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Supreme Court No. 85581-T

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

JARED PECK,

Plaintiff,

and JAMES BOWDEN,

Plaintiff-Appellant,

v.

CINGULAR WIRELESS LLC, et al.,

Defendants-Appellees.

**APPELLEES' ANSWER TO BRIEF OF AMICUS CURIAE CTIA –
THE WIRELESS ASSOCIATION**

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I. INTRODUCTION

Appellee Cingular Wireless respectfully submits this Answer to the Brief of Amicus Curiae CTIA – The Wireless Association. While Cingular agrees with *all* of CTIA’s arguments, the purpose of this Answer is to emphasize three points that are especially important in responding to the Ninth Circuit’s certified question.

First, Cingular agrees with CTIA that this Court’s opinion in *Nelson v. Appleway Chevrolet, Inc. (Nelson)*, 160 Wn.2d 173, 157 P.3d 847 (2007), permits sellers to recoup B&O taxes so long as the surcharge is disclosed before a transaction is finalized. *See* Amicus Mem. at 7-8. The Court’s opinion is clear on that point: “[I]t is lawful for Appleway to disclose a B&O charge to Nelson *during* the course of negotiating a purchase price or later identify any claimed element of overhead.” 160 Wn.2d at 181. The conduct prohibited under *Nelson* is equally clear: “Appleway may not add a B&O charge as one of several fees and taxes *after* Appleway and Nelson negotiated and *agreed upon* a final purchase price.” *Id.*

Consistent with the above distinction, the Court in *Nelson* concluded that the seller’s conduct was unlawful because the contract explicitly stated that “Business and Occupation taxes (B&O tax) have been assessed on the negotiated sales amount,” yet the seller added an

additional B&O charge *on top* of the final negotiated price – a charge that was *not* disclosed to the buyer prior to finalizing the sale. *Id.* at 178 n.3 (internal quotation marks and citation omitted). Here, in contrast, the Ninth Circuit reviewed the evidence submitted by the parties and specifically concluded that “Cingular disclosed that it would charge and collect a surcharge for gross receipts taxes before Bowden purchased his phone service plan.” Certification Order at 1333. As Cingular previously noted, any remaining questions could easily be resolved by contacting Cingular or by reviewing the B&O tax rates on the Washington Department of Revenue’s website (<http://dor.wa.gov/content/findtaxesand-rates/bandotax/>).

Second, Cingular also agrees with CTIA that because of the nature of wireless services, it generally is not possible to specify the precise dollar amount of any B&O tax surcharge during negotiations. *See* Amicus Mem. at 8-9. As CTIA appropriately points out, the monthly payment received from a given customer necessarily varies based on such things as additional minutes, text messages, and internet use. *Id.* As such, requiring wireless companies to specify the precise dollar amount of a B&O surcharge is impracticable. The fact that Cingular voluntarily suspended its B&O surcharge pending the outcome of this case does not change that analysis, as both Cingular and other wireless companies should be

permitted to recoup B&O taxes so long as they disclose such charges prior to the final sale.

Third, CTIA's amicus brief also confirms – as Cingular previously argued – that if RCW 82.04.500 were interpreted to preclude sellers from recouping B&O taxes even where, as here, the surcharge is disclosed before a transaction is finalized, the statute would be preempted by the Federal Communications Act. In *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053 (9th Cir. 2008), the Ninth Circuit held that RCW 82.04.500 is not preempted by the Federal Communications Act because it “simply structures the contract’s negotiation and disclosure.” *Id.* at 1057. By interpreting RCW 82.04.500 to structure negotiation and disclosure, CTIA’s analysis appropriately avoids preemption concerns. Bowden’s reformulated question and contrary interpretation of RCW 82.04.500 do not.

In sum, CTIA’s amicus brief confirms – as Cingular previously established – that the proper answer to the certified question is “yes.”

Dated: October 7, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cindy Castro, certify that at all times mentioned herein I was and now am a citizen of the United States of America and a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is: Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, Washington 98101-3197.

That on October 7, 2011 I caused to be hand delivered by legal messenger service a true and correct copy of the foregoing Appellees' Answer to Brief of Amicus Curiae CTIA- The Wireless Association on the following counsel of record:

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Dated this 7th day of October, 2011 at Seattle, Washington.

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