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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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Supreme Court No. \_\_\_\_\_

(Court of Appeals No. 57491-4-1)

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COMMUNITY TELECABLE OF SEATTLE, INC.,  
COMCAST OF WASHINGTON I, INC., AND  
COMCAST OF WASHINGTON IV, INC.,

Petitioners,

v.

CITY OF SEATTLE,

Respondent.

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PETITION FOR REVIEW

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**I. Identity of Petitioners.**

Community Telecable of Seattle, Inc., Comcast of Washington I, Inc., and Comcast of Washington IV, Inc. (collectively “Comcast”), seek review of the decision designated in Part II.

**II. Court of Appeals Decision.**

The court of appeals’ decision below will be published and was filed on December 11, 2006. A copy of the decision is attached as Appendix A.

The decision below involves an issue of national importance. The court employed a strained interpretation of the Internet Tax Freedom Act (“ITFA”),<sup>1</sup> nullifying Congress’s purpose in enacting the statute. Congress enacted the ITFA to prevent States and cities from interfering with the emergence of Internet commerce. The act prohibits State and local taxes on Internet access, with an exception for taxes on Internet access that were “authorized by statute” prior to October 1, 1998. The decision so plainly flouted congressional intent that, unless corrected, it will become a road map showing other states and local jurisdictions how to avoid the ITFA to tax Internet commerce.

In 1997, our State Legislature enacted a similar Internet tax moratorium statute to encourage growth of the State’s high-technology

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<sup>1</sup> Pub. L. No. 105-277, Div. C. Title XI, 112 Stat. 2681-719 (1998), *codified as amended at* 47 U.S.C. § 151 (note) (2006). Unless otherwise noted, all cites to the ITFA are to the current version of the act. A copy of the ITFA is attached as Appendix B.

industries by preventing the taxation of Internet services at telephone tax rates.<sup>2</sup> The 1997 State Act blocks Seattle from being able to satisfy the requirement of the federal ITFA that a telephone tax on Internet access must be “authorized by statute” prior to October 1, 1998. That should be the end of the analysis. But the court of appeals misconstrued the ITFA by upholding Seattle’s position that it is not taxing “Internet access” at all, but instead is taxing “network telephone service.”

When Congress became aware in 2003 that some States and local jurisdictions were circumventing the ITFA by segregating data transport from Internet access (and taxing data transport), Congress amended the ITFA with the express goal of preventing such attempts to end-run the act.<sup>3</sup> The court of appeals, however, refused to defer to Congress’s judgment that Internet commerce should be encouraged and instead authorized local Washington jurisdictions to ignore the ITFA by taxing the data transport component of Internet access, contrary to Congress’s intent. To approve Seattle’s imposition of its data transport tax, the court of appeals accepted the hypothetical division of Comcast’s internet service into the sale of two services: data transport taxed at telephone rates, and Internet access taxed at B&O rates. By upholding this fictional

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<sup>2</sup> Ch. 304, 1997 Laws of Washington, pointedly titled “Prohibiting Taxation of Internet Service Providers as Telephone Service Providers,” codified in pertinent part at RCW 35.21.717, 82.04.297, and 82.04.065 (“the 1997 State Act”). See Section 1 of the act for a description of its purpose.

<sup>3</sup> Internet Tax Nondiscrimination Act (“ITNA”), Pub. L. 108-435, 118 Stat. 2615 (2004).

bifurcation, the court of appeals expressly refused to defer to the judgment of the Supreme Court in *National Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 2703, 162 L. Ed. 2d 820, 842 (2005) (“*Brand X*”), that “telecommunications is part and parcel of cable modem service and is integral to its other capabilities.” The court of appeals’ decision also renders a section of the 1997 State Act superfluous and ignores key language in RCW 35.21.714.

Given the national significance of these issues, this Court should accept review under RAP 13.4(b) for three reasons.

**First**, the court of appeals should not be allowed to circumvent the clear intent of Congress and avoid the application of ITFA’s 1998 moratorium by elevating form over substance. The city’s tax on data transport is an unauthorized tax on Internet access.

**Second**, the city taxes Comcast at 6% while it taxes dial-up Internet Service Providers (“ISPs”) at 0.415%. The court misapplied the ITFA antidiscrimination standard and ignored congressional intent in upholding this differential taxation of Internet providers who provide Internet access by different means. Slip op. 9, 20.

**Third**, the court below ignored the section of the 1997 Act that explicitly prohibits taxing “internet service” at telephone rates and ignored that RCW 35.21.714 permits cities to tax only *intrastate* telephone calls.

### **III. Issues Presented for Review.**

1. Does the federal moratorium in the ITFA bar the city from imposing its data transport tax on Comcast's Internet access service?
2. Does a city violate the ITFA's antidiscrimination provision by taxing cable Internet access providers at a 6% rate while taxing other Internet access providers at a 0.415% tax rate?
3. May a city tax internet services as "network telephone service" even though the 1997 State Act prohibits such taxes, especially where the Internet services are provided through interstate connections and RCW 35.21.714 authorizes cities to tax only intrastate calls?

### **IV. Statement of the Case.**

#### **A. Comcast's Internet Services.**

The court of appeals correctly found that Comcast "provides Internet services," Slip op. 9, though the court then failed to give this conclusion any legal effect. Comcast itself provides the Internet services to its subscribers (CP 616-17, 911-13) for one price that does not itemize any data transport charges. CP 52, ¶ 7. Although Comcast subcontracted with Excite@home to perform some services *for Comcast* for eleven months in 2001 and subcontracted with AT&T to perform a reduced set of services *for Comcast* after Excite@home ceased operating in November 2001, at all times Comcast (or its predecessor) has been the ISP providing

Internet services *to Comcast's subscribers*. CP 97, 114.

**B. Proceedings Below.**

The trial court granted summary judgment to Comcast, ordered the city to refund the telephone taxes collected from January 2001 to December 2002, and declared that the city could not tax Comcast's Internet revenues prospectively at the telephone tax rate but only at the city's B&O rate. CP 765-66, 768-69. The court of appeals reversed and directed entry of the city's motion for summary judgment of dismissal. The dismissal of Comcast's claims would leave intact the city's 6% telephone tax on *all* of Comcast's cable Internet revenues.

**V. Argument Why Review Should Be Accepted.**

**A. This Court Should Accept Review to Prevent the Nullification of the ITFA and the 1997 State Act.**

The decision below cannot be reconciled with the language or the congressional intent of the ITFA and conflicts with cases from the United States Supreme Court, from this Court, and from the court of appeals. Properly applying the ITFA is important to national economic policy. The court also misinterpreted the 1997 State Act and RCW 35.21.714. The Court should grant review under all prongs of RAP 13.4(b).

**B. The ITFA Prohibits the City's Tax on Data Transport Unless the Tax Was Grandfathered.**

In the 1998 ITFA, Congress declared a moratorium on State and

local taxes on Internet access, which originally expired in 2001 and was later extended to 2003, then to 2007. Section 1101(a) of the ITFA states:

(a) *No State or political subdivision thereof may impose any of the following taxes* during the period beginning November 1, 2003 [originally October 1, 1998] and ending November 1, 2007:

(1) *Taxes on Internet access;*

(2) Multiple or discriminatory taxes on electronic commerce.

(Emphasis added.) The emphasized language of ITFA § 1101(a)(1) imposed a moratorium on State and local taxes on Internet access.

**1. The ITFA Prohibits Separately Taxing Data Transport Used to Provide Internet Access.**

The definitions in the original ITFA show that Congress intended in 1998 to prohibit separate taxes on data transport used to provide Internet. For example, ITFA § 1105(4) defines “Internet” to specifically include “telecommunications facilities”:

The term “Internet” means collectively the myriad of computer and *telecommunications facilities*, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol . . . .

(Emphasis added.) Thus the original definition of “*Internet* access” included “telecommunications facilities.” The amended definition of “Internet access” clarified that telecommunications services used to

provide Internet access are part of “Internet access”:

The term “Internet access” means *a service that enables users to access* content, information, electronic mail, or other services offered over the Internet . . . . *The term “Internet access” does not include telecommunication services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.*

ITFA § 1105(5) (emphasis added). Congress amended this definition by adding the last sentence above and by deleting a sentence that stated “Such term does not include telecommunications services.” ITNA, § 2(c)(2).

## **2. Congress Intended to Prohibit Taxes on Data Transport Used to Provide Internet Access.**

The legislative history of the ITNA proves that Congress clarified the definition of “Internet access” to *prevent* the taxation of data transport used for Internet access:

In practice, *Internet access provided to the user may include a transmission component that is an integral part of the Internet access, as in the case of . . . cable modem Internet access*, and certain wireless Internet access. *In such cases, the transmission component is not a separate telecommunications service subject to taxation.*

H.R. Rep. 108-234, at 9 (2003), CP 699 (emphasis added).

The same House Report also shows that Congress intended that, when a dial-up ISP does not offer data transport as a component of its service, the telephone lines used to transport data to the dial-up ISP *may* be separately taxed:

Internet access also may be provided to the user without a transmission component included, as *in the case of dial-up Internet access*, which requires the use of a telephone line. *In this case, by contrast, the transmission component is a separate telecommunications service subject to taxation.* . . .

*Id.* (emphasis added). In other words, if an ISP includes data transport in its service, such transport should not be segregated and taxed.<sup>4</sup>

Congress became aware that some States and local jurisdictions were attempting to avoid the ITFA by separating data transport from “Internet access” so that they could tax data transport:

*States have adopted different views of “Internet access,” some of which have been overly narrow. They have segregated what they consider to be Internet access from the transport used to deliver that access, and taxed the transport as “telecommunication services” separate from, and merely, in their view, “bundled” with, Internet access.*

*Id.* (emphasis added; footnote omitted). Congress prohibited data transport taxes because they undermined the purpose of the ITFA:

[W]hile apparently no states tax the dial-up method of Internet access (with the exception of those subject to the grandfather clause), *some tax other technologies, such as DSL Internet services, thereby undermining the purpose of the ITFA.* In contrast, *other states have ruled that transmission and access together constitute “Internet access” and are included within the ITFA moratorium.*

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<sup>4</sup> See also *Concentric Network Corp. v. Commw.*, 897 A.2d 6, 15 (Pa. Commw. Ct. 2006) (*en banc*) (under ITFA, ISP would not have to pay sales and use taxes on telecommunications services used to provide Internet access if ISP provided those services itself rather than purchasing them from other companies), *appeal pending*, Docket No. 65 MAP 2006 (Pa. Supreme Ct.). The court of appeals incorrectly cites the lower court decision as a decision of the Pennsylvania Supreme Court. Slip op. 13 n.3, 21.

*The Committee believes that the latter interpretation more correctly conforms with Congressional intent.* But the disparity of treatment necessitated further clarification to the definition of “Internet access” to ensure that the ITFA is technology-neutral.

*Id.* at 10, CP 700 (emphasis added; footnote omitted).

H.R. Rep. 108-234 explains that the amended definition prohibits taxing data transport used to provide cable Internet access, and indeed it affirms that cable Internet service’s data transport component was always within the protected zone of “Internet access”:

The amendment *clarified* the exception to the definition: While telecommunications services are not generally within the definition of Internet access, to the extent they are used to provide Internet access, they are subject to the moratorium . . . .

***[C]able modem Internet access services, which are not telecommunications services, are already subject to the ITFA moratorium.***

*Id.* (emphasis added).<sup>5</sup>

The Senate Commerce Committee stated, just as clearly, that local jurisdictions were violating the ITFA by segregating and taxing data transport used to provide “Internet access”:

[T]he Committee believes that the current definition of Internet access under the Act requires clarification ***to ensure that States and localities do not attempt to circumvent the moratorium on Internet access taxes by***

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<sup>5</sup> See also U.S. Gov’t Accountability Office, *Internet Access Tax Moratorium* (“GAO Report”), 24 (2006) (ITNA’s direct effect was to eliminate “a distinction between DSL and services offered using other technologies, such as ***cable modem service***, a competing method of providing Internet access that ***was not to be taxed***”) (emphasis added).

*taxing individual components of access such as telecommunications services used to provide Internet access.* To date, some States have interpreted narrowly the definition of Internet access under the ITFA in order to impose taxes on certain types of Internet access or components thereof. . . .

S. Rep. No. 108-155, at 2-3 (2003) (emphasis added). The report also explains that the definition of “Internet access” was amended precisely to prevent State and local jurisdictions from taxing data transport:

*The bill would ensure that all methods, whether in the form of dial-up, DSL, cable, satellite, wireless, or any other technology platform, as well as components used to provide Internet access, would be covered by the Internet access moratorium and, therefore, would be exempt from State and local taxation. . . .*

By modifying the definition of Internet access, *the Committee seeks to clarify that, under the ITFA, neither Internet access nor the transmission component of Internet access is subject to taxation.*

*Id.* (emphasis added). This legislative history<sup>6</sup> establishes that, unless the city tax was permitted by the ITFA grandfather clause, the city violated the ITFA by segregating Comcast’s data transport from its provision of Internet access.

### **3. Applicable Cases Establish That the City Was Precluded From Segregating Data Transport.**

The U.S. Supreme Court’s holding in *Brand X*, 125 S. Ct. at 2703, that data transmission is a necessary component of cable Internet service,

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<sup>6</sup> See also GAO Report, 8 (“Internet access, in turn, includes broadband services, such as cable modem and DSL services, which provide continuous, high-speed access . . . .”)

applies here. The court below declined to follow *Brand X*, stating that it “did not address whether, under federal law, states and local governments can tax revenue from cable modem service as a network telephone service.” Slip op. 11. But Congress stated that the ITFA must be applied to be consistent with FCC regulatory policies: “For more than 30 years, the FCC has been analyzing the nature of the convergence of communications and computer services. . . . For States now to start classifying computer-based services as ‘telecommunications services’ only creates confusion for the industry.” H.R. Rep. No. 105-570, pt. 1, at 10 (1998). Congress sought to assure that the two acts were interpreted consistently by using the Telecommunications Act definition of “telecommunications service” in the definition of “Internet access.” ITFA §§ 1105(4) & (9).

The court of appeals also ignored settled Washington law, which holds that a company’s revenues are characterized for tax purposes by the service provided to customers,<sup>7</sup> when it held that the city imposed “its six percent telephone utility tax on Comcast’s revenue from data transmission.” Slip op. 10; *see also id.*, 21. Comcast’s subscribers paid Comcast for Internet service, not for data transport. CP 97, 114.

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<sup>7</sup> *See, e.g., PUD No. 3 of Mason County v. Washington*, 71 Wn.2d 211, 214, 427 P.2d 713, 715 (1967) (amounts collected were “part of the consideration given by the customer for electric services”); *Sprint Spectrum, L.P. v. City of Seattle*, 131 Wn. App. 339, 346, 127 P.3d 755, 759 (2006) (amounts paid by cellular phone customers were “part of the consideration that Sprint’s customers pay for cellular service”).

**C. The City's Tax Was Not Authorized by the ITFA Grandfather Clause.**

The court below held (Slip op. 14-19) that the city's application of its telephone tax to Comcast satisfies the requirements of the grandfather exception to the ITFA's moratorium stated in § 1104(a), which provides:

(a) Pre-October 1998 taxes --

(1) In general -- Section 1101(a) does not apply to a tax *on Internet access* that was generally imposed and actually enforced prior to October 1, 1998, if, before that date --

(A) Tax was authorized by statute; and

(B) Either – (i) a provider of Internet access services had a reasonable opportunity to know, by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax *to Internet access services*; or

(ii) a State or political subdivision thereof generally collected such tax *on charges for Internet access*.

(Emphasis added.)<sup>8</sup> The court below did not analyze the city's tax as Congress intended – to determine if it taxed “Internet access.”

**1. The City's Tax Was Not Authorized by Statute.**

The city telephone tax was not “authorized by statute” as required by ITFA § 1104(a)(1)(A). On the contrary, Section 4(3) of the 1997 State

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<sup>8</sup> The city did not contend that the grandfather clause in ITFA § 1104(b) applies and court below did not address that provision. Comcast therefore does not address that issue here but reserves the argument regarding ITFA § 1104(b) that it made below. See Comcast's brief to the court of appeals, page 35 n.7.

Act, codified at RCW 82.04.297(3), defines "Internet service" in terms synonymous with the ITFA definition of "Internet access":

(3) "Internet service" means a service that includes computer processing applications, *provides the user* with additional or restructured information, or *permits the user to interact with stored information through the Internet* or a proprietary subscriber network. "Internet service" includes provision of Internet electronic mail, *access to the Internet for information retrieval*, and hosting of information for retrieval over the Internet or the graphical subnetwork called the world wide web.

(Emphasis added.) That section, together with Section 2 of the same act, codified in RCW 35.21.717, authorized a tax on Internet services, including "Internet access" under the ITFA, only at the B&O service rate.

Section 2 of the 1997 State Act provides in pertinent part:

A city or town may tax internet service providers under generally applicable business taxes or fees, *at a rate not to exceed the rate applied to a general service classification*. For the purposes of this section, "internet service" has the same meaning as in section 4 of this act [RCW 82.04.297(3)].

(Emphasis added.) Section 5 of the 1997 State Act completed the Legislature's effort to prevent Internet services from being taxed at telephone rates. Section 5 added language, underlined in the quote below, to the definition of "Network telephone service" in RCW 82.04.065(2):

"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.

1997 State Act, Section 5(3). The second added phrase excluded “internet service” from “network telephone service” and thus affirmatively prohibited the city from taxing Internet access at the telephone tax rate.

The “dial-in connection” language also demonstrates an intent to exempt data transport when provided by the ISP.<sup>9</sup> The city’s tax thus lacks statutory authority and cannot satisfy the ITFA grandfather clause.

The court of appeals ignored the second phrase added by the above-quoted amendment and gave meaning only to the part of the amendment that added data transport to and from the site of an ISP to the definition of “network telephone service.” Slip op. 15. By ignoring the exclusion of “internet service” from “network telephone service,” the lower court violated the rule that every provision of a statute must be

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<sup>9</sup> Dial-in connection would appear to reference those circumstances where, for example, AOL would provide a toll-free 800 number for its user, and a small per-minute fee would be charged to the user.

given meaning.<sup>10</sup> If “internet service” did not overlap with “network telephone service” and include data transport, there would be no need to specifically address data transport “to and from the site of an ISP.” Where an ISP provides its own data transport as part of Internet service, data are transported from subscribers to the Internet backbone by the sole ISP and the “to and from” sentence does not apply.

The court of appeals also erred by shoe-horning Comcast’s Internet services into the “to and from the site of an ISP” sentence in part because the court misunderstood how Comcast provides Internet services. The court apparently thought that Comcast passively “transmits Internet services” generated elsewhere. Slip op. 3, 5. But it is undisputed that Comcast provides Internet services by manipulating and processing data, not by providing passive “data transport.”<sup>11</sup> *See also Brand X*, 125 S. Ct. at 2703 (cable Internet service requires data manipulation).

Finally, RCW 82.04.297(3) defines “internet service” in terms of services provided to *users*. Comcast provides such services to users not “transmission to and from the site of an internet provider.”<sup>12</sup> In sum, the amendments to RCW 82.04.065(2) do not satisfy the statutory

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<sup>10</sup> *E.g., Dennis v. Dep’t of Labor & Indus.*, 109 Wn.2d 467, 479, 745 P.2d 1295 (1987).

<sup>11</sup> Comcast processes data through routers, servers, and Cable Modem Termination Service equipment that assigns IP addresses to data packets. CP 616-17, 619, 911-13.

<sup>12</sup> The Department of Revenue’s Excise Tax Advisory (“ETA”), which the court below relied upon (Slip op. 10), also emphasizes the “to and from the site of an ISP” provision. ETA, at 2. Even if the ETA were correct in circumstances where data are transported to and from the site of an ISP, that provision and the ETA do not apply here.

authorization requirement of the ITFA grandfather clause.

## 2. The City Failed to Provide Notice.

The city cannot satisfy the notice requirement of the grandfather clause, ITFA § 1104(a)(1)(B)(i) (quoted above at page 12). That section required the city to notify ISPs that the city planned to tax *Internet access* at telephone tax rates. At most, Seattle's former Rule 155(6) provided notice that the city intended to tax *data transport* at the telephone rate, not "Internet access" as defined by the ITFA. Rule 155(6) provided in pertinent part:

*An Internet provider located in Seattle must insure payment of the Seattle public utility tax on their telephone access charges for the telephone lines, microwave, or other method of electronic transmission.* Non-payment of the public utility tax on the aforementioned telephone access charges will indicate to the City that the Internet provider is holding itself out to be in the telephone business (see SMC 5.48.020). In such a case, the gross charges by the Internet provider to their clients will be apportioned between the public utility tax and the service business and occupation tax classification based on the ratio of telephone line costs (or similar costs) to the total costs of doing business.

CP 439 (emphasis added).<sup>13</sup>

Further, the rule was constitutionally invalid because it was not uniformly applied. It purported to segregate and tax data transport only

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<sup>13</sup> The city repealed Rule 155 without a savings clause effective December 31, 2001 (<http://clerk.ci.seattle.wa.us/~finance/?btxrtext.htm>), but claims still to follow it. Although the former rule states that the city will apportion an Internet provider's gross charges between the telephone and the B&O taxes, the city applied the 6% telephone tax to *all* of Comcast's Internet access revenues and the court of appeals permitted the tax.

for Internet service, not for the three other services protected by RCW 82.04.065(2) – broadcast television, radio, or cable television.<sup>14</sup>

The court of appeals’ reliance on Seattle Municipal Code provisions to satisfy the notice requirement of ITFA § 1104(a)(1)(B)(i) (Slip op. 17 and n.4) was similarly misplaced. The ordinances do not state that *Internet access* will be taxed at telephone rates. Further, if merely having a telephone tax ordinance could provide the notice required by the ITFA, all such statutes would provide notice and there would have been no reason for Congress to impose a separate notice requirement.

**3. The City Did Not Impose Its Tax on Internet Access.**

Finally, the city cannot show that it “generally collected such tax *on charges for Internet access.*” As noted by the court below, “[t]he city contends that its telephone business tax does not tax ‘Internet access.’” Slip op. 13. The city may not argue that its tax was on data transport for State law purposes but on “Internet access” for ITFA purposes. The tax fails to meet the grandfather requirement and is barred by the ITFA.

**D. The Court of Appeals Compared the Wrong Category of Services to Determine Whether the City’s Taxes Violate the ITFA Nondiscrimination Provision.**

Even if the city’s data transport tax were permitted by the ITFA

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<sup>14</sup> See *Lone Star Cement Corp. v. City of Seattle*, 71 Wn.2d 564, 569-72, 429 P.2d 909, 912-14 (1967) (equal application of privileges and immunities violated when revenues of business taxed and similar revenues of similarly situated taxpayers were not). An invalid rule is void. See *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994, 995 (1975).

grandfather clause, it would still be prohibited by ITFA § 1101(a)(2), which prohibits discriminatory taxes on “electronic commerce.” Discriminatory taxes cannot be grandfathered under the ITFA.

The term “electronic commerce” is defined by ITFA § 1105(3) to include “the provision of Internet access.” ITFA §§ 1101(a)(2) and 1105(3) together thus prohibit States and local governments from imposing discriminatory taxes on the provision of Internet access. The ITFA, in turn, defines “discriminatory tax” to include:

(A) Any tax imposed by a State or political subdivision thereof on electronic commerce that --

....

(iv) *establishes a classification of Internet access service providers or on-line service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means* . . . .

ITFA § 1105(2) (emphasis added). The city violated this antidiscrimination provision by establishing, through former Rule 155, a classification of ISPs that provide data transport with other Internet access services, which includes cable ISPs, and taxing these ISPs at the 6% tax rate, while creating a second classification of ISPs that do not provide data transport, which includes dial-up ISPs, which the city taxes at the 0.415% rate. The court below acknowledged these disparate tax rates (Slip op. 18, 20) but failed to find discrimination because it did not analyze the city’s

taxes on “the provision of Internet access.” The court instead analyzed taxes on data transport services. Slip op. 20-21. If the court below had examined the city’s taxes on Internet access, the court would have found that the city taxes cable ISPs at a rate more than ten times higher than dial-up ISPs, which violates ITFA § 1101(a)(2).

**E. The Court of Appeals Misinterpreted the 1997 State Act and RCW 35.21.714.**

The court of appeals misconstrued the 1997 State Act, defeating its purpose. Another State statute, RCW 35.21.714(1), confirms that the 1997 State Act should be interpreted to preclude taxing Internet service at telephone tax rates. That statute states in pertinent part:

Any city which imposes a license fee or tax upon the business activity of engaging the telephone business which is measured by gross receipts or gross income may impose the fee or tax if it desires, on 100 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 . . . or charges for, interstate services . . . .

(Emphasis added.) Only “revenue derived from *intrastate* toll telephone services” is taxable. The court of appeals incorrectly considered only the proviso in this statute. Slip op. 12. Because Comcast’s servers that provide e-mail, web-hosting, and DNS connectivity are located out-of-state (CP 913, ¶ 22), all of Comcast’s Seattle subscribers’ Internet traffic

is delivered through an out-of-state location. Even if the city's telephone tax were applied, RCW 35.21.714(1) would prohibit taxing Comcast's Internet service because it is an interstate service.

**VI. Conclusion.**

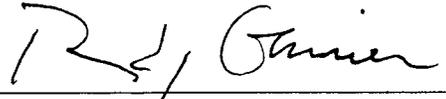
Petitioners request the Court grant review under RAP 13.4(b).

Respectfully submitted,

Davis Wright Tremaine LLP  
Attorneys for Comcast

Dated: January 10, 2007

By



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# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

COMMUNITY TELECABLE OF	)	NO. 57491-4-I
SEATTLE, INC.; COMCAST OF	)	
WASHINGTON I, INC.; and COMCAST	)	DIVISION ONE
OF WASHINGTON IV, INC.,	)	
	)	
Respondents,	)	
	)	
v.	)	
	)	
CITY OF SEATTLE, DEPARTMENT	)	Published Opinion
OF EXECUTIVE ADMINISTRATION,	)	
	)	
Appellant.	)	FILED: December 11, 2006
	)	

**COLEMAN, J.** — This case concerns the legality of the City of Seattle's telephone utility tax as it applies to Comcast's Internet transmission activities. Comcast sued the City for a refund of the tax, arguing that the tax is illegal under Washington's Internet Tax Moratorium and the federal Internet Tax Freedom Act. The trial court granted Comcast's cross-motion for summary judgment and denied the City's motion for summary judgment. The City appeals. We reverse because:

1. The tax is not barred by the Washington Internet Tax Moratorium;
2. The tax is exempt from the federal Internet Tax Freedom Act's moratorium on taxes on Internet access under a grandfather clause; and
3. The tax is not discriminatory under the federal Internet Tax Freedom Act.

### **FACTS**

#### **Comcast's Business in Seattle**

Comcast owns a cable transmission network leading to many homes and businesses in Seattle. Comcast and its predecessor corporations entered into franchise agreements with the City for the right to run cable to customers in Seattle. As a result, 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.

In addition to providing cable television signals over its Seattle cable network, Comcast also offers its customers the ability to use the cable network for a high-speed broadband Internet connection. The use of the cable network for this purpose began in approximately early 1998.

In September 1995, in anticipation of the use of the cable network as a connection to the Internet, Comcast's predecessor and the City entered into a memorandum of understanding as part of cable refranchise discussions. The memorandum stated, "[T]elecommunications and Internet service shall be taxed at the City rate for telecommunications services

(currently 6%).”

Comcast provides its Internet customers with a device for their home called a cable modem that allows its customers to use the cable network for the Internet. The actual pathway to the customer’s house for the Internet is through the same cable used for cable television service. The transmission of the Internet signal to and from the customer’s house is through a coaxial cable that leads to a pole outside the house, then through fiber optic cable to hubs in Seattle, and from there through fiber optic cable to Comcast’s head end in Burien. From Burien, the signal travels by fiber optic cable to a facility at the Westin Building in Seattle. The signal leaves the Westin Building by fiber optic cable.

Comcast’s customers receive, through the network, Internet services such as email and the ability to use a browser to access web pages on the World Wide Web. Comcast has previously entered into contracts with other entities to provide Internet services to Comcast’s customers. During much of the time period at issue in this case, Comcast’s customers received Internet services from a company known as Excite@home. Excite@home had contracts with Comcast that allowed Excite@home to provide Internet service and all equipment necessary to provide those services other than the equipment provided by Comcast between the subscriber’s home and the head end in Burien. In exchange for providing this equipment and services to Comcast’s subscribers, Excite@home agreed to split certain subscriber revenues with Comcast. Comcast received 65 percent of these revenues and Excite@home received 35 percent. In effect, Comcast provided the portion of the transmission system from the subscriber’s home to the head end and

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Excite@home provided other infrastructure and the Internet services received by the subscribers. In November 2001, Excite@home ceased providing Internet services to Comcast's customers. Comcast then used a variety of other entities to provide the services that Excite@home had provided.

### The Tax

The City imposes a telephone utility tax on entities engaged in the business of transmitting data over a network in Seattle. SMC 5.48.050A. Under SMC 5.48.050A, Seattle businesses must pay a tax of six percent on the revenue from that business.

The Seattle Municipal Code defines "telephone business":

"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).

In addition to enacting SMC 5.48.050A, the City amended Seattle Business Tax Rule 5-44-155(6) in 1995 to advise Internet companies that provided data transmission services that data transmission activities were subject to the telephone utility tax and that Internet services were subject to the business and occupation (B&O) service tax.

The rule was repealed in 2001. The City continued to rely on the rule for guidance and placed a statement to that effect on its website. Since prior to 1998, the City has enforced the tax code so that a company that owns transmission capability through wire, cable, microwave, or other medium is considered a telephone business under SMC 5.30.060C and is subject to the telephone utility tax under SMC 5.48.050. The City collected the utility tax from other companies using networks to transmit Internet services and also collected the service B&O tax from Internet service providers.

#### The Audit

Prior to March 15, 2002, Comcast paid the cable television tax to the City for its cable modem services revenue rather than the telephone utility tax. The City taxes cable television activities at ten percent. In a letter dated September 20, 2000, the City instructed Comcast to report its cable modem service revenue under the telephone business classification of the utility tax rather than under the cable television tax. The City then sent a letter on October 6, 2000, rescinding these instructions and advising Comcast that, “[a] task force made up of personnel from our tax, cable and legal departments is meeting to discuss your business practices, and to formulate correct legal and contractual positions.” In a December 26, 2000 letter, the City instructed Comcast to pay the six percent telephone utility tax on its cable modem activity revenue. Comcast, however, continued to pay the higher cable television tax until March 15, 2002. On April 29, 2002, Comcast informed the City that in the future, it would pay neither the telephone utility tax nor the cable television tax. Instead, it would only pay the .415 percent B&O tax rate imposed on service activities under SMC 5.45.050. The City disagreed with

Comcast's conclusion and repeated in a May 9, 2002 letter its instruction that Comcast should report cable modem revenue under the telephone utility tax. Comcast refused to comply with these reporting instructions.

On June 18, 2002, the City notified Comcast that it would conduct an audit of Comcast's business activities. The City conducted the audit and concluded that Comcast was subject to the telephone utility tax for its revenue from data transmission activities in connection with Internet service. Accordingly, the City issued tax assessments to Comcast on July 25, 2003. The City assessed its utility tax against Comcast for engaging in the telephone business in Seattle in 2001 and 2002 (the "audit period"). The assessments included a credit to reimburse Comcast for the period during which it had incorrectly paid the ten percent cable television tax.

Comcast sued the City for a refund of the tax and declaratory relief, arguing that the tax is illegal under Washington's Internet Tax Moratorium and the federal Internet Tax Freedom Act. The trial court denied the City's motion for summary judgment and granted Comcast's cross-motion for summary judgment. The City appeals. We reverse for the reasons stated below.

### **Analysis**

#### **Failure to Make Records Available During Audit**

The City argues that Comcast is barred under SMC 5.55.060D from challenging the tax because it allegedly failed to make records available during the audit. SMC 5.55.060D provides:

Any person who fails, or refuses a Department request to provide or make available records . . . shall be forever barred from questioning in any court

action, the correctness of any assessment of taxes made by the City based upon any period for which such records have not been provided, made available or kept and preserved . . . .

Comcast argues that (1) it did comply with the City's requests for information during the audit, (2) SMC 5.55.060D is an unconstitutional limit on the jurisdiction of superior courts under Article IV, section 6 of the Washington State Constitution, and (3) SMC 5.55.060D creates a conclusive presumption in violation of the Washington State Constitution. We do not decide these issues because we conclude that the tax itself is legal under the Washington Internet Tax Moratorium and the federal Internet Tax Freedom Act.<sup>1</sup>

Washington's Internet Tax Moratorium

Comcast contends that Washington's Internet Tax Moratorium prohibits the City from taxing it at more than 0.415 percent, the City's general B&O service rate. The City argues that the moratorium does not affect taxes on revenue from data transmission via a cable transmission system. We conclude that the moratorium does not preclude the City from taxing revenue from data transmission activity via a cable transmission system because of the plain language of the statutes and a persuasive interpretation of the statutes by the Washington Department of Revenue.

RCW 35.21.717 states:

Until July 1, 2006, a city or town may not impose any new taxes or fees specific to Internet service providers. A city or town may tax Internet service providers under generally applicable business taxes or fees, at a rate not to exceed the rate applied to a general service classification. For the purposes of this section, "Internet service" has the same meaning as in RCW 82.04.297.

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<sup>1</sup> We also do not decide whether Comcast was required to notify the Attorney General about its constitutional challenge to SMC 5.55.060D.

RCW 82.04.297(3) defines "Internet service" as

a service that includes computer processing applications, provides the user with additional or restructured information, or permits the user to interact with stored information through the internet or a proprietary subscriber network. "Internet service" includes provision of internet electronic mail, access to the internet for information retrieval, and hosting of information for retrieval over the internet or the graphical subnetwork called the world wide web.

This definition of Internet services does not include the telephone business activities that are taxed under the City's telephone utility tax.

State statutes specifically distinguish between Internet service and network telephone service, preserving the City's ability to tax Comcast's data transmission activities as telephone business. 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. Laws of 1997, ch. 304, §§ 2, 5. RCW 82.04.065(2) defines network telephone service to include data transmission, including transmission to and from the site of an Internet provider:

"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.

(Emphasis added.) The statute specifically distinguishes between network telephone service (which includes data transmission

via a cable system) and internet service (which, under the moratorium, cannot be taxed at a rate higher than the rate applied to a general service classification). RCW 82.04.065(2) allows the City to tax data transmission activities because such activities are distinct from “internet service”— the subject of the moratorium.

Comcast’s data transmission activities are covered by the descriptions of network telephone service in RCW 82.04.065 and, thus, not protected by the moratorium. First, Comcast provides data transmission over a cable system in accordance with the first sentence in RCW 82.04.065(2) (“Network telephone service’ means the providing by any person of . . . data . . . transmission . . . via a . . . cable . . . transmission system.”). Second, Comcast provides “transmission to and from the site of an internet provider” via a cable transmission system as described in the second sentence of RCW 82.04.065(2). The undisputed facts show that Comcast provides a cable transmission system from its customers’ homes and businesses to Comcast’s facilities in Burien and then to the Westin Building.

Comcast argues that the definition of network telephone service does not apply to its activities because it provides Internet services in addition to a transmission system. Comcast is incorrect. Under the plain language of RCW 82.04.065(2), “network telephone service” includes any entity that provides “transmission to and from the site of an internet provider via a . . . cable . . . transmission system.” Comcast also provides “Internet services” (as defined in RCW 82.04.297), which, under the moratorium, cannot be taxed at a rate higher than the rate applied to a general service classification. This does not mean, however, that the City is precluded from imposing its six percent telephone utility tax on

Comcast's revenue from data transmission. As the City points out, "[u]nder Comcast's interpretation of RCW 35.21.717, any telephone business could avoid the telephone utility tax simply by offering its customers Internet services such as email and access to the web." Brief of Appellant, at 20. Comcast cannot avoid the City's telephone utility tax on data transmission activities by bundling its charges for cable data transmission with its charges for Internet services. State law distinguishes between network telephone services, such as data transmission via a cable network, and Internet services, allowing the City to tax Comcast's data transmission activities as a "telephone business."

This interpretation of Washington law is supported by an Excise Tax Advisory (ETA) issued by the Washington Department of Revenue. ETA 2029.04.245 confirms that the 1997 amendment to the definition of "network telephone service" explicitly includes data transmission via cables to and from the site of an Internet provider.

ETA 2029.04.245 states:

This includes services used to connect an ISP to the Internet backbone or to ISP customer locations, such as the provision of transmission capacity over dial-up connections, coaxial cables, fiber optic cables, T-1 lines, frame relay service, digital subscriber lines (DSL), wireless technologies, or other means.

Washington has traditionally taxed the sale of these network telephone services to a customer under the retailing classification of the business and occupation tax (B&O) tax and required the seller to collect retail sales tax. In 1997, RCW 82.04.065 was amended to explicitly include "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" as taxable network telephone service.

The Department of Revenue concurs with the City that network telephone services include data transmission over cable networks to internet customer locations. A reviewing court gives considerable

deference to the construction of an ordinance by those officials charged with its enforcement. GMC v. City of Seattle, 107 Wn. App. 42, 57, 25 P.3d 1022 (2001). Network telephone services, which are taxed by the City as "telephone business," are not subject to Washington's Internet Tax Moratorium.

Comcast argues that under Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005), the data transmission component of its Internet provision cannot be separated from the Internet services it offers. Comcast's reliance on Brand X is misplaced because Brand X is not binding on a Washington court interpreting Washington law. In Brand X, the Court considered whether the Federal Communications Commission's classification of broadband cable modem service under the federal Telecommunications Act of 1996 as an "information service" rather than a "telecommunications service" was reasonable under Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) and the federal Administrative Procedures Act. Brand X, 545 U.S. at 967. It did not consider whether data transmission was inseparable from Internet service under Washington law. It also did not address whether, under federal law, states and local governments can tax revenue from cable modem service as a network telephone service.

#### Tax on Interstate Services

Comcast argues that the City's tax on telephone business is illegal because RCW 35.21.714 prohibits cities from imposing their telephone utility taxes on interstate service. Comcast reasons that this statute bars the City from taxing its data transmission activities because all of the

Internet traffic from Comcast's Seattle subscribers is delivered to an out-of-state location.

Comcast misrepresents RCW 35.21.714. 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. RCW 35.21.714 provides in relevant part:

Any City which imposes a . . . tax . . . upon the business activity of engaging in the telephone business . . . may impose the . . . tax . . . on one hundred percent of the total gross revenue derived from intrastate toll telephone services . . . : PROVIDED, that the City shall not impose the . . . tax on that portion of network telephone service . . . , which represents charges to another telecommunications company . . . for access to, or charges for, interstate services . . . .

Comcast has not shown, or even alleged, that it charges another telecommunications company for interstate services.

RCW 35.21.714 requires cities to give a deduction for the portion of network telephone service that represents a charge to another telecommunications company for interstate services. It does not bar the City from taxing Comcast's data transmission revenue simply because data transmission signals cross Washington's borders. Comcast's interpretation of RCW 35.21.714 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. RCW 35.21.714 concerns charges to other telecommunications companies for interstate services. Such charges are not at issue in this case.<sup>2</sup>

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<sup>2</sup> Comcast also argues that RCW 35.21.714 forbids the City from taxing Internet

The Federal Internet Tax Freedom Act's Moratorium on Taxes on Internet Access

Comcast argues that the City is subject to the federal Internet Tax Freedom Act (ITFA) because its telephone utility tax is a tax on "Internet access" as that term is defined in the ITFA. The City contends that its telephone business tax does not tax "Internet access." We do not decide this issue because we hold that even if the City taxes "Internet access" as that term is used in the ITFA, (1) the City's tax is exempt under the ITFA's grandfather clause and (2) the tax is not a discriminatory tax on electronic commerce.<sup>3</sup>

ITFA's Grandfather Clause

Comcast argues that the City is precluded from taxing it as a telephone business under the ITFA's moratorium on taxes on "Internet access." The City contends that it is exempt from this moratorium under the ITFA's grandfather clause. We conclude that the City's tax is exempt under the grandfather clause because it was authorized by the

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service as a telephone business. Comcast cites Western Telepage, Inc. v. City of Tacoma, 95 Wn. App. 140, 974 P.2d 1270 (1999), aff'd, 140 Wn.2d 599, 998 P.2d 884 (2000). Neither the statute nor the case precludes the City from taxing data transmission activities as a telephone business.

<sup>3</sup> This is similar to the approach taken by the State in ETA 2029.04.245 regarding the applicability of the ITFA to Washington's taxes on network telephone services related to Internet access. In ETA 2029.04.245, the State declined to adopt an interpretation of the term "Internet Access" and instead focused on whether the State's taxes are exempt under the ITFA's grandfather clause. The Pennsylvania Supreme Court also declined to adopt an interpretation of "Internet Access" and instead concluded that the tax in question was exempt under the ITFA's grandfather clause. Concentric Network Corp. v. Commonwealth of Pennsylvania, 897 A.2d 6, 15 (Penn. 2006) ("We need not decide whether application of the Tax Code to Taxpayer's purchases is a tax on Internet access, because we conclude that Tax Code provisions in question were generally imposed and actually enforced prior to October 1, 1998.").

State before October 1, 1998, the City notified taxpayers of the tax before October 1, 1998, and the City generally collected the tax prior to October 1, 1998.

As originally enacted and through its first extension, the ITFA provides:

No State or political subdivision thereof may impose any of the following taxes during the period beginning on October 1, 1998, and ending on November 1, 2003—

- (1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and
- (2) multiple or discriminatory taxes on electronic commerce.

ITFA, § 1101(a) (2003) (emphasis added). The ITFA defines the terms “generally imposed and actually enforced” to mean that the law was authorized by statute and that either notice was given or the tax was generally collected:

For purposes of this section, a tax has been generally imposed and actually enforced prior to October 1, 1998, if, before the that date, the tax was authorized by statute and either—

- (1) a provider of Internet access services had a reasonable opportunity to know by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or
- (2) a State or political subdivision thereof generally collected such tax on charges for Internet access.

ITFA, § 1101(d) (2001). To be exempt under the grandfather clause, the City's tax first must have been authorized by statute before October 1, 1998. Second, either Comcast must have had a reasonable opportunity to know by rule or other public proclamation that the City taxed its data transmission activities before October 1, 1998, or the City must have generally collected the tax before October 1, 1998. Each of these issues will be considered.

The City's tax has been authorized by statute since at least 1997. Cities in

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Washington are authorized by statute to impose taxes such as Seattle'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). And as explained above, Washington's Internet Tax Moratorium does not preclude the City from imposing its telephone business tax on Comcast's data transmission activities. In 1997, the same year the state legislature enacted the Internet tax moratorium, it also amended the definition of "network telephone service" to preserve state and local government's ability to tax data transmission activities such as Comcast's.

The next requirement is that Comcast had "a reasonable opportunity to know" by rule or other proclamation that the City "has interpreted and applied such tax to Internet access services" before October 1, 1998. ITFA, § 1101(d) (2001). Comcast had a reasonable opportunity to know by virtue of a rule that the City applied its telephone utility tax to companies transmitting Internet services. In 1995, the City amended Seattle Business Tax Rule 5-44-155(6) (Rule 155) to advise Internet companies that provided data transmission services that data transmission activities were subject to the telephone utility tax and that Internet services were subject to the B&O service tax. The Seattle Business Tax Rules are passed according to the procedures in SMC chapter 3.02. Prior to adoption, amendment, or repeal of a rule, the City is required to publish in a newspaper and hold a public hearing, as well as provide a draft to anyone who requests one. The final rules are available from the City Clerk, the RCA division, and, since the mid-1990s, the City's web site. Rule 155 was amended in 1995 in accordance with this procedure.

By enacting Rule 155, the City

notified the public that it imposed its telephone utility tax on companies that transmitted data related to the Internet. Rule 155 provided:

Providers of information services on the Internet, or on other electronic networks, are subject to the service classification on their gross "Service" charges. An internet provider located in Seattle must insure payment of the Seattle public utility tax on their telephone access charges for the telephone lines, microwave, or other method of electronic transmission. Non-payment of the public utility tax on the aforementioned telephone access charges will indicate to the City that the internet provider is holding itself out to be in the telephone business (see SMC 5.48.020). In such a case, the gross charges by the internet provider to their clients will be apportioned between the public utility tax and the service business and occupation tax classification based on the ratio of telephone line costs (or similar costs) to the total costs of doing business.

(Emphasis added.) The City notified the public in Rule 155 that it would apportion an Internet provider's revenue based on its transmission costs and other costs of doing business. Through Rule 155, the City met the notice requirement of IFTA, § 1101(d)(1) (2001).

Comcast argues that Rule 155 fails the ITFA's notice requirement because it was repealed effective December 31, 2001. Comcast cites three cases to support its argument: Cazzanigi v. Gen. Elec. Credit Corp., 132 Wn.2d 433, 441, 938 P.2d 819, 822 (1997); State v. Burke, 92 Wn.2d 474, 478, 598 P.2d 395 (1979); and Glubrecht v. Dep't of Revenue, No. 55759, 2002 WL 726433 (Wash. Bd. of Tax Appeals Feb. 28, 2002), available at <http://www.bta.state.wa.us/> and. None of these decisions concerns the effect of a repealing a statute on notice requirements.

Though it was repealed, Rule 155 satisfied the ITFA's notice requirement. The rule remained in effect for six years, including the first year of the audit period. The City continued to rely on the rule for guidance and placed a statement to that effect on its website. Thus, Rule 155 provided

notice prior to October 1, 1998, that the City applied its telephone utility tax to companies that transmitted data related to the Internet. Moreover, before Rule 155 was repealed, the Seattle Municipal Code already contained provisions taxing utilities engaged in the telephone business and defined "telephone business" to include data transmission via cable. See SMC 5.48.050A and SMC 5.30.060C. These statutes also provided notice that the City applied its telephone utility tax to companies that transmitted data related to the Internet.

Comcast argues that Rule 155 was invalid because it (1) created a conclusive presumption in violation of the Washington State Constitution, (2) was not authorized under the Seattle Municipal Code, and (3) was discriminatory. Rule 155 stated that the City would enforce its tax code so that companies engaged in both providing telephone business and Internet services would be required to pay the telephone utility tax and the Internet service tax. It stated that the City would apportion revenues between the two activities. Comcast's arguments about the validity of Rule 155 do not eliminate the fact that as early as 1995, the rule notified businesses that the City applied its telephone utility tax to companies transmitting data related to the Internet.<sup>4</sup>

Even if the City did not provide sufficient notice to Comcast, the tax can still qualify for the grandfather clause if the City "generally collected" it prior to October 1,

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<sup>4</sup> In addition to Rule 155, the City argues that the 1995 memorandum of understanding between Comcast's predecessor and the City also satisfied the ITFA grandfather clause's notice requirement. We conclude that Rule 155 and the Seattle Municipal Code provided adequate notice and that the City generally collected the tax; therefore, we do not decide whether the memorandum qualifies as a public proclamation to Comcast that the City "has interpreted and applied such tax to Internet access services" before October 1, 1998. ITFA, § 1101(d)(1) (2001).

1998. ITFA § 1101(a)(2). The City contends that it has generally collected the tax since at least 1994. Comcast argues that the City has not generally collected the tax because in an October 6, 2000 letter, it instructed Comcast's predecessor to continue reporting its Internet revenues under the ten percent cable television classification of the utility tax until further notice. In that letter, the City stated: "A task force made up of personnel from our tax, cable and legal departments is meeting to discuss your business practices, and to formulate correct legal and contractual provisions." This letter notwithstanding, the City generally imposed and actually enforced its telephone utility tax on Internet related data transmissions prior to October 1, 1998.

The City notified Comcast's predecessor directly in the 1995 memorandum that cable modem activities would be subject to the six percent telephone utility tax. It notified Summit, the only other cable company operating in Seattle, in 1996 that its cable modem activities were subject to the utility tax. Since prior to 1998, the City has enforced the tax code so that a company that owns transmission capability through wire, cable, microwave, or other medium are considered a telephone business under SMC 5.30.060C and, thus, subject to the telephone utility tax under SMC 5.48.050A. Comcast does not deny that the City collected the utility tax from other companies, such as Summit, that used networks to transmit Internet services and also collected the service B&O tax from mere Internet service providers, such as Speakeasy. The October 6, 2000 letter merely shows that there was confusion over what tax Comcast was supposed to pay. It does not show that the City failed to generally collect the six percent tax from companies using networks to transmit Internet services. The ITFA does not require a taxing jurisdiction to

collect and enforce its taxes with 100 percent accuracy. This would be impossible in a self-reporting tax system like the City's.

Discriminatory Taxes

Comcast argues that the tax violates the ITFA's moratorium on discriminatory taxes on electronic commerce. We conclude that the tax is not discriminatory because all companies in Seattle that engage in the telephone business are subject to the telephone utility tax and all companies that provide Internet services are subject to the B&O tax.

Unlike the ITFA's moratorium on taxes on Internet access, the ban on discriminatory taxes does not have a grandfather clause. The ITFA provides:

No state or political subdivision thereof may impose any of the following taxes during the period beginning on October 1, 1998, and ending November 1, 2003—

- (1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and
- (2) multiple or discriminatory taxes on electronic commerce.

ITFA, § 1101(a) (2001) (emphasis added). "The term 'electronic commerce' means any transaction conducted over the Internet or through Internet access, comprising the sale, lease, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access." ITFA, §1104(3) (2001).<sup>5</sup>

ITFA, §1104(2) (2001) defines "discriminatory tax to mean:

- (A) any tax imposed by a State or political subdivision thereof on electronic commerce that—

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<sup>5</sup> The City again argues that the six percent tax is not a tax on "Internet access." As explained above, we do not have to decide whether the City taxes "Internet access" as the term is defined under the ITFA. Instead, we conclude the tax is not discriminatory.

(i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

(ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;

(iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means; [or]

(iv) establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers that the tax rate generally applied to providers of similar information services delivered through other means[.]

Comcast argues the tax is discriminatory under ITFA, §1104(2)(A)(i), (ii), (iii), and (iv).

The first three provisions, ITFA, §1104(2)(A)(i), (ii), (iii), do not apply to this case. They are intended to apply to an attempt to tax transactions differently over the Internet than off the Internet. Even if these provisions applied, the City's taxes would not be affected. The City's telephone utility tax applies uniformly to companies engaged in the telephone business. The City's service B&O tax applies uniformly to companies providing services, such as Internet services.

The City's tax is not discriminatory under ITFA, §1104(2)(A)(iv). Under this section, a tax is discriminatory if it:

establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means[.]

ITFA, §1104(2)(A)(iv). Seattle taxes Comcast's data transmission activities at the same rate as similar information services delivered through other means. The City's

telephone utility tax applies uniformly to all companies engaged in telephone business in Seattle, including data transmission through telephone networks or through cable networks. The tax is based on the gross income from that business activity. Similarly, the City's B&O tax applies to companies providing Internet services in Seattle. The tax is based on the gross income from providing Internet services. Neither of these taxes creates a separate class of Internet access service providers that are taxed at a separate rate despite providing similar information services. All companies in Seattle that engage in the telephone business are subject to the telephone utility tax and all companies that provide Internet services are subject to the B&O tax.

The Pennsylvania Supreme Court's decision in Concentric Network Corp. v. Commonwealth of Pennsylvania, 897 A.2d 6, 15 (Penn. 2006) supports this conclusion. In that case, an Internet service provider, Concentric, did not own wires for transmitting "its Customers' data traffic to and from the [Taxpayer's] serving office and to and from the Internet backbone." Concentric, 897 A.2d at 8. Instead of owning wires, Concentric purchased data transport services and equipment to transmit Internet services. It paid a state sales and use tax on the purchases. It appealed the state's imposition of the sales and use tax, arguing that the tax was discriminatory under the ITFA because cable-based and facilities-based Internet service providers did not have to pay the tax (because they already owned and, thus, did not need to purchase infrastructure for transmitting data). The court ruled that Concentric was not subject to discrimination under the ITFA merely because it paid a sales and use tax on the purchase of data transmission services which other companies did not have to purchase. Any other company that



## APPENDIX B

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United States Code Annotated Currentness  
 Title 47. Telegraphs, Telephones, and Radiotelegraphs  
Chapter 5. Wire or Radio Communication (Refs & Annos)  
Subchapter I. General Provisions (Refs & Annos)

→ § 151. Purposes of chapter; Federal Communications Commission created

HISTORICAL AND STATUTORY NOTES

Internet Tax Freedom Act

Pub.L. 105-277, Div. C, Title XI, § § 1100 to 1104, Oct. 21, 1998, 112 Stat. 2681-719, as amended Pub.L. 107-75, § 2, Nov. 28, 2001, 115 Stat. 703; Pub.L. 108-435, § § 2 to 6A, Dec. 3, 2004, 118 Stat. 2615 to 2618, provided that:

"§ 1100. Short title

"This title [Pub.L. 105-277, Div. C, Title XI, Oct. 21, 1998, 112 Stat. 2681-719, which enacted this note] may be cited as the 'Internet Tax Freedom Act'.

"§ 1101. Moratorium

"(a) **Moratorium.**--No State or political subdivision thereof shall impose any of the following taxes during the period beginning November 1, 2003, and ending November 1, 2007:

"(1) Taxes on Internet access.

"(2) Multiple or discriminatory taxes on electronic commerce.

"(b) **Preservation of state and local taxing authority.**--Except as provided in this section, nothing in this title [this note] shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or superseding of, any State or local law pertaining to taxation that is otherwise permissible by or under the Constitution of the United States or other Federal law and in effect on the date of enactment of this Act [Oct. 21, 1998].

"(c) **Liabilities and pending cases.**--Nothing in this title [this note] affects liability for taxes accrued and enforced before the date of enactment of this Act [Oct. 21, 1998], nor does this title [this note] affect ongoing litigation relating to such taxes.

"(d) **Exception to moratorium.**--

"(1) **In general.**--Subsection (a) shall also not apply in the case of any person or entity who knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors unless such person or entity has restricted access by minors to material that is harmful to minors--

"(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

"(B) by accepting a digital certificate that verifies age; or

"(C) by any other reasonable measures that are feasible under available technology.

"(2) **Scope of exception.**--For purposes of paragraph (1), a person shall not be considered to making a

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communication for commercial purposes of material to the extent that the person is--

"(A) a telecommunications carrier engaged in the provision of a telecommunications service;

"(B) a person engaged in the business of providing an Internet access service;

"(C) a person engaged in the business of providing an Internet information location tool; or

"(D) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the communication.

"(3) **Definitions.**--In this subsection:

"(A) **By means of the World Wide Web.**--The term 'by means of the World Wide Web' means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol, file transfer protocol, or other similar protocols.

"(B) **Commercial purposes; engaged in the business.**--

"(i) **Commercial purposes.**--A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

"(ii) **Engaged in the business.**--The term 'engaged in the business' means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

"(C) **Internet.**--The term 'Internet' means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

"(D) **Internet access service.**--The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. The term 'Internet access service' does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.

"(E) **Internet information location tool.**--The term 'Internet information location tool' means a service that refers or links users to an online location on the World Wide Web. Such term includes directories, indices, references, pointers, and hypertext links.

"(F) **Material that is harmful to minors.**--The term 'material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--

"(i) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

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"(ii) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

"(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

"(G) **Minor.**--The term 'minor' means any person under 17 years of age.

"(H) **Telecommunications carrier; telecommunications service.**--The terms 'telecommunications carrier' and 'telecommunications service' have the meanings given such terms in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

"(e) **Additional exception to moratorium.**--

"(1) **In general.**--Subsection (a) shall also not apply with respect to an Internet access provider, unless, at the time of entering into an agreement with a customer for the provision of Internet access services, such provider offers such customer (either for a fee or at no charge) screening software that is designed to permit the customer to limit access to material on the Internet that is harmful to minors.

"(2) **Definitions.**--In this subsection:

"(A) **Internet access provider.**--The term 'Internet access provider' means a person engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet, but does not include a common carrier to the extent that it provides only telecommunications services.

"(B) **Internet access services.**--The term 'Internet access services' means the provision of computer and communications services through which a customer using a computer and a modem or other communications device may obtain access to the Internet, but does not include telecommunications services provided by a common carrier.

"(C) **Screening software.**--The term 'screening software' means software that is designed to permit a person to limit access to material on the Internet that is harmful to minors.

"(3) **Applicability.**--Paragraph (1) shall apply to agreements for the provision of Internet access services entered into on or after the date that is 6 months after the date of enactment of this Act [Oct. 21, 1998].

"§ 1102. **Advisory Commission on Electronic Commerce**

"(a) **Establishment of commission.**--There is established a commission to be known as the Advisory Commission on Electronic Commerce (in this title [this note] referred to as the 'Commission'). The Commission shall--

"(1) be composed of 19 members appointed in accordance with subsection (b), including the chairperson who shall be selected by the members of the Commission from among themselves; and

"(2) conduct its business in accordance with the provisions of this title [this note].

"(b) **Membership.**--

"(1) **In general.**--The Commissioners shall serve for the life of the Commission. The membership of the Commission shall be as follows:

"(A) 3 representatives from the Federal Government, comprised of the Secretary of Commerce, the Secretary of the Treasury, and the United States Trade Representative (or their respective delegates).

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"(B) 8 representatives from State and local governments (one such representative shall be from a State or local government that does not impose a sales tax and one representative shall be from a State that does not impose an income tax).

"(C) 8 representatives of the electronic commerce industry (including small business), telecommunications carriers, local retail businesses, and consumer groups, comprised of--

"(i) 5 individuals appointed by the Majority Leader of the Senate;

"(ii) 3 individuals appointed by the Minority Leader of the Senate;

"(iii) 5 individuals appointed by the Speaker of the House of Representatives; and

"(iv) 3 individuals appointed by the Minority Leader of the House of Representatives.

"(2) **Appointments.**--Appointments to the Commission shall be made not later than 45 days after the date of the enactment of this Act [Oct. 21, 1998]. The chairperson shall be selected not later than 60 days after the date of the enactment of this Act [Oct. 21, 1998].

"(3) **Vacancies.**--Any vacancy in the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

"(c) **Acceptance of gifts and grants.**--The Commission may accept, use, and dispose of gifts or grants of services or property, both real and personal, for purposes of aiding or facilitating the work of the Commission. Gifts or grants not used at the expiration of the Commission shall be returned to the donor or grantor.

"(d) **Other resources.**--The Commission shall have reasonable access to materials, resources, data, and other information from the Department of Justice, the Department of Commerce, the Department of State, the Department of the Treasury, and the Office of the United States Trade Representative. The Commission shall also have reasonable access to use the facilities of any such Department or Office for purposes of conducting meetings.

"(e) **Sunset.**--The Commission shall terminate 18 months after the date of the enactment of this Act [Oct. 21, 1998].

"(f) **Rules of the Commission.**--

"(1) **Quorum.**--Nine members of the Commission shall constitute a quorum for conducting the business of the Commission.

"(2) **Meetings.**--Any meetings held by the Commission shall be duly noticed at least 14 days in advance and shall be open to the public.

"(3) **Opportunities to testify.**--The Commission shall provide opportunities for representatives of the general public, taxpayer groups, consumer groups, and State and local government officials to testify.

"(4) **Additional rules.**--The Commission may adopt other rules as needed.

"(g) **Duties of the Commission.**--

"(1) **In general.**--The Commission shall conduct a thorough study of Federal, State and local, and international taxation and tariff treatment of transactions using the Internet and Internet access and other comparable intrastate, interstate or international sales activities.

"(2) **Issues to be studied.**--The Commission may include in the study under subsection (a)--

"(A) an examination of--

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"(i) barriers imposed in foreign markets on United States providers of property, goods, services, or information engaged in electronic commerce and on United States providers of telecommunications services; and

"(ii) how the imposition of such barriers will affect United States consumers, the competitiveness of United States citizens providing property, goods, services, or information in foreign markets, and the growth and maturing of the Internet;

"(B) an examination of the collection and administration of consumption taxes on electronic commerce in other countries and the United States, and the impact of such collection on the global economy, including an examination of the relationship between the collection and administration of such taxes when the transaction uses the Internet and when it does not;

"(C) an examination of the impact of the Internet and Internet access (particularly voice transmission) on the revenue base for taxes imposed under section 4251 of the Internal Revenue Code of 1986 [26 U.S.C.A. § 4251];

"(D) an examination of model State legislation that--

"(i) would provide uniform definitions of categories of property, goods, service, or information subject to or exempt from sales and use taxes; and

"(ii) would ensure that Internet access services, online services, and communications and transactions using the Internet, Internet access service, or online services would be treated in a tax and technologically neutral manner relative to other forms of remote sales;

"(E) an examination of the effects of taxation, including the absence of taxation, on all interstate sales transactions, including transactions using the Internet, on retail businesses and on State and local governments, which examination may include a review of the efforts of State and local governments to collect sales and use taxes owed on in-State purchases from out-of-State sellers; and

"(F) the examination of ways to simplify Federal and State and local taxes imposed on the provision of telecommunications services.

"(3) **Effect on the Communications Act of 1934.**--Nothing in this section shall include an examination of any fees or charges imposed by the Federal Communications Commission or States related to:

"(A) obligations under the Communications Act of 1934 (47 U.S.C. 151 et seq.); or

"(B) the implementation of the Telecommunications Act of 1996 [Pub.L. 104- 104, Feb. 8, 1996, 110 Stat. 56, which enacted part II of subchapter II of chapter 5 of this title (47 U.S.C.A. § 251 et seq.); for complete classification, see Tables] (or of amendments made by that Act).

"(h) **National Tax Association Communications and Electronic Commerce Tax Project.**--The Commission shall, to the extent possible, ensure that its work does not undermine the efforts of the National Tax Association Communications and Electronic Commerce Tax Project.

### "§ 1103. Report

"Not later than 18 months after the date of the enactment of this Act [Oct. 21, 1998], the Commission shall transmit to Congress for its consideration a report reflecting the results, including such legislative recommendations as required to address the findings of the Commission's study under this title. Any recommendation agreed to by the Commission shall be tax and technologically neutral and apply to all forms of remote commerce. No finding or recommendation shall be included in the report unless agreed to by at least two-thirds of the members of the Commission serving at the time the finding or recommendation is made.

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**"Sec. 1104. Grandfathering of states that tax Internet access**

**"(a) Pre-October 1998 taxes.--**

**"(1) In general.--**Section 1101(a) [of this note] does not apply to a tax on Internet access that was generally imposed and actually enforced prior to October 1, 1998, if, before that date--

**"(A)** the tax was authorized by statute; and

**"(B)** Either--

**"(i)** a provider of Internet access services had a reasonable opportunity to know, by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or

**"(ii)** a State or political subdivision thereof generally collected such tax on charges for Internet access.

**"(2) Termination.--**

**"(A) In general.--**Except as provided in subparagraph (B), this subsection shall not apply after November 1, 2007.

**"(B) State telecommunications service tax.--**

**"(i) Date for termination.--**This subsection shall not apply after November 1, 2006, with respect to a State telecommunications service tax described in clause (ii).

**"(ii) Description of tax.--**A State telecommunications service tax referred to in subclause (i) is a State tax--

**"(I)** enacted by State law on or after October 1, 1991, and imposing a tax on telecommunications service; and

**"(II)** applied to Internet access through administrative code or regulation issued on or after December 1, 2002.

**"(b) Pre-November 2003 taxes.--**

**"(1) In general.--**Section 1101(a) [of this note] does not apply to a tax on Internet access that was generally imposed and actually enforced as of November 1, 2003, if, as of that date, the tax was authorized by statute and--

**"(A)** a provider of Internet access services had a reasonable opportunity to know by virtue of a public rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; and

**"(B)** a State or political subdivision thereof generally collected such tax on charges for Internet access.

**"(2) Termination.--**This subsection shall not apply after November 1, 2005.

**"§ 1105. Definitions**

"For the purposes of this title [this note]:

**"(1) Bit tax.--**The term 'bit tax' means any tax on electronic commerce expressly imposed on or measured by the volume of digital information transmitted electronically, or the volume of digital information per unit of time

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transmitted electronically, but does not include taxes imposed on the provision of telecommunications services.

**"(2) Discriminatory tax.--**The term 'discriminatory tax' means--

**"(A)** any tax imposed by a State or political subdivision thereof on electronic commerce that--

**"(i)** is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

**"(ii)** is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;

**"(iii)** imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means;

**"(iv)** establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means; or

**"(B)** any tax imposed by a State or political subdivision thereof, if--

**"(i)** the sole ability to access a site on a remote seller's out-of-State computer server is considered a factor in determining a remote seller's tax collection obligation; or

**"(ii)** a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of--

**"(I)** the display of a remote seller's information or content on the out-of-State computer server of a provider of Internet access service or online services; or

**"(II)** the processing of orders through the out-of-State computer server of a provider of Internet access service or online services.

**"(3) Electronic commerce.--**The term 'electronic commerce' means any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access.

**"(4) Internet.--**The term 'Internet' means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

**"(5) Internet access.--**The term 'Internet access' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. The term 'Internet access' does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.

**"(6) Multiple tax.--**

**"(A) In general.--**The term 'multiple tax' means any tax that is imposed by one State or political subdivision thereof on the same or essentially the same electronic commerce that is also subject to another tax imposed by another State or political subdivision thereof (whether or not at the same rate or on the same basis), without a credit (for example, a resale exemption certificate) for taxes paid in other jurisdictions.

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**"(B) Exception.**--Such term shall not include a sales or use tax imposed by a State and 1 or more political subdivisions thereof on the same electronic commerce or a tax on persons engaged in electronic commerce which also may have been subject to a sales or use tax thereon.

**"(C) Sales or use tax.**--For purposes of subparagraph (B), the term 'sales or use tax' means a tax that is imposed on or incident to the sale, purchase, storage, consumption, distribution, or other use of tangible personal property or services as may be defined by laws imposing such tax and which is measured by the amount of the sales price or other charge for such property or service.

**"(7) State.**--The term 'State' means any of the several States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

**"(8) Tax.**--

**"(A) In general.**--The term 'tax' means--

**"(i)** any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or

**"(ii)** the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity.

**"(B) Exception.**--Such term does not include any franchise fee or similar fee imposed by a State or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 U.S.C. 542, 573), or any other fee related to obligations or telecommunications carriers under the Communications Act of 1934 (47 U.S.C. 151 et seq.).

**"(9) Telecommunications service.**--The term 'telecommunications service' has the meaning given such term in section 3(46) of the Communications Act of 1934 (47 U.S.C. 153(46)) and includes communications services (as defined in section 4251 of the Internal Revenue Code of 1986) [26 U.S.C.A. § 4251].

**"(10) Tax on Internet access.**--

**"(A) In general.**--The term 'tax on Internet access' means a tax on Internet access, regardless of whether such tax is imposed on a provider of Internet access or a buyer of Internet access and regardless of the terminology used to describe the tax.

**"(B) General exception.**--The term 'tax on Internet access' does not include a tax levied upon or measured by net income, capital stock, net worth, or property value.

**"Sec. 1106. Accounting rule**

**"(a) In general.**--If charges for Internet access are aggregated with and not separately stated from charges for telecommunications services or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business.

**"(b) Definitions.**--In this section:

**"(1) Charges for internet access.**--The term 'charges for Internet access' means all charges for Internet access as defined in section 1105(5) [of this note].

**"(2) Charges for telecommunications services.**--The term 'charges for telecommunications services' means all charges for telecommunications services, except to the extent such services are purchased, used, or sold by a

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provider of Internet access to provide Internet access.

**"Sec. 1107. Effect on other laws**

**"(a) Universal service.**--Nothing in this Act [this note] shall prevent the imposition or collection of any fees or charges used to preserve and advance Federal universal service or similar State programs--

"(1) authorized by section 254 of the Communications Act of 1934 (47 U.S.C. 254); or

"(2) in effect on February 8, 1996.

**"(b) 911 and e-911 services.**--Nothing in this Act [this note] shall prevent the imposition or collection, on a service used for access to 911 or E-911 services, of any fee or charge specifically designated or presented as dedicated by a State or political subdivision thereof for the support of 911 or E-911 services if no portion of the revenue derived from such fee or charge is obligated or expended for any purpose other than support of 911 or E-911 services.

**"(c) Non-tax regulatory proceedings.**--Nothing in this Act [this note] shall be construed to affect any Federal or State regulatory proceeding that is not related to taxation.

**"Sec. 1108. Exception for voice services over the Internet**

"Nothing in this Act [this note] shall be construed to affect the imposition of tax on a charge for voice or similar service utilizing Internet Protocol or any successor protocol. This section shall not apply to any services that are incidental to Internet access, such as voice-capable e-mail or instant messaging.

**"Sec. 1109. Exception for Texas municipal access line fee**

"Nothing in this Act [this note] shall prohibit Texas or a political subdivision thereof from imposing or collecting the Texas municipal access line fee pursuant to Texas Local Govt. Code Ann. ch. 283 (Vernon 2005) and the definition of access line as determined by the Public Utility Commission of Texas in its 'Order Adopting Amendments to Section 26.465 As Approved At The February 13, 2003 Public Hearing', issued March 5, 2003, in Project No. 26412."

