IN THE SUPREME COURT OF THE STATE OF OREGON

CITY OF EUGENE, an Oregon municipal corporation

Plaintiff-Appellant,
Respondent on Review,

v.

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

Defendant-Respondent,
Petitioner on Review

Lane County Circuit Court
No.160803280

Court of Appeals
A147114

S062816

PETITIONER ON REVIEW'S BRIEF ON THE MERITS

On review of the decision of the Court of Appeal
on appeal from the Judgment entered on October 21, 2010
Lane County Circuit Court,
Honorable Karsten H. Rasmussen

Opinion filed May 21, 2014
Reversing the trial court in part and remanding
Before Duncan, Presiding Judge, Wollheim, Judge, and Schuman, Senior Judge
Author of opinion: Schuman, Senior Judge

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March 2015

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NATURE OF PROCEEDING

This tax case arises out of a 2008 action that the City of Eugene ("City") filed against Comcast of Oregon II, Inc. ("Comcast"), seeking to assess taxes—dating back to 1999—on the revenues Comcast earned from providing cable modem service in the City. On cross motions for summary judgment, the Lane County Circuit Court (Karsten H. Rasmussen, J.) entered an Opinion and Order on June 16, 2009, and an Amended Opinion and Order on August 7, 2009. On August 25, 2010, the trial court modified several of its rulings on summary judgment in an Opinion and Order on reconsideration. In that Opinion and Order, the trial court awarded judgment in favor of Comcast on all of the City's claims, dismissed the Amended Complaint, and awarded Comcast costs. On October 21, 2010, the trial court entered its Judgment. On May 21, 2014, on cross-assignments of error, the Court of Appeals filed a decision. The Court of Appeals affirmed in part the trial court's Opinion and Order, and reversed and remanded in part. *City of Eugene v. Comcast of Oregon II, Inc.*, 263 Or App 116, 333 P3d 1051 (2014).

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

A. First Question Presented on Review

Where an Internet Service Provider ("ISP") has a preexisting contractual right to occupy public rights-of-way, does an ordinance requiring the ISP to pay a "license fee" for use of the same rights-of-way it already enjoys confer a "privilege, service, or benefit" on the ISP thereby avoiding the Internet Tax

Freedom Act's prohibition on taxation of Internet access service?

B. First Proposed Rule of Law

Where an ISP has a preexisting contractual right to occupy public rights-of-way, an ordinance requiring the ISP to pay a "license fee" for use of the same rights-of-way that the ISP already enjoys "confer[s]" no "privilege, service, or benefit" on the ISP and, therefore, is barred by the Internet Tax Freedom Act's prohibition on taxation of Internet access service.

C. Second Question Presented on Review

If a cable operator is already paying the maximum five percent franchise fee pursuant to a franchise agreement, does 47 USC § 542(b) bar a municipality from imposing an additional fee on the cable operator, such as the City's seven percent "license fee" here?

D. Second Proposed Rule of Law

Section 542(b) of the federal Cable Communications & Policy Act of 1984, as amended ("Cable Act"), prohibits states and municipalities from charging "franchise fees" in excess of five percent of a cable operator's "cable service" (*i.e.*, cable television service) revenues. If a cable operator is already paying the maximum five percent franchise fee on its cable service revenues pursuant to a franchise agreement, section 542(b) bars a municipality from imposing an additional fee on any of the cable operator's revenues derived from cable modem services.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. In 1991, Eugene Grants a Franchise for Comcast's Cable Communications System.

In May 1991, the City of Eugene adopted an ordinance that granted Comcast's predecessor in interest, TCI, a franchise to develop, install and operate a "cable communication system" in the City's right-of-ways. ER 29 (Fact 16).[1] The franchise agreement ("Franchise") specifically grants TCI a franchise "to install, construct, *operate, maintain, reconstruct, and expand* a cable communications system within the public streets, ways, alleys, public utility easements, and places of the City of Eugene." SER 7 (emphasis added). The Franchise broadly defines "cable communications service" as "a system of antennas, cable, amplifiers, towers, microwave links, waveguides, laser beams, earth stations, or any other conductors, converters, equipment, or facilities, designed and constructed for the purpose of producing, receiving, amplifying, storing, processing, or distributing audio, video, digital, or other forms of electronic or electrical signals." *Id.*

Following TCI's 1998 merger with AT&T, those franchise rights were

[1] Unless otherwise noted, citations are to portions of the Excerpts of Record filed in the Court of Appeals ("ER__") containing the Parties' Combined Proposed Findings of Fact, to which the parties stipulated and which the trial court expressly adopted in its Opinion and Order on reconsideration. *See* ER 62-83 (Opinion and Order, filed August 25, 2010). Those findings of fact were undisturbed by the Court of Appeals.

first transferred to AT&T Broadband and then to Comcast in 2002. ER 29 (Facts 17-18). Under the Franchise, Comcast and its predecessors (collectively, "Comcast") paid the City a five percent fee on revenues derived from providing cable television services in the City. ER 29 (Fact 20). The 1991 franchise had an initial expiration date of July 1, 2008, but, pursuant to an ordinance adopted in October 2007, the City extended the franchise until 2018. ER 29 (Fact 19). The renewal did not alter in any way the same broad definition of "cable communications service" set forth in the original 1991 franchise and grants the same rights to "operate, maintain, reconstruct, and expand a cable communications system within the public streets, ways, alleys, public utility easements, and places of the City of Eugene." Decl. of Pam Berrian in Supp. of City's Mot. for S.J. ("Berrian Decl."), ¶ 20 & Ex. 25 (Ordinance 20397).

2. In 1997, the City Passes its Telecommunications Ordinance.

In April 1997, the City adopted Ordinance 20083 (the "Telecommunications Ordinance" or "Ordinance"), effective July 1, 1997. ER 26 (Fact 3). The Telecommunications Ordinance imposes two fees on entities that either provide "telecommunications services" (as that term is defined in the Ordinance) over a "communications facility" or that manage and operate such a facility. *See* Eugene City Code ("ECC") §§ 3.005, 3.405, 3.410, 3.415. First, any "operator" that installs its communications facilities in a city right-of-way must pay the city a license fee in the amount of seven percent of gross revenues

derived from providing telecommunications service in the city ("License Fee"). ECC §§ 3.410, 3.415(2). Second, any person who provides telecommunications services using a communications facility located in the city must register and pay an annual registration fee in the amount of two percent of its gross revenues derived from the provision of telecommunications services within the city's public rights-of-way ("Registration Fee"). ECC §§ 3.405, 3.415(1). As explained below, only the License Fee remains a live issue on this appeal, as the Court of Appeals ruled that the Registration Fee is preempted by the Internet Tax Freedom Act, 47 USC § 151, Note, § 1100, *et seq.* ("ITFA")—a ruling the City has not appealed.

3. The City Did Not Collect, or Attempt to Collect, the License Fee From Any ISPs Before October 1998.

The City has stated that, "[u]pon passage of the Ordinance in 1997, [it] immediately commenced working with all persons known by it to be subject to the Ordinance, engaging in a focused educational campaign to register all persons subject to its terms." Plaintiff City's Brief in Support of Mot. for S.J. ("City's S.J. Br.") at 18 (citing Berrian Decl. ¶ 5). Two Eugene officials were instrumental in administering the Telecommunications Ordinance: Randy Kolb, who was heavily involved in drafting the Ordinance, and Pam Berrian, who was responsible for its enforcement. ER 63; ER 28-29 (Facts 14-15).

Before October 1998, the "Yellow Pages" listed many ISPs—including, for example, US West Interprise America—that provided Internet access in the

City of Eugene. ER 81-82. As the trial court found in the proceedings below, however, "[t]he City did not collect, or even attempt to collect registration or license fees for charges for Internet access service" from any of these providers before October 1998. ER 82. As the City admitted, and as the trial court found, the City did not collect the License Fee from a single ISP before October 1998. ER 38 (Fact 66); ER 67.

As of October 1, 1998, Metricom was the only ISP located in Eugene from which the City received *any* revenues under the Telecommunications Ordinance. *See* ER 82. But the small amount the City collected—a total of $39.56 throughout a nine-month period—represented *only Registration Fees*. ER 35, 38 (Facts 46, 66). Metricom paid no License Fees. *Id.* And, even as to the amount collected, the trial court found that "there is insufficient evidence to show that any fee collected was for * * * Internet access service" (ER 80)—as opposed to some other service that Metricom provided.

4. Following Passage of the Internet Tax Freedom Act, the City Continued to Maintain that No License Fee Was Due on Internet Access.

Congress passed ITFA on October 21, 1998. Pub L 105-277, 112 Stat 2681-719 (1998). The statute's purpose was to "foster the growth of electronic commerce and the Internet by facilitating the development of a fair and consistent Internet tax policy." S Rep No 105-184, 105th Cong, 2d Sess (1998), 1. In particular, Congress was concerned that "[t]he benefits to be gained by

the surge in electronic commerce could be stifled * * * by the haphazard imposition of multiple and confusing State and local taxes." *Id.* at 2. To avoid a patchwork of potentially conflicting and burdensome state and local taxation that could stymie the growth of the Internet, ITFA prohibits state or local taxing authorities from imposing any "tax on Internet access," unless the tax was "generally imposed and actually enforced prior to October 1, 1998." ITFA § 1101(a).

In the wake of ITFA's passage, the City issued a February 1999 report by Mr. Kolb and Ms. Berrian, noting that "Internet taxation" has been capturing attention on several fronts, but "[t]hat issue will not be discussed here since Ordinance 20083 (the Telecommunications Ordinance) is not inclusive of Internet activities." ER 64; *see also City of Eugene v. Comcast of Oregon II, Inc.*, 263 Or App 116, 122, 333 P3d 1051 (2014) ("*City of Eugene v. Comcast*").

Electric Lightwave, Inc. ("ELI") began providing Internet access and other communications services in Eugene sometime after October 1, 1998. ER 66; ER 35 (Fact 52). The Director of Tax of a company (Integra) that acquired ELI testified that, when Integra took over ELI in 2006, ELI was not collecting the Licensee Fee (or, for that matter, the Registration Fee) on revenues from its Internet access service. ER 66; ER 53 (Fact 135). He also testified that, at least since 2006, ELI has not paid any Licensee Fee (or Registration Fee) on Internet

access revenues. ER 67; ER 54 (Fact 137).

Although City officials Mr. Kolb and Ms. Berrian testified that they informed ELI that ELI would be subject to the Ordinance for its Internet access service, the trial court rejected their testimony as unpersuasive—instead finding the testimony of Integra's Tax Director more "credible." ER 81. The City did not appeal that factual finding to the Court of Appeals, which noted in its opinion that "Comcast proved shortcomings in the city's collection of the license fee as to * * * two providers, Qwest Corporation and ELI." *City of Eugene v. Comcast*, 263 Or App at 146.

5. Comcast Provides Cable Modem Service Under the Franchise Using the Same Cable Infrastructure Used to Provide Cable Television Service.

In October 1999, Comcast began providing cable modem service to customers in Eugene. ER 63; ER 29 (Fact 20). Comcast's cable modem service is a form of high-speed (or "broadband") Internet access service that (a) uses cable modems and (b) is delivered to customers via the same cable infrastructure system that Comcast uses to provide customers with "cable services" (*i.e.*, cable television). ER 69; ER 46 (Fact 98); *see also* City's S.J. Br. at 1 ("This case addresses the City's power to tax revenues from providing access to the Internet to Eugene customers through signals transmitted over cables in the City's right-of-way that *are also used* to transmit cable television signals.") (emphasis added)). In order to provide Internet access using cable

modems, Comcast "did not need to make any changes to any facilities it had in the City's right of way." ER 69; ER 46 (Fact 100). Thus, the City incurs no incremental cost when Comcast uses the same rights-of-way to provide cable modem service over the same infrastructure that it uses to provide cable television service.

Given the broad definition of "cable communications system"—the system that the Franchise authorizes Comcast to "install, operate, maintain, reconstruct, and expand" in Eugene's rights-of-way, *see* SER 7 & p. 3, *supra*—the trial court found that "[t]he authorization language of the Franchise is broad enough to include cable modem service." ER 16.

Consistent with that understanding, the City told Comcast's predecessor in January 2001 that the Franchise "represents the only authority [it] has to use the public right-of-way in Eugene to provide cable modem services" and that the Franchise "permits [Comcast] to use its facilities to provide other types of communications services, which [Comcast] has specifically claimed include cable modem services." Berrian Decl., Ex. 20 (letter of January 2, 2001 from Jim Johnson, City Manager, to Sanford Inouye, AT&T Broadband). Prior to this lawsuit, the City repeatedly demanded payment *under the Franchise* for revenues earned from cable modem service. *See id.*; Decl. of Timothy R. Volpert in Supp. of Mot. for S.J., Ex. 12 (letter of April 12, 2002 from Pam Berrian, Franchise Manager, to Sanford Inouye, AT&T Broadband). Eugene

official Randy Kolb testified at trial that, in enacting the Telecommunications Ordinance, it was the City's intention to not tax the same infrastructure twice. ER 64; ER 32 (Fact 30). The City's actions are consistent with the fact that the Franchise authorized Comcast to provide cable modem service.

From the time Comcast began providing cable modem service in Eugene in 1999 through March 2002 (when the Federal Communications Commission issued a major ruling addressing franchise fees, described below), Comcast also paid five percent on revenues derived from providing cable modem services in the City pursuant to the Franchise. ER 29 (Fact 20). It is undisputed that the City accepted those payments. *See* Berrian Decl. ¶ 21 & Ex. 28 at 4 (noting Comcast's payments for cable modem service from the fourth quarter of 1999 to the first quarter of 2002).

The impetus for Comcast's decision to stop paying the five percent fees under the Franchise *for cable modem service* was a declaratory ruling that the FCC issued in 2002. *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798 (2002) ("*Declaratory Ruling*"), *aff'd, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 US 967, 125 S Ct 2688, 162 L Ed 820 (2005). In the *Declaratory Ruling*, the FCC tentatively concluded that a cable operator providing cable modem service under an existing franchise is entitled to continue to use the franchise to provide cable modem service, without paying

franchise fees on cable modem service and without obtaining an additional franchise. 17 FCC Rcd at 4850-51, ¶¶ 102, 105. (As discussed below, the FCC has recently reaffirmed that ruling. *See* p. 42, *infra.*)

In March 2002, Comcast informed the City that it would stop paying the five percent fees on its revenues from cable modem service in light of the FCC's *Declaratory Ruling*, ER 30 (Fact 24), and Comcast accordingly discontinued those payments, *id.* The City objected (*see id.*; *see also* Decl. of Timothy R. Volpert in Supp. of Def. Mot. for S.J. ("Volpert Decl."), Ex. 12)—making clear that the City continued to view the Franchise as authorizing the provision of cable modem service, for which the City continued to seek payment from Comcast.

B. PROCEDURAL HISTORY

1. In 2008, the City Sues Comcast for License and Registration Fees Allegedly Due Under the Telecommunications Ordinance.

In 2008, the City filed this action against Comcast, seeking payments assessed on cable modem service revenues dating back to 1999. ER 1-9 (Amended Cplt.).

Despite repeatedly taking the position—both before and after the FCC's 2002 *Declaratory Ruling*—that Comcast owed a five percent assessment on cable modem revenues *pursuant to the Franchise*, the City's 2008 lawsuit was predicated solely on the theory that License and Registration fees were due under Eugene's Telecommunications Ordinance. *See* ER 3-8 (Amended Cplt.).

The City's Amended Complaint does not assert any claim for payment under the Franchise. *Id.* This was the first time that the City had ever demanded that Comcast pay fees on cable modem services *under the Ordinance,* as opposed to under the Franchise. Declaration of Robert Schroeter in Support of Def's Reply to Pl's Opp. to Pl's Mot. for S.J. ¶ 9.

Up to the time it filed this lawsuit against Comcast, the City never attempted any enforcement action against any ISP in Eugene. As the trial court found, the City here "attempt[ed] to exact a fee only from Comcast and not from similarly-situated providers of Internet access service within its class." ER 82-83.

2. On Cross-Motions for Summary Judgment, the Trial Court Issues its August 2009 Amended Opinion and Order.

The parties filed cross-motions for summary judgment raising various issues, including: (1) whether cable modem services are "telecommunications services" within the meaning of the Telecommunications Ordinance; (2) whether the License Fee and Registration Fee are barred by ITFA; (3) whether the License Fee and Registration Fee are barred by the federal Cable Act (47 USC § 542(b)); (4) whether the Franchise agreement bars the City's claims under the Telecommunications Ordinance; and (5) whether the City's enforcement of the Ordinance involves unconstitutional discrimination.

Ruling against Comcast on most of these issues, the trial court set two issues for trial: (1) whether the City "generally collected" the Registration Fee

before October 1, 1998, thereby enabling the City to rely on a grandfathering exception to ITFA's ban on taxing Internet access; and (2) whether the City, in enforcing the Ordinance against Comcast but not other ISPs, engaged in unconstitutional discrimination. *See* Amended Opinion & Order filed Aug. 7, 2009 (excerpts of which are included at ER 15-19).

3. The Trial Court Issues its August 2010 Opinion and Order on Reconsideration.

Following trial, the court partially granted Comcast's motion for reconsideration. Based on expert testimony introduced regarding the meaning of terms used in the Telecommunications Ordinance, the trial court reconsidered its earlier ruling and concluded that Comcast's cable modem service is not a "telecommunications service" within the meaning of the Ordinance. ER 74-77.

Although that determination was dispositive, in order to avoid a potential remand following appeal, the trial court also addressed several other issues, including those before this Court. As relevant here, the trial court adhered to its earlier ruling that the License Fee was not barred by ITFA. Without addressing Comcast's argument that it already enjoyed the privilege to use Eugene's rights-of-way to provide cable modem service pursuant to its Franchise, the trial court reasoned that the License Fee was "a fee imposed for a specific privilege, service, or benefit conferred" and, therefore, was not a "tax" on Internet access that is prohibited by ITFA. ER 78. The trial court also adhered to its prior

conclusion that the License Fee is not preempted by the Cable Act, 47 USC § 542(b). *Id.*

Ruling in favor of Comcast, however, the trial court held that (1) the Registration Fee is barred by ITFA both because it is a "discriminatory tax" and because it is a tax on Internet access; and (2) the City's enforcement of the Ordinance was unconstitutionally discriminatory. ER 78, 82-83. As to the latter, the trial court held that the City's enforcement of the License and Registration fees violated the Oregon and federal Constitutions because "it attempts to exact a fee only from Comcast and not from similarly-situated providers of Internet access service within its class." ER 82-83. The trial court further determined that "the City has not collected the registration or license fees on Internet access revenues of other providers that are subject to the Ordinance under the City's interpretation." ER 83.

4. In a May 2014, Opinion, the Court of Appeals Affirms in Part and Reverses in Part.

The Court of Appeals affirmed in part and reversed in part. With respect to the License Fee, the court agreed with the trial court that ITFA posed no obstacle because the fee is "imposed for a specific benefit"—*i.e.*, "'compensation for use of right[s]-of-way'"—and therefore is not a "tax" under ITFA. *City of Eugene v. Comcast*, 263 Or App at 142 (citation omitted). In adopting the trial court's reasoning "without further discussion," *id.*, the Court of Appeals—like the trial court—did not address Comcast's argument that the

Franchise already granted Comcast the "specific privilege" that the license regime supposedly conferred.

In a footnote at the end of its opinion, the Court of Appeals "reject[ed] * * * without discussion" Comcast's additional and independent argument that the License Fee is barred by the federal Cable Act (47 USC § 542(b)) as an impermissible "franchise fee" on cable modem service revenues. *Id.* at 148 n 16.

The Court of Appeals made several further rulings. In a ruling that the City has not appealed, the Court of Appeals agreed with the trial court that the Registration Fee is barred by ITFA as "a tax on Internet access that was not generally imposed and actually enforced prior to October 1, 1998." *Id.* at 143-45. The Court of Appeals rejected the City's argument that the City had "'interpreted and applied' its tax to Internet access services." *Id.* at 144. "In fact," the Court of Appeals observed, "the city repeatedly said the opposite: that the ordinance did not apply to Internet access services." *Id.* (citing statements by city officials, including Mr. Kolb). Nevertheless, the Court of Appeals held—contrary to the trial court's conclusion on reconsideration—that Comcast's cable modem service is a "telecommunications service" under the Telecommunications Ordinance, an issue to which the court devoted the majority of its opinion. *See id.* at 127-41.

Without rejecting any of the factual findings underpinning the trial

court's constitutional ruling—and acknowledging that "Comcast proved shortcomings in the city's collection of the license fee as to * * * two providers, Qwest Corporation and ELI," *id.* at 146—the Court of Appeals overturned the finding of unconstitutional discrimination, reasoning that there was insufficient evidence to meet the constitutional requirement of "an intentional and systematic pattern of discrimination." *Id.* at 147-48 (citation omitted).

SUMMARY OF ARGUMENT

This case involves the City of Eugene's attempt to exact a payment from Comcast for a right Comcast already possesses and pays for at the maximum amount allowed under federal law—namely, the right to use the public rights-of-way to provide cable modem service. This double-taxation is prohibited by federal law pursuant to both the Internet Tax Freedom Act and the Cable Act (47 USC § 542(b)).

Each statute independently preempts the City's application of its License fee in this case.

I. As the statutory text and purpose of ITFA make clear, the City's assessment of its License Fee is barred as a "tax on Internet access." The Court of Appeals erred in holding that the License Fee is instead a "fee imposed for a

specific privilege, service, or benefit conferred," ITFA § 1104(8)(A)(i),[2] and is, therefore, beyond ITFA's reach.

As a matter of ordinary English and common sense, where an ISP already enjoys a "preexisting contractual right to occupy public rights of way" (Order Allowing Review at 1), payment of a "license fee" in exchange for a supposed privilege to enjoy the *same* rights-of-way "confers" nothing—much less any "privilege" or "benefit."

That precisely describes this case. In reasoning that the City's License Fee does not operate as a "tax" under ITFA, the decisions below rested on the misconception that payment of the License Fee would confer a "privilege"—the entitlement to use the City's rights-of-way to provide cable modem service. But the Court of Appeals and trial court overlooked that Comcast *already* possesses that privilege under its Franchise. In a ruling undisturbed on appeal, the trial court squarely held that Comcast's franchise agreement authorizes Comcast to use the City's rights-of-way to provide cable modem service over the *same cable infrastructure* that it has used for years to provide television service.

Furthermore, as the FCC clarified in its 2002 *Declaratory Ruling*, and recently reaffirmed, franchising authorities may not require additional

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[2] Unless otherwise indicated, citations are to the original version of ITFA enacted in 1998. The Appendix includes copies of ITFA as enacted in 1998 and as of March 24, 2015, along with the text of 47 USC §§ 522 and 542.

franchises or fees when an ISP that already has a cable franchise wishes to provide Internet access. By operation of law, Comcast has the right under its franchise to use the public rights-of-way to provide cable modem service and cannot be subjected to any additional charges for that right.

At least until it filed this lawsuit in 2008, the City itself conceded that the franchise agreement represented the *only* authority for Comcast to use the City's rights-of-way to provide cable modem service. Because the grant of an illusory "privilege" or "benefit" that one already enjoys "confers" nothing, the City's License Fee is not exempt from ITFA as a "fee imposed for a specific privilege, service, or benefit conferred." ITFA § 1104(8)(A)(i).

While ITFA's plain text resolves this case in Comcast's favor, consideration of Congress' purpose in enacting ITFA confirms that the License Fee operates as an unlawful "tax" on Internet access. If the decision below were allowed to stand, ITFA would pose no obstacle to any of the approximately 250 taxing jurisdictions in Oregon—and thousands of others across the nation, if other courts follow the decision below—imposing a welter of burdensome and potentially conflicting taxes on Internet access. But that would invite the very haphazard patchwork of taxation that Congress considered a serious threat to the Internet's growth and specifically sought to prevent when it enacted ITFA. The loophole created by the decision below also threatens the strong federal policy in favor of expanding consumer access to

broadband—a policy Congress has expressly recognized when reauthorizing ITFA—as ISPs, faced with the specter of burdensome taxation, inevitably think twice before making the huge infrastructure investments necessary to deploy state-of-the-art technologies for high-speed Internet access.

II. The City's application of its License Fee is also preempted on the independent ground that it is an impermissible "franchise" fee on cable modem service under the Cable Act, 47 USC § 542(b). "Every jurisdiction that has considered the issue has held that § 542(b) bars governmental units from collecting franchise fees on revenues that cable system operators generate by providing cable modem services." *Comcast Cable of Plano, Inc. v. City of Plano*, 315 SW3d 673, 679 (Tex Ct App 2010).

The Cable Act broadly defines "franchise fees"—which are limited to five percent of a cable operator's revenues from *cable services* (*i.e.*, cable television service)—to include "*any tax, fee, or assessment of any kind* imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 USC § 542(g)(1) (emphasis added). The City has never disputed that its seven percent License Fee is a "fee or assessment of any kind"; that the City of Eugene is a "franchising authority or other governmental entity"; and that Comcast is a "cable operator."

Moreover, the City has imposed the License Fee on Comcast "solely

because of [Comcast's] status as [a cable operator]." *Id.* The term "cable operator" includes any company that "is responsible for * * * the management and operation of * * * a cable system." 47 USC § 522(5). Here, the obligation to pay the License Fee is triggered by Comcast's actions in managing and operating a cable system, the same cable system it uses to provide both cable services and cable modem service. As a result, the License Fee applies "solely because of" Comcast's role as a cable operator. And that remains true even if other entities were subject to the License Fee for different reasons (*i.e.*, they provide non-cable-modem "telecommunications services" under the Ordinance using their own facilities), as the City claims is the case. The statute bars a fee or assessment that is imposed "solely because of [a cable operator's] status as such," 47 USC § 542(g)(1). This prohibition does not require that the fee or assessment be "*solely applicable to* cable operators."

In any event, as the trial court found, in a ruling left intact on appeal, "[t]he City attempts to exact a fee *only from Comcast* and not from similarly-situated providers of Internet access service within its class." ER 82-83 (emphasis added). For essentially the same reasons, the License Fee is not saved as a tax, fee, or assessment "of general applicability," 47 USC § 542(g)(2)(A). Even if it were applicable to cable and noncable ISPs, it remains a franchise fee because it is "unduly discriminatory against cable operators," *id.* It is precisely the type of assessment that the Cable Act was

enacted to prohibit—a "discriminatory tax not levied on cable's competitors," S Rep No 98-67, 98th Cong, 1st Sess (1983), 25.

ARGUMENT ON FIRST QUESTION ON REVIEW: APPLICATION OF THE LICENSE FEE IS BARRED BY ITFA

The City's assessment of its "license fee" is barred by ITFA as a "tax on Internet access." Contrary to the decisions below, the seven percent License Fee is a "tax" rather than a "fee imposed for a specific privilege, service, or benefit conferred." 47 USC § 151, Note, ITFA § 1104(8)(A)(i).

Where, as here, an ISP already enjoys a "preexisting contractual right to occupy public rights of way" (Order Allowing Review at 1), nothing—and certainly no "privilege" or "benefit"—is "conferred" by the "license fee" scheme. That conclusion is not only compelled by the statute's plain text, but also its fundamental purpose: to avoid a patchwork of potentially conflicting taxing regimes that threaten to stunt the Internet's growth.

A. ITFA's Plain Text Prohibits Assessment of the License Fee.

Enacted in 1998 with the goal of encouraging the Internet and electronic commerce to flourish, ITFA prohibits state or local taxing authorities from imposing any "tax on Internet access," unless the tax was "generally imposed and actually enforced prior to October 1, 1998." ITFA § 1101(a).[3] As

[3] In the Court of Appeals, the City never argued that the License Fee is grandfathered under ITFA as a tax that was "generally imposed and actually enforced prior to October 1, 1998." ITFA § 1101(a)(1). *See* Plaintiff-Appellant

originally enacted, ITFA provided in relevant part:

> "No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of the enactment of this Act—(1) taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998."

ITFA § 1101(a)(1).

Congress has extended ITFA four times. The moratorium on taxing Internet access has remained in effect throughout this litigation and is not due to sunset until October 1, 2015. Pub L 113-235 § 624, 128 Stat 2130, 2377 (2014). A bill is currently pending that would make ITFA's moratorium permanent. Permanent Internet Tax Freedom Act, H.R. 235, 114th Congress.

1. The City's Application of the License Fee is a "Tax" on "Internet Access."

When interpreting a federal statute, this Court follows "the methodology prescribed by the federal courts. Federal courts generally determine the meaning of a statute by examining its text and structure and, if necessary, its legislative history." *Corp. of the Presiding Bishop v. City of West Linn*, 338 Or

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City of Eugene's Combined Reply and Answering Brief at 50, 54-58 (limiting grandfathering argument to the Registration Fee or "business tax"). That issue is, therefore, not preserved for this Court's review, *see* ORAP 5.45(1); *Strawn v. Farmers Ins. Co. of Oregon*, 350 Or 336, 366-67 & 369 n 23, 258 P3d 1199 (2011), nor was it one of the questions on which this Court granted limited review, *see* ORAP 9.20(2). The City admitted, and the trial court found, that the City did not collect the License Fee from a single ISP before October 1998. ER 38 (Fact 66); ER 67.

453, 463, 111 P3d 1123 (2005) (internal citation omitted).

ITFA defines a "tax" as "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes," except for "a fee imposed for a specific privilege, service, or benefit conferred." ITFA § 1104(8)(A)(i). The sole ITFA-related question on this appeal is whether the City's application of its License Fee in this case is barred as a tax on Internet access or whether the License Fee qualifies as a "fee imposed for a specific privilege, service, or benefit conferred" where, as here, Comcast already enjoys a preexisting contractual right to occupy rights-of-way. *See* Order Allowing Review at 1 ("Where an ISP has a preexisting contractual right to occupy public rights-of-way, does an ordinance requiring the ISP to pay a 'license fee for use of the same rights-of-way it already enjoys confer a 'privilege, service, or benefit' on the ISP thereby avoiding the Internet Tax Freedom Act's prohibition on taxation of Internet access service?").[4]

As a threshold issue, the City did not dispute below that the License Fee would be a "tax" on "Internet access" if the fee is found not to be "imposed for a specific privilege, service, or benefit conferred." *See, e.g.,* Plaintiff-Appellant

[4] The City has never disputed that it has sought to "impose" the License Fee on Comcast within the meaning of ITFA, *see* ITFA § 1101(a)(1), nor has it disputed that Comcast can assert as a defense to this collection action an as-applied claim that federal law preempts the City's attempt to impose the License Fee. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 US 691, 698, 716, 104 S Ct 2694, 81 L Ed 2d 580 (1984) (upholding preemption of state law on an as-applied basis).

City of Eugene's Combined Reply and Answering Brief in Court of Appeals at 21 (contending that the License Fee "is not a 'tax' for purposes of the ITFA" on sole basis that "ITFA excludes from its definition of 'tax' any 'fee imposed for a specific privilege, service, or benefit [conferred].'"). Nor is that surprising. A tax is broadly defined as "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes," subject to the exception discussed below. ITFA § 1104(8)(A)(i).

Here, the License Fee indisputably is a "charge" imposed by a "governmental entity" (the City of Eugene) and is imposed "for the purpose of generating revenues for governmental purposes." *Cf. MCI Commc'ns Servs., Inc. v. City of Eugene*, 359 Fed Appx 692, 695-97 (9th Cir 2009) (City of Eugene's License Fee was a tax under the Tax Injunction Act because revenues derived were "'directed to the municipality's general fund'" (citation omitted)). The City itself has previously argued that its License Fee is a "tax." *AT&T Commc'ns of the Pac. Nw., Inc. v. City of Eugene*, 177 Or App 379, 387 n 3, 35 P3d 1029 (2001) ("The city nevertheless contends that the fee amounts, in substance, to a tax."). For all these reasons, the License Fee runs afoul of ITFA.

The License Fee is also a tax *on "Internet access"* within the meaning of ITFA. As the Court of Appeals correctly found in addressing the Registration Fee—and as the City did not dispute below—the Comcast service to which the

City is attempting to apply its License and Registration fees is "Internet access." *See City of Eugene v. Comcast*, 263 Or App at 145 (Registration Fee is a prohibited "tax *on Internet access*" under ITFA (emphasis added)); *see also* Plaintiff City of Eugene's Mem. in Support of Mot. for S.J. at 1 ("Such Internet access, when provided by cable operators, is often described * * * as 'cable modem service.'"). Comcast's cable modem service "enables users to access content, information, electronic mail, or other services offered over the Internet," ITFA § 1104(5) (1998) (defining Internet access service); *see* ER 46-47, 69, 71; *see also* ITFA § 1105(5) (as amended in 2004) ("Internet access" means any "service that enables users to connect to the Internet to access content, information, or other services offered over the Internet," and includes the sale of "telecommunications"). Comcast's cable modem service, therefore, unquestionably constitutes "Internet access" under ITFA.

Because the License Fee is a "tax on Internet access," the *only* basis on which it could escape ITFA's prohibition is if the License Fee qualifies as a "fee imposed for a specific privilege, service, or benefit conferred." As explained below, it does not.

2. Because Comcast Already Enjoys the Preexisting Contractual Right to Occupy Public Rights-of-Way, the License Fee Does Not "Confer" Any "Privilege" or "Benefit."

In three sentences, the Court of Appeals rejected the ITFA argument before this Court, simply stating:

> "The trial court reasoned that the license fee—that is, the seven-percent fee that must be paid 'as compensation for use of right-of-way,' ECC 3.415(2)—is a fee imposed for a specific benefit and therefore not a 'tax' for purposes of the ITFA. We agree with the trial court's reasoning and reject Comcast's cross-assignment of error on that issue *without further discussion.* The ITFA does not bar the city's license fee, which is a fee imposed in exchange for using the city's right-of-way to provide a telecommunications service."

City of Eugene v. Comcast, 263 Or App at 142 (emphasis added); *see also* ER 78 (trial court ruling that "Comcast is paying the license fee for the privilege of using the City's right-of-way. Thus the License Fee is a fee imposed for a specific privilege, service, or benefit conferred and not a tax under ITFA."). But neither the Court of Appeals nor the trial court even mentioned—let alone came to grips with—Comcast's argument that no benefit or privilege is "conferred" under the license scheme because the City's grant of a franchise to Comcast for installation and operation of a "cable communications system" already conferred the right to use Eugene's rights-of-way to provide cable modem service. *See* Respondent's Brief in Court of Appeals at 52; Def's Reply Regarding Closing Arg. and Mot. for Recon. at 28. This was error.

As reflected in the question on review, Comcast already enjoys the "preexisting contractual right to occupy rights-of-way" that the courts below characterized as the "benefit" or "privilege" that the license supposedly "confers." *See* p. 23, *supra* (quoting Order Allowing Review at 1).

This framing of the first issue on appeal is consistent with the trial court's finding in this case—undisturbed by the Court of Appeals—that Comcast's Franchise granted Comcast the right to use public rights-of-way not only in providing cable services, but also in providing the cable modem service at issue. *See* ER 16 ("[t]he authorization language of the Franchise is broad enough to include cable modem service."). As the trial court explained, "the Franchise permits construction of a cable communications system," which is broadly defined to include "'a system of * * * cable * * * or any other * * * equipment, or facilities, designed and constructed for the purpose of producing, receiving, amplifying, storing, processing or distributing audio, video, digital, or other forms of electronic or electrical signals.'" ER 16 (quoting Franchise). That same broad definition remains in the 2007 renewal of the franchise, which continues in effect until 2018. ER 63; Berrian Decl. ¶ 20 & Ex. 25 (Ordinance 20397). Thus, "[e]ven if cable modem service was not explicitly contemplated when the Franchise was enacted, the Franchise was intended to authorize a broad range of activities, including cable modem service." ER 16. *Cf. Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 294-99, 332, 337 P3d 768 (2014) (interpreting statutory amendments adopted in 1973 as covering Internet access, even though the amendments were adopted before Internet access even existed). The City itself has previously conceded that the Franchise "represents the *only* authority [Comcast's predecessor] has to use the public right-of-way in Eugene

to provide *cable modem service*." Berrian Decl., Ex 20 (letter of January 2, 2001 from Jim Johnson, City Manager, to Sanford Inouye, AT&T Broadband) (emphasis added).

This broad authorization is, in any event, required by operation of law. The Cable Act provides that "[a]ny franchise *shall be construed* to authorize the construction of a *cable system*"—without limitation of the particular services to be provided—"over public rights-of-way." 47 USC § 541(a)(2) (emphasis added). In other words, a cable system remains a cable system even if it is used to provide non-cable services in addition to cable services. As explained in the legislative history, "cable operators are permitted under the provisions of [the Cable Act] to provide any mixture of cable and non-cable service they choose," and "[a] facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services *other than cable service*." HR Rep No 98-934, 98th Cong, 2d Sess (1984), 44 (emphasis added); *see also Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd 7099, 7104, ¶ 24 (1991) ("the House report accompanying the Cable Act clearly defeats [the] claim that a cable operator's facilities cease being a 'cable system' merely because they carry non-cable communications services in addition to video entertainment"), *aff'd, Texas Utils. Elec. Co. v. FCC*, 997 F2d 925 (DC Cir 1993); p. 41, *infra* (discussing the FCC's 2002 *Declaratory Ruling* and recent

reaffirmation of rule that franchising authorities may not require additional franchises or fees when an ISP that already has a cable franchise wishes to provide Internet access).

In light of Comcast's preexisting rights to occupy the rights-of-way, the answer to the question whether an ordinance like Eugene's "confer[s] a 'privilege, service, or benefit' on the ISP thereby avoiding the Internet Tax Freedom Act's prohibition on taxation of Internet access service" (Order Allowing Review at 1) is an unequivocal "no."

By its terms, ITFA excludes from the definition of a "tax" any "fee imposed for a specific privilege, service, or benefit *conferred*." ITFA § 1104(8)(A)(i) (emphasis added). As a matter of ordinary English, nothing—much less any "privilege" or "benefit"—is "conferred" if the supposed recipient of the privilege or benefit already enjoys it. *See, e.g.,* Webster's Third New Int'l Dictionary 475 (unabridged ed 2002) (defining "confer" as "to grant or bestow"); *Personal Indus. Bankers v. Citizens Budget Co. of Dayton, Ohio*, 80 F2d 327, 328 (6th Cir 1935) (accepting "dictionary meaning of the word 'conferred' in its context as equivalent to 'bestowed' or 'granted'").

Reflecting this common-sense conclusion, one court, for example, explained that a treaty "could not confer a new right unless it conferred something *in addition to what the [right-holders] already possessed*." *Cal. & Or. Land Co. v. Rankin*, 87 F 532, 533 (CCD Or 1898) (emphasis added). The

Court of Appeals and trial court decisions in this case rested on the flawed premise that the License Fee regime conferred a privilege or benefit—the right to use the City's rights-of-way to provide cable modem service. *City of Eugene v. Comcast*, 263 Or App at 142; ER 78. But, as the discussion above shows, Comcast already possessed that right under its Franchise and the License Fee (for which Comcast would be required to pay a seven percent assessment) does *not* confer any privilege to use the right-of-way beyond the privilege Comcast already possessed.

Likewise, the License Fee regime confers no "privilege" or "benefit." ITFA § 1104(8)(A)(i).[5] *See* Black's Law Dictionary 158 (6th ed 1990) ("benefit" means "[t]he receiving as the exchange for promise some performance or forbearance *which promisor was not previously entitled to receive*") (emphasis added); *id.* at 1197 (defining "privilege" as "[a] particular and peculiar benefit or advantage"); *see also Shelley v. Portland Tug & Barge Co.*, 158 Or 377, 388, 76 P2d 477 (1938) ("'[b]enefit' * * * means that the promisor has, in return for his promise, acquired some legal *right to which he would not otherwise have been entitled*") (emphasis added; citation omitted).

This point is illustrated by cases addressing the distinction between "fees" and "taxes" in other contexts. In *City of Shawnee v. AT&T Corp.*, 910 F

[5] Clearly, the License Fee regime does not confer any "service" on Comcast, *see* ITFA § 1104(8)(A)(i), nor did either of the courts below—or the City, for that matter—suggest otherwise.

Supp 1546 (D Kan 1995), for example, the court examined two municipal ordinances that granted AT&T the right to install and operate fiber optic cables in public rights-of-way in order to operate its long distance telephone network. As in this case, however, AT&T already had the right to do so. *See id.* at 1555. In concluding that the ordinances "exact[ed] a tax rather than a user fee," the court—echoing almost word-for-word the definition of "fee" under ITFA—reasoned:

> "'[A] fee is paid in exchange for a *special service, benefit, or privilege not automatically conferred upon the general public*.' * * *
>
> "Although some characteristics of the tolls imposed by the ordinances are consistent with a fee, closer examination indicates that the tolls are, in reality, a tax. The ordinances state that, in exchange for compensation, AT&T has the right and privilege to construct, use and maintain cables in public right-of-ways. *As stated previously, however, the state legislature already granted AT&T this right.*"

Id. at 1556-57 (citation omitted; emphasis added); *see also United States v. River Coal Co., Inc.*, 748 F2d 1103, 1106 (6th Cir 1984) ("reclamation fee" for mining operations was a "tax" under bankruptcy law provisions, since it was "imposed as an additional charge on operators who have already received [mining] permits" and therefore "d[id] not confer a benefit on the operator").

So, too, here. Because the municipal legislature (the Eugene City Council) in its Franchise "already granted" Comcast the "right" purportedly conferred by the License Fee scheme, no "privilege" or "benefit" was

conferred—and the License Fee operates as a tax rather than a fee.

In sum, the License Fee regime cannot "confer" a "privilege" or "benefit" that already exists pursuant to a contract or franchise agreement. The very term "license fee" is a misnomer in this case. *See, e.g., Reser v. Umatilla Cnty.*, 48 Or 326, 329, 330 (1906) (noting that "'[t]he object of a license * * * is to confer a right that does not exist without a license,'" and reasoning that the charge at issue "cannot be said to be [for] a license" unless its payment "confers some right or privilege upon such owners *which otherwise would not exist*") (emphasis added; citation omitted). Under ITFA's plain language, the answer to the Court's first question is "no."

B. The Decision Below Creates a Loophole That Threatens to Undermine ITFA's Fundamental Purpose.

1. The Decision Below Undermines ITFA's Goal of Preventing Haphazard and Inconsistent Taxation of Internet Access.

Although the statutory text alone resolves this case in Comcast's favor, consideration of ITFA's overarching purpose confirms that the City's assessment of the License Fee is a tax on Internet access barred by ITFA. *See Shaw v. PACC Health Plan, Inc.*, 322 Or 392, 400, 908 P2d 308 (1995) (considering "structure and purpose of the Act" (citation omitted)); *Friends of the Columbia River Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or 366, 377-78, 213 P3d 1164 (2009) (examining context and legislative history).

The legislative history of ITFA reflects that Congress was particularly

concerned that "[t]he benefits to be gained by the surge in electronic commerce"—an engine of economic growth that has only increased since 1998—"could be stifled * * * by the haphazard imposition of multiple and confusing State and local taxes." S Rep No 105-184, 105th Cong, 2d Sess (1998), 2; *see also* S Rep No 105-276, 105th Cong, 2d Sess (1998), 5 ("inconsistent or difficult to administer tax rules could present impediments to development of this sector of the economy."); HR Rep No 105-570 Part 1, 105th Cong, 2d Sess (1998), 7, 11 ("[T]he growth of the Internet, and thus the growth of electronic commerce, should not be hampered by State and local taxation. "). State—as well as federal—officials echoed these concerns. The Governor of Virginia, for example, explained that "[t]he Internet Tax Freedom Act is important to our state economies, to online consumers, and to the future success of electronic commerce." Letter of September 25, 1998 from James S. Gilmore III, Governor of Virginia, to the Hon. John McCain, Chairman, Senate Committee on Commerce, Science and Transportation. 144 Cong Rec S11679 (daily ed Oct. 7, 1998). "With more than 30,000 state and local taxing jurisdictions in the United States, Internet development is in danger of being stifled by a maze of inconsistent, unfair, and burdensome taxing regimes." *Id.*

And as Senator Wyden, a co-sponsor of ITFA, explained:

> "[W]hen you have in the vicinity of 30,000 taxing jurisdictions—and that is the number in our country—you have the prospect of different taxing jurisdictions in States and localities that all see the Internet as the

> golden goose; you have the real prospect that policies could be adopted that would cause great damage to the Internet's development and cause that golden goose to lay far fewer eggs."

144 Cong Rec S11677 (daily ed Oct. 7, 1998). Similarly, the Secretary of the Treasury observed that, in light of the "dramatic growth of the Internet and electronic commerce," "[w]e would not want duplicative, discriminatory or inappropriate taxation by 30,000 different state and local tax jurisdictions to stunt the development of what President Clinton has called 'the most promising new economic opportunity in decades.'" 144 Cong Rec 14,234 (1998) (statement of Lawrence H. Summers). Reflecting the continuing importance of this legislative policy, on a bipartisan basis, Congress has renewed ITFA *four times* since 1998—most recently in December 2014. *See* Pub L 107-75 § 2, 115 Stat 703 (2001) (extending ITFA to November 1, 2003); Pub L No 108–435 § 2, 118 Stat 2615-2618 (2004) (extending ITFA to November 1, 2007); Pub L No 110–108 § 2, 121 Stat 1024-1026 (2007) (extending ITFA to November 1, 2014); Pub L 113-235 § 624, 128 Stat 2130, 2377 (2014) (extending ITFA to October 1, 2015). And the FCC underscored only weeks ago that "the recently reauthorized Internet Tax Freedom Act (ITFA) prohibits States and localities from imposing '[t]axes on Internet access'"—a prohibition that, the FCC made clear, continues to apply "notwithstanding our regulatory classification of broadband Internet access service" under federal law. *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and

Order on Remand, Declaratory Ruling, and Order, 2015 WL 1120110 at *130, ¶ 430 (Mar. 12, 2015) ("*Open Internet Order*") (footnotes omitted).

The Court of Appeals decision, however, invites the very outcome that Congress repeatedly has sought to avoid. It allows the approximately 250 taxing jurisdictions in this state to follow Eugene's example in this case—to attempt to raise revenues on Internet services by characterizing these taxes as "license fees" for a supposed "privilege" or "benefit" that ISPs already enjoy under their franchises. Worse still, each of those taxing authorities can adopt its own regulatory classification and rate of taxation—contrary to Congress's clear intent. *See, e.g.*, HR Rep 105-570 at 7 (noting that "[a]t least twelve States have taken measures to tax Internet-related activities and they do so in an inconsistent and potentially burdensome manner. For example, some States tax Internet access as 'computer and data processing services.' Other States tax Internet access as either a 'telecommunications service' or 'information service.'"). Under the Court of Appeals' ITFA holding, as well as its holding rejecting Comcast's argument for preemption under the Cable Act (*see* Argument on Second Question on Review, *infra*), there is *no check* under federal law on these revenue-raising incentives that threaten the growth of the Internet as an engine of innovation, creativity, and job creation.

Under the logic of the decision below, rather than effecting "a 'time-out' on State and local taxation of the Internet so that such taxation does not become

a burden on interstate and foreign commerce," HR Rep 105-570 at 12, ITFA will pose no obstacle to the patchwork of potentially conflicting taxing regimes that Congress considered a threat to the Internet's growth.

2. The Decision Threatens the Strong Federal Policy in Favor of Promoting Broadband Deployment.

The loophole created by the Court of Appeals' decision not only threatens continued gains in electronic commerce, it also runs counter to Congress's express goal of encouraging the deployment and proliferation of broadband Internet access. Congress was particularly concerned when extending ITFA that "there remains a need to ensure that taxes on Internet access will not pose a hurdle to the continued adoption of basic dial-up access or to the migration from basic internet access to broadband internet access." S Rep No 108-155, 108th Cong, 1st Sess (2003), 2. Commenting on the 2003 legislation, the Secretary of Commerce stated that "[t]he next-generation, broadband Internet offers even greater impact, and this Administration strongly supports the deployment of broadband services. In this regard, government must not slow the roll-out or usage of Internet services by establishing administrative barriers or imposing new access taxes." HR Rep No 108-234, 108th Cong, 1st Sess (2003), 18.

These sentiments align with Congress' expressly stated policy that "[c]ontinued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create

business and job growth." 47 USC § 1301(1). The FCC recently reported that, despite broadband providers' investing "tens of billions of dollars each year to further extend the reach of their networks," approximately 17% of Americans do not have access to broadband Internet, there is a "gaping disparity between urban populations and rural and Tribal populations," and "Americans living in rural areas and on Tribal lands disproportionately lack access to broadband." *Inquiry Concerning the Deployment of Advanced Telecomm. Capability to All Americans in a Reasonable and Timely Fashion*, 2015 Broadband Progress Report and Notice of Inquiry, 2015 WL 477864 at *3, *28, ¶¶ 4, 6, 79 (Feb. 4, 2015). The same report concluded that 37% of rural Oregonians lack access to broadband. *Id.* at Appx. E, *available at*: http://www.fcc.gov/reports/2015-broadband-progress-report.

If the decision below stands, and any jurisdictions can tax Internet access, with no cap on the rate, by claiming the tax is for a preexisting "privilege or benefit," the continued deployment of broadband access will be jeopardized. As a matter of basic economics and common sense, broadband providers will think twice before making the huge infrastructure investments necessary to deploy state-of-the-art technologies for high-speed Internet access if they can be subjected to a welter of burdensome and potentially conflicting tax obligations. *See, e.g., Four Years of Broadband Growth*, White House Office of Science and Technology Policy and the National Economic Council, at 16 (June 2013)

(acknowledging correlation between tax burden and incentives for broadband investment), *available at*: https://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf. A recent congressional committee report recommending that ITFA's ban on taxing Internet access be made permanent notes that "[o]ne should be highly skeptical of the suggestion from States and localities that Internet adoption rates are not affected by taxes." HR Rep No 113-510, 113th Cong, 2d Sess (2014), 6. Moreover, taxes on Internet access are likely to disproportionately impact lower-income Americans. *See* Ron Wyden, *Don't Discourage Use of Internet*, USA TODAY, Nov 27, 2014, http://www.usatoday.com/story/opinion/2014/11/27/internet-tax-freedom-ron-wyden-editorials-debates/19586269/ ("It is clearly in America's interest to prevent regressive Internet taxes that stifle America's winning digital economy and put an unfair burden on working-class families.").

The Court of Appeals' decision stands as an obstacle to the accomplishment of an important federal policy that will benefit consumers across this State. This Court should interpret ITFA consistently with its purpose and close the loophole established by the decision below.

ARGUMENT ON SECOND QUESTION ON REVIEW: EVEN IF THE LICENSE FEE IS NOT A "TAX" BARRED BY ITFA, IT IS AN IMPERMISSIBLE "FRANCHISE FEE" BARRED BY 47 USC § 542

The Court need go no further than concluding that application of the License Fee is barred by ITFA; that is sufficient to resolve this case. But even

if assessment of the License fee were not preempted by ITFA as a "tax on Internet access," it is nevertheless preempted by the Cable Act (47 USC § 542(b)) as an impermissible "franchise fee" on cable modem service revenues. The court below rejected that argument "without discussion." *City of Eugene v. Comcast*, 263 Or App at 148 n 16. This Court should reverse that erroneous holding, which allows the City to do just what section 542(b) sought to prevent: circumvent Congress' prohibition of *any* franchise fees imposed on cable modem services by imposing a discriminatory seven percent "license fee" that the City assesses on Comcast, but not other ISPs.

A. The Cable Act Bars the City from Collecting Franchise Fees on Comcast's Cable Modem Service Revenues.

1. Congress' Policy in Limiting Franchise Fees.

Concerned by "the misuse of franchise fees for revenue-raising purposes because excessive fees effectively created a regressive, indirect tax on subscribers," *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 231 Ill 2d 399, 406, 900 NE 2d 256 (Ill 2008), Congress enacted section 542(b) in the Cable Act of 1984. The Cable Act was designed to "encourage fair competition" and "achieve parity of treatment" among communications providers. S Rep No 98-67, 98th Cong, 1st Sess (1983), 5. And it reflected the concern that, "without a check on [franchise] fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors." *Id.* at 25. With those

concerns in mind, and aware that "many local authorities had extracted high [franchise] fees more for revenue-raising than for regulatory purposes," *id.* at 9-10, Congress capped "franchise fees"—defined broadly—at five percent of a cable operator's gross annual revenues. 47 USC § 542(b).

2. Congress' 1996 Revision to the Cable Act: Franchise Fees May Be Assessed *Only* on Cable Services.

Before 1996, section 542 read: "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.*" Pub L 98-549 § 622, 98 Stat 2779, 2787 (1984). Thus, before 1996, if a cable operator earned revenues from providing non-cable television service, those revenues were subject to franchise fees (up to the five percent limit).

In 1996, with the goal of "encouraging cable operators to employ technological advances and provide new services," *City of Chicago*, 231 Ill 2d at 406, Congress revised section 542 specifically to change that. Congress added four critical words. Section 542(b) now provides:

> "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) (emphasis added). The 1996 amendment "makes clear that

the franchise fee provision is not intended to reach revenues that a cable operator derives [from] providing new telecommunications services over its system, but *only* the operators [sic] cable-related revenues." HR Rep No 104-458, 104th Cong, 2d Sess (1996), 180 (emphasis added).

Thus, under current law, if a cable operator earns revenues from operating its cable system to provide cable modem service (or some other noncable service), those revenues *cannot be* subject to franchise fees at all. Further, Congress' intent in preempting any conflicting state or local law was unequivocal: "any provision of law of any State, political subdivision, or agency thereof, or franchising authority * * * which is inconsistent with this [Act] shall be deemed to be preempted and superseded." 47 USC § 556(c).

3. The FCC's 2002 Cable Modem *Declaratory Ruling.*

In 2002, the FCC issued its *Declaratory Ruling* addressing, among other things, the regulatory classification of cable modem service under federal telecommunications law and the Cable Act's limits on franchise fees. *See* p. 10, *supra*. The FCC, which is the expert federal agency charged with interpreting the Cable Act provisions at issue here, ruled that cable modem service "is an offering of Internet access service" that is an "information service" and *not* a "cable service." *Declaratory Ruling*, 17 FCC Rcd at 4822, ¶ 38. As noted above, the FCC also tentatively concluded that a cable operator providing cable modem service under an existing franchise is entitled to continue to use its

franchise to provide cable modem service, without paying franchise fees on cable modem service, and without obtaining an additional franchise. 17 FCC Rcd at 4850-51, ¶¶ 102, 105.

The FCC reaffirmed this rule in its recent order reclassifying cable modem service (and other forms of broadband Internet access service) as a "telecommunications service" rather than an "information service" under federal law. As the FCC explained, "we do *not* believe that the classification decision * * * would serve as justification for a state or local franchising authority to require a party with a franchise to operate a 'cable system' * * * to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services." *Open Internet Order*, 2015 WL 1120110 at *131, ¶ 433 n 1285 (emphasis added). The FCC further underscored:

> "[I]t would be inappropriate for franchising authorities to require additional franchises, fees, or concessions for the provision of broadband Internet access service by a provider that already has a franchise, either through service regulation or claimed regulation of broadband equipment that *adds no appreciable burden to the rights of way*."

Id. (citation omitted; emphasis added). In short, following reclassification of cable modem and other forms of broadband Internet access service, the rule that no additional franchise is required nor additional fees owed remains in full

force.

4. The City Cannot Collect Franchise Fees on Cable Modem Service Revenues.

Because "cable modem services" are not "cable services" (a fact that remains true in the wake of the FCC's recent reclassification of broadband Internet access service), "[e]very jurisdiction that has considered the issue has held that § 542(b) bars governmental units from collecting franchise fees on revenues that cable system operators generate by providing cable modem services." *Comcast Cable of Plano, Inc. v. City of Plano*, 315 SW3d 673, 679 (Tex Ct App 2010); *see also City of Chicago*, 231 Ill 2d at 411 ("the FCC's ruling means that the franchise fee imposed on cable operators is limited to five percent of their gross cable service revenues, *but may not include gross revenues from cable modem services*." (emphasis added)); *Declaratory Ruling*, 17 FCC Rcd at 4851, ¶ 105 ("[R]evenue from cable modem service would *not be included* in the calculation of gross revenues from which the franchise fee ceiling is determined." (emphasis added)); *City of Chicago v. AT & T Broadband, Inc.*, 2003 WL 22057905, *3 (ND Ill Sept 4, 2003), *vac'd on jurisdictional grounds sub nom. City of Chicago v. Comcast Cable Holdings, L.L.C.*, 384 F3d 901 (7th Cir 2004).

The Court of Appeals' departure from this unbroken line of authority in this case is troubling not only because it runs counter to the statutory text, but also—and more fundamentally—because "inconsistent judicial interpretations

threaten to undo the uniformity Congress sought to achieve in establishing a federal standard for franchise fees." *American Civil Liberties Union v. FCC*, 823 F2d 1554, 1574 (DC Cir 1987). In addition, if the decision below is not reversed, other cities will be tempted to follow Eugene's example and impose fees with no limitation on the amount of the fee, completely eviscerating the congressional intent underlying the Cable Act.

B. The License Fee is a Franchise Fee Prohibited by the Cable Act.

1. "Franchise Fees" are Broadly Defined in Section 542.

As described above, section 542 prohibits municipalities from charging "franchise fees" in excess of five percent revenues from cable service, and revenues from cable modem services cannot be included in that amount. 47 USC § 542(b); *see* pp. 40, *supra*.

"Franchise fees" are broadly defined to include "*any tax, fee, or assessment of any kind* imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 USC § 542(g)(1) (emphasis added). The nomenclature a taxing body uses is not dispositive. Even if the Court concludes that the City's assessment of the License Fee against Comcast is not barred by ITFA as a "tax on Internet access," the License Fee indisputably qualifies as a "fee" or "assessment * * * imposed by a franchising authority or other governmental entity on a cable operator." The City has never disputed—nor

could it—the following essential propositions: (1) the License Fee is a "fee or assessment of any kind"; (2) the City of Eugene is a "franchising authority or other governmental entity"; and (3) Comcast is a "cable operator."

2. The License Fee is Imposed "Solely Because Of" Comcast's Status as a Cable Operator.

The City's assessment of the License Fee also operates as a prohibited franchise fee assessed on cable modem service revenues because it is imposed "solely because of [Comcast's] status as [a cable operator]." 47 USC § 542(g)(1).

a. The "solely because of" clause is not limited to the provision of cable services.

The statute does *not* say "solely because of [its] status as a *provider of cable services*." Instead, it uses the defined term "cable operator," which means anyone who *either* "provides cable [television] service over a cable system" *or* "otherwise * * * is responsible for * * * the management and operation of such a cable system." 47 USC § 522(5).

Given this dual definition of "cable operator," to the extent that the Court of Appeals deemed it fatal to Comcast's argument that the License Fee applied to Comcast "solely because of" its provision of cable modem services and not

cable services,[6] that holding misconstrued the statute. The Texas Court of Appeals in *Comcast Cable of Plano v. City of Plano*, 315 SW3d 673—a decision the court below did not address—comprehensively dissected the flaws in such a statutory construction. The court first noted the City of Plano's argument that the fee in question could not be a prohibited franchise fee because it was imposed "because of [Comcast's] status as a provider of cable-*modem* service, not cable service." *Id.* at 681 (emphasis in original). As the court explained, "the City's argument fails because it does not reckon with the entire statutory definition of 'cable operator.'" *Id.* A company is not only a cable operator when it provides cable service; a company is "also a 'cable operator' if it controls or is responsible for the management and operation of 'such a cable system,' meaning a cable system over which cable service is provided." *Id.* (citing 47 USC § 522(5)(B)). As in this case, the court reasoned:

> "There is no dispute that Comcast provided cable service over its cable system, in addition to cable modem service. Thus, we conclude that Comcast's provision of cable modem service over that system was part of its management and operation of the cable system, and therefore part of its activity as a 'cable operator.' We further conclude * * * that the City is trying to collect the fee on Comcast's cable-modem-service revenues solely because of its status as a cable operator. Accordingly, the fee is a 'franchise fee' that § 542(b) bars the City from collecting."

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[6] Of course, it is impossible to be certain of the court's reasoning, because it rejected Comcast's argument "without discussion." *City of Eugene v. Comcast*, 263 Or App at 148 n 16.

Id.; *see also City of Chicago*, 231 Ill 2d at 412-13 (Illinois Supreme Court's rejection of virtually identical argument as contrary to "the plain language" of the Cable Act).

For the same reasons that the "solely because of" argument failed in the *Plano* and *City of Chicago* cases, it likewise fails here. The City has sought to brush aside these (and other) cases, arguing that they involved attempts to impose impermissible franchise fees "under their cable television franchises" rather than under a municipal ordinance. *See, e.g.,* City's Resp. to Pet. for Review at 13. That is true, but irrelevant in light of the Cable Act's broad definition of a franchise fee—which covers "*any tax, fee, or assessment of any kind* imposed by a franchising authority *or other governmental entity* on a cable operator or cable subscriber, or both, solely because of their status as such." 47 USC § 542(g)(1). Thus, the City cannot escape the conclusion that its License Fee operates as a prohibited franchise fee on the basis that it was imposed pursuant to an ordinance rather than a franchise agreement.

b. The "solely because of" clause does not mean "solely *applicable to* cable operators."

The trial court rejected Comcast's Cable Act argument on the ground that the License Fee, at least in theory, applies to *all* utilities that use the City's right of way and not just cable operators. ER 78 (emphasis added). To the extent that the Court of Appeals' unexplained conclusion rested on the same reasoning, it was wrong.

On its face, the phrase "solely *because* of" simply requires that the fee apply to the cable operator *because* (and *only* because) of its activity *as a cable operator*—which includes managing and operating a cable system. *See* 47 USC § 522(5). That test excludes any fee that applies only *partly* (not *solely*) because Comcast manages and operates a cable system. For example, a payroll tax on all Comcast employees (including some not involved in cable operations) is *not* a franchise fee. But a fee on providing cable modem service (which Comcast only provides via its cable system) *is* a franchise fee.

Here, the obligation to pay the License Fee is triggered by Comcast's actions in managing and operating a cable system; thus, the License Fee applies "solely because of" Comcast's role as a cable operator. 47 USC § 542(g)(1). That conclusion still applies even if other entities were theoretically or actually subject to the License Fee for different reasons (*i.e.*, they provide non-cable modem "telecommunications services" under the Ordinance using their own facilities). The statute's plain text requires that the fee or assessment be imposed "solely because of [a cable operator's] status as such," 47 USC § 542(g)(1)—not that it be "*solely applicable to* cable operators."

This understanding of the text is confirmed by section 542(g)(2)(A), which provides that franchise fees *do not* include a "tax, fee, or assessment of general applicability" (provided that it is not "unduly discriminatory against cable operators."). 47 USC § 542(g)(2)(A). One example of such a generally

applicable fee is a tax "on *both utilities and cable operators*." *Id.* (emphasis added). This strongly suggests that the "solely because of their status as such" clause cannot mean "solely *applicable to* cable operators." If it did, there would have been no need for Congress to include express language in section 542(g)(2)(A) specifying that taxes of general applicability (other than unduly discriminatory ones) are not franchise fees; otherwise, those taxes already would be excluded from the definition of franchise fee under the "solely because of" clause. By contrast, reading the text to simply require that the fee apply to the cable operator *because* (and *only* because) of its activity *as a cable operator* honors the rule of construction that, where possible, every word in the statute should be given meaning. *Williams v. Taylor*, 529 US 362, 404, 120 S Ct 1495, 146 L Ed 389 (2000).

In sum, the "solely because of" test is fully satisfied here.

c. Even if the trial court's reading of the "solely because of" clause were correct, the City's application of the License Fee operates as a prohibited "franchise fee."

Even if the trial court and City were correct in reading the "solely because of" clause as effectively meaning "solely applicable to cable operators," the License Fee—*as actually applied in this case*—functions as a prohibited franchise fee. *See, e.g., City of Chicago*, 231 Ill 2d at 416 (finding preemption under section 542 on as-applied basis in collection action); *City of Plano*, 315 SW3d at 684 (same). Despite the City's claims about the meaning

of the Telecommunications Ordinance and its supposed application to all facilities-based ISPs, the trial court found—and the record confirms—that the City in fact made no serious effort to assess the License Fee on *any* ISPs other than Comcast. As the trial court explained, "[t]he City attempts to exact a fee *only from Comcast* and not from similarly-situated providers of Internet access service within its class. * * * [T]he City has not collected the * * * license fees on Internet access revenues of other providers that are subject to the Ordinance under the City's interpretation." ER 82-83 (emphasis added).[7]

To the extent the City relies on its alleged efforts to collect from providers ELI and Qwest, that argument falls short. The trial court expressly rejected the City's testimony concerning its alleged collection efforts with respect to ELI: "Although Randy Kolb and Pam Berrian testified that they informed ELI that it would be subject to the Ordinance for its Internet access service, this Court is not persuaded by their testimony on this point." ER 81. And the Court of Appeals acknowledged that "Comcast proved shortcomings in the city's collection of the license fee" from both ELI and Qwest. *City of Eugene v. Comcast*, 263 Or App at 146.

As a result, even under the trial court's flawed statutory construction, the

[7] The trial court noted these findings of fact while discussing Comcast's claims of unconstitutional discrimination. Although the Court of Appeals overturned the trial court's *legal conclusion* that the City had engaged in unconstitutional discrimination, its *factual findings* remained undisturbed on appeal.

City surely imposed a fee on "a cable operator" (Comcast) "solely because of [its] status as such." 47 USC § 542(g)(1).

3. The License Fee is Not Saved as a "Tax, Fee, or Assessment of Generally Applicability," and In Any Event, it is "Unduly Discriminatory."

For the same reasons, the License Fee is not saved as a tax, fee, or assessment "of general applicability." 47 USC § 542(g)(2)(A). Because the City made no serious effort to collect the License Fee from any ISPs other than Comcast (*see* pp. 5-6 and 49-50, *supra*), the fee cannot genuinely be of "general applicability."

Even if it were generally applicable, however, the License Fee is "unduly discriminatory." Under section 542, an assessment that otherwise would be a "tax of general applicability"—and, therefore, exempt from the Cable Act's definition of franchise fees—remains a franchise fee if it is "unduly discriminatory against cable operators or cable subscribers." 47 USC § 542(g)(2)(A) (emphasis added).

As established by the stipulated facts and factual findings following a five-day trial, that is precisely the case here: the License Fee was effectively applied *only* to Comcast's cable modem service. *See* pp. 12 and 49-50, *supra*. It necessarily follows that the City has assessed an "unduly discriminatory" fee on cable operators, but not other ISPs—an outcome that subverts the Cable Act's purpose of "encourag[ing] fair competition" and "achiev[ing] parity of

treatment" among communications providers. S Rep No 98-67, 98th Cong, 1st Sess (1983), 5. The City's actions here epitomize the type of local government taxation—imposing "what would amount to a discriminatory tax *not levied on cable's competitors*," *id.* at 25 (emphasis added)—that Congress sought to prohibit in the Cable Act. Given the City's singular and relentless focus on Comcast, the tax has been "unduly discriminatory," as applied in this collection action.

This conclusion is consistent with the meaning given "unduly discriminatory" in *TCI Cablevision of Oregon, Inc. v. City of Eugene*, 177 Or App 433, 438-39, 38 P3d 269 (2001). That case—which involved a pre-enforcement *facial* challenge to Eugene's *Registration Fee*—determined that the Registration Fee was a tax of general applicability because it was imposed "on all providers of telecommunications services, including telecommunications utilities, competitive telecommunications providers, and cable operators." *Id.* at 438; *see also AT&T Commc'ns of the Pacific Northwest, Inc.*, 177 Or App at 400 ("[I]n a facial challenge, 'the question is whether the challenged enactment is valid as written, as opposed to validly applied to a given set of facts'" (citation omitted)). In this collection action involving the City's *License Fee*, by contrast, "[t]he City attempts to exact a fee only from Comcast and *not* from similarly-situated providers of Internet access service within its class." ER 82-83 (emphasis added). Moreover, in *TCI*, the

Court of Appeals concluded that the Registration Fee was not unduly discriminatory because there was a rational basis for imposing it on cable operators (which use the City's rights-of- way) but not satellite and broadcast television companies (which do *not* use the rights-of-way). *See* 177 Or App at 439. Yet there is no similar rational basis for imposing the License Fee on Comcast alone, but not other ISPs that use the City's rights-of-way—especially where Comcast imposes no additional burden on the rights-of-way when it uses them to provide cable modem service over the same infrastructure that it uses to provide cable service. *See* pp. 6-9, *supra*. If the City declines to impose the License Fee on wireless providers of "telecommunications service"—as it has—because the additional burden wireless facilities impose on the rights-of-way is "incidental," it cannot rationally impose the License Fee on Comcast where the additional burden is nonexistent. *See* Volpert Decl., Ex. 3 at 11 (City of Eugene's Year One Status Report on Telecommunications Ordinance 20083, observing that "[w]ireless facilities co-located on existing facilities in the ROW are considered an *incidental* use of the ROW; the seven percent fee does not apply." (emphasis added)).

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the Court of Appeals and remand the case to the trial court for entry of judgment in favor of defendant Comcast on the ground that the License Fee is barred by ITFA and/or the Cable Act (47 USC § 542(b)) and for dismissal, with prejudice, of the Amended Complaint.

Dated this 25th day of March, 2015.

Respectfully submitted,

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

Brief Length

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 13,043 words.

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

Dated: March 25, 2015.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on March 25, 2015, I directed the foregoing **BRIEF ON THE MERITS OF PETITIONER ON REVIEW COMCAST OF OREGON II, INC.**, to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the Court's electronic filing system.

I further certify that, on March 25, 2015, I directed the foregoing **BRIEF ON THE MERITS OF PETITIONER ON REVIEW COMCAST OF OREGON II, INC.**, to be served upon the attorneys listed below, by either using the Court's electronic filing system or by convention email as so indicated:

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