No. 79702-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

vs.

City of Seattle,

Respondent,

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Supplemental Brief of Respondent City of Seattle

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I. INTRODUCTION

Defendant/Respondent City of Seattle ("City") submits this supplemental brief in accordance with RAP 13.7(d). Plaintiffs/respondents Community Telecable of Seattle, Inc., Comcast of Washington I, Inc., and Comcast of Washington IV, Inc. ("Comcast") sought discretionary review of the court of appeals' December 11, 2006 decision, *Community Telecable , et al v. City of Seattle*, 136 Wn. App. 169, 149 P.2d 380 (2006). This Court accepted review.

II. STATEMENT OF THE CASE

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. *Community Telecable*, 136 Wn. App. at 173-174. Comcast offers its customers the ability to use the cable network for a high-speed broadband Internet connection. *Id.*

The transmission of the Internet signal to and from a Comcast customer's house runs through 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, Washington. *Id.* From Burien the signal travels by fiber optic cable to a facility at the Westin Building in Seattle. *Id.* The signal leaves the Westin Building by fiber optic

cable owned by a different company. *Community Telecable*, 136 Wn. App. at 173-174. Comcast owns all of the cable, fiber optics and other transmission equipment from the outside of the customer's house to the head end in Burien. *Id.* Beyond the Burien head end, other entities provide Internet service and all equipment necessary to provide those services under contracts with Comcast. *Id.*

The City imposes a telephone utility tax on entities engaged in the business of transmitting data over a network in Seattle. Seattle Municipal Code ("SMC") 5.48.050A. Comcast's use of its cable network in Seattle for the intrastate transmission of transmit data is subject to the telephone utility tax imposed by SMC 5.48.050A.

III. ARGUMENT

A. The Court's Decision In *Qwest Corp. v. City of Bellevue* Interpreting RCW 35.21.714 Does Not Affect The Outcome Of This Case Because Comcast Failed To Assert In Its Complaint That It Was Exempt From Tax Under RCW 35.21.714.

Subsequent to the court of appeals' decision in this case, this Court issued the decision *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007). In *Qwest,* the Court disapproved of the court of appeals' interpretation of RCW 35.21.714 in *Comcast v. Seattle*. *Qwest v. Bellevue,* 161 Wn.2d at 368. However, Comcast never raised RCW 35.21.714 as grounds for relief under any claim in its complaint in this

case. Therefore, the court of appeals' erroneous interpretation of RCW 35.21.714 was dicta and should not change the outcome of this case.

The alleged prohibition against the taxing of interstate telephone service under RCW 35.21.714 was never before the court in this case because Comcast never identified that statute in its complaint as a basis for its appeal of the City's tax assessment. CP 3-8. Comcast only mentioned the argument based on that statute in a footnote in its brief to the trial court and the court of appeals. (Comcast Response Brief, p. 15; CP 139.) Comcast did not cite any legal authority to support the argument in the footnotes. Indeed, the footnotes merely stated an alternate basis for avoiding the tax that Comcast believed existed, but was not addressing fully in the briefs. In all likelihood, Comcast did not develop this claim in its briefs because Comcast knew that it had not raised the claim in its complaint.

Although pleadings are liberally construed under CR 8, a party must plead the legal theories upon which a cause of action relies. *Trask v. Butler*, 123 Wn.2d 835, 846, 872 P.2d 1080 (1994). In *Trask*, an attorney malpractice action, plaintiff attempted to assert in his appellate brief a consumer protection act ("CPA") claim that he did not raise in his complaint. *Id.* The Court refused to allow plaintiff to assert the claim:

> To give effect to both CR 8 and *Sprague*, a litigant must plead more than general facts in a complaint to properly allege a CPA cause of action. If no reference is required to the CPA, a litigant would not have to amend their complaint to assert a violation. If this were the rule, a litigant could simply await trial and surprise their adversary with a CPA claim so long as enough facts were intermixed in the complaint. In hindsight it is easy to view facts and agree they support a CPA claim. It is a much more difficult, if not an impossible task, to predict whether a plaintiff will raise such a claim when it is not alleged in the complaint. Because Russell did not allege a violation of the CPA in his complaint, we do not decide the merits of this claim

Trask, 123 Wn.2d at 846. Washington courts have made similar rulings in other cases to prevent litigants from asserting claims not raised in the complaint. In *Dewey v. Tacoma School District*, 95 Wn. App. 18, 25-26, 974 P.2d 847 (1999), plaintiff brought a wrongful discharge claim against his employer and attempted to assert a first amendment claim on appeal that was not raised in the complaint. The court refused to allow the claim:

> Although inexpert pleading is permitted, insufficient pleading is not. *Lewis*, 45 Wn. App. at 197, 724 P.2d 425. "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests."

Dewey, 95 Wn. App. at 23. The court in *Dewey* also rejected plaintiff's claim that the parties had impliedly tried the issue by virtue of plaintiff including it in a motion to dismiss, stating:

> A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting

> the theory into trial briefs and contending it was in the case all along.

Dewey, 95 Wn. App. at 26. *See also Kirby v. City of Tacoma*, 124 Wn. App. 454, 470, 98 P.3d 827 (2004) (court refused to consider claim not raised in complaint); *Camp Finance, LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946 (2006) (complaint must provide both the court and opposing party with notice of the general nature of claims). Here, Comcast did not claim in its complaint that RCW 35.21.714 prevented the City from taxing Comcast's alleged interstate activities. Comcast devoted two footnotes to this argument in ninety-two pages of briefs submitted to the trial court and court of appeals. As a result, the court of appeals did not benefit from development of the issues in the trial court or from proper briefing on appeal.

Although the court of appeals devoted a portion of its decision to the RCW 35.21.714 argument, that portion of the decision was dicta and was not part of the court's holding. *Pacific Northwest Trans. Services, Inc. v. Utilities and Transp. Comm'n,* 91 Wn. App. 589, 599 n.14, 959, P.2d 160, (1998) (*citing State v. Pawlyk,* 115 Wn.2d 457, 487, 800 P.2d 338 (1990). Qwest itself argued in *Qwest v. Bellevue*, that *Community Telecable*'s interpretation of RCW 35.21.714 was "not identified as a holding in the case" and "responds to an issue that was not properly before

the court." *Qwest v. Bellevue*, 161 Wn.2d at 365; Qwest's Supplemental Brief, pp. 9-11. After stating Qwest's position, this Court then listed the stated grounds for the court of appeals' holding in *Community Telecable*, which did not include the interpretation of RCW 35.21.714:

> [The court in] *Community Telecable*, 136 Wn. App. at 172, 149 P.3d 380, held Seattle's telephone utility tax as applied to Comcast's Internet transmission activities (1) is not barred by the Washington Internet tax moratorium, (2) is exempt from the federal Internet Tax Freedom Act's (47 U.S.C. § 151) moratorium on taxes on Internet access under a grandfather clause, and (3) is not discriminatory under the federal Internet Tax Freedom Act.

Qwest v. Bellevue, 161 Wn.2d at 366 n.14. Comcast did not properly raise the interstate/intrastate argument under RCW 35.21.714 and the court of appeals' discussion of the argument is dicta that was not necessary to the decision.

Qwest accurately summarized the purpose for limiting review to issues briefed by the parties:

> Under these circumstances, this Court should not have addressed the issue. The Supreme Court has held that Washington courts "should not engage in the resolution of issues which arise, but are not briefed by the parties." *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Const., Inc.,* 119 Wn.2d 334, 352, 831 P.2d 724 (1992) (*citing John Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 785, 819 P.2d 370 (1991)). Attempting to resolve "issues present, but not briefed" is necessarily "conjectural" because courts do not have the full benefit of argument by both parties. *Puget*

> *Sound Blood Ctr.* 117 Wn.2d at 785. . . . Here, the statutory interpretation of RCW 35.21.714 was not before this court in *Community Telecable* and should not have been addressed.

Qwest's Supplemental Brief in *Qwest v. Bellevue*, pp. 10-11; *see also* Qwest's Amicus Curiae Memo. in Support of Petition to Review *Community Telecable*, pp. 9-10.

This Court will generally decline to decide issues that were not raised below. *State v. Clark,* 124 Wash.2d 90, 104-05, 875 P.2d 613 (1994); RAP 2.5(a). One of the well-settled reasons for this rule is: to "encourage parties to raise issues before the Court of Appeals, thereby ensuring the 'benefit of developed arguments on both sides and lower court opinions squarely addressing the questions'." *Id.* at 105. That said, the Court does have discretion to address important public policy issues, whether or not they were raised below. *International Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37. 42 P.3d 1265 (2002).

Here, the court has already ruled on the correct interpretation of RCW 35.21.714. The Court should exercise its discretion and should not base its decision in this case on the undeveloped arguments and facts surrounding the application of RCW 35.21.714 to this case. The parties did not develop this issue in discovery or motions in the trial court or in

the briefing at the court of appeals. Now, the City can only speculate about the arguments that Comcast will make on this issue in its supplemental brief and will not have the opportunity to reply to those arguments. This is not the proper manner to address this issue, with a limited record and limited briefing. Accordingly, this Court should review the stated grounds for the *Community Telecable* decision and should not decide this case based on an issue that was not part of the case and was not properly briefed or argued by the parties.

B. The Court's Decision In *Qwest v. Bellevue* Does Not Affect The Court Of Appeals' Ruling In This Case Because The City Is Not Taxing Comcast For Federal Access Charges Or Federally Tariffed Charges.

Unlike the situation in *Qwest v. Bellevue*, the City here is not attempting to tax federal access charges, federally tariffed charges, or charges for interstate service. *See Qwest v. Bellevue,* 161 Wn.2d at 356. Instead, as the court of appeals stated, the "City imposes a telephone utility tax on entities engaged in the business of transmitting data over a network in Seattle. *Community Telecable*, 136 Wn. App. at 174 (emphasis added). The City defines "telephone business" to include activities other than traditional telephone service and includes the business of providing data transmission over a cable system. SMC 5.30.060C; RCW 82.04.065(2).

Comcast's charges for this service, provided in the City of Seattle, are not regulated by the FCC as are the charges at issue in *Qwest v. Bellevue*.

In contrast to this case, in *Qwest v. Bellevue* the city of Bellevue disputed the trial court's ruling that prevented Bellevue from taxing "CALCs, private line, frame relay, ATM charges and other federally tariffed charges." *Qwest v. Bellevue*, 161 Wn.2d. at 359. The charges at issue were not charges for the transmission of data over in-city cable facilities. As stated in *Qwest v. Bellevue*, "all of the charges at issue in this case are imposed pursuant to FCC regulations to compensate Qwest for providing *access* to the national interstate telephone network. *Qwest v. Bellevue*, 161 Wn.2d. at 360 n.11. This Court in *Qwest v. Bellevue* then held that "tariffs properly filed with the FCC include charges that are *necessarily* interstate in nature." *Id.* at 363.

Here, none of Comcast's charges are imposed pursuant to FCC regulations or filed in an FCC tariff. Unlike Comcast, Qwest's telephone service is heavily regulated by the FCC under the Federal Telecommunications Act of 1996, 110 Stat. 56, and is subject to regulations developed following the breakup of the AT&T monopoly. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 975-976, 162 L. Ed. 2d 820, 125 S. Ct. 2688 (2005); *Qwest Corp. v. Washington State Util. and Transportation Comm'n*, 484 F. Supp.

1160, 1162 (W.D. Wash. 2007). Comcast, as a cable modem provider, is not governed by those regulations and is not covered by the complex web of regulations that govern services and compensation between local and long distance telephone carriers. Consequently, the charges and services at issue in *Qwest v. Bellevue* are fundamentally different than the charges and services at issue in this case. Seattle is not taxing Comcast on federal access charges or federally tariffed charges. The Court's decision in *Qwest v. Bellevue* does not prevent the City from taxing Comcast's activities in Seattle.

C. The City Is Not Barred From Taxing Comcast Under The Court's Interpretation Of RCW 35.21.714 In *Qwest v. Bellevue* Because The City Is Not Taxing Comcast For Providing Interstate Services Or For Access To Interstate Service.

The City is imposing its tax on Comcast's use of a transmission network in the City that transmits data from the customer's house, to Comcast's head end in Burien. *Community Telecable*, 136 Wn. App. at 173-174. The use of that equipment is the intrastate service that the City is taxing. Other companies provided the services and equipment beyond what Comcast provided between the customer's home and the head end in Burien. *Id.*

This Court's decision in *Qwest v. Bellevue* did not hold that the FCC's regulatory classifications control cities' authority to tax all types of

network telephone service covered by the broad definition of telephone service in RCW 82.04.065(2) and SMC 5.30.060C. In fact, Congress specifically stated in the 1996 Telecommunications Act, a regulatory as opposed to a tax measure, that local taxation power is not modified or impaired by that Act :

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

Section 601, 47 U.S.C. § 152(c)(2) nt., 110 Stat. 143.[1] While it is true that the 1996 Telecommunications Act grants the FCC regulatory jurisdiction over interstate telecommunications, the Act does not govern local taxes. *Cf. In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* FCC 04-267, WC Docket No. 03-211, Memorandum Opinion and Order (Nov. 12, 2004) at ¶ 14, n.47, (preempting the state of Minnesota's "regulations" but not its "laws concerning taxation"), *affirmed by Minnesota Public Utilities Com'n v. F.C.C.,* 483 F.3d 570 (8th Cir. 2007). This section of the Act permits cities and states to tax telecommunications without being bound by the FCC's regulatory classifications.

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[1] The statute notes exceptions for sections 622 and 653(c) of the Act, neither of which is applicable here.

For good reason, the 1996 Telecommunications Act contains the above provision stating that the Act does not modify or impair local taxes. The FCC's regulatory goals may be unrelated to or at odds with local taxation policies. In addition, the Act does not create or follow a clear line between interstate and intrastate services. The U.S. Supreme Court discussed the overlap of intrastate and interstate services under FCC regulations in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). In *Iowa Utilities*, the U.S. Supreme Court held that the FCC had authority under the 1996 Act to enact rules governing local intrastate competition among local exchange carriers ("LECs") in Iowa. *Iowa Utilities*, 525 U.S. at 397. The Court specifically rejected the LECs' argument that primary authority to implement the local-competition provisions belonged to the States rather than to the FCC. *Id. See also Pacific Bell v. Pac-West Telecom., Inc.,* 325 F.3d. 1114, 1126 (9th Cir. 2003) (1996 Act granted the FCC regulatory authority over those intrastate matters governed by the Act.) Although these rulings establish that the FCC has regulatory authority over intrastate as well as interstate matters covered by the Telecommunications Act, the Act does not neatly divide service into interstate and intrastate in a manner that applies to local taxing jurisdictions or local taxpayers.

The Federal District Court in the state of Washington recently discussed the confusion between the interstate and intrastate labels when it summarized what it called the "tortured regulatory tale" of FCC regulation of local ISP-bound telephone calls. *Qwest Corp. v. Washington State Util. and Transportation Comm'n*, 484 F. Supp. 1160, 1164 (W.D. Wash. 2007). The court in *Qwest v. WUTC* (and numerous other cases cited therein) dealt with the FCC's regulation of charges between LECs for intrastate calls to Internet service providers ("ISPs"). As explained by the court, the FCC initially classified these calls, which originated and terminated in-state, as local and required LECs to enter into reciprocal compensation agreements to compensate the terminating LEC for completing the call. *Qwest v. WUTC*, 484 F. Supp. at 1162-63. However, some competing LECs used this system to obtain excessive compensation for local ISP-bound calls to the detriment of the carriers originating the calls. The originating carriers objected and accused the terminating carriers of "regulatory arbitrage." *Id.* at 1165. Then, through the tortuous course of litigation and FCC orders described in *Qwest v. WUTC,* the FCC changed the compensation system and held that ISP-bound calls were instead subject to access charges, like interstate long distance calls. *Id.* at 1164-65. But the FCC did not do this by classifying the calls as non-local. Instead, the FCC exercised its authority to compensate LECs fairly for

ISP-bound traffic and to "eradicate the ills" of regulatory arbitrage. *Qwest v. WUTC*, 484 F. Supp. at 1165-66. The FCC took this regulatory action, despite the fact that the ISP-bound calls were intrastate calls. *Id. See also Pacific Bell v. Pac-West Telecom., Inc.,* 325 F.3d. at 1126; *WorldCom, Inc. v. Federal Communications Comm'n*, 288 F.3d 429, 431 (D.C. Cir. 2002).

As demonstrated by these cases, the FCC has jurisdiction over matters that are indisputably intrastate and regulates both interstate and intrastate activity to advance the purposes of the 1996 Act. However, the regulations do not depend strictly on the actual interstate or intrastate nature of the services being regulated. Even more significantly, the Act creates no bright line between interstate and intrastate telecommunications for state taxation purposes. Consequently, Congress specifically stated that the Act was not to be "construed to modify, impair, or supersede . . . any State or local law pertaining to taxation." Section 601, 47 U.S.C. § 152(c)(2) nt., 110 Stat. 143. Thus, in the present case, the City's ability to tax Comcast's in-city business is not foreclosed by an FCC regulatory classification.

There is no indication in RCW 35.21.714 that the Washington legislature chose to base cities' taxing authority on the complex and evolving regulatory classifications adopted by the FCC under the 1996

Telecommunication Act. This Court did not rule to the contrary in *Qwest v. Bellevue*. This Court in *Qwest v. Bellevue,* finding the code-city counterpart to RCW 35.21.714 to be ambiguous, examined the statute's legislative history. *Qwest v. Bellevue*, 161 Wn.2d at 366. The Court noted that the impetus for the amendments to the statute was apparently the breakup of AT&T and concerns about double taxation of telephone carriers. *Qwest v. Bellevue*, 161 Wn.2d at 366. Accordingly, the Court ruled that the legislature's intent was to preclude "taxation of charges for interstate service." *Id.* at 368. This holding, however, does not incorporate the 1996 Telecommunications Act classifications into Washington local tax law for all types of network telephone service. No other decision by this Court or the court of appeals purports to do so. This is especially the case for a service like Comcast's.

Comcast is providing network telephone service as defined by RCW 82.04.065 over intrastate facilities. But Comcast is not providing the traditional telephone service found in the legislative history discussed in *Qwest v. Bellevue*. Comcast's services are not related to the AT&T breakup or to the local and long distance markets regulated by the FCC in the aftermath. Thus, there is no authority to base the City's taxation of Comcast on the regulatory provisions of the 1996 Telecommunications Act. The U.S. Congress specifically stated that the Act was not intended

to affect local tax law and there is no indication that the Washington legislature intended that a city's authority to tax cable modem service be governed by the FCC's classification of that service.

D. The City Is Not Barred From Taxing Comcast Under RCW 35.21.714 Merely Because Comcast's System Connects To The Internet.

Comcast's argument that its local network constitutes interstate service or access to interstate service stretches the definitions of "interstate," "intrastate" and "access" beyond reason. First, neither term is defined in RCW 82.04.065. In the absence of a legislative definition, courts may resort to the applicable dictionary definition to determine a word's plain and ordinary meaning unless a contrary intent appears within the statute. *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991). The common meaning of "intrastate" is "existing within a state;" the term "interstate" means "existing between or including different states;" and "access" means "ability to enter, approach, communicate with, or pass to and from." Webster's Third New International Dictionary (3d ed.1993). The City is taxing Comcast's use of its intrastate transmission network. Comcast's network is entirely within the state. As the Court stated in *Qwest v. Bellevue,* "It is undisputed that under state law the City may tax Qwest's charges for and its provision of access to *intrastate* services." *Qwest v. Bellevue,* 161

Wn.2d. at 359. Here, the City of Seattle is exercising its undisputed authority to tax Comcast's intrastate services.

When construing tax statutes, provisions regarding exemptions are strictly construed *against* the taxpayer. *Seattle Filmworks, Inc. v. Dept. of Revenue*, 106 Wn. App. 448, 453, 24 P.3d 460 (2001). Here, Comcast is seeking a tax exemption. Comcast cannot avoid taxation by contending that it provides access to an interstate service. This argument is incompatible with the undisputed authority to tax intrastate service. Under Comcast's argument, virtually no telephone service, even traditional local service, would be subject to local tax. No telephone system in any city would be taxable unless the system was incapable of communicating with a point outside the state. Under Comcast's theory, nearly all telephones and cable modem systems would be exempt because almost all such systems enable their users to contact places out-of-state.

For example, under Comcast's theory, the traditional dial-up telephone connection of a local Internet user who calls a Seattle-based ISP to connect to the Internet would be exempt because the ISP routes that local call to the Internet.[2] This contradicts the longstanding authority of

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[2] *National Cable v. Brand X*, 545 U.S. at 975 (traditional means by which consumers in the United States access the Internet is through dial-up connections provided over local telephone facilities.)

cities to tax intrastate telephone service. That authority is not lost merely because a local transmission company provides a connection to the Internet or enables the user to place an interstate long distance call.

The language of the statute and the legislative history cited in *Qwest v. Bellevue* indicates that the legislature's intent with RCW 35.21.714 was to avoid double taxation on long distance interstate telephone calls. There is no indication that the statute prohibits taxation of all other types of network telephone service merely because the other types of service may link to the Internet. Here, Comcast provided its users with a high-speed intrastate transmission system. This is no different than a telephone company that provides local service to its customers who can then call their ISPs by dialing a Seattle telephone number. Like the local dial-up Internet service that takes place wholly within the state, Comcast's data transmission service takes place wholly between points located in the state. Both are intrastate services that the City is authorized to tax.

Other courts have recognized that the use of a local telephone system is an intrastate service. In *AT&T Communications of the Mountain States, Inc. v. State of Colorado Dept. of Revenue*, 778 P.2d 677 (Colo. 1989), the state of Colorado imposed its sales tax on AT&T. The Colorado sales tax applied to sales of intrastate telephone service. *Id.* at 679. AT&T was a long distance carrier and, in order to enable its

customers to make long distance charges, it purchased access to Mountain Bell's local exchange network. *Colorado Dept. of Revenue*, 778 P.2d at 679. The court rejected AT&T's argument that the services were exempt because they were "integral to and indivisible from the interstate telephone call." *Id.* at 682-683. The court relied on the ordinary meaning of "intrastate," i.e. existing within a state, and found that because the services were "provided by facilities, equipment, and personnel which are located entirely within the State of Colorado," that the services were intrastate and taxable. *Id.* at 683. The court found that the "services and long distance calls were not one indivisible product" but are "separate, identifiable, and quantifiable." *Id* at 684. *See also Comcation, Inc. v. United States,* 78 Fed. Cl. 61, 64 (2007) (in-state lines used to provide dial-up Internet service subject to federal excise tax on local service); *MCI Telecommunications Corp. v. Dept. of Treasury*, 136 Mich. App. 28, 355 N.W.2d 627 (1984) (local exchange services are intrastate services subject to state tax).

Similarly, in this case, Comcast is selling an intrastate service that does not become exempt from the City's tax merely because Comcast bundles the transmission services with Internet services. Both transmission and Internet services are distinct services can be and are sold separately. *See Time Warner Telecom, Inc. v. Federal Communications*

Comm'n, -- F.3d --, 2007 WL 2993044, p. 10 (3rd Cir. 2007) (cable modem providers not only have the capability to offer their transmission facilities on a stand-alone basis, but in fact, have entered into agreements with independent ISPs to do so). The City's tax applies to the transmission services, which are taxable as network telephone services. This tax is not barred by RCW 35.21.714.

IV. CONCLUSION

The City imposed its telephone utility tax on Comcast because Comcast operates an intrastate data transmission system within the City. The services are not interstate services or access to interstate services barred by RCW 35.21.714. In addition, as discussed in the City's briefs to the court of appeals, the court of appeals correctly held that Comcast cannot escape the tax by bundling Internet service revenue with its telephone business revenue and that neither the state nor the federal Internet tax statutes prohibit the City's telephone utility tax. This Court should affirm the court of appeals.

DATED this 30 day of November, 2007.

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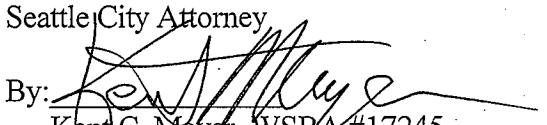
By: 
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Marisa Johnson