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 *AMICUS CURIAE* BROADBAND TAX INSTITUTE

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

Scott A. Shorr, OSB No. 961873
Mark A. Friel, OSB No. 002592
STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
sshorr@stollberne.com
mfriel@stollberne.com

Attorneys for *Amicus Curiae*
Broadband Tax Institute

(additional counsel on next page)
March 2015

Susan D. Marmaduke, OSB No. 841485
HARRANG LONG GARY RUDNICK P.C.
1001 SW 5th Avenue, 16th Floor
Portland, OR 97204
Telephone: (503) 242-0000
Facsimile: (541) 241-1458
susan.marmaduke@harrang.com

Sivhwa Hwa Go, OSB No. 033252
Jerome Lidz, OSB No. 772631
City of Eugene
125 E 8th Avenue, 2nd Floor
Eugene, OR 97401
Telephone: (541) 682-8447
Facsimile: (541) 682-5414
hwa.go@ci.eugene.or.us
jerry.lidz@ci.eugene.or.us

Attorneys for Respondent on Review

Mark P. Trinchero, OSB No. 883221
Gregory A. Chaimov, OSB No. 822180
DAVIS WRIGHT TREMAINE LLP
1300 SW 5th Avenue, Suite 2400
Portland, OR 97201
Telephone: (503) 778-5205
Facsimile: (503) 778-5299
marktrinchero@dwt.com
gregorychaimov@dwt.com

Peter Karanjia (*Pro hac vice*)
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, D.C. 20006
Telephone: (202) 973-4200
peterkaranjia@dwt.com

Attorneys for Petitioner on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

I. INTRODUCTION

The Broadband Tax Institute ("BTI") is a non-profit corporation formed in 1986 to facilitate cooperation among its members on tax issues and developments affecting the cable and telecommunications industries. BTI is currently composed of approximately 250 industry members and associate consultants, and includes the majority of the nation's largest communications companies.

BTI files this amicus brief on the merits in support of Petitioner on Review Comcast of Oregon II, Inc. ("Comcast") and endorses Comcast's straightforward interpretation of the federal Internet Tax Freedom Act, Pub L 105-277, §§ 1100-1104 (Oct 21, 1998), 112 Stat 2681, as amended, 47 USC § 151 note ("ITFA"). Contrary to the Court of Appeals' decision, the seven-percent license fee charged by the City of Eugene for use of its right-of-way is an improper tax on Internet access under the ITFA because the fee was not charged for imposing a specific privilege, service, or benefit received by Comcast. Comcast had already been granted the privilege of using Eugene's right-of-way to provide Internet access service when it previously entered into a franchise agreement with Eugene for use of that right-of-way.[1]

---

[1] As discussed in Comcast's brief, the ITFA prohibits "taxes on Internet access" unless such taxes were generally imposed and actually enforced prior to the ITFA's effective date on October 1, 1998. ITFA § 1101(a)(1). A tax under the ITFA is "any charge imposed by any governmental entity for the purpose of

BTI writes separately to address three additional issues. First, the legislative history makes clear that Congress intended to prohibit local governments from charging "fees" on Internet access that were disguised taxes. Congress wanted to ensure local governments could not re-label taxes as fees and, thus, circumvent the ITFA's strong policy favoring national uniformity, encouraging Internet growth, and barring taxes on Internet access. Second, the result of Eugene's improper practice, if left standing, is a regressive tax on consumers, particularly poor and rural consumers who have more limited access to the Internet. This undermines the congressional intent to promote Internet growth across the country. Third, and finally, Eugene's disguised fee, if not barred by the ITFA, may encourage other local governments to use other disguised fees to further tax and limit Internet growth. This would further threaten the uniform national policy mandated by the ITFA.

While the federal government is supporting nationwide efforts to lift barriers to the expansion and accessibility of broadband Internet services to all Americans—including the 132,000 Oregonians who, as of 2012, still lacked some form of broadband service—the Court of Appeals decision opens a loophole in the moratorium on local taxation of Internet access services imposed by the ITFA. The impact will be to increase consumers' costs to access

---

generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred[.]" ITFA § 1104(8)(A)(i).

the Internet, particularly as other jurisdictions consider whether they can legally follow Eugene's path. For many consumers, the Internet is used to access job information, healthcare, educational opportunities, and other information vital to spreading the new economy to all areas of Oregon.

The Court of Appeals decision also creates uncertainty for all Internet service providers that purchase or use communications facilities to provide such services, including cable modem service providers like Comcast. These providers now face the specter of local taxation of Internet access service (as defined by the ITFA) under the guise of license fees, even when those fees do not entitle the provider to any privileges or benefits beyond those already paid for as part of an existing franchise agreement. Even providers that use, but do not own, facilities in the rights-of-way may also be affected to the extent the owners' increased costs are passed on to them.

In light of the potential and far-reaching consequences the Court of Appeals decision will have on BTI's members and Oregon consumers, BTI respectfully requests that this Court rule that Eugene Ordinance No. 20083's license fee (Eugene City Code 3.415(2)) is a tax preempted by the ITFA.

II. ARGUMENT

A. The ITFA and its Legislative History Indicate Congress Intended to Prevent the Types of Local and Disguised Taxes Evidenced by the City of Eugene's Improper Fee

The ITFA enacted a moratorium on both taxes on Internet access and discriminatory taxes on the Internet itself—taxes that are not imposed on non-Internet businesses generally. The Senate and House Reports that accompanied the ITFA demonstrate a strong preference to promote Internet access everywhere in the United States, while barring a number of state and local taxes that would impede Internet access (at least until a national and uniform system of taxation could be discussed and resolved):

> Most state and local commercial tax codes were enacted prior to the development of the Internet and electronic commerce. Efforts to impose these codes without any adjustment to Internet communications, transactions or services or to impose discriminatory Internet related taxes will lead to State and local taxes that are imposed in unpredictable and overly burdensome ways. Before States and localities are allowed to take such actions and thereby stunt the growth of electronic commerce, a temporary moratorium on Internet-specific taxes is necessary to facilitate the development of a fair and uniform taxing scheme.

S Rep 184, 105th Cong, 2d Sess, p 3 (1998). *See also* HR Rep 808, 105th Cong, 2d Sess (1988) (discussing ensuring that state and local jurisdictions do not proceed with an uncoordinated and irrational sub-federal taxation scheme that would stifle development of Internet commerce).

Eugene's additional license fee—which is charged for a right-of-way privilege that Comcast already paid for and enjoyed—overly burdens Internet

access, prevents national uniformity, and is precisely the type of unpredictable, local tax that Congress intended to prohibit through passage of the ITFA.

B. The Court of Appeals Decision Negatively Impacts Consumers by Imposing Higher Costs and Regressive Taxes on Internet Access.

The Court of Appeals decision—which may encourage home-rule municipalities across the state to adopt fees similar to those adopted by the Eugene City Council—may significantly increase the cost of broadband services to providers and consumers through regressive taxes and fees, and inhibit the expansion and accessibility of such services in Oregon.

The continued expansion and growth of broadband services remains integral to economic growth in this country, and remains a Congressional mandate for the Federal Communications Commission ("FCC"). *See* Telecommunications Act of 1996 § 706, 47 USC § 1302; *In the Matter of Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No 11-121, FCC 12-90 para 1 (2012).

Broadband services have expanded exponentially throughout the United States in the past decade, due in significant part to the fact that they have remained largely exempt from federal, state, and local taxes. The ITFA, initially

promulgated in 1998 and repeatedly extended since then[2], prohibits local governments from burdening broadband service providers with taxes in order to further the national policy of encouraging the growth and availability of broadband Internet services to all Americans. Now, the Court of Appeals has provided Oregon municipalities with what they may view as new-found authority to impose taxes disguised as right-of-way fees on vital Internet access service, potentially undermining that important policy.

The continued availability of broadband services to consumers, in part, depends on controlling the costs associated with the use of broadband. While the majority of the United States has access to broadband services, smaller percentages of Americans have broadband services at home. As of September 2013, seventy percent of adults nationwide used broadband at home; however, only fifty-two percent of those with income below $30,000 used broadband at home. Pew Research Internet Project, Broadband Technology Fact Sheet (Sept 2013), available at http://www.pewInternet.org/factsheets/broadband-technology-fact-sheet/. Conversely, at higher income levels, home broadband use is significantly more prominent, with ninety-one percent of adults with income at or above $75,000 using broadband at home. *Id.* The disparity in home broadband use among different income levels evidences the impact that the

[2] The most recent extension occurred last fall. *See* Pub L 113-235 (Dec 16, 2015).

costs of broadband deployment and access have on consumers' use. Increased costs associated with the provision of broadband services, such as municipal taxes on broadband services, will further impede access to broadband services for lower-income consumers.

Congress continues to recognize the threat to consumers posed by the imposition of such taxes. Senate Bill 431, sponsored by both Senators Wyden and Merkeley, among others, would make permanent the ITFA's continuing moratorium on local taxes on Internet access. Senate Bill 431's findings state:

> According to the National Broadband Plan, cost remains the biggest barrier to consumer broadband adoption. Keeping Internet access affordable promotes consumer access to this critical gateway to jobs, health, education, healthcare, and entrepreneurial opportunities regardless of race, income, or neighborhood.

S Rep 431, 114th Cong, 1st Sess, p 2 (2015). The Court of Appeals decision undermines the goal of ensuring that consumers have unburdened and economical access to the Internet. It encourages municipalities to impose additional fees on providers of broadband services above and beyond the compensation the municipalities already receive as part of their video franchise agreements, hampering the expansion of broadband services within municipal areas.

Allowing such supplemental taxes would also impose a cost that may be passed on to consumers, as evidence in the record here suggests. *E.g.*, Declaration of James Silke in Support of Defendant's Motion for Summary

Judgment, Ex. 1; Declaration of Timothy R. Volpert in Support of Defendant's Motion for Summary Judgment, Exs. 2&9; Tr. Testimony of A. Ottinger, at 67:22-23. This is problematic given that taxes and fees on communication services are regressive with respect to income; that is, taxes and fees as a percentage of income increase as household income decreases. *See* Tuerck, David, Ph.D., *et al.* "Taxes and Fees on Communication Services," Heartland Institute, p 22-23 (rev. June 2007)[3]. The Heartland Institute study found that a family in the lowest quintile of households in the country shouldered a tax burden of approximately 1.0 percent from taxes and fees on communication services; a household in the median income range paid half as much as a percentage of taxes (or .56 percent) and the wealthiest families paid only .14 percent (a tenth of the rate paid by the lowest income households). *Id.* These taxes limit Internet access in low-income households and further contribute to the digital divide that persists. *Id.*

The strong federal intent against regressive local taxes and fees on consumers of high-speed information services is also evident in the federal policy in favor of the development of cable communications. The FCC, in its initial rule-making surrounding cable communications, concluded with respect to local government's taxing of cable franchises:

---

[3] A copy of the relevant portions of this study is included as part of the Appendix to this brief.

> [M]any local authorities have—understandably but unfortunately—exacted high franchise fees for revenue-raising rather than regulatory purposes. Though most fees seem to run around about five percent, some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers....

36 FCC 2d 141, 185 (Feb 3, 1972). The FCC prohibited local governments from charging cable franchise fees above five percent of a cable operator's gross revenues. Ultimately, Congress affirmed this federal policy through passage of the Cable Communications Policy Act of 1984 ("Cable Act"), which codified the cap on cable franchises at five percent. The Cable Act, as discussed in Comcast's brief, bars the seven-percent purported license fee at issue in this case because that fee is truly a franchise fee on cable modem services barred by 47 USC § 542(b).

In enacting the Cable Act, the legislative history once again notes the uniform congressional intent against discriminatory and costly local taxes and in favor of low cost information services generally available to all. *See* S Rep 98-67, 98th Cong, 1st Sess, pp 9-10 (1983) (noting Congressional concern that local jurisdictions not levy high and discriminatory taxes on consumers as a way to raise general revenues); HR Rep 98-934, 98th Cong, 2d Sess., pp 36-37 (1984) (noting that improving consumer access to telecommunication networks is important to "full participation in the political, economic, social and cultural life of the nation.")

One court, examining this same federal regulatory and legislative history, concluded:

> By codifying the FCC's regulatory scheme, Congress adopted the FCC's underlying purpose and rationale, in the absence of any contrary showing. Thus, the changes expressed congressional concern over the misuse of franchise fees for revenue-raising purposes because excessive fees effectively created a regressive, indirect tax on subscribers.

City of Chicago v. Comcast Cable Holdings, L.L.C., 231 Ill 2d 399, 406, 900 NE2d 256, 259 (Ill 2008). This uniform regulatory and legislative policy further demonstrates federal concern over excessive local fees and regressive taxes that harm consumer's access to critical information services.

C. The Court of Appeals Decision, If Upheld, Could Encourage Municipal Governments in Oregon and Elsewhere to Pass Similar Ordinances

The Court of Appeals' ruling that the license fee is not a tax ignores the language and intent of the ITFA, and opens a loophole in the federal statute that may be used by other home-rule municipalities in Oregon and elsewhere. Oregon Constitution, Art IX, § 2; *City of Idanha v. Consumers Power, Inc.*, 9 Or App 551 (1972) (discussing powers of municipality to assess taxes and fees pursuant to its home-rule charter). It makes no sense from a policy standpoint that the ITFA's definition of "tax" would permit a municipality to impose fees for the use of the rights-of-way on a provider who already pays for use through a franchise agreement. In the absence of the conferral of any new privileges or

benefits, such fees constitute taxes and are preempted. This Court should correct the Court of Appeals' error.

D. If the Court of Appeals Decision Is Upheld, It May Be Subjected to Further Challenges

Moreover, if the Court of Appeals' error is not corrected, the Eugene Ordinance will likely be subjected to further challenges. Such challenges may include those under the federal constitution's Commerce Clause. Among other requirements, to be constitutional under the Commerce Clause taxes must meet a four-part test. They must (1) have a substantial nexus with the taxing jurisdiction, (2) be fairly apportioned, (3) nondiscriminatory, and (4) fairly related to the services the jurisdiction provides. *E.g.*, *Complete Auto Transit v. Brady*, 430 US 274 (1977); *Goldberg v. Sweet*, 488 US 252 (1989). In this case, there are likely to be further assertions by other providers claiming that the Eugene Ordinance, both as written and applied, fails to satisfy these basic requirements. These providers will not be constrained, either legally or factually, by cases like *Goldberg*, both because the Ordinance does not meet the four factors set forth above, and because it is unconstitutional under the Equal Protection and Due Process clauses.

III. CONCLUSION

For all the foregoing reasons, this Court should rule that the Eugene Ordinance's license fee is preempted by the ITFA.

DATED this 25th day of March, 2015

Respectfully submitted,

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: /s/ Mark A. Friel
Scott A. Shorr, OSB No. 961873
Mark A. Friel, OSB No. 002592

209 S.W. Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
sshorr@stollberne.com
mfriel@stollberne.com

Attorneys for *Amicus Curiae*
Broadband Tax Institute

CERTIFICATE OF COMPLIANCE

I certify that the word count of this brief (as described in ORAP 5.05(2)(a)) is 2,534 words.

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 in ORAP 5.05(4)(f).

/s/ Mark A. Friel
Mark A. Friel

Attorneys for *Amicus Curiae*
Broadband Tax Institute

CERTIFICATE OF FILING AND SERVICE

I certify that on March 25, 2015, I filed the original of this **BRIEF ON THE MERITS OF *AMICUS CURIAE* BROADBAND TAX INSTITUTE** with the State Court Administrator in pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

I further certify that on March 25, 2015, I served a true copy of the foregoing **BRIEF ON THE MERITS OF *AMICUS CURIAE* BROADBAND TAX INSTITUTE** by mailing a true copy by first class mail with the United States Postal Service on the following individuals at their addresses listed below:

Susan D. Marmaduke, OSB No. 841485
HARRANG LONG GARY RUDNICK PC
1001 SW 5th Avenue, 16th Floor
Portland, OR 97204
susan.marmaduke@harrang.com

Sivhwa Hwa Go, OSB No. 033252
Jerome Lidz, OSB No. 772631
City of Eugene
125 E 8th Avenue, 2nd Floor
Eugene, OR 97401
hwa.go@ci.eugene.or.us
jerry.lidz@ci.eugene.or.us

Attorneys for Respondent on Review

Mark P. Trinchero, OSB No. 883221
Gregory A. Chaimov, OSB No. 822180
DAVIS WRIGHT TREMAINE LLP
1300 SW 5th Avenue, Suite 2400
Portland, OR 97201
marktrinchero@dwt.com
gregorychaimov@dwt.com

Peter Karanjia (*Pro hac vice*)
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, D.C. 20006
peterkaranjia@dwt.com

Attorneys for Petitioner on Review

Richard A. Finnigan, OSB No. 965357
Law Office of R A Finnigan
2112 Black Lake Boulevard SW
Olympia, WA 98512
rickfinn@localaccess.com

Attorney for *Amici Curiae*: NTCA The Rural Broadband Association, Oregon Telecommunications Association, and Washington Independent Telecommunications Association

Thomas W. Brown, OSB No. 801779
Cosgrave Vergeer Kester LLP
888 SW 5th Avenue, Suite 500
Portland, OR 97204
tbrown@cosgravelaw.com

Attorney for *Amici Curiae*: Associated Oregon Industries and Oregon Business Association

Lisa Rackner, OSB No. 873844
McDowell Rackner &Gibson PC
419 SW Eleventh Avenue, Suite 400
Portland, OR 97205
Lisa@mcd-law.com

Eric S. Tresh, Georgia Bar No. 691831
Sutherland Asbill &Brennan LLP
999 Peachtree St., NE
Atlanta, GA 30309
eric.tresh@sutherland.com

Robert P. Merten, III, California Bar No. 261446
Sutherland Asbill &Brennan LLP
500 Capitol Mall, Suite 2500
Sacramento, CA 95814
robert.merten@sutherland.com

Attorneys for *Amici Curiae*: American Cable Association, National Cable & Telecommunications Association, and Oregon Cable Telecommunications Association

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: /s/ Mark A. Friel
Scott A. Shorr, OSB No. 961873
Mark A. Friel, OSB No. 002592

209 S.W. Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
sshorr@stollberne.com
mfriel@stollberne.com

Attorneys for *Amicus Curiae* Broadband Tax Institute