

No. 79702-1

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

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

Petitioners,

vs.

City of Seattle,

Respondent,

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 December 20, 2007 amicus curiae memorandum in support of Comcast.

II. ARGUMENT

A. Amicus Qwest 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 Qwest essentially rehashes arguments made by Comcast. The bulk of Amicus Qwest's brief provides no new arguments to overrule the court of appeals' decision in favor of the City. Thus, in accordance with RAP 10.3(f), the City will limit its response to the few arguably new matters raised by Qwest.

B. Qwest's Arguments Regarding RCW 35.21.714 Are Contrary To Its Earlier Arguments To This Court.

Qwest contradicts its earlier arguments to this Court by now arguing that under RCW 35.21.714 the City is barred from imposing its telephone utility tax on Comcast. (Qwest Amicus Brief, p. 13.) As the City stated in its supplemental brief and response to Comcast's petition, the portion of the court of appeals' decision regarding the application of RCW 35.21.714 was dicta and was not properly before the court. Comcast did not raise the issue in its complaint and did not properly brief

the issue. The court of appeals' discussion of RCW 35.21.714 was not identified by the court as part of its holding in the case and was therefore dicta. See *Community Telecable of Seattle, Inc. v. City of Seattle*, 136 Wn. App. 169, 172, 140 P.3d 149 (2006).

In contradiction to its new position, Qwest previously argued to this Court, with respect to RCW 35.21.714, that "the decision below erroneously addressed an issue that was not briefed or argued by the parties." (Qwest Amicus Brief in Support of Petition for Review, p. 9.) Moreover, in its appellate brief in *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007), Qwest argued, "The Court may disregard the *Community Telecable* panel's discussion of RCW 35.21.714(1) on the grounds that it is dicta. Dicta is language that is not necessary to a decision, and it is not binding." (Qwest's Supplemental Brief in *Qwest v. Bellevue*, No. 79909-1, p. 9.) Qwest also argued in *Qwest v. Bellevue* that "in *Community Telecable* the application of RCW 35.21.714(1) was not properly before the Court" because "the only mention of the statute was a footnote in Comcast's brief. *Id.*

Qwest's earlier representations contradict its contentions to this Court in its amicus brief. Consequently, the Court should judicially estopp Qwest from taking inconsistent positions. "A court may invoke judicial estoppel either to prevent a party from gaining an advantage by

taking inconsistent positions or to maintain the dignity of judicial proceedings.” *Garrett v. Morgan*, 127 Wn. App. 375, 379. 112 P.3d 531 (2005) (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir.2001)). The Court should not permit Qwest to take inconsistent positions on an identical issue.

Qwest’s earlier position was, in fact, correct. The issue of RCW 35.21.714 was not properly before the court and was not briefed or argued by the parties. The court of appeal’s discussion of the issue was dicta. Thus, this Court should not accept Comcast’s or Qwest’s invitation to invalidate the City’s tax based on a statute that was not properly before the trial court and the court of appeals.

C. Qwest Erroneously Attempts Interpret State Tax Law Based On Federal Cases Interpreting Telecommunication Regulations Unrelated To Taxes.

Qwest repeats the same error that Comcast makes by confusing the analysis of federal and state law governing the Internet and its taxation. Qwest ignores the U.S. Congress’ stated intent not to affect state and local taxes through the federal 1996 Telecommunications Act, which is a regulatory measure and not a tax measure. Congress specifically stated in the 1996 Telecommunications Act that local taxation power is not modified or impaired by that Act :

[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or suppression of, any State or local law pertaining to taxation ...

Section 601, 47 U.S.C. § 152(c)(2) nt., 110 Stat. 143. Although the 1996 Telecommunications Act grants the Federal Communications Commission regulatory jurisdiction over interstate telecommunications, the Act does not govern local taxes. *Cf. In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, FCC 04-267, WC Docket No. 03-211, Memorandum Opinion and Order (Nov. 12, 2004) at ¶ 14, n.47, (preempting the state of Minnesota's "regulations" but not its "laws concerning taxation"), *affirmed by Minnesota Public Utilities Com'n v. F.C.C.*, 483 F.3d 570 (8th Cir. 2007).

Thus, Qwest's efforts to construe state and local tax statutes and ordinances based on *National Cable & Telecommunications Ass'n v. Brand X*, 545 U.S. 967, 162 L. Ed. 2d 820, 125 S. Ct. 2688 (2005) is misplaced. (Qwest Amicus Brief, pp. 5-6, 9-10.) The *Brand X* case involved the regulation of cable companies under the Telecommunications Act and did not involve the Internet Tax Freedom Act ("ITFA") or local taxation of cable modem service. In fact, the word "tax" does not appear in *Brand X*. Although the ITFA incorporates the statutory definition of

“telecommunication services” that was construed in *Brand X*, neither the ITFA nor *Brand X* purport to apply to Washington tax law.

Simply put, the State of Washington has chosen to unbundle transmission and Internet services for tax purposes and the federal government bundles them for regulatory purposes. But there is no support for Qwest’s and Comcast’s arguments that the federal handling of Internet regulation and taxation affects Washington law. As discussed extensively in the City’s briefs and as recognized by the court of appeals, the State Internet Tax Moratorium, RCW 35.21.717 and RCW 82.04.065(2), specifically distinguish between taxable telephone business (data transmission) and Internet services. See *Community Telecable*, 136 Wn. App. at 178-179. As the court of appeals noted, “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.” *Id.* at p. 178; Laws of 1997, ch. 304, §§ 1, 2, 5. In Section One of the bill the legislature stated its intent to identify what Internet services are taxable. In Section Two, the legislature created the moratorium on “Internet service” and defined that term in Section Four (and did not include transmission services in the definition). In Section Five the legislature distinguished between data transmission and Internet services. *Id.* Qwest disregards the plain language of the state legislature and relies

instead on unrelated and irrelevant federal law to interpret these state statutes. The state legislature expressly unbundled transmission and services and allowed cities to tax transmission. *Brand X* and other federal regulatory authorities do not apply to state tax law.

D. Qwest's Extensive Discussion Of DSL Versus Cable Modem Data Transmission Systems Supports The State Legislature's Unbundling of Data Transmission From Internet Services.

The undisputed evidence establishes that a cable modem customer receives two separate components, transmission and Internet services. The state of Washington allows cities to tax the transmission component. Qwest's summary of the chronology of the FCC's decision to regulate DSL transmission in a manner similar to cable modem transmission is irrelevant. A review of the FCC report cited by Qwest reveals that the FCC was carrying out its regulatory duties and was not purporting to control local taxes in contravention of the 1996 Telecommunications Act. *See In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al*, 20 FCC Rcd. 14853, 2005 FCC LEXIS 5257 (2005).

The FCC acknowledges that both data transmission and Internet services are distinct services that are sold separately by cable companies and telephone companies. *See Time Warner Telecom, Inc. v. Federal Communications Comm'n*, 507 F.3d 205, 218 (3rd Cir. 2007) (cable

modem providers not only have the capability to offer their transmission facilities on a stand-alone basis, but in fact, have entered into agreements with independent ISPs to do so). Indeed, during a portion of the audit period Comcast provided the transmission component and contracted with Excite@home to provide Internet services. *See Community Telecable*, 136 Wn. App. at 173. Qwest's attempt to inextricably combine transmission and Internet service belies reality. As permitted by the State Legislature, the City's tax simply applies to transmission services, which are taxable as network telephone services.

E. The City Telephone Utility Tax Is Not Discriminatory Under The Internet Tax Freedom Act Because The Tax Is Imposed Upon And Legally Collectible From Companies Engaged In Telephone Business.

The City does not impose a discriminatory tax as defined by the Internet Tax Freedom Act. The City's telephone utility tax applies uniformly to all companies engaged in telephone business and the City's service B&O tax applies to companies providing Internet services in the City. It is undisputed that the City notified Summit, the only other cable company operating in Seattle, that its cable modem activities were subject to the utility tax. CP 502-503. Qwest's implication to the contrary is incorrect.

The undisputed evidence provided to the trial court establishes that the City imposes the telephone utility tax on companies that provide transmission services and the B&O tax on Internet service providers. As stated by the City's director of Revenue and Consumer Affairs:

During my tenure as Director, the City has conducted audits of taxpayers who have paid the telephone utility tax under SMC 5.48.050A for transmitting data over cable or other transmission system in the City. . . . The RCA interprets the telephone utility tax under SMC 5.48.050A as applying to cable companies such as plaintiffs that use their transmission systems to transmit internet-related data. The RCA has imposed, enforced, and actually collected the telephone utility tax from these types of companies. . . .

The RCA has enforced the tax code so that a company that owns transmission capability through wires, cable, microwave or other medium are considered a telephone businesses under SMC 5.30.060C and are subject to the telephone utility tax under SMC 5.48.050. The RCA enforced the tax code in this fashion prior to October 1, 1998.

(CP 43-44.) The City does not create a separate class of Internet access service providers that are taxed at a higher rate in violation of the ITFA. All companies in Seattle that engage in telephone business are subject to the telephone utility tax and all companies that provide Internet services are subject to the B&O tax.

F. If The Court Interpreted RCW 35.21.714 To Prohibit Taxing Data Transmission, The Court Would Nullify The Legislature's 1997 Amendment To The Definition Of Network Telephone Service To Include Data Transmission Of Internet Services.

The data transmission services provided by Comcast occur in the City of Seattle and are neither interstate services nor access to interstate services under RCW 35.21.714. Qwest's arguments to the contrary would nullify the authority the legislature granted to the cities in 1997 when it amended the definition of network telephone services to include data transmission, including transmission to and from the site of an Internet provider. RCW 82.04.065.¹ Qwest contends that all transmission systems for the Internet are "interstate" and cannot be taxed under RCW 35.21.714. By accepting this argument, the Court would nullify the legislature's amendment to RCW 82.04.065 in which it specifically included in the definition of network telephone service the "provision of transmission to and from the site of an Internet provider" and stated that the definition did not include the "provision of Internet service as defined in RCW 82.04.297." RCW 82.04.065. This amendment, made in the

¹RCW 82.04.065 states: "Network telephone service" means the providing by any person of access to a telephone network, telephone network switching service, toll service, or coin telephone services, or the providing of telephonic, video, data, or similar communication or transmission for hire, via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" includes the provision of transmission to and from the site of an Internet provider via a telephone network, toll line or channel, cable, microwave, or similar communication or transmission system. "Network telephone service" does not include the providing of competitive telephone service, the providing of cable television service, the providing of broadcast services by radio or television stations, nor the provision of Internet service as defined in RCW 82.04.297, including the reception of dial-in connection, provided at the site of the Internet service provider.

same bill that created the Internet Tax Moratorium, carved out data transmission services as taxable. In Section One of the bill, the legislature specifically states that the purpose of the bill is to clarify what taxes cities can impose. There would be no point to the amendments to RCW 82.04.065 if data transmission was not taxable under RCW 35.21.714.

Qwest discusses at length a decision by the New York Board of Tax appeals, *In re Petition of Concentric Network Corp.*, 2006 WL 776279 (N.Y. Tax App. Trib.), Dkt. No. 819533 (2006). This case, which applies New York law, is not applicable here. The State of New York may have chosen not to permit taxation of the data transmission for the Internet. The board in *Concentric* stated that the “imposition of tax on interstate telephone calls is permissible” under the federal constitution. *Id.* at p. 8. The board’s decision was based on New York law that has no relevance to the legislature’s 1997 amendments to RCW 82.04.065. Here, the issue is Washington law and under Washington law the state has authorized cities to tax data transmission of Internet services.

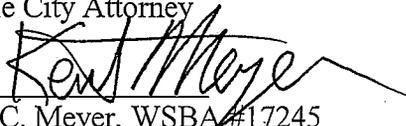
III. CONCLUSION

The City imposes a telephone utility tax on companies that operate a data transmission system in the City. The State Legislature distinguished between Internet service and data transmission and permitted cities to tax data transmission. Federal regulations do not affect

state and local tax laws. Accordingly, this Court should affirm the court of appeals decision in favor of the City of Seattle.

DATED this 14 day of January, 2008.

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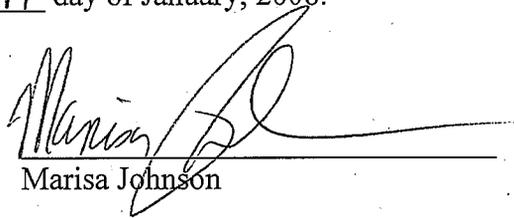
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