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STATE OF WASHINGTON

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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,

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Respondent's Answer to Qwest's Amicus Curiae Memorandum

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ORIGINAL

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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.

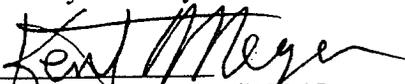
IV. CONCLUSION

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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CERTIFICATE OF SERVICE

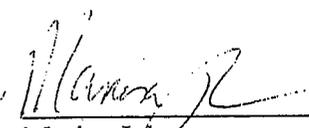
I, certify that on this date I caused a copy of appellant City of Respondent's Answer to Qwest's Amicus Curiae Memorandum to served by legal messenger on:

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