NO. 83673-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

QUALCOMM INCORPORATED,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF INTELLIGENT TRANSPORTATION SOCIETY OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*

The Intelligent Transportation Society of America ("ITS America") was established in 1991 as a not-for-profit organization to foster the use of advanced technologies in surface transportation systems. Its members include private corporations, public agencies, and academic institutions involved in the research, development, and design of Intelligent Transportation Systems ("ITS") technologies to enhance safety, increase mobility, and sustain the environment. As the leading advocate for technologies that improve the safety, security, and efficiency of the nation's surface transportation systems, ITS America is aggressively involved in education and advocacy efforts related to vital transportation issues, including measuring and improving performance through ITS, advancing next generation innovations, and financing the future of transportation.

ITS services are fundamentally different from telecommunications services, which transmit user-provided data from one location to another. By contrast, ITS services provide significant aggregation, supplementation, processing, manipulation, and storage of data. To be sure, ITS service providers *use* telecommunications services to disseminate this information to their customers. But, telecommunications is merely an input. The ITS service provided to the customer is an information service. The OmniTRACS Service, which performs all these processing, storage, and information-generating functions, is typical.

As a result, this Court's treatment of the OmniTRACS Service carries potentially broad implications for the ITS industry. The Department of

Revenue ("Department") has taken the position that the OmniTRACS Service is primarily a transmission service, used to passively transport user information between two user locations, and that, as a result, the Service should be taxed in the same manner as a basic telephone service. This position is directly contrary to the facts. Customers purchase ITS services, including the OmniTRACS Service, in order to obtain additional, processed, and stored information. The fact that the OmniTRACS Service contains a transmission component does not alter the analysis. As both federal and Washington State law recognize, services that process, manipulate, store, or generate information are "information services," even if these services *use* telecommunications to disseminate the information. *Cf.* Appellant's Supp. Br. 6-8. If this Court were to adopt the Department's position and treat the OmniTRACS service as a simple means of transmission, many ITS technologies normally considered to be "information services" could be affected.

The taxation of ITS technologies is of particular interest to ITS America and its members because the market for these systems is still emerging, and thus highly cost-sensitive. Additional cost burdens, such as increased or unpredictable taxation, could retard the development of a robust ITS infrastructure, along with the social, environmental, and economic benefits that come with it.

STATEMENT OF THE CASE

At issue in this case is the proper tax treatment of Appellant Qualcomm's OmniTRACS Service. The procedural history, as well as a de-

scription of the technology at issue, are well set forth in Qualcomm's briefs.

OmniTRACS is a fleet-management system that provides Qualcomm's customers with information about the vehicles in their fleets, including vehicle location and other key performance metrics. CP 29, 77. The System has three components—hardware installed in the vehicle, software used at the customer's dispatch center, and a monthly subscription service—that must all be purchased (through a single contract) for the System to work. CP 30, 76-84, 184-90. The OmniTRACS System, operating as a whole, generates location and status information that the customer, using System components, can utilize, analyze, and integrate into other office functions. CP 29, 81-84. And the OmniTRACS Service, viewed in isolation from the rest of the System, performs a number of information processing, storage, and generation functions at Qualcomm's Network Management Center ("NMC"), including determining vehicle location, CP 185, 242; generating additional descriptive information about that location, CP 241; formatting this information for compatibility with the rest of the OmniTRACS system, CP 30, 112; and performing hourly position polls, CP 30.

In 2002, the Department conducted an audit and concluded, CP 53-64, that the OmniTRACS Service is subject to retail sales tax as a "network telephone service," *i.e.*, a service providing "communication or transmission for hire." RCW 82.04.065(2) (2000). The category of "network telephone services" does not include "information services," which

consist of "every business activity . . . by which a person . . . conveys data, facts, knowledge, procedures, and the like to any user of such information through any tangible or intangible medium." WAC 458-20-155.[1] Qualcomm, having paid the tax, is challenging the Department's ruling and seeking a refund on the ground that the OmniTRACS Service is properly classified as an information service. The Department denied Qualcomm's refund request, CP 122-23, 17, and the Superior Court granted summary judgment in favor of the Department, CP 304; the Court of Appeals affirmed, *Qualcomm, Inc. v. State Dep't of Revenue*, 151 Wn.App. 892, 213 P.3d 948 (2009).

ARGUMENT

I. ITS TECHNOLOGIES LIKE OMNITRACS CREATE SIGNIFICANT SOCIAL VALUE THROUGH THE PROCESSING AND GENERATION OF TRANSPORTATION-RELATED INFORMATION.

The OmniTRACS Service at issue in this case provides processing, storage, and information generation functions similar to those provided by a number of other, socially beneficial ITS technologies. As such, this case has the potential to affect many services in addition to the single system that is now before this Court.

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[1] The tax code has been amended to distinguish between "telecommunications service" and "information service," RCW 82.04.065(27) (2007), though the amendment post-dates the audit period in this case, CP 4-5. The Department, however, takes the position that its interpretation applies equally to both versions of the statute. *See* Respondent's Answer to Pet. for Rev. at 10-11.

ITS technologies are used in a wide variety applications that include the generation and dissemination of information regarding traffic incidents, emergencies, and weather conditions; management of commercial and public transit fleets; management of traffic flow; and collision avoidance. *See* United States Department of Transportation, Research and Innovative Technology Administration ("RITA"), Applications Overview, http://www.itsoverview.its.dot.gov (last visited Aug. 20, 2010). These applications typically use wireless and wire line communication networks to disseminate information. *See* RITA, ITS Frequently Asked Questions, http://www.its.dot.gov/faqs.htm (last visited Aug. 20, 2010). However, the service that is provided to the customer is the provision of information. For example, data may be collected through stationary road sensors that detect events at particular points on roadways or through hardware located in individual vehicles. The data is then monitored, processed, augmented and often aggregated. Finally, the information about the conditions is disseminated to the customers by means of a communications network. *See* RITA, Applications Overview; United States Government Accountability Office, *Surface Transportation: Efforts to Address Highway Congestion through Real-Time Traffic Information Systems Are Expanding but Face Implementation Challenges*, Enclosure 1 ("GAO Report"), at 4-5, 8, *available at* http://www.gao.gov/new.items/d10121r.pdf.

Increased utilization of ITS technologies brings considerable public benefits—so much so that United States Department of Transportation has undertaken a major initiative, IntelliDrive[SM], to promote the use of wire-

less technology in surface transportation systems. *See* IntelliDrive[SM] Frequently Asked Questions, http://www.intellidriveusa.org/about/faqs.php (last visited Aug. 20, 2010). ITS technologies can—and already do—play an important role in reducing congestion and emissions, improving road safety, and providing the traveling public with better transportation options through increased information. *See Hearing on the Research and Development Portfolio to Support the Priorities of the Department of Transportation Before the H. Subcomm. on Technology and Innovation of the H. Comm. on Science and Technology*, 2009 WL 3969953 (Nov. 19, 2009) (statement of Ann Flemer, Deputy Executive Director, Policy, Metropolitan Transportation Commission) ("Flemer Statement"); IntelliDrive[SM] Frequently Asked Questions.[2] For example, sensors can detect unsafe road conditions and produce data that can be processed to generate driver alerts, as well as processed and aggregated to generate real-time traffic information. *See* RITA, Application Area Definitions, http://www.itsbenefits.its.dot.gov/its/benecost.nsf/ByInfo/WhatIsAppAreas (last visited Aug. 20, 2010). Likewise, as travelers make better-informed decisions—by avoiding heavily congested routes, opting to take mass transit based on real-time road information, or otherwise—

[2] The economic cost of congestion in the nation's major metropolitan areas exceeds $87 billion per year, including 4.2 billion hours of delay and 2.8 billion gallons of wasted fuel. See Flemer Statement. Traffic crashes exact a human toll of over 40,000 Americans killed every year, with an annual economic cost of over $230 billion. *See id.* And the transportation sector is estimated to contribute nearly a third of the nation's carbon dioxide emissions. *See id.*

they also emit fewer pollutants through their vehicles. *See* Flemer Statement; IntelliDrive[SM] Frequently Asked Questions.

These beneficial technologies are used by both private companies and governmental agencies. Private companies collect real-time data and process them to generate information that is made available to paying customers and to the general public (*e.g.*, through radio, television, or internet broadcast), *see* GAO Report at 7. The increased information helps to alleviate traffic-related costs. Governmental agencies are also highly involved in the collection and processing of real-time data, but these efforts are often limited in scope due to the cost of installing and maintaining fixed sensors and cameras, as well as the limited geographic coverage that such fixed hardware can achieve. GAO Report at 4. As a result, public entities often rely upon data generated by private companies, which have started to achieve greater success in adopting newer technologies like vehicle probes. *See id.* at 8.

For example, vehicle probes utilize wireless communications to collect and analyze data from groups of individual vehicles—such as commercial fleets—that have been outfitted with specific hardware; companies then can use this probe data, *inter alia*, to calculate the speed of individual vehicles and generate information about traffic flow. *Id.* Governmental agencies then contract with private companies to furnish this information, thereby greatly expanding the information available to the public. *Id.* Likewise, data from satellite positioning and telematics systems used by commercial trucking fleets, like OmniTRACS, are used to provide impor-

tant input for research about the nation's major freight traffic corridors. *See* American Transportation Research Institute, *Measuring Travel Time in Freight Significant Corridors*, *available at* http://www.atri-online.org/research/results/One-Pager%20FPM3_final.pdf. These kinds of partnerships thus enable governmental agencies and research organizations to leverage the significant technical and market power of private companies.

Qualcomm's NMC processing center performs the same information processing that make many of these ITS applications possible: it collects data, reformats it, performs calculations, combines the data with additional information (such as proximity to geographic landmarks), and ultimately stores and furnishes usable information to end-user customers of the OmniTRACS Service. *See supra* pages 3-4. Many sensor-based ITS technologies, including (but far from limited to) the vehicle probes that are used to generate real-time traffic data, rely upon similar techniques to aggregate and transform data collected from individual sensors into usable information. *See, e.g.*, GAO Report at 8 (explaining calculations performed on data collected wirelessly from vehicles to determine current traffic speeds).

In light of the processing, storage, and generation of information that make these ITS services possible, such services—OmniTRACS included—are a far cry from the mere "communication or transmission for hire" that is taxable as "network telephone service" under RCW 82.04.065(2). Indeed, under this Court's decision in *Community Telecable*

v. City of Seattle, 164 Wn.2d 35, 186 P.3d 1032 (2008), such processing activity, which is an integral part of the service, puts these ITS services outside the definition of "network telephone service." *See id.* at 44 (explaining that "network telephone services" do not include services for which the transformation and manipulation of data "is an integral and necessary part of the provision of . . . services" such that the "passed data would not be useful unless [the service provider] had transformed the data along the way"). Thus, if this Court were to retreat from its precedent in *Community Telecable* and hold that the OmniTRACS Service is—despite all the processing necessary to provide valuable information to customers—a "network telephone service" under RCW 82.04.065(2), it would raise serious questions about the taxability of the many other socially beneficial technologies that rely upon similar processing models.

II. THE DEPARTMENT'S INTERPRETATION OF RCW 82.04.065(2) WOULD IMPOSE SUBSTANTIAL COSTS ON THESE EMERGING ITS TECHNOLOGIES.

Although the definition of "network telephone service" in RCW 82.04.065(2) bears little textual relationship to processing-intensive ITS technologies like the OmniTRACS Service, any possible ambiguity must be construed against the Department's proposed interpretation. It is a fundamental rule of statutory interpretation that "[a]mbiguities in taxing statutes are construed 'most strongly against the government and in favor of the taxpayer.'" *Estate of Hemphill v. State Dep't of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005) (quoting *Dep't of Revenue v. Hoppe*, 82

Wn.2d 549, 552, 512 P.2d 1094 (1973)). This rule serves to ensure that courts do not "enlarge [tax provisions'] operations so as to embrace matters not specifically pointed out." *Gould v. Gould*, 245 U.S. 151, 153, 38 S. Ct. 53; 62 L. Ed. 211 (1917). Moreover, "[t]he rule should be no less when interpreting the facts in a tax case and concluding therefrom the applicability of a taxing statute." *Foremost Dairies, Inc. v. State Tax Comm'n*, 75 Wn.2d 758, 763, 453 P.2d 870 (1969).

These principles have particular force where, as here, enlargement of the tax provision at issue could have a significant negative impact on the development of socially beneficial technology. The Washington State Legislature has recognized in other tax provisions that emerging technologies are particularly sensitive to the burdens of taxation. In enacting tax incentives for certain high-technology businesses, the Legislature codified its finding that "many high-technology businesses incur significant costs associated with research and development and pilot scale manufacturing many years before a marketable product can be produced, and that current state tax policy discourages the growth of these companies by taxing them long before they become profitable." RCW 82.63.005. The Legislature further explained that "stimulating growth of high-technology businesses early in their development cycle, when they are turning ideas into marketable products, will build upon the state's established high-technology base, creating additional research and development jobs and subsequent manufacturing facilities." *Id.*

The Legislature's understanding regarding the taxation of emerging technologies applies equally here. In many geographic areas, it is still not cost-effective for private companies to deploy ITS technologies like vehicle probes, *see* GAO Report at 9, and increases in costs (such as through additional taxation) will slow ITS advancement. The Department's proposed interpretation, however, has the potential to increase taxes on a large assortment of relatively new technologies and applications that are still developing their commercial footing, thereby also affecting the development of the considerable environmental, economic, and safety-related benefits that come from greater ITS adoption. *See supra* pages 5-8. It would diminish the incentives for private companies to advance new technologies and widen the deployment of existing technologies. Moreover, because many governmental agencies rely upon privately collected data, *see* GAO Report at 8, disincentives affecting the deployment of ITS technologies in the private sector will also limit the availability of data and information to be furnished through public-private partnerships.

Thus, although it should be clear from the statute that "network telephone service" does not include services that rely upon the sort of processing that underlies the OmniTRACS Service, there are compelling reasons to construe any lingering ambiguity against the Department.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED this 20th day of August, 2010.

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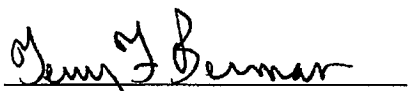
By 
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing Brief of Intelligent Transportation Society of America as *Amicus Curiae* in Support of Appellant to be served upon the following counsel of record in the manner noted below:

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Terry F. Berman, WSBA #20896

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1. Notice of Motion and Motion for Permission to File Brief of *Amicus Curiae*
2. Brief of Intelligent Transportation Society of America as *Amicus Curiae* in Support of Appellant

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