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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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QWEST CORPORATION, Respondent,

vs.

CITY OF BELLEVUE, Appellant.

SUPPLEMENTAL BRIEF

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FACTUAL BACKGROUND

This Court issued its opinion in the case of *Community Telecable of Seattle, Inc. v. City of Seattle*, 149 P.3d 380, on December 11, 2006. On January 4, 2007, the City of Bellevue ("City") filed a statement of additional authority notifying the Court of this "pertinent and significant authority" which had come to the City's attention after the filing of its briefs. On January 11, 2007, Qwest Corporation ("Qwest") submitted a Motion to Submit Additional Briefing, arguing that *Community Telecable* "does not directly address the question on appeal here." On January 12, 2007, the City filed a Limited Response noting that while additional briefing may be unnecessary, the City did not generally object to it. On January 31, 2007, the Court granted Qwest's Motion.

ARGUMENT

The City welcomes the opportunity to discuss the applicability of *Community Telecable* to this case. In its briefs, the City has already demonstrated that Qwest has misread Washington law in claiming that the City may not apply its Utility Occupation Tax ("UOT") to what Qwest labels "Customer Access Line Charges" ("CALCs") or to Qwest's

customer charges for ATM, frame relay, and private line services.[1] *Community Telecable* clarifies Washington law on this issue and offers a related but independent ground for finding that Qwest, like Comcast, has misread Washington law in an attempt to avoid paying an applicable and enforceable City tax.

I. *COMMUNITY TELECABLE* DEMONSTRATES THAT QWEST HAS MISREAD WASHINGTON LAW.

In *Community Telecable*, Comcast challenged the City of Seattle's telephone utility tax as it applied to Comcast's data transmission activities. In rejecting Comcast's challenge, this Court interpreted RCW 35.21.714, a statute substantively identical to RCW 35A.82.060, to find that Washington law did not prohibit the City of Seattle's taxation of Comcast's transmission of interstate data transmissions. As applied here, *Community Telecable* dictates that RCW 35A.82.060 does not bar the City of Bellevue's assessment of its UOT on Qwest's charges to end users, regardless of whether or not those charges are for interstate service or access to interstate service.

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[1] Among other things, the City has shown that a Qwest customer charge cannot possibly be for "access to, or charges for, interstate service" when the very charge being taxed is one for the delivery of *intrastate* service.

A. The *Community Telecable* Decision.

In *Community Telecable*, Comcast contended that RCW 35.21.714 barred the City of Seattle from taxing Comcast's interstate data service regardless of whether Comcast had actually charged another telecommunications company for such service. 149 P.3d at 386. The Court rejected Comcast's view and found that Comcast had "misrepresent[ed]" the statute. *Id.* As the Court put it:

> This statute merely precludes the City from taxing the portion of network telephone service that represents *charges* to another telecommunications company for access to interstate services. ... Comcast has not shown, or even alleged, that it charges another telecommunications company for interstate services.

Id (emphasis in original). As the Court further explained:

> [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 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.

Id. The Court concluded by reiterating that "RCW 35.21.714 concerns charges to other telecommunications companies for interstate services. Such charges are not at issue in this case." *Id.*

B. RCW 35.21.714 and RCW 35A.82.060 Are Identical and Should Be Interpreted Accordingly.

In addition to relying on two statutes not directly at issue here,[2] Comcast argued that the City's tax ran afoul of RCW 35.21.714. *Id.* at 386. In this case, Qwest has relied on RCW 35A.82.060 to argue that the City may not apply its UOT to charges Qwest collects from its customers. *See* Qwest's Response Brief, 14-33. RCW 35A.82.060 is substantively *identical* to RCW 35.21.714. RCW 35.21.714(1) provides:

> Any city which imposes a license fee or tax upon the business activity of engaging in the telephone business which is measured by gross receipts or gross income may impose the fee or tax, if it desires, on one hundred percent of the total gross revenue derived from intrastate toll telephone services subject to the fee or tax: 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). Likewise, RCW 35A.82.060 provides:

> Any code city which imposes a license fee or tax upon the business activity of engaging in the telephone business which is measured by gross receipts or gross income may

[2] Comcast had argued that the City of Seattle's tax violated Washington's Internet Tax Moratorium and the federal Internet Tax Freedom Act. The Court rejected these arguments. 149 P.3d at 385, 388-390.

> 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.

The only difference between the two statutes is that RCW 35A.82.060 applies to "code" cities, such as the City of Bellevue, whereas RCW 35.21.714(1) applies to non-code cities, like the City of Seattle. Since the statutes are substantively identical, the Court's reading of RCW 35.21.714(1) in *Community Telecable* should control here.

C. *Community Telecable* Demonstrates that RCW 35A.82.060(1) Does Not Bar the Taxation of Qwest's Charges.

Community Telecable demonstrates that, like Comcast, Qwest and the Superior Court have misread Washington law by adopting an overly expansive view of the bar on City taxation under 35A.82.060(1).

First, *Community Telecable* makes clear that the Washington statutes at issue only bar taxes on "charges to another telecommunications company." 149 P.3d at 386. Not once throughout this litigation has Qwest "shown, or even alleged, that it charges *another*

telecommunications company for interstate service." *Id.* (emphasis added). Instead, to the best of the City's knowledge,[3] Qwest's charges at issue in this case, like those of Comcast, are merely charges to the company's end user customers, *not* charges *to another telecommunications company* for interstate service. The City is quite certain of this with respect to Qwest's charges for its frame relay services, since Qwest has charged the City for (*wholly intrastate*) frame relay services. *See* City Brief, 26. The City likewise suspects that Qwest only collects what it labels "CALCs" from its end user customers, not from other telecommunications companies. Unless Qwest can show otherwise, the City may assess its UOT on Qwest's charges.

Second, *Community Telecable* clarifies that the Washington statutes at issue do not bar the taxation of interstate telecommunications

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[3] The City's knowledge is, of course, limited by the City's total inability to conduct discovery and by Qwest's refusal to provide information to the City regarding these charges. *See* City Brief, 32-36. As the City has pointed out, Qwest has "refused to provide the City with information as to the true nature of its CALC charges, and specifically whether these charges were really for access to interstate services." City Brief, 7. The City has maintained that a charge is not an "interstate access charge" simply because Qwest unilaterally labels it as such. *See* City Brief, 27 ("the City has no way of knowing whether Qwest's charges are indeed imposed for access to interstate services or are instead surcharges..."); City Reply Brief, 13 (the City "take[s] issue with a conclusion that 'CALCs' constitute access charges to interstate service as a matter of law simply because Qwest says so.").

services. Qwest has taken precisely the opposite position before this Court, alleging that RCW 35A.82.060 "plainly prohibits ... the taxation of 'interstate' telecommunications services...." Qwest Brief, 16. Likewise, the Superior Court's *Order Granting Plaintiff Qwest Corporation's Cross-Motion for Summary Judgment* flatly declared that the City may not assess its UOT on "charges for interstate services." Order, 2. *Community Telecable* rejects this view of Washington law. 149 P.3d at 386 (finding Washington law "does not bar the City from taxing Comcast's data transmission revenue simply because data transmission signals cross Washington's borders."). Like Comcast's data service, Qwest's ATM, frame relay, and private line services are simply services for the transmission of data which may, in some cases, involve the transmission of data across state lines. *Community Telecable* stands for the fact that Washington cities may tax a telecommunication company's customer charges for such interstate services.

Qwest is left to take an expansive view of "access" charges, urging the Court to find that all of its charges at issue here are actually "access" charges -- even if not denominated as such -- since they appear in Qwest's federal tariffs. *See* Qwest Brief, 26 (noting that "the City's description of the ATM and frame relay services as 'services' rather than access charges glosses over the point that the charges at issue here are FCC tariffed

services."). This argument is fundamentally nothing more than an extension of the view rejected in *Community Telecable* that a Washington city may not tax interstate services. *Id.* at 386. Since interstate services are regulated at the federal level, and since Qwest charges customers for interstate *and* intrastate service, Qwest files tariffs pursuant to a federal regulatory scheme.[4] Qwest now argues that references in its federal tariffs to Qwest's services dictate as a matter of law -- as a matter of *Washington* law -- that such charges are non-taxable charges for "access to...interstate services." This is simply wrong. The fact that a service is *regulated* at the federal level, like the fact that the service is generally interstate in nature, is not dispositive of the question of whether a charge is for "access to...interstate services" under Washington law.

Community Telecable provides the test under Washington law, and it instructs that the bar on City taxation under the controlling statutes is very narrow. The bar neither turns on the interstate nature of services for which a company charges its customers, nor on the regulation of those

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[4] Of course, the interstate services of Comcast and Qwest are *regulated* differently at the federal level. As a cable service and information service provider under the federal Communications Act, Comcast is not required to file tariffs with the FCC. As a provider of telecommunications service under Title II of the Communications Act, Qwest is required to file such tariffs. Neither *Community Telecable* nor 35A.82.060 suggests that federal regulation dictates how a charge may be taxed under Washington law.

charges under federal law. Instead, the bar turns on whether a telecommunications company can show it has "charge[d] another telecommunications company" for interstate services. *Id.* The City respectfully submits that Qwest has wholly failed to make such a showing.

For these reasons, and for the reasons submitted in the City's Brief and Reply Brief, the City urges this Court to reverse the Superior Court's judgment that the City of Bellevue may not levy its UOT on Qwest's CALCs, or its charges for ATM, frame relay, and private line services.

DATED this 20th day of February, 2007.

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COURT OF APPEALS, DIVISION I
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QWEST CORPORATION, Respondent, v. CITY OF BELLEVUE, Appellant.	NO. 58154-6-1 **CERTIFICATE OF SERVICE**

THE UNDERSIGNED hereby certifies that on this date, I cause service of the **City of Bellevue's Supplemental Brief** and **Certificate of Service** for the above-referenced case by having the original and one copy filed via messenger service with the Court of Appeals -- Division I, Appellate Court Clerk and a copy delivered via messenger to the Respondent's Counsel of Record:

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I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 20th of February, 2007.

Sharon L. Taylor