

No. 797021

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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Community Telecable of Seattle, Inc., Comcast of Washington I, Inc., and  
Comcast of Washington IV, Inc.,

*Petitioners,*

vs.

City of Seattle,

*Respondent,*

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**Answer to Amicus Curiae Memorandum from Microsoft et al**

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## **I. INTRODUCTION**

Defendant/Respondent City of Seattle (“City”) submits this opposition to the amicus curiae memorandum filed by Microsoft, AOL LLC, Time Warner Cable, Verizon, EarthLink, and the National Cable & Telecommunications Association (collectively “NCTA” herein) in support of Comcast’s petition for review.

## **II. STATEMENT OF THE CASE**

Comcast transmits cable television services and internet services to homes and businesses in Seattle. CP 176, ¶¶ 8-9. Comcast owns a transmission system in Seattle that includes cable running to individual properties and a network of fiber optics, cables, and other equipment to transmit between its Seattle customers and Comcast’s “head end” in Burien, Washington. CP 132-133, 188-189, 193-194, 202-205. Comcast entered into contracts with other entities to provide internet services to Comcast’s customers. In effect, Comcast provided the final portion of the transmission system from the subscriber’s home to the head end and other companies provided other infrastructure and the internet services received by the subscribers.

The City’s telephone utility tax applies to entities engaged in the business of transmitting data over a network in Seattle. Seattle Municipal Code (“SMC”) 5.48.050A.. CP 219. Such businesses must pay a tax of six

percent of the revenue from that business. Comcast's use of its cable network in Seattle to transmit data provided by internet service providers is subject to the telephone utility tax imposed by SMC 5.48.050A.

Without question, Comcast's use of its cable transmission system in the City constitutes a "telephone business" as defined by the Seattle Municipal Code. Neither the Federal Internet Tax Freedom Act nor the Washington Internet Tax Moratorium preempt the City's tax. The court of appeals correctly ruled in favor of the City. The issues in this case do not qualify for review under RAP 13.4(b).

### **III. ARGUMENT**

A. Amicus NCTA Fails To Present Grounds For Review Under RAP 13.4(b).

Amicus NCTA fails to identify any of the considerations under RAP 13.4(b) for accepting review. The only conceivable basis for NCTA's position is that NCTA believes that the petition "involves an issue of substantial public interest" under RAP 13.4(b)(4). In reality, the decision below does not involve an issue of substantial public importance that should be determined by this Court.

This case involved a straightforward application of state and local law that does not require review by this Court. Simply put, companies that provide internet services pay the City's B&O tax and companies engaged in telephone business pay the telephone utility tax. Thus, under the City's tax

code and rules, a company that provides transmission lines to an end user is a telephone business under SMC 5.30.060C and is subject to the telephone utility tax under SMC 5.48.050. CP 44. In fact, the majority if not all of the telephone businesses the City has audited since 1995 have subsidiary companies that provide their internet services and account separately for that revenue or otherwise break out the internet service charge from their transmission charges so that each activity can be taxed under its proper classification. CP 45. Thus, all companies carrying on a telephone business that involve the transmission of internet-related data are taxed on the same basis. The court of appeals decision preserves this system. Amicus NCTA presents no evidence to support its allegation that preservation of the status quo will “lead to significant harm to Washington consumers and companies.” (Amicus Brief, p. 2.)

B. Amicus NCTA Essentially Repeats Comcast’s Arguments In Contravention Of RAP 10.3(e).

Under RAP 10.3(e), an amicus must “avoid repetition of matters in other briefs.” Here, Amicus NCTA essentially repeats arguments raised by Comcast’s petition. Amicus NCTA repeats Comcast’s arguments that federal and state law preempt the City’s tax and that the City should not be allowed to unbundle internet service and telephone business. Amicus NCTA provides no new arguments justifying review by this court. The

simple fact that companies such as amici disagree with the court of appeals is not grounds for review under RAP 13.4(b).

C. The State Statutes Distinguish Between Internet Services And Telephone Business And Permit The City To Impose Its Tax On Telephone Business Activities In The City.

The State Internet Tax Moratorium, RCW 35.21.717, does not prohibit the City's telephone utility tax. NCTA ignores the language of the state statutes when NCTA complains that the court of appeals wrongly "bifurcated the taxpayer's cable modem service into two components." (NCTA Brief, p. 9.) In reality the state legislature specifically distinguishes between taxable telephone business (data transmission) and internet services in the relevant statutes. The court of appeals specifically discussed this issue in its decision:

State statutes specifically distinguish between Internet service and network telephone service, preserving the City's ability to tax Comcast's data transmission activities as telephone business. In the same legislative bill that created the Internet Tax Moratorium, the legislature amended the definition of "network telephone service" to distinguish it from Internet service. Laws of 1997, ch. 304, § § 2, 5. RCW 82.04.065(2) defines network telephone service to include data transmission, including transmission to and from the site of an Internet provider . . .

...

The statute specifically distinguishes between network telephone service (which includes data transmission via a cable system) and internet service (which, under the moratorium, cannot be taxed at a rate higher than the rate applied to a general service classification). RCW

82.04.065(2) allows the City to tax data transmission activities because such activities are distinct from “internet service” - the subject of the moratorium.

Comcast's data transmission activities are covered by the descriptions of network telephone service in RCW 82.04.065 and, thus, not protected by the moratorium. First, Comcast provides data transmission over a cable system in accordance with the first sentence in RCW 82.04.065(2) (“ ‘Network telephone service’ means the providing by any person of ... data ... transmission ... via a ... cable ... transmission system.”). Second, Comcast provides “transmission to and from the site of an internet provider” via a cable transmission system as described in the second sentence of RCW 82.04.065(2). The undisputed facts show that Comcast provides a cable transmission system from its customers' homes and businesses to Comcast's facilities in Burien and then to the Westin Building.

*Community Telecable of Seattle, Inc. v. City of Seattle*, 136 Wn. App. 169, 178-179, 149 P.3d 380 (2006) (emphasis added). Thus, the state legislature distinguishes between internet service and telephone business in the statutes governing those activities. The State Internet Tax Moratorium governs taxation of internet service, but does not affect taxation of telephone business. Accordingly, there are no grounds for this court to review the court of appeals’ decision to follow state statutes.

D. The Brand X Case Does Not Prohibit The City From Imposing Its Telephone Utility Tax On Data Transmission In The City

Amicus NCTA misapplies the holding in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, \_\_\_ U.S. \_\_\_, 162 L. Ed. 2d 820, 125 S. Ct. 2688 (2005). NCTA incorrectly argues that the

*Brand X* case requires cable modem service to be regarded as a “single integrated service” for tax purposes. But *Brand X* involved the regulation of cable companies under the Telecommunications Act and did not involve the ITFA or the taxation of cable modem service. In fact, the word “tax” does not appear in *Brand X*. The Court in *Brand X* addressed the issue of the “proper regulatory classification under the Communications Act of broadband cable Internet service.” *Brand X*, 125 S. Ct. at 2696. The court of appeals recognized the limits of *Brand X* and held:

In *Brand X*, the Court considered whether the Federal Communications Commission's classification of broadband cable modem service under the federal Telecommunications Act of 1996 as an “information service” rather than a “telecommunications service” was reasonable under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) and the federal Administrative Procedures Act. *Brand X*, 545 U.S. at 967, 125 S.Ct. 2688. It did not consider whether data transmission was inseparable from Internet service under Washington law. It also did not address whether, under federal law, states and local governments can tax revenue from cable modem service as a network telephone service.

*Community Telecable*, 136 Wn. App. at 181. The Court in *Brand X* did not address the issue of how states and cities can tax companies that provide cable modem service. Amicus NCTA incorrectly applies *Brand*

X. The court of appeals properly ruled that *Brand X* does not prevent the City from taxing Comcast's telephone business.

E. The City's Telephone Utility Tax Is Not Barred By The ITFA.

The court of appeals correctly ruled that the City's tax was permissible under the ITFA grandfather clause. *Community Telecable*, 136 Wn. App. at 183. Amicus NCTA complains that the court of appeals ruling is erroneous because the court declined to rule on whether Comcast's activities fell under the definition of "internet access" under the ITFA. The court of appeals held that it was unnecessary to make that determination because the City was exempt under the grandfather clause of ITFA:

Comcast argues that the City is subject to the federal Internet Tax Freedom Act (ITFA) because its telephone utility tax is a tax on "Internet access" as that term is defined in the ITFA. The City contends that its telephone business tax does not tax "Internet access." We do not decide this issue because we hold that even if the City taxes "Internet access" as that term is used in the ITFA, (1) the City's tax is exempt under the ITFA's grandfather clause . . .

*Community Telecable*, 136 Wn. App. at 182. The court also noted that its position was consistent with the position of the Washington Department of Revenue as stated in ETA 2029.04.245 regarding the applicability of the ITFA to Washington's taxes on network telephone services. *Community Telecable*, 136 Wn. App. at 182 n. 3.

Amicus NCTA argues that the court of appeals' decision not to rule on the "internet access" issue undermines the court of appeals' holding that the City's tax is permissible under the ITFA grandfather clause. This is a logically inconsistent argument. If the City's tax is on "internet access," then the tax is protected by the grandfather clause as the court of appeals held. *Community Telecable*, 136 Wn. App. at 183. On the other hand, if the tax is not on "internet access," then the tax is not barred by the ITFA because the ITFA applies to taxes on "internet access." 47 U.S.C.A. § 151 (note) § 1101(a) (2001). The court of appeals held that a determination on whether the tax was on "internet access" was unnecessary because even if the tax was on "internet access," the tax was exempt under the grandfather clause. *Community Telecable*, 136 Wn. App. at 182. This decision is consistent with the plain language of the ITFA as well as the interpretation of the ITFA by the Washington Department of Revenue. Moreover, the Pennsylvania Supreme Court reached a similar conclusion when it held that Pennsylvania's sales and use taxes qualified for the grandfather clause under ITFA in *Concentric Network Corp. v. Commonwealth of Pennsylvania*, 897 A.2d 6, 15 (Penn. 2006). Amicus NCTA presents no grounds for this court to review the lower court's decision.

F. The City Is Not Required To Adopt The “Primary Activity” Test For Its Telephone Utility Tax.

NCTA asks the Court to consider for the first time on appeal whether the City should be required to use the “primary activity” test for its telephone utility tax. This issue was not raised with the trial court or the court of appeals and should not be considered on appeal. RAP 2.5(a).

In addition, neither the Seattle Municipal Code nor the Seattle Business Tax Rules require that the City use the “primary activity” test for its telephone utility tax. NCTA’s desire to impose this practice on the City is not grounds for review under RAP 13.4. Indeed, in this case, the primary activity test as used in the Washington Department of Revenue in the cases cited by NCTA would be inapplicable.

First, the City did not bifurcate between the different B&O tax classifications of service or sales. Here, the City sought to impose its telephone tax on Comcast’s telephone business and the B&O tax on Comcast’s internet service business. This was a division of activity between two different taxes, not two classifications of the B&O tax.

Second, the primary activity test is used by the Department of Revenue when a contract is not subject to bifurcation. Det. No. 03-170, 24 WTD 393 (2005). Here, there is no question that Comcast sold both the transmission infrastructure and the services transmitted over the

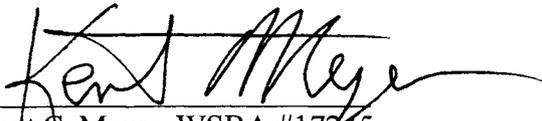
transmission facilities. In fact, Comcast itself owned the transmission infrastructure and contracted with a third-party to provide internet services to its customers. CP 40. Companies can separate revenue earned from providing transmission facilities and revenue earned from providing internet services. Indeed, other companies self-separate those activities by providing either internet service or transmission facilities and charging accordingly. CP 45. Thus, there are no grounds for resorting to the primary activity test in this case and certainly no grounds to grant a petition for review based on that test.

#### IV. CONCLUSION

Amicus NCTA does not raise any issues that meet the criteria for review under RAP 13.4(b). The City imposes a telephone utility tax on companies that operate a data transmission system in the City. Comcast operates a data transmission system in the City. Accordingly, this Court should not accept the petition for review.

DATED this 18 day of April, 2007.

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**CERTIFICATE OF SERVICE**

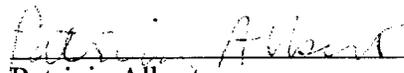
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**Respondent's Answer to Qwest's Amicus Curiae Memorandum**

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## **I. INTRODUCTION**

Defendant/Respondent City of Seattle ("City") submits this opposition to Qwest Corporation's amicus curiae memorandum in support of Comcast's petition for review.

## **II. STATEMENT OF THE CASE**

Comcast transmits cable television services and internet services to homes and businesses in Seattle. CP 176, ¶¶ 8-9. Comcast owns a transmission system in Seattle that includes cable running to individual properties and a network of fiber optics, cables, and other equipment to transmit between its Seattle customers and Comcast's "head end" in Burien, Washington. CP 132-133, 188-189, 193-194, 202-205. From Burien the signal travels by fiber optic cable to a facility at the Westin Building in Seattle. CP 132-133, 193-194, 202-205. The signal leaves the Westin Building by fiber optic cable. CP 132, 204-205. Comcast owns all of the cable, fiber optics and other transmission equipment only from the outside of the customer's house to the head end in Burien. CP 176, 187, 189, 194.

Comcast entered into contracts with other entities to provide internet services to Comcast's customers. In effect, Comcast provided the final portion of the transmission system from the subscriber's home to the head end and other companies provided other infrastructure and the internet services received by the subscribers.

The City's telephone utility tax applies to entities engaged in the business of transmitting data over a network in Seattle. Seattle Municipal Code ("SMC") 5.48.050A. CP 219. Such businesses must pay a tax of six percent of the revenue from that business. Comcast's use of its cable network in Seattle to transmit data provided by internet service providers is subject to the telephone utility tax imposed by SMC 5.48.050A.

Without question, Comcast's use of its cable transmission system in the City constitutes a "telephone business" as defined by the Seattle Municipal Code. The City did not impose its tax on interstate telephone services. The undisputed facts establish that Comcast operated a transmission system in the City and is therefore subject to the telephone utility tax. The court of appeals correctly ruled in favor of the City. The issues in this case do not qualify for review under RAP 13.4(b).

### **III. ARGUMENT**

A. Comcast Is Not Entitled To Review Under RAP 13.(4)(b.

Amicus Qwest argues that the court should accept to review RAP 13.4(b)(4). on the grounds the court of appeals' decision "is of great public importance." On the contrary, the decision below does not involve an issue of substantial public issue that should be determined by this Court.

This case does not involve a tax on interstate telephone services. The City of Seattle's telephone utility tax is a tax on the privilege of

engaging in "telephone business" in the City. SMC 5.48.050A. CP 219.

As Qwest acknowledges, the City's code states that tax is not imposed on interstate telephone services:

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.). . .

SMC 5.48.050A (emphasis added). CP 291. Here, the tax at issue did not involve a tax on interstate services.

Instead, the City taxed Comcast for engaging in the business of business of providing a cable transmission system in Seattle. The City defines "telephone business" to include the business of providing data transmission over a cable system. The definition states:

"Telephone business" means the providing by any person of access to a local telephone network, local telephone network switching service, toll service, cellular or mobile telephone service, coin telephone services, pager service or the providing of telephonic, video, data, or similar communication or transmission for hire, via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. The term

includes cooperative or farmer line telephone companies or associations operating exchanges. The term also includes the provision of transmission to and from the site of an internet provider via a local telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Telephone business" does not include the providing of competitive telephone service, or providing of cable television service, or other providing of broadcast services by radio or television stations.

SMC 5.30.060C (emphasis added). CP 215-216. The relevant language for Comcast is that "telephone business" includes "the providing of . . . data, or similar communication or transmission for hire via a . . . cable, or similar communication or transmission system." SMC 5.30.060C. CP 215-216. In addition, the definition of telephone business specifically includes the "provision of transmission to and from the site of an internet provider via a . . . cable . . . or similar communication or transmission system." *Id.*

Comcast engaged in telephone business when it used its cable system to transmit data in Seattle. Comcast transmitted to and from the site of an internet provider by transmitting from its customers' homes to Comcast's facility in Burien and to the Westin building. This provision of an intrastate transmission system was the basis of the City's tax assessment, not the provision of interstate telephone service. This case involved a straightforward application of state and local law and does not present issues for review by the State Supreme Court.

B. The Court Of Appeals' Discussion Of RCW 35.21.714 Is Dicta Because The Issue Was Not Before The Court And Was Not Necessary To Decide The Case.

Qwest bases its brief on the court of appeals discussion of RCW 35.21.714. The court of appeals' discussion of RCW 35.21.714 is dicta and does not create grounds for review. Comcast never raised this issue in its complaint and the issue was not properly before the court. CP 3-8. In addition to failing to raise this issue in its complaint, Comcast only mentioned the issue in a footnote in its brief to the trial court and the court of appeals. (Comcast Brief, p. 2; CP 139.) Comcast did not properly raise this issue and failed to cite any legal authority to support its argument.

Qwest's concerns are based on dicta and do not rise to the level of "an issue of substantial public interest" under RAP 13.4(b)(4). Washington courts have held that "statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum." *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992); *Evergreen Freedom Foundation, V. National Education Association*, 119 Wn. App. 445, 452, 81 P.3d 911 (2003). Here, Qwest seeks review of statements by the court of appeals that do not relate to an issue before the court and that were not briefed by the parties. Comcast did not raise the issue in question in its complaint and mentioned it only in

a footnote in its brief. The issue was not before the court and was not necessary to decide the case.

The issue before the court was that the City imposed its tax on Comcast's use of a transmission network in the City that transmits data from the customers' house to the head end in Burien to the Westin Hotel. The tax was not imposed on interstate telephone services. The court of appeals' analysis of RCW 35.21.714, cited by Qwest is dicta and is not binding on other entities. Thus, the issue does not warrant review by the Washington Supreme Court under RAP 13.4(b)(4).

C. The City Is Authorized To Tax Telephone Business Under Other Statutes.

Qwest argues that the case is subject to review because the court of appeals "ignored" the limited grant of authority to cities to tax telephone business under RCW 35.21.714. Qwest ignores the longstanding statutory authority to tax telephone business and the cases applying those statutes. Cities in Washington are authorized by statute to impose taxes such as the City's telephone utility tax and B&O service tax. *See* RCW 35.22.280(32); RCW 35.22.570; RCW 35.21.714; RCW 35.21.870(1);

This court upheld Seattle's telephone utility tax more than seventy years ago in *Pacific Telephone and Telegraph Co. v. City of Seattle*, 172 Wash. 649, 653, 21 Pac. 721 (1933). In *Pacific Telephone*, plaintiff

challenged Seattle's authority to impose a tax on persons engaged in telephone business. The court held, relying on the statute authorizing cities to "grant licenses for any lawful purpose, that the power to impose the tax was well-established:

This court has held in numerous cases that cities and towns, under the powers granted, have the right to impose license taxes either for the purpose of regulation or revenue.

*Pacific Telephone*, 172 Wash. at 653. *Western Telepage v. City of Tacoma*, 140 Wn.2d 599, 998 P.2d 884 (2000). Thus, the City's telephone utility tax is authorized by statute. The City's authority to impose telephone utility taxes does not come from RCW 35.21.714. Although in some situations, that statute may impose limitations on a tax, those limitations are not relevant in this case.

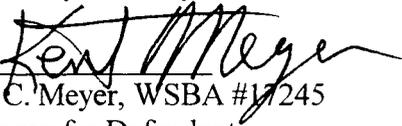
#### IV. CONCLUSION

Qwest does not raise any issues that meet the criteria for review under RAP 13.4(b). The City imposes a telephone utility tax on companies that operate a data transmission system in the City. Comcast operates a data transmission system in the City. The limitations under RCW 35.21.714 are not applicable to Comcast's activities in the City. In addition, Comcast failed to assert a claim based on RCW 35.21.714 in its complaint and only mentioned the statute in a footnote in its brief, without any supporting authority. The court of appeals discussion of RCW

35.21.714 is dicta and does not create grounds to grant a petition for review. Accordingly, this Court should not accept the petition for review.

DATED this 26 day of March, 2007.

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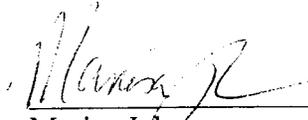
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