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SUPREME COURT OF THE STATE OF WASHINGTON

**HERBERT NELSON, on his behalf and on
behalf of all others similarly situated,**

Respondent/Appellee,

v.

**APPLEWAY CHEVROLET, INC., a Washington corporation, d/b/a
APPLEWAY SUBARU/VOLKSWAGEN/AUDI, APPLEWAY
ADVERTISING, APPLEWAY AUDI, APPLEWAY AUTOMOTIVE
GROUP, APPLEWAY CHEVROLET LEASING, APPLEWAY
GROUP, APPLEWAY MAZDA, APPLEWAY MITSUBISHI,
APPLEWAY SUBARU, APPLEWAY TOWING, APPLEWAY
TOYOTA, APPLEWAY VOLKSWAGEN, EAST TRENT AUTO
SALES, LEXUS OF SPOKANE, OPPORTUNITY CENTER, and
TSP DISTRIBUTORS; and AUTONATION, INC., a foreign
corporation,**

Petitioners/Appellants.

**RESPONDENT HERBERT NELSON'S ANSWER TO AMICUS
CURIAE MEMORANDA OF CAMP AUTOMOTIVE, INC. AND
LITHIA MOTORS, INC., CHARTER COMMUNICATIONS LLC,
AND ASSOCIATION OF WASHINGTON BUSINESS**

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ORIGINAL

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I. INTRODUCTION

For over 70 years, businesses in Washington State have paid a business and occupation tax (“B&O Tax”) for the privilege of doing business in Washington. Until a small handful of businesses, including Petitioners, initiated the practice of assessing and collecting B&O Tax (and sales tax on the B&O Tax) from their customers, it was settled that businesses paid their own B&O Tax as a cost of doing business, just as Washington consumers pay sales tax. The Washington Court of Appeals’ decision in this case confirmed that the practice of assessing and collecting B&O Tax from consumers contravenes the plain language of the B&O Tax statute. *See Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 121 P.3d 95 (2005). As Respondent Herbert Nelson highlighted in his answer to the petition for discretionary review, Petitioners Appleway Chevrolet, Inc. and AutoNation, Inc. (collectively “Appleway”) have failed to satisfy any of the criteria warranting discretionary review of that decision.

The memoranda filed by amici curiae Camp Automotive, Inc., and Lithia Motors, Inc. (“Camp and Lithia”), Charter Communications LLC (“Charter”), and the Association of Washington Business (“AWB”) (collectively, “Amici”) largely mirror the arguments in Appleway’s petition. In the interest of brevity, Mr. Nelson will not restate the points in his answer to the petition, which respond to most issues raised by Amici.¹

¹ The memoranda filed by Camp and Lithia and Charter focus on the first issue presented by Appleway’s petition: whether the Court of Appeals erred when it held

Rather, Mr. Nelson takes this opportunity to address new arguments raised by Amici and to demonstrate that Amici, like Petitioners, have failed to provide the Court with any grounds for granting discretionary review under RAP 13.4(b).

II. ARGUMENT

A. **Amici Fail to Show That the Court of Appeals' Decision Conflicts With A Decision of This Court**

As did Appleyway in its petition, Amici fail to show that the Court of Appeals' decision conflicts with a decision of this Court, and thus that review is appropriate under RAP 13.4(b)(1). Indeed, Camp and Lithia's amicus brief utterly fails to mention this ground for review,² and Charter's and AWB's briefing fails to do so explicitly, only suggesting, by citing several decisions of this Court, that the Court of Appeals has somehow ignored binding authority.

This is incorrect. Neither Charter nor AWB are able to point to any decisions of this Court which consider the specific question here: whether the Washington B&O tax statute, RCW 82.04 *et seq.*, permits businesses to assess and collect B&O tax from consumers.

RCW 82.04.500 prohibited Appleyway's practice of assessing and collecting B&O Tax from consumers. Only AWB's memorandum references the other issues in the petition: whether the Court of Appeals erred when it held Mr. Nelson had standing and a right to bring his claim under the Declaratory Judgment Act and whether the Superior Court abused its discretion when it certified a CR 23(b)(2) class. AWB Mem. at 6 – 10. AWB's arguments on these two issues replicate those presented in the petition and do not reference any new authority. Mr. Nelson thus incorporates by reference his answer to the petition on these issues. *See Answer to Pet.* at 11 – 20.

² As discussed below, the sole argument articulated in Camp and Lithia's amicus memorandum is that this case involves issues of "widespread public importance."

The B&O tax statute plainly states that the B&O Tax “[is not intended to be] construed as [a] tax[] upon the purchasers or consumers, but that [the B&O Tax] shall be levied upon, and collectible from, the person engaging in the business activities herein designated” RCW 82.04.500. Citing this Court’s decision in *Pub. Util. Dist. No. 3 of Mason County v. Washington*,³ Charter claims that the function of this statutory language is to ensure that businesses do not escape tax liability for the amount of tax “itemized” on customer invoices. Charter Mem. at 5–6. This argument ignores that the legality of the taxpayer’s “itemization” of the public utility tax in question was not an issue before the Court in *Pub. Util. Dist. No. 3*. Indeed, the governing statute for that public utility tax explicitly provides that public utility districts “shall have the power to add the amount of such tax to [their] rates or charges” RCW 54.28.070. In sum, nothing in this Court’s decision in *Pub. Util. Dist. No. 3* conflicts with the Court of Appeals’ decision in this case.

Amici also fail to cite any of this Court’s decisions which undercut the principles of statutory interpretation applied by the Court of Appeals. Charter claims that “Washington courts are not at liberty to graft new text onto clear tax statutes,” citing *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 587 P.2d 535 (1978). Charter Mem. at 3. While the *Vita* court refused to “add words to the statute to ascribe legislative intent,” Charter is unable to point to anything in the Court of Appeals’ decision which

³ 71 Wn.2d 211, 427 P.2d 713 (1967).

“added words” to the B&O Tax statute. Indeed, as the Court of Appeals noted, “RCW 82.04.500 specifically provides that the B&O tax is not to be ‘construed as taxes upon the purchasers or customers,’” and concluded that the “plain language” of the statute “provides that the B&O tax can be added to operating overhead but cannot be passed on to the customer as a tax.” *Nelson*, 129 Wn. App. at 942–43.

Finally, Charter asserts that “[w]hen a court construes tax statutes, ‘all provisions should be harmonized so that no words or phrases are rendered superfluous or meaningless,’” suggesting that the Court of Appeals’ failure to reference Washington’s public utility tax statute⁴ and the Washington Consumer Protection Act (“CPA”)⁵ in its analysis of the B&O Tax statute contravened this Court’s precedent. Charter Mem. at 9–10 (citing *City of Puyallup v. Pac. Northwest Bell Tel. Co.*, 98 Wn.2d 443, 448-49, 656 P.2d 1035 (1982)). The statutory provisions at issue in *City of Puyallup*, however, were provisions from the *same* law: a municipal ordinance⁶ enacting a B&O tax. *City of Puyallup*, 98 Wn.2d at 449–50. This Court’s recent decision in *Sheehan v. Cent. Puget Sound Reg’l Transit Auth.* underscores that any statutory provisions to be “harmonized” should be from “the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the

⁴ RCW 82.16 *et seq.*

⁵ RCW 19.86 *et seq.*

⁶ Washington courts apply the same rules of construction to interpretation of municipal ordinances as they do to interpretation of statutes. *City of Puyallup*, 98 Wn.2d at 448.

provision is found.”” *Sheehan*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) (citing *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002)). Here, the Court of Appeals appropriately referenced other provisions of the B&O tax statute. *See Nelson*, 129 Wn. App. at 942. The public utility tax is related to the B&O tax only to the extent that both taxes are excise taxes; the public utility tax statute is not part of the same act in which the relevant provisions of the B&O tax statute are found. In sum, the Court of Appeals did not contravene any principles of statutory interpretation established by this Court when it elected not to consider the language of the public utility tax statute (much less the CPA statute) in interpreting RCW 82.04.500 as prohibiting Appleway’s practice of assessing and collecting B&O Tax and B&O Sales Tax from its customers.

B. Amici Fail to Show That the Court of Appeals’ Decision Conflicts With Another Decision of the Court of Appeals

Amicus AWB claims that review is warranted under RAP 13.4(b)(2) because the Court of Appeals’ decision conflicts with a subsequent decision of the Court of Appeals, *Sprint Spectrum L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 127 P.3d 755 (2006). Nothing in *Sprint Spectrum*, however, casts doubt on Division III’s holding in *Nelson v. Appleway*. Whether Sprint could collect and assess B&O Tax from its customers was not the issue before Division I. Indeed, the *Sprint Spectrum* court interpreted a different tax statute (actually, a municipal ordinance) containing no provision similar to RCW 82.04.500. *See Sprint*

Spectrum, 131 Wn. App. at 341 (noting that the tax at issue is the city of Seattle’s “telephone business utility tax,” codified at Seattle Municipal Code (“SMC”) chapter 5.48).⁷ Dicta in *Sprint Spectrum* noting that “[t]here is no dispute that . . . Sprint may pass on the tax it owes as part of the price it charges for cellular service,” 131 Wn. App. at 346, has no bearing on whether Washington businesses may flout the unambiguous language of RCW 82.04.500 and assess and collect B&O Tax from their customers. AWB’s assertions notwithstanding, *Sprint Spectrum* does not conflict with *Nelson*, and does not support this Court’s granting review under RAP 13.4(b)(2).

C. Amici Provide No Support For Their Claim That This Case Involves Issues of Substantial Public Importance

Amici claim that this case involves issues of substantial public importance that should be determined by this Court. Camp and Lithia Mem. at 1–2; Charter Mem. at 1–2; AWB Mem. at 5.

Yet, none of Amici’s claims are supported by the record. Nor do Amici offer any affidavits or other evidence to support their assertions. Aside from one lawsuit against amicus Lithia and Camp and one against amicus Charter, Amici can point to nothing supporting a claim that “multiple” class actions have been filed subsequent to *Nelson*. Moreover, there is nothing in the record supporting AWB’s claim that “thousands” of

⁷ Attached hereto as Appendix A is a copy of all provisions of SMC Chapter 5.48. There is no provision comparable to RCW 82.04.500 providing that the tax is not to be construed as a tax on customers or purchasers. The SMC is also available on the City of Seattle’s website at <http://www.clerk.ci.seattle.wa.us/~public/toc/table.htm>.

Washington businesses assess and collect B&O Tax and B&O Sales Tax from consumers. Nor does AWB provide any evidence supporting such a claim. To the contrary, even the Department of Revenue's ("DOR") "Special Notice," to which both Petitioners and Amici urge the Court to defer, states that "[a]lthough a few businesses do choose to itemize the B&O tax, the *majority* does not." CP 24 (emphasis added).

D. The Court Should Not Accept Amicus Charter's Invitation to Review An Inapposite Issue Not Raised By the Parties Below

In addition to supporting Appleyway's petition, Charter asks this Court to review an issue not raised by the parties nor addressed by the courts below: whether the Court of Appeals erred because its interpretation of RCW 82.04.500 "runs contrary to the vital policies of certainty, consistency, and fair notice" that this Court's "settled interpretative canon" vis-à-vis taxing statutes "is designed to serve." Charter Mem. at 8. Specifically, Charter argues that the Court of Appeals erred when it failed to adopt the DOR's "settled interpretation" of RCW 82.04.500 in light of these "vital policies." *Id.*

The Court should decline Charter's request.

1. The Interpretive "Axiom" Proposed By Charter is Inapposite Here

Charter argues that "this Court has adopted the axiom that 'if there is any doubt as to the meaning of a taxing statute, it is to be construed in *favor of the taxpayer.*'" Charter Mem. at 7 (citing *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978)) (emphasis in original). Unlike *Vita*, however, the issues here do not involve a suit by a

taxpayer against the taxing authority. In all of the Washington opinions Charter cites in support of this claim, the dispute was between taxpayers and the taxing authority and the issue before the court was either the applicability of a specific tax to the taxpayer or was a challenge to the validity of the tax itself. *See, e.g., Vita*, 91 Wn.2d at 133 (taxpayer sought declaratory judgment that it was not subject to tax on fish handlers); *Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 546, 105 P.3d 391 (2005) (taxpayers' challenge to validity of state's assessment and calculation of estate taxes); *Group Health Co-op of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 393, 722 P.2d 787 (1986) (taxpayers' suit seeking refund of B&O tax based on statutory deduction); *In re Gunderson's Estate*, 93 Wn.2d 808, 809, 613 P.2d 1135 (1980) (appeal by state of decision permitting estates to defer payment of inheritance tax).⁸ None of the cases cited by Charter concern a dispute between consumers and a taxpayer who has chosen to disregard the plain language of a statute and assess and collect a tax from its customers, as is the case here. As this Court held most recently in *Hemphill*, “[a]mbiguities in taxing statutes are construed ‘most strongly *against the government* and in favor of the taxpayer.’” 153 Wn.2d at 552 (citing *Dep't of Revenue v. Hoppe*,

⁸ The non-Washington authorities cited by Charter are similar. *See White v. Aronson*, 302 U.S. 16, 17, 58 S. Ct. 95 (1937) (suit against tax collector regarding applicability of federal sporting good tax statute); *Board of Assessors of Town of Brookline v Prudential Ins. Co. of America*, 38 N.E.2d 145, 148 (Mass. 1941) (appeal from decision of taxing authority granting abatement of real property tax assessment); *Comm'r of Revenue v. Oliver*, 765 N.E.2d 742, 733–34 (Mass. 2002) (appeal from decision of taxing authority holding taxpayer did not owe state income tax on certain pension plan payments).

82 Wn.2d 549, 552, 512 P.2d 1094) (1973)) (emphasis added). Here, the government is not a party to this suit. Nor do Appleway and Amici dispute the legality of the B&O Tax or its applicability to retail sales transactions. If Appleway and Amici have a dispute with the Department of Revenue, that is a matter for another day.

2. The Special Notice Is Not A “Settled Interpretation” of the B&O Tax Statute

Charter claims that the DOR’s interpretation of RCW 82.04.500, as exemplified by the Special Notice, is a “settled interpretation” of the statute that should be adopted by this Court. Charter Mem. at 8. As the Superior Court held, based on other DOR publications “which advise[] the taxpayer not to bill the B&O tax directly to the consumer,” “[i]t is clear this issue is not well settled at the Department of Revenue level.” CP 581.⁹ The Court of Appeals implicitly agreed when it held that it need not defer to the Special Notice. *Nelson*, 129 Wn. App. at 946. An informal agency opinion that is not the result of a formal adjudication by the DOR nor a legislative rule codified in the Washington Administrative Code is not a “settled interpretation.”

3. Charter’s Request For Review Is Not Proper

Even if the Court found some power in Charter’s assertions, discretionary review of this issue would be inappropriate. None of the

⁹ The Superior Court’s opinion referenced a DOR “Business and Occupation Tax Fact Sheet,” dated September 2004, which states that “[t]he B&O tax is a cost of doing business and should not be billed to your customer as a separately stated item (as is the sales tax).” *See* CP 498.

parties has ever raised this argument. And neither the Superior Court nor the Court of Appeals considered the issue in their respective (and concurring) interpretations of RCW 82.04.500. The issue on which the parties disagreed, and the issue that the courts addressed, was the level of deference to be accorded the Special Notice. *See Nelson*, 129 Wn. App. at 946.

Charter's argument is procedurally incorrect. *See Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (refusing to address "arguments raised only by amicus"). Moreover, this Court "does not generally consider issues raised for the time in a petition for review." *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998). Thus, the Court should decline to consider the new argument raised by Charter.

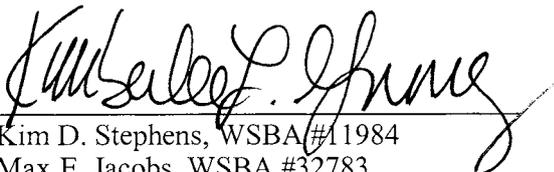
III. CONCLUSION

For the foregoing reasons, Mr. Nelson respectfully requests that the Court reject Amici's arguments and deny Appleway's petition for discretionary review.

Date: April 3, 2006.

Respectfully submitted,

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APPENDIX A



Seattle Municipal Code

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Chapter 5.48 BUSINESS TAX -- UTILITIES

Sections:

- 5.48.010 Exercise of revenue license power.
- 5.48.015 Administrative provisions.
- 5.48.020 Definitions.
- 5.48.050 Occupations subject to tax -- Amount.
- 5.48.055 Solid waste activities subject to tax -- Amount.
- 5.48.060 City of Seattle subject to tax.
- 5.48.070 Exceptions and deductions.
- 5.48.072 Anti-pyramiding credit for haulers of CDL Waste.
- 5.48.260 Allocation of revenues -- Cellular telephone service.

Severability: If any provision or section of this chapter shall be held void or unconstitutional, all other parts, provisions and sections of this chapter not expressly so held to be void or unconstitutional shall continue in full force and effect.

(Ord. 62662 Section 23, 1932.)

Cases: A city excise tax which makes a distinction between national banks and the chattel loan business is not unreasonable. *Austin v. Seattle*, 176 Wn. 654, 30 P.2d 646 (1934).

SMC 5.48.010

Exercise of revenue license power.

The provisions of this chapter shall be deemed an exercise of the power of The City of Seattle to license for revenue. The provisions of this chapter are subject to periodic statutory or administrative rule changes or judicial interpretations of the ordinances or rules. The responsibility rests with the taxpayer to reconfirm tax computation procedures and remain in compliance with the City code.

(Ord. 118315 Section 1, 1996: Ord. 62662 Section 1, 1932.)

SMC 5.48.015

Administrative provisions.

The provisions contained in SMC Chapter 5.55 shall have full force and application with respect to taxes imposed under the provisions of this chapter except as expressly stated to the contrary herein.

(Ord. 120668 Section 17, 2001.)

SMC 5.48.020

Definitions.

A. The definitions contained in SMC 5.30 shall be fully applicable to the provisions of this chapter unless otherwise expressly defined in this chapter.

B. "Gross income" means the value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses, including the amount of credit losses actually sustained by the taxpayer whose regular books or accounts are kept upon an accrual basis.

(Ord. 120794 Section 119, 2002; Ord. 120668 Section 18, 2001; Ord. 120182 Sections 1, 2, 2000; Ord. 120181 Section 97, 2000; Ord. 118397 Section 84, 1996; Ord. 118315 Section 2, 1996; Ord. 117401 Section 1, 1994; Ord. 117169 Section 44, 1994; Ord. 116955 Section 1, 1993; Ord. 115908 Section 2, 1991; Ord. 115756 Section 1, 1991; Ord. 113690 Section 5, 1987; Ord. 112111 Section 1, 1985; Ord. 112022 Section 1, 1984; Ord. 110274 Section 1, 1981; Ord. 102620 Section 1, 1973; Ord. 62662 Section 2, 1932.)

SMC 5.48.050

Occupations subject to tax -- Amount.

There are levied upon, and shall be collected from everyone, including The City of Seattle, on account of certain business activities engaged in or carried on, annual license fees or occupation taxes in the amount to be determined by the application of rates given against gross income as follows:

A. Upon everyone engaged in or carrying on a telephone business, a fee or tax equal to six (6) percent of the total gross income from such business provided to customers within the City. The tax liability imposed under this section shall not apply for that portion of gross income derived from charges to another telecommunications company, as defined in RCW 80.04.010, for connecting fees, switching charges, or carrier access charges relating to intrastate toll telephone services, or for access to, or charges for, interstate services, or charges for network telephone service that is purchased for the purpose of resale.

(Such charges, except for interstate service, shall be taxed under SMC Chapter 5.45.) The total gross income shall also include all charges by the provider of cellular or cellular mobile telephone services provided to its customers in any taxing jurisdiction (intrastate or interstate), which are billed to a "place of primary use" located in Seattle by or for the home service provider, irrespective of whether the services are provided by the home service provider.

B. Upon everyone engaged in or carrying on the business of selling, brokering, or furnishing gas for hire, a fee or tax equal to six (6) percent of the total gross income from such business in the City.

C. Upon everyone, including The City of Seattle, engaged in or carrying on the business of selling or furnishing water for hire to consumers, a fee or tax equal to fifteen and fifty-four one-hundredths (15.54) percent of the total gross income from such retail business in the City; provided that as to The City of Seattle in the conduct of its municipal water utility, such tax shall be applicable to the business of such utility done without, as well as within, the City.

D. Upon everyone, including The City of Seattle, engaged in or carrying on the business of selling or furnishing electric light and power to consumers, a fee or tax equal to six (6) percent of the total gross income from such business in the City. The fee or tax imposed upon the municipal light and power system of the City shall be applicable to the business of such system both within and without the City.

E. Upon everyone conducting or engaged in the business of supplying steam heat or power to consumers, a fee or tax equal to six (6) percent of the total gross income from such business in the City.

F. Upon The City of Seattle in respect to the conduct, maintenance, and operation of its municipal drainage system as a public utility a fee or tax equal to eleven and one-half (11.5) percent of the total gross income from the drainage charges provided for under City ordinances.

G. Upon The City of Seattle in respect to the conduct, maintenance, and operation of its municipal wastewater system as a public utility a fee or tax equal to twelve (12) percent of the total gross income from the wastewater charges provided for under City ordinances.

H. As to solid waste, see Section 5.48.055.

I. Upon everyone engaged in the business of operating or conducting a cable television system (CATV), a fee or tax equal to ten (10) percent of the total gross income from gross subscriber revenues. For purposes of this chapter, "gross subscriber revenues" means and includes those revenues derived from the supplying of subscription service, that is, installation fees, disconnect and reconnect fees, fees for regular cable benefits including the transmission of broadcast signals and access and origination channels and per-program or per-channel charges; provided the tax liability imposed under this section shall not include leased channel revenue, advertising revenues, or any other income derived from the system, which shall be taxed under SMC Chapter 5.45. The business of operating or conducting a cable television system (CATV) does not include the provision of interactive two-way communications over cable. Such activities shall be reported under telephone business.

(Ord. 121987 Section 2, 2005; Ord. 121673 Section 1, 2004; Ord. 121672 Section 1, 2004; Ord. 121671 Section 1, 2004; Ord. 121266 Section 31, 2003; Ord. 120668 Section 19, 2001; Ord. 120647 Section 1, 2001; Ord. 119860 Section 1, 2000; Ord. 118315 Section 4, 1996; Ord. 117183 Section 1(part), 1994; Ord. 116955 Section 2, 1993; Ord. 116460 Section 1, 1992; Ord. 116429 Section 1, 1992; Ord. 116186 Section 1, 1992; Ord. 115954 Sections 1-4, 1991; Ord. 115908 Section 1, 1991; Ord. 115756 Section 2, 1991; Ord. 115549 Section 1, 1991; Ord. 115422 Section 1, 1990; Ord. 115386 Section 1, 1990; Ord. 115055 Section 1, 1990; Ord. 114779 Section 1, 1989; Ord. 114371 Section 1, 1989; Ord. 114212 Section 1, 1988; Ord. 114155 Section 9, 1988; Ord. 113714 Section 1, 1987; Ord. 113690 Section 6, 1987; Ord. 113375 Section 1, 1987; Ord. 113172 Section 1, 1986; Ord. 112943 Section 1, 1986; Ord. 112552 Section 1, 1985; Ord. 112021 Section 1, 1984; Ord. 111432 Section 1, 1983; Ord. 110843 Section 1, 1982; Ord. 110590 Section 1, 1982; Ord. 110274 Section 2, 1981; Ord. 108886 Section 1, 1980; Ord. 108639 Section 1, 1979; Ord. 106526 Section 1, 1977; Ord. 106088 Section 1, 1976; Ord. 106041 Section 1, 1976; Ord. 104434 Section 1, 1975; Ord. 104357 Section 1, 1975; Ord. 104033 Section 1, 1974; Ord. 98423 Section 2, 1969; Ord. 97288 Section 1, 1968; Ord. 94116 Section 1, 1965; Ord. 90511 Section 1, 1961; Ord. 87623 Section 1, 1958; Ord. 85885 Section 1, 1957; Ord. 84414 Section 1, 1955; Ord. 62662 Section 5, 1932.)

Cases: A City ordinance which subjects a private public utility company to a license or excise tax based on gross income, while leaving untaxed a competing business operated by the City, is not unconstitutional as a denial of equal protection or as a taking of property without due process of law. Puget Sound Power and Light Co. v. Seattle, 219 U.S. 620, 54 S.Ct. 542, 78 L.Ed. 1028 (1934), aff'g 172 Wn. 668, 21 P.2d 727 (1933).

Ordinance 62662, an excise tax measured by the gross income derived from business within the City, is not so vague and indefinite as to violate the due process clause of the Fourteenth Amendment, as applied to a foreign telephone company doing business within and without the City. Pacific Teleph. & Teleg. Co. v. Seattle, 291 U.S. 300 (1934) aff'g 172 Wn. 649, 21 P.2d 721 (1933).

Ordinance 62662, which requires burglar alarm system businesses to pay a higher tax rate than other types of burglar prevention services, held not to violate the equal protection clause of Article 1, Section 12 of the State Constitution. Sonitrol Northwest v. Seattle, 84 Wn.2d 588, 528 P.2d 474 (1974).

SMC 5.48.055

Solid waste activities subject to tax -- Amount.

There is levied upon, and shall be collected from everyone including The City of Seattle, on account of the following business activities engaged in or carried on with respect to solid waste, an annual license fee or occupation tax in the amount to be determined by the application of the rates given below:

A. Upon everyone engaged in or carrying on the business of operating a garbage transfer station or upon the business of transferring solid waste generated in or outside of Seattle from one (1) mode of transportation to another a fee or tax equal to Six Dollars and

Twenty-five Cents (\$6.25) per ton of the waste handled for transportation or transported for garbage disposal, landfill, or incineration purposes. Effective January 1, 2003, upon everyone engaged in or carrying on the business of operating a garbage transfer station or upon the business of transferring solid waste generated in or outside of Seattle from one (1) mode of transportation to another a fee or tax equal to Six Dollars and Forty-five Cents (\$6.45) per ton of the waste handled for transportation or transported for garbage disposal, landfill, or incineration purposes. To prevent pyramiding of the tax under this subsection when two (2) or more transfers occur in Seattle, the fee or tax is imposed only upon the last transferor and shall not apply to earlier transfers. Waste is transferred from one (1) mode of transportation to another whenever it is moved from a motor vehicle (including, for example, landgrading or earthmoving equipment), barge, train or other carrier to another motor vehicle (including landgrading or earthmoving equipment), barge, train or other carrier, irrespective of whether or not temporary storage occurs in the process, provided that waste shall not be considered transferred if it has been placed in a sealed shipping container prior to being moved from one mode of transportation to another in the City. Solid waste transported for recycling or reuse as recovered material (which solid waste shall contain no more than ten (10) percent non-recyclable material, by volume), yardwaste destined for composting, items to be scrapped for salvage, and sand and gravel for construction of a public improvement shall not be included in the tonnage by which the fee or tax is measured.

B. Upon everyone, including The City of Seattle, engaged in or carrying on the business of the collection of garbage, rubbish, trash, CDL Waste, and other solid waste, a fee or tax measured by the total of components 1 and 2 below:

1. Eleven and one-half (11.5) percent of the total gross income from the collection of solid waste in Seattle, less income derived from the activities identified in subsection C of this section; and

2. a. Twelve Dollars and Five Cents (\$12.05) per ton of solid waste collected in Seattle, excluding the tonnage from recycling when such recycling contains no more than ten (10) percent non-recyclable material by volume, yardwaste destined for composting, items to be reused or scrapped for salvage, and/or sand and gravel for construction of a public improvement; or

b. Effective January 1, 2003, Twelve Dollars and Forty Cents (\$12.40) per ton of solid waste collected in Seattle, excluding the tonnage from recycling when such recycling contains no more than ten (10) percent non-recyclable material by volume, yardwaste destined for composting, items to be reused or scrapped for salvage, and/or sand and gravel for construction of a public improvement.

C. The gross receipts factor identified in subsection B1 of this section above shall exclude income derived from:

1. Collection and/or sale of recycled materials and/or recovered materials, including charges for the lease or rental of containers used in the collection of recycled/recovered materials;

2. Collection and/or sale after processing of yardwaste products, including charges for the lease or rental of containers used in the collection of yardwaste products;

3. Sale of containers used for collection of residential solid waste;
4. Collection and disposal of bulky items and white goods;
5. Grants and contracts from governmental agencies;
6. The City of Seattle for collecting or disposing of residential garbage and other solid waste;
7. The portion of the City's solid waste collection receipts expended for collection of recyclable materials and yardwaste; and
8. Transportation or deposit of sand and gravel for construction or a public improvement.

D. The tax imposed under subsection A of this section applies to transferring in the City of all solid waste generated in or outside the City and the tax imposed under subsection B of this section applies only to collecting solid waste in the City. The taxes imposed under subsections A and B of this section are cumulative as to solid waste collected and transferred in the City, even though the same tonnage of solid waste may be involved at each successive stage in the disposal process, and the economic burden of the two (2) taxes may aggregate.

E. Income derived from activities excluded from the gross receipts factor as described in subsections B and C of this section above shall be taxed under SMC Chapter 5.45.

(Ord. 121987 Section 3, 2005; Ord. 121670 Section 1, 2004; Ord. 121000 Section 1, 2002; Ord. 120668 Section 26, 2001; Ord. 119737 Section 7, 1999; Ord. 118315 Section 5, 1996; Ord. 117183 Section 1(part), 1994; Ord. 116955 Section 2, 1993; Ord. 116460 Section 1, 1992; Ord. 116429 Section 1, 1992; Ord. 116186 Section 1, 1992; Ord. 115954 Sections 1-4, 1991; Ord. 115908 Section 1, 1991; Ord. 115756 Section 2, 1991; Ord. 115549 Section 1, 1991; Ord. 115422 Section 1, 1990; Ord. 115386 Section 1, 1990; Ord. 115055 Section 1, 1990; Ord. 114779 Section 1, 1989; Ord. 114371 Section 1, 1989; Ord. 114212 Section 1, 1988; Ord. 114155 Section 9, 1988; Ord. 113714 Section 1, 1987; Ord. 113690 Section 6, 1987; Ord. 113375 Section 1, 1987; Ord. 113172 Section 1, 1986; Ord. 112943 Section 1, 1986; Ord. 112552 Section 1, 1985; Ord. 112021 Section 1, 1984; Ord. 111432 Section 1, 1983; Ord. 110843 Section 1, 1982; Ord. 110590 Section 1, 1982; Ord. 110274 Section 2, 1981; Ord. 108886 Section 1, 1980; Ord. 108639 Section 1, 1979; Ord. 106526 Section 1, 1977; Ord. 106088 Section 1, 1976; Ord. 106041 Section 1, 1976; Ord. 104434 Section 1, 1975; Ord. 104357 Section 1, 1975; Ord. 104033 Section 1, 1974; Ord. 98423 Section 2, 1969; Ord. 97288 Section 1, 1968; Ord. 94116 Section 1, 1965; Ord. 90511 Section 1, 1961; Ord. 87623 Section 1, 1958; Ord. 85885 Section 1, 1957; Ord. 84414 Section 1, 1955; Ord. 62662 Section 5, 1932.)

SMC 5.48.060

City of Seattle subject to tax.

Subsections 5.48.050 C, D, and F, Section 5.48.055, and Sections 5.55.050 C, 5.55.090 A and B, and 5.55.110 shall, so far as permitted by law, be applicable to The City of Seattle, except that the City

shall not, as a taxpayer, be required to conform to the other provisions of this chapter.

(Ord. 120668 Section 28, 2001; Ord. 118315 Section 6, 1996; Ord. 117183 Section 2, 1994; Ord. 116460 Section 2, 1992; Ord. 104802 Section 1, 1975; Ord. 99524 Section 1, 1970; Ord. 84414 Section 2, 1955; Ord. 62662 Section 6, 1932.)

SMC 5.48.070

Exceptions and deductions.

A. There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed, amounts derived from business which the City is prohibited from taxing under the Constitution or laws of the United States, the Constitution or laws of the state, or the Charter of the City; and any amounts collected by the taxpayer as an excise tax (trust funds) and remitted to the taxing authority, including but not limited to the leasehold excise tax, retail sales and use tax, State's refuse collection tax and admission tax.

B. A taxpayer engaged in a telephone business shall exclude from the total taxable gross income taxed under this chapter charges to another telecommunications company, for such fees and charges as are excluded under SMC Section 5.48.050 A. This excluded revenue shall be recorded and taxed under SMC Chapter 5.45.

C. A deduction from gross income shall be allowed, only to cellular telephone service companies who keep their regular books of account on an accrual basis, for credit losses actually sustained by a taxpayer as a result of cellular telephone service business.

(Ord. 121987 Section 4, 2005; Ord. 120668 Sections 20, 27, 2001; Ord. 118315 Section 7, 1996; Ord. 116951 Section 4, 1993; Ord. 116462 Section 1, 1992; Ord. 114850 Section 1, 1989; Ord. 112943 Section 2, 1986; Ord. 100327 Section 1, 1971; Ord. 62662 Section 9, 1932.)

Cases: Since the exactions levied under Seattle Ordinance 62662 and the corresponding state law are not "taxes imposed or levied upon the sale or distribution of property or services," the amounts paid pursuant to the terms of such ordinance and state law are not deductible under Section 9 of Ordinance 62662. *Seattle Gas Co. v. Seattle*, 192 Wn. 456, 73 P.2d 1312 (1937).

SMC 5.48.072

Anti-pyramiding credit for haulers of CDL Waste.

There shall be allowed to anyone who is engaged in the business of the collection of CDL Waste and subject to tax under Section 5.48.055 B a credit against the tax in the amount of One Dollar and Forty-three Cents (\$1.43) per ton for each ton of CDL Waste collected in the City, delivered to a person engaged in or carrying on the business of transferring CDL Waste from one (1) mode of transportation to another under Section 5.48.055 A (called the "transfer station"), and used by the transfer station in measuring the tax due under Section 5.48.055 A upon the transfer station's activities of transferring CDL Waste from one (1) mode of transportation to another. When the transfer station

engages in recycling activities, the tonnage used by the taxpayer in measuring the credit shall be reduced by the proportion of the transfer station's tonnage recycled.

This section is intended to prevent pyramiding of the economic impact of the tax imposed under Section 5.48.055 A on CDL Waste, and is limited in its application to fulfilling that purpose.

(Ord. 121987 Section 5, 2005; Ord. 121266 Section 32, 2003; Ord. 118315 Section 8, 1996; Ord. 116955 Section 3, 1993.)

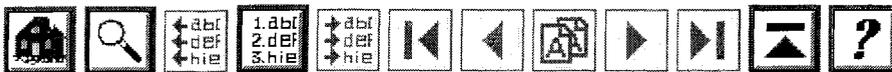
SMC 5.48.260

Allocation of revenues -- Cellular telephone service.

A. In determining the total gross income from telephone business in the City for purposes of Section 5.48.050 A, there shall be included all gross income from cellular telephone service (including roaming charges incurred by Seattle customers outside this state) provided to customers whose "place of primary use" is in the City, regardless of the location of the facilities used to provide the service. The customer's "place of primary use" is, with respect to each telephone: (a) the customer's address; or (b) the customer's place of residence if the telephone is for personal use, and in both cases must be located within the licensed service area of the home service provider. Roaming charges and cellular telephone charges to customer whose principal service address is outside Seattle will not be taxable even though those mobile services are provided within Seattle.

B. There is a rebuttable presumption that the "place of primary use" address shown on the cellular telephone service company's records is accurate. If the cellular telephone service company knows or should have known that a customer's place of primary use address for a telephone is within the City then the gross revenue from cellular telephone service provided to that customer with respect to that telephone is to be included in the company's gross income.

(Ord. 120668 Section 21, 2001; Ord. 117401 Section 2(part), 1994.)



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CERTIFICATE OF SERVICE

C. J. HERRITT

I, Juliet Albertson, declare and say as follows:

CLERK

1. I am a citizen of the United States and resident of the state of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address and telephone number are 1700 Seventh Avenue, Suite 2200, Seattle, Washington 98101, 206.682.5600.

2. On April 3, 2006, I caused a true and correct copy of the foregoing document to be personally delivered to the following parties in the manner indicated at the addresses listed below.

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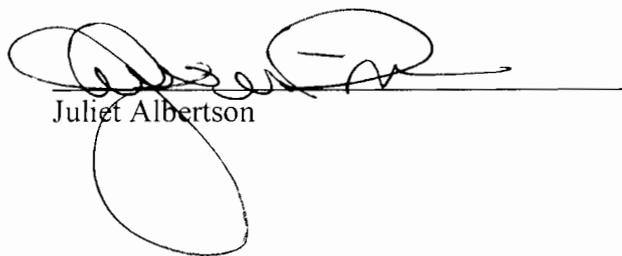
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*Attorneys for Amicus Curiae
Association of Washington
Business*

I declare under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

Executed April 3, 2006, at Seattle, Washington.



Juliet Albertson

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STATE OF WASHINGTON
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BY C. J. HERRITT
[Signature]
CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
|------------------------------------|---|-------------------------|
| HERBERT NELSON, on his |) | Case No. 77985-6 |
| behalf and on behalf of all others |) | |
| similarly situated, |) | |
| |) | MOTION OF AMICUS |
| Respondent-Appellee |) | CHARTER |
| |) | COMMUNICATIONS FOR |
| v. |) | PERMISSION TO SUBMIT AN |
| |) | AMICUS CURIAE |
| APPLEWAY CHEVROLET, |) | MEMORANDUM IN |
| INC., et al. |) | SUPPORT OF PENDING |
| |) | PETITION FOR REVIEW |
| Petitioners-Appellants. |) | |

COMES NOW Charter Communications LLC (“Charter”), and respectfully moves, pursuant to Washington Rules of Appellate Procedure 10.6(b) and 13.4(h), for permission to submit an amicus curiae memorandum in support of the pending Petition for Review. In support, Charter states as follows:

APPLICANT’S INTEREST AND THE PERSON OR GROUP APPLICANT REPRESENTS

1. Charter’s predecessors and affiliates were and are engaged in the business of providing cable television service to subscribers in several states, including the State of Washington. Shortly after the

appellate court issued its decision in this case, Charter was served with a “Complaint for Class Action” captioned *Brown v. Charter Communications, LLC* (Chelan County Superior Court Case No. 05-2-01218-2) based upon allegations similar to those made by respondent here. (See Exhibit A).

2. Like respondent in this case, the individual named plaintiff in *Brown* brings a putative class action alleging that RCW 82.04.500 prohibits itemization of the Washington Business and Occupation (“B&O”) Tax on customer invoices. The proposed class definition includes “[A]ll persons ... who have purchased or received services provided by Charter Communications, LLC, and ... [w]ho, within the applicable statute of limitations, were charged Washington State business and occupation (B&O) tax as an itemized charge on their monthly bill.”

**APPLICANT’S FAMILIARITY WITH THE ISSUES
INVOLVED IN THE REVIEW AND WITH THE SCOPE OF THE
ARGUMENT PRESENTED OR TO BE PRESENTED BY THE
PARTIES**

3. Since being served the *Brown* Complaint, Charter has thoroughly reviewed the written arguments to, and the resulting opinion by, the appellate court in this case.

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**SPECIFIC ISSUES TO WHICH THE AMICUS CURIAE
BRIEF WILL BE DIRECTED**

4. Charter’s memorandum would succinctly address the meaning and effect of RCW 82.04.500 as confirmed by the Department of Revenue “Special Notice” in September 2000 and supporting case law.

**APPLICANT’S REASON FOR BELIEVING THAT ADDITIONAL
ARGUMENT
IS NECESSARY ON THESE SPECIFIC ISSUES**

5. Charter’s memorandum would provide additional support for petitioner’s demonstration that the appellate court’s ruling is contrary to the plain terms of RCW 82.04.500. The ruling contravenes fundamental canons of statutory construction which rest upon the vital policies of certainty, consistency and fair notice applicable to tax statutes.

WHEREFORE, Charter respectfully moves, pursuant to Washington Rules of Appellate Procedure 10.6(b) and 13.4(h), for permission to submit an amicus curiae memorandum in support of the pending Petition for Review. In further support, Charter incorporates by this reference its prior-filed “Motion of Amicus Charter Communications for Extension of Time to Submit Proposed Amicus Curiae Memorandum.”

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Charter proposes to file its amicus curiae memorandum on or before January 27, 2006.

DATED this 17th day of January, 2006.

Respectfully submitted,

FARLEIGH WITT

By: /s/ Kimberley Hanks McGair
Kimberley Hanks McGair,
Of Attorneys for Amicus Charter
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**FILED AS ATTACHMENT
TO E-MAIL**

1 resident of Chelan County, Washington. Brown has agreed to act as class
2 representative in this matter.

3 1.2 Defendant. Charter Communications, LLC ("Charter") is a
4 Delaware limited liability company doing business in Chelan County,
5 Washington.

6 1.3 Putative Class Members. The members of the relevant class
7 include all persons:

8 (a) Who have purchased or received services provided by
9 Charter Communications, LLC, and

10 (b) Who, within the applicable statute of limitations, were
11 charged Washington State business and occupation (B&O) tax as an itemized
12 charge on their monthly bill.

13 II. JURISDICTION AND VENUE

14 2.1 The acts complained of in this lawsuit occurred in whole or in part in
15 Chelan County, Washington.

16 2.2 Jurisdiction and venue are proper pursuant to RCW 4.12.020,
17 4.12.025, and other applicable law.

18 III. PROPRIETY OF CLASS ACTION PROSECUTION

19 3.1 Impracticality of Joining All Members of the Class as Parties Due to
20 Size of Class - CR 23(a)(1). The exact number of persons and/or entities
21 similarly situated to the Representative Plaintiff is now unknown. However,

1 Charter is one of the largest providers of cable television service, digital
 2 television service, and high speed Internet service in the state of Washington,
 3 and it is estimated that the number of such persons is in the hundreds of
 4 thousands. The exact number of such persons may be identified from Defendant
 5 Charter's records of customers in Washington State, and such persons may be
 6 identified with particularity through appropriate judicial discovery procedures,
 7 such that it would be possible to give such persons actual notice of these
 8 proceedings, if required.

9 3.2 Existence of Questions of Law or Fact Common to the Class - CR
 10 23(a)(2). There exist questions of law and fact common the Representative
 11 Plaintiff's claim and the claims of the putative class members, such as those set
 12 forth for Representative Plaintiff James Brown individually in paragraphs 4.1
 13 through 9.5.

14 3.3 Claims of the Representative Party are Typical of Claims of the
 15 Class - CR 23(a)(3). The claims of the Representative Plaintiff are similar to all
 16 others in that the Plaintiffs are or have been customers of Charter, and have
 17 been and are continuing to be, charged Washington State B&O tax as an
 18 itemized charge on their monthly bills from Charter.

19 3.4 The Representative Party Fairly and Adequately Protects the
 20 Interest of the Class - CR 23(a)(4). The Representative Plaintiff comes before
 21 this Court in the same capacity as any other litigant seeking redress for

1 | grievances and to seek class relief for all of those persons exposed to the same
2 | harm for which he is aggrieved. The adequacy of the Representative Plaintiff's
3 | ability to fairly and adequately protect the interest of the class does not depend
4 | upon his financial status but rather upon:

5 | (a) The capacity of chosen counsel to adequately prosecute the
6 | case on his behalf and on the behalf of the putative class. Plaintiffs' counsel are
7 | experienced trial attorneys who have engaged in extensive trial practice and
8 | have considerable experience in all aspects of class action litigation from several
9 | other class action cases. Plaintiffs' counsel has the necessary skills, expertise,
10 | and competency to adequately represent the Plaintiffs' interest in those of the
11 | class.

12 | (b) The fact that the Representative Plaintiff does not have any
13 | interests which are antagonistic to those of the class;

14 | (c) The fact that the Representative Plaintiff is ready and willing
15 | to bring this class action in a representative capacity on behalf of the putative
16 | class.

17 | 3.5 This Class Action is Maintainable Under CR 23(b). In addition to
18 | satisfying CR 23(a), the Plaintiffs' claims satisfy the conditions of CR 23(b)(1), (2)
19 | and (3).

20 | (a) CR 23(b)(1)(A) and (B). The prosecution of separate actions
21 | by individual members of the class would create a risk of inconsistent or varying

1 adjudications which would establish incompatible standards of conduct for the
 2 Defendant and would also create the risk of adjudication with respect to
 3 individual members of the class which would, as a practical matter, be dispositive
 4 of the interests of other persons not party to the adjudication.

5 (b) CR 23(b)(2). The defendant has acted on grounds generally
 6 applicable to all putative class members, making final injunctive relief appropriate
 7 with respect to the class as a whole.

8 (c) CR 23(b)(3). Alternatively, the resolution of the numerous
 9 legal and factual questions pertaining to the putative class members
 10 predominates over any questions affecting only individual members such that the
 11 prosecution of a class action is superior to other available methods for the fair
 12 and efficient adjudication of this controversy. In this regard, there should be little,
 13 if any, interest in individual members of the class controlling the prosecution of a
 14 separate action for this relief since the relief sought is to apprise the entire class
 15 membership of their rights to damages or reductions in charges. This action is a
 16 superior method in preventing future economic and pecuniary loss to thousands
 17 of Washington citizens and members of the public at large in purchasing cable
 18 television services, digital television services, and high speed internet services.
 19 This action is uniquely directed to preserve the integrity and safety of Washington
 20 citizens, the sanctity of business ventures, and to ensure that all Washington
 21 citizens are protected in the future by providing that businesses operating in

1 Washington State may not pass along B&O tax to consumer customers as an
 2 itemized charge. The class will benefit by redress from the ongoing action which,
 3 if left to hundreds of thousands of individual actions, would greatly congest the
 4 forums of the Superior Courts of the state of Washington. Any difficulties which
 5 may be encountered in this action will be slight compared to the impracticality of
 6 having hundreds of thousands of individuals bringing individual actions and
 7 thereby unnecessarily burdening the courts throughout the state of Washington.
 8 The class litigation is a fair, efficient and expeditious vehicle for providing redress
 9 to both unnamed and named plaintiffs and to as yet unidentified class members.
 10 This action is superior to any other available method for the fair and efficient
 11 adjudication of the controversy.

IV. FACTS

13 4.1 Over the past several years Plaintiff James A. Brown purchased
 14 cable television service and high speed internet service from Charter.

15 4.2 Brown continues to be a customer of Charter.

16 4.3 Brown's monthly bill from Charter has included an itemized charge
 17 for Washington State B&O tax for the monthly cable television service and high
 18 speed internet service provided by Charter.

19 4.4 It is unlawful for a business operating in Washington to pass along
 20 Washington State B&O tax to customers by including such as an itemized charge
 21 on a bill or invoice.

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V. FIRST CAUSE OF ACTION: DECLARATORY RELIEF

5.1 Brown has a statutory legal right under RCW 82.04.500 that is capable of judicial protection.

5.2 Pursuant to Washington's Uniform Declaratory Judgments Act (RCW 7.24), Brown seeks a declaratory judgment that Charter has violated RCW 82.04.500 by the manner in which it collects the B&O tax from its customers.

5.3 Brown also seeks further relief in this declaratory action pursuant to RCW 7.24.080, as set forth below.

VI. SECOND CAUSE OF ACTION: INJUNCTIVE RELIEF

6.1 Brown requests that the Court issue an injunction permanently enjoining Charter from assessing, collecting, passing through or itemizing the B&O taxes from customers in Washington.

VII. THIRD CAUSE OF ACTION: RESTITUTION

7.1 Brown requests that the Court enter judgment against Charter so that Brown and the other class members may receive restitution. Restitution should be awarded to the extent Charter has been unjustly enriched by assessing, collecting, passing through or itemizing the B&O taxes from its customers in Washington.

VIII. FOURTH CAUSE OF ACTION: BREACH OF CONTRACT

8.2 Charter's unlawful assessment, collection, passing through or itemization of the B&O taxes to its Washington customers as herein alleged

1 constitutes breach of contract. Brown therefore seeks judgment in favor of
 2 Brown and the other class members for any damages caused by Charter's
 3 breach of contract.

4 **IX. FIFTH CAUSE OF ACTION: VIOLATION OF THE WASHINGTON**
CONSUMER PROTECTION ACT, RCW 19.86, et. seq.

5
 6 9.1 Charter engaged in unfair or deceptive acts by passing along the
 7 Washington State B&O tax by including such as an itemized charge on
 8 customers' monthly bills.

9 9.2 Charter violated RCW 82.04.500.

10 9.3 Charter's above-described actions occurred in the conduct of its
 11 trade or commerce.

12 9.4 Charter's above-described actions affect the public interest.

13 9.5 Charter's actions caused injury to Plaintiffs in an amount to be
 14 determined at trial.

15 **IX. PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff James A. Brown, individually and on behalf of
 17 others similarly situated, prays that the court grant the following relief:

18 1. For declaratory judgment that Charter has violated RCW 82.04.500
 19 by the manner in which it collects the B&O tax from its customers.

20 2. For a permanent injunction against Charter enjoining Charter from
 21 engaging in the above-described unlawful and/or unfair or deceptive business

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acts.

3. For an award of restitution to the extent Charter has been unjustly enriched.

4. For an award of damages based on Charter's breach of contract.

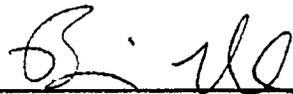
5. For an award of treble and other damages for violation of the Washington Consumer Protection Act, RCW 19.86, et. seq.

6. For an award of reasonable attorney's fees and costs based on RCW 19.86, et. seq., or other legal or equitable bases.

7. For such and other further relief as the court deems just and proper.

DATED this 14 day of November, 2005.

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By 
JAMES M. DANIELSON, WSBA #01629
BRIAN C. HUBER, WSBA #23659
Attorneys for Plaintiff

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STATE OF WASHINGTON

06 JAN 17 PM 3:55

BY C. J. MERRITT

CERTIFICATE OF SERVICE

The foregoing MOTION OF AMICUS CHARTER COMMUNICATIONS FOR PERMISSION TO SUBMIT AN AMICUS CURIAE MEMORANDUM IN SUPPORT OF PENDING PETITION FOR REVIEW was served by facsimile and by mail, first-class postage prepaid, on this 17th day of January, 2006, to:

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Luba Shur
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 2005

DATED January 17, 2006.

/s/ Kimberley Hanks McGair
Kimberley Hanks McGair
WSBA #30063
Of Attorneys for Amicus Charter
Communications LLC

FILED AS ATTACHMENT
TO E-MAIL

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06 JAN 24 PM 2:28

NO. 77985-6

BY C. J. HERRITT

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

HERBERT NELSON, on his behalf and on
behalf of all others similarly situated,

Respondent/Appellee,

v.

APPLEWAY CHEVROLET, INC., a Washington corporation, d/b/a
APPLEWAY SUBARU/VOLKSWAGEN/AUDI, APPLEWAY
ADVERTISING, APPLEWAY AUDI, APPLEWAY AUTOMOTIVE
GROUP, APPLEWAY CHEVROLET LEASING, APPLEWAY
GROUP, APPLEWAY MAZDA, APPLEWAY MITSUBISHI,
APPLEWAY SUBARU, APPLEWAY TOWING, APPLEWAY
TOYOTA, APPLEWAY VOLKSWAGEN, EAST TRENT AUTO
SALES, LEXUS OF SPOKANE, OPPORTUNITY CENTER, and
TSP DISTRIBUTORS; and AUTONATION, INC., a foreign
corporation,

Petitioners/Appellants.

**RESPONDENT HERBERT NELSON'S OBJECTION TO
CHARTER COMMUNICATIONS LLC'S MOTION FOR
PERMISSION TO SUBMIT AN AMICUS CURIAE
MEMORANDUM**

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Attorneys for Respondent/Appellee

ORIGINAL

I. INTRODUCTION

On January 17, 2006, Charter Communications LLC (“Charter”) filed a Motion for Permission to Submit an Amicus Curiae Memorandum in Support of the Pending Petition for Review in this case. Pursuant to RAP 10.6(d), Respondent Herbert Nelson hereby opposes Charter’s Motion as untimely.

II. ARGUMENT

RAP 13.4(h) provides that the Supreme Court may grant a motion for leave to file an amicus curiae memorandum if the memorandum is filed and served not later than 60 days from the date the petition for review is filed. Here, Petitioners Appleyway Chevrolet, Inc., *et al.* filed their Petition for Review on November 14, 2005.¹ All motions seeking leave to file an amicus curiae memorandum regarding the Petition, therefore, were due no later than January 13, 2006.

Contrary to the Washington Rules of Appellate Procedure, Charter untimely filed its Motion on January 17, 2006. Charter still has not filed a proposed amicus curiae brief. This Court, therefore, should deny Charter’s request for permission to file an amicus curiae memorandum regarding the pending Petition for Review.

¹ The Petition for Review was filed in the Court of Appeals, as explicitly required by RAP 13.4(a).

III. CONCLUSION

For the foregoing reasons, this Court should reject Charter's request to file an amicus curiae memorandum.

RESPECTFULLY SUBMITTED this 24th day of January, 2006.

TOUSLEY BRAIN STEPHENS PLLC

By: 

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Attorneys for Respondent/Appellee

CERTIFICATE OF SERVICE

I, Juliet Albertson, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address and telephone number are 1700 Seventh Avenue, Suite 2200, Seattle, Washington 98101, telephone 206.682.5600.

2. On January 24, 2006, I caused a true and correct copy of the foregoing document to be personally delivered to the following parties in the manner indicated at the addresses listed below.

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- Overnight Courier
- Facsimile
- Electronic Transmission

*Attorneys for Proposed Amici
Curiae Camp Automotive, Inc.
and Lithia Motors, Inc.*

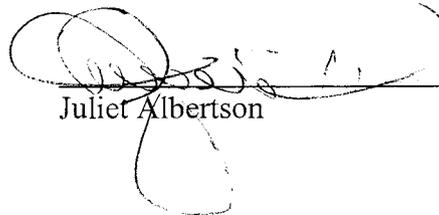
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- U.S. Mail, postage prepaid
- Hand Delivered via Messenger Service
- Overnight Courier
- Facsimile
- Electronic Transmission

*Attorneys for Proposed Amicus
Curiae Charter Communication
LLC*

I declare under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

Executed January 24, 2006, at Seattle, Washington.



Juliet Albertson

FILED
 JAN 24 2006
 CLERK OF SUPERIOR COURT
 STATE OF WASHINGTON
apl

No. 77985-6

**SUPREME COURT
OF THE STATE OF WASHINGTON**

HERBERT NELSON, on his behalf and
on behalf of all others similarly situated,

Plaintiff-Respondent

v.

APPLEWAY CHEVROLET, INC., a Washington corporation,
 d/b/a APPLEWAY SUBARU/VOLKSWAGEN/AUDI;
 APPLEWAY ADVERTISING; APPLEWAY AUDI;
 APPLEWAY AUTOMOTIVE GROUP; APPLEWAY
 CHEVROLET LEASING; APPLEWAY GROUP;
 APPLEWAY MAZDA; APPLEWAY MITSUBISHI;
 APPLEWAY SUBARU; APPLEWAY TOWING;
 APPLEWAY TOYOTA; APPLEWAY VOLKSWAGEN;
 EAST TRENT AUTO SALES; LEXUS OF SPOKANE;
 OPPORTUNITY CENTER; and TSP DISTRIBUTORS;
 and AUTONATION, INC., a Delaware corporation,

CLERK

Defendants-Petitioners

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 BY C. J. HERRITT

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION III

MOTION FOR EXTENSION OF TIME
TO FILE AMICUS MEMORANDUM

Michael B. King
 WSBA No. 14405
 Linda B. Clapham
 WSBA No. 16735
 LANE POWELL PC
 Attorneys for Amicus Curiae
 Association of Washington Business

Lane Powell PC
 1420 Fifth Avenue, Suite 4100
 Seattle, Washington 98101
 Telephone: (206) 223-7000
 Facsimile: (206) 223-7107

interpretation of taxing statutes. For purposes of this motion for extension of time, it is sufficient to note that AWB has a significant interest in the issues presented by the Petition for Review in this case and submits that this Court will benefit by its submission of an amicus memorandum.

4. Our office learned through a telephone call on January 13, 2006 to the Supreme Court clerk's office that the Petition for Review was received by that Court on November 28, 2005, and that is the date utilized by the Supreme Court for purposes of calendaring dates in this matter. Given a calendaring baseline of November 28, this would make AWB's proposed amicus memorandum due on Friday, January 27, 2006. During the same call to the Supreme Court clerk's office, we also learned that this case has not yet been put on the Court's Petition for Review calendar and that the Court was currently setting that calendar for September 2006.

5. At the time I was retained for this matter, I was preparing for a sanctions hearing on January 13, 2006, in Vancouver, Washington, in Magana v. Hyundai Motor America, Clark County No. 00-2-00553-2, a multimillion dollar product liability case, scheduled for retrial on January 17, 2006. Because of the scope and significance of the hearing, it continued through January 20, 2006, at which time I returned to Seattle.

6. In addition, I have other previous commitments which prevent me from completion of AWB's brief prior to February 28, 2006. They include (1) finalization of the answer to amicus curiae in Woo v.

Fireman's Fund, Supreme Court No. 77684-9, filed January 24, 2006;
 (2) finalization of the joint answering brief in Cormier v. Discover Bank,
 Ninth Circuit No. 05-36019, due to be filed January 26, 2006;
 (3) preparation of the answering brief in Harris v. Union Pacific, Court of
 Appeals No. 56495-1-I, due to be filed February 2, 2006; (4) preparation
 of the reply brief in Tesoro Refining & Marketing v. DOR, Court of
 Appeals No. 33236-1-II, due to be filed February 6, 2006; (5) preparation
 for oral argument in PPA appeals arising out of MDL No. 1407, Ninth
 Circuit No. 03-35953 and related matters, a multidistrict litigation
 involving 17 cases for which we are responsible as local counsel and will
 be extensively involved in preparation for arguments on February 7 and 8,
 2006; and (6) preparation of the answering brief in Braaten v. Buffalo
 Pumps & Crane Co., Court of Appeals No. 57011-I, due to be filed
 February 22, 2006.

Michael B King
 Michael B. King

Subscribed and sworn to before me on January 24, 2006.



Kathryn M. Savaria
 Print Name: Kathryn M. Savaria

NOTARY PUBLIC for the State of
 Washington, residing at Everett

My appointment expires: 09-08-2009

4. Grounds for Relief Requested. Under RAP 18.8(a), this Court may extend the time in which an act must be done in order to serve the ends of justice. Under the circumstances set forth in the Affidavit of Michael B. King, justice would best be served by extending the due date to file AWB's Amicus Memorandum in Support of Petition for Review to February 28, 2006. In addition, given the Court's Petition for Review calendaring schedule, there will be no prejudice suffered by any party who chooses to submit an answer.

5. Conclusion. This Court should extend the due date of AWB's Amicus Memorandum in Support of Petition for Review to February 28, 2006.

RESPECTFULLY SUBMITTED this 24th day of January, 2006.

LANE POWELL PC

By Michael B. King
Michael B. King
WSBA No. 14405
Linda B. Clapham
WSBA No. 16735
Attorneys for Amicus Curiae
Association of Washington Business

FILED
 JAN 24 2006
 SUPREME COURT
 STATE OF WASHINGTON
apl

No. 77985-6

**SUPREME COURT
OF THE STATE OF WASHINGTON**

HERBERT NELSON, on his behalf and
on behalf of all others similarly situated,

Respondent-Appellee

v.

APPLEWAY CHEVROLET, INC., a Washington corporation;
 d/b/a APPLEWAY SUBARU/VOLKSWAGEN/AUDI;
 APPLEWAY ADVERTISING; APPLEWAY AUDI;
 APPLEWAY AUTOMOTIVE GROUP; APPLEWAY
 CHEVROLET LEASING; APPLEWAY GROUP;
 APPLEWAY MAZDA; APPLEWAY MITSUBISHI;
 APPLEWAY SUBARU; APPLEWAY TOWING;
 APPLEWAY TOYOTA; APPLEWAY VOLKSWAGEN;
 EAST TRENT AUTO SALES; LEXUS OF SPOKANE;
 OPPORTUNITY CENTER; and TSP DISTRIBUTORS;
 and AUTONATION, INC., a Delaware corporation,

Petitioners-Appellants

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 BY C. J. HERRITT

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION III

DECLARATION OF SERVICE

Michael B. King
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 Linda B. Clapham
 WSBA No. 16735
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 Association of Washington Business

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I, Kathryn Savaria, declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

3. On January 24, 2006, I caused to be served true copies of the following documents: Motion for Extension of Time to File Amicus Memorandum on the following parties in the manner as indicated below:

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The foregoing statements are made under penalty of perjury under
 the laws of the State of Washington and are true and correct.

Signed at Seattle, Washington, this 24TH day of January, 2006.

Kathryn Savaria

Kathryn Savaria

**FACSIMILE COVER PAGE**

DATE January 24, 2006
TIME

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OPERATOR

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FROM Michael B. King
206.223.7046

RE Nelson v. Appleway Chevrolet, Inc., et al.; Supreme Court Cause No. 77985-6

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