

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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BY RONALD P. CARPENTER

Supreme Court No. 79702-1

CLERK

COMMUNITY TELECABLE OF SEATTLE, INC.,
COMCAST OF WASHINGTON I, INC., AND .
COMCAST OF WASHINGTON IV, INC.,

Petitioners,

v.

CITY OF SEATTLE,

Respondent.

Motion to Admit Additional Evidence and for Judicial Notice

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I. Identity of Petitioners

Petitioners are Community Telecable of Seattle, Inc., Comcast of Washington I, Inc., and Comcast of Washington IV, Inc. (collectively "Comcast").

II. Statement of Relief Sought

Comcast asks the Court to supplement the record to include the State of Washington, Department of Revenue, Audit Division reports regarding petitioners that the State's Auditor issued in October 2007. The reports are attached to the Declaration of Suzanne Harmes filed with this motion. The reports show that each of the petitioners was found by the State's Auditor to be an Internet service provider that provided Internet services and that the petitioners' Internet service revenues should be taxed by the State at the service Business and Occupation ("B&O") tax rate. In addition to supplementing the record, Comcast asks the Court to take judicial notice that the Auditor's reports include the findings referred to above.

III. Parts of Record Relevant to Motion

The parts of the record pertinent to this motion include the documents submitted to the trial court that establish that Comcast provides Internet services to its subscribers (CP 16-17, 911-13) for one price that does not itemize any data transport charges. CP 52, ¶ 7. Also pertinent

are documents that show that Comcast or its predecessor has been the Internet service provider providing Internet services to Comcast subscribers at all times pertinent to this appeal. CP 114.

Another document that is pertinent to this motion, although it is not a part of the formal record, is the Washington Department of Revenue Excise Tax Advisory 2029.04.245 ("ETA"), which was attached as Appendix A to the City of Seattle's Reply Brief in the Court of Appeals in this case. The ETA was dated February 24, 2006, which was after the trial court granted summary judgment to Comcast in November 2005. CP 765-66. The Court of Appeals held that the ETA supported its conclusion that "State law . . . allow[s] the City to tax Comcast data transmission activities as a `telephone business.'" *Cnty. Telecable of Seattle, Inc. v. City of Seattle*, 136 Wn. App. 169, 180 IT 20, 21 (2006).

IV. Statement of Grounds for Motion

A. The State's Auditor's Reports Should Be Considered Pursuant to RAP 9.11(a).

The Court of Appeals misinterpreted the ETA as indicating that the State Department of Revenue had concluded that Internet services, such as those provided by Comcast, should be taxed at the rate applied to network telephone services. *Cnty. Telecable*, 136 Wn. App. at 178 IF 19, 180, ¶¶ 20, 21. Having concluded that the ETA supported its conclusion that Comcast's Internet service revenues should be taxed at network telephone

services tax rates, the Court of Appeals stated that "[a] reviewing court gives considerable deference to the construction of an ordinance by those officials charged with its enforcement." 136 Wn. App. at 180 ¶ 21.

The Department of Revenue Auditor's reports show that the Court of Appeals misinterpreted the ETA. When the State's Auditor actually reviewed Comcast Internet service revenues, he determined that the State should tax those revenues at the State's B&O *service* tax rate -- not at the B&O *retail* tax rate that the State has traditionally applied to tax revenues from network telephone services. In other words, the Auditor's findings stated in his reports regarding petitioners' Internet service revenues directly contradict the Court of Appeals' interpretation of the ETA.

Given that the City injected the post judgment ETA into the appellate record, the Court should supplement the record and consider the Auditor's reports. The reports show that, rather than giving "considerable deference to" the Department of Revenue's construction of State tax laws, the Court of Appeals interpreted those laws in a manner that was directly at odds with the Department's application of the laws.

RAP 9.11(a) states:

The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the

evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting anew trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in a trial court.

This Court applied RAP 9.11(a) to permit additional evidence to be considered on appeal in *Wash. Fed'n of State Employees v. State*, 99 Wn.2d 878, 884-887, 665 P.2d 1337, 1341-43 (1983). In that case, as in this one, actions were taken after the matter was pending before this Court that were pertinent to the outcome of the case. In *Wash. Fed'n of State Employees*, the additional evidence that this Court admitted and considered included a memorandum from the Director of the State Office of Financial Management and an administrative order from the same official establishing emergency rules for the implementation of the lagged payroll plan at issue in the case. 99 Wn.2d at 884. Neither document had been created before the matter was pending in this Court. *Id.* at 885. The Court applied the criteria stated in RAP 9.11(a) and found that they supported considering the new documents. *Id.* at 884-86.¹

¹ Additionally, the Court held that it could disregard the initial sentence of the version of RAP 9.11(a) in force at that time, which stated that the record could be supplemented could "only on [the court's] own initiative." *Id.*, 99 Wn.2d at 885. The Court disregarded that aspect of RAP 9.11(a), holding that, pursuant to RAP 1.2 and 18.8, it could waive or alter the provisions of any of the Rules of Appellate Procedure to serve the ends of justice. *Id.* RAP 9.11 was amended in 1985 to delete the phrase "only on its own initiative," so that parties may now move the Court to consider additional evidence pursuant to RAP 9.11. 2A Karl B. Tegland, *Washington Practice* 633 (2004).

The October 2007 Auditor's reports should similarly be considered in this matter pursuant to RAP 9.11(a). First, the additional facts shown by the Auditor's reports are needed to fairly resolve the issues on review. The Court of Appeals misinterpreted the ETA to support its conclusion that Comcast's Internet service revenue should be taxed at a network telephone service rates. The Auditor's reports directly contradict that interpretation of State law and directly undercut the Court of Appeals' conclusion that the Department of Revenue's interpretation of State law was consistent with the erroneous view adopted by the Court of Appeals. It would be transparently unfair for this Court to disregard Department of Revenue's findings.

Second, the additional evidence would probably change the decision being reviewed. The Court of Appeals explicitly held that its decision was predicated in part on the ETA. *Cnty. Telecable*, 136 Wn. App. at 178 ¶ 19, 180, ¶¶ 20, 21. The court stated that it was supposedly giving deference to the Department of Revenue's interpretation of State tax laws in the ETA. *Id.* at 180 ¶ 21. The Auditor's reports should persuade this Court that the Court of Appeals' interpretation of the ETA was incorrect.

Third, it would be equitable to excuse Comcast's failure to present the Auditor's reports to the trial court because the reports were issued only

in October 2007, long after not only the parties' cross-motions for summary judgment in 2005 but also after the Court of Appeals' review of this case. In this regard, Comcast's position is similar to that of the movants in the *Wash. Fed'n of State Employees*, where additional evidence was created after the case was pending in this Court. 99 Wn.2d at 884-85.

Fourth, requiring Comcast to proceed through a postjudgment motion to the trial court to have the additional evidence admitted would be unnecessarily expensive. The additional evidence can be considered by the Court without the necessity of returning to the trial court to have the documents admitted.

Fifth, the remedy of granting a new trial would be unnecessarily expensive. Again, the additional evidence can and should be admitted and considered by this Court. There is no need for a remand.

Finally, it would be inequitable to decide this case solely on the evidence admitted in the trial court because the Court of Appeals accepted, considered, and relied on the ETA, which was never considered by the trial court. Given that the Court of Appeals considered and based its decision in part on the ETA, it would be inequitable for the case to be decided without considering the Auditor's reports, which show that the Court of Appeals' interpretation of the ETA was incorrect.

For the forgoing reasons, this Court should add the Auditor's reports to the record to be considered on appeal.

The Court Should Take Judicial Notice that the State Auditor Determined that Comcast's Internet Services Revenues Should Be Taxed at the Service B&O Rate.

Pursuant to ER 201(d) and (f), this Court may take judicial notice of the contents of the Auditor's reports. The contents of the reports are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(d)(2). That the reports stated that the Auditor determined that petitioners are Internet service providers, that they provide Internet service and that their Internet service revenues should be taxed at the service B&O tax rate can be readily determined by reviewing the Auditor's reports. *See* Declaration of Suzanne Harmes, Ex. 1, pp. 1, 2; Ex. 2, pp. 1, 3; Ex. 3, pp. 1, 3.

Both this Court and many other courts have taken judicial notice of records of administrative agencies. For example, in *Pudmaroff v. Allen*, 138 Wn.2d 55, 65 n.5, 977 P.2d 574, 579 n.5 (2002), this Court took judicial notice of a report of the Washington Traffic Research and Data Center. In *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004), the Court took judicial notice of a license agreement entered into by a state agency. The Ninth Circuit Court of Appeals stated: "These licensing agreements are documents of the

University System, a state entity. Under Fed. R. Evid. 201, we may take judicial notice of the records of state agencies and other undisputed matters of public record." 375 F.3d at 866 ^{11.1} (citations omitted). In *Opoka v. Immigration and Naturalization Serv.*, 94 F.3d 392, 394-95 (7th Cir. 1996), the Court held that it had the power and an obligation to take judicial notice of an administrative law judge's decision in a related immigration case. The Court stated "it is a well-settled principle that the decision of another court or agency, including the decision of an administrative law judge, is a proper subject of judicial notice." 94 F.3d at 394 (citations omitted). The ALJ's decision considered in *Opoka* was that an of immigration judge who found that the appellant's wife had been permitted to remain in the country. *Id.* at 395. The Court stated "[w]e would be derelict in our duty not to recognize a decision indicating the salient facts and circumstances." *Id.* See also *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 924 n.3 (9th Cir. 2002) (taking judicial notice of administrative ruling in related proceeding). Just as the courts took judicial notice in each of the foregoing cases, this Court should take judicial notice that the Auditor determined that Comcast is an Internet service provider that provides Internet service and that the State's service B&O tax rate should be applied to Comcast's Internet service revenues.

Comcast is aware that the Court has held that it may not take judicial notice of records in separate judicial proceedings when the party seeking judicial notice has failed to meet the requirements of RAP 9.11(a). *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 98-99, 117 P.3d 1117, 1122 (2005); *In re Adoption of B.T.*, 150 Wn.2d 409, 41445, 78 P.3d 634, 636-37 (2003). Both *Spokane Research* and *In re Adoption of B.T.* are distinguishable from this case.

First, in neither case did the party requesting judicial notice satisfy RAP 9.11(a), as Comcast has done here. *Spokane Research*, 155 Wn.2d at 98-99; *In re Adoption of B.T.*, 150 Wn.2d at 415. Second, the parties in each of those cases asked the Court to take judicial notice of records in judicial proceeding, whereas Comcast asks the Court to take judicial notice of the contents of a state agency determination. *Spokane Research*, 155 Wn.2d at 98, *In re Adoption of B.T.*, 150 Wn.2d at 415.

Finally, Comcast does not ask the Court to take judicial notice that the facts found by the State's Auditor are true. Comcast asks only that the Court take judicial notice that the Auditor's reports contain the findings that Comcast is an Internet service provider that provides Internet service and Comcast's Internet service revenues should be taxed at the service B&O tax rate. In other words, Comcast does not ask the Court to treat the Auditor's findings as preclusive. Rather, the Auditor's findings should be

considered to show that the Court of Appeals' interpretation of the Department of Revenue's ETA was incorrect. That the Auditor found that the service B&O tax rate, rather than the retail B&O tax rate, should be applied to the petitioners' Internet service revenues should be considered by the Court.

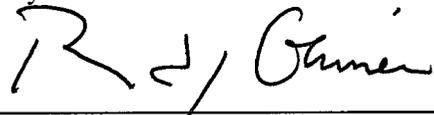
V. Conclusion

For the foregoing reasons, the Court should permit the Auditor's reports to be added to the record and the Court should take judicial notice that the Auditor determined Comcast is an Internet service provider that provides Internet service and that the State's service B&O tax rate should be applied to Comcast's Internet service revenues.

Respectfully submitted,

Davis Wright Tremaine LLP
Attorneys for Comcast

Dated: November____2007

By  _____

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Certificate of Service

I hereby certify that on this ____ ay of November, 2007, I caused to be served by first class mail, postage prepaid, a true and correct copy of the Motion To Admit Additional Evidence and for Judicial Notice filed in connection with the above-referenced matter upon the following counsel of record at the following addresses:

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A copy of the above-referenced document was also sent by first-class mail, postage prepaid to the following:

The Honorable Rob McKenna
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Dated this 30th day of November, 2007.


Deborah Linkowski