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 No. 160803280 Court of Appeals No. A147114 Supreme Court No. S062816

BRIEF ON THE MERITS OF *AMICI CURIAE* NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; and WASHINGTON ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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Author of Opinion: Schuman, Senior Judge
Concurring Judges: Duncan, Presiding Judge, and Wollheim, Judge

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I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors (NATOA) is a non-profit, professional association of local government officials. It represents the interests of its local government members on the many local, state, and federal communications laws, administrative rulings, judicial decisions, and technology issues impacting them. Its members support policies that result in deployment of advanced broadband wireline and wireless networks, while protecting important local interests in managing and obtaining fair compensation for the use of valuable public property used by those networks, including the rights of way.

The Washington Association of Telecommunications Officers and Advisors (WATOA) is a chapter of NATOA whose members are professional individuals and organizations serving citizens of the State of Washington in the development, regulation, and administration of cable television and other telecommunication systems. WATOA shares in, and supports the goals of NATOA.

Amici file in support of the City of Eugene to emphasize three points:

First, the essence of the argument by Comcast and supporting *amici* is that federal telecommunications law creates a special right applicable only to cable operators, *viz:* a cable operator may use public property to provide any

communications service it desires to provide, but can only be charged a fee based on revenues from cable services, while its competitors who use public property but are not cable operators can be charged a fee on any of the services that they provide. That "rule-of-favoritism" was rejected by Congress. Moreover, contrary to the briefs of Comcast and its supporters, that rule has never been adopted by the FCC. That is why Comcast, without clearly saying it is doing so, relies heavily on statements by the FCC in a *Notice of Proposed Rulemaking*. In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*,17 FCC Rcd 4798 (2002)("*High Speed Access Ruling and NPRM*"). In a notice of proposed rulemaking, of course, an agency proposes different possible interpretations of law and seeks comments on them, but its tentative rulings are not binding in any substantive sense.)

What Congress and the FCC have done is make clear that while a state or a locality cannot use *cable franchising authority* under federal law as a basis for imposing a franchise fee on non-cable services, a state or locality can impose a fee on use of the rights of way to provide other services if there is independent state or local charter authority to do so (as there is in Oregon). *Amici* therefore file to show that, under federal telecommunications law, a locality can levy a

fee that reaches other services provided by a cable operator, even if those services flow over a "cable system."

Second, *amici* file to show that the fee at issue here does not fall within ambit of fees prohibited by the Internet Tax Freedom Act ("ITFA"), Pub. L. 105-277, 112 Stats. 2681 (Oct. 21, 1998), 47 U.S.C. § 151 *n. 4.* By its terms, the ordinance at issue imposes a fee in return for the grant of a license to use the rights of way for the provision of services other than cable services. Eugene OR. Code §§ 3.410, 3.415(2). It falls within the ITFA's exception for fees imposed on a benefit conferred. Neither Comcast nor its supporting *amici* actually contest that basic point: rather, Comcast suggests that because it has a cable franchise, it does not benefit from the license granted by Eugene. The degree to which Comcast benefits is not the issue.[1] The issue is the nature of the fee, and here the fee is for a benefit.

Third, in support of their case, Petitioner and supporting *amici* present the Court with a parade of horribles. The Court is told that if a charge were imposed upon cable operators for use of the rights of way to provide Internet service, investment in Internet would plummet. Supporting *amici* cite to, or

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[1] The argument Comcast is making is that it does not need the benefit *conferred* by an additional license because Eugene has already *conferred* the right to use the rights of way upon it. But even under Comcast's view of the world, it clearly has required a benefit from Eugene (a right to use the rights of way), and equally as clearly, the fee will apply to revenues obtained as a result of the exercise of that benefit.

present the Court with studies that purport to show that taxation of the Internet is a bad thing.[2] Here, however we are not faced with classic taxation: here Comcast is being charged in return for its use of a public asset. There have been studies of the economic consequences of charging rents for us of the rights of way. *Amici* attach as Appendix A three such studies – one of which was presented in a litigated proceeding involving the City of Portland – that show that market-based charges for use of the rights of way do not discourage and may actually encourage deployment of advanced, competitive networks.

Relatedly, Comcast and supporting *amici* argue that the fee is particularly unfair because Comcast's provision of Internet services (or other communications services) need impose no additional burdens on rights of way. While the legal answer to that is: it does not matter, the court should be aware that *in fact*, Comcast is placing additional burdens on the right of way in the form of, *e.g.*, Wi-Fi Internet devices that it is installing on outside cable plant across the country.

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[2] Brief on the Merits of *Amici Curiae* Oregon Cable Telecommunications Assn *et al.* at 18-20; Brief on the Merits of *Amicus Curiae* Broadband Tax Institute, Appendix.

II. FEDERAL TELECOMMUNICATIONS LAW DOES NOT BAR IMPOSITION OF FEES OF THE SORT IMPOSED BY EUGENE

A. Federal Law Has Permitted States and Localities to Impose Fees on the Provision of Non-Cable Services.

The Cable Communications Act of 1984, Pub. L. 98-549, 98 Stats. 2779 (Oct. 30, 1984), codified at 47 U.S.C. §521 *et seq.,* established a "national policy" regarding cable communications that was designed to ensure that cable systems would be responsive to the "needs and interests of local communities." 47 U.S.C. §521(1)-(3). The law relied heavily on local cable franchising, and established a federal requirement (with limited exceptions) that "a cable operator may not provide cable service without a franchise" issued by a state or local franchising authority. 47 U.S.C. §541(b)(1).

As initially adopted, the Cable Act strictly prohibited federal Title II common carriers from providing cable service directly to subscribers – that is, a clear line was drawn between the telephone industry and the services it could provide, and the cable industry and the services it would provide. Pub.L. 98-549, § 613(b). This did not mean that cable operators could only provide video programming services – the Cable Act recognized that operators *were* providing non-cable services. But it meant that the federal law prevented Title II telephone companies from entering the cable field, and cable companies could not be Title II common carriers. Congress went out of its way, however, to emphasize that "[n]othing in this title" [the Cable Act] "shall be construed to

affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service…." 47 U.S.C. §541(d)(2).

The Cable Act did effectively place a limit on the amount a cable operator could be charged for use of the rights of way. A fee could be imposed upon a cable operator "solely because of [its] status as such" equal to five per cent of gross revenues derived from the operation of the cable system. The fee allowed localities to use cable franchising authority to impose a fee that reached all services provided via a cable system. By its terms, this allowed localities to impose fees on services that might be functionally identical to, even if not classified the same as, services provided by a Title II common carrier.[3] Pub.L. 98-549, §§622(b), (g)(1). The fee could apply to such services even if no similar fee applied to telephone providers. In addition to that franchise fee, a cable operator could be required to pay any "tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services). That is, as adopted, the "franchise fee" provisions of the Cable Act included and limited only charges *solely applicable* to cable operators.

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[3] All parties to the proceeding recognize that as initially adopted, the Cable Act permitted localities to impose a fee through the cable franchise on all services provided via the cable system.

In 1996, Congress adopted a sweeping revision of the nation's telecommunications laws that was intended to promote competition in the communications industry by *inter alia*, encouraging competition between telephone and cable companies in the provision of communications services, including cable services. Pub.L. 104-104, 110 Stats. 56 (Feb. 8, 1996), the "Telecommunications Act of 1996." As part of the rewrite, Congress preempted state and local laws that prohibit, or have the effect of prohibiting, the ability of any entity to provide intrastate or interstate telecommunications services. 47 U.S.C. §253(a). However, Congress specifically preserved the right of states and localities to "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis…" 47 U.S.C. §253(c). This clause, of course, was in tension with the provisions of the Cable Act as initially adopted, as the law permitted localities to charge cable franchisees a 5% franchise fee on all services PLUS generally applicable utility fees. Congress chose to remove that tension by limiting cable franchise fees to 5% of gross revenues derived from the operation of the cable system to provide *cable services*. But the intent was not to somehow relieve operators of obligations to pay fees on other services that might be provided via the cable system. Rather, as the legislative history emphasizes:

> 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.

S.Conf.Rpt. 104-230 (1996) at 180. The Conference Report shows that Congress intended for cable operators to be subject to applicable right of way and other fees when providing non-cable services, and it intended other communications companies to be subject to cable franchise fees even if *those* companies already had authority to be in the rights of way. Thus, Congress allowed states and localities to impose a franchise fee or a fee in lieu of a franchise fee for use of the rights of way to provide video services comparable to cable service via common carrier video platforms. *Id.* at 178. That is, the goal of the 47 U.S.C. § 542 amendment was not to exempt cable operators from additional charges for use of the rights of way imposed under state and local law, but to prevent localities from imposing such fees through the federally-mandated cable franchising requirement. And this is exactly how the law has been interpreted. In the only decision on point, the FCC made it clear that local governments may not use their *cable franchising* authority under the federal Cable Act to levy a fee on non-cable services. Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Second Report and Order*, 22 FCC Rcd 19633, 19637 ¶11(2007), ("*Second Report and*

Order"). However, the FCC also emphasized that the ruling with respect to the Cable Act "does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services." *Id.,* n. 31.

Comcast and its supporting *amici* do not seriously contend that the fee at issue here would be invalid if applied to an entity that did not qualify as a cable operator under federal law. An entity that provided *only* Internet service and wished to place facilities in the rights of way would be subject to the fee, for example. Comcast and supporting *amici*'s argument is that federal law was intended to create a special rule for cable operators, that limits fees that can be charged in connection with use of the rights of way to cable service fees. As suggested above, that argument cannot be squared with the history of the fee provision, or with other provisions of federal law.

B. The Cable Act's Definition of Franchise Fee Would Not Reach the Fees At Issue.

If read straightforwardly, the franchise fee provisions of the Cable Act serve the intent of Congress as described above, and can be squared with other provisions of federal communications law, including 47 U.S.C. § 253. There are two passages of particular import. First, the 5% Cable Act fee limit applies only to taxes, fees and assessments imposed upon a cable operator (or cable subscriber) solely because of their status as such. Second, the 5% fee limit does not apply to taxes, fees or assessments of "general applicability."

If a tax, fee or assessment does not fall on a cable operator solely because of its status as such, or if it is generally applicable (and not unduly discriminatory) it is not a franchise fee within the meaning of the Cable Act, and a cable operator can be required to pay the fee. These clauses allow a locality to impose fees for use of the rights of way to provide telecommunications services exactly as contemplated by the legislative history and 47 U.S.C. §253, *discussed supra.* That is, the Cable Act's franchise fee provisions do not limit what may be charged in return for the privilege of using the rights of way; they limit *how* those fees may be imposed, with cable franchise fees being established through the cable franchise, and fees on other services being imposed through other provisions of state or local law.

The license fee here is not imposed on Comcast because of its status as a cable operator. The provisions of the Eugene Code are written so that even if Comcast were not a cable operator, it would be required to pay the fee if it had any communications system in the right of way, however classified. Likewise, the fee is generally applicable to any entity that uses the rights of way, even if that entity is a private communications company. It follows that the fees are not prohibited by 47 U.S.C. §542, and may be imposed upon Comcast in return for its use of public assets. This is effectively the reasoning correctly adopted by the Court of Appeals.

Comcast argues to the contrary that the "solely because of" language reaches any fees that apply to it because it is engaged in the management of a cable system – even if the fees would apply if the system were *not* a cable system. The reading is not an obvious one, so Comcast argues that any other reading would swallow the "general applicability" clause because (it claims) by definition every "generally applicable" tax falls upon all entities without regard to whether they are cable operators. The Comcast argument simply ignores the history of the provision, which suggests *why* Congress initially distinguished between fees imposed solely on cable operators and general utility fees.[4] Comcast Brief on the Merits at 48-49 ("Comcast Brief"). But in any case, the categories, while overlapping, are distinguishable. In the first category might fall any number of charges that are not "generally applicable" but are established on a case by case basis not based on how a provider may be characterized under communications law, but on the activity in which it is engaged. A cable operator who wished to rent space in a public building (or buy a piece of public property) could be required to pay a fee whether the fee were generally applicable or not. In the second category (as Comcast points

[4] Comcast's brief itself illustrates the problems with Comcast's interpretation. Comcast claims, for example, that a payroll tax that fell on all its employees for all its operations (cable and non-cable) would be an example of a fee that does not fall on the company solely because of its status as a cable operator. But taxes of that sort would also be taxes of general applicability. Comcast's example indicates that it is Comcast's reading that renders the "solely because of" and "general tax" language redundant.

out) there may be fees that apply to operators of cable systems, telephone systems and electric systems. For example, a public utilities code may impose a regulatory fee on cable operators under one provision, a regulatory fee on gas companies on under another, and so on. Each fee would fall on a particular payor based "solely on" its regulatory status. However, the legislative history to the Cable Act explains such fees are "generally applicable" and are not franchise fees within the meaning of Act even if they "may differentiate the rates charged to different types of utilities," so long as they do not "effectively constitute a tax directed at the cable system." 1984 U.S.C.C.A.N. 4655, 4701, H.Rep. No. 934, 98th Cong. 2d Sess. at 64 (1984). That is, contrary to Comcast's arguments, nothing in the rulings below make any terms of the Cable Act superfluities. Comcast cannot justify its appeal on that basis, and offers no other sound reason for ruling that the Cable Act prevents Eugene from imposing a fee on non-cable services.

Comcast appears to concede that the Eugene Code on its face imposes fees that are "generally applicable" but argues that the law is not being applied generally. But absent some showing that the law is a sham (and that is not made), this is at most a complaint that the City is seeking to enforce the provision against Comcast rather than everyone. Comcast offers no real support for an "all or none" enforcement rule.

C. The Cases Cited By Comcast and *Amici* Do Not Support the Broad Rule Sought Here.

The cases cited by Comcast and its supporting *amici* do not support the result sought here – a declaration that cable operators can only be charged right of way fees based on cable services revenues. The cases cited generally deal with the question of whether a locality may use its cable franchising authority to impose a fee for use of the rights of way to provide other services – or involve case-specific interpretations of state law and franchises which have little to do with Oregon law.

Comcast contends that the FCC has "tentatively concluded" that a cable operator that was providing cable modem service under an existing franchise is entitled to continue to do so without paying franchise fees or obtaining an additional franchise, a ruling Comcast claims was recently "reaffirmed." Comcast Brief at 10-11, 42. But that argument is misleading at best. Comcast begins by citing to the notice of proposed rulemaking in the *High Speed Access Ruling and NPRM*. In that NPRM, FCC sought comments on the tentative interpretations Comcast cites. The FCC has never acted upon the NPRM. The tentative interpretations are not binding on anyone, much less a statement of the law on which this Court can rely. As noted above, after the notice of proposed rulemaking issued, the FCC's *Second Report and Order* confirmed that the franchise fee provisions do not bar imposition of charges for use of the rights of

way for non-cable services. In any case, Comcast cites to the following passage from the *High Speed Access Ruling and NPRM*: "[W]e tentatively conclude that Title VI [the Cable Act] does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service." Id. at 4849-4850. This passage says nothing about local authority to impose fees for use of the right of way based on other state and local sources of authority, and no one argues that the Cable Act is the source of authority for the fee being challenged here.

Nor has the FCC recently "reaffirmed" that non-decision. Comcast quotes a submission from the cable trade association that was cited at note 1285 of the FCC's net neutrality order, In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report And Order On Remand, Declaratory Ruling, And Order,* FCC 15-24 (March 12, 2015) ("*Open Internet Order*"). What the FCC actually said in the footnote was that it did not believe that the reclassification of Internet service from an "information service" to a "telecommunications service" under federal law would in and of itself justify the imposition of new franchise fee or franchise requirements.[5] In this case, the

[5] The FCC stated: "We note also that we do not believe that the classification decision made herein would serve as justification for a state or local franchising authority to require a party with a franchise to operate a "cable system" (as defined in Section 602 of the Act) to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay

applicability of the fee does not depend on the federal classification of Internet service, and the license requirement is not tied to the reclassification. But in any event, the footnote is not a definitive statement as to what localities may or may not do – it is actually a footnote to a larger discussion identifying issues of the sort the agency may or may not address at some point in the future.

Setting aside its affirmation of local authority to charge fees in the *Second Report and Order*, and the structure of the statute, discussed above, the FCC had every reason to be cautious in the *Open Internet Order* discussion of fees. The FCC has very limited authority to regulate prices charged for property used in connection with communications services. There is the Cable Act's franchise fee limitation, but otherwise, regulation of charges for access to property is strictly limited. *See*, *e.g.*, 47 U.S.C. §224 (allowing the FCC to set rates for access to privately owned utility rights of way, poles and conduit, but forbidding the agency from setting rates for access to similar municipally-owned property). It would raise significant Fifth Amendment issues to limit compensation for occupation of public property to revenues from cable service alone, without regard to whether those revenues reflect the value of the property taken. *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419, 446-447 (1982), *St. Louis v. Western Union Telegraph Co.,* 148 U.S. 92 (1893) (holding

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any new franchising fees in connection with the provision of such services." *Id*. at n. 1285.

a state may, if it chooses, require a company using the right of way to pay compensation to the general public).

III. THE ITFA DOES NOT BAR THE FEES AT ISSUE

If the Court determines, as it should, that the Cable Act does not bar imposition of a fee for use of the rights of way to provide non-cable services, the ITFA issue is easy to resolve. As all parties and *amici* agree, a charge on Internet access service is not barred by the ITFA if it is a "fee imposed for a specific privilege, service, or benefit conferred." 47 U.S.C. §151, n.4, §1104(8)(A)(i). The fee could be imposed in or as part of a license. But a state might also confer a privilege (the right to use the rights of way) and authorize a locality to impose a fee on those who exercise the benefit conferred. In either case – whether the fee is imposed in the license granting a privilege, or in connection with the exercise of a privilege – the fee is for a benefit conferred.

In this case, the Eugene Code clearly does charge the fee in return for a privilege: "[a]s compensation for use of right-of-way, each operator required to obtain a license…shall pay…a fee in the amount of 7% of the licensee's gross revenues derived from telecommunications activities within the city, to compensate the City for the use of the rights-of-way." Eugene OR. Code §3.415(2). Comcast's argument is that the license is of little value to it, because it already *has* an authorization to use the rights of way in Eugene. But, in the first place, the ITFA does not ask how much benefit is conferred to any

particular entity – it simply asks whether a benefit is conferred. And here, a benefit is conferred.[6]

Second, Comcast is arguing that Eugene *has already* conferred a benefit upon it through the grant of a cable franchise. But unless the City is prohibited by the Cable Act from imposing any fee for that benefit that goes beyond a fee on cable service revenues – and we have shown above it is not prohibited from doing so - then the fee at issue falls squarely within the ambit of the ITFA exception. [7]

The arguments to the contrary are of little substance. Comcast argues that the fee is "double taxation." It clearly is not, as it falls on a completely different set of revenues.[8] Comcast and supporting *amici* also argue that

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[6] Among other things, Comcast obtains a right to use the right of way to provide non-cable services even should its cable franchise terminate, or should it choose to stop providing cable services.

[7] Ironically, as the briefs before this Court explained, Eugene and Comcast had both originally assumed that Internet access service was a cable service until 2002. Comcast Brief at 10. The ITFA was initially adopted in 1998, Pub. L. 105-277, 112 Stats. 2681 (Oct. 21, 1998) . Thus, Comcast agreed to pay and was paying a fee on Internet access service in return for use of the rights of way, and implicitly conceding that the portion of the fee it was paying for use of the rights of way based on revenues from Internet access fell squarely within the ITFA's exceptions. The source of the obligation to pay is now different than it was in 2002 (the ordinance) but the fee is still imposed in return for a benefit conferred.

[8] As n. 6 observes, it also includes additional rights. Eugene OR Code §3.410(3). Comcast argues that the Cable Act gives it authority to build a cable system and to occupy the rights of way to provide any service it desires over that system. That is not the case. 47 U.S.C. §541(a)(2) provides that a

allowing Eugene to charge a fee would effectively make the ITFA meaningless. In fact, imposition of the fee is entirely consistent with the ITFA. Congress thought that states and localities *should* be allowed to impose a fee on Internet access in return for the grant or the exercise of a right to use the rights of way – otherwise, the exception would have been unnecessary.[9]

IV. FEES FOR USE OF THE RIGHTS OF WAY ARE NEITHER UNFAIR, NOR HARMFUL TO BROADBAND DEPLOYMENT

The issue before the Court is obviously whether Eugene may charge the fees at issue, and not the wisdom of doing so. Nonetheless, a significant portion of the briefs before the Court are devoted to arguing that allowing fees of the sort adopted here will harm broadband deployment, and should therefore not be tolerated.

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franchise shall be interpreted to authorize *"construction"* of a cable system over public rights of way and through certain dedicated private easements, but that provision simply allows operators, even where a franchise is silent, to access properties of the sort accessed by telephone companies. The provision is not a restriction on state or local authority to limit rights granted to the provision of certain services, or to condition use of the rights of way for non-cable services on the payment of additional rents. To the contrary, the same section emphasizes that "nothing" in the title restricts regulation of a cable operator to the extent it provides non-cable services. 47 U.S.C. §541(d)(2).

[9] Nor need this Court be concerned with the spectre that every community will impose a fee on Internet access as did Eugene. What Eugene did was consistent with Oregon State law. It took its actions years ago. No one suggests that there has been groundswell of similar ordinances adopted, or shows that similar ordinances would or could be adopted in all states across the nation.

Most of those arguments are based on analyses that assume that the fees at issue here are similar to sales or use taxes, or other fees on consumption. *See, e.g.,* Brief on the Merits of Amici Curiae Oregon Cable Telecommunications Assn. *et al*. at 18-20; Brief on the Merits of Amicus Curiae Broadband Tax Institute, Appendix. They are not. The charges here are in return for the exercise of a privilege, the right to use valuable public property that has been paid for by all members of the public, including those who have no interest in purchasing services from wireline providers. The rights granted are significant: those subject to the license fee are provided the right to occupy public property throughout the community with wires, equipment cabinets and other devices.[10]

In a free market economy, one would expect companies to pay market value for property used to conduct their business. While it might reduce grocery prices if the City of Eugene gave away public property to Wal-Mart for its stores, few would seriously suggest that is a good idea, or that providing such an enormous benefit to a giant company would somehow translate to long-term public benefits.

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[10] Under the Eugene Code, the term License "[r]efers to the authorization granted by the city to an operator of a communications facility, giving the operator the non-exclusive right to provide, through facilities maintained or operated upon, across, beneath, or over any public right-of-way in the city, a specified service within a license area." Eugene OR Code §3.005.

But that is what Comcast and supporting *amici* are effectively arguing here. They are arguing that Comcast and other cable operators should be allowed to use valuable public property paying a fee based solely on cable revenues, regardless of whether those revenues represent the value of the property used.[11] And they are arguing that Comcast (and other cable operators) should be entitled to a special deal. While other, non-cable operators may be required to pay 7% fee on Internet access revenues for use of public property, Comcast is arguing that it is entitled to use the same property for 0% of its gross revenues. For all the ink spilled by Comcast and supporting *amici*, none explain why a result that so favors the dominant market company is any fairer, or more reasonable or is likely to yield any better results than giving away public property to Wal-Mart. Nor do they explain why requiring full compensation for use of property is a bad idea. What Comcast and supporting *amici* have presented is irrelevant to the issues before the court.

There are studies that are closer to the point, however, which NATOA and other national organizations presented in two FCC proceedings. *In the Matter of Level 3 Communications, LLC Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority*

[11] The value of the right of way is reflected in part by the revenues that can be generated from the use of that property. As traditional cable services are replaced with non-cable services, including Internet services, the charges for cable service will be significantly less reflective of the value of the resources used by cable operators.

Are Preempted Under Section 253, Docket No. WC 09-153, Reply Comments of the National Association Of Telecommunications Officers And Advisors, *et al.* (Nov. 5, 2009), available at http://apps.fcc.gov/ecfs/document/view?id=7020246627; *In the Matter of Acceleration of Broadband Deployment*, "Comments of National league of Cities, *et al.,*" WC Docket No. 11-59 at 13 (Jul. 18, 2011), available at http://apps.fcc.gov/ecfs/document/view?id=7021693807. Those studies examine the value of the public rights of way, and the impact of right of way fees on competition in the communications marketplace, and find *inter alia*, that as an economic matter, charging a fee for use of the rights of way does not have negative effects on competition or deployment, and in fact, is likely to have positive effects. One of these studies, the report by Dr. Alan Pearce, was presented in a federal court case involving the City of Portland, where fees charged by the City of Portland were challenged, and upheld. *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1095-1096 (D. Or. 2006) aff'd ; 322 Fed. Appx. 496 (9th Cir. Or. 2009) *cert. den.* 2009 U.S. LEXIS 9073 (U.S., Dec. 14, 2009); *Time Warner Telecom of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1107, 1111 (D. Or. 2006). The studies are appended to this brief.[12]

[12] Appendix A: Pearce, Alan, Ph.D., *Expert Report* submitted in *Timewarner Telecom of Oregon, LLC v. The City of Portland, OR*, CV 04-1393-MO;

Comcast and *amici* also argue that there is something unfair about charging Comcast a fee based on the provision of Internet access service, as it is not required to place any additional burden on the rights of way in order to provide Internet services via the cable system. Of course, incremental burden is not the issue – the issue is whether a fee can be imposed under state and local law on a benefit that Comcast undoubtedly receives. But if "burden" were important, the Court should be aware that, even if Comcast is NOT *required* to place additional facilities to provide Internet services, it is doing so. It is deploying a broad-based Wi-Fi network that involves placing Wi-Fi devices in homes, in business, and on the wire strand that supports its cable system in the rights of way and other public places.[13] According to Comcast, the combined number of devices was expected to reach 8 million in 2014, and while many or even most of the devices may be on private property, these additions to the network are hardly insignificant. [14] Comcast is now offering business services that included dedicated Internet access services and Ethernet data transport

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TeleCommunity, *Valuation of the Public rights-of-Way Asset*; Ward, Bruce, *Effect on Broadband Deployment on Local Government Right of Way Fees and Practices* (Jul. 18, 2011).

[13] Yankee Group, Comcast, Apple Highlight Wi-Fi hotspots (Jun. 11, 2013) found at http://maps.yankeegroup.com/ygapp/content/b610651b4a934ef7b0fc7d432ff6b3e8/68/DAILYINSIGHT/0.

[14] Comcast to Reach Eight Million XFinity WiFi Hotspots in 2014 (Apr. 30, 2014) found at http://corporate.comcast.com/news-information/news-feed/comcast-to-reach-8-million-xfinity-wifi-hotspots-in-2014. *See also* http://hotspots.wifi.comcast.com/ for a listing of Comcast hotspots in Eugene.

services via fiber built to the business (in contrast to the coaxial cable system it uses to provide services to homes).[15] Just this week, Bloomberg announced that the number of Comcast Internet subscribers had now passed the number of Comcast cable subscribers – meaning facilities that are in the right of way are being used in some cases *solely* to provide Internet services.[16] This is not a start-up industry that is before the Court. Ultimately, it is neither unfair nor bad policy to require a company to pay for the resources it is using – and that is all Eugene has done here.

May 6, 2015

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[15] Dedicated Ethernet Built for Secure Bandwidth and Saving found at http://business.comcast.com/ethernet/products/dedicated-internet

[16] Smith, Gerry, Comcast Beats Estimates as Internet Customers Surpass Cable (May 4, 2015) found at http://www.bloomberg.com/news/articles/2015-05-04/comcast-s-earnings-beat-estimates-as-internet-subscribers-grow.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation ORAP 5.05(2)(B) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,908 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)(g).

Respectfully submitted this 6th day of May, 2015.

I certify that on May 6, 2015, I filed the foregoing

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on May 6, 2015, I directed the foregoing BRIEF ON THE MERITS OF AMICI CURIAE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS and WASHINGTON ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the Court's electronic filing system.

I further certify that on May 6, 2014, I directed the foregoing BRIEF ON THE MERITS OF AMICI CURIAE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS and WASHINGTON ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS to be served upon the attorneys listed below, by either using the Courts' electronic filing system or by conventional email as so indicated:

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