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No. 797021

**SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Petitioners

v.

CITY OF SEATTLE,

Respondent

**AMICUS CURIAE MEMORANDUM IN SUPPORT OF
PETITION TO REVIEW**

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I. INTRODUCTION

Pursuant to RAP 13.4(h), amicus curiae Qwest Corporation ("Qwest") respectfully asks this Court to grant the petitioners' Petition for Review and reverse the decision of the court of appeals.

This case involves at least two issues of state law that are of broad and fundamental public importance. The first is whether Washington cities may impose tax on "access to, or charges for, interstate services" in express contradiction to a statutory limitation imposed by the Legislature. The second issue is whether Washington cities have authority to impose utility license tax on network telephone services other than "intrastate toll services."

While Qwest agrees with petitioners that the court of appeals erred in interpreting and applying the federal Internet Tax Freedom Act, the decision below contains fundamental errors in applying state law limitations on cities' power to tax. The impact of the court of appeals' erroneous decision extends well beyond city taxation of Internet access to allow the taxation of traditional interstate telephone service and access to such service. Unlike city B&O taxes, which are imposed by relatively few Washington cities, utility license taxes are imposed across the state by over 200 cities.¹ In addition, utility license taxes are traditionally billed to consumers, causing a significant adverse impact on millions of Washington consumers in direct contradiction to express limitations in

¹ Wash. State Dep't of Revenue, Research Division, Tax Reference Manual 2007 at 116 (January 2007), http://dor.wa.gov/content/statistics/2007/tax_reference_2007.

Washington law. This case is of great public importance and should be review by this Court. RAP 13.4(b)(4).

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of amicus curiae are described in Qwest's Motion for Permission to File Amicus Curiae Memorandum in Support of Petition to Review, which is filed with this Memorandum.

III. ISSUES OF CONCERN TO AMICUS CURIAE

- A. May a city impose utility license tax on interstate telecommunication services or access to such services where the Legislature has specifically prohibited imposition of tax on "access to, or charges for, interstate services"? *Cf. Pet. for Review* at 4 (Issue 3).
- B. May a city impose utility license tax on network telephone services other than "intrastate toll telephone service"? *Id.*
- C. Should the court of appeals have addressed a legal issue that was not briefed or argued by the parties?

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- A. **The Decision Below Extends the Scope of the City Utility License Tax Contrary to the Plain Language of RCW 35.21.714 and the Legislature's Clear Intent.**

RCW 35.21.714 provides in relevant part:

Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business ... 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 which represents 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, or charges for mobile telecommunications services provided to customers whose place of primary use is not within the city.

RCW 35.21.714(1) (emphasis added). Despite the plain language of the statute and the failure of the parties to brief the issue, the decision below makes the sweeping and erroneous conclusion that cities are free to tax interstate service provided to consumers:

[RCW 35.21.714] does not bar the City from taxing Comcast's data transmission revenue simply because data transmission signals cross Washington's borders. Comcast's interpretation of RCW 35.21.714 would make it impossible for cities to tax telephone business because many data transmissions and traditional telephone line transmissions are delivered to an out-of-state location. RCW 35.21.714 concerns charges to other telecommunications companies for interstate services.

Community Telecable of Seattle, Inc. v. City of Seattle ("Comcast"), ___ Wn.App. ___, 149 P.3d 380, 386 (2006).² This conclusion is contrary to the plain language of the statute, the sequence of enactments that have produced RCW 35.21.714(1), and the legislative history of those enactments.

² The court of appeal's suggestion that the plain reading of RCW 35.21.714 "would make it impossible for cities to tax telephone business" is an inaccurate exaggeration. Far from being "impossible," the City's top tax administrator testified in this case that Seattle did not tax interstate service. CP 799-800.

While RCW 35.21.714(1) has grown through various amendments over the past 24 years, the plain language does two things. First, it authorizes cities to impose a utility license tax on telephone businesses measured by "one hundred percent of the total gross revenue derived from intrastate toll telephone services." Second, the statute expressly prohibits cities from imposing utility license tax on certain other revenues and activities, including (a) charges from one telecommunications company to another "for connecting fees, switching charges, and carrier access charges relating to intrastate toll telephone services"; (b) "access to, or charges for, interstate services"; (c) "charges for network telephone service that is purchased for the purpose of resale"; and (d) "charges for mobile telecommunications services provided to customers whose place of primary use is not within the city." RCW 35.21.714. In its attempt to parse through these prohibitions, the court of appeals mistakenly read the prohibition on taxes on "access to, or charges for, interstate service" as part of the prohibition on taxing charges from one telecommunications company to another for connecting, switching, and carrier access charges. However, each of the four prohibitions was added separately in distinct legislative action with a distinct legislative purpose.

In 1983 the Legislature explicitly limited the cities' authority to impose utility license tax to only "intrastate" service and explicitly prohibited the taxation of "access to, or charges for, interstate services." 1983 Wash. Laws, 2nd Ex. Sess., Ch. 3, § 37. In 1986, the Legislature amended RCW 35.21.714 to add a prohibition on taxing charges by one

telecommunication company to another for connecting fees, switching charges, or carrier access relating to intrastate toll telephone services. 1986 Wash. Laws, Ch. 70, § 1. The legislative history confirms that the additional prohibition on taxing inter-company connecting, switching, and access charges was not intended to change the existing prohibition on taxing "access to, or charges for interstate service" or the limited grant of authority to impose utility license tax on intrastate toll service:

BACKGROUND:

Cities may tax telecommunications companies for intrastate service. This has been and would continue to be the case if this bill is enacted. ...

SUMMARY:

Interstate services continue to be exempt from taxation by cities. Receipts by a local telecommunications company from a long distance company for connecting fees, switching charges, or carrier access charges relating to intrastate toll services are not subject to utility tax, but are subject to the Business and Occupation (B&O) tax. ...

Final Bill Report, S.H.B. 1892.³ Thus, the Legislature established two separate limitations on the taxing authority of cities: (1) cities can tax intrastate toll service, but not interstate service or access to interstate service; and (2) cities cannot tax inter-company connecting, switching, and access charges related to intrastate toll service.

³ Similarly, the Local Government Fiscal Note for the 1986 legislation stated that "Cities collect taxes on intrastate long distance revenue," and described the concern that, since the break-up of AT&T, "cities are collecting taxes on *intrastate long distance* from both the long distance companies ... and from [Pacific Northwest Bell] who incorporates these charges into their total bill to customers." Local Government Fiscal Note, S.B. 4945/H.B. 1892 (prepared 2/4/1986; reviewed 2/5/1986) (emphasis added).

In 1989, the Legislature again amended RCW 35.21.714 to add a new limitation on cities' authority to tax telephone businesses—a prohibition on imposing utility tax on "charges for network telephone service that is purchased for the purpose of resale." 1989 Wash. Laws, Ch. 103, § 1. Again, the sequence of enactments, the plain language of the statute, and the legislative history indicate that this new limitation did not authorize cities to tax interstate service. The Final Bill Report for the 1989 legislation provides:

BACKGROUND:

... Cities impose utility taxes on both local and long distance companies for *calls within the state*. ...

SUMMARY:

Cities, code cities, and towns may impose tax on 100 percent of the total gross revenue *derived from intrastate toll service*, but they may not impose a fee of tax upon that portion of network telephone service which represents a charge to another telephone company.

Final Bill Report, S.B. 5990 (emphasis added).

In 2002, the Legislature amended RCW 35.21.714 to add a fourth limitation on cities' authority to tax intrastate service—"charges for mobile telecommunications services provided to customers whose place of primary use is not within the city." 2002 Wash. Laws, Ch. 67., § 9. As with prior amendments, this new limitation did not expand the cities' taxing authority.⁴

⁴ This amendment was required to comply with the federal Mobile Telecommunications Sourcing Act, P.L. 106-252. See 2002 Wash. Laws, Ch. 67, § 1 (describing the legislature's intent).

Related statutes, including RCW 35.21.715, further confirm that the Legislature intended the prohibition on taxing "access to, or charges for, interstate services" to be distinct from the prohibition on taxing inter-company charges for connecting, switching, and carrier access charges. RCW 35.21.715 authorizes cities to impose **B&O tax** on "that portion of network telephone service ... which represents charges to another telecommunications company ... for connecting fees, switching charges, or carrier access charges relating to intrastate toll services, or charges for network telephone service that is purchased for the purpose of resale." RCW 35.21.715 very noticeably omits authorization to impose B&O tax **"for access to, or charges for, interstate services."**

Seattle's own ordinances acknowledge that it is prohibited from taxing interstate service and access to interstate service. Its utility tax ordinance states that the tax on telephone business activity 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.)**

SMC 5.48.050(1)(A) (emphasis added). Consistent with RCW 35.21.714 and 35.21.715, Seattle does not impose utility tax or B&O tax on access to, or charges for, interstate services, while specifically imposing B&O tax (at a much lower rate than the utility tax) on the other categories of

telephone business activities that the City is prohibited from subjecting to utility tax (*e.g.*, intercompany connecting, switching, and carrier access charges).

Although these various amendments to RCW 35.21.714 have produced a long and awkward sentence, the Legislature's intention to prohibit city taxation of "access to, or charges for, interstate service" is clear from the plain language, the sequence of legislation resulting in the current statute, the legislative history of the various acts, and a review of related tax statutes.

B. The Decision Below Improperly Ignores the Legislature's Limited Grant of Authority to Cities to Impose Utility License Tax Only on "Intrastate Toll Service."

This Court has concluded that cities may define their tax categories "only if not restrained by legislative enactment." *City of Tacoma v. Sea-First National Bank*, 105 Wn.2d 663, 668, 717 P.2d 760 (1986). RCW 35.21.714 provides cities with the authority to impose a "license fee or tax upon the business activity of engaging in the telephone business ... on one hundred percent of the total gross revenue derived from *intrastate toll telephone services* subject to the fee or tax."

The court of appeals' decision ignores this limited grant of authority and permits cities to impose utility tax on one hundred percent of Comcast's revenue from activity that the court concludes includes "Internet services." *Comcast*, 149 P.3d at 385 ("Comcast also provides 'Internet services' ..."). Internet services are not a part of "network

telephone services" as defined in RCW 82.04.065, much less "intrastate toll service" for which tax is authorized under RCW 35.21.714.

The record below indicates that Comcast's customers are purchasing Internet access. The decision below cites no authority for permitting the City to redefine the transaction to isolate a "data transmission" component to this service in order to impose a utility license tax on all or some part of the revenue stream. By allowing the City to redefine the underlying service, the court of appeals undermined the Legislature's power over municipal taxation and conferred upon each city the authority to effectively determine for itself what activities fall within the licensing authority granted by the Legislature.

C. The Decision Below Erroneously Addressed an Issue That Was Not Briefed or Argued by the Parties.

The court of appeals was significantly disadvantaged in its analysis of RCW 35.21.714 because neither party briefed or argued the issue. The only mention of the interstate service issue was contained in a single footnote on page 15 of Comcast's brief. That footnote merely stated that RCW 35.21.714 prohibits the taxation of interstate service and cited testimony from a City tax administrator agreeing with that conclusion. The City did not address the issue in either of its two briefs to the court of appeals and, in its Answer to Petition for Review, argues that the issue was not even before the court. City's Answer to Petition for Review at 19.

This Court has concluded that Washington courts "should not engage in the resolution of issues which arise, but are not briefed by the

parties." *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Const., Inc.*, 119 Wn.2d 334, 352, 831 P.2d 724 (1992). The reasons for this conclusion are evident in the court of appeals' discussion of the interstate service issue. The process of briefing and arguing the interstate service issue would have focused the court's attention on the plain language of RCW 35.14.714, the sequence of legislation resulting in the current version of the statute, the legislative history of the various acts, and the existence of related statutes, which demonstrate that cities are prohibited from taxing "access to, or charges for, interstate service."

V. CONCLUSION

The decision below strikes at the heart of the authority of the Legislature to define and limit city taxation. The court of appeals' failure to apply Washington law will subject millions of Washington consumers in over 200 cities throughout the state to increases in the cost of not just Internet access, but traditional telecommunications services. This Court should grant review and reverse the decision of the court of appeals.

DATED: February 23, 2007

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