue***, 440 Mass. 154, 161 (2003) ("The credibility of witnesses, the weight of the evidence, and inferences that reasonably may be drawn from the evidence are matters for the board.") (citation omitted). The Board instead focused on the substance of the charges at issue rather than

their label, and determined that these charges were in fact charges for Internet access under the ITFA.

The Board considered the Commissioner's reliance on ITFA § 1105(D) to be inapposite here. That subparagraph specifically excludes "voice, audio or video programming . . . that utilize Internet protocol or any successor protocol and for which there is a charge, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E)." ITFA § 1105(D). While the Appellant's customers could subscribe to video programming such as MobiTV and Cellular Video,³⁸ charges for this content, as well as charges for features such as ringtones and games, were not included in the Massachusetts Abatement and Refund Claim. Even if these features used the charges at issue to access the purchased content, the Board construed this access as part of the services incidental to the "service that enables users to connect to the Internet to access content, information, or other services offered over the Internet." ITFA §§ 1105(A) and (C). The fundamental capacity of the Appellant's data services was to provide customers with the capability of connecting to the Internet, within the meaning of the ITFA. See *id.*

³⁸ See footnotes 27 and 28, *supra*.

III. The Appellant Satisfied the Accounting Rule Provision

On December 3, 2004, the Internet Tax Nondiscrimination Act, P.L. 108-435, codified as a note to 47 U.S.C. § 609, amended the ITFA by adding the accounting rule provision:

(a) In General. - If charges for Internet access are aggregated with and not separately stated from charges for telecommunications services or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business.

(b) Definitions. - In this section:

(1) Charges for Internet access. - The term 'charges for Internet access' means all charges for Internet access as defined in section 1105(5).

(2) Charges for telecommunications services. - The term 'charges for telecommunications services' means all charges for telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.

ITFA § 1106 (as added by P.L. 108-435). The accounting rule provision was amended on October 31, 2007, by the Internet Tax Freedom Act Amendments Act of 2007, P.L. 110-108, codified as a note to 47 U.S.C. § 609, as follows:

(a) In General. - If charges for Internet access are aggregated with and not separately stated from charges for telecommunications or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges

for Internet access from its books and records kept in the regular course of business.

(b) Definitions. - In this section:

(1) Charges for Internet access. - The term 'charges for Internet access' means all charges for Internet access as defined in section 1105(5).

(2) Charges for telecommunications. - The term 'charges for telecommunications' means all charges for telecommunications, except to the extent such telecommunications are purchased, used, or sold by a provider of Internet access to provide Internet access or to otherwise enable users to access content, information, or other services offered over the Internet.

ITFA § 1106 (as amended by P.L. 110-108).

Turning to the matter at hand, Telegence, the custom AT&T billing system primarily relied upon by the Appellant to file the Massachusetts Abatement and Refund Claim, captured individual transactions for each customer down to the level of particular services purchased by a customer. Mr. Adams testified to the Appellant's proprietary billing codes and how these codes enabled the Appellant to segregate the charges at issue from charges for other services, such as voice and text messaging and charges for bundled services. Mr. Adams also testified to numerous customer invoices, identifying individual line items on invoices that pertained solely to the charges at issue, along with the tax imposed on these charges.

Further, the root of this and similar matters stemmed from the class action, which originated with Mr. Robertson, a customer who detected – from reviewing AT&T bills – that sales tax was included on charges for data services, the charges at issue in this matter. If Mr. Robertson could detect such detail from an invoice, as he testified, then the charges for data services were separately stated.

The Board found and ruled that this testimony and exhibits in the record amply demonstrated compliance with the accounting rule provision of the ITFA. See ITFA § 1106. See **Bayer Corp. v. Commissioner of Revenue**, 436 Mass. 302, 308 (2002) (“[W]e have consistently ruled that assessment of the credibility of witnesses is a matter for the board.”) (citations omitted). Conversely, Mr. Nazari’s speculation as to the Appellant’s billing systems, practices, and codes was inadequate to either advance the Commissioner’s case or detract from the credibility of the Appellant’s witnesses and exhibits. See *id.*

The Commissioner continued his refrain that the charges at issue cannot fall within the requisites of the ITFA because customers can use the data services to access features that are not considered Internet access, such as the purchase of a ringtone or game only available to a customer on the Appellant’s network. The Commissioner argued that since the quantity of data used to download such features was not segregated from the data

used to access the Internet, the Appellant failed to satisfy the accounting rule provision. As the Board found and ruled above, charges for features such as ringtones and games were separate and excluded from the Massachusetts Abatement and Refund Claim. Even if such features used the data services for purposes of downloading the content, this was incidental to the "service that enables users to connect to the Internet to access content, information, or other services offered over the Internet." ITFA §§ 1105(A) and (C). Further, the ITFA does not require that these incidental uses be itemized separately from using the service to access the Internet, and so the Board declined to incorporate this burden into its analysis. See ITFA § 1106. See also **Adams v. Assessors of Westport**, 76 Mass. App. Ct. 180, 183-84 (2010) ("We strive to adopt a reading 'consistent with the purpose of the statute and in harmony with the statute as a whole.' [A]nd we also bear in mind the general principle favoring strict construction of tax statutes to resolve doubt in favor of taxpayers.") (citations omitted).

The Board was also unpersuaded by the Commissioner's reliance on **Verizon New England, Inc. v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2011-457. The Commissioner contended that visual voice mail requires the Appellant's data services to function, but does not involve accessing the Internet. Thus, according to the Commissioner, the

charges at issue were not sufficiently segregated to account for these disparate uses.

In making his argument, the Commissioner described two types of voice mail: (1) standard voice mail, a voice service that requires a customer to call into a server and retrieve messages in a linear fashion, *i.e.*, in the order received, and (2) visual voice mail, a feature permitting a customer to view and retrieve messages via a phone screen in a non-linear fashion. Relying on **Verizon New England** for the Board's finding that voice mail is a taxable telecommunications service, the Commissioner maintained that visual voice mail is also a taxable telecommunications service indiscriminately co-mingled here with Internet access.

In **Verizon New England**, the Board found that the charges made by the taxpayer "for voice mail services were charges for the 'transmission of messages or information by electronic or similar means, between or among points' and that [the taxpayer] properly reported sales taxes on its voice mail services." *Id.* at 2011-475. Here, the Commissioner admitted that standard voice mail generally falls within a voice service, the type of service consistent with the Board's ruling in **Verizon New England**, Mass. ATB Findings of Fact and Reports 2011-457. The record did not indicate that visual voice mail was anything other than an incidental feature using the data services to interface with

standard voice mail, rather than a stand-alone taxable telecommunications service, and the Board declined to broaden its ruling in **Verizon New England** to encompass visual voice mail or to otherwise find that the Appellant had not complied with the accounting rule provision of the ITFA. See ITFA § 1106.

IV. The Appellant Satisfied the Screening Software Provision

The ITFA moratorium "shall [] not apply with respect to an Internet access provider, unless, at the time of entering into an agreement with a customer for the provision of Internet access services, such provider offers such customer (either for a fee or at no charge) screening software that is designed to permit the customer to limit access to material on the Internet that is harmful to minors." ITFA § 1101. This screening software provision defines the term "Internet access provider" as "a person engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet, but does not include a common carrier to the extent that it provides only telecommunications services." *Id.* It defines the term "Internet access services" as "the provision of computer and communications services through which a customer using a computer and a modem or other communications device may obtain access to the Internet, but does not include telecommunications services provided by a common carrier." *Id.* It defines the term "screening software" as software that is

designed to permit a person to limit access to material on the Internet that is harmful to minors." *Id.*

The Appellant claimed that the ITFA's screening software requisite did not apply in this matter because the Massachusetts sales tax at issue here is a tax imposed on a customer and the screening software provision limits the moratorium to taxes borne by an Internet access provider. The Appellant also claimed that it is not an "Internet access provider" as that term is defined in the screening software provision - the Appellant stressed that it does not provide a computer to its customers and merely resells devices to customers or customers purchase a device elsewhere. Regardless, the Appellant maintained that it met the requisites of the screening software provision by offering its Parental Controls and Smart Limits features. Because the Board found that at the time of entering into a contract for Internet access the Appellant offered its customers screening software designed to limit access to material on the Internet that is harmful to minors, the Board determined that it was unnecessary to analyze whether or not the screening software applied to a tax imposed on a purchaser rather than a vendor.

The evidence supported the Appellant's contention that it offered its customers relevant screening software at the time that they entered into an agreement for the provision of Internet access services. Ms. Leatherberry provided credible

testimony as to numerous documents and website pages available during the tax periods at issue to inform customers of the Appellant's Parental Controls and Smart Limits features. See **Cumington School of the Arts, Inc. v. Assessors of Cumington**, 373 Mass. 597, 605 (1977) ("The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board."). These features clearly were "designed to permit a person to limit access to material on the Internet that is harmful to minors," in accordance with the ITFA's screening software provision. ITFA § 1101. The ITFA does not require that this screening software be compatible with all devices sold by the Appellant and/or used by its customers, only that it be designed for the purpose articulated in the screening software provision, *i.e.*, restriction of use by minors. Consequently, the Board declined to follow the Commissioner's contention that incompatibility of the Parental Controls or Smart Limits features with certain devices is fatal to compliance with ITFA § 1101.

The Board also rejected the Commissioner's carefully selected definitions of the term "offer" in its determination that the Appellant indeed offered screening software at the time a customer entered into an agreement for Internet access. Since the ITFA's screening software provision does not define the term, the Board turned to the definition of "offer" as Merriam-

Webster defines it in a broad sense "to make available." *Offer*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/offer> (last visited April 17, 2018). See also ***Doherty v. Planning Board of Scituate***, 467 Mass. 560, 569 (2014) ("When a statute does not define its words we give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose.") (citation omitted). Ms. Leatherberry's testimony established that information on the Parental Controls and Smart Limits features was made available to customers via an abundance of mechanisms, from in-store brochures to websites to box inserts. The Board found and ruled this was sufficient to establish compliance with the ITFA's screening software provision. ITFA § 1101.

V. The Appellant Is Entitled to an Abatement and a Refund of the Sales Tax at Issue

When a taxpayer claims to be aggrieved by the refusal of the Commissioner to abate or to refund a tax, the Board has jurisdiction to determine whether the Commissioner erred by refusing to abate or to refund the subject tax. See G.L. c. 62C, § 39.

The Board's review under G.L. c. 62C, § 39 of the Commissioner's refusal to abate or to refund a tax includes a review of the two discreet determinations the Commissioner is authorized to make under G.L. c. 62C, § 37; the Commissioner is

authorized to **abate** a tax that is "excessive in amount or illegal" but may withhold a **refund** of tax until the taxpayer "establishes to the satisfaction of the commissioner, under such regulations as the commissioner may prescribe" that the taxpayer has repaid the tax to its purchaser.³⁹ Hearings before the Board are conducted de novo, **Space Building Corp. v. Commissioner of Revenue**, 413 Mass. 445, 451 (1992), and the Board considers all of the evidence of record to determine whether a taxpayer has met its burden of proving its entitlement to an abatement and a refund.

The Board determined that the escrow mechanism instituted by means of the settlement agreement, escrow agreement, and plan of distribution was sufficient to satisfy the repayment requisite of G.L. c. 62C, § 37. Mr. Robertson detailed the process of repayment by way of the escrow mechanism and emphasized that the Appellant relinquished all rights to any refund amount and that the escrow account remains in the custody of the United States District Court for the Northern District of

³⁹ The regulation at 830 CMR 62C.37.1 is silent as to the type or quantum of evidence necessary to satisfy the G.L. c. 62C, § 37 repayment requisite, simply stating in pertinent part that a vendor must establish that "no refund of money shall be made until the operator or vendor establishes, to the satisfaction of the Commissioner, that it has repaid or credited or will repay or credit any purchaser who has paid the tax to the operator or vendor in the amount for which the application is made." Cf **Kimberly-Clark Corporation v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 2011-1, affirmed by, 83 Mass. App. Ct. 65 (2013) (finding that the regulation and Technical Information Release provided guidance as to the type of evidence that would satisfy the "clear and convincing" standard under the add-back statutes).

Illinois. The Board found his testimony to be credible and ruled that the evidence of record established that the Appellant would satisfy the repayment requisite of G.L. c. 62C, § 37.

The Board dismissed the Commissioner's assertion that the Board would be acting beyond its authority by determining that the escrow mechanism fulfills the repayment requisite of G.L. c. 62C, § 37. Pursuant to G.L. c. 62C, § 39, the Board has authority over matters involving "[a]ny person aggrieved by the refusal of the commissioner to abate *or to refund* any tax, in whole or in part, whether such refusal results from the denial of an abatement application made under section 36 or section 37." G.L. c. 62C, § 39 (emphasis added). The Commissioner's theory would create an anomaly, contrary to the Board's authority under G.L. c. 62C, § 39, where the Board could determine that a refund was due to a taxpayer pursuant to G.L. c. 62C, § 37, but could not order a refund because of the repayment requisite of G.L. c. 62C, § 37.

The Commissioner also contended that the settlement agreement is a private agreement, is not binding on the Commonwealth, and has no relevance in this matter. Hence the Board should accord it no weight. While the Board agreed that the Commonwealth is neither a party to nor bound by the settlement agreement, the Commissioner failed to consider the evidentiary value of the settlement agreement rather than its

binding capacity. See *In re: AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 983 (N.D. Ill., E. Div., 2011) (“The Settlement does not purport to dictate to any state or local authority the makeup of its applicable law.”). The Board’s determination relied upon the settlement agreement as proof of the intent and establishment of the mechanism to ensure repayment to impacted customers.

CONCLUSION

On the basis of its analysis of the record and applicable legal provisions and case law, the Board ruled that the charges at issue were exempt from Massachusetts sales tax. The charges at issue were for Internet access as defined in the ITFA and the Appellant provided evidence sufficient to establish its compliance with the ITFA’s accounting rule and screening software provisions.

Further, the escrow mechanism instituted as part of the class action settlement demonstrated that the Appellant would relinquish any control over the amount abated and that such amount would be distributed pursuant to a settlement agreed to by impacted customers who had not opted out of the settlement. Accordingly, the Board found and ruled that the Appellant satisfied the repayment requisite of G.L. c. 62C, § 37, as it applied to the Commissioner. Additionally, the Board found and

ruled that the Appellant was otherwise entitled to an abatement and refund under G.L. c. 62C, § 39.

The Board therefore issued a decision for the Appellant and granted an abatement in the amount of \$19,938,368, plus statutory additions, and ordered said amount to be refunded.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board