

Case No. 02-35473

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

QWEST CORPORATION

Plaintiff-Appellant,

v.

CITY OF PORTLAND

Defendant-Appellee

CITY OF ASHLAND, CITY OF EUGENE, CITY OF HAPPY VALLEY,
CITY OF KEIZER, CITY OF NORTH PLAINS, CITY OF PENDLETON,
CITY OF REDMOND, CITY OF SALEM, and CITY OF SPRINGFIELD
Defendant-Intervenors/Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF OREGON
D.CT. NO. CV-01-01005-JE

BRIEF FOR APPELLEE CITY OF PORTLAND

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Corporate Disclosure Statement

The City of Portland is a governmental party and is not required by FRAP 26.1 to file a corporate disclosure statement.

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JURISDICTIONAL STATEMENT

Appellee City of Portland accepts Appellant's jurisdictional statement.

COUNTER-STATEMENT OF THE ISSUES

1. Did the District Court correctly dismiss Qwest's claims under Section 253(a) where it is undisputed that Qwest is and has been providing telecommunications services in Portland (as well as in the intervening cities), and there is no evidence that the laws Qwest challenged "prohibit" or have the "effect of prohibiting" it from providing any telecommunications service?)

2. Assuming the court finds it necessary to reach the issue, did the District Court correctly determine that the challenged provisions were protected from preemption under the Telecommunications Act of 1996?

COUNTER-STATEMENT OF THE CASE

This case arises under Section 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253, which provides:

Sec. 253 REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [relating to

universal service] of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or 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, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Also critical to this case is Section 601(c) of the Telecommunications Act of 1996, which appears as a note following 47 U.S.C. § 152:

(c) FEDERAL, STATE AND LOCAL LAW.-

(1) NO IMPLIED EFFECT. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION.-
Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

Qwest alleged that certain Oregon statutes and provisions of Portland's Charter and Portland's tax code, and a Temporary Revocable Permit ("TRP") under which Qwest uses public rights-of-way in Portland, violated 47 U.S.C. § 253. Qwest also sought relief under 42 U.S.C. § 1983, claiming a violation of due process, the Commerce Clause and the Telecommunications Act of 1996, QER 5 00010-14.

Qwest moved for summary judgment against Portland. The City opposed and filed a cross-motion for summary judgment because there was no prohibition or effective prohibition to trigger preemption under Section 253(a). The City further argued that the provisions Qwest challenged were protected from preemption by 47 U.S.C. § 253(b) - (c) and by Section 601(c) of the Telecommunications Act.

In the meantime, several Oregon cities were permitted to intervene, and cross-motions for summary judgment were filed by Qwest and the intervenors.

Based upon the record before it, the District Court agreed with the cities that, as a factual matter, there had been no prohibition or effective prohibition under Section 253(a). *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1256-57 (D. Or. 2002) (“*Portland*”). The court found in light of the undisputed facts that the challenged provisions were in any event protected from preemption by Section 253(c). *Id.* at 1258-59. Qwest’s Section 1983 claim was dismissed. On appeal Qwest challenges the court’s ruling with respect to the City’s Charter, its ordinances and the TRP. Qwest did not appeal the District Court’s dismissal of its Section 1983 claims, or the court’s dismissal of its challenge to the state laws.¹

¹ On appeal, Qwest improperly seeks to present challenges and claims never raised below. For the Court’s convenience, a chart is attached showing the provisions cited in Qwest’s appeal brief, compared to those which it specifically challenged below. Qwest argued below that it was being discriminated against because it pays fees and taxes totaling 7% of its gross revenues derived from local exchange revenues, under ORS 221.515 and local ordinances adopted to comply with that provision, while competitive local exchange providers do not pay under those provisions. The record below showed that CLECS pay fees under different provisions of law, or under their franchises, and Qwest was not being disadvantaged. *See infra*, pp. 13-16. Qwest now shifts its position to claim that any difference in the formula under which it is and its competitors pay under the fee it pays per se unlawful, and further asserts “[i]t makes no difference which competitor is disadvantaged.” Qwest Brief at 26. Qwest cannot raise new arguments on appeal. *Crawford v. Lundgren*, 96 F.3d 380, 389 n. 6 (9th Cir. 1996) *cert. denied*, 520 U.S. 1117 (1997).

COUNTER-STATEMENT OF THE FACTS

Portland's streets must accommodate competing uses by traffic signal operations, street lighting, railroads, light rail transit, sanitary and storm sewers, water lines, electricity distribution, gas pipelines and telecommunication facilities. PER00018, PER00028-29. In order to manage those competing interests responsibly, Portland requires all entities wanting to occupy the streets (including telecommunications providers) to obtain franchises or other grants of authority from the City Council. PER00032.

A telecommunications provider desiring to occupy the streets may do so by filing a one-page franchise application with the City. PER00067. Making market entry even easier, Portland has (as with Qwest) issued temporary permits while processing franchise applications. PER00066-67. Under Portland's existing franchise process, by the year 2000 over 30 telecommunications providers either had been granted franchises or had applications in process. PER00068-69. These franchises contain terms and conditions similar to those in Qwest's TRP. PER00069-70, PER00077-82. Portland's Director of Cable Communications and Franchise Management testified that, to his knowledge, the City has never denied a telecommunications franchise to any applicant, nor has it refused to renew

or extend the term of a telecommunications franchise. PER00070. In other words, all the evidence shows that Portland's franchising process has succeeded in promoting competition. The Oregon PUC has recognized as much. PER00070-71.

Qwest's use of Portland's streets is extensive, pervasive, and damaging. PER00028-29, PER00033-35, PER00039. Between July 1, 2000 to June 30, 2001, Qwest installed 114 underground structures, 185 poles, and excavated approximately 192,000 square feet of street area, equal to twenty linear blocks of street surface. PER00042, PER00028-29. Qwest also has extensive facilities located within City park property. PER000354-355. Qwest's installation and repair of its facilities within the right-of-way increases the City's costs of maintaining this asset, disrupts traffic, adversely affects abutting residences and businesses, and increases the complexities of right-of-way usage by other utilities. PER00028-29, PER00026, PER00033-35, PER00036-37, PER00039. The useful life of street paving is shortened by Qwest's on-going excavation and fill activities. PER00036-37.

In Fiscal Year 2001, Portland budgeted \$28.7 million in capital improvements related to rights-of-way and \$41 million to maintain, repair and manage the city streets. Portland's has other street-related costs such as

the planning and legal representation, not included in these budgeted amounts. PER00027, PER00036-37. By contrast, Qwest's utility payments for FY2000-01 totaled \$6.16 million, approximately 12.2 percent of the utility payments received by the City during that fiscal year. PER00057-58.

Qwest alleged that it has operated in Portland since the dawn of the last century pursuant authority granted by the City. QER 5 00002. Since at least 1932, Qwest has operated under terms and conditions substantially similar to those which it now argues "prohibit" its offering of telecommunications services. PER00069-70, PER00077-82, PER00090-91. In 1932 the City issued a permit to the Pacific Telephone and Telegraph Company for use of city property. PER00072. When Qwest Corporation acquired US West Communications, it succeeded to US West's rights and responsibilities under the 1932 permit.

In 1998, US West contested the City's right to require payment for use of fee-owned park property, beyond fees paid under the 1932 permit. PER00356. In binding arbitration, Qwest contended, and the arbitrator agreed, that fees paid under the 1932 permit covered use of *all* City property, not just the right-of-way. PER00356, PER00371-372. Qwest was thus permitted to occupy substantial and valuable amounts of City parkland

for no additional rent, contrary to policies otherwise adopted by the City Council. PER00354.

The 1932 permit was revocable by the City on 18 months notice. PER00072. Because the City believed the Arbitrator's decision was inconsistent with the 1932 permit, and to protect its property outside the right-of-way, in December, 2000, the City Council notified Qwest that the permit was being terminated. PER00072-73.

The parties entered into negotiations and were unable to agree on terms, at least in part because Qwest did not respond to city proposals, asserting the Telecommunications Act of 1996 limited the City's right to charge rents for use of the rights-of-way, and to require Qwest to pay certain taxes. PER00073-74. The City therefore issued Qwest a TRP on July 5, 2001 containing a provision reserving the parties' rights to contest the validity of TRP, Charter and Code provisions. PER00213. The TRP was accepted by Qwest, fully reserving its rights. PER00215-216. Qwest's current authority to use city streets is based upon the TRP.²

² Qwest has a separate franchise issued in 1997 to use and occupy 14,038 linear feet of Portland's streets for the provision of telecommunications services. PER00152. While the 1997 franchise contains conditions similar to those here, Qwest has not challenged the 1997 franchise. PER00074. Qwest also operates phone booths within the streets, under a permit granted in 2000. PER00074-75. Although Qwest pays permit fees based upon 20%

Qwest has not identified a single service that it has been or will be prohibited, or effectively prohibited, from providing as a result of the provisions it challenges. PER00417, PER00473-474, PER00480, PER00481, PER00440, PER00495. Instead, Qwest repeatedly stated that it had no idea of the impact of the challenged provisions, and that whether the challenged provisions prohibited or had the effect of prohibiting it from providing service was “speculative.” PER00420. *See also* PER00473-480; PER00504-5005; PER00595-597; PER000409-410. Qwest did not investigate whether it was being prohibited or effectively prohibited from providing services before filing suit. PER00487-495. Qwest provides in Portland and in the intervening cities every telecommunications service it offers anywhere (other than long-distance services federal law prohibits it from offering). PER00495.³

In the District Court, Portland submitted the following: (a) undisputed testimony on the reasonableness of the charges paid by Qwest; (b) undisputed testimony that a gross revenues based fee is a well-recognized, competitive-market method of charging for property; (c)

of its phone booth revenues, the permit was also not challenged in this lawsuit.

³ There was no appeal from the District Court’s denial of Qwest’s FRCP 56(f) motion. *Portland* at 1259.

undisputed testimony that a gross revenues based fee reflects the value of property usage; (d) proof that others were paying the same amount or more for use of the right-of-way; and (e) proof that the 7% tax limit challenged by Qwest was adopted by the legislature at the behest of Qwest, and had long been paid by Qwest. PER00380-86, PER00075-77.

While Qwest presented evidence that Qwest and other ILECs pay fees calculated on a different basis than the fees paid by new entrants, there were no facts presented to show that this difference is significant, has any competitive effect, or prohibits or has the effect of prohibiting Qwest from providing any service. The evidence was that the difference was designed to be revenue neutral and to promote competition, or so it was promoted by US West to the Oregon legislature. PER00075-76; PER00496-497, PER00421-422.

In response to Qwest's challenge to non-fee city regulations, Portland submitted un rebutted evidence regarding their necessity for street management and to protect public safety and welfare. PER00038-89, PER00080-81. The evidence also detailed how Qwest's failure to comply with challenged City requirements had harmed the City, by, for example, adding \$125,000 to the cost to complete a sewer installment project. PER00349-50.

Rather than present facts to support its claims, Qwest's devotes its Statement of Facts to argument about the franchising process. The argument depends on misreading and misrepresenting the provisions challenged,⁴ and using the adjective "burdensome" repeatedly. The record shows the company's designated witnesses were unable to identify the "burdens" placed on the company, much less quantify them. PER00474-482.

While the law underlying the franchising process may seem complex, the evidentiary record shows Portland's franchising process is simple and has promoted competition among telecommunications providers.

Portland's franchising process is not the result of a single, uniform ordinance regulating telecommunications providers. Instead, the process reflects a number of disparate provisions adopted over the course of more than a century, applicable to utilities generally. Many of Qwest's "factual"

⁴ For example, Qwest states Charter 10-209(b), 10-210(d) & (e), and PCC 7.12.050, 7.14.050 "require" franchise holders to provide in-kind compensation. Qwest Brief at 5. The Charter provisions require "fair compensation" for use of the rights-of-way, and provide that this compensation *may* take the form of in-kind services. In-kind services are not required. PCC 7.12.050 has no connection to in-kind services, and PCC 7.14.050 allows licensees to deduct from the license fee any services provided to the City, at the provider's election. Qwest complains of burdensome reports when the record shows the reports are about 20 lines long. PER00329-334.

statements concerning the franchising process reflect a fundamental mischaracterization of how these provisions relate to one another.

a. *The City's Charter Authority.* Portland is a home-rule charter city. Under the Oregon Constitution, “[t]he people of Oregon, . . . , gave to the people of a municipality (acting through their local government) the right to pass laws, and restrict their own individual freedom and the freedom of others within their jurisdiction, subject only to the ‘Constitution and the criminal laws of the State of Oregon.’” *City of Portland v. Jackson*, 316 Or. 143, 149, 850 P.2d 1093, 1096 (1993) (Charter conferred on the City of Portland “plenary power” similar to that exercised by the State itself.); Oregon Constitution Art. XI §2. Thus, Portland does not require specific authorization from the State to act; it looks first to its own Charter. While the existence of a state law may enhance or confirm local authority, state laws, including those challenged by Qwest, generally act as limitations on municipal authority.

As its organic document, the Charter grants the City powers to perform various enumerated functions. It does not purport to allow the City to act in derogation of superior law. Hence, the record shows that each Charter provision should be applied, and is being applied, as if the phrase “subject to State and Federal laws” appeared before it. PER00078.

b. *The City Code and Privilege Taxes.* City Code

provisions are enacted to exercise Charter grants of authority. The Code establishes *local* requirements, and does not purport to limit or eliminate related federal or state requirements. For example, even where a provision appears to reserve local “discretion,” all that means is that there is no independent *local* requirement restraining decisionmakers – but any discretion would be separately constrained and exercised in light of any state or federal limitation.

The central objection raised by Qwest is to the City Code tax provisions: PCC 7.12.060, 7.14.020, and 7.14.40. Section 7.12.060 requires any public utility using Portland’s streets without a franchise to pay a privilege tax. The tax is generally 5% of all gross revenues. However, due to changes in state law discussed below, the City Code was amended to add Section 7.12.060(C), which sets a privilege tax on unfranchised “telecommunications utilities” using the streets – effectively, incumbent local exchange carriers such as Qwest – at 7% of local exchange revenues.

PER00089.

Section 7.14.020 requires any person operating a public utility in the City to pay a different privilege tax, designated as a utility license fee, in the amount specified in PCC 7.14.040. The utility license fee is triggered by

the operation of a utility, not use of city streets. PCC 7.14.010. The utility license fee for telecommunication utilities is set at 7% of local exchange revenues.

Portland's current tax structure was adopted in 1990, the year following the legislature's adoption of ORS 221.515. During the 1989 session of the Oregon legislature, US West lobbied for adoption of a separate privilege tax for incumbent local exchange carriers. PER00388, PER00406-407, PER00441-456, PER00496-498, PER00510-513, PER00539-541, PER00569-00571. The legislature responded by adopting ORS 221.505 through 221.515, limiting cities to a privilege tax on "telecommunications utilities" of no more than 7% of local exchange revenues. Qwest testified at the legislature that this change was pro-competitive and revenue neutral. PER00075-76, PER00448-49, PER00452. Prior to the passage of ORS 221.515, Qwest paid the City 5% of gross revenues; after its passage, the City Code was amended as described above. PER00391-98. Competitive local exchange carriers do not fall within the statutory definition of telecommunications utilities, and so pay (and continue to pay) fees to the City equal to 5% of gross revenues under other provisions of law and franchises. For over a decade, and long after passage

of the Telecommunications Act of 1996, Qwest paid Portland 7% of its local exchange revenues. PER00338.

In addition to these tax obligations, Portland issued franchises and temporary permits contain provisions establishing compensation levels for the grant of the franchise or permit. These payments are in the nature of rents, but parallel the tax provisions above. Because of offsets and credits provided for under the Code and franchises, each utility ends up paying a single fee based on a percentage of gross revenues. PCC 7.14.050; PER00088-89.

c. *The Franchise/Permit.* The authority of a public utility to use Portland's streets are generally reflected in franchises, or, as is the case here, in a temporary permit adopted while the parties resolve franchise issues. PER00069, PER00077. Because of their binding, long-term effect, and the City's historical experience with improvidently or corruptly granted franchises, franchises only issue after public hearing and by ordinance. PER00086-87.

SUMMARY OF THE ARGUMENT

Qwest now claims that it has been prohibited or effectively prohibited from providing telecommunications services by Portland's Charter, Code

and permit. The *undisputed and central* fact of this case is: Qwest *is and has been* providing telecommunications services.

Qwest cannot identify a single telecommunications service that it has been or will be directly or effectively prohibited from providing by the challenged provisions. As Section 253(a) only preempts provisions which “prohibit or have the effect of prohibiting” an entity from providing service, that should end the inquiry.

But additional reasons exist for dismissing Qwest’s claims. Uncontested evidence showed that the allegedly “prohibitory” provisions fell within the safe harbors of Section 253(b) - (c). In addition, some of the fees challenged by Qwest are unqualifiedly protected by Section 601(c) of the Telecommunications Act, notably, the local tax provisions of the City Code.

The City of Portland’s process is allowing entry into the market. There is no evidence that the application process here is burdensome; there is affirmative evidence that it is simple and has promoted and resulted in competition. PER00068-71. Qwest’s real plea is thus: read *City of Auburn v. Qwest Corporation*, 260 F.3d 1160 (9th Cir. 2001), to strike down local laws even where the facts show that there is no prohibitive effect. Qwest’s

reading is not consistent with the statute, the decisions of this Court, the Supreme Court, or other Courts of Appeal.

STANDARD OF REVIEW

The City of Portland concurs in and adopts the Intervenor City of Eugene’s statement of the standard of review.

ARGUMENT

Section 253(a) only preempts state or local legal requirements that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Subsections (b) and (c) of Section 253 create “safe harbors” for certain types of state and local requirements. Even if a rule would “prohibit or have the effect of prohibiting” under subsection (a), it cannot be preempted if it falls within the scope of (b) or (c).⁵ *Auburn* at 1175-77.

There are some laws that are not subject to preemption under Section 253: state and local laws “pertaining to taxation” are explicitly protected from preemption by Section 601(c)(2). Qwest’s brief never takes the Court

⁵ The FCC has concluded that the Section 253(b) protections extend to local governments where the state has delegated authority to engage in activities within the scope of the Section 253(b). *In re Classic Telephone*, 11 FCC Rcd. 13082, 13100-01 at ¶ 34 (1996). In *Auburn*, the Court concluded that there was no such delegation in Washington. In Oregon, the delegation is

through the analysis required by Sections 253 and 601, except in a cursory way. Instead, Qwest insists that the real issue here is “whether the district courts are required to follow the decisions of this Court.” Qwest Brief at 2. But the District Court did follow *Auburn*: What the court did not do was adopt Qwest’s interpretation of *Auburn*. At least three other courts have rejected key aspects of Qwest’s reading of the *Auburn* decision.⁶ The District Court properly applied Section 253 in light of *Auburn*, and properly dismissed Qwest’s claims.

I. THE DISTRICT COURT PROPERLY APPLIED SECTION 253(a).

A. The District Court Properly Recognized That Section 253(a) Requires a Prohibition or Effective Prohibition, and Properly Followed *Auburn* In Reaching That Conclusion.

Qwest argues that the decision below should be reversed because the District Court “concluded that this Court had misconstrued subsection (a) in

clear under the home rule provisions of the state constitution, and is confirmed by ORS 221.510 and ORS 221.420.

⁶ *Qwest Corp. v. City of Santa Fe*, No. CIV-00-795, 2002 WL 31163012 (D. N.M. Aug. 30, 2002), *Qwest Communications Corp. v. City of Berkeley*, 208 F.R.D. 288 (N.D. Cal. 2002); *US West Communications, Inc. v. City of Eugene*, 177 Or. App. 424, 37 P.3d 1001 (2001), 37 P.3d 1001 (2001) *rev. allowed*, 334 Or. 693, ___ P.3d ___ (2002).

Auburn.”⁷ The District Court said no such thing. It recognized, in discussing Section 253(a), that *Auburn* cites two lines of cases. One line of cases,⁸ could be read to mean that Section 253(a) preempts state or local laws which might possibly or could conceivably prohibit an entity from providing service. The other line cited by *Auburn*⁹ indicates that Section 253(a) preempts only state or local laws where there is a showing that the laws actually prohibit or have the effect of prohibiting entry into the market. See also *BellSouth Telecommunications Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001). Qwest claims *Auburn* adopted the “hypothetical’ approach. Qwest argues that any provision that burdens or even conceivably burdens it should be treated as a prohibition.¹⁰ Qwest thus

⁷ Qwest Brief at 7.

⁸ This line is represented by the vacated *Bell Atlantic –Maryland, Inc. v. Prince George’s County*, 49 F. Supp. 2d 805 (D. Md. 1999), vacated, 212 F.3d 863 (4th Cir. 2000).

⁹ *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000) rev’d on different grounds, *TCG New York v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000).

¹⁰ Consistent with this approach, Qwest effectively asks the court to presume that Portland will exercise its authority unlawfully, but the correct presumption is the reverse. Qwest asks this court to strike down provisions based upon mere conjecture as to how those provisions might be applied. That is a facial challenge, and “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the

reads Section 253 to “outlaw municipal and economic regulation police-power regulation of telecommunication providers” altogether. Qwest Brief at 6.

Given the facts of this case, these two approaches are presented in sharp contrast. Neither *Auburn* nor any other reported federal case appears to have squarely answered the precise question presented here. That question is whether an incumbent local exchange carrier, such as Qwest, who is both already in the market and who produced no evidence on how the challenged regulations prohibited or had the effect of prohibiting it from providing any telecommunications services, can state a claim under Section 253(a), particularly given that Section 253 was designed to protect “new entrants” *Verizon North., Inc. v. Strand*, 140 F. Supp. 2d 803, 812 (W.D. Mich. 2000), *aff’d in part and vacated in part*, ___ F. 3d ___, 2002 WL 31477192 (6th Cir. Nov. 7, 2002). The Oregon Court of Appeals, however, in a series of related cases including one brought by Qwest, has directly addressed this question and decided it against Qwest’s position. *U.S. West*

challenger must establish that no set of circumstances exists under which the Act would be valid.” *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); see also, *N.Y. State Club Ass’n. v. City of New York*, 487 U.S. 1, 11 (1988) (“to prevail plaintiff must demonstrate that the law ‘could never be applied in a valid manner.’”) The Court cannot presume laws will be applied in a prohibitory manner and they have not been here.

Communications, Inc. v. City of Eugene, 177 Or. App. 424, 37 P.3d 1001 (2001), *rev. allowed*, 334 Or. 693 (2002); *AT&T Communications of the Pac. Northwest, Inc. v. City of Eugene*, 177 Or. App. 379, 35 P.3d 1029 (2001), *rev. den.*, 334 Or. 491, 52 P.3d 1057 (2002); *Sprint Spectrum L.P. v. City of Eugene*, 177 Or. App. 417, 35 P.3d 327 (2001); *TCI Cablevision v. City of Eugene*, 177 Or. App. 433, 38 P.3d 269 (2001), *rev. den.*, 334 Or. 492, 52 P.3d 1057 (2002).

In this case, the District Court noted the dueling citations within *Auburn*, looked to how this Court (at 1175-76) harmonized these cases and then refused to accept Qwest’s “incorrect, overly broad” argument, instead finding that the statute requires a showing of a prohibition or effective prohibition:

The statute “actually provides that no local requirements may:

- (1) prohibit the ability to provide service, or
- (2) have the effect of prohibiting the ability to provide service.

A correct reading of the statute shows that Congress used the word ‘may’ as a synonym for ‘is permitted to’: ‘No State or local statute or regulation, or other State or local legal requirement, may [i.e., is permitted to] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.’ 47 U.S.C. § 253(a).’

Portland at 1255. This is the only linguistically correct reading of the plain language of the statute. *Auburn* does not require a different interpretation. Qwest’s claim that all “police-power” regulations are prohibited regardless of impact, on the other hand, is rebutted by the language of Section 253(a) and Section 253(b) (protecting police power regulations even where there is a prohibition).

Qwest cites several FCC cases or appeals which it claims support its position. They do not. *In re California Payphone Ass’n*, Opinion and Order, 12 FCC Rcd. 14,191 (1997) states that the first question in any Section 253(a) analysis is whether there is an *explicit* prohibition on entry. If there is none (and there is none here) “[w]e then consider whether the Ordinance has the *practical effect* of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” *Id.* at 14,204 ¶ 27. Qwest cites *In re Public Utility Comm’n of Texas*, 13 FCC Rcd. 3460, 3465 at ¶ 9. However, that case also supports *Portland*. The Commission emphasized that there is no prohibition unless challenged requirements “materially inhibit or limit the ability” of an entity to compete. *Id.* at 3470 ¶ 22. It also indicated that in determining whether a Section 253 violation has occurred, the key is “implementation” (not speculation). *Id.* at 3465 ¶ 10. This approach is consistent with the structure of the Act,

which indicates that a challenged provision is only to be preempted “‘to the extent necessary’ to correct a violation of section 253.” 47 U.S.C. § 253(d). In *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1267 (10th Cir. 2000), the provider applied for authority to provide local exchange service, and was flatly denied – an actual prohibition. The court emphasized that Section 253(a) only reaches state or local actions which prohibit or have ‘the effect of prohibiting’ entry.

Intervenors’ Brief at 12-15, in which Portland joins, explains in more detail how the FCC’s interpretation of Section 253(a) supports the District Court’s reading. *See also* PER00604-609. Portland further joins in the argument in Intervenors’ Brief at 17-24, which explains how relevant decisions since *Auburn* support the District Court’s interpretation of Section 253(a).

The District Court’s decision is also consistent with the decision in *AT&T Corp. v. Iowa Utilities Bd*, 525 U.S. 366, 389-90 (1999), interpreting 47 U.S.C. § 251(d)(2). That section directs the FCC to order ILECs to provide unbundled access to network elements to competitors where the failure to provide access would “impair the ability” of a competitor “to provide...services.” The Supreme Court found that the Commission cannot

order access merely to promote competition or because, absent access, market entry becomes more difficult or costly

An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been “impaired” in its ability to amass earnings, but has not *ipso facto* been “impair[ed] ... in its ability to provide the services it seeks to offer”
AT&T, 525 U.S. at 390.

Under Section 251 an impairment is required; under Section 253 a prohibition or effective prohibition is required. If an impairment claim requires more than proof of additional costs or other burdens, then surely a “prohibition” cannot be based upon mere speculation.¹¹ Ultimately, Qwest is urging this Court to read *Auburn* in a manner that conflicts with other circuit courts, with the plain language of the statute, and with the FCC’s analysis of the statute. No such reading is required. The District Court

¹¹ Qwest disparages the decision below by arguing that the approach of the District Court here was the same as the approach of the District Court in the *Auburn* case. Qwest Brief at 10-11. That is not the case; the District Court in *Auburn* did not attempt to decide Qwest’s Section 253 claims on the merits. Qwest simply confuses the *Auburn* District Court’s discussion of ripeness with a determination on the merits.

properly interpreted *Auburn*, and Section 253(a) to require a prohibition or effective prohibition.¹²

B. The District Court Properly Found That There Was No Prohibition And Refused To Decide the Case on the Based Upon Inapt Analogies to *Auburn*.

The District Court was unable to find a prohibition because there was none. Qwest did not produce any evidence supporting its claims that it has been or will be prohibited or effectively prohibited from providing any service. Instead, using the FCC's terms, the "practical effect" of the challenged provisions is that: (1) Qwest is in the market; and (2) Qwest is providing and plans to continue to provide services even if challenged provisions are upheld. PER00417, PER00420, PER00473. Portland's franchising process has resulted in significant market entry and competition – the highest level of competition in the State of Oregon. *See supra* at 5-6; PER00070-71.

¹² Qwest is thus wrong when it claims that Section 253 automatically preempts local laws that are "disadvantageous" or which are outside the bounds of Section 253(c). Qwest Brief at 7, 9-11. Qwest's claim is based on selective quotations from the *Auburn* decision, ignoring the Court's statements (at 1175-1176) that, absent a prohibition, there is no claim. *Accord BellSouth*. Qwest's reading would make Section 253(a) entirely superfluous.

Qwest asks this Court to ignore the facts, and decide the case by analogy to *Auburn*. Qwest claims *Auburn* establishes a number of *per se* rules, so that any ordinance provision analogous to the *Auburn* provisions is itself unlawful. One problem with this approach is that *Auburn* provides little guidance as to treatment of wireline providers. *Auburn* considered Section 253 only as it applied to Qwest's wireless facilities. Washington state law resolved all issues with regard to Qwest's wireline facilities. *Auburn* at 1174. As Qwest pointed out to the Supreme Court in its opposition to certiorari in *Auburn*, this distinction is significant: wireless facilities do not use rights-of-way in the same ways or to the same extent as wireline facilities. PER00432-433.

Qwest's "analogy" is dependent upon the ordinances at issue in *Auburn* and Portland being indistinguishable in scope and requirements. Qwest's description of the telecommunications-specific *Auburn* ordinances has them running at over "450 sections" and regulating in "minute detail." PER00422. The Portland Charter and Code provisions challenged by Qwest total only about two dozen in all and they are not telecommunications specific. Qwest's "analogy" is a failure. *See also* discussion of TRP, *infra*, n. 55-56.

Even more critically, *Auburn* did not adopt *per se* rules as urged by Qwest. In *Auburn*, this Court found that the cumulative impact of a broad telecommunications-specific ordinance on the application process effectively prohibited entry to the market, but acknowledged that the challenged provisions could be lawful in other contexts. *Id.* at 1176.

Qwest claims that *Auburn* found that non-cost-based compensation provisions are *per se* prohibitions, relying on a footnote to a paragraph that discusses not rents or compensation for use of the rights-of-way, but police power regulatory fees, which by their nature are typically restricted to costs.¹³ It was in this context that the Court objected to a regulatory fee that allowed Auburn to collect more than its costs. *Id.* at n. 19. The question of the proper compensation for use of the rights-of-way was not before the Court. Counsel for Qwest initially raised, but then specifically withdrew its challenge to a 6% fee being charged by Washington cities. PER00425, PER00428.¹⁴ There is no indication the Court thought it was adopting a *per se* rule limiting compensation to costs. Instead, the Court, without

¹³ See, e.g., *Hickey v. Riley*, 177 Or. 321, 162 P.2d 371 (1945) (meter fees of 5 cents were valid traffic regulations.)

¹⁴ Portland joins in the discussion of Qwest's actions in Intervenor's Brief at 28-30. Qwest argues that the 6% fee is distinguishable because it was not

discussion, cited with approval *TCG Detroit* at 624, which held that compensation is not limited to costs.

Qwest at 12 claims that any local law that provides “unbridled discretion” to a local government is *per se* unlawful under *Auburn*. But in *Auburn*, as in other cases where “unbridled discretion” have been found to prohibit entry, the finding arises in very limited and specific situations where a law: (a) addresses the process by which an entity can obtain a franchise; (b) is specific to telecommunications providers, as opposed to general franchise requirements; (c) purports to permit the consideration of factors otherwise expressly prohibited under state law, and which permit denial on grounds unrelated to management of the rights-of-way or other legitimate municipal interests; (d) contains a lengthy and complex application process requiring information that the locality cannot require under state law; and (e) is designed in a way discouraging market entry. *See, e.g., Auburn* at 1179; *AT&T Communications of Southwest, Inc. v. Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998). These conditions do not exist here.

“for use of the public streets.” Qwest Brief at 23. The tax provided for in PCC Chapter 7.14 is not tied to right-of-way use to any extent.

Indeed, the problem for Qwest is that there is no unbridled discretion here. The Charter, ordinances and TRP contain limits on local authority which Qwest ignores in its effort to pigeonhole this case. For example, Qwest claims that the City has “unbridled discretion” to revoke the TRP. In fact:

- The right to revoke is limited to violations of the TRP; the permit cannot be revoked “without cause”¹⁵ or “based on unnamed factors.”¹⁶
- The TRP does not permit revocation without notice and opportunity to cure, and the TRP cannot be revoked if there is a “good faith” dispute between the parties. TRP o.4.

Similarly, Qwest claims that under *Auburn*, a prohibition occurs whenever the City reserves the right to prohibit entry unless a telecommunications provider agrees to accept unlawful local regulations, and it suggests the Portland ordinances fit that model. Qwest Brief at 8. In fact, the reverse is true in Portland. Qwest was not required to waive its rights or accept unlawful regulations. If the District Court had determined that any provision of the TRP was unlawful, the company would never have been required to accede to the condition; as it did not, Qwest can be expected to follow the law.

¹⁵ Qwest Brief at 13.

¹⁶ *Auburn* at 1179.

As apparent “proof” of Portland’s “unbridled discretion,” Qwest notes that in 2001 “Portland was within seven days of denying Qwest permits necessary to continue use of Portland’s streets.” Qwest Brief at 8-9. But Portland did not deny permits to Qwest. It instead crafted and (and has extended) the TRP issued here. The TRP was issued near the termination date for the 1932 permit, but that was not the City’s fault. The City gave Qwest notice that it intended to terminate the permit 18 months before. PER00145. Qwest was only near termination because it delayed its responses to City franchise proposals, and did not put forward proposals itself. PER00150. If Qwest’s claim is broader, that a limited term for any franchise is a prohibition, Qwest is wrong. The issuance of a franchise allows entry. The fact that a franchise has an end date does not mean Qwest will be or has been prohibited from entering the market, as this case demonstrates. Finally, Section 253 is a preemptive provision. It does not create affirmative obligations for localities to grant Qwest permanent and perpetual rights to use the rights-of-way.¹⁷

¹⁷ Section 253 cannot be read to require states or localities to take affirmative acts, much less issue permanent, local grants to private actors for use of city property. Such a reading would raise significant constitutional issues. *Printz v. U.S.*, 521 U.S. 898, 934 (1977); *infra* at 42.

Finally, Qwest asserts that any law that “allows” a locality to impose civil or criminal penalties, or which allows a locality to revoke a franchise, is unlawful under *Auburn*. It seems Qwest reads *Auburn* and Section 253 to create a sort of unique criminal class, free to violate the law and escape punishment. The Ninth Circuit has not required cities or states to ignore unlawful behavior. Instead, this court has affirmatively held that Section 253 does not prohibit governments from imposing fines or suspending a license where the licensee violates applicable law. *Communications Telesystems Int’l v. California PUC*, 196 F.3d 1011, 1016-17 (9th Cir. 1999). *Auburn* supports this point, 260 F. 3d at 1176, n. 11. As the Sixth Circuit observed in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 1998), when it is the providers own decision to violate a lawful requirement that creates the problem, it is not the local law that is “prohibiting” entry, it is the provider’s own unlawful activities.

The District Court’s finding regarding the discretion of the Cities, far from being “a patent fallacy,” as claimed by Qwest, is exactly on point and supported by the record:¹⁸

The franchise agreements and ordinances at issue here do not give the Cities unfettered discretion to

¹⁸ Qwest Brief at 12.

deny telecommunications franchises, unlike the requirements struck down as barriers to entry in *City of Auburn*, 260 F.3d at 1176.¹⁹

The heart of the matter is that Qwest believes the District Court erred by deciding this case on the factual record. There are obviously cases where Section 253(a) issues can be decided as a matter of law. A state law granting an exclusive statewide franchise to provide telecommunications service to one company requires little fact-finding to determine whether it prohibits entry. But *Auburn* does not stand for the proposition that facts can or must be ignored. Given that this Court recognized it was the particular combination and circumstances present in *Auburn* that rendered the challenged provisions unlawful, *Auburn* at 1176, it follows that facts presented cannot simply be ignored in determining whether or not a particular law violates Section 253. Here, where the facts show the “practical effect” of challenged provisions has been to promote competition, and there is no evidence of prohibition, there is no violation of Section 253.

¹⁹ *Portland* at 1256.

II. EVEN IF THERE WERE A PROHIBITION, THE CHALLENGED PROVISIONS ARE PROTECTED FROM PREEMPTION.

A. Section 601(c) Precludes Preemption of the Tax Provisions At Issue Here.

The preceding decision assumes *arguendo* that the privilege taxes under Portland City Code Chapter 7.12 and 7.14 are subject to preemption under Section 253(a). However, when it adopted Section 253, Congress also adopted Section 601(c)(2), which provides that “nothing in” the Telecommunications Act may be read to “modify, impair or supersede” “any State or local law pertaining to taxation.” Congress recognized the absolute breadth of this provision, and crafted three narrow and specific exceptions: cable system franchise fees (47 U.S.C. § 542); open video system franchise fees (47 U.S.C. § 573); and “any tax or fee” imposed by local jurisdictions on direct-to-home satellite services. State and local taxes on telecommunications providers cannot be preempted under Section 253.

Qwest argues that the fees it must pay are “for the use of the rights-of-way” and therefore cannot be taxes. Qwest Brief at 23. Even assuming that Qwest were correct in this characterization, protection under Section 601(c)(2) is not dependent on the purpose of the tax. Nor can an additional exception to Section 601(c)(2) be implied. Section 601(c)(1) forbids

implied preemption. Further, as originally reported by the House Committee on Commerce, what is now Section 601(c)(2) protected state and local laws from preemption except “to the extent that such law would impair or prevent the operation of” Title II of the Communications Act of 1934. H. Rep. No. 104-204, at 44, 124-25 (1995) (discussing Section 401 of H.R. 1555). When the bill moved to the House floor, this exception was removed. H. Rep. No. 104-223, at 25 (1995) (discussing Section 402). Qwest seeks to resurrect a caveat struck by Congress.

The protection afforded to taxes is not surprising. The federal government has long recognized the importance of protecting state and local taxing authority. *Dows v. City of Chicago*, 78 U.S. 108 (1870). Efforts to adopt new taxes are subject to significant political checks. Congress could have reasonably concluded that existing taxes (such as those at issue here) did not present sufficient problems to justify the impact on state and local governments if telecommunications providers were given federal authority to challenge taxes.

In its state law challenge to taxes imposed by the City of Eugene, Qwest repeatedly argued that Section 221.515 was a limit on “municipal taxation” and that the seven percent fees imposed in accord with that provision are imposed pursuant to a City’s “charter authority to tax.” *See*,

e.g., PER00401, PER00403-406, PER00566, PER00576; *see also* PER00461-467, PER00516-517. The fees provided for under PCC Chapters 7.12 and 7.14 fall within the privilege taxes permitted under ORS 221.420 and 221.515, and thus plainly “pertain” to state and local taxation.²⁰ While the fee under Chapter 7.12 is referred to as a “privilege tax,” and the fee under Chapter 7.14 is referred to as a utility “license fee,” courts in Oregon have long recognized that such fees are taxes. *Safeway Stores v. City of Portland*, 149 Or. 581, 599-600, 42 P.2d 162, 169 (1935). It follows that the city charges are taxes and Qwest’s challenge to the tax provisions of the Portland City Code fails.

²⁰ There is no case deciding what is meant by the phrase “pertaining to taxation” under Section 601(c). The breadth of the language and the narrow exceptions for cable and open video system franchise fees suggest that the language reaches any charge that is a tax within the meaning of state law. The charges here “pertain” to taxation under tests such as those applicable under the Tax Injunction Act. *See Bidart Bros. v. California Apple Comm’n.*, 73 F.3d 925 (9th Cir. 1996). The charges at issue here were (a) imposed by the Portland City Council, the legislative body for the City of Portland, consistent with a state law adopted by the state legislature; (b) fall on a broad range of utilities, (including electric cooperatives, people’s utility districts, privately owned public utilities and heating companies, PCC 7.12.060); (c) are placed in the City’s general fund; PER00056-57; and (d) are not used to the particular benefit of Qwest. The charges established by the Portland City Code are taxes.

B. To the Extent Section 601(c) Does Not Apply, the Challenged Fee Provisions Are Protected By Section 253(c).

1. *Section 253(c) does not limit cities to recovering costs.*

Qwest claims that gross-revenues based fees are *per se* unlawful and outside Section 253(c). Qwest and amici argue that gross-revenues based fees are inherently anticompetitive, and that the terms “reasonable” and “competitively neutral” and nondiscriminatory” together limit compensation to costs.²¹ That claim is not supported by the language of the Act, or its legislative history.

Had Congress meant to limit cities to costs, rather than legislate by adjectives it would have done so, as it did in other provisions of the Act, *see* 47 U.S.C. §252(h).²² Congress adopted the term “compensation” after rejecting arguments that localities should not charge gross revenues based

²¹ We assume *arguendo* that the City code tax provisions and the TRP franchise fee provisions are both “compensation for use of the rights-of-way” within the meaning of Section 253(c), although taxes are independently protected under Section 601(c)(2).

²² *See also* 47 U.S.C. § 252(d)(1)(A)(1) (Interconnection and Network Element rates); 47 U.S.C. § 224(e)(2) (cost of space in conduit).

fees for use of the rights-of-way.²³ The proponents of subsection (c) described the safe harbor as providing broad authority to set rents for use of the rights-of-way:

As Republicans, we should be with our local city mayors, our local city councils, because we are for decentralizing...and that is what the Stupak-Barton amendment [containing a provision identical to Section 253(c)] does.

It explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right-of-way. . . .The Federal Government has no business telling state and local governments how to price access to their right-of-way.

141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995). (Statement of Rep. Barton).

Both the proponents and opponents of the Stupak-Barton amendment understood that local governments could charge gross-receipts-based franchise fees under that amendment.

Mr. SCHAEFER. Mr. Chairman, I rise in strong opposition to this Stupak amendment... All of a sudden I find that the gentleman, the author of the amendment, reneged on that particular deal, and now all of a sudden is saying well, we want 8

²³ It is entirely appropriate for cities to charge rent for city-owned property that a utility wants to appropriate for its private use. *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 99 (1893).

percent of the gross, the gross, of the people who are coming in....

* * *

Mr. STUPAK. . . . Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything....

* * *

141 Cong. Rec. H8460-61 (daily ed. Aug. 4, 1995).

The Stupak-Barton amendment passed the House by a vote of 338-86, over an opposition which argued, as Qwest does here, that the amendment would impede competition. 141 Cong. Rec. H8477 (daily ed. Aug. 4, 1995). Despite Qwest's arguments, the language of Section 253(c) was intended to allow cities broad discretion to "set the price" for access...not to limit that authority.

Qwest's raises a number of arguments in an effort to overcome the clear and unequivocal legislative history that Congress intended to allow cities to charge non-cost based rents for use of the rights-of-way. None are convincing.

Qwest argues that the “majority of courts” have concluded that cost recovery is the proper compensation standard.²⁴ Qwest’s “majority” is based on: cases that have been vacated (*Prince George’s* and *Dallas*); the *New Jersey Payphone* case²⁵ where the court explicitly stated that it was not deciding whether compensation had to be limited to costs; the *Berkeley* case, which does not decide the issue; and *Grant County*,²⁶ which turned on county authority under New Mexico law, as was made clear in *Santa Fe*, 2002 WL 31163212 at *16 (D. N.M. 2002).

By contrast, there are a number of cases contrary to Qwest’s argument. In *TCG Detroit v. City of Dearborn*,²⁷ the Sixth Circuit upheld a gross receipts fee as a proper form of compensation. *Santa Fe* concluded fees were not limited to costs. *Santa Fe* at *22. *Accord, Eugene*, 177 Or. App. at 410; *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 522 S.E.2d 804, 808 (S.C. 1999). The Second Circuit in *White Plains* found that “Congress’s choice of the term ‘compensation’ may suggest that gross

²⁴ Qwest Brief at 20.

²⁵ *New Jersey Payphone Ass’n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D. N.J. 2001).

²⁶ *Board of County Comm’rs of Grant County v. Qwest Corp.*, 169 F. Supp. 2d 1243 (D. NM. 2001). Qwest relies on the unpublished (and un-final) slip opinion attached to its brief.

revenue fees are permissible,” but declined to decide the issue. *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 77-79 (2d Cir. 2002).

Qwest also suggests that the FCC took the position that gross-revenues based fees are not protected by Section 253(c) in *White Plains*. The baseless nature of this assertion is discussed in Intervenor’s Brief at 22-24; PER00529. Portland adopts this argument here. The *White Plains* decision at 74 itself notes that the Court had asked the FCC for supplemental briefing on the compensation issue, but the FCC “declined to make definitive statements on... the questions of whether a gross revenue fee could be “fair and reasonable compensation.”

Qwest argues that the 1996 amendments to the Cable Act, excluding telecommunications revenues from cable franchise fees demonstrate that Congress intended to prevent cities from charging telecommunications providers gross-revenues-based fees. 47 U.S.C. § 542(b). Qwest misunderstands the Cable Act’s franchise fee provisions. The Cable Act limited local fee authority, it was not a grant of local authority. *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999); *City of Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997). The absence of a specific cap in Section 253 reflects Congressional

²⁷ 206 F. 3d at 624-25.

intentions to give local governments greater, not lesser flexibility to set fees for use of the rights-of-way, a result precisely consistent with the legislative history. The Cable Act changes were intended to ensure that “telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to charge fair and reasonable fees.” H.R. Conf. Rep. No. 104-458, at 180 (1996).

Qwest makes an unsupported and incorrect economic argument that revenue-based fees impede competition and are therefore inconsistent with the Act’s purpose.²⁸ The unrebutted testimony of economist Ed Whitelaw showed that requiring payment for resources at fair market value is entirely consistent with a free market economy. Mr. Whitelaw’s unrebutted testimony also explains that gross revenues based fees are a fair and common way of charging for property, and an appropriate measure of right-of-way use. PER000380-386. The FCC has itself recognized that market-based pricing promotes competition.²⁹

Finally, reading the law to limit compensation to costs would pose significant constitutional issues. The Supreme Court has held that the Fifth

²⁸ Qwest Brief at 18.

²⁹ *In re FCC Report to Congress on Spectrum Auctions*, 1997 WL 629251 (1997), Part II, V.B-C.

Amendment “encompass[es] the property of state and local governments when it is condemned by the United States.” *U.S. v. 50 Acres*, 469 U.S. 24, 31 (1984). In a takings context, the legislature cannot both commandeer property and then fix the price for its use. *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 327 (1893). To read Section 253(c), as Qwest does, to both command the City to turn over its property to Qwest and to set a cost-limited price for use would render that provision unconstitutional. *See also* n. 17.

2. *The City presented evidence that the fee charged was fair and reasonable.*

Saying that a gross revenues-based fee is permitted does not resolve the question as to whether the fee fits within Section 253(c)’s safe harbor: compensation must be “reasonable,” and must be “nondiscriminatory and competitively neutral.” Portland presented unrebutted testimony that the fee was fair and reasonable in form and in amount. PER384-386. The record showed the fee had been supported by Qwest, agreed to by Qwest, and paid by Qwest for years. The fee was designed to be comparable to the fee paid by other utilities and other communications companies. *See infra* at 46-47;

PER00075-76; PCC 7.14.040; PER00013.³⁰ Qwest presented no facts to the contrary.

3. *The Fees Are Non Discriminatory and Competitively Neutral.*

Qwest now asserts that Portland's fees are neither nondiscriminatory or competitively neutral. As Qwest's Complaint merely claimed that the fees were discriminatory, QER 5 00010, the competitive neutrality issue is not properly before the Court. *See n. 1 supra.*

In any case, the claims are foreclosed by Qwest's decision to drop its challenge to ORS 221.515. Any difference in treatment is owing to the fact that the statute provides for charging telecommunications utilities such as Qwest a 7% privilege tax based on exchange access revenues. If Section 221.515 is lawful under Section 253 – and the District Court's determination on that point is now conclusive – then local taxes designed to comply with that law must also be lawful. Any difference in treatment would certainly be justified by the fact a lawful state provision, once

³⁰ Qwest argues that the fact it supported the fee before the legislature is irrelevant. The fact is, Qwest specifically claimed the proposed fee was reasonable, and presumably would not have supported a fee that was unreasonable. If Qwest's point is that times have changed, it should have at least submitted evidence showing when, how and why the fee became unreasonable. PER00524-25.

championed by Qwest, prevents Oregon cities from charging Qwest the same amount charged to CLECs.

Amici raise a slightly different claim: they claim that the 5% fees to which *they* are subject are not competitively neutral or nondiscriminatory. But, the validity of the 5% fee is not before the Court. Qwest is not challenging the 5% fee, nor could it, because it is not subject to that fee.

Qwest also failed to establish the predicate for its discrimination or competitive neutrality claims. Aside from asserting that the words “discriminatory,” “competitively neutral” and “compensation” in combination somehow equal the term “cost,” Qwest’s claim is that the fee that it is charged is just *different* from those charged to CLECs. Qwest Brief at 25.

The City concedes that, as a result of the state laws that Qwest challenged below but not here, some telecommunications providers pay a right-of-way fee equal to 5% of gross revenues, while Qwest now pays a fee equal to 7% of its local exchange revenues. PER00003; PER00013.

However, as the Second Circuit explained in *White Plains*, 305 F.3d at 80:

The statute does not require precise parity of treatment. An earlier draft of the bill that ultimately became § 253 included a provision that would have forbidden local governments from imposing any fee that ‘distinguishes between or among providers of telecommunications

services.’ H.R. 1555, 104th Cong. § 243(e) (1995). Both the elimination of that provision and the language of the enacted version of § 253 strongly support the conclusion that franchise fees need not be equal...A city can negotiate different agreements with different service providers; thus a city could enter into competitively neutral agreements where one service provider would provide the city with below-market-rate telecommunications services and another service provider would have to pay a larger franchise fee, provided the effect is a rough parity between competitors.³¹

TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 790-92 (E.D. Mich. 1998), *aff’d* 206 F.3d 618 (6th Cir. 2000); *In re Petition of the State of Minnesota*, 14 FCC Rcd. 21,697, 21,725 at ¶ 52 (1999) (“it is not necessary for a state to treat all entities in the same way.”) The City may be required to treat those who are similarly situated with “rough parity” (at least absent good cause for different treatment). However, in order to state a discrimination claim, a plaintiff must at least claim that it is “similarly situated” to those to whom it compares itself. *See, e.g., Tigner v. Texas*, 310 U.S. 141, 147 (1990) (things which are not different in fact or opinion are

³¹ Qwests and amici argue that only cost-based discrimination is permissible. *White Plains* is to the contrary and more directly on-point. The authority relied upon by Qwest or amici involved provisions of the Telecommunications Act which required nondiscriminatory, cost-based rates. Any differences in treatment thus had to be cost based. Even so the FCC went on to indicate difference in treatment could at least be justified based on “requirements of the Act or applicable rules.”

not required by law to be treated as if the same). Here, Qwest did not show or even try to show, that it was similarly situated to communications companies paying 5% of gross revenues to the City. Instead, Qwest argues that any “differential fee” is unlawful, a claim that has been squarely rejected.³²

In any case, the record shows the fee is nondiscriminatory. The evidence shows that the 7-5% distinction was designed to provide “rough parity” between incumbent local exchange providers and new entrants, and further that any difference was designed to reflect problems allegedly facing Qwest and incumbent providers given the nature of their systems and the obligations imposed on them by state law. Thus Qwest told the legislature that moving from 5% of all gross to 7% of local exchange revenues would be “revenue neutral” and was necessary to establish a “uniform tax base” given the number of franchises held by Qwest.

³² Amici raise new factual bases for a discrimination claim based on Portland’s municipally-owned communications utility that were not raised or supported below. The City has moved to strike those arguments, and the Court should grant that motion. If it does not, it should be aware that had the claims been raised below the City would have shown Portland is licensed as a CLEC, and will be required to pay fees equivalent to those paid by other CLECs. However, Qwest has refused to provide services under an interconnection agreement with the City system, and so Portland is in fact not in the same position as amici. The statutes challenged do not contemplate or require any discrimination in favor of a municipal system.

PER00496-498. Qwest also argued that the change would promote competitive equality. Qwest further suggested that the changed revenue base was appropriate in order to maintain the fees at appropriate levels in light of Qwest's historical business. PER00225-235. Hence, the goal was to address a problem unique in scope to the incumbent. A different methodology might have been devised, but the chosen formula captured the majority of Qwest's revenues and (at least as far as the legislature was aware), achieved uniformity (at the time of enactment) without granting a significant revenue benefit to Qwest or to the cities. Nor would a different approach necessarily be fairer or less discriminatory. Charging new entrants a fee based on local exchange revenues would underrecover rents from them, given that the local exchange business is dominated by Qwest. Indeed, this appears to be the point of amici's briefs; they do not have similar revenue streams.

The competitive neutrality claims are equally meritless. Qwest claims that competitive neutrality requires differences in treatment to be based on cost, but the cases it cites required costs to be allocated on a competitively neutral basis and hence discuss the neutrality test in terms of cost. It is quite clear, however that the FCC has not stated neutrality depends on a cost

based test. *Silver Star Telephone Co, Inc.*, 13 FCC Rcd. 16, 356 (1998), n. 23.

Instead, the cases show Qwest's claims should fail, for at least four reasons. First, as White Plains explains, a mere difference in treatment does not create a competitive neutrality claim any more than it gives rise to a discrimination claim. Second, the focus of the competitive neutrality analysis is on "the effect" of a provision. *Minnesota*, 14 FCC Rcd. at 21,724, ¶ 51. In this case, the record shows the effect of the challenged provisions. There is unrebutted evidence of ample competition in Portland. PER00069-71. Third, revenue-based compensation is consistent with, not inconsistent with competitive neutrality. *In re Telephone Number Portability*, Opinion and Order, 17 FCC Rcd. 2578 (2002), the Commission rejected a "cost causation" test and instead decided that competitive neutrality required the allocation of costs based on *end user revenues*. This approach is consistent with the unrebutted testimony of Dr. Whitelaw showing that a gross revenues based fee can encourage entry. PER00386.³³

Fourth, there is no single, magic formula for "competitively neutrality." *Amicus* ELI asserts that charging every entrant a "flat fee" for

³³ Dr. Whitelaw's unrebutted testimony also explains that Qwest is wrong when it claims a gross revenue-based fee is unrelated to right-of-way use.

rent would not be competitively neutral, because it would prohibit new entry. ELI Brief at 9-10. Incumbent *amicus* Verizon suggests that every user should pay the same amount for use of the same rights of way...or that fees should be based on cost causation (an approach that would require new entrants to pay more and incumbents less). Verizon Brief at 15-16. Cities must have latitude to develop compensation structures, as *White Plains* indicates.

The *White Plains* decision was based on a record that showed the incumbent was being charged *nothing* going forward, while new entrants were being charged a gross revenues based fee. *White Plains* at 79. Here, Qwest and CLECs are being charged fees based on gross revenues. The City has presented probative evidence that the formulas chosen result in “rough parity” and has promoted competition. No more can be required.³⁴

³⁴ Amici argue that Qwest must recover a 7% tax entirely from local exchange customers (and thus will be disadvantaged in competing in that market), while intervenors must recover a 5% fee from all of its customers (and thus will be at a disadvantage competing for customers other than local exchange customers). These arguments have no support in the record. ELI Brief at 6. The City does not dictate that the fees it is paid must be recovered from one group of customers versus another; it leaves cost recovery to the companies and state law. The challenged provisions do not compel the results claimed.

C. Each of the Challenged Non-Fee Provisions Cited By Qwest Is Protected Under Section 253(b) or (c).

1. *Congress provided localities broad authority to obtain compensation for, and to manage use of rights-of-way.*³⁵

Qwest's argument assumes that local authority to manage the rights-of-way under Section 253(c) must be narrowly construed.³⁶ Section 253(c) was intended to provide broad protections against federal interference in an area historically left to state and local control.

Industry proponents in the Senate and the House opposed the broad exemption granted in subsection (c) precisely because they wanted the results alleged by Qwest, namely, a right to have the courts oversee whether particular right-of-way rules were necessary. Early versions of the House bill had contained language limiting the manner in which localities could manage the rights-of-way.³⁷ Limits on local authority over right-of-way

³⁵ There is a debate as to whether the “non-discrimination” and “competitive neutrality” tests for compensation also extend to requirements for use of the rights-of-way. *Cablevision of Boston, Inc. v. Pub. Improvement Comm’n*, 184 F.3d 88, 105 (1st Cir. 1999). It is not necessary to resolve the issue here, as Qwest does not argue that the non-fee provisions are discriminatory, or are applied in a way that is not “competitively neutral.”

³⁶ Qwest Brief at 7, 14.

³⁷ *See, e.g.* H.R. 1555, 104th Cong. (1st sess. 1995), as introduced May 3, 1995, protecting only permitting requirements that met certain defined tests

were rejected. Senators Feinstein (the former mayor of San Francisco) and Kempthorne (the former mayor of Boise) led the fight the Senate. Senator Feinstein pointed out the inherent problems associated with making local government management decisions subject to preemption:

[I]s a city insurance or bonding requirement a barrier to entry? Is a city requirement that a company pay fees prior to installing any facilities to cover the cost of reviewing plans and inspecting excavation work a barrier to entry? Is the city requirement that a company use a particular type of excavation equipment or a different and specific technique suited to certain local circumstances to minimize the risk of major public health and safety hazards a barrier to entry?....

141 Cong. Rec. S8305 (daily ed, June 14, 1995.).

Senator Gorton offered the compromise amendments that were ultimately adopted by the Senate as a modification to the Feinstein amendment. He concurred with the goals of the Feinstein amendment, noting that “the rules that a city or county imposes on how its street rights of way are going to be utilized...are a matter of primarily local concern and, of course, they are exempted” from preemption. 141 Cong. Rec. S8306 (daily ed., June 14, 1995).

and making even permitting requirements subject to preemption where requiring the permit prohibited market entry.

Courts and state legislatures have long recognized the importance of preserving local authority to regulate use of rights-of-way.³⁸ The 1996 Congress was particularly interested in respecting local and state authority under our federal system.³⁹ Right of way management problems have been compounded in recent years by the entry of new telecommunications providers, as well as the need to replace or upgrade systems installed decades ago, such as sewer and water systems. PER00014, PER00015. The failure to manage the rights-of-way properly can create health hazards and endanger local economies. PER00006, PER00007, PER00019-22.

Accordingly, Congress adopted language preserving the municipal authority to manage the rights-of-way, unqualified by any adjective. The Act does not state that cities are limited to including provisions (such as insurance provisions) that afford protection *after* a disaster occurs, as

³⁸ See, *Oregon Railway v. City of Portland*, 9 Or. 231, 238-39 (1881). The statute does not indicate that the railroad may proceed under such terms and conditions as it may dictate to the cities. The statute governs the use of public streets as railroad crossings. It does not restrict the terms and conditions of usage that may be sought by cities. Cities may fix terms and reserve general powers, provided that they do not serve to defeat the rights granted by the state franchise. See, generally, *Southern Pacific Co. v. City of Portland*, 227 U.S. 559 (1913).

³⁹ “Let local governments decide this issue. Washington does not know everything.” Remarks of Rep. Stupak, co-sponsor of the Stupak-Barton

opposed to imposing regulations (such as qualifications requirements and construction standards) that are designed to prevent the disaster from occurring. With the benefit of hindsight, for example, we now know that bonds and insurance may provide very limited protection as telecommunications companies go bankrupt. We know that it does make a difference who owns and control facilities, and that “off-the-book” “transfers” may devastate the companies involved, and leave cities with bankrupt facilities in the rights-of-way. The words of the Supreme Court in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) are appropriate here: nothing assigns “to the judiciary the authority to replace the Park Service as the manager of the Nation’s parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.” This does not mean that municipal discretion is unrestrained. A locality must, for example, be able to articulate the connection between right-of-way management and a particular regulation. But, it is clear that Congress

amendment, that passed the House over objections of the bill’s managers, 141 Cong. Rec. H8461 (daily ed., Aug. 4, 1995).

meant to leave it to Cities to manage the rights-of-way; and courts are not placed in the position of second-guessing the choices made.⁴⁰

2. *Each challenged provision is a proper exercise of the police power or right of way management authority.*⁴¹

A review of the non-fee provisions challenged by Qwest in its brief re-emphasizes that there is nothing in the provisions that comes close to “prohibiting” or “effectively prohibiting” entry. It is also clear from the nature of the challenges that Qwest has very little objection to the TRP under which it is actually operating. In the body of its brief, it challenges only four distinct sections of the TRP, and within those sections, a total of 9 subsections.⁴² The weakness of Qwest’s objection highlights the point

⁴⁰ The legislative history recites examples of activities falling within the scope of right-of-way management; that list has been parroted by the FCC. *In re Classic Telephone* 12 FCC Rcd. at fn. 102 (1997). Nothing in the legislative history suggests that list was meant to be comprehensive. The complexity of right-of-way management is clearly set out in the record. PER00033-34.

⁴¹ Each local government in this proceeding has passed separate and distinct provisions, and defending them together would result in an over-generalization. As such, each community is defending its own provisions. This brief only addresses the provisions at issue for the City of Portland.

⁴² In the addendum to its brief, Qwest lists an additional 11 subsections to which it objects, but where it never bothers to explain a basis for its objection. At least seven of those subsections were never even raised in the summary judgment proceedings below. There is a similar disconnect between Qwest’s addendum and its challenge to the Charter and Ordinance.

made earlier: the City is interpreting and applying its Charter and regulations in a manner consistent with limitations on its authority established by federal and state law. Each of the non-fee Portland provisions⁴³ that Qwest challenges in the body of its brief can be defended as falling within the safe harbors of Section 253 (b) or (c), and to the extent that Qwest raised such claims below, there is an undisputed factual record which explains why the safe harbors apply.⁴⁴ PER00025-55, PER00086-88.

1. *Franchise requirement; franchising process; franchise duration.* Charter 10-207, 10-208, 10-212, PCC 7.14.010, TRP a.2.C, r, t.

Portland requires persons using the rights-of-way to obtain franchises establishing terms and conditions for use and occupancy of the rights-of-way.⁴⁵ Franchises are mutually binding contracts under law. By spelling

Qwest's (unexplained) objections relate to items such as performance bonds, which fall directly within the bounds of right-of-way regulation

⁴³ Fee-related provisions, such as Charter 10-210, are supported by the preceding argument.

⁴⁴ Of course, as to challenges that Qwest raises for the first time on appeal, the record could not be complete. That is one of the reasons why issues cannot be raised on appeal for the first time, and why Qwest's claim that the Section 253(c) record with respect to all provisions it now cites is disingenuous.

⁴⁵ The permitting process is designed to address the specific construction issues that are presented by the use of the right-of-way at particular locations throughout the City. The franchise grants the right to enter into

out the terms and conditions of occupancy, Portland ensures that a utility's placement of its facilities is subject to reasonable public control, and that the control is not lost through a de facto or de jure transfer of rights. The FCC has made it clear that requiring a franchise is a proper form of right-of-way management, and almost every decided case, including *Auburn*, is to the same effect. *In re Classic Telephone*, 11 FCC Rcd. 13802 ¶ 4; *AT&T Communications of Southwest v. City of Dallas*, 8 F. Supp. 2d 582, 586 (N.D. Tex. 1998).

It follows that Portland may adopt a process for issuing and establishing fair contracts, and that is what the challenged provisions do. Qwest's objections to specific requirements are meritless. Acceptance provisions (Charter 10-212, TRP r) are essential to the formation of a contract, and hence the franchise. Cases finding acceptance provisions objectionable arise where acceptance is a mechanism for allowing the City to force the company to accept unlawful provisions; that is not the case here. TRP a.2.C set a relatively short limit on the permit period, a sensible provision given the purpose of the TRP to allow occupancy and usage to continue while outstanding legal issues are clarified. Strangely, Qwest

the rights-of-way, and establishes the general limitations on that grant.
PER00012, PER00005-06

never suggests what other mechanism, if any, for franchising that would be legally sufficient under its analysis. TRP a.2.D prevents Qwest from claiming property rights in the rights-of-way. Allowing one private party to gain property rights in the right-of-way would interfere with management of the rights-of-way and use by others, a real risk given Qwest's behavior elsewhere, as *Auburn* suggested, at 1168-69 when upholding the Cities' right to require relocation of facilities.

2. *Reservation of regulatory rights.* Charter 10-105, 10-106, 10-208, 10-211, PCC 7.12.050, 7.14.030. Many of the provisions to which Qwest objects simply reserve rights, designating the entity that is responsible for taking actions, or clarifying the relationship between the Charter and other provisions. They thus provide the predicate for organized and rational exercise of powers protected by Section 253(b) and (c). *See, e.g.,* Charter 10-105, 10-211. The City's more specific reservation in Charter 10-106⁴⁶ is specifically protected by Section 253(c), as one of the purposes of right-of-way management is to balance competing interests, and prevent public health hazards. PER00005. Section 253(b) also protects precisely this type of police power from preemption. The regulation of rates

⁴⁶ The right to investigate utility practices "when the public service, health or welfare require[s]."

(Charter 10-106) would be protected by Section 253(b) if the City were regulating rates. In fact the City does not interpret the Charter as permitting rate regulation of Qwest's rates under current law. PER00088; *Woodburn v. Public Service Commission*, 82 Or. 114, 161 P. 391 (1916); ORS Chapter 759. Qwest has not identified a single action taken by the City pursuant to any of these provisions which actually exceeds the bounds of Section 253(b)-(c), or which violates state law. The record shows the City interprets and applies the provisions only "to the extent authorized by law," TRP a.2.F.; PER00078.⁴⁷

The licensing provision to which Qwest objects (PCC 7.14.030) requires Qwest to obtain a tax certificate so the City can track those subject to the privilege tax. It is issued automatically. A provision that permits the City to enforce a tax that is fully protected by Section 601(c) and (to the extent it applies) Section 253(c) is itself protected by those sections.

3. *Gross Revenue and Other Reports.* Charter 10-107, 10-214, 10-215, PCC 7.12.010, 7.12.020, 7.12.030, 7.12.050, 7.12.080, 7.12.210, 7.14.060, TRP 1.c.3. Functions protected under Section 253(b) and (c)

⁴⁷ The provisions challenged are applicable to all utilities, not just telecommunications utilities, and the City's authority under state and federal law varies from utility to utility. In this context, it is particularly important to examine how the provisions are actually applied to particular utilities.

cannot be carried out unless the Franchisee's compliance can be monitored. The periodic reports on Qwest's gross revenues required by the City are directly related to the gross revenue fees Qwest owes the City; as those are valid, the reporting requirements are valid. Other reports provided for are designed to "conform" to those required by "state and federal" utility commission, except for "important and necessary changes". Among other things, these reports permit the City to identify franchisees facing financial difficulties. The undisputed record shows it protects against the harms to the rights-of-way by *inter alia* permitting the City to establish appropriate performance bonds and other security requirements. Charter 10-107, PCC 7.12.020, PER00057, PER00336-337, PER00077-82. Qwest does not point to any instance where the City has requested a report or information that exceeds that appropriate to permit it to perform functions protected by Section 253(b) or (c). It objects to one provision requiring the Franchise to identify the Franchisee (PCC 7.12.050), another (PCC 7.12.010) which imposes obligations on the City Auditor, not Qwest, and another (Charter 10-209) which requires compensation to be stated, and to the extent relevant, to identify when work will be performed in the streets – a clear management function.

5. *Transfer Provisions.* Charter 10-213, 10-216, TRP n.1, n.2.

Transfer provisions have been stricken in several cases. However, those cases assumed that “transfer review” process, in the context of the applicable state law, would be used to consider issues already reviewed and resolved by a state public service commission, and therefore could serve no legitimate municipal purpose. In fact, the Oregon PUC has no “transfer” oversight responsibilities for telephone companies. *Cf.*, ORS 757.511 (Commission oversight of exercise of influence over other utilities). No case has suggested transfer provisions always fall outside the protections of Section 253(b) or (c), as Qwest claims. The Second Circuit rejected that proposition in *White Plains*. The transfer process permits the City to ensure it knows who is responsible for the facilities in its streets, PER00006-07 and ensure that the necessary security, bonds, insurance and the like are in place for the new company *before the new company begins to operate*.⁴⁸ PER00079. The City (and its taxpayers) cannot be placed in the position of granting entry to a company that is incapable of satisfying its obligations with respect to right-of-way use, or which may lack the resources to remove facilities, repair streets, and repair damage. The undisputed facts are that

⁴⁸ For example, if a company is “self-insured,” in whole or in part, it is the assets of the company that are critical to the protection of the City.

Portland applies the transfer provisions in a manner that is directly aimed at protecting its interests in managing the rights-of-way. The challenged provisions are written to ensure that Portland may not “unreasonably delay or withhold” transfer consent. PER00006-07; TRP n.2 Portland is thus not in a position to consider unlawful factors as a ground for denying a transfer.

6. *Enforcement, Monitoring and Penalty Provisions.* Charter 10-108, 10-215, PCC 7.12.050, 7.12.100, 7.12.200, 7.14.070, 7.14.080, TRP o.1-o.4. Penalty provisions are key to ensuring that franchisees and licensees comply with the obligations they can be required to assume, PER00082-83, and is therefore protected by Section 253(b)-(c). The authority to manage rights-of-way implies the right to penalize those who refuse to comply with local management rules. The City uses insurance, indemnification, bonds, other security devices, as well as financial penalties and eviction to assure appropriate, non-abusive behavior by individual rights-of-way users. PER00040, PER00077-82. Where penalty provisions have been criticized in other cases, it is where they appear to serve as a mechanism to force compliance with unlawful provisions. Here, for example, Charter 10-108 allows an affected party to challenge the “justness or reasonableness” of orders.

III. QWEST'S OTHER CLAIMS SHOULD BE REJECTED

Qwest argues that the challenged laws are not severable. Portland joins intervenor Eugene's brief on this issue. Severability determines whether a comprehensive bill survives when its constituent provisions fail. But there is no single enactment here. Analysis of the Charter, Code and TRP must proceed separately. If Qwest's attack is limited to the TRP, it fails. TRP q.2. *See also*, PCC. 1.01.160 (Code provisions are severable).

Qwest also claims the District Court's rulings on claim preclusion and issue preclusion were error. We further join the briefing of Eugene on this issue as well.

CONCLUSION

This Court should affirm the judgment entered below.

Respectfully submitted,

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November 8, 2002
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Statement of Related Cases

Counsel are unaware of any related case within the meaning of
Circuit Rule 28-2.6.

[colored spacer per Cir. Rule 28-2.7]

STATUTORY ADDENDUM

Certificate of Compliance

(Cir. Rule 32.1)

I certify that Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Joint Brief for Appellee City of Portland is proportionately spaced, has a typeface of 14 points or more and contains 13,452 words.

Joseph Van Eaton

November 8, 2002

Certificate of Service

On November 8, 2002, I served the foregoing Brief for Appellee City of Portland and Supplemental Excerpts of Record via first-class U.S. mail to the Office of the Clerk, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, California 94119-3939 and to the following attorneys of record.

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