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

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW CITY OF EUGENE , APPENDIX AND EXCERPT OF RECORD

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

This case is about the City's right to obtain compensation for two different commercial uses of the public rights-of-way: cable television and broadband cable modem service. Both federal law and City ordinances treat these as two distinct services. The City does not double-charge for either of them.

The City authorizes Comcast to provide cable television under the "Metropolitan Cable TV Franchise Ordinance." The Cable Act prohibits the provision of cable television without a franchise, and it authorizes municipalities to charge a value-based, rather than burden-based, fee for that franchise – specifically, five percent of cable television revenues. That is precisely what the City does.

The City authorizes the use of the public streets and sidewalks for data transmission services *other than cable television* by means of a license under its Telecommunications Ordinance.[1] The license requirement applies to such data transmission services as telephone, Local Area Networks ("LANs"), Digital Subscriber Line ("DSL"), and broadband cable modem services. The City charges seven percent of revenues from covered data transmission services, including broadband and excluding cable television, as a license fee.

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[1] The City's Telecommunications Ordinance is codified at Eugene Code ("EC") Section 3.005, 3.400 to 3.430.

Comcast argues that it is entitled to a "free ride" for its use of the public rights-of-way for its broadband services. Comcast is incorrect. Neither the Cable TV Franchise, nor federal law, denies the City the right to compensation for private commercial use of the public rights-of-way to provide broadband. Nor do they grant Comcast the competitive advantage it implicitly claims over all others who use the rights-of-way for broadband that do not happen to also be a cable television operator. The fact that Comcast is separately franchised to use the public rights-of-way to provide cable television services does not entitle it to use the rights-of-way free of charge for all other services it provides using those rights-of-way.

The trial court and the Court of Appeals correctly concluded that Comcast failed to prove its affirmative defenses to the City's claim for compensation under its Telecommunications Ordinance for a license to use the public rights-of-way for broadband cable modem services. This court should affirm the Court of Appeals.

II. RESPONSE TO QUESTIONS PRESENTED ON REVIEW AND PROPOSED RULES OF LAW

RESPONSE TO QUESTION 1: The Internet Tax Freedom Act ("ITFA") prevents state and local governments from imposing taxes on Internet access and its definition of "tax" excludes a "fee imposed for a specific privilege, service, or benefit conferred." ITFA Section 1104(8)(i). Comcast

and its *amici* do not dispute that a fee for license to use the public rights-of-way for broadband would, on its face, be a "fee imposed for a specific privilege, service, or benefit conferred." Comcast argues that the license fee is nonetheless a "tax" under the ITFA because Comcast did not need that privilege. But the ITFA does not ask whether a particular entity needs the specific privilege; it asks only whether the fee is imposed for a specific privilege – which the license fee indisputably is.

Comcast asserts that the City granted it that privilege under the Metropolitan Cable TV Franchise. Comcast is also wrong about that. As the City explains below, the City's Cable TV Franchise granted the privilege of using the rights-of-way for cable television service, not for broadband.

Question 1, as posed by Comcast and adopted by the court in its order allowing review, assumes (incorrectly, the City submits) that Comcast has a preexisting contractual right to occupy public rights-of-way to provide broadband services under its Cable TV Franchise. The issue arises with regard to two franchises, one issued in 1991 to Comcast's predecessor and the other issued in 2007 to Comcast. Thus, the "Question Presented" contains two embedded issues:

First Embedded Issue: Did the City grant Comcast's predecessor a right to use the public rights-of-way to transmit data other than cable television service in the 1991 Cable TV Franchise?

Second Embedded Issue: Did the City grant Comcast a right to use the public rights-of-way to transmit data other than cable television service in the 2007 Cable TV Franchise?

Answer to Both Embedded Issues: No. The City granted a right to use the public rights-of-way to locate facilities (described under the term, "Cable Communications System") in the rights-of-way only for the purpose of providing the service that is required by the Cable TV Franchise, which is cable television service.

FIRST QUESTION PRESENTED (rephrased): Does the ITFA prohibit a city from charging a company a fee for a license to use the public rights-of-way to transmit data other than cable television simply because the city has previously granted the company a franchise to use the rights-of-way to provide cable television service?

PROPOSED RULE OF LAW: The ITFA does not prohibit a city from charging a company a fee for a license to use the public rights-of-way to provide data transmission services other than cable television, simply because it has previously granted the company a franchise to use the rights-of-way to provide cable television.

RESPONSE TO QUESTION 2: The second question, as posed by Comcast and adopted by the court in its order allowing review, omits any reference to the key facts that define the issue, *i.e.*, to whom the fee is

applicable, what the fee is imposed upon, and under what franchise is a fee already being paid. The City proposes that the second question be rephrased as follows:

SECOND QUESTION PRESENTED (rephrased): Where a cable operator pays five percent of its cable television service revenues as a fee for a cable television franchise, does 47 USC 542(b) of the Cable Act immunize the cable operator from compliance with a municipality's ordinance requiring those who use the rights-of-way to provide non-cable television services to obtain a license and pay a fee of seven percent of their revenues from those non-cable television services?

PROPOSED RULE OF LAW: 47 USC 542(b) limits the amount a municipality can charge under a federal Cable Act franchise, *i.e.*, a cable television service franchise, to five percent of cable television service revenues. It does not preempt local governments' authority to obtain compensation for the use of public rights-of-way for private commercial purposes *other than cable television service*, including imposing a fee for such uses on non-cable television revenues.

III. NATURE OF THE ACTION, RELIEF SOUGHT AT TRIAL, NATURE OF THE JUDGMENT AND PROCEDURAL HISTORY

In 2008, the City commenced this action, seeking a money judgment for payments assessed on Comcast's broadband cable modem services revenues

dating back to 1999, plus prejudgment interest, under the City's Telecommunications Ordinance. Comcast denied that the Telecommunications Ordinance applies to broadband and asserted various affirmative defenses.

On cross-motions for summary judgment, the trial court interpreted the Telecommunications Ordinance and declared that Comcast's broadband services are a type of "transmission of data for hire" within the meaning of that ordinance. The trial court also dismissed Comcast's affirmative defenses that are the subject of this appeal. The court found issues of fact as to two of Comcast's other affirmative defenses, *i.e.*, whether the "registration fee" (a business tax) was grandfathered under the ITFA, and whether the City's enforcement efforts were unconstitutionally discriminatory. The court set those two issues down for trial. After that trial, the court reconsidered its ruling on the meaning of the Telecommunications Ordinance and concluded that its definition of "telecommunications service" does not cover broadband. The court also ruled against the City on the issues of whether the "registration fee" (a business tax) was "grandfathered" under the ITFA and whether the City's enforcement of the license fee was unconstitutionally discriminatory. Thus, the court entered a judgment of dismissal.

The Court of Appeals affirmed the trial court's ruling that the registration fee was barred by the ITFA, but reversed and remanded with regard to the City's authority to collect the license fee for Comcast's use of the rights-of-way

for broadband. *City of Eugene v. Comcast of Oregon II, Inc*., 263 Or App 116, 149, 333 P3d 1051 (2014) ("*City v. Comcast*"). The Court of Appeals affirmed the trial court's ruling that the license fee is not a tax under the ITFA. *Id*. at 142. The Court of Appeals also rejected Comcast's argument that Section 622(b) of the Cable Act, codified at 47 USC 542(b) (and referred to herein as Section 542(b)), prohibits the City from requiring a license for using the rights-of-way for data transmission *other than cable television service*, such as broadband, and from imposing a fee for such a license on revenues from non-cable television services, such as broadband. Comcast sought review of a number of issues; this court granted review of two.

IV. CONCISE STATEMENT OF MATERIAL FACTS

A. Terminology

The Cable Communications Act of 1984 ("Cable Act") is Title VI of the Federal Communications Act of 1934.[2] Congress enacted the Cable Act to establish a national policy with respect to "cable service." "Cable service" is defined in both the Cable Act (47 USC 522(6)) and the City's Telecommunications Ordinance (EC 3.005) to mean the one-way transmission

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[2] The Communications Act of 1934 was amended by the Cable Communications Policy Act of 1984 ("Cable Act") and further amended by the Telecommunications Act of 1996 ("Telecommunications Act"). The City refers to them collectively as the "federal Act."

of video programming, *i.e.*, cable television service. (The City uses "cable service" and "cable television service" interchangeably in this brief.)

Cable modem service is not "cable service" under either the federal Act or the Telecommunications Ordinance. *In re Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4802 (2002) ("*2002 Declaratory Ruling*"); EC 3.005.

"Franchise" is a defined term under the Cable Act. A Cable Act "franchise" is an authorization for the construction or operation of a cable system, which is a system designed to provide cable television service. *See* 47 USC 522(9) ("franchise"); 522(7) ("cable system"); 522(6) ("cable service"). "Franchise fee" is also a defined term. 47 USC 542(g). It is undisputed that Section 542(b) limits the amount of a cable service franchise fee to five percent of revenue earned from cable service and that, because broadband cable modem service is not a "cable service," broadband revenues cannot be included in the base from which that five percent maximum is calculated. Cable modem service, like DSL, is a type of broadband Internet service. (The City uses "broadband" and "cable modem service" interchangeably in this brief.)

The City's Telecommunications Ordinance defines "telecommunications service" broadly as the transmission of data for hire, but the definition expressly excludes "cable service," which in turn is defined to mean cable television. Eugene Code ("EC") 3.005. Cable modem service involves data transmission

and it is not encompassed by the definition of "cable service" under the Ordinance. Accordingly, cable modem service is a telecommunications service, and not a cable service, under the Ordinance. *City v. Comcast*, 263 Or App at 148.

The term "telecommunications service" is defined differently under the federal Act, and it has had several meanings during the past twenty years. As a result of changes in statutory interpretation and technological changes, broadband services have been categorized in different ways over time. *See generally AT&T Corp. v. City of Portland*, 216 F3d 871, 878 (9th Cir 2000); *2002 Declaratory Ruling*, 17 FCC Rcd 4798 (2002); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 US 967, 980, 125 S Ct 2688 (2005) ("*Brand X*"). Earlier this year, the FCC reclassified broadband service, including cable modem service, as a "telecommunications service" for purposes of the federal Act. *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24, 015 WL 1120110 (Mar. 12, 2015) ("*Open Internet Order*").

B. In 1991, the City granted TCI Cablevision, Comcast's predecessor, a franchise under the "Metropolitan Cable TV Franchise."

The City of Eugene, in collaboration with the City of Springfield and Lane County, collectively acting through the Lane Council of Governments ("LCOG"), has negotiated cable service franchise agreements with Comcast

and its predecessors, and the City has memorialized those agreements in ordinances denominated as "Cable TV Franchise" ordinances, continuously since 1978.[3] Every cable TV franchise since 1978 has contained the same wording authorizing the grantee to install and maintain various facilities (described in the franchise under the term, "Cable Communications System") in the public rights-of-way for the purpose of providing the service authorized – and required – by the franchise ordinance, namely, cable television service. *See, e.g.*, Section 1 ("Purpose") and Section 5 ("Services Provided") Ord. 19775 ER-1; ER-3-6; Ord. 20397, ER-28-29 (Sections 2-3); Ord. 18284, App-1-6; Ord. 18936, App-7-10; Ord. 19359, App-11-15. By its terms, the franchise was to last until July 1, 2008, unless terminated sooner. ER-16 (Section 16(1)).

C. In 1997, the City enacted its Telecommunications Ordinance to license and obtain compensation for use of the rights-of-way for data transmission services other than cable television, but soon was enjoined from enforcing it.

In 1997, the City enacted the Telecommunications Ordinance, codified in part as Eugene Code sections 3.005 and 3.400-3.430. Ord. 20083. The

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[3] Ord. 18284, "Eugene Cable TV Franchise Ordinance," adopted October 23, 1978, granting franchise to Teleprompter Corporation (App-1-6); amended by Ord. 18936, adopted March 8, 1982 (App-7-10); amended by Ord. No. 19359, "Metropolitan Cable TV Franchise Ordinance," adopted October 14, 1985, granting franchise to Group W Cable, Inc. (App-11-15); repealed by Ord. No. 19775, "Metropolitan Cable TV Franchise Ordinance," adopted May 13, 1991, granting franchise to TCI Cablevision of Oregon, Inc. (ER-1-26); amended by Ord. No. 20397, "Metropolitan Cable TV Franchise Ordinance," granting franchise to Comcast of Oregon II, Inc., adopted October 22, 2007 (ER-27-31).

Telecommunications Ordinance requires all entities engaged in "[electronic] transmission of * * * data * * * for hire" using facilities in Eugene to pay a business tax ("registration fee"). The registration fee is not at issue on review.

The Telecommunications Ordinance also requires those businesses that would locate their lines or other equipment in the public rights-of-way to provide data transmission services to obtain a license and pay the license fee that is the subject of this dispute. The Ordinance requires a license from the "operator" of a "communications facility" in the right-of-way and defines "operator" as a person who provides "telecommunications services." EC 3.005, Section 1 "License" and "Operator." It defines "telecommunications services" to exclude "cable service," as follows:

> "The transmission for hire, of information in electromagnetic frequency, electronic or optical form, including, but not limited to, voice, video, or data * * *." Telecommunications service includes all forms of telephone services and voice, data and video transport, but does not include: (1) cable service * * *."

EC 3.005, Section 1, "Telecommunications Services." The license fee is calculated as a percentage of the licensee's gross revenue from the services authorized by the license. As the Court of Appeals confirmed, the Ordinance covers Comcast's broadband cable modem services. *City v. Comcast*, 263 Or App at 148.

The Telecommunications Ordinance is blind to whether a data transmission service involves the Internet. It generally applies to those who

locate their facilities in the public streets and sidewalks to provide "telecommunications services," *i.e.*, the transmission of data for hire. Some transmissions involve the Internet, such as DSL Internet providers and broadband cable modem service providers. Others do not involve the Internet, such as telephone companies and Local Area Networks ("LANs").

Because the City separately franchises cable service and authorizes those franchisees to locate the equipment they use for that purpose in the rights-of-way, the Telecommunications Ordinance excludes "cable service" from the license requirement. EC 3.005. Its definition of "cable service" is identical to the Cable Act's definition encompassing the one-way transmission of video or other programming, *i.e.*, cable television. EC 3.005, Section 1; 47 USC 522(6).

Almost immediately after the City enacted the Telecommunications Ordinance, Comcast's predecessor TCI, Sprint, US West, and AT&T sued the City, contending that the Ordinance violated various state and federal laws. In March 1999, the Lane County Circuit Court entered judgments declaring the Telecommunication Ordinance invalid, and enjoining its enforcement. Joint Ex. Berrian 14.[4]

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[4] Comcast and the City stipulated at trial to enter into evidence the declarations and exhibits that each party submitted in the summary judgment proceedings. Such declarations and exhibits shall be referred to hereafter by the declarant's name and exhibit number.

D. In 1999, while the City was enjoined from enforcing the Telecommunications Ordinance, Comcast's predecessor started using the rights-of-way to transmit data other than cable television service, despite the City's protestations that the Cable TV Franchise authorized only cable television service.

Because the Lane County Circuit Court had ruled the Telecommunications Ordinance unenforceable, the City was unable to license the use of the rights-of-way under it. Around the time TCI merged with AT&T Broadband, a representative of LCOG wrote to TCI, stating that the LCOG members proposed discussions concerning the cable franchise "to clarify the types of services that TCI may provide." Volpert Ex. 7. The representative, Milo Mecham, wrote, in part:

> "When the current cable franchise for TCI * * * was adopted in 1991. it provided authority for TCI to 'install, construct, operate, maintain, reconstruct, and expand a cable communications system.' That language in the franchise must be read within the context of what was contemplated by both franchising parties: *In 1991 this was limited to regular cable television service.* Since 1991 things have changed a great deal, but the franchise has not. * * *
>
> Conflicts have already begun to appear between what TCI may be doing and what the franchise contemplated, as TCI begins to launch other services and take advantage of its affiliation with ATT to expand into other areas of service. * * *."

Volpert Ex. 7 (emphasis added).

AT&T Broadband rejected the franchising authorities' request to discuss the franchise and took the position that the existing franchise authorized it to

provide services besides multichannel video service, including cable modem service. Volpert Ex. 8.

In October 1999, AT&T Broadband began providing cable modem services in Eugene. ER-29 (Court of Appeals Excerpt of Record) Para. 20. By treating broadband cable modem services as a "cable service" authorized by the Cable TV Franchise, AT&T deemed itself authorized to use the rights of way for that purpose as well as for traditional cable video services. AT&T included its cable modem services revenues in the base from which the five percent Cable TV Franchise fee was calculated and started paying the City five percent of its revenue from both cable television and broadband cable modem services. *Id.* Unable to enforce the Telecommunications Ordinance with its license fee of seven percent of revenues from data transmissions other than cable television (including broadband), the City accepted the five percent payments under the rubric of the Cable TV Franchise.

In June 2000, the Ninth Circuit Court of Appeals ruled in *AT&T v. Portland* that broadband cable modem service is not a "cable service" as defined in the Cable Act.[5] Section 542(b) of the Cable Act prohibits the

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[5] The Court of Appeals also ruled that cable modem service is a "telecommunications service" for purposes of the Telecommunications Act of 1996, making it subject to the common carrier requirements of Title II of the federal Act and regulation by the FCC and state public utility commissions.

inclusion of revenue from non-cable services in the base from which a cable television franchise fee is calculated.

In December 2000, AT&T wrote to the City that, in light of the ruling in *AT&T v. Portland*, "there is a serious question as to whether local franchising authorities have the right to assess *cable service franchise fees* on cable modem services revenue." Volpert Ex. 9 (emphasis added). AT&T asked the City to waive franchise fees until the issue was settled. *Id.*

Still enjoined from enforcing the Telecommunications Ordinance, the City responded in January 2001, in part, as follows:

> "AT&T Broadband cannot have it both ways: If AT&T chooses not to pay franchise fees on cable modem services, then it cannot rely on the Eugene franchise to use public rights-of-way in Eugene to provide that service. If AT&T cannot rely on the franchise, it has no authority whatsoever to use public rights-of-way in Eugene to provide cable modem service."

Volpert Ex. 10. (Of course, AT&T Broadband could have obtained that authority through a license under the Telecommunications Ordinance if it had not persuaded the circuit court to enjoin enforcement of the Ordinance.)

In October 2001, the Oregon Court of Appeals reversed the Lane County judgments and ruled that the injunction against enforcement of the Telecommunications Ordinance should be vacated. *AT&T Commc'ns v. City of Eugene*, 177 Or App 379, 35 P3d 1029 (2001), *rev den*, 334 Or 491 (2002) (holding, among other things, that the ordinance is not preempted by 47 USC

253(a)); *TCI Cablevision v. City of Eugene*, 177 Or App 433, 38 P3d 269 (2001), *rev den*, 334 Or 492 (2002) ("*TCI v. Eugene*") (holding that the Ordinance's registration fee is *not* a Cable Act "franchise fee" and thus is *not* preempted by 47 USC 542(b) because it applies generally to all providers of data transmission services and is, therefore, a "tax of general applicability" and not "unduly discriminatory" against cable operators or subscribers).

In early 2002, while TCI's petition for review was pending, the City and other franchising authorities met with AT&T to try to ascertain exactly what services AT&T and its affiliates were providing. Berrian Ex. 29. The City learned that AT&T and its affiliates were providing not only cable television and broadband services, but telephone services as well, and that they were leasing excess capacity of their system to others. *Id*. AT&T continued to insist that the Cable TV Franchise was not limited to cable television and that AT&T was authorized to provide those other services, but that it was not required to pay any fees for its use of the rights-of-way to provide those non-cable television services. *Id*.

E. In 2002, after the Court of Appeals upheld the Telecommunications Ordinance, the City notified Comcast's predecessor and Comcast that they would owe the license fee for using the rights-of-way to provide non-cable television services.

In February 2002, the City informed AT&T that the City disagreed with AT&T's assertion of entitlement to provide telephone, as well as broadband,

services under the Cable TV Franchise. The City further explained that, if the Court of Appeals decision upholding the Telecommunications Ordinance resulted in a final judgment in the City's favor, AT&T and its affiliates would owe registration and license fees under the Ordinance for their non-cable television services. *Id.*

In March 2002, the FCC ruled that cable modem service is not a "cable service" under the federal Act. *2002 Declaratory Ruling*, 17 FCC Rcd at 4802 (2002).[6] By that time, AT&T had conditionally assigned its rights under the Cable TV Franchise to its corporate successor, Comcast. Comcast informed the City that it would stop paying any portion of its broadband revenues to the City. Volpert Ex. 11.

In August 2002, this court denied TCI's petition for review. Freed from the legal cloud on the validity of the Telecommunications Ordinance, the City again made clear to Comcast that broadband was not authorized by the Cable TV Franchise and had to be licensed under the Telecommunications Ordinance. The City and Comcast discussed settlement of the City's claim for Telecommunications Ordinance registration fees on cable television revenues, which claim the Court of Appeals had ruled was *not* preempted by the franchise

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[6] The FCC also ruled that cable modem service is not a "telecommunications service" under the Act. In March 2015, the FCC changed course and ruled that broadband, including cable modem service, *is* properly classified as a "telecommunications service" under the Act. *Open Internet Order*.

fee provision of the federal Cable Act. In November 2002, one of the City's attorneys, Jerome Lidz, wrote to Comcast's counsel:

> "When we talked Friday, you asked * * * whether there is anything else 'out there' on which Comcast might still owe registration fees or other charges after paying $2.0 million under this settlement. The answer is Yes, as to two issues unrelated to the [*TCI v. Eugene*] litigation that we are settling.
>
> "First, as to revenue from cable modem services: *The City of Eugene believes that Comcast owes both license fees and registration fees on its cable modem revenue under City's [Telecommunications] Ordinance 20083.* Comcast disagrees. * * * When we discussed the change of control from Broadband to Comcast * * * last spring, we agreed to put the cable modem issue to the side and work on it separately because of the pending FCC proceeding and appeal. *The current settlement agreement in our case reflects that understanding and the fact that the underlying litigation did not address cable modem fees at all."*

Lidz Ex. 1 (emphasis added).

The December 2002 settlement of the dispute over unpaid registration fees in *TCI v. Eugene* reserved both parties' rights with respect to the application of the Telecommunications Ordinance to Comcast's revenue from broadband:

> "Comcast's payment of $2.0 million covers its obligation to pay registration fees based on its revenue from cable television service under Eugene Code section 3.415(1) through December 31, 2002 and the one-time fees due under Administrative Order No. 44-97006-F. *This Agreement does not apply to any other issue or matter not specifically addressed by the Agreement, including but not limited to matters concerning cable modem revenue* and lease revenue. With regard to these unaddressed matters, each party reserves all rights and remedies related thereto, and nothing herein constitutes waiver of either party's rights or remedies in relation thereto."

Volpert Ex. 18, Para. 2 (emphasis added).

F. In 2007, the City granted a Cable TV Franchise to Comcast, subject to a side agreement reserving the City's claim for license fees under the Telecommunications Ordinance.

The 1991 Cable TV Franchise Ordinance was to expire by its terms on July 1, 2008. LCOG and Comcast began to negotiate a renewal. In October 2007, the City adopted Ordinance 20397, granting Comcast an additional term and franchise renewal for the provision of cable television services. ER-27-31. Because of the City's stated position that Comcast owed money under the Telecommunications Ordinance for its broadband, Comcast and the City entered into a side agreement that included a release of claims arising under the Cable TV Franchise Ordinance, but not claims arising under the Telecommunications Ordinance. ER-32-35. The 2007 Cable TV Ordinance expressly incorporates the terms and conditions of the side agreement. ER-27. The side agreement preserved any claims arising out of the Telecommunications Ordinance. ER-34 ("this release does not include (a) any claims arising out of state or local laws other than the Franchise * * *.")

G. Comcast refused to pay for a license under the Telecommunications Ordinance to use the rights-of-way for broadband.

Comcast has paid 5 percent of its reported cable television service revenue under the Cable TV Franchise Ordinance, but has refused to obtain or

pay for a license under the Telecommunications Ordinance to use the rights-of-way for its broadband services. In 2008, the City brought this action.

V. SUMMARY OF ARGUMENT

The license fee does not violate the ITFA.

The trial court and the Court of Appeals correctly concluded that Comcast failed to show that the City's Telecommunications Ordinance violates the ITFA's prohibition against taxes on Internet services. The ITFA excludes from its definition of "tax" any "fee imposed for a specific privilege, service, or benefit[.]"[7] ITFA Section 1105(8).

Comcast does not dispute that the right to use public rights-of-way for broadband conferred by the Telecommunications Ordinance license is a specific privilege or benefit, but contends that the license fee is nonetheless a "tax" under the ITFA because the City already granted Comcast that privilege in the Cable TV Franchise. Comcast's argument fails for two, independently sufficient, reasons: First, a fee for a "specific privilege" is not a "tax" under the ITFA, regardless of whether a particular entity needs the privilege. Second, Comcast misinterprets the Cable TV Franchise by lifting certain of its words out of their textual, legal, and historical context.

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[7] The ITFA is a note to 47 USC 151.

Franchises must be interpreted narrowly in favor of the public. Cable TV Franchises were in effect during the period since Comcast began using the rights-of-way for broadband in 1999: Ordinance 19775, adopted in 1991, and Ordinance 20397, adopted in 2007.[8] Both bear the short title of "Metropolitan Cable TV Franchise." Both franchises grant:

> "a right and an obligation to provide the service of a cable communications system as required by the provisions of this ordinance."

ER-1; ER-27-28. The "service" that is "required" by the provisions of the Cable TV Franchise ordinances is cable television service, described with specificity in Section 5 of the Franchise. The Franchises authorize the grantee to locate within the public rights-of-ways the facilities described under the term, "Cable Communications System," for purpose of providing the "service" that is "required by" the Franchise, and the Franchise's various references to "service" leave no doubt that the service authorized and required by the Franchise is cable television. ER-1-6, 28-29 (Sections 1, 2, 5). Thus, the Cable TV Franchises are unambiguous in their grant of the right to provide cable television service, and not whatever service the facilities that the grantee is authorized to place in the rights-of-way might be capable of producing. The trial court and Court of

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[8] Ordinance 20397 incorporated most of Ordinance 19775 and amended certain sections. The "purpose" and "services provided sections in Ordinance 19775 were incorporated without change into Ordinance 20397. ER-1-31.

Appeals correctly concluded that the Telecommunications Ordinance license fee is not a "tax" under the ITFA.

The license fee does not violate the Cable Act.

The trial court and Court of Appeals also correctly concluded that 47 USC 542(b) does not forbid the Telecommunications Ordinance license fee. The Cable Act prohibits the provision of "cable services," *i.e*., cable television, without a franchise (47 USC 541(b)), and it prescribes many of the terms of such a cable television service franchise. Section 542(b) sets a limit on cable television franchise fees and prohibits inclusion of revenues from non-cable services (such as broadband) in the fee.

Section 542 applies only to cable television franchise fees; it does not apply to the Telecommunications Ordinance license fee on Comcast's broadband service revenues. The license is not a franchise under the Cable Act; it does not authorize the operation of a cable television system – the Cable TV Franchise does that. The Telecommunications Ordinance excludes cable television from the license requirement. Thus, the license fee is not a franchise fee under Section 542(b). The Cable Act neither authorizes, nor prohibits, the City's license fee. The City does not look to the Cable Act for authority to impose the license fee on non-cable services; that power derives from the Telecommunications Ordinance and the City's authority as a home rule

municipality to obtain compensation for the use of the public rights-of-way for commercial purposes.

When Congress amended Section 542(b) in 1996, the conferees explained that the Cable Act does not impair the authority of local governments to impose fees, including on cable companies, for the use of their public rights-of-way for other, non-cable television services, stating:

> "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."

HR Conf. Rep 458, 104th Cong, 2d Sess at 180 (1996). And when, in 2007, the FCC issued its order ruling that "a cable operator is not required to pay cable franchise fees on revenues from non-cable services" (FCC 07-190, Para. 11), it specifically stated that this "of course, does not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services." *In re Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd 19633, 19637 n 31 (2007).

Because the license is not a cable television franchise, it does not have the attributes of a "franchise fee," as defined in 47 USC 542(b). The Telecommunications Ordinance does not impose a fee on cable television subscribers or on Comcast as a cable television operator, in the words of that

section, "solely because of [their] status as such." To the contrary, the license fee applies to Comcast solely because of its use of the rights-of-way to provide services *other than cable service*, *i.e.*, broadband cable modem services. If Comcast provided broadband service but did not provide cable television service, it would still be obligated to pay the license fee on its broadband revenues under the Telecommunications Ordinance.

Section 542 excludes "generally applicable" fees from its scope. The license fee is generally applicable to all who locate their facilities in the City's streets and sidewalks to transmit data other than cable television, including DSL, Local Area Networks, and telephone, and it applies only to revenue from those non-cable television services. It does not, in the words of 47 USC 542, "unduly discriminate against" cable television subscribers or operators.

Comcast asserts that the City may not collect a license fee on its revenue from broadband service because that service places no additional burden on the City. Even assuming for the sake of argument that Comcast's use of the public streets and sidewalks for broadband imposes no regulatory burden on the City (a proposition not founded on the record), the law does not limit right-of-way compensation to burden-based fees. Both Oregon law and federal law allow for gross revenue-based fees, and gross revenue reflects value, rather than burden. A fee based on gross revenue earned through use of a public asset is a well-recognized measure of the value of the public asset that finds precedent not only

in utility franchise fees, but also in rent for use of public spaces. The City's license fee is not a Cable Act franchise fee, but, contrary to Comcast's argument, the Cable Act – like Oregon law – provides for a revenue- or value-based fee, not a burden-based fee.

VI. ARGUMENT

RESPONSE TO FIRST QUESTION ON REVIEW

A license to use the rights-of-way for broadband confers a "specific privilege * * * or benefit." Therefore, the license fee is not a "tax," as defined in the ITFA. Moreover, the City's Metropolitan Cable TV Franchise, enacted in 1991 and amended in 2007, granted a right to locate facilities in the rights-of-way only to provide cable television service, not broadband.

A. The ITFA defines "tax" to exclude a fee for a privilege.

Effective October 1, 1998, Congress enacted the Internet Tax Freedom Act ("ITFA"), codified in a note following 47 USC 151. The ITFA imposes a moratorium on taxes on Internet access. Section 1101(a)(1). It prohibits taxes that apply only to commerce involving the Internet and not to "similar sales, uses, or transactions not using the Internet, online services, or Internet access service." S. Rep No. 184, 105th Cong. 2d Sess (1998) at 8.

The ITFA defines "tax" as follows:

"The term 'tax' means –

(1) 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 * * * ."

Section 1105(8)(A)(i) (emphasis added).

The license fee is imposed for the specific privilege of using the public streets and sidewalks for the commercial purpose of transmitting data (other than cable television). It is therefore not a "tax" as defined by the ITFA. Whether Comcast had need of that privilege does not change the character of the license fee under the ITFA.

B. The license fee is a fee for a specific privilege and benefit that Comcast did not already enjoy.

1. The 1991 and 2007 Cable TV Franchises granted only the right to provide the cable television services enumerated in those franchises.

Unlike most statutes and ordinances, the Metropolitan Cable TV Franchise Ordinances are not enactments of general applicability. Instead, they memorialize a negotiated agreement as to rights and duties that run between the City and a particular party. They grant a right to use the public rights-of-way to locate a "cable communications system" for the purpose of providing only that "service" of such a cable communications system that is "required by the provisions of this [franchise] ordinance," *i.e.*, cable television service.

Because a franchise of this type has all the incidents of a contract, the rights and liabilities of the parties to that contract are evaluated in standard contract terms, with one notable exception. When interpreting a franchise

agreement, a court construes the terms "strictly against the grantee and liberally in favor of the public." *NW Natural Gas Co. v. City of Portland*, 300 Or 291, 308, 711 P2d 119 (1985) (quoting *City of Joseph v. Joseph Water Works Co*., 57 Or 586, 591, 111 P 864, 112 P 1083 (1911)).

In resolving a dispute over the meaning of a contractual term, a court's task is to ascertain the intent of the contracting parties. *James v. Clackamas Cnty*., 353 Or 431, 441, 299 P3d 526 (2013). *See also* ORS 42.240 ("In the construction of an instrument the intention of the parties is to be pursued if possible[.]"). This requires the familiar three-step inquiry that begins with an examination of the text of the disputed provision in the context of the document as a whole. *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997).

Here, the context of the whole franchise agreement leaves no doubt that it creates both a right and an obligation to provide the enumerated cable television services, while authorizing the grantee to locate its "cable communications system" in the rights-of-way for that purpose.

The 1991 Cable TV Franchise – like all that preceded it and like the 2007 renewal – states, in part:

> "This franchise shall constitute both a right and an obligation to provide the service of a cable communications system as required by the provisions of this ordinance."

ER-1 (Section 1).

The definition of the "Cable Communications System" that the franchise authorizes the grantee to locate in the public rights-of-way has remained the same throughout all of the franchise ordinances enacted since 1978. The franchise grants a right (and imposes an obligation) to provide only that service of a cable communications system that is "required by the provisions of this ordinance." The service that is required by the ordinance is described with specificity in the section entitled "Services Provided." The details have changed over the years, but they have always been features of only one service: cable television. Section 5 of the 1991 Cable TV Franchise, Ord. 19775, provides as follows:

> "(1) Channel Capacity. The cable communication system operated by Grantee at the time this franchise was adopted provides 35 *channels* of capacity. Before Grantee further increases the *channel capacity* of its cable system, it shall submit to the commission reports * * *."
>
> (2) Basic *Service*.
>
> (a) Basic *service* shall include *programming of local, regional and national interest* providing in the aggregate a variety of *video programming* and shall include the *access channels*. * * *
>
> (b) At least 30 days before Grantee rearranges, replaces, removes, or otherwise offers a particular *cable service* it shall notify the commission. * * * .
>
> (3) Control Devices. Subscribers to any *premium programming service* shall, upon request, be supplied with control devices at a reasonable charge to limit viewing of the *premium programming service* on individual *television receivers*.

> (4) *Service* to institutions. Upon request of the commission, the Grantee shall provide single installations of *basic service* to [various public institutions].
>
> (5) Access Facilities and Equipment. Commission may equip, maintain, and operate an access center on premises within Grantee's service area * * *. Grantee shall provide at its expense and upon reasonable notice the necessary connection(s) between its cable communications system and the access center, [various public institutions] to allow the *simultaneous live cablecast of programs on the access channels*. * * * ."
>
> (6) Access Channels. (A) Grantee shall provide *three channels* dedicated for public, educational, and local government *access programming within the basic service*. * * *
>
> (7) Emergency Use. In the case of any emergency or disaster, the Grantee shall, upon request of the Grantor, make available its facilities for emergency use during the emergency or disaster period at no cost to the Grantor. The system shall be designed so that viewers on all *channels can receive immediate notice of the emergency* by way of an emergency override audio or written message or both. * * *.

ER-3-4, Sec. 5 (emphasis added).

Thus, the Franchise grants a right – and an obligation – to provide the cable television service described in the "Services" section of the Franchise. It authorizes the grantee to locate within the rights-of-way any or all of the items listed in the definition of "Cable Communications System" to provide the authorized and required "service." That definition merely lists general categories of equipment that may be placed in the right-of-way; it does not define the service scope of the Franchise. The types of equipment listed in the definition are or can be used to provide cable television service. The Franchise

makes no mention of broadband service or anything remotely like it. Instead, all of the Franchise's references to the required "service" clearly refer to traditional cable service, that is, multichannel video service. Because the scope of the Franchise is clear from its text and context, the analysis should end there.

If the court were nonetheless to conclude that text and context permit the scope of the franchise granted to be reasonably interpreted in more than one way, the court would examine extrinsic evidence to resolve the ambiguity and determine the intent of the parties at the time of contracting. *Yogman*, 325 Or at 363.

It is undisputed that the grantee of the 1991 Franchise, TCI Cablevision, did not provide broadband cable modem services and that, in fact, such services did not exist in Eugene until 1999. While enacting bodies sometimes draft statutes and ordinances expansively to encompass future circumstances, the franchise ordinances are not enactments of general applicability, but negotiated agreements that impose both rights and obligations on the parties to them. Given that the Franchise obligates the grantee to provide "the service of a cable communications system," from the grantee's perspective, it is only reasonable that the franchised services would be tailored to the capacities of the grantee to provide cable television, rather than imposing an open-ended right and obligation to provide whatever services the "cable communications system" might ultimately be capable of producing. And, from the City's perspective, it

would make no sense to give away the use of the rights-of-way for any such unspecified service.

If this court were to find any ambiguity is not resolved by the extrinsic evidence, the court would move to the third step of the analysis, *i.e.*, applying "appropriate maxims of construction." *Yogman*, 325 Or at 364. Here, the appropriate maxim is that the franchise must be narrowly construed in favor of the public and "[w]hat is not unequivocally granted is withheld, and nothing passes by implication, except what is necessary to carry into effect the obvious intent of the grant." *City of Joseph*, 57 Or at 591.

The only services for which a right is expressly granted are cable television services. Cable modem services are not mentioned, much less "unequivocally granted" in the Franchise. Moreover, it would make no sense for a grantee to undertake an open-ended obligation to provide whatever services a "cable communications system" may be capable of producing. Neither the City, nor TCI Cablevision, Inc., would have intended the 1991 Cable TV Franchise to grant a right or an obligation to provide anything other than the cable television services specified in it.

2. Even if there were room for disagreement about the scope of the right granted by the 1991 Franchise, any possible doubt was eliminated by the time of the 2007 Franchise.

The 1991 Franchise clearly granted TCI only the right (and imposed only the obligation) to provide that service of the cable communications system that is "required in the ordinance," which was only cable television service.

In 1996, Congress amended 47 USC 542(b) to clarify that only revenues from cable television services can be included in the base from which the five percent franchise fee is calculated. In light of that change, when the City and Comcast renewed the Cable TV Franchise in 2007, it would have made even less sense for the City to give away for free the right to provide whatever services a "cable communications system" might ultimately be capable of producing. It also would have violated the City's Telecommunications Ordinance.

The City enacted the Telecommunications Ordinance in 1997. It provided that operators holding a franchise in effect in 1997 could continue to operate under that franchise only until it expired (but not for any renewal) and only with respect to activities expressly authorized by such franchise. EC 3.410(6). The Ordinance gave clear notice to Comcast and everyone else that any cable franchise adopted after the 1997 Ordinance's enactment would grant a right only to provide cable service. The Ordinance states that a separate license would be required in order to use the rights-of-ways to provide data transmission services other than cable service – even if those non-cable services were provided over the same facilities. The Ordinance states:

> "The fact that a particular communications facility may be used for multiple purposes does not obviate the need to obtain a license for other purposes. By way of illustration and not limitation, a cable operator of a cable system must obtain a license to construct, install or locate a cable system to provide cable services and, should it intend to provide telecommunications services over the same facilities, must also obtain a separate license."

EC 3.410(3).

From 1999, at least until this court denied TCI's petition for review in August 2002, the City was enjoined from enforcing the Telecommunications Ordinance. During that period, Internet service technology was new and changing quickly, and the classification of cable modem services under federal law was evolving (as it continues to evolve today). During that period, a number of confusing and conflicting exchanges occurred between the City and AT&T and Comcast. None of those communications changes the fact that, when the City and TCI Cablevision, Inc., entered into the 1991 franchise, they intended it to grant only the right – and impose only the correlative obligation -- to provide the "service" required by the franchise – which are all multichannel video service, *i.e.*, cable television service.

And when the franchise was renewed in 2007, it was again clear that the City granted only the right – and imposed only the obligation – to provide cable television services in that franchise. The injunction against enforcement of the Telecommunications Ordinance had been lifted, Section 542(b) had been amended to clarify that the 5 percent maximum franchise fee could be based

only on revenues from cable television services, and the City had expressly told Comcast that it was required to obtain a license and pay a license fee under the Telecommunications Ordinance to use the rights-of-way for transmission of data other than cable television.

Comcast asserts in its "Statement of Facts" that the City's Amended Complaint in this case was "the first time that the City had ever demanded that Comcast pay fees on cable modem services under the Ordinance, as opposed to the Franchise." Comcast Br at 12. That statement is both irrelevant and inaccurate. As early as 2002, the City made clear its position that Comcast was not authorized to use the rights-of-way free of charge for transmission of data other than cable service. *See, e.g.*, Berrian Ex. 29 (February 2002 letter from City informing AT&T that it would owe fees under the Telecommunications Ordinance on its non-cable TV services if the Ordinance was upheld) and Lidz Ex 1 ("The City of Eugene believes that Comcast owes both license fees and registration fees on its cable modem revenue under City's Telecommunications Ordinance 20083"). In light of that position, the City reserved its claim for license fees for Comcast's use of the rights-of-way to provide data transmission other than cable service, both in its 2002 settlement and in the side agreement incorporated into the 2007 franchise.

In short, the text and context of the 2007 Cable TV Franchise Ordinance are clear that it was intended to grant a right, and impose an obligation, to

provide only cable television service and Comcast could not possibly have believed the City intended otherwise. Because the franchise never granted Comcast the right to use City rights-of-way to provide broadband service, the license required by the Telecommunications Ordinance is for a "specific privilege" and therefore not a "tax" within the meaning of the ITFA.

C. Because the fee for a license to use the rights-of-way for broadband is a fee for a "specific privilege * * * or benefit conferred," it does not violate ITFA or the policies that law was intended to foster.

Comcast argues at length that "[t]he decision below [holding that the license fee does not violate ITFA] creates a loophole that threatens to undermine ITFA's fundamental purpose." Comcast's Br at 32 – 38. Those arguments are beside the point. Comcast does not dispute that, on its face, the Telecommunications Ordinance license fee is in fact a fee for a "specific privilege * * * or benefit." Comcast argues only that it does not need that privilege or benefit because it already enjoyed it under the Cable TV Franchise. The ITFA's express exemption of fees for specific privileges shows that Congress did not regard such fees as creating any "loophole" at all in the ITFA.

RESPONSE TO SECOND QUESTION ON REVIEW

The Cable Act, 47 USC 542(b), does not bar a municipality from requiring a license to use the rights-of-way to provide non-cable services or imposing a license fee on non-cable television revenue simply because a cable

operator is paying the maximum five-percent cable television franchise fee on its cable television revenue.

A. The license fee is not a Section 542(b) franchise fee.

1. The license does not authorize the construction or operation of a cable television service system and therefore the license fee is not a Section 542(b) franchise fee.

Congress amended the Communications Act of 1934 by enacting the Cable Communications Policy Act of 1984 ("Cable Act") to create a national policy for regulating cable television service, denominated "cable services." The Cable Act prohibits the provision of cable service without a franchise (47 USC 541(b)(1)) and it specifies many of the terms of cable service franchises. Among other terms, it sets a maximum (five percent) fee for a cable service franchise and provides that the fee can be imposed only on cable service revenue. 47 USC 542(b). Consistent with that requirement, the City charges five percent of Comcast's cable service revenues for its Cable TV Franchise.

Comcast argues that Section 542(b) means that its payment of the cable television franchise fee on its cable service revenues entitles it and other cable operators to a "free ride" to use the rights-of-way to provide other, non-cable services, including broadband. Comcast is incorrect.

The Cable Act defines "franchise" as an authorization issued by a franchising authority "which authorizes the construction or operation of a cable system." 47 USC 522(9). A "cable system" is a facility that is designed to

provide "cable service" (47 USC 522(7)), and "cable service" means video programming service, *i.e.*, cable television. 47 USC 522(6).

The Cable Act, 47 USC 542(b), states:

> "For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."

47 USC 542(b). When Congress added the terminal phrase, "to provide cable services," it did not intend to limit right-of-way fees on other, non-cable services – such as broadband – that cable operators might also provide. The House Conference Report explained:

> "The conferees intend that * * * 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."

HR Conf Rep 458, 104th Cong, 2d Sess at 180 (1996) ("Report") (emphasis added). This unequivocally answers the question before the court: Contrary to Comcast's assertion, Congress did not intend to immunize cable operators from right-of-way fees on their provision of non-cable services. Rather, Congress intended only that fees for such services, if a city chose to impose such fees, would not be recovered through cable television franchise fees.

Comcast ignores that legislative history, and instead relies on two cases that are inapposite and on statements by the FCC that have no legal force and do not stand for the proposition Comcast advances.

Comcast argues that the Court of Appeals' conclusion that the Cable Act does not prohibit the license fee represents a "departure from [an] unbroken line of authority[.]" Comcast Br at 43. In fact, however, Comcast relies on only two cases, both of which stand for the unremarkable – and inapposite – proposition that a cable television franchise under the Cable Act cannot include revenue from broadband cable modem service in the base from which the five percent cable television franchise fee is calculated. No one disputes that point in this case.

Comcast cites *Comcast Cable of Plano, Inc. v. City of Plano*, 315 SW 3d 673 (Tex Ct App 2010), and *City of Chicago v. AT&T Broadband, Inc*., 2003 WL 22057905 (ND Ill Sept 4, 2003) ("*Chicago*"), which stand only for the proposition that a Cable Act franchise fee must be limited to five percent of cable television revenues. It is undisputed that the City charges only five percent of Comcast's cable television revenues for its cable television franchise.[9] Comcast also cites *City of Chicago v. Comcast Cable Holdings,*

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[9] The decision is entitled to no weight for the further reason that the U.S. Court of Appeals for the Seventh Circuit vacated it under the name of *City of Chicago v. Comcast Holdings, LLC*, 384 F3d 901 (7th Cir 2004). The Circuit Court of

LLC, 900 NE 2d 256 (Ill 2008), which is *Chicago* on remand. Again, the case is inapposite. The City of Chicago sought a declaration that cable television operators were required to comply with provisions in their *cable television franchise agreements* requiring them to pay five percent of their revenues from broadband services in addition to cable television revenues. The court rejected the city's home rule argument because the city could not cite any source separate from the Cable Act franchise agreement authorizing the fee. 900 NE 2d at 266. In contrast, here, the City imposes the license fee under the Telecommunications Ordinance, which does not impose the fee on cable television revenues, not under a Cable Act cable television franchise.

Comcast relies on a "tentative conclusion" by the FCC in its *2002 Declaratory Ruling*. Comcast Br at 41. A "tentative conclusion" is merely a proposition about which the agency seeks comment before making a rule that has the force of law, and the FCC has never adopted that tentative conclusion. Moreover, in 2007, the FCC issued an order clarifying, and limiting, the scope of its ruling that a cable operator is not required to pay cable franchise fees on revenues from non-cable services. Directly contrary to Comcast's position in this case, the FCC stated:

Appeals found no basis for federal jurisdiction because the City of Chicago based its claim on a series of cable franchise contracts and an ordinance that it alleged was enacted under its home-rule power that gave it the right to franchise cable television systems, not the federal law. *Id.* at 904.

> "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."

In re Implementation of Section 621(A)(1), 22 FCC Rcd at 19637 n 31 (2007) (emphasis added). Thus, the FCC's position is entirely consistent with the City's imposition of the Telecommunications Ordinance license fee on a cable operator's provision of non-cable services over the rights-of-way.

Comcast also relies on a footnote that appears in the FCC's 2015 *Open Internet Order*. The footnote was dicta, not a ruling. The subject of the *Open Internet Order* was whether the FCC has authority to, and should, regulate broadband Internet services as "telecommunications services." After appropriate notice and hearings under the APA, FCC reversed its *2002 Declaratory Ruling* that broadband service (including cable modem service) is not a "telecommunications service" and instead ruled that broadband is a "telecommunications service" for purposes of the federal Communications Act, of which the Cable Act is a part. The FCC gave no notice in the Notice of Potential Rulemaking (NPRM) that the issue of right-of-way fees was being considered, much less that it would be decided, in the *Open Internet* proceeding. The footnote does not purport to rule that the Cable Act prohibits imposing a fee for the privilege of using public rights-of-way to transport and sell broadband services, nor could it, consistent with the Administrative Procedure Act, because the FCC did not seek comment on that issue. Only

those administrative interpretations that Congress and the agency intend to have the force of law are entitled to *Chevron* deference. *United States v. Mead Corp*., 533 US 218, 226-27, 121 S Ct 2164 (2001). The footnote is entitled to no deference.

Moreover, Comcast misconstrues the footnote. All the FCC said in it was that it does not believe its reclassification of broadband in the *Open Internet Order* would serve as a basis for a state or local government to require a cable operator to obtain an additional franchise for – or pay new franchise fees on – broadband service. The City does not base its right to impose a fee for the use of the rights-of-way to provide broadband services on the *Open Internet Order*, or on any federal law. To the contrary, the City bases its right to charge the fee on its own Telecommunications Ordinance, which it enacted pursuant to its home rule authority.

2. The license fee is not a Section 542 franchise fee because it does not apply to cable television operators or their subscribers "solely because of their status as such."

The Cable Act defines "franchise fee" as follows:

> "(1) the term 'franchise fee' includes 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;
>
> "(2) the term 'franchise fee' does not include –
> "(A) 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 but not including a

> tax, fee or assessment which is unduly discriminatory against cable operators or cable subscribers.
>
> * * * * *"

47 USC 542(g). The license fee falls outside subsection (1)'s description of what *is* a franchise fee, and it falls within subsection (2)'s description of what is *not* a franchise fee.

Comcast argues that the license fee applies to it solely because of its status as a cable operator. That is patently false. Because the Telecommunications Ordinance excludes cable television from its definition of "telecommunications services," a cable operator that uses the rights-of-way only to provide cable television service does not need a license under the Telecommunications Ordinance and is not required to pay a license fee. Conversely, a provider of broadband services that does not provide cable television service or manage or operate a cable television service system would be subject to the license fee. Thus, the license fee applies to Comcast solely because it locates its facilities in the rights-of-way to provide broadband services, *not* because of its status as a cable operator. The license fee therefore cannot be a "franchise fee" within the meaning of the Cable Act.

Comcast argues that a company is a "cable operator" not only when it provides cable television service, but also when it "controls or is responsible for * * * the management and operation of" a cable television system. Comcast Br at 46. That proves nothing. The license fee is not imposed on Comcast "solely

because of its status" as one who "controls or is responsible for the management and operation of" a cable television system. To the contrary, if Comcast merely owned and operated a broadband system and provided no cable service at all, it would still be required to obtain a license.

Any company that locates facilities in the rights-of-way for the purpose of data transmission – other than cable television service -- is required to pay the license fee. DSL is a type of broadband that uses digital lines to transmit data to and from the Internet. A DSL provider does not own or operate a cable television system, nor does it provide cable television. It is, however, required to pay the license fee.

The Cable Act, 47 USC 542(b), does not purport to give cable operators who also provide broadband services a competitive advantage over competitors who provide broadband services only. Yet, if Comcast were to prevail in its argument that cable operators, and only cable operators, are entitled to a "free ride" on the right-of-way to provide non-cable services, those users of the City's rights-of-way who provide broadband but not cable service can be expected to claim that their having to pay the license fee on broadband service, while cable operators like Comcast do not, would be the very type of discriminatory and non-competitively neutral result that Congress intended to prevent. *See* Conf. Rpt. 104-230 (1996) at 180 (quoted above); and 47 USC 253(c) (preserving the right of state and local governments 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 * * *."). Congress clearly did not intend to confer such a preference on cable operators.

3. The license fee is not a Section 542 franchise fee because it is a fee of "general applicability" that does not "unduly discriminate" against cable television subscribers or cable television providers.

The license fee is also not a Section 542 franchise fee because it is a fee of "general applicability" and it does not "unduly discriminate" against cable television subscribers or cable television providers. The license fee does not apply to cable television subscribers or those who provide only cable television services at all, much less "unduly discriminate" against them.

Comcast essentially rehashes the arguments it made and lost in the Court of Appeals to the effect that the City discriminated against it by not enforcing the Ordinance as to "ISPs before 1998" and by not collecting as to ELI and Qwest. Comcast Br at 6. But the Cable Act asks whether the fee is "generally applicable," *not* whether it is perfectly enforced. Any shortcomings in the City's collection of the Telecommunications Ordinance license fee do not establish that it is a prohibited "franchise fee" under 47 USC 542(b).

And, even if the efficacy of the City's one-person enforcement team were relevant, neither of Comcast's arguments survives scrutiny. The application of

the license fee is not limited to ISPs. Instead, it applies generally to telephone utilities, Local Area Networks, and others who transmit data (other than cable television) over their facilities in the City's rights-of-way. RER-11 (Reply Excerpt of Record at Court of Appeals) (Comcast's Trial Ex. D77) (list of providers registered under the Telecommunications Ordinance that located their facilities in the rights-of-way at the time of trial).

And, in 1998, the vast majority of ISPs were "dial-ups" that depended on the local telephone company (US West, then Qwest, now CenturyLink) to transmit signals to and from the ISP's subscribers over the telephone companies' telecommunications facilities. *See AT&T v. Portland*, 216 F3d at 874 (9th Cir 2000). The FCC classified "non-facilities-based" ISPs – those that do not own the transmission facilities they use to connect the end user to the Internet – as "information service providers," rather than as "telecommunication carriers." In keeping with that distinction, the Ninth Circuit described the "typical ISP" as follows:

> "A typical ISP connects with the Internet via leased telecommunication lines, which its consumers access through 'dial-up' connections over ordinary phone lines."

Id. at 874. The US Supreme Court described that "traditional" means of access to the Internet as follows:

> "The traditional means by which consumers in the United States access the [Internet] is through 'dial-up' connections provided over local telephone facilities. * * * Using these connections,

> consumers access the Internet by making calls with computer modems through the telephone wires owned by local phone companies."

Brand X, 545 US at 974.

As the Oregon Court of Appeals recognized, dial-up ISPs use a materially different technology than do providers of cable modem service:

> "The trial court discounted the differences between dial-up Internet access and cable modem service, reasoning that 'just because the Internet has evolved, it does not mean that the City can suddenly interpret the Ordinance to include a new type of service. Clearly the intent behind the Ordinance was not to tax Internet access.' The question, in our view, is not whether the Internet has evolved, but *how* it has evolved. In this case, *the technology has evolved such that Comcast is providing Internet access services by transmitting data over its own telecommunications facilities*."

City v. Comcast, 263 Or App at 141 n 13 (emphasis added).

In short, Comcast's assertion that the Telecommunications Ordinance license fee constitutes a prohibited "franchise fee" under Cable Act, 47 USC 542(b) because the City did not enforce the license fee against the dial-up ISPs is obviously not well taken.

By 2010, there were 12 registered entities locating their telecommunications facilities within the City's rights-of-way to transmit data. RER-11 (Comcast's Ex. D77 at 1). Comcast proved shortcomings in the City's collection of the license fee as to only two of those providers: Qwest

Corporation and ELI.[10] There is no dispute that the City attempted to enforce the license fee against both. The City tried to enforce as to Qwest and found itself in litigation for years. *US West v. City of Eugene*, 177 Or App 424, 37 P3d 1001 (2001), *aff'd in part and vac'd in part,* 336 Or 181 (2003). When the City learned in the course of this litigation that ELI and Qwest were not including their broadband revenue in their license fee payments, the City sent demand letters to both of them. City's Trial Exs. P10, P13, P15, P17, P62, P64. The fact that the City had not yet sued them cannot mean the license fee is a prohibited "franchise fee" under the Cable Act. Comcast argues, in effect, that the City had to sue all broadband providers at once, or not at all. It that were the standard, few, if any, fees or taxes would be valid.

B. Contrary to Comcast's argument, both Oregon law and the Cable Act permit value-based, not merely burden-based, right-of-way fees.

Comcast attempts to justify the free ride on the City's rights-of-way to provide broadband by arguing that it creates no additional burden on the right-of-way. Because the license fee is not a "franchise fee" under Section 542, Comcast's argument that the City should not impose the license fee without

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[10] The testimony that the trial court rejected (Comcast Br at 8) concerned an early meeting in 1997 or 1998. Trial Opinion and Order at 20. (Court's examination of whether City "generally collected" registration and license fees before October 1998 so as to satisfy the ITFA grandfather clause, which is no longer at issue in this case).

proving that the fee is justified by an additional burden is not germane. It is also incorrect. Even assuming for purposes of argument that Comcast's provision of broadband imposes no additional burden (which the record does not support), neither Oregon law nor federal law restricts right-of-way compensation to burden-based fees. *Cf.*, ORS 221.450 (authorizes cities to impose a five percent gross revenue-based privilege tax on public utilities using public streets without a franchise); *AT&T v. City of Eugene*,177 Or App at 381 (upholding Eugene's Telecommunications Ordinance gross revenue-based license fee); 47 USC 542(b) (authorizes five percent gross revenue-based cable television franchise fee).

Comcast relies on a 1983 Senate Report for the proposition that the Cable Act was intended to protect against local authorities extracting cable television franchise fees "more for revenue-raising than for regulatory purposes[.]" Comcast Br at 39-40 (quoting S. Rep No 98-67, 98th Cong, 1st Sess (1983) at 9-10). Again, the City's license fee is not a Cable Act franchise fee. And, contrary to Comcast's argument that Congress is opposed to local authorities generating revenue, what Congress did in enacting the Cable Act shows quite the opposite.

In the FCC's *1972 Cable Television Report and Order*, 36 FCC 2d 141 (1972), it adopted a rule capping cable television franchise fees at 3 percent of basic service revenues, but gave localities the right to petition the FCC to

increase the fee up to five percent if they could show the higher fee "is appropriate in light of the planned regulatory program." The FCC revised the rule in various minor ways over the course of the 1970s, but the basic structure of the rule remained the same until 1984, when Congress enacted the Cable Act. Congress rescinded the FCC's franchise fee regime and "stripped" the FCC of authority to regulate the use of franchise fee proceeds. HR Rep 98-934 at 46; 47 USC 542(i) ("Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section."). The committee report states:

> "Subsection 622(i) [codified at 47 USC 542(i)] prohibits any agency of the United States, including the FCC, from regulating the amount of the franchise fee *or the use to which the funds collected through the fee will be put*. The current FCC regulations which restrict the use of franchise fee revenues to cable-related uses and permit franchise fees of 5 percent only if a waiver is granted by the FCC are invalid by the terms of this legislation."

HR Rep 98-934, 65 (1984) (emphasis added).

More fundamentally, Comcast's "burden" standard for measuring right-of-way "use" is at odds with the Cable Act. The five percent cable franchise fee authorized by 47 USC 542, is "a fee for [a cable] operator's use of public ways." HR Rep No. 934 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4663. The franchise fee is therefore "essentially a form of rent: the price paid to rent use of public right-of-ways." *City of Dallas v. FCC*, 118 F3d 393, 397 (5th Cir

1997). And, on its face, the Cable Act's five percent cable franchise fee cap, like the City's license fee, permits that rent to be based on value, not "burden."[11]

VII. CONCLUSION

The fee for a license to use the rights-of-way to provide broadband services is a "fee for a specific privilege" and not, therefore, a "tax" as defined by the ITFA. Moreover, because the Cable TV Franchise Ordinance authorizes (and requires) only cable television services, a license under the Telecommunications Ordinance grants a privilege that Comcast does not otherwise enjoy. The ITFA does not bar the City's imposition of the license fee on Comcast.

Because the license fee is not a franchise fee under Section 542 of the Cable Act, Section 542(b) does not prohibit the City from exercising its home rule authority to obtain compensation for the use of the rights-of-way for data

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[11] The Cable Act's abandonment of the FCC's 1972 regulatory scheme, and its subsequent clear classification of the fee as rent, also reveals the error of the Illinois court in *Chicago v. Comcast*, upon which Comcast relies. The Illinois court quoted the FCC's 1972 Order expressing concern that "[t]he ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers." 900 NE 2d at 259 (quoting 36 FCC 2d 143). The Illinois court then stated that the Cable Act "codif[ied] the FCC's regulatory scheme[.]" 900 NE 2d at 259. As noted above, that is flatly incorrect. In the 1984 Cable Act, Congress rescinded the FCC scheme and made clear that the fee was value-based rent, not burden-based cost reimbursement.

transmission services other than cable television through the Telecommunications Ordinance license fee.

Respectfully submitted this 6th day of May, 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 12,089 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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CERTIFICATE OF FILING AND SERVICE

I certify that on May 6, 2015, I caused to be electronically filed the foregoing **BRIEF ON THE MERITS OF RESPONDENT ON REVIEW CITY OF EUGENE , APPENDIX AND EXCERPT OF RECORD** with the Appellate Court Administrator by using the eFiling system.

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