

No. 58154-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

QWEST CORPORATION, Respondent,

vs.

CITY OF BELLEVUE, Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Qwest argues that the City may not tax what Qwest labels Customer Access Line Charges (“CALCs”), federally tariffed charges, and charges for ATM, frame relay, and private line service. Qwest argues that all of these charges are charges for access to interstate service and hence, are exempt from taxation under Washington law. Qwest further argues that there is no need to review the facts regarding the nature of these charges, and specifically whether they are truly charges for access to interstate services, because they are charges for access to interstate services as a matter of law. Qwest urges the Court to take its word that these charges are charges for access to interstate services. Qwest is wrong. The Court cannot determine that these charges are charges for access to interstate services, and hence, exempt from taxation, without a factual analysis as to their true nature. Further, the evidence introduced by the City shows that at least some of the charges that Qwest claims to be exempt from taxation are in fact charges for intrastate services and are therefore fully subject to the City’s Utility Occupation Tax (“UOT”). Thus, the Superior Court erred in ignoring the evidence and ruling that all of these taxes were exempt as a matter of law.

Qwest likewise errs by claiming that the Superior Court did not abuse its discretion in denying the City’s Motion for a Continuance

Pursuant to Rule 56(f). Contrary to Qwest's argument, there are at least two critical question of fact in this case. The Superior Court erred in not allowing the parties to explore these factual issues through discovery before ruling on Qwest's Summary Judgment Motion.

Finally, Qwest is mistaken in arguing that the Superior Court did not abuse its discretion in denying the City's Motion to Dismiss. The Superior Court's failure to dismiss the suit risks undermining the City's administrative process, and needlessly delays a proper resolution of this dispute.

I. QWEST MISREADS AND MISAPPLIES APPLICABLE LAW TO ARGUE THAT THE SUPERIOR COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON QWEST'S DECLARATORY JUDGMENT CLAIM.

Qwest misreads and misapplies the applicable law to contend that the Superior Court correctly granted summary judgment on Qwest's Declaratory Judgment claim. The City does not dispute that RCW 35A.82.060(1) prohibits the City from taxing "access to, or charges for, interstate services." Thus, if Qwest sought a declaration that the City was prohibited from taxing charges for access to interstate services, the City would have had no grounds to oppose such relief.¹ But that is not what

¹ Of course, such a declaration would be pointless since it would do nothing more than repeat what the statute says.

Qwest sought. Instead Qwest sought a declaration that charges for certain types of services that are not enumerated in RCW 35A.82.060(1) – namely, charges Qwest labels as CALCs, private line, frame relay and ATM services, and any other federally tariffed charges – constitute charges for access to interstate services, as a matter of law, and hence are exempt from taxation. Qwest asked the Court to make such a declaration without conducting any factual analysis as to the true nature of the charges. Put another way, Qwest sought a declaration that necessarily requires factual findings, without allowing for any discovery into or analysis of such facts. That is simply wrong and is particularly egregious here where the record shows that at least some of the charges Qwest claims are exempt are in fact charges for intrastate services.

With respect to “federally tariffed charges, Qwest simply misreads the statute. By its plain language RCW 35A.82.060(1) does not prohibit the taxation of “federally tariffed charges.” Qwest Brief (“QBr.”) 19.

With respect to what Qwest labels Customer Access Line Charges, these charges may or may not be charges for access to interstate services. Because CALCs is a term that Qwest uses, and is not defined, it is unclear what the phrase means. To the extent Qwest is truly charging customers for access to interstate services, the City acknowledges that such charges are exempt from the UOT. However, there must be at least some factual

analysis to determine whether the CALCs (as defined by Qwest) are in fact charges for access to interstate services. Alternatively, the language of the declaratory judgment should be limited to prohibiting the taxation of charges for access to interstate services, not customer access line charges.

Finally, Qwest's charges for its ATM, frame relay, and private line services are not charges for *access* at all; they are simply charges for particular services. *See* City Br. 24-25 (describing the services in question). As such, Qwest's contention that its charge for frame relay service connecting two points within the state of Washington is a charge "for access to...interstate services" is simply wrong. If anything, such a charge is one "for access to...*intrastate* services."

Aside from misreading and misapplying RCW 35A.82.060(1), Qwest misstates the law in arguing that the City lacks jurisdiction to tax the charges in question. While it may be true that the City lacks jurisdiction to *regulate* Qwest and its customer charges, it is not true that the City lacks jurisdiction to *tax* such charges. Qwest misreads Washington law and completely ignores controlling Washington Supreme

Court authority,² each which demonstrates that the City has jurisdiction to impose its UOT on the charges at issue.

A. RCW 35A.82.060(1) Does Not Prohibit Taxes on Federally Tariffed Charges.

Qwest fails to recognize that the appearance of a charge in a federal tariff is, in and of itself, not dispositive of a charge's taxability under Washington law.³ Instead, RCW 35A.82.060(1) only outlaws taxes on federally tariffed charges if such charges qualify as "charges for, or access to, interstate services." Accordingly, the test is *not* the existence of a tariff, or the mention of a charge therein, but whether a given charge is for "access to...interstate services."

To see just how wrong Qwest and the Superior Court are in their interpretation of RCW 35A.82.060(1) one need only compare the statute with the Court's Final Judgment for Qwest Corporation. By its plain language, RCW 35A.82.060(1) prohibits taxes on *two* types of charges relating to interstate services: (1) "charges for" interstate services or (2) [charges for] "access to," interstate services. In contrast, the Superior

² *Pacific Telephone & Telegraph Co. v. City of Seattle*, 172 Wn. 649, 654 (1933), *aff'd*, 291 U.S. 300 (1934).

³ Tariffs are used in the regulation of telecommunications services under federal law. As discussed at Part I.D, *infra*, the regulation of telecommunications services is distinct from the taxation of such services.

Court's Judgment bars the City from taxing *three* sweeping categories of services:

- (1) charges for *access to* interstate service, including but not limited to, consumer access line charges imposed pursuant to 47 C.F.R. Part 69 and private line, frame relay, and ATM access charges purchased under a Federal Communications Commission tariff;
- (2) *charges for* interstate services; or
- (3) federally tariffed charges.

CP 425-26 (emphasis added). Only the second category falls within the statutory language of RCW 35A.82.060(1). With respect to the first category, the Court properly held that the statute prohibits taxing "charges for access to interstate services," but erred in holding that the specific types of services constitute "access to interstate services" without any factual analysis. *See* Part I.B, *infra*. The third category found to be exempt by the Superior Court -- "federally tariffed charges" -- appears nowhere in RCW 35A.82.060(1) and is just plain wrong. Yet, just as it argued below, Qwest dedicates an entire section of its brief to suggesting that this limitation appears in Washington law. *See* QBr. Part V.B.2 ("Washington Statute Prohibits Bellevue From Taxing Federally Tariffed Charges"). It does not.

Qwest attempts to defend its misreading of RCW 35A.82.060(1) to include an exemption for "federally tariffed charges" by quoting language

from a version of the statute that existed prior to 1986. That earlier version read:

...the city shall not impose the fee or tax on that portion of network telephone service, as defined in RCW 82.04.065, which represents access to, or charges for, interstate services *for which rates are contained in tariffs filed with the federal communications commission.*

(Emphasis added.) As Qwest is forced to concede, however, the Washington Legislature removed the italicized language in its entirety in 1986. As such, the existence of an FCC tariff no longer constitutes any part of the test under RCW 35A.82.060(1).⁴ *Graffell v. Honeysuckle*, 30 Wn. 2d 390, 399 (1948) (holding that “where a material change is made in the wording of a statute, a change in legislative purpose must be presumed.”). In fact, the Supreme Court of Washington has held that when the Legislature omits language from a previous version of a statute, a court may not unilaterally read the omitted language back into the statute under the court’s own assumption that the Legislature would have intended that it do so. *State v. Reese*, 12 Wn. App. 407, 409 (1974) (“The omission of words from a statute must be considered intentional on the

⁴ By beginning with the legislative history, Qwest has its statutory interpretation backwards. The Court only should look to the legislative history if the statute is ambiguous on its face on the question of whether an FCC tariff is controlling. RCW 35A.82.060(1) is clear on its face that the test is not tied to the existence of FCC tariffs, but to “access to, or charges for, interstate services.”

part of the legislature.”). Instead, a court is bound by the text of a statute as it is written, as the Supreme Court held in a 1977 case:

Because the reference to “any member or officer of any corporate employer” was not brought forward into the newly created proviso by the 1917 amendment, the proviso thus limits itself to the term “such employer.” Whether we believe the legislature may have inadvertently omitted the phrase “member or officer of any corporate employer” is not important. The fact remains that the proviso lacks this phrase. We are not authorized to read into it those things which we conceive the legislature may have left out unintentionally. We must assume the legislature meant what it said.

Jepson v. Department of Labor and Industries, 89 Wn. 2d 394, 403 (1977) (internal citations omitted). Here, the Legislature omitted all references to FCC tariffs from RCW 35A.82.060(1), and the Court must take the Legislature at its word.⁵

Qwest cites no evidence in the legislative record to support its speculation that the Legislature silently intended to preserve the 1986 test considering FCC tariffs. QBr. 20. Had the Legislature intended to do so,

⁵ Qwest’s attempt to read *Russello v. United States*, 464 U.S. 16, 23-24 (1983), in its favor is unavailing. QBr. 20, n.5. That the earlier limitation to federal access charges that were contained in an FCC tariff was deleted does not mean that the prohibition on taxes gets expanded to all charges that are regulated by an FCC tariff. The point is that the Legislature eliminated the reference to an FCC tariff when it could have left the language in. As such, the Court must presume that the Legislature meant to delete this phrase and the Court therefore cannot read the statute to prohibit taxes on all charges regulated by an FCC tariff.

QBr. 20, it had a simple textual tool available to do it.⁶ By omitting the reference to FCC tariffs, accidentally or not, without leaving *any* record that such tariffs should continue to control, the Legislature has forced the hand of this Court under the canons of statutory construction. The test is not the existence of a federal tariff, but whether the charges in question are “for access to, or charges for, interstate services.” Not all federally tariffed charges are “for access to, or charges for, interstate services.” Thus, the statute does not prohibit the City from imposing its UOT on all federally tariffed charges.

B. RCW 35A.82.060(1) Does Not Prohibit Charges for ATM, Frame Relay, and Private Line Services.

Qwest further argues that charges for ATM, frame relay, and private line service are all charges for “forms of access to interstate service.” QBr. 25. However, Qwest cites no support for its blanket conclusion that these charges are for access to interstate service as a matter of law and in fact the conclusion is wrong. Charges for private line, ATM, and frame relay service are charges for particular types of telecommunications services, not merely charges for access to interstate

⁶ As the City discussed in its opening brief, City Br. 31, the Legislature could have inserted three words -- “or any services” -- to achieve the change Qwest suggests. In so doing, the Legislature would have retained a prohibition on taxes based on whether a charge was regulated by an FCC tariff. The Legislature did not do this.

service.⁷ *See* City Br. 24-26. Thus, these charges only constitute charges “for access to...interstate services” if they are collected in exchange for the provision of access to services that extend *outside* of the state of Washington. Otherwise, the charges are for intrastate services and are subject to the UOT.

Qwest’s attempts to overcome this hurdle fall short. First, Qwest attempts to blur the distinction between what the company refers to as CALCs and charges for ATM, frame relay, and private line services. It states in blanket fashion:

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 network.

QBr. 29. While this is certainly true for true access charges for interstate services, as indicated in the case cited by Qwest, *N.A.R.U.C. v. F.C.C.*, 737 F.2d 1095, 1104 (D.C. Cir. 1984), it is not true for charges for private line, frame relay, and ATM service.

Next, Qwest contends that these charges nevertheless constitute access charges since they are “FCC tariffed services.” QBr. 26. However, as discussed above, nothing under Washington law prohibits the City from

⁷ As Qwest points out, QBr. 25, the FCC has expressly classified true access charges as “access charg[e] for interstate or foreign access services provided by [local] telephone companies.” 47 C.F.R. § 69.1. In contrast,

imposing a tax on a charge that is federally tariffed. The City is only prohibited to the extent that the charge is one imposed “for access to, or charges for, interstate services.” RCW 35A.82.060(1). *See* Part I.A, *supra*. Just because a charge is federally tariffed does not mean that it is being imposed for access to or for interstate service as a matter of law.

Qwest also criticizes the City’s focus on the nature of the service Qwest is providing. QBr. 26. Yet, the City has no choice. RCW 35A.82.060(1) explicitly requires that the City examine the type of service for which Qwest is charging a customer, and specifically whether a charge is being imposed for access to or for interstate service. If Qwest is charging a customer for a telecommunications service connecting two points within the state of Washington, it is plainly not charging “for access to...interstate services,” and the City may lawfully levy the UOT on the charge. Below, the City introduced unrebutted evidence that Qwest had charged the City for access to wholly *intrastate* frame relay service. City Br. 25-26. Accordingly, the City does not “gloss over” the issue by asking whether Qwest has charged for the provision of access to *interstate* or *intrastate* service; it directly confronts it.⁸

the FCC has not classified charges for ATM, frame relay, and private line service in the same manner.

⁸ Qwest also misstates the law from other states. Qwest incorrectly contends that *Advisory Opinion*, TSB-A-93(26)S (April 12, 1993) was

C. CALCs Only Constitute Charges for Access to Interstate Service if the Charges Are Collected for Such a Purpose.

The City does not dispute that a true charge imposed for access to interstate service is exempt from taxation under 35A.82.060(1). What the City objects to is the conclusion that a “customer access line charge” – a term used by Qwest – is automatically deemed to be a charge for access to interstate services without any factual analysis as to the true nature of the charge. Put another way, the City objects to the conclusion that a CALC equals an End User Access Service charge, as that term is defined under Qwest’s FCC Tariff, without any discovery or factual analysis. *See* CP 342-343. Thus, the City would not take issue with a ruling that it is

“rendered moot” by the New York State Tax Appeals Tribunal in *Concentric Network Corporation*, DTA No. 819533 (January 20, 2005). QBr. 24. The *Concentric* case, which Qwest attached at Exhibit 5, does no such thing. In that case, Concentric had argued that “the Division improperly categorized [its] purchases as intrastate telephone services because the lines constitute access points to a packet switched network.” *Id.* at 14. The Tribunal found that Concentric’s claim was “without merit,” and held that the taxes were not barred since they were imposed “upon [Concentric’s] *intrastate* line access charges only.” *Id.* at 17. Qwest also errs in suggesting that it is “not clear” that *MCI Telecomms. Corp. v. Dept. of Treasury*, 136 Mich. App. 28 (Mich. Ct. App. 1984) represents current Michigan law in light of *GTE Sprint Communications Corp. v. Dep’t of Treasury*, 445 N.W.2d 476, 477 (Mich. Ct. App. 1989). The *GTE* court itself clarified that the portion of the *MCI* decision relevant here – *see* City Br. 27 – remains good law. *Id.* at 480, n.7 (recognizing the decision “does not necessarily contradict the *MCI* holding” inasmuch as the previous decision address “whether access services are intrastate or interstate in nature” and not the Use Tax Act.).

prohibited from imposing its UOT on End User Access Service charges as defined by the Tariff or on actual charges for access to interstate services. But it does take issue with a conclusion that “CALCs” constitute access charges to interstate service as a matter of law simply because Qwest says so. At a minimum, the City should have been permitted to take discovery to determine the true nature of these charges.

In its brief Qwest claims, “If Qwest were to charge a ‘surcharge’ that was not authorized by the FCC, that charge would not be a CALC.” QBr. 28. This simply re-states the problem. The City’s point remains that it has not been able to determine whether Qwest has collected charges that are “not authorized by the FCC” and labeled them as CALCs. A CALC is not an access charge for interstate service simply because Qwest labels it as such.

Moreover, as the City discussed in its opening brief, City Br. 29, the City has reason to believe that at least some of Qwest’s CALCs are surcharges levied in addition to the \$5.85 CALC authorized by the FCC Tariff. Qwest attempts to duck this fact, contending that “[w]hether or not the City believes Qwest has miscalculated its CALC revenues has no bearing on the legal issues about which Qwest seeks declaratory relief.”

QBr. 28.⁹ That misses the point. The issue is not whether Qwest has miscalculated its access charges; the issue is whether certain charges Qwest is putting into the category of CALCs are in fact charges for access to interstate service. Resolution of this issue cannot be achieved without reviewing the facts.

D. Qwest Errs In Contending that the City Lacks Jurisdiction To Tax Federally Regulated Charges.

Qwest also errs in contending that the City lacks jurisdiction to tax federally regulated charges. QBr. 29. The error is premised upon Qwest’s assumption that the City levies its UOT pursuant to its “regulatory or licensure authority.” QBr. 30.¹⁰ That is incorrect. While it may be true that the City lacks jurisdiction to *regulate* Qwest and its customer charges, it is not true that the City lacks jurisdiction to *tax* such charges.¹¹ The levy

⁹ For the first time, Qwest offers an explanation of why the total revenues Qwest received during the test month might not add up to a multiple of \$5.85 – the amount of the access charge Qwest was entitled to charge a customer under its FCC tariff. QBr. 28-29. The City does not have the information to determine whether these reasons explain the discrepancy. Qwest’s attempt at an explanation only serves to highlight why this is a factual issue and why discovery on this point was necessary.

¹⁰ In fact, Qwest’s entire discussion on pages 29 through 33 appears to be predicated on an assumption “that ... Bellevue imposes the UOT pursuant to its regulatory authority.” QBr. 32. The discussion is wholly irrelevant because the UOT is imposed pursuant to the City’s taxation authority.

¹¹ Contrary to Qwest’s claim, QBr. 21, the City does not seek to “create its own tax categories.” It seeks to tax Qwest’s charges under its taxing authority and subject to the limitations established by RCW 35A.82.060(1).

of the Utility Occupation Tax is an exercise of the City's taxation authority, not its regulatory authority, as the City's opening brief plainly demonstrates. *See* City Br. 16-17.

Qwest's implication that taxation of the intrastate services in question here would run afoul of federal law is a red herring. Throughout its brief, Qwest deliberately conflates "regulation" with "taxation." For example, Qwest writes:

The jurisdictional boundaries forming the foundation of the *regulation* of the telecommunication industry put in place by Congress cannot be ignored or overruled by the City.

QBr. 27 (emphasis added). Of course, as Qwest is well aware, this case has absolutely nothing to do with Congress' jurisdictional boundaries for the *regulation* of the telecommunications industry. *See* City Br. 15. The City does not seek to regulate the telecommunications industry in any way. This case is about the *taxation* of charges for telecommunications services, a subject on which Congress has unequivocally stated that *regulatory* jurisdictional boundaries do not apply:

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

Section 601, 47 U.S.C. § 152 (c)(2) nt., 110 Stat. 143.

As it did before the Superior Court, Qwest makes its strained claim about the City's lack of jurisdiction based on a single phrase in the Bellevue City Code – "license for revenue." BCC 4.10.010. Stressing the word *license*, Qwest implies that the City only has regulatory jurisdiction over Qwest's charges, presumably since licensing is often equated with regulation. However, as the City showed in its opening brief, City Br. 18-20, the Washington Supreme Court has expressly rejected such a narrow reading of the phrase "license for revenue." *Pacific Telephone & Telegraph Co. v. City of Seattle*, 172 Wn. 649, 654 (1933), *aff'd*, 291 U.S. 300 (1934). The Supreme Court plainly recognized that the power to "license for revenue" confers a power to raise revenue separate and apart from a power to regulate. Moreover, RCW 35A.82.020 draws the same distinction, recognizing that the powers "to regulate" and "to impose excises for regulation or revenue" are separate and distinct:

A code city may exercise the authority authorized by general for any class of city to license and revoke the same for cause, *to regulate*, make inspections and *to impose excises for regulation or revenue* in regard to all places...

RCW 35A.82.020. Qwest has no response on this point, and ignores *Pacific Telephone & Telegraph* entirely. The Court should summarily reject Qwest's attempt to blur the distinction between taxation and regulation. Regardless of the City's authority to regulate or license

telecommunications providers, the City plainly has jurisdiction to tax the charges in question.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BY DENYING THE CITY’S RULE 56(f) MOTION.

Qwest argues that “the issue of whether Bellevue can levy its UOT on CALCs and other federally-regulated access service charges is a legal question that would not have been affected by factual discovery.” QBr. 34. That is simply wrong. Washington law only bars City taxes “for access to, or charges for, *interstate* services.” RCW 35A.82.060(1) (emphasis added). Thus, in order to determine if the charges at issue are exempt from taxation, the Court first must make a factual determination of whether the charges at issue are imposed for interstate services or access to interstate services.

As discussed above, there would be no factual issue if Qwest had sought a declaration that the City may not impose its UOT on charges for access to interstate services. But Qwest chose instead to seek a much broader declaration, one that goes far beyond the limitations set forth in RCW 35A.82.060(1). Qwest sought a ruling that CALCs (a term defined by Qwest), charges for private line, frame relay and ATM services, and federally tariffed charges, all are exempt from taxation under RCW 35A.82.060(1). With respect to federally tariffed charges, Qwest and the

Superior Court are simply wrong. Those charges are not exempt from taxation under the plain language of the statute. With respect to the other charges, however, the Court cannot determine whether these charges are exempt from taxation without making a factual determination that the charges constitute charges for access to interstate services. It was an abuse of discretion for the Court to refuse to grant the City an opportunity to take discovery on this critical factual issue.

Qwest simply misreads the law when it argues that the “physical location of the telephone *services...is irrelevant.*” QBr. 34 (emphasis added). The statute expressly says otherwise. If Qwest charges a customer for its provision of access to two points within the state of Washington, it is plainly not charging “for access to...interstate services.” Moreover, the City introduced evidence that Qwest had charged the City for access to wholly *intrastate* frame relay service. City Br. 25-26.

Qwest also argues that this case only presents questions of law because the charges in this question “are imposed pursuant to Qwest’s *federal* interstate tariff, and they are classified by the FCC as charges for access to interstate services.”¹² QBr. 35. However, as discussed in Part I.A., *supra*, whether a charge is regulated under a federal tariff has no

bearing on whether the charge is taxable under Washington law. The issue is whether or not the charge is collected in exchange for the provision of “interstate” services, or access thereto – a question of fact.¹³ RCW 35A.82.060(1).

Qwest further argues: “[T]he City does not have the authority to impinge on the FCC’s jurisdiction as to the classification of what services are interstate versus intrastate, nor to regulate where the FCC has classified a charge as compensation for interstate service.” QBr. 35. Once again, Qwest has confused regulation with taxation. The City does not seek to regulate Qwest’s charges, but to tax them. The jurisdictional boundaries set out by Congress for the regulation of the telecommunications industry do not impact the City’s ability to tax.¹⁴

¹² Again, Qwest conflates CALCs with its charges for ATM, frame relay, and private line services. Only the CALCs are classified as access charges by FCC regulation.

¹³ Even if one accepted Qwest’s argument that anything covered by the FCC Tariff constituted access to interstate service or interstate service, Qwest has provided no explanation for those private line, frame relay or ATM services where a customer indicates that ten percent or less of the services will be used for interstate services. In those cases, the charges are not regulated by the FCC, CP 358, and yet, Qwest seeks a blanket declaration that all private line, frame relay and ATM services constitute access to interstate services. At a minimum, a factual analysis is needed to determine whether such services fall under this ten percent or less threshold, and hence, are not subject to the FCC Tariff.

¹⁴ As such, the question of whether there are errors in Qwest’s tariff filings with the FCC and the WUTC is beyond the scope of this proceeding. *See* QBr. 27.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION BY DENYING THE CITY'S MOTION TO DISMISS.

Qwest further errs in contending that the Superior Court did not abuse its discretion in denying the City's Motion to Dismiss by not dismissing the case based on the doctrines of primary jurisdiction and exhaustion of administrative remedies.

To support its argument that dismissal based on the doctrine of primary jurisdiction was unnecessary, Qwest again falls back on the erroneous contention that the case presents a "pure question of state statutory and constitutional interpretation." QBr. 39. As discussed above, that is simply wrong. To resolve this dispute, it is necessary first to determine whether the charges at issue constitute charges for "access to, or charges for, interstate services," which involves a factual determination. The question is whether the Court should have deferred the fact-finding process to the City's Hearing Examiner. It should have.

As the City pointed out in its opening brief, City Br. 41-42, each of the three elements courts look to in deciding whether to defer jurisdiction to an administrative agency are present here. It is beyond dispute that the City has a clearly defined procedure for resolving disputes such as this one. Further, the City's Hearing Examiner has a special competence to make factual determination such as those required here. The Hearing

Examiner was appointed specifically to make factual determinations regarding the application of the City's tax codes, as is required here. The Court should therefore defer to the expertise of the City's Hearing Examiner.

Moreover, the Superior Court's decision directly conflicts with the City's administrative scheme for the resolution of tax disputes. *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 302-03 (1980). Based on the Superior Court's erroneous ruling, the danger that the City's administrative process would be disrupted has been realized. The City Hearing Examiner has been barred from even considering whether the City may impose its UOT on *any* of what Qwest describes as CALCs or on its charges for ATM, frame relay, and private line services, even though the Hearing Examiner has never made a factual determination of whether the charges in question are actually charges for access to interstate services. The Court's ruling has stripped the City of its ability to apply its administrative process in this situation.

The Superior Court's failure to grant the City's motion to dismiss will also result in inefficiencies. The issue of whether the challenged charges are charges for access to interstate service will now have to go back to the Hearing Examiner for consideration, essentially resulting in two proceedings before the Hearing Examiner in addition to the Court

action. This inefficiency could have been avoided had the Superior Court deferred to the City's Hearing Examiner in the first instance.

Likewise, the Superior Court abused its discretion by not requiring Qwest to exhaust its administrative remedies. Qwest contends that it was not required to exhaust its administrative remedies because that doctrine only "governs an appellate relationship between the administrative body and the court." QBr. 40. However, to follow that principle in this case would undermine the very principles the doctrine was designed to serve. The City's Hearing Examiner has "clearly defined machinery" for the resolution of this dispute, and it can supply an "adequate administrative remedy." *South Hollywood Hills Cits. v. King County*, 101 Wn. 2d 68, 73 (1984).

Furthermore, Qwest may not defend its failure to exhaust its administrative remedies by citing the difficulties associated with providing refunds to customers. QBr. 42. This would be a problem of Qwest's own creation: nothing requires it to pass on the levies to its customers. Its decision to do so may not be relied upon to justify prematurely casting this issue upon the Washington courts.

CONCLUSION

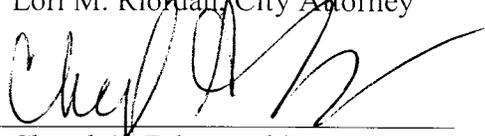
The Court of Appeals should not be misled by Qwest's misreading and misapplication of Washington and federal law. The Court of Appeals

should reverse the Superior Court's judgment that the City of Bellevue may not levy its UOT on Qwest's CALCs, its charges for ATM, frame relay, and private line service, and other federally tariffed charges, and remand for further proceedings consistent with the Court of Appeals' ruling. The Court should reverse the Superior Court's denial of the City's Motion to Dismiss on the grounds that such denial was an abuse of discretion based on the doctrines of exhaustion of administrative remedies and primary jurisdiction, with instructions to grant the Motion to Dismiss. Finally, if the Court does not order the Superior Court to grant the City's Motion to Dismiss, it should reverse the Superior Court's denial of the City's Motion for Continuance with instructions that the Court grant the motion.

DATED this ^{PM} 5 day of September, 2006.

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