IN THE SUPREME COURT OF THE STATE OF OREGON

CITY OF EUGENE, an Oregon municipal corporation, Plaintiff-Appellant-Respondent on Review, vs. **COMCAST OF OREGON II, INC., an Oregon corporation,** Defendant-Respondent-Petitioner on Review.	Lane County Circuit Court Case No. 160803280 CA A147114 S062816

SUR-REPLY BRIEF ON THE MERITS OF RESPONDENT ON REVIEW CITY OF EUGENE

On petition for review of the decision of the Court of Appeals dated May 21, 2014, on appeal from a judgment of the Lane County Circuit Court, The Honorable Karsten H. Rasmussen

Before Schuman, S.J., Duncan, P.J., Wollheim, J.

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I. INTRODUCTION

The Cable Act, 47 USC 541(b)(1), requires a cable operator to obtain a "franchise," which the Act defines as an authorization by a local, state, or federal government to construct or operate a facility designed to provide "cable service," which means cable television. 47 USC 522. Section 541(b)(1) does not mention, much less authorize, the provision of any noncable service by a cable operator. The City's Cable TV Franchise constitutes "a right and an obligation" to provide the service that is required by it and that service is cable service. City Br. at 28–30.

Comcast replies that whether its Cable TV Franchise with the City authorizes it to provide noncable services such as broadband cable modem services does not matter because all Cable Act franchises carry with them, by operation of law, a federal right to use of the rights-of-way for delivery of noncable service, free of any obligation to pay right-of-way compensation for the provision of noncable services. Specifically, Comcast argues that:

- Congress granted cable operators a federal right to use their cable systems to provide noncable services in addition to cable service;
- Federal law specifies that Cable Act franchises "'shall be construed' to authorize such service" (citing 47 USC 541(a)(2)); and,

- Federal law prohibits municipalities from imposing a fee for cable operators' use of the rights-of-way to provide noncable services (citing 47 USC 544(a)).

Comcast Reply, at 5. The City submits this surreply to address that argument.

I. ARGUMENT

A. Congress did not grant cable operators a federal right to free use of the rights-of-way to provide noncable services.

The federal Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984 ("Cable Act"), and by the Telecommunications Act of 1996, expressly preserves the authority of state and local governments to require telecommunications providers who use the public rights-of-way to pay, on a competitively neutral and non-discriminatory basis, fair and reasonable compensation for that use. 47 USC 253(c). Comcast, however, contends that cable operators–and only cable operators–get a Cable Act-mandated free ride on the rights-of-way to provide noncable services, including broadband.

Comcast misstates the law. The Cable Act and its legislative history, as well as the FCC's interpretation of the Act, directly refute Comcast's claim. Congress has clearly explained that cable operators are *not* entitled to the preferential treatment that Comcast claims. For example, when Congress adopted 47 USC 541(b)(3)(A) as part of the 1996 Telecommunications Act amendments to the 1984 Cable Act, the Conference Report stated:

> "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 non-discriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees."

H.R. Conf. Rep. 458, 104th Cong, 2d Sess at 180 (1996) ("1996 Conf. Rep."), (emphasis added).[1]

If, as Comcast asserts, a cable operator's Cable Act franchise carried with it a federal right to provide noncable services, then neither the states nor their political subdivisions would have any authority to regulate a cable operator's provision of noncable services. Under Comcast's theory, for instance, a cable operator's possession of a Cable Act franchise would authorize it to use the rights-of-way to provide any noncable service over its system without any need for State authorization. But 47 USC 541(d)(2) provides:

> "Nothing in this title [VI, 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, whether offered on a common carrier or private contract basis."

Id. Comcast's claim that a cable operator's franchise to provide cable service carries with it a federal right to provide noncable services (including "any

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[1] Consistent with the Conference Report, the Cable Act excludes from the definition of the "franchise fee" (which is subject to a cap of five percent of cable services revenue under 47 USC 542(b)) any fee of "general applicability[.]" 47 USC 542(g)(2).

communication service other than cable service"), would deny states the very authority that 47 USC 541(d)(2) expressly guarantees to them.

Two other Cable Act provisions added in 1996, 47 USC 541(b)(3)(A) and (C), also contradict Comcast's argument. They provide as follows:

> "If a cable operator * * * is engaged in the provision of telecommunications services[,] * * * such cable operator * * * shall not be required to obtain a *franchise under this title* for the provision of telecommunications services * * *."

47 USC 541(b)(3)(A) (emphasis added).

> "A franchising authority may not order a cable operator * * * to discontinue the provision of a telecommunications service * * * by reason of the failure of such cable operator * * * to obtain a *franchise or franchise renewal under this title* with respect to the provision of such telecommunications service."

47 USC 541(b)(3)(C) (emphasis added).

If Comcast were correct that a Cable Act franchise carries with it a franchise to provide noncable services, a cable operator that loses, or otherwise does not have, a Cable Act franchise would also lose the federal "right" to provide noncable services over its cable system, because it is that Cable Act franchise which, according to Comcast, supposedly confers on it the right to provide those services. But Sections 541(b)(3)(A) and (C) refute Comcast's argument. They provide that a Cable Act franchise authorizing cable TV

service–or the loss of such a franchise–has no effect one way or the other on a cable operator's authority to provide telecommunications services.[2]

The Cable Act is not a source of authority for cable operators to use the rights-of-way to provide noncable services, nor is it a source of authority for local governments to regulate or franchise a cable operator's use of that right-of-way to provide noncable services. But while the Cable Act does not give local franchising authorities the authority to franchise or regulate a cable operator's provision of noncable services, the key point relevant here is that the Cable Act also does *not impair* the power of local governments to exercise such authority as they may otherwise have under state law–such as the City's home rule authority under Oregon law–to manage the rights-of-way and obtain compensation for a cable operator's use of local rights-of-way to provide noncable services. To the contrary, Congress was at pains to make clear that federal law *preserves* that local authority. *See e.g.*, 1996 Conf. Rep. at 180,

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[2] In addition to disproving Comcast's assertion that its Cable Act franchise carries with it, by operation of federal law, the right to use the rights-of-way to provide noncable services, these Cable Act provisions confirm that the Cable Act does not grant to franchising authorities any authority they do not otherwise have to regulate a cable operator's provision of noncable services. In some states (unlike Oregon), authorization to use local rights-of-way to provide telecommunications service is vested solely in the state public utilities commission. *See e.g.*, Cal. Pub. Util. Code 7901. Sections 541(b)(3)(A) and (C) make clear that the Cable Act does not upset that allocation of authority by vesting local franchising authorities with authority over telecommunications services that they do not otherwise have under state law.

supra. The FCC has agreed with the Conference Report and confirmed that the Cable Act preserves such local authority as may exist independent of the Cable Act. In the FCC's 2007 "*Second Video Franchising Order,*"[3] it ruled:

> "The relevant findings from the First Report and Order that apply to incumbent providers include the following: (1) our clarification that a cable operator is not required to pay cable franchise fees on revenues from non-cable services[.]. Fn. 31: * * * This finding, of course, does *not* apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services."

22 FCC Rcd. at 19637, n. 31 (emphasis added).

The Cable Act, 47 USC 541(b)(3)(A) and (C), when read together with the passage in the 1996 Conference Report, which the FCC endorsed in footnote 31 of the *Second Video Franchising Order*, point to but one conclusion: A cable operator's authorization to use the local rights-of-way to provide noncable services cannot derive from any federal right conferred by a Cable Act franchise, but must come from elsewhere. And the only possible alternative source of such authority would be either state or municipal law. In this instance, that authority can come only from a license under the City's Telecommunications Ordinance.

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[3] "*In the Matter of Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended*," 22 FCC Rcd 19633, 2007 WL 328714.

Comcast fails to respond in any meaningful way to the authorities discussed above. Instead, Comcast relies on authorities that are not on point and it misstates the law. Comcast argues that 47 USC 541(a)(2) specifies that a Cable Act franchise shall be construed to authorize the provision of noncable services (Reply, at 5), but that provision says nothing at all about what services a Cable Act franchise authorizes. It states:

> "(2) Any franchise shall be construed to authorize the *construction of a cable system* over public rights-of-way * * *."

Id. There is no dispute that the Cable TV Franchise authorizes the construction of a cable system over the public rights-of-way.

Comcast argues that 47 USC 544(a) bars "municipal regulation," which Comcast asserts necessarily includes the securing of compensation for a cable operator's use of the rights-of-way to provide noncable services. Comcast's interpretation of that section is at odds with both its text and context. Section 544(a) actually states:

> "Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title [VI, the Cable Act]."

Id. Nothing in the Cable Act prohibits the City from imposing a fee for Comcast's use of the rights-of-way to provide noncable services.

Comcast's reliance on *Matter of TCI Cablevision of Oakland County, Inc*., 35 FCC Rcd 16400 (1998), is likewise misplaced. TCI, a franchised cable operator, provided only cable service in the City of Troy, Michigan. *Id*. at Para.

31. TCI sought construction permits for construction to extend its cable system to provide cable services in new parts of Troy. *Id*. at Para. 41. TCI's cable TV franchise required it to submit construction permit applications for construction within the rights-of-way. *Id*. at Para. 39. Critically, Troy's right-of-way ordinance applied to TCI "*only* because it filed the * * * permit applications *in order to provide cable services in [the city]*." *Id*. at Para. 44 (emphasis added). The FCC said, "Congress clearly intended to separate the functions of cable franchising from the regulation of telecommunications services." *Id*. at Para. 12. *Accord*, Para. 42. In the context of that case, the FCC concluded that the city violated 47 USC 542(b)(3)(B) "by insisting on placing a telecommunications condition on its grant of *cable* permits[.]" *Id*. at Para. 11 (emphasis added).

Unlike the city cable permit at issue in TCI, Comcast is not subject to the City's Telecommunications Ordinance license fee because it is a cable operator. To the contrary, the Telecommunications Ordinance specifically excludes cable TV service from the license fee requirement. Comcast is subject to the license fee because it uses the rights-of-way to provide noncable service. If Comcast ceased providing cable TV service tomorrow and (like any other noncable operator) used the rights-of-way to provide only noncable services such as

broadband cable modem service, Comcast would still be subject to the license fee.

Comcast relies on HR Rep 98-034 at 44 (Reply, at 5). That reliance is misplaced. The passage is part of the legislative history of the original 1984 Cable Act, before Section 541(b)(3) was added in 1996. And Comcast takes the passage out of context. The passage discusses the definition of "cable system," and merely states that the provision of non-cable services does not, in and of itself, disqualify a system from being a "cable system." The passage does not speak to the full scope of services that a Cable Act franchise authorizes a cable operator to provide. In fact, on its face, Section 541(b)(1) makes it clear that a Cable Act franchise authorizes a cable operator to "provide cable service." It says nothing about authorizing a cable operator to provide any other service.

Comcast relies on *Heritage Cablevision Assocs. of Dallas, LP v. Texas Utils. Elec Co*., 6 FCC Rcd 7099 (1991). The decision relates only to interpretation of the Pole Attachment Act, 47 USC 224, not to the scope of local cable and noncable franchising authority. As the FCC stated, "* * * we conclude that the Title VI [Cable Communications Act] definitions are irrelevant to the issues before us." 6 FCC Rcd at 7104. Moreover, because that decision pre-dates the 1996 Cable Act amendments, 47 USC 542(b) still

extended the cable TV franchise fee to the "noncable communications services" referred to in the decision, and the provisions of 47 USC 541(b)(3), discussed above, did not exist. If the *Heritage* decision had said anything at all about the scope of permissible cable and noncable franchising (which it did not), it would be superseded by the 1996 amendments to the Act and the key passages in the 1996 Conference Report and footnote 31 of the *Second Video Franchising Order*.

The City does not impose the license fee on Comcast's use of the rights-of-way to provide noncable services because of Comcast's status as a cable operator, or in the City's capacity as a Cable Act franchising authority. Instead, the City imposes the license fee on those who use the rights-of-way to provide noncable telecommunications services under the City's Telecommunications Ordinance, which it enacted under its Oregon home rule authority.

II. CONCLUSION

Nothing in the Cable Act prohibits the City from obtaining fair and reasonable compensation for the use of the public rights-of-way to provide noncable services, including broadband cable modem services. The fact that

Comcast happens also to be a cable operator does not give it a federal right to free use of the rights-of-way for that purpose.

Respectfully submitted this 5th day of June, 2015.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(D)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,359 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 by ORAP 5.05(4)(f).

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I further certify that the following are participants in the court's ECF filing system and will be served using the court's eFiling system.

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