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City of Eugene v. Comcast of Oregon II, Inc.

Court of Appeals of Oregon - May 21, 2014 - P.3d - 2014 WL 2119215

City sued internet service provider (ISP), arguing that city was entitled to collect registration and license fees from ISP for cable modem services under city telecommunications ordinance. The Circuit Court found in favor of ISP. City appealed.

The Court of Appeals held that:

- Cable modem services were subject to fees under ordinance;
- Internet Tax Freedom Act (ITFA) did not bar license fee;
- Even if registration fee was not discriminatory, fee was tax barred by ITFA; and
- City's efforts to enforce license fee did not violate Equal Protection or state constitution.

Internet service provider's (ISP) cable modem service qualified as "transmission for hire" of electronic data within ordinary meaning of those words as used to define telecommunications services under city's telecommunications ordinance, such that ordinance applied to ISP, despite Federal Communications Commission's (FCC) conclusion that such services were not telecommunication services and testimony from ISP's telecommunications expert regarding distinction between transmission services and internet access services. ISP provided its cable modem services in exchange for subscriber fees, FCC based its conclusion on language in federal Telecommunications Act, which was materially different from ordinance, and expert did not offer industry meaning of "transmission for hire."

Federal Internet Tax Freedom Act (ITFA) did not bar city's license fee imposed on internet service provider for its cable modem services under telecommunications ordinance, since license fee was not a tax for purposes of IFTA. Fee was imposed in exchange for using city's right-of-way to provide telecommunications service, and under IFTA, tax was "not a fee imposed for a specific privilege, service, or benefit conferred.

Even if registration fee imposed against internet service provider (ISP) for its cable modem service under city's telecommunication's ordinance was not discriminatory, fee was tax on internet access barred by federal Internet Tax Freedom Act (ITFA). Despite contention that ISP's predecessor had actual notice that fee would apply to cable modem services; city did not make public proclamation that provided notice that it interpreted and applied such a tax to internet access servers, and predecessor's comment that mentioned potential for dual-use technologies did not demonstrate actual notice.

City's efforts to enforce license fee against internet service provider (ISP) for its cable modem service under city's telecommunication ordinance did not violate Equal Protection Clause or state constitutional article governing uniformity of taxation, absent evidence that city's decision to impose license fee amounted to intentional and systematic pattern of discrimination or something akin to fraud.

