SUPREME COURT NO. 94720-1

Court of Appeals No. 75423-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Appellant,

v.

T-MOBILE WEST CORP.,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' decision in *City of Seattle v. T-Mobile W. Corp.*, 199 Wn. App. 79 (2017) (the "Decision") follows directly from prior decisions of this Court and Division One of the Court of Appeals, which concluded that RCW 35.21.714 means what it says: Washington cities are authorized to tax the telephone business, but their authority is limited to the "intrastate" component of that business. Nothing in the Decision changes the authority of Washington cities to tax the telephone business and nothing "thwarts" the purpose of the U.S. Congress in enacting the Mobile Telecommunications Sourcing Act ("MTSA"), because Congress expressly disavowed any purpose to add to the taxing authority of local governments.

T-Mobile West Corp. ("T-Mobile"), the taxpayer and appellee, makes this Answer to the Petition for Review filed by the City of Seattle ("the City"). The City's Petition is a thinly-disguised attempt to argue the merits of its claim, repeating arguments that were rejected by the King County Superior Court and all three judges at Division One of the Court of Appeals.[1] But of course, such argument on the merits is premature; the

[1] The City was likewise unsuccessful before the Hearing Examiner, but her decision was based on the scope of the Seattle Municipal Code and she did not reach the issue of legislative authority. Petition, p. 4.

question here is whether the Decision meets the criteria for acceptance of review in RAP 13.4. It does not.

The City offers two arguments in support of the Petition but neither has merit. The City's primary argument is that the Decision involves an issue of substantial public interest "because it thwarts the purpose of the Mobile Telecommunications Sourcing Act." Petition, p.4. But the Court of Appeals properly concluded that the MTSA does not authorize the City to impose a tax on the revenues at issue because "[a] municipal corporation's authority to tax must be delegated by the state legislature." Decision, 199 Wn. App. at 85. Indeed, the MTSA expressly recognizes that the authority to tax mobile telecommunications is controlled by state law, which may differ from state to state. 4 USC § 118 (1).

The City's second argument is that the Decision conflicts with Division One's earlier decision in *Vonage America v. City of Seattle*, 152 Wn. App. 12 (2009). Petition, p. 16. Simply put, there is no conflict. In fact, the Decision expressly *followed* the holding in *Vonage* that any tax on the telephone business much be based on the" intrastate component" of that business. Decision, 199 Wn. App. at 86.

As discussed below, none of the considerations governing acceptance of review by the Supreme Court is present here. RAP 13.4. T-Mobile respectfully submits that the Petition should be denied.

II. RESPONSE TO STATEMENT OF ISSUES PRESENTED FOR REVIEW[2]

The City's statement of issues presented for review conflates several different issues, many of which are irrelevant to the narrow issue of statutory interpretation that governs the Decision. Because only the Washington Legislature can create taxing authority in the City, the dispositive issue in the Decision is whether the *Washington Legislature* has *expressly authorized* the City to tax the international revenues in question. *Carkonen v. Williams*, 76 Wn.2d 617, 627, 458 P.2d 280 (1969); Decision, 199 Wn. App. at 85. In resolving that issue, the Decision followed earlier opinions by this Court and by the Court of Appeals that held that the pertinent statute, RCW 35.21.714, authorizes the City to tax *only the intrastate component* of T-Mobile's revenues. *See* discussion, below.

The City's discussion of the MTSA is a red herring. As discussed below, and as the Decision properly holds, Federal laws enacted pursuant to the Commerce Clause in the U.S. Constitution (including the MTSA)

[2] T-Mobile does not dispute the City's description of the case in Sections I, II and IV of the Petition for Review.

may place *limits* on the taxing authority of state and local governments, but federal law does not and cannot create new taxing authority that does not exist under state law.

III. ARGUMENT: NONE OF THE ISSUES IN THE PETITION MEETS THE CRITERIA IN RAP 13.4

The City contends that two of the criteria in RAP 13.4 are presented here. First, the City argues that the Decision impacts a matter of substantial public importance because it supposedly "thwarts" the Congressional purpose in the Mobile Telecommunications Sourcing Act and because it will impact other cities, as well as Seattle. Second, it argues that the Decision conflicts with an earlier decision of Division One (the *Vonage* case). Neither argument has merit.

In fact, the Decision merely affirms a statutory limitation on the City's taxing authority that has been in effect since at least 1983, when the Legislature amended RCW 35.21.714 by adding an express limitation to "*intrastate* toll telephone services" to the first sentence. This Court and the Court of Appeals have previously interpreted the same language, holding that any tax on the telephone business imposed by a city must be limited to the intrastate component of that business. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358-59, 166 P.3d 667 (2007); *Vonage*, 152 Wn. App. at 24. Thus the taxing authority of Seattle and the other cities mentioned in the Petition (p. 9) has long been limited to intrastate

revenues; the Decision does not change that authority. The Decision follows *Qwest* and *Vonage*; there is no conflict. Nor does the Decision "thwart" Congressional purpose in enacting the MTSA.

A. In Enacting the MTSA, Congress Expressly Disavowed Any "Purpose" To Create New State or Local Taxing Authority

The City argues that "[t]he MTSA authorizes cities and states to tax mobile telephone communications services without having to determine the place of origin, termination, or the route of the call." Petition, p. 8. This assertion, which is the premise of the City's primary argument in support of the Petition, is wrong as a matter of law. The federal government did not, and in fact it *cannot*, grant taxing authority to a Washington City, nor can it amend a state statute.

The City's arguments ignore the relationship between the state and federal governments and the limited role that the latter plays with regard to state and local taxes. Washington's Constitution provides that cities and other municipal bodies in the state have no inherent authority to levy taxes, but must derive express taxing authority from the *State Legislature*. Wash. Const. art. VII, § 9, art. XI, § 12; *Carkonen,* 76 Wn.2d at 627; Decision, 199 Wn. App. at 85.

Thus, the federal government has no power to create or expand taxing authority for any Washington city, even it were inclined to do so.

The federal government can, however, *limit* the ability of States and local governments to tax interstate commerce under some circumstances, by application of the Commerce Clause in the U.S. Constitution, Art. I, § 8, cl. 3. Seattle acknowledges this point in its discussion of *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989). Petition, p. 5.

Contrary to the arguments in the Petition, Congress had no "purpose" in the MTSA to expand the taxing authority of local governments. Congress recognized the limited role of the federal government and made it clear that the MTSA does *not* authorize any state or locality to levy a tax:

> Sections 116 through 126 of this title [4 USCS §§ 116-126] *do not* […] provide authority to a taxing jurisdiction to impose a tax, charge, or fee that the laws of such jurisdiction do not authorize such jurisdiction to impose.

4 USC § 118 (1) (emphasis added). [3] The MTSA expressly provides that the power of a city to tax wireless telecommunications services must derive from *the laws of the taxing jurisdiction* which, in the case of the City, confirms that Congress understood that the Washington State Legislature must expressly grant that authority.

[3] The Legislative History of the MTSA, which repeatedly describes the MTSA as "revenue-neutral," further confirms that Congress did not intend for the MTSA to expand taxing authority for states or municipalities. Brief of Respondent, Court of Appeals (Division One), No. 75423-8-I, pp. 19-21.

The MTSA does *permit* taxing jurisdictions to levy taxes on wireless services based on the location of a wireless customer's place of primary use ("PPU"), but *only if* the tax is authorized by state and local laws. The City's own authority confirms this point:

> Because the MTSA forbids the states from taxing wireless services except as provided under the Act, states have a strong incentive to amend their statutes to provide for taxation of wireless services in conformity with the Act. Unless and until the states take such affirmative action, they will lose tax revenue, because the MTSA itself does not impose the tax; it simply 'authorizes' the states to impose the tax in conformity with its provisions.

Petition, p. 7. (quoting from 2 J. Hellerstein & W. Hellerstein, State Taxation ¶ 18.07[3] (3d ed. 2002) (footnotes omitted) (CP 409)). As discussed below, the Decision also properly concluded that the Washington Legislature has not chosen to authorize the City to tax the revenues at issue.

Thus, the City's primary argument—that the Decision "thwarts the purpose of the MTSA"—is wrong as a matter of law. In enacting the MTSA, Congress was cognizant of the fact that the federal government cannot create new taxing authority for states and cities and Congress had no intention to do so in the MTSA.[4]

[4] The City makes essentially the same argument when it contends that "[f]or tax purposes, cellular calls are no longer interstate or intrastate." Petition, p. 8. But the Washington Legislature chose in RCW 35.21.714 to limit a city's taxing authority to revenues from the "intrastate" component of the telephone business and Congress has no

The City also appears to imply that the "public interest" standard in RAP 13.4 is met because the Decision will "affect taxation by […] dozens of other Washington cities." Petition, p. 9. But, as discussed below, the Decision does not make any changes that affect the taxing authority of Seattle or any other Washington city. The intrastate limit on a city's authority to tax the telephone business has been in effect since at least 1983. And both the Supreme Court and the Court of Appeals have since confirmed that limit, relying on the same language considered by the Decision.

B. The Decision Is Not "Contrary To The Washington State Legislature's Intent," As Expressed In RCW 35.21.714 And The 2002 Amendments Thereto

The City next makes two related arguments that boil down to an assertion that the Decision misinterprets RCW 35.21.714 and the 2002 Amendments to that statute. Petition, pp. 10-16. As a threshold matter, these arguments go to the merits of the City's claim rather than the considerations governing review set out in RAP 13.4. T-Mobile will briefly respond here, even though the Court does not need to resolve this issue unless it grants review, because the Decision properly rejected both arguments made by the City.

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authority to amend that state statute. Nor does the MTSA purport to do so. 4 USC § 118 (1). So for purposes of Washington state law, which controls here, there is a significant difference between intrastate calls, on one hand, and interstate (or international) calls, on the other.

1. Since at least 1983, the City's authority to tax the telephone business has been limited to the intrastate component of that business.

The City argues that its tax on the telephone business is authorized by RCW 35.22.280(32), rather than RCW 35.21.714. But it is well established that, when the Legislature chooses to delegate taxing authority to a city, the delegation "is attended by such conditions and limitations as that body may prescribe." *State ex rel. Sch. Dist. v. Clark County*, 177 Wash. 314, 31 P.2d 897 (1934); *Great Northern R. Co. v. Stevens County*, 108 Wash. 238, 183 P. 65 (1919). RCW 35.21.714 is a later-enacted statute that imposes limits on the City's taxing authority, as the City has elsewhere conceded.[5]

RCW 35.21.714 was enacted by the Washington Legislature in 1981; in 1983 the Legislature clarified the intrastate taxing limits in the statute. *See* discussion below. The earliest tax year included in the assessments at issue here is 2006; by that date, it is clear that the City's authority (if any) must be determined by reference to RCW 35.21.714, which is both more recent than RCW 35.22.280(32) and more specific in its application to taxes on the telephone business.[6]

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[5] *See* Opening Brief of City of Seattle, Court of Appeals (Division One), No. 75423-8-I, p. 9.

[6] This issue is discussed at some length in T-Mobile's Brief of Respondent, Court of Appeals (Division One), No. 75423-8-I, n.3, pp. 7-9.

The first sentence of RCW 35.21.714 authorizes the City to levy a tax on the "telephone business," but only on that portion of the telephone business that reflects revenue from "intrastate toll telephone services":

> Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business which is measured by gross receipts or gross income may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from *intrastate* toll telephone services subject to the fee or tax.

RCW 35.21.714 (emphasis added).[7] The City argues that the first sentence "does not say that cities can tax 'only' intrastate toll telephone services." Petition, p. 14. But it is clear that this language is intended as a limitation on a city's authority to tax the telephone business. Otherwise, the term *intrastate* would have no meaning. The history of the statute makes this point abundantly clear.

RCW 35.21.714 was enacted in 1981; the original (1981) version of the statute made no distinction between interstate and intrastate services and simply allowed municipalities to tax "the total gross revenue derived from toll telephone services." Laws of 1981, ch. 144, § 11; *Qwest,* 161 Wn.2d at 366.

In 1983 the statute was amended and the term *intrastate* was inserted in the first sentence. The entire statute then read:

[7] The limitation to tax only intrastate telephone communications is reinforced by the language of the proviso to this section, which provides that "the city shall not impose the fee or tax on that portion of network telephone service which represents […] access to, or charges for, interstate services." *Id.*

> Any code city which imposes a license fee or tax upon the business activity of engaging in the telephone business, as defined in section 24 of this 1983 act, which is measured by gross receipts or gross income may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from *intrastate* toll telephone services subject to the fee or tax: PROVIDED, That the city shall not impose the fee or tax on that portion of network telephone service, as defined in section 24 of this 1983 act, which represents access to, or charges for, interstate services for which rates are contained in tariffs filed with the federal communications commission.

Laws of 1983, 2d Ex. Sess., ch. 3, § 38 (emphasis added). The Legislature must have intended the term "intrastate" to have meaning, but the City's argument would render it meaningless. This violates the rules of statutory construction:

> Just as we 'cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language,' *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003), we may not delete language from an unambiguous statute: 'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'

State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318, 320 (2003). Moreover, both this Court and the Court of Appeals have previously interpreted this language to limit a city's taxing authority to the intrastate component of the telephone business. Thus, in *Qwest*, this Court held:

> It is undisputed that under state law, the City may tax Qwest's charges for and its provision of access to intrastate services. *See* RCW 35A.82.060(1) ('Any code city . . .

> may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from *intrastate* toll telephone services . . . .'). And in their initial briefs, both Qwest and the City agreed the City could *not* tax Qwest on charges for *interstate* services. *See* RCW 35A.82.060(1) (precluding cities from taxing charges 'for access to, or charges for, interstate services').

161 Wn.2d at 358-59. [8]

In *Vonage,* Division One of the Court of Appeals relied on *Qwest* in concluding that RCW 35.21.714 (the same statute at issue here) authorized Seattle to levy taxes only on the intrastate component of Vonage's VoIP service:

> Under RCW 35.21.714, cities have the option of taxing the intrastate component of such services. . . . However, the City may not tax the interstate component of Vonage's VoIP service . . . . We hold the superior court properly concluded that Vonage is subject to the City's telephone utility tax but the assessment must be based on the intrastate component of Vonage's service.

Vonage, 152 Wn. App. at 24 (internal citations omitted). [9]

[8] Qwest involved RCW 35A.82.060(1), which is identical to RCW 35.21.714 (the statute applicable here), except that the former statute applies to code cities such as Bellevue.

[9] The Decision properly rejected the City's "strained argument" that this interpretation of the statute makes the Proviso "superfluous." Decision, 199 Wn. App. at 83- 84; Petition, p. 14. The Proviso "illuminates the meaning of the first clause [of the statute], it is not superfluous." *Id.*

2. The 2002 Amendments did not expand the City's taxing authority to include interstate or international revenues.

The City's argument regarding the 2002 Amendments to RCW 35.21.714 rests on selected citations to the Legislative History of the Amendments, but of course the starting point in interpreting a statute must be the language of the statute, itself. *Qwest*, 161 Wn.2d at 363-64 ("Review begins with the plain meaning of the statute "). The language of the statute, before and after the amendments, belies the City's arguments.

Most tellingly, in enacting the 2002 Amendments to RCW 35.21.714 "the legislature did not delete the term 'intrastate'," which appears in the first sentence of the body of the statute, even though that term had been "construed in *Vonage* as limiting taxation to intrastate services." Decision, 199 Wn. App. at 86. If the Legislature had intended to erase this long-standing limitation on cities' authority to tax the telephone business, it would have done so expressly by changing the "intrastate" language in the body of the statute.

To the extent that the City makes any reference to the language of the statute, it points to certain language in the last clause of the Proviso. Petition, p. 10. But this language cannot reasonably be interpreted to have rewritten the body of the statute, as the City contends. First, "provisos generally should be strictly construed 'with any doubt to be resolved in

favor of the general provisions'" of a statute. *Garvey v. St. Elizabeth's Hospital*, 103 Wn.2d 756, 759, 697 P.2d 248 (1985).

Moreover, the language on which the City relies from the 2002 amendment to the Proviso shows that the Legislature intended to further *limit* the City's authority rather than to grant it substantial additional taxing authority. The 2002 amendment resulted in the following language:

> PROVIDED, That the city shall not impose the fee or tax ... for mobile telecommunications services provided to customers whose place of primary use is not within the city. (emphasis supplied).

The City asks the Court to read the limiting negative language in this clause as an *affirmative* grant of additional taxing authority, i.e., that, "The city *may* impose the tax on mobile telecommunication services provided to customers whose primary place of use *is* within the city." But that is not a reasonable construction of the actual language in the amendment, which is negative in tone and in effect. Decision, 199 Wn. App. at 86.[10]

Finally, the City's argument that the Legislature passed the 2002 Amendments in order to implement the sourcing rules in the MTSA misses the point. In fact, the 2002 Amendments do impose the MTSA's sourcing rules on

[10] The Legislative History of the 2002 Amendments to RCW 35.21.714 also supports the Decision, contrary to the City's arguments. See T-Mobile's Brief of Respondent, Court of Appeals (Division One), No. 75423-8-I, n.3, pp. 28-31.

the City by altering the City's ability to tax *intrastate* revenues from mobile telecommunications, as the Decision found:

> Another part of the proviso [added in 2002] bars taxation of 'charges for mobile telecommunications services provided to customers whose place of primary use is not within the city.' RCW 35.21.714(1). In other words, if a Bellevue resident was in Seattle and used her T-Mobile West cellular service to call someone in Bellevue, this would constitute an intrastate communication, but Seattle could not tax it because the customer's place of primary use would not be within Seattle.[11]

But the 2002 Amendments do not expand the City's authority to allow it to tax international telecommunications, as the City argues.

C. The Decision Does Not Conflict With *Vonage*; It Follows *Vonage*

The City's argument that the Decision conflicts with *Vonage* is puzzling. The Decision repeatedly cites *Vonage* as authority that supports its holding: "Following *Vonage*, we conclude the legislature has not delegated to the city the authority to tax revenue derived from the roaming charges." Decision, 199 Wn. App. at 86. And, as discussed above, the holding in *Vonage* is precisely the same as in the Decision: "We hold the superior court properly concluded that Vonage is subject to the City's

[11] The Legislative History of the 2002 Amendments shows that the primary purpose in adopting uniform sourcing rules for taxes on intrastate telecommunications was to eliminate the problem of double-taxation. Final Bill Report, SB 6539 (CP 333) ("[T]he different sourcing methods can give rise to multiple claims on the same tax revenue.")

telephone utility tax but the assessment must be based on the intrastate component of Vonage's service." *Vonage*, 152 Wn. App. at 24.[12]

IV. CONCLUSION

The City of Seattle identifies several issues in the Petition, but none fits within the RAP 13.4(b) criteria for the acceptance of review by this Court. For all the reasons herein, T-Mobile respectfully submits that the Petition should be denied.

DATED this 21st day of July, 2017.

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[12] The City's final argument is also misplaced. It argues that "RCW 35.21.714 does not prohibit the taxation of international calls." Petition, p. 18. But, as this Court and the Court of Appeals have repeatedly held, this statute limits the City's telephone tax to the intrastate component of the telephone business and "the roaming charges at issue here involve communications originating in a foreign country." Decision, 199 Wn. App. at 86. Such communications are clearly not "intrastate" calls. *Id.*

CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of July, 2017, I caused to be served a true and correct copy of the foregoing *Answer to Petition for Review* by method indicated below and addressed to the following:

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