# IN THE SUPREME COURT OF THE STATE OF OREGON

**CITY OF EUGENE**, an Oregon municipal corporation,

Plaintiff-Appellant,
Respondent on Review,

v.

**COMCAST OF OREGON II, INC.**, an Oregon corporation,

Defendant-Respondent,
Petitioner on Review.

Lane County Circuit Court
Case No. 160803280

CA A147114

S062816

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## BRIEF OF *AMICUS CURIAE* LEAGUE OF OREGON CITIES IN SUPPORT OF RESPONDENT ON REVIEW

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On Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Lane County,
Hon. Karsten H. Rasmussen, Judge

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Opinion Filed: May 21, 2014
Author of Opinion: Schuman, Senior Judge
Concurring Judges: Duncan, Presiding Judge, and Wollheim, Judge

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May 2015

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## I. INTEREST OF *AMICUS* LOC

The League of Oregon Cities ("LOC"), founded in 1925, is a statewide association representing all of Oregon's 242 incorporated cities. The LOC was formed to be, among other things, the effective and collective voice of Oregon's cities before the legislative assembly and state courts. The LOC advocates for improved quality of municipal services through technical assistance, research, and education.

The LOC, on behalf of its members, has an interest in the outcome of this case because the Court's decision will impact the ability of each of Oregon's 242 cities to receive just compensation from third parties for the use of city rights of way. Accordingly, *Amicus* requests to appear to present a position as to the correct rule of law that does not affect a private interest of its own.

## II. QUESTIONS PRESENTED FOR REVIEW

*Amicus* LOC joins in the statement of questions presented for review and accompanying proposed rules of law of respondent, City of Eugene ("City").

## III. NATURE OF THE PROCEEDINGS, RELIEF SOUGHT AND JUDGMENT

*Amicus* LOC joins in the City's statement of the nature of the proceedings.

## IV. STATEMENT OF FACTS

*Amicus* LOC joins in the City's statement of the facts of the case.

## V. SUMMARY OF ARGUMENT

Cities in Oregon hold in trust, for the benefit of their residents and the general public, the rights of way—the surface and area above and below the streets, sidewalks and other areas open for public travel. As trustees, cities have a duty to manage this valuable and limited asset. With an ever-increasing number of public and private entities seeking to construct and install facilities along, above and below the rights of way, efficient and effective management is paramount, as each utility and communications facility puts pressure on the remaining capacity.

The home rule provisions of the Oregon Constitution ensure city authority to act locally to manage the rights of way, subject only to state or federal law preemptions. As home rule jurisdictions, Oregon cities need not rely on statutory authority for their actions. Oregon courts have long upheld the authority of Oregon cities to impose right of way use taxes and fees consistent with the terms of their home rule charters. Similarly, federal laws that otherwise impose limits on local authority have nevertheless protected local authority over the rights of way.

Here, the City exercised its home rule authority in enacting the right of way use fee—the "License Fee" codified at 3.415(2) of the Eugene Code ("EC")—Petitioner challenges. To be clear, the issue before the Court is not whether the City had the authority to enact the License Fee. There is no challenge to that authority. The sole issues are whether the federal Internet Tax Freedom Act ("ITFA") or Section 542(b) of the Cable Communications and Policy Act of 1984, as amended ("Cable Act") preempt the City from collecting the License Fee from Petitioner. In both instances, the answer is no.

Both the ITFA and Section 542(b) of the Cable Act reflect Congress's intent to preserve local authority over the rights of way. To conclude otherwise would rewrite these laws to provide a special exemption for cable operators—a discriminatory result both statutes were designed to avoid.

# VI. ARGUMENT

## A. OREGON CITIES HAVE HOME RULE AUTHORITY TO MANAGE AND IMPOSE FEES FOR USE OF THE RIGHTS OF WAY

### 1. Oregon Cities Have Home Rule Authority to Enact Policies and Laws Without Authorization from the Legislature Unless Preempted by State or Federal Law

Although the City's authority to enact the License Fee is not disputed in this case, preemption analysis must begin with an understanding of the scope and extent of local government authority. This context illuminates the fact that the City did not rely on its cable franchise, the Cable Act or any other state or federal law in enacting the License Fee. The City exercised its home rule authority to implement a comprehensive law governing telecommunications providers' use of City rights of way, which includes the License Fee. *See* EC 3.400 *et seq.* The Court of Appeals correctly concluded that neither the ITFA nor Section 542(b) of the Cable Act interferes with that authority.

Oregon cities, though their home rule charters, have broad powers to enact local laws and regulations to the extent not otherwise specifically preempted by state or federal laws or the constitutions. *See, e.g.*, *Jarvill v. City of Eugene*, 289 Or 157, 169, 613 P2d 1, 7-8 (1980) (explaining the "'home rule' provisions permit the people of a city or town

to decide upon the organization of their government and the scope of its powers under its charter, without the need to obtain statutory authorization from the legislature.").

Oregon municipal home rule authority is rooted in two 1906 amendments to the Oregon Constitution. The first prohibits the state legislature from enacting, amending and repealing city charters and authorizes city voters to adopt municipal charters "subject to the Constitution and criminal laws of the State of Oregon." OR. CONST. Article XI, § 2. The second retains the initiative and referendum powers to the "voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district." OR. CONST. Article IV, § 1(5).

As interpreted by this Court, the "home rule" provisions of Oregon's Constitution

> provide authority for the people of a city to determine the organization, and to define the powers, of their local government without first having to obtain authorization from the state legislature. The "home rule" provisions of the Oregon Constitution therefore preserve the authority of the people of a city to choose the organization and political form of their local government.

*Springfield Util. Bd. v. Emerald People's Util. Dist.*, 339 Or 631, 647, 125 P3d 740 (2005). Recognizing the broad authority granted Oregon home

rule jurisdictions, this Court has stated that the issue is not whether a city needs state authorization to act, but "[r]ather, whether state or federal law prohibits the city from doing so." *US West Communications, Inc. v. City of Eugene,* 336 Or 181, 186, 81 P3d 702, 705 (2003).

Oregon cities' home rule authority is in stark contrast to the principle known as Dillon's Rule. Dillon's Rule is a judicial concept that gained wide acceptance throughout many state courts in the 1800's and holds that because municipal governments derive their authority and existence from the state, they are only allowed to engage in such activities as expressly allowed by the state. John F. Dillon, 1 *The Law of Municipal Corporations* § 9b, 93 (2d ed 1873).

Put simply, in the many states that follow Dillon's Rule, a local government must point to a state statute that affirmatively grants authority for that local government to act. In contrast, and as noted already, a home rule local government is empowered to act unless state or federal law preempts it from doing so.

The City has adopted a home rule charter, which states: "The city has all powers that the constitution or laws of the United States or of this state expressly or impliedly grant or allow cities, as fully as if this charter specifically stated each of those powers." Eugene Charter of 2002,

Chapter II, § 4(2). This power includes "all powers that cities may assume under state laws or the provisions of the state constitution regarding municipal home rule." *Id*. at Chapter II, § 4(3). As described by the Court of Appeals, the City's charter "broadly confers all authority not specifically denied by state or federal statute or constitution" including "the power to impose the [License Fee]." *AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 177 Or App 379, 389-90, 35 P3d 1029, 1037 (2001), *rev den*, 334 Or 491, 52 P3d 1056 (2002).[1]

**2. Cities Rely on Home Rule Authority to Effectively and Efficiently Discharge the Duty to Manage Use of Limited Space in the Rights of Way in the Public's Interest**

The City exercised its home rule authority in enacting Ordinance 20083, which amended the Eugene Code to establish a comprehensive law governing use of the City's rights of way and provision of services by telecommunications providers, including the License Fee challenged here. *See* EC 3.400 *et seq*.

The City's use of home rule authority to manage its rights of way is not unique. Oregon cities have for decades relied on their home rule

[1] While the Court of Appeals' holding was based on the City's 1976 Charter, the home rule provisions on which the Court relied are unchanged in the City's 2002 Charter.

authority to require franchise agreements, licenses or similar approvals that both authorize and condition use of the streets by utilities, including conditions requiring payment of fees and taxes for the unique privileges granted therein. *See* Oregon Public Utility Commission Order No. 36403 ("PUC Order"), pp. 6-9 (1958) (Recognizing that Oregon cities have "long exercised their authority" to obtain revenue-based compensation for use of the rights of way through franchise agreements, privilege taxes and/or various other taxes and fees). *See also* ORS 221.415 (Recognizing "the independent basis of legislative authority granted to cities in this state by municipal charters" and "reaffirm[ing] the authority of cities to regulate use of municipally owned rights of way").

The rights of way are among cities' most valuable assets. Rights of way are vital to the essential functions of any city—safe and efficient travel, transportation of goods, and delivery of utility services to the public. As trustee of this asset, cities have an obligation to manage it for the benefit of all, including a fiduciary duty to receive compensation from third parties granted the special privilege to use the rights of way for revenue-generating services. *See* PUC Order at 9 (rejecting the notion that *ad valorem* property taxes are adequate compensation because

"there exists a measurable benefit to the utility that is distinct and additional to the benefits provided ordinary *ad[] valorem* taxpayers.").

Effective and efficient management grows more critical as the rights of way become increasingly crowded with a variety of users, from municipal water and sewer services to privately provided communications services. As of 2012, the City of Portland, for example, had over 25 different communications providers using the rights of way to provide services, in addition to the cable, electric and gas providers and municipal water and sewer systems. *See* LOC, *Utility and Franchise Fee Survey* (March, 2012), pp. 13-14; (relevant portions attached hereto as Exhibit A).[2] The City of Beaverton had 18 communications providers using its rights of way and at least five municipal and public utilities. *Id*. pp. 6-7. Even North Plains, Oregon, with a population of just over 2,000, had five different communications providers in its rights of way, also in addition to the other municipal and public utility users. *Id*. p. 12.

The increasing number of entities using city rights of way puts pressure on the limited capacity of this asset. Each facility consumes

[2] A full copy of the Survey is available at http://www.orcities.org/Portals /17/Premium/2012FranchiseFeeSurveyFinal.pdf.

space to the exclusion of other facilities, yet cities must find room for essential services and the growing number of competitive communications services.[3] The increasingly congested rights of way make placing and maintaining city facilities more complicated, and often more costly. *See* Frederick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism, And The Public Rights-Of-Way*, 26 Seattle U. L. Rev. 475, 493 (2003). Further, utility installations demonstrably impact the useful life of city streets. *See, e.g.*, *id*. at 491-93; James B. Speta, *Competitive Neutrality in Right of Way Regulation: A Case Study in the Consequences of Convergence*, 35 Conn. L. Rev. 763, 809 (2003).

Without a means by which cities can obtain compensation from those entities that are deriving a specific benefit from the use of the rights of way, the cost of managing the rights of way would be borne by the community at large. Indeed, as trustees of a public asset, it would arguably be a breach of a city's fiduciary duty to the public at large if it failed to maximize the revenue from those that use the public's asset for private gain. *Cf. Lassen v. Arizona*, 385 US 458, 468 (1967) (requiring

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[3] Under federal law, cities have limited ability to exclude communications providers from the rights of way. *See* 47 U.S.C. § 253(a) (preempting the prohibition or effective prohibition of telecommunications services); 47 U.S.C. § 541(a)(1) (prohibiting franchising authorities from unreasonably refusing to grant competitive cable franchises).

state land managers "derive the full benefit" of trust lands for the benefit of public education).

In this context, it is evident the City's adoption of Ordinance 20083 in 1997 reflects necessary right of way management practices employed throughout Oregon for decades that ensure the public at large is compensated by those who specially benefit from use of the rights of way. Reversing the Court of Appeals decision in this case not only undermines the City's long standing law, but also jeopardizes the right of way management practices of all Oregon cities.

### 3. Oregon Cities Have Home Rule Authority to Enact Revenue-Based Fees for Third Party Use of Public Rights of Way

As the Oregon Public Utility Commissioner stated decades ago, "[t]hat cities should be reasonably compensated [for telecommunications companies'] use of the streets and ways cannot be denied." PUC Order at 8-9. This cogent statement continues to hold true as right of way use increases and rights of way become more congested—and more valuable.

A long line of Oregon cases affirm city home rule authority to impose revenue-based taxes and fees for use of city rights of way, including the City's License Fee. *See, e.g., US West Communications*,

336 Or at 186; *AT&T Communications*, 177 Or App at 381, 389 (upholding city's authority to impose a tax under its home rule charter, which "broadly confers all authority not specifically denied by state or federal statute or constitution"); *City of Idanha v. Consumers Power, Inc.*, 8 Or App 551, 561, 495 P2d 294, 299 (1972) (city's home rule charter authorized the city to "levy a business or occupation tax based solely on its taxing power … as well as a business or occupation license fee based on its police power alone or in combination with the taxing power…" (citations omitted)). *See also* PUC Order at 9 (Recognizing that "the imposition of reasonable taxes, fees and other exactions by municipalities as compensation for the actual use of its streets and ways … is a recognized, legitimate and widespread practice...").

State and federal laws have incorporated the concept of revenue-based right of way taxes and fees, codifying this long-standing practice. *See, e.g.*, ORS 221.450 (originally enacted in 1931) (affirming city authority to impose a privilege tax of 5% of gross revenues on certain utilities using the rights of way); 47 U.S.C. § 542(b) (franchise fee of 5% on cable operators). *See also* ORS 757.667 (Recognizing "a city's authority to control the use of its rights of way and to collect license fees,

privilege taxes, rent or other charges for the use of the city's rights of way.")

Revenue-based fees also are a common device for calculating rent outside the context of municipal rights of way. *See, e.g.,* Douglas Gross, *Calculation of Rental Under Commercial Percentage Lease*, 58 A.L.R.3d 384, §2a (noting that revenue-based leases are "widely used" in commercial leases); Ellrod and Miller at 494-95 (providing examples of revenue-based "rent" including commercial shopping mall leases and Alaska's royalties on oil from state-owned lands).

In sum, revenue-based fees are a common mechanism for ensuring that third parties pay fair market value for use of property, whether public or private. *See id*. The City has invoked this same mechanism in exercising its home rule authority to enact the License Fee. Here, Petitioner seeks to avoid paying the License Fee, invoking the ITFA and the Cable Act in an effort to avoid the valid exercise of the City's home rule authority. Petitioner and its supporting *amici* ignore that in enacting the ITFA and Section 542(b) of the Cable Act, Congress intended to—and did—preserve this long-standing practice of requiring private companies to pay for use of city rights of way based on the value the companies derive from this public asset.

## B. THE INTERNET TAX FREEDOM ACT DOES NOT PREEMPT THE LICENSE FEE

Petitioner's arguments fail to consider the implications of the City's home rule authority. The City need not (and does not) rely on its franchise agreement, the provisions of the Cable Act or any other statutory authority in enacting its License Fee. The City exercised its home rule authority in determining that *all* telecommunications providers using the City's rights of way—including internet service providers ("ISPs") and operators that provide more than one service over their facilities—pay the License Fee for each service they provide. *See* EC 3.410(3); 3.410(6). It is evident that in enacting the ITFA, Congress intended to preserve this authority.

### 1. The ITFA Preserves Local Right of Way Fee Authority

In enacting the ITFA, which preempts certain taxes on internet access services, Congress expressly reserved local government's authority to impose fees "for a specific privilege, service, or benefit

conferred." ITFA § 1104(8)(A)(i).[4] This statement precisely describes the License Fee, which by its terms is imposed as compensation for the privilege of using the City's rights of way. *See* EC 3.415(2); *see also AT&T Communications*, 177 Or App at 381, 383.

Congress's intent in preserving this authority is defeated if any preexisting cable franchise prevents cities from imposing fees for use of the rights of way for internet access services.[5] As described above, revenue-based fees for rights of way use have long been the practice in

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[4] The full definition of "tax" in the ITFA is as follows:

(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*.).

[5] Petitioner primarily relies on the specific language of the cable franchise granted by the City in arguing the ITFA preempts the License Fee. Petitioner Brief, pp. 25-28. The City refutes this theory in its Brief. *Amicus* LOC therefore focuses on Petitioner's assertion that cable modem services are authorized by every cable franchise by operation of the Cable Act, and thus preempted by the ITFA. Petitioner Brief, pp. 28-29.

Oregon, a practice rooted in the accepted notion that cities are entitled to market-based rent when third parties generate revenue through their use of the rights of way. The Court of Appeals' decision preserves this long-standing practice. Petitioner's position, on the other hand, would allow some ISPs—but not all—to compensate cities on only a narrow portion of the benefits they derive from their use of a valuable public asset.

As more fully explained in Section C.1 below, Congress' most recent amendments to the Cable Act reflect its intent to preserve local authority to impose fees for use of the rights of way, including fees on non-cable services imposed outside the cable franchise agreement. Yet, Petitioner argues that the Cable Act somehow authorizes the provision of non-cable services over every cable system—regardless of the language individual cable franchises—and thus all cable franchises confer the privilege of providing cable modem services. Petitioner Brief, pp. 28-29. Petitioner then concludes the ITFA preempts any "taxes" on these services because cable operators' cable franchises are preexisting authorizations to use the rights of way to provide internet access services. *Id*. The law does not support Petitioner's position.

Nothing in the ITFA references in any way, let alone creates a special exemption for, cable operators. Had Congress intended the result Petitioner seeks here, it would have expressly stated as much. Petitioner's interpretation of the ITFA would allow a cable operator to provide very limited "cable services" and a host of "internet access services" and yet pay for its use of the rights of way based only on its limited cable revenue. This position would eviscerate the long standing practice of utility compensation that is based on revenues derived from use of the rights of way. Surely in excluding rights of way use fees from the ITFA's preemption, Congress did not intend this result.

Further, neither the City's cable franchise nor its licensing provisions expressly limit the number of cables, fibers, cabinets and other facilities and equipment Petitioner may install in the City's rights of way, which is typical of franchises in Oregon. The result is that cable operators can expand their "cable" facilities under the guise of their cable franchise when in reality the expansion is to accommodate internet access services. Petitioner's interpretation of the ITFA would preclude cities from collecting any additional fees without regard for whether or not there is an additional burden on the rights of way from the internet access facilities.

It is important to note that Congress did not condition the exclusion of right of way use fees from the meaning of "taxes" in the ITFA on whether or not there was an additional burden on the rights of way. The ITFA states only that "taxes" do not include fees imposed "for a specific privilege, service, or benefit conferred." Had Congress intended to exempt preexisting franchisees from right of way use fees, or to establish an "additional burden" test, it would have done so. In adopting the language it did, Congress was aware that local franchises and rights of way use fees existed, and intended to preserve them without conditions.

The License Fee reflects the City's protected exercise of its home rule authority to impose rights of way fees. The City's Code does *not* exclude cable operators from the license and License Fee requirements with respect to their non-cable services, even where there is a preexisting cable franchise. EC 3.410(3); 3.410(6). To the contrary, the Code contemplates that all non-cable services must be licensed and are subject to the License Fee. *Id*. The ITFA does not interfere with the clear intent of the City to require Petitioner to pay the License Fee on its internet access services.

### 2. Reversing the Court of Appeals Creates an Unequal Taxing System Congress Sought to Avoid

Petitioner and its supporting *amici* argue the decision below will discourage new investment in infrastructure to deploy internet access services. Petitioner Brief, pp. 32-38; *Amicus* Oregon Cable Telecommunications Association *et al.* Joint Brief of the Merits ("OCTA Brief"), pp. 14-20; *Amicus* Broadband Tax Institute Brief on the Merits ("BTI Brief"), pp. 4-5. The opposite is, in fact, the case. Petitioner's position provides a free ride for existing cable franchisees with respect to their internet access services, whereas new entrants into the broadband market would be subject to local right of way use fees. This serves only to protect incumbent cable operators by allowing them to avoid the right of way fees their ISP competitors will face. *This* is the harm Congress intended to avoid. *See, e.g.*, Petitioner Brief, pp. 33-34 (citing legislative history illustrating Congress's intent to avoid "inconsistent," "unfair," and "discriminatory" taxation on internet access services).

Petitioner and its *amici* also argue the Court of Appeals opinion would result in new taxes on ISPs in other Oregon cities, resulting in a "haphazard patchwork" of taxes they claim Congress intended to prevent. Petitioner Brief, pp. 18; 32-38; OCTA Brief, pp. 11-14; BTI

Brief, pp. 10-11. This "slippery slope" argument cannot withstand scrutiny. Congress expressly preserved local authority to impose fees for use of the rights of way by excluding them from the ITFA's definition of "taxes." In doing so, Congress clearly contemplated that cities would impose fees for use of the rights of way to the extent they have authority to do so, which the City does (as do all home rule cities in Oregon). The possibility that other Oregon cities might also exercise their home rule authority to impose rights of way fees the ITFA clearly does not preempt has no bearing on the outcome of this case.[6]

The City's License Fee on its face applies equally to all ISPs granted the privilege of installing facilities in the City's rights of way. Congress clearly preserved the City's authority to enact this fee and apply it to Petitioner. Any other result is simply a windfall for incumbent cable operators at the expense of other ISPs the ITFA was intended to encourage and protect.

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[6] The BTI Brief also references a 2007 Heartland Institute "study" finding that telecommunications taxes and fees are regressive with respect to income. BTI Brief, p. 8. Even if this is correct, Congress expressly excludes rights of way fees from the ITFA's preemption and thus this policy issue has no bearing on the application of the ITFA to the License Fee.

## C. THE CABLE ACT DOES NOT PREEMPT THE LICENSE FEE

Petitioner's arguments that its cable franchise is a preexisting right to use the right of way, apparently for any purpose whatsoever, with no obligation to compensate the city for any additional uses, rest on the mistaken notion that the City has no alternative basis on which to impose right of way fees. In Oregon, this is not the case. As explained above, the City has independent home rule authority to impose the License Fee, and does not need to—nor does it—rely on its cable franchise or the Cable Act for such authority.

### 1. Section 542(b) Does not Preempt the License Fee

The City enacted the License Fee pursuant to the City's home rule authority, not as part of its cable franchise or any authority granted under the Cable Act. Section 636(a) of the Cable Act expressly states that the Act does not affect local authority—including the home rule authority of the City here—to the extent consistent with the terms of the Act. 47 U.S.C. § 556(a). Nothing in the License Fee is inconsistent with the Cable Act. As explained above, the License Fee applies to Petitioner because of its provision of internet access services over facilities in the City's rights of way. It applies regardless of whether Petitioner is a "cable operator" and is wholly consistent with Section 542.

As is the case with the ITFA, the most recent amendments to Section 542(b) of the Cable Act—the amendments on which Petitioner relies—reflect a federal policy of protecting local authority over the rights of way.

In enacting the Telecommunications Act of 1996 (the "TCA"), Congress amended Section 542(b) of the Cable Act to clarify that the five percent franchise fee cap in the Cable Act applied to the cable operator's gross revenues from the operation of the cable system "to provide cable services." Petitioner argues this new language excludes all non-cable revenues from cable franchise fees. Petitioner Brief, p. 41. The legislative history does not support this argument.

The primary purpose of the TCA was to promote competition in telecommunications markets. *See* Telecommunications Act of 1996, P.L. 104-104, Preamble ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."). To achieve this goal, the TCA (among other things) preempts certain "barriers to entry" into the telecommunications market. 47 U.S.C. § 253(a). Yet Congress took care to protect local authority over the rights of way, expressly

ensuring cities could continue to charge fees for use of their rights of way. *See, e.g.*, 47 U.S.C. § 253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way …").

Similarly, in amending Section 542(b) of the Cable Act, Congress intended to protect local authority over non-cable services. The legislative history of the TCA makes clear that the addition of "to provide cable services" was *not* intended to limit local authority to tax other services. The Conference Report states:

> The conference agreement adopts the House provision with some minor, technical modifications. The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees.

H.R. Rep. No. 104-458 at 180 (1996) (Conf. Rep.).

This statement supports the simple fact that Section 542(b) means exactly what it says—the franchise fee *in a cable franchise* is limited to gross revenue from cable services—nothing more. Local authority to

impose fees on cable operators for their telecommunications services is untouched by Section 542(b).[7]

Thus, while Section 542(b) may prove to impede cities that rely on the Cable Act for their authority to collect franchise fees from cable operators on their non-cable services, that is not the case in Oregon. As noted above, the question is not whether the Cable Act authorizes the City to impose the License Fee; the question is whether the Cable Act preempts the City from imposing the License Fee. The Cable Act limits only those franchise fees based on gross revenues from providing cable services, and does not impose any limit on a city's authority to impose fees based on gross revenues from providing other services. Here, the City used its well-established home rule authority—not its cable franchise or the Cable Act—to enact and enforce the License Fee. Nothing in the language of the statute or the legislative history supports

[7] As noted by Petitioner, the FCC recently classified internet access services, including Petitioner's cable modem services, as "telecommunications services" under federal law. Petitioner Brief, p. 42.

the contention that Section 542(b) preempts the Fee.[8]

**2. The License Fee is not a "Franchise Fee"**

Further, the License Fee is not a "franchise fee" subject to the limitations of the Cable Act. The Cable Act defines a franchise fee as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such[.]" 47 U.S.C. § 542(g).

Here, the License Fee is not assessed on Petitioner because of its status as a cable operator. The License Fee is not in any way limited

[8] Petitioner also cites a footnote in the Federal Communications Commission's ("FCC") recent Order classifying internet access services as "telecommunications services" to support its position. Petitioner Brief, p. 42; *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 2015 WL 1120110 (Mar. 12, 2015) ("Order"). The footnote states that the FCC's classification would not serve as justification for a state or local franchising authority to require a party with a cable franchise to pay new franchise fees. Petitioner Brief, p. 42 (citing footnote 1285 of the Order). The City clearly did not rely on the FCC's classification of internet access services in adopting and enforcing the License Fee. The City exercised its home rule authority—long before the FCC's March 2015 Order—to establish the License Fee. Nor did the City rely on any statutory authority applicable to "telecommunications" providers in adopting its License Fee. The Order in no way addresses existing local right of way use fees for internet access services. To find otherwise requires one to conclude the FCC used a mere footnote to take the drastic (and legally questionable) step of preempting local authority Congress clearly reserved, a conclusion that is simply not reasonable.

to—or based on the status of—cable operators. It applies to all "operators" using the rights of way, which is defined as those who provide "transmission for hire, of information in electromagnetic frequency, electronic or optical form, including, but not limited to, voice, video, or data …." EC 3.005. On its face, then, the License Fee is not aimed at "cable operators" at all, let alone "solely because of their status as such."

The same is true in the application of the License Fee to Petitioner. Petitioner is subject to the License Fee because its internet access services are "telecommunications services" as defined in EC 3.005 and are provided using facilities the City's rights of way. *See* EC 3.415.

Any doubt about whether the License Fee is imposed solely because of Petitioner's status as a cable operator is resolved in the City's favor when one acknowledges, as one must, that Petitioner could cease providing all cable services in the City and it would continue to be subject to the License Fee. The reverse is also true: If Petitioner ceased providing internet access services, it would no longer be subject to the License Fee even if it continued to provide cable services. There is no logical basis to conclude the License Fee is imposed solely

because of Petitioner's status as a cable operator when that status is neither necessary nor sufficient to result in liability for the Fee.

The cases cited by Petitioner are inapposite. Petitioner Brief, p. 43. Those cases involve application of Section 542(b) to franchise agreements, not a local law establishing right of way use fees such as the License Fee. It is not at all surprising that courts would find a franchise fee in a cable franchise applies to the franchisee—the cable operator—solely because of its status as a cable operator. That reasoning, however, does not translate to consideration of a rights of way fee adopted pursuant to local home rule authority and applicable to all "telecommunications" providers using the rights of way.

Further, the definition of "cable operator" in the Cable Act does not support Petitioner's position. Petitioner argues—citing the franchise fee cases mentioned above—that the License Fee applies because of its "actions" in managing its cable system (i.e., its decision to provide internet access services over those facilities). Petitioner Brief, p. 48. Petitioner's syllogism is as follows: If the definition of "cable operator" in the Cable Act includes management and operation of the cable system, then any actions in managing and operating the system are included in that definition, and thus a fee on any such action must apply "solely"

because of its status as a cable operator. The flaw in the logic is that it inserts words into Section 542(g) that do not exist.

The definition of "franchise fee" does not reference the "actions" of a cable operator. Rather, the definition includes fees imposed solely because of an entities' "status" as a cable operator. Petitioner concedes that a payroll tax would not be imposed on cable operators solely because of their status as such, yet surely hiring employees is one of the many actions Petitioner undertakes in managing and operating its system. Petitioner Brief, p. 48. There is no basis to conclude that this action is excluded from Petitioner's definition of "franchise fee" while the act of providing internet access services—another action that is *not* provision of cable services—is included. The statute's touchstone is one's "status" as a cable operator, not its "activities" or "actions" as a cable operator, and Petitioner's status as a cable operator is not the basis for the License Fee.

## VII. CONCLUSION

The City's home rule charter provides all necessary authority to enact and enforce the License Fee. The only question here is whether the ITFA or Section 542(b) of the Cable Act preempts that authority. Neither statute does. Both clearly preserve local authority to impose

fees on ISPs for use of the rights of way. To conclude otherwise would rewrite these laws to provide a special exemption for cable operators—a discriminatory result both statutes were designed to avoid.

DATED this 6th day of May, 2015.

Respectfully submitted:

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## CERTIFICATE OF COMPLIANCE
## WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation of ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,039 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 6th day of May, 2015.

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## CERTIFICATE OF FILING AND SERVICE

I certify that on May 6, 2015, I directed the foregoing **Brief of *Amicus Curiae* League of Oregon Cities in Support of Respondents on Review** to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System and to be electronically served upon the following parties by using the electronic service function of the eFiling system or by First-Class Mail:

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