

**FILED: May 21, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CITY OF EUGENE, an Oregon municipal corporation,  
Plaintiff-Appellant,

v.

COMCAST OF OREGON II, INC., an Oregon corporation,  
Defendant-Respondent.

Lane County Circuit Court  
160803280

A147114

Karsten H. Rasmussen, Judge.

Argued and submitted on July 17, 2013.

Susan D. Marmaduke argued the cause for appellant. With her on the briefs were William F. Gary, Sihwa Go, Jona Maukonen, and Harrang Long Gary Rudnick PC.

Timothy R. Volpert argued the cause for respondent. With him on the briefs was Davis Wright Tremaine LLP.

Before Duncan, Presiding Judge, and Wollheim, Judge, and Schuman, Senior Judge.

SCHUMAN, S. J.

Reversed in part and remanded.

1 SCHUMAN, S. J.

2 This case involves a dispute between the City of Eugene and Comcast of  
3 Oregon II, Inc. (Comcast) over whether the city can impose certain fees on revenue that  
4 Comcast earned by providing broadband Internet service in Eugene. According to the  
5 city, Comcast's broadband Internet service is a "telecommunications service" under the  
6 city's telecommunications ordinance, and the city is therefore entitled to collect a two-  
7 percent registration fee and seven-percent license fee that the ordinance imposes on gross  
8 revenues derived from telecommunications services within the city. Comcast, for its part,  
9 claims that the definition of "telecommunications services" in the ordinance was never  
10 intended to include Internet access services and, further, that the city has discriminated  
11 against Comcast by treating it differently from all other Internet access service providers  
12 in Eugene. The trial court agreed with Comcast for the most part, ruling that its  
13 broadband Internet services were not "telecommunications services" under the ordinance  
14 and, alternatively, that the city's enforcement of the ordinance against Comcast would  
15 violate the federal Internet Tax Freedom Act (ITFA) and state and federal constitutional  
16 protections. For the reasons that follow, we affirm the trial court's judgment with respect  
17 to the registration fee, collection of which is barred by the ITFA, but we reverse and  
18 remand with respect to collection of the license fee.

19 I. BACKGROUND

20 We will reserve some discussion of the facts for a more focused treatment  
21 of particular assignments of error, but we provide the following general background to

1 frame the issues on appeal. We take the facts from the trial court's findings, which the  
2 parties do not challenge on appeal, and we supplement them with the undisputed  
3 regulatory backdrop and procedural history of the case.<sup>1</sup> Because the sequence of events  
4 is relevant, we set out the facts in roughly chronological order.

5 A. *Regulatory Background*

6 1. *Comcast is granted a cable franchise in Eugene.*

7 In 1991, the City of Eugene granted Comcast a nonexclusive franchise to  
8 develop, install, and operate a cable communications system in the city's rights-of-way.<sup>2</sup>  
9 The franchise called for Comcast to pay the city a fee in the amount of five percent of  
10 Comcast's revenue from services within the franchise area. Pursuant to the franchise,  
11 Comcast provided cable television services in Eugene and paid the city the five-percent  
12 franchise fee on revenue derived from those television services.

13 2. *Congress passes the Telecommunications Act.*

14 In 1996, Congress passed the Telecommunications Act, which amended the  
15 Communications Act of 1934 (collectively, "the Act"). The Act imposes common-carrier

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<sup>1</sup> In addition to making explicit factual findings, the trial court also adopted a set of stipulated findings that the parties submitted jointly.

<sup>2</sup> The franchise was granted to Comcast's predecessor in interest, TCI Cablevision of Oregon, Inc. (TCI). TCI merged with AT&T in 1998, creating AT&T Broadband, and TCI's rights under the franchise were assigned to AT&T Broadband, which later assigned its rights under the franchise to Comcast. To avoid unnecessary confusion, we generally do not distinguish in this case between Comcast and its predecessors.

1 duties on providers of "telecommunications service," 47 USC § 153(51),<sup>3</sup> but not on  
2 providers of "information service." The Act defines "telecommunications service" as  
3 "the offering of telecommunications for a fee directly to the public, or to such classes of  
4 users as to be effectively available directly to the public, regardless of the facilities used."  
5 47 USC § 153(53). It then defines the term "telecommunications" as "the transmission,  
6 between or among points specified by the user, of information of the user's choosing,  
7 without change in the form or content of the information as sent and received." 47 USC  
8 § 153(50). "Information service," by contrast, is defined as "the offering of a capability  
9 for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or  
10 making available information via telecommunications." 47 USC § 153(24).

11 3. *Eugene adopts its telecommunications ordinance.*

12 That same year, 1996, the Eugene City Council adopted its  
13 Telecommunications Vision and Policies. As described in that document, the city  
14 envisioned a "coordinated regional information infrastructure that provides accessible and  
15 affordable high-speed connectivity for citizens, public institutions, and businesses and is  
16 constructed in a manner that best serves the public interest." The city identified, as one  
17 of its policies, that "[p]ublic inconvenience and disruption stemming from the  
18 installation, maintenance, and operation of telecommunications facilities shall be  
19 minimized and fully compensated."

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<sup>3</sup> As a result of amendments over the years, many provisions in the Act have been renumbered. For ease of reference, we use the numbering in the current version of the Act.

1           The following year, in April 1997, the city council adopted the ordinance at  
2 issue in this case, Ordinance No. 20083 ("the ordinance" or "telecommunications  
3 ordinance"). The ordinance imposes two fees that are relevant here. First, the ordinance  
4 requires "operators"--*i.e.*, those "who provide[] telecommunications services"--to register  
5 with the city and pay an annual registration fee of two percent of revenues for those  
6 telecommunications services. Eugene City Code (ECC) 3.005; ECC 3.405; ECC  
7 3.415(1). Second, the ordinance requires operators to obtain a license before locating any  
8 facility in the city right-of-way to "[c]onstruct a telecommunications facility or provide  
9 telecommunications service." ECC 3.410. Operators who are required to obtain a license  
10 must pay an annual license fee "in the amount of 7% of the licensee's gross revenues  
11 derived from telecommunications activities within the city, to compensate the City for the  
12 use of the rights-of-way." ECC 3.415(2). The license fee is separate from, and in  
13 addition to, the registration fee.

14           As described above, both the license fee and registration fee apply to  
15 providers of "telecommunications services." The ordinance includes the following  
16 definition of that term:

17           "Telecommunications services. The transmission for hire, of  
18 information in electromagnetic frequency, electronic or optical form,  
19 including, but not limited to, voice, video, or data, whether or not the  
20 transmission medium is owned by the provider itself, and whether or not  
21 the transmission medium is wireline or wireless. Telecommunications  
22 service includes all forms of telephone services and voice, data and video  
23 transport, but does not include: (1) cable [television] service; (2) OVS  
24 service; (3) private communications system services; (4) over-the-air radio  
25 or television broadcasting to the public-at-large from facilities licensed by  
26 the Federal Communications Commission or any successor thereto; and (5)

1 direct-to-home satellite service within the meaning of Section 602 of the  
2 Telecommunications Act of 1996."

3 ECC 3.005.

4 Both before and after the ordinance was adopted, there were questions as to  
5 whether it was intended to reach Internet service providers (ISPs), which, at that point in  
6 time, were predominantly "dial-up" ISPs that depended on local telephone companies to  
7 transmit signals. During a public hearing on whether the city council should adopt the  
8 ordinance, the general manager of one of those dial-up ISPs, Eugene FreeNet, asked city  
9 council members to address whether the proposed amendments would apply to Internet  
10 service providers. Randy Kolb, who was the staff lead to the council committee that  
11 developed the ordinance, responded at the hearing by stating that Internet service  
12 providers would not be affected by the proposed fees. One of the council members then  
13 requested that the language of the ordinance be amended to make it clear that Internet  
14 service providers would not be affected by the ordinance, but no such amendments were  
15 made.<sup>4</sup>

16 After the ordinance was adopted, a city employee prepared a "white paper"  
17 to guide the city's application of the ordinance. The white paper, which was reviewed by  
18 the city's legal counsel, stated in its first paragraph that "Internet and radio/television  
19 broadcasting are *not* applicable." (Emphasis in original.)

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<sup>4</sup> Kolb reviewed proposed language and determined that no amendments were necessary. At trial, he testified that, to the best of his recollection, he concluded that no clarification was necessary because the ISPs did not operate telecommunications facilities in the city.

1                   4.       *Congress enacts the Internet Tax Freedom Act.*

2                   Around the same time that the City of Eugene was adopting its  
3 telecommunications ordinance, Congress was addressing the specific question of taxation  
4 of the Internet. In 1998, one year after the city adopted its telecommunications  
5 ordinance, Congress enacted the ITFA, codified in a note following 47 USC § 151. The  
6 ITFA, in oversimplified terms, does two things. First, it prevents state and local  
7 governments from imposing "taxes on Internet access, unless such tax was generally  
8 imposed and actually enforced prior to October 1, 1998." ITFA § 1101(a)(1). Second,  
9 the ITFA prohibits state and local governments from imposing "multiple or  
10 discriminatory taxes on electronic commerce." *Id.* at § 1101(a)(2).

11                   In February 1999, the city's employees, including Kolb and Pam Berrian,  
12 who was the city's telecommunications and cable program manager, submitted a report to  
13 the Eugene City Council that addressed the status of the telecommunications ordinance  
14 and, in particular, mentioned the newly enacted ITFA. The report states that the subject  
15 of "Internet taxation" had been capturing attention on several fronts, but that "[t]hat issue  
16 will not be discussed here since Ordinance 20083 (the telecommunications ordinance.) is  
17 not inclusive of Internet activities."

18                   5.       *Comcast begins offering broadband Internet service in Eugene.*

19                   On October 26, 1999, Comcast began providing cable modem service, a  
20 broadband Internet access service, to customers in Eugene. The technical aspects of that  
21 service will be discussed later in more detail, but Comcast essentially provides its

1 subscribers with Internet access by delivering Internet Protocol (IP) packets to and from  
2 the Internet and by providing an associated set of services, such as assigning IP  
3 addresses. Unlike the dial-up ISPs that preceded it, which depended on transmission  
4 facilities owned by other providers (such as telephone companies) to deliver IP packets,  
5 Comcast owns its own transmission facilities--*i.e.*, the cable lines that it used to provide  
6 cable television under its franchise agreement with the city. Beginning in 1999, when it  
7 began providing broadband Internet services, Comcast paid a five-percent fee on those  
8 services pursuant to the franchise agreement. That changed in 2002, however, as the  
9 result of a ruling by the Federal Communications Commission (FCC).

10           6.       *The FCC rules that cable modem services are not*  
11                    *telecommunications services.*

12           Although Comcast did not begin providing cable modem services in  
13 Eugene until 1999, questions had arisen elsewhere over whether cable modem services  
14 were "telecommunications services" or "information services" for purposes of the 1996  
15 Federal Telecommunications Act. In 2002, the FCC issued a declaratory ruling in which  
16 it concluded that cable modem services are *not* "telecommunications services" under the  
17 Act. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other*  
18 *Facilities*, 17 FCC Rcd 4798 (2002). (As we will later discuss, the United States  
19 Supreme Court eventually held that the FCC's interpretation of the Telecommunications  
20 Act was a reasonable one and was therefore entitled to deference. *Nat'l Cable &*  
21 *Telecomm. v. Brand X*, 545 US 967, 125 S Ct 2688, 162 L Ed 2d 820 (2005).) In the  
22 wake of the FCC's 2002 declaratory ruling, Comcast stopped paying any franchise fees to



1 the City of Eugene for cable modem services and, from that point forward, rebuffed the  
2 city's assertions that franchise fees were owed on those services.

3 B. *Procedural History*

4 1. *The city attempts to enforce its ordinance against Comcast.*

5 Comcast and the city entered into a new franchise agreement, effective  
6 November 2007. A few months later, the city filed its complaint in this action to collect  
7 fees based on Comcast's cable modem services. However, this time, the city was not  
8 seeking to collect under the franchise agreement, but, rather, based on the city's  
9 telecommunications ordinance. That is, the city alleged, among other things, that  
10 Comcast owed the two-percent registration fees and the seven-percent license fees under  
11 the ordinance dating back to 1999, when Comcast began providing cable modem services  
12 in Eugene.

13 2. *The trial court rules that cable modem services are*  
14 *"telecommunications services" under the city's ordinance and rejects*  
15 *Comcast's arguments that the registration and license fees are*  
16 *barred as a matter of law by the ITFA.*

17 The parties filed cross-motions for summary judgment with respect to  
18 various issues raised by the city's complaint, including whether cable modem services are  
19 within the definition of "telecommunications services" in the ordinance. That question,  
20 in turn, reduced to whether Comcast engaged in "transmission for hire"--part of the  
21 definition of "telecommunications services"--when providing cable modem services. The  
22 trial court ruled in the city's favor on that question, applying dictionary definitions of  
23 "transmission" and "for hire" to conclude that, by sending and receiving signals for

1 remuneration, Comcast had engaged in "transmission for hire" and, consequently, had  
2 provided telecommunications services subject to the ordinance.

3           Alternatively, Comcast argued that, even if the ordinance were to apply to  
4 its cable modem services, then the registration and license fees are barred by the ITFA's  
5 tax moratorium and ban on discriminatory taxes; the license fees are franchise fees and  
6 therefore preempted by a provision of the federal Cable Act, 42 USC § 542(b); the  
7 franchise agreement excuses Comcast from obtaining a right-of-way and paying the  
8 license fees; and the city's selective enforcement of the ordinance violates constitutional  
9 protections against discriminatory treatment. The trial court ruled as a matter of law  
10 against Comcast on the bulk of those issues, leaving two questions for trial: (1) whether  
11 the annual registration fees had been generally collected before October 1, 1998, thereby  
12 excepting them from the moratorium on Internet taxes; and (2) whether the city, in  
13 enforcing the ordinance against Comcast but not other ISPs, had discriminated against  
14 Comcast in violation of state and federal constitutional protections.

15           3.       *Comcast offers expert testimony at trial regarding Internet access*  
16                    *services.*

17           The parties then proceeded to trial before the court on those two remaining  
18 questions. The city offered testimony by Kolb and Berrian to explain why the city had  
19 attempted to collect registration and license fees from Comcast but not other ISPs. Kolb  
20 explained that the city was not interested in "things like modems, which merely translate  
21 analog to digital," but rather was "always after the physical lines that existed in the city of  
22 Eugene and in the radio communications that were located in the city of Eugene that

1 carried this traffic. \* \* \* We were interested in the highway."

2           Among its witnesses, Comcast called Dale Hatfield, an expert in the field of  
3 telecommunications. Hatfield explained that Internet access service is provided by using  
4 "transmission service," but that Internet access service is not *itself* transmission service.  
5 He used the analogy of train transportation. The "transmission facility," he testified,  
6 "would be the rail bed." The transmission service "might be the engine and flatbed cars,"  
7 and the "Internet packets would be those shipping containers that go onto the flatbed."  
8 According to Hatfield, Kolb's description, by way of related analogy, of what the city  
9 intended to tax--the highway--was separate and apart from the Internet access service that  
10 rides on top of the highway.

11           4.       *The trial court reconsiders its ruling and changes course.*

12           After the parties put on their respective cases, Comcast asked the court to  
13 reconsider its summary judgment rulings in light of the development of the record at trial.  
14 Primarily, Comcast asked the court to reconsider its earlier ruling that cable modem  
15 services involved "transmission for hire" under the ordinance. Comcast argued that the  
16 court had erred in relying on the ordinary meanings of "transmission" and "for hire,"  
17 because "transmission for hire" is a term of art in the telecommunications industry, as  
18 demonstrated by Hatfield's testimony.

19           The trial court agreed with Comcast and, over the city's objection,  
20 reconsidered its earlier interpretation of the ordinance. This time, rather than look to the  
21 ordinary meanings of the terms "transmission" and "for hire," the court looked to

1 Hatfield's testimony and the meaning of "telecommunications" under state and federal  
2 laws. The court ultimately "adopt[ed] Mr. Hatfield's testimony and conclud[ed] that  
3 Internet access is not a transmission for hire in the telecommunications industry, and thus  
4 cable modem access is not subject to the Ordinance." The court further reasoned that  
5 "telecommunications" should mean the same thing under the ordinance as it does under  
6 state and federal laws, notwithstanding the fact that those laws use language different  
7 from the ordinance. The court explained:

8 "This Court is persuaded that telecommunications services in  
9 Eugene should be defined in the same way as the Oregon Legislature and  
10 Congress define telecommunications services. Although, Eugene's  
11 Ordinance defined telecommunications very broadly, this Court does not  
12 understand telecommunications to be different in Eugene than it is in the  
13 rest of the country. Thus, in Eugene, Comcast is not offering a  
14 'transmission for hire' when it offers Internet access, but is offering the end  
15 product of data manipulation."

16 Although the trial court's ruling regarding application of the ordinance was  
17 dispositive, the court nonetheless proceeded to address other issues to avoid the necessity  
18 of a remand after appeal. The court declined to reconsider its ruling that the license fee  
19 was a tax under the ITFA, but did reconsider the legality of the registration fee under that  
20 statute, concluding that it was discriminatory and therefore barred by the ITFA. As for  
21 the two issues that had been set for trial, the court ruled that the registration fee had not  
22 been generally collected from Internet access providers before October 1, 1998, and was  
23 therefore barred by the ITFA for that reason as well. Additionally, the court concluded  
24 that, for purposes of the state and federal constitutions, "Comcast has demonstrated an  
25 intentional and systematic pattern of discrimination by the City because the City has not

1 collected the registration or license fees on Internet access revenues of other providers  
2 that are subject to the Ordinance under the City's interpretation." The court then entered  
3 a judgment in Comcast's favor that incorporated the court's letter opinion.

4 5. *The city appeals; Comcast cross-assigns error.*

5 The city now appeals, advancing five assignments of error. Those  
6 assignments raise three general issues: whether the court erred in ruling that (1) the  
7 ordinance did not apply to Comcast's cable modem services; (2) the registration fee is  
8 barred by the ITFA; and (3) the imposition of the registration and license fee violated  
9 Comcast's rights under Article I, section 32, of the Oregon Constitution or the Equal  
10 Protection Clause of the Fourteenth Amendment to the United States Constitution.  
11 Comcast defends the court's rulings and asserts cross-assignments of error in which it  
12 argues that the license fee is unenforceable for three additional reasons that the trial court  
13 rejected: (1) the license fee is barred by the ITFA; (2) the license fee is preempted by 47  
14 USC § 542; and (3) the license fee is barred by ECC 3.410(6).

15 II. ANALYSIS

16 A. *Are Cable Modem Services "Telecommunications Services" under the*  
17 *Ordinance?*

18 In its first assignment of error, the city challenges the trial court's ruling that  
19 cable modem services are not "telecommunications services" within the meaning of the  
20 ordinance. In the city's view, the trial court was swayed by two sources--Hatfield's  
21 testimony and the definitions of "telecommunications" under state and federal statutes--  
22 that have little to no bearing on the meaning of the city's ordinance. For the reasons that

1 follow, we agree with the city.

2           Our aim in construing a local ordinance is the same as when construing a  
3 statute: to discern the intent of the body that promulgated the law. Thus, we follow the  
4 same method that we ordinarily employ to determine the meaning of a statute, examining  
5 the text, context, and helpful legislative history of the provision in dispute, and, if  
6 necessary, turning to maxims of construction. *See State v. Gaines*, 346 Or 160, 171-72,  
7 206 P3d 1042 (2009) (setting out the method for statutory interpretation); *Lincoln Loan*  
8 *Co. v. City of Portland*, 317 Or 192, 199, 855 P2d 151 (1993) (applying statutory  
9 construction template to a municipal ordinance); *Comcast of Oregon II, Inc. v. City of*  
10 *Eugene*, 211 Or App 573, 584, 155 P3d 99 (2007), *aff'd on other grounds*, 346 Or 238,  
11 209 P3d 800 (2009) (examining the text of the Eugene City Code by the same method  
12 prescribed for statutory interpretation).

13           The starting point, then, is the text of the disputed provision, ECC 3.005,  
14 which sets forth the definition of "telecommunications services." That definition, once  
15 again, states:

16           "Telecommunications services. The transmission for hire, of  
17 information in electromagnetic frequency, electronic or optical form,  
18 including, but not limited to, voice, video, or data, whether or not the  
19 transmission medium is owned by the provider itself, and whether or not  
20 the transmission medium is wireline or wireless. Telecommunications  
21 service includes all forms of telephone services and voice, data and video  
22 transport, but does not include: (1) cable [television] service; (2) OVS  
23 service; (3) private communications system services; (4) over-the-air radio  
24 or television broadcasting to the public-at-large from facilities licensed by  
25 the Federal Communications Commission or any successor thereto; and (5)  
26 direct-to-home satellite service within the meaning of Section 602 of the  
27 Telecommunications Act of 1996."

1           The parties agree that we should focus on the first four words of the  
2 definition--"the transmission for hire"--but from there, their approaches diverge.  
3 Whereas the city urges us to look at the plain meaning of those words, Comcast argues  
4 that the trial court correctly understood "transmission for hire" as a term of art in the  
5 telecommunications industry.

6           Generally, when an enacting body like a city council has not defined a term  
7 used in its law, we assume that the body used words consistently with their ordinary  
8 meanings. *See Zimmerman v. Allstate Property and Casualty Ins.*, 354 Or 271, 279-80,  
9 311 P3d 497 (2013) (describing that rule in the context of statutory interpretation).  
10 However, if "the term has acquired a specialized meaning in a particular industry or  
11 profession," we assume that the enacting body "used the term consistently with that  
12 specialized meaning." *Id.* at 280. Thus, the first question before us is whether  
13 "transmission for hire" is a term that has acquired a specialized meaning in the  
14 telecommunications industry.

15           In support of its position that "transmission for hire" is a term of art,  
16 Comcast points to the testimony of its expert, Hatfield. The trial court relied heavily on  
17 that testimony as well, stating that "Hatfield, an expert in the field of  
18 telecommunications, *has testified to the industry definitions of 'transmission for hire' and*  
19 *telecommunications does not include cable modem service.*" (Emphasis added.) But, as  
20 the city correctly observes, Comcast and the trial court read Hatfield's testimony for more  
21 than it is worth.

1           Because it is central to the parties' argument, we quote much of Hatfield's  
2 testimony at length. Hatfield, who had decades of experience in the telecommunications  
3 industry, was initially called upon to testify concerning "how providers of Internet access  
4 service utilize telecommunications facilities within the city of Eugene."<sup>5</sup> Hatfield  
5 proceeded to explain that various ISPs--dial-up, cable modem, DSL, dedicated digital  
6 line, and wireless--use different types of transmission facilities, but each performs the  
7 same basic function: delivering information packets to and from the Internet. Hatfield  
8 prepared various diagrams, including Exhibit D42, which charted the delivery of those  
9 packets by different types of ISPs. For each type of access, the exhibit showed, from left  
10 to right, the computer and modem; the local transmission facility; the physical location of  
11 the Internet access provider's facilities ("Point of Presence"); the dedicated high capacity  
12 transmission facility; and the Internet.<sup>6</sup> Hatfield explained that Internet access can be  
13 broken into different "layers" or tiers. He used the analogy, to which we alluded above,  
14 of rail transportation: The transmission facility is like the rail bed and tracks; the  
15 transmission service is like an engine and flatbed cars; and the Internet packets are like

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<sup>5</sup> First, Comcast's counsel asked Hatfield to testify about "any specific expert opinions regarding the issues in this case[.]" After an objection from the city, Comcast's counsel stated, "Your honor, these are not opinions on the law. These are opinions on facts *on how Internet access is provided in the city of Eugene.*" (Emphasis added.) After the court questioned whether that would be of any assistance to it, Comcast's counsel assured the court that Hatfield would be describing "how providers of Internet access service utilize telecommunications facilities within the city of Eugene."

<sup>6</sup> In the case of the dedicated digital line, there are high capacity transmission facilities on both sides of the point-of-presence.



1 shipping containers that ride on flatbed cars. Thus, he testified, "the Internet is a network  
2 that rides on top and takes advantage of these transmission facilities, and so there's high-  
3 capacity transmission facilities that you can get from any number of carriers,"  
4 emphasizing that "the Internet is something that rides on top of, that can use all types of  
5 different capacity."

6           After Hatfield testified, Kolb testified for the city. Kolb had prepared his  
7 own version of Exhibit D42, which highlighted the local transmission facilities and  
8 dedicated high-capacity transmission facilities that were depicted on that exhibit. Kolb  
9 testified that he highlighted "the telecommunications lines, be they physical lines like  
10 fiber or copper or coaxial or radio communications, that are located within the city of  
11 Eugene." When asked why he had excluded the "so-called point-of-presence," he  
12 explained that the city was not interested "in things like modems [located at the point-of-  
13 presence], which merely translate analog to digital," but that the city was "always after  
14 the physical lines that existed in the city of Eugene and in the radio communications that  
15 were located in the city of Eugene that carried this traffic. \* \* \* We were interested in the  
16 highway."<sup>7</sup>

17           Comcast later re-called Hatfield to the stand, and he was asked about Kolb's  
18 diagram. The following colloquy ensued:

19           "Q. [COMCAST'S COUNSEL] Now, sticking with Mr. Kolb's  
20           diagram, the services that Mr. Kolb indicates the City did intend to tax are

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<sup>7</sup> In addition to his railroad analogy, Hatfield had likened the "transport layer" of communications to a highway.

1 the transmission services that are highlighted. *Now, in common industry*  
2 *parlance, are those what--are those transmission services traditionally*  
3 *known as telecommunications services?*

4 "A. [HATFIELD] *Yes, they would be telecommunications services.*  
5 As I tried to explain yesterday, the Internet then rides upon--using that  
6 layered model, they ride upon those transmission facilities or services.

7 "Q. *And once again, in common industry parlance, are those*  
8 *transmission services that are highlighted there on Mr. Kolb's diagram*  
9 *considered Internet access service?*

10 "A. *No.* As I tried to--

11 "THE COURT: Stop, stop. You said transmission services.

12 "[COMCAST'S COUNSEL]: *Yes.*

13 "THE COURT: The diagram says transmission facilities. Is there  
14 any distinction to be made there?

15 "[HATFIELD]: As an engineer, I would make the distinction. The  
16 transmission facility is the actual physical electrical equipment that's used.  
17 But that can be used for lots of different services."

18 (Emphasis added.)

19 Hatfield then offered further testimony on "common industry parlance":

20 "Q. [COMCAST'S COUNSEL]: So now, *in common industry*  
21 *parlance, are those transmission services that you just discussed with the*  
22 *Judge and that are highlighted on Mr. Kolb's diagram there considered*  
23 *Internet access service?*

24 "A. *No. As I was trying to say, the Internet access is just but one*  
25 *service that could use that transmission service \* \* \*."*

26 (Emphasis added.)

27 Hatfield explained that Comcast does not offer separate, stand-alone  
28 transmission service between the customer's premises and Comcast's point-of-presence.

1 Rather, as a result of the FCC's 2002 declaratory ruling described above, cable modem  
2 companies can "combine the telecommunications portion, if you will, with the Internet  
3 access portion *into a single offering*." (Emphasis added.) He later returned to the subject  
4 of Kolb's diagram, explaining that it did not actually highlight Internet access revenues:

5 "Q. So you were here and you heard what Mr. Kolb testified to  
6 yesterday, that they only wanted to get--they only wanted to tax the  
7 transmission services that are highlighted there. But also implicit in his  
8 testimony is that they wanted to capture Internet access revenues.

9 "Now, given what he's done there [with highlighting], does that  
10 make any sense? Are you taxing Internet service revenues there?

11 "A. No. When I heard \* \* \* the testimony, that was my reaction. It  
12 captures the telecom part but does not capture the--does not capture the  
13 Internet access part.

14 "Q. Now, why is that? Can you explain why?

15 "A. Well, for the reason--the reason that I just described. Without  
16 this link in here (indicating), you couldn't have packets moving back and  
17 forth across that network, going back to the layer sort of description and the  
18 analogies that I've given here this afternoon."

19 (Emphasis added.)

20 Based on the foregoing testimony, we conclude that, despite being asked  
21 about certain "industry parlance," Hatfield did not actually offer a technical or industry  
22 meaning of the terms used in the ordinance--"transmission for hire." Hatfield testified to  
23 the technical distinction in the telecommunications industry between transmission  
24 services and Internet access services and the effect of the FCC's ruling. The question for  
25 purposes of the ordinance, though, is not whether Internet access services are  
26 transmission services, or whether Comcast offers stand-alone transmission services.

1 Rather, the question is whether Comcast's *cable modem services* are "transmission for  
2 hire."

3           Hatfield did not testify that "transmission for hire" or, for that matter,  
4 "transmission," is a term of art in the telecommunications industry. While "transmission  
5 services" might be understood to be distinct from Internet access services, Hatfield also  
6 testified that transmission of data is a necessary component of Internet access, and that  
7 cable modem services are a combined offering that transmits data over  
8 telecommunications facilities. That is, unlike some other types of ISPs, when Comcast  
9 provides cable modem services, it provides Internet access services by *transmitting data,*  
10 *over its own cable lines, to and from the Internet.* Hatfield's testimony, which conveys  
11 the industry's understanding of the technical layers involved in providing Internet access,  
12 says nothing about whether the city, by using the phrase "transmission for hire," intended  
13 to capture revenue from a provider whose combined offering, like Comcast's cable  
14 modem services, necessarily includes the transmission of data to and from the Internet  
15 over its own transmission facilities.<sup>8</sup> Thus, the court erred in treating "transmission for  
16 hire" as a term of art based on Hatfield's testimony.<sup>9</sup>

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<sup>8</sup> To the extent that Comcast suggests that "telecommunications services," as opposed to "transmission for hire," is a term of art, we reject the contention. We will not give words their industry (or common) meaning when those words are specifically defined in the law itself, as is the case with "telecommunications services." Moreover, as we later discuss, the definitions of "telecommunications services" in other contexts provide little help in interpreting the language of the ordinance, which differs significantly from those other definitions.

<sup>9</sup> Because we agree with the city that Hatfield did not actually testify that

1           The trial court, however, offered an alternative reason for looking beyond  
2 the ordinary meaning of "transmission for hire." The court, on reconsideration, was  
3 "persuaded to consider federal legal definitions and interpretations" of the Federal  
4 Telecommunications Act, which had excluded cable modem services from the definition  
5 of "telecommunications services." The court observed that the city's ordinance was  
6 adopted with knowledge, and in consideration, of the Act, and ruled that there was "no  
7 reason to define cable modem access as a transmission in Eugene, when federal law has  
8 determined that cable modem access is not a separate transmission."

9           There are, as the city identifies, two fundamental problems with that  
10 approach. First, as noted before, timing matters. The classification of cable modem  
11 services under the Act would provide relevant context for interpreting the city's ordinance  
12 only if the city could have known about it at the time the ordinance was adopted. *See*  
13 *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995) (proper inquiry in  
14 interpreting a law focuses on what the legislature intended at the time of enactment).  
15 Although the Act itself predated the city's ordinance, it was the FCC's interpretation of  
16 that Act--and the Supreme Court's decision in *Brand X*, affirming the FCC's ruling--that  
17 the trial court ultimately found persuasive regarding the meaning of the city's ordinance.  
18 The FCC's interpretation of the Act *vis-a-vis* cable modem services, which it expressed in  
19 the declaratory ruling, was not issued until 2002, five years after the city adopted its

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"transmission for hire" is a term of art, we need not resolve the parties' dispute as to whether expert testimony is a permissible way to establish the meaning of a term of art.

1 ordinance. The Supreme Court's decision in *Brand X* did not issue until three years after  
2 that. Thus, the city council could not have been aware of either interpretation when  
3 crafting its own ordinance.

4           Second, and most important, the Act defines "telecommunications services"  
5 with language that is materially different from the definition in the city's ordinance. The  
6 Act defines "telecommunications service" as "the offering of telecommunications for a  
7 fee directly to the public, or to such classes of users as to be effectively available directly  
8 to the public, regardless of the facilities used." 47 USC § 153(53). It then defines  
9 "telecommunications" as "the transmission, between or among points specified by the  
10 user, of information of the user's choosing, *without change in the form or content of the*  
11 *information as sent and received.*" 47 USC § 153(50) (emphasis added). The ordinance,  
12 by contrast, makes no reference to whether there is change in the form or content of the  
13 information that is sent. Rather, as set out more fully above, \_\_\_ Or App at \_\_\_ (slip op  
14 at 13), the ordinance defines "telecommunications" broadly as "[t]he transmission for  
15 hire, of information in electromagnetic frequency, electronic or optical form, including,  
16 but not limited to, voice, video, or data, whether or not the transmission medium is  
17 owned by the provider itself, and whether or not the transmission medium is wireline or  
18 wireless." If anything, the fact that Eugene's city council was aware of (and referred to)  
19 the Telecommunications Act but employed its own definition of "telecommunications  
20 services," suggests that the city council intended a different meaning for its ordinance.  
21 *E.g., Schmitt v. State Tax Com.*, 234 Or 455, 464, 383 P2d 97 (1963) (inferring that

1 differences between state and federal statutes represented a purposeful departure from  
2 federal law where "[t]he most reasonable interpretation is that the drafters of the [state]  
3 act were familiar with the use of the phrase in the federal act \* \* \* [and] were also  
4 familiar with the importance the federal government had placed on that phrase").

5           Indeed, it was language that appears in the Telecommunications Act--and  
6 not in the city's ordinance--that ultimately drove the FCC's conclusion that cable modem  
7 services are not "telecommunications services." As relevant here, the Act creates two  
8 categories of regulated entities: telecommunications carriers and information-service  
9 providers. Telecommunications carriers are regulated as common carriers, which  
10 requires them to charge just and reasonable, nondiscriminatory rates, 47 USC §§ 201-  
11 209, design their systems so that other carriers can interconnect with their networks, *id.* at  
12 § 251(a)(1), and contribute to the federal "universal service" fund, *id.* at § 254(d).  
13 Information-service providers, on the other hand, are not subject to those common-carrier  
14 regulations.

15           In April 1998, the FCC issued a report to Congress regarding  
16 implementation of the Act. In that report (the "Universal Service Report"), the FCC  
17 addressed the definitions of "telecommunications service," "telecommunications," and  
18 "information service" as they relate to Internet access. *In the Matter of Federal-State*  
19 *Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998). At that time, Internet  
20 access services were typically provided through a "dial up" connection that involved  
21 transmission of information over local telephone lines. In the Universal Service Report,

1 the FCC assumed that ISPs generally are separate from the telecommunications  
2 companies that are transmitting the data across telephone lines, but suggested that a  
3 different model might require a different approach. The report states, in part:

4 "[W]e clarify that the provision of transmission capacity to Internet access  
5 providers and Internet backbone providers is appropriately viewed as  
6 'telecommunications service' or 'telecommunications' rather than  
7 'information service,' and that the provision of such transmission should  
8 also generate contribution to universal service support mechanisms. Thus,  
9 we find, in general, that continued growth in the information services  
10 industry will buttress, not hinder, universal service. *In those cases where  
11 an Internet service provider owns transmission facilities, and engages in  
12 data transport over those facilities in order to provide an information  
13 service, we do not currently require it to contribute to universal service  
14 mechanisms. We believe it is appropriate to reexamine that result, as one  
15 could argue that in such a case that the Internet service provider is  
16 furnishing raw transmission capacity to itself. We recognize, however, that  
17 there are significant operational difficulties associated with determining the  
18 amount of such an Internet service provider's revenues to be assessed for  
19 universal service purposes and with enforcing such requirements. We  
20 intend to consider these issues in an upcoming proceeding. Finally, we find  
21 that Internet service providers generally do not provide  
22 telecommunications."*

23 13 FCC Rcd at 11508-59 (emphasis added). With regard to the distinction between  
24 telecommunications and information services, the report further states:

25 "The provision of Internet access service involves data transport  
26 elements: an Internet access provider must enable the movement of  
27 information between customers' own computers and the distant computers  
28 with which those customers seek to interact. But the provision of Internet  
29 access service crucially involves information-processing elements as well;  
30 it offers end users information-service capabilities inextricably intertwined  
31 with data transport. As such, we conclude that it is appropriately classed as  
32 an 'information service.'"

33 *Id.* at 11539-11540. Thus, shortly after the city's adoption of its telecommunications  
34 ordinance in 1997, the FCC in 1998 had indicated that ISPs generally provide



1 information services rather than telecommunications, but also identified the need to  
2 reexamine that approach in "a case that the Internet service provider is furnishing raw  
3 transmission capacity to itself." *Id.* at 11508.

4 Two years later, in *AT&T Corp. v. City of Portland*, 216 F3d 871 (9th Cir  
5 2000), the Ninth Circuit confronted the question raised but not definitively answered in  
6 the Universal Service Report: how to deal with Internet service providers who own their  
7 own transmission facilities. The court ruled that AT&T's cable modem service, unlike a  
8 "dial up" service, was providing "telecommunications services":

9 "Like other ISPs, @Home [AT&T's service] consists of two  
10 elements: a 'pipeline' (cable broadband instead of telephone lines), and the  
11 Internet service transmitted through that pipeline. However, unlike other  
12 ISPs, @Home controls all of the transmission facilities between its  
13 subscribers and the Internet. To the extent @Home is a conventional ISP,  
14 its activities are that of an information service. *However, to the extent that*  
15 *@Home provides its subscribers Internet transmission over its cable*  
16 *broadband facility, it is providing a telecommunications service as defined*  
17 *in the Communications Act."*

18 216 F3d at 878 (emphasis added).

19 In the wake of the decision in *AT&T Corp.* (and conflicting decisions in  
20 other jurisdictions<sup>10</sup>), the FCC initiated a rulemaking proceeding to address whether  
21 broadband Internet services provided by cable companies should be classified as  
22 "telecommunications services" or as "information services" under the Act. In 2002, the  
23 FCC issued its declaratory ruling stating that cable modem services are *not*

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<sup>10</sup> See *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287, 19292-93 (2000) (describing inconsistent judicial decisions).

1 "telecommunications services" under the Act. 17 FCC Rcd 4798.

2           Various parties petitioned for judicial review of the declaratory ruling, and  
3 the Ninth Circuit was selected as the venue for the challenge. Relying on the principle of  
4 *stare decisis*, the court held that its earlier conclusion in *AT&T Corp.* was controlling  
5 with regard to whether cable modem services were part "telecommunications service,"  
6 and it vacated the FCC's ruling and remanded for reconsideration.

7           The Supreme Court granted certiorari and, in *Brand X*, reversed the Ninth  
8 Circuit. Although the Supreme Court affirmed the FCC's ruling that cable modem  
9 services are not "telecommunications services," the reasoning in *Brand X* actually  
10 underscores the differences between the Act and the city's ordinance. The Court  
11 ultimately upheld the FCC's ruling not based on the well understood meaning of the  
12 terms "telecommunications" or "telecommunications services," but on the basis of  
13 *Chevron* deference--that is, the principle that federal courts must accept an implementing  
14 agency's plausible construction of a statute, "even if the agency's reading differs from  
15 what the court believes is the best statutory interpretation." 545 US at 980. In explaining  
16 why the FCC's construction of "telecommunications services" was a reasonable one, the  
17 Court focused not on whether cable modem services were telecommunications; indeed,  
18 the FCC "conceded that, like all information-service providers, cable companies use  
19 'telecommunications' to provide consumers with Internet service; cable companies  
20 provide such service via the high-speed wire that transmits signals to and from an end  
21 user's computer." 545 US at 988. Rather, the case turned on whether cable modem

1 services providers are "offering" those underlying telecommunications within the  
2 meaning of the Act. *See* 47 USC § 153(53) (defining "telecommunications services" as  
3 the "offering of telecommunications for a fee directly to the public, or to such classes of  
4 users as to be effectively available directly to the public, regardless of the facilities  
5 used").

6 The Court held that, consistent with the FCC's conclusion, "'offering' can  
7 reasonably be read to mean a 'stand-alone' offering of telecommunications, *i.e.*, an  
8 offered service that, from the user's perspective, transmits messages unadulterated by  
9 computer processing." *Id.* at 989. The Court explained:

10 "The question, then, is whether the transmission component of cable  
11 modem service is sufficiently integrated with the finished service *to make it*  
12 *reasonable to describe the two as a single, integrated offering. See ibid.*  
13 We think that they are sufficiently integrated, because '[a] consumer uses  
14 the high-speed wire always in connection with the information-processing  
15 capabilities provided by Internet access, and because the transmission is a  
16 necessary component of Internet access.' *Supra*, at 988. In the  
17 telecommunications context, *it is at least reasonable to describe companies*  
18 *as not 'offering' to consumers each discrete input that is necessary to*  
19 *providing, and is always used in connection with, a finished service. \* \* \**  
20 What cable companies providing cable modem service and telephone  
21 companies providing telephone service 'offer' is Internet service and  
22 telephone service respectively--the finished services, though they do so  
23 using (or 'via') the discrete components composing the end product,  
24 including data transmission. Such functionally integrated components need  
25 not be described as distinct 'offerings.'"

26 *Id.* at 990-91 (emphasis added).

27 What that regulatory history demonstrates is that *Brand X* and the FCC's  
28 declaratory ruling not only post-dated the adoption of the city's ordinance, but they turned  
29 on ambiguous language in the Act that appears nowhere in the city's ordinance. For that

1 reason, we conclude that the trial court erred when, on reconsideration, it relied on the  
2 Act, the FCC's declaratory ruling, and *Brand X* to interpret the city's ordinance.<sup>11</sup>

3           In our view, the trial court's original interpretation of the ordinance at the  
4 summary judgment stage was the correct one. There was no basis to depart from the  
5 ordinary meaning of the terms used in the ordinance. The word "transmission," as used  
6 in this context, means "an act, process, or instance of transmitting." *Webster's Third New*  
7 *Int'l Dictionary* 2429 (unabridged ed 2002). "Transmit," in turn, means to "send out a  
8 signal either by radio waves or over a wire line." *Id.* There is no dispute that Comcast  
9 transmits data when it provides cable modem services.

10           Furthermore, Comcast transmits data "for hire" as part of its cable modem  
11 services, under the common meaning of those words. We have observed that, "[i]n  
12 common usage, 'for hire' means 'available or offered for rent.' *Webster's* \* \* \* at 892; *see*  
13 *also id.* at 1072 (defining 'hire' and describing the phrase 'for hire' to mean 'available for  
14 use or service in return for payment')." *Beaver Creek Coop. Telephone Co. v. PUC*  
15 *(A109890)*, 182 Or App 559, 571, 50 P3d 1231 (2002). In *Beaver Creek Coop.*  
16 *Telephone Co.*, we explained that, "as a matter of common usage, a cooperative is

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<sup>11</sup>           The trial court also looked to public policy, as demonstrated by the ITFA, and to Oregon's telecommunications laws, which use the same definitions for "telecommunications" and "telecommunications services" as the federal Telecommunications Act. *See* ORS 759.005(8) (defining "telecommunications services" identically to the Telecommunications Act); ORS 759.005(7) (defining "telecommunications" identically to the Telecommunications Act). Neither the ITFA nor Oregon's telecommunications laws had been enacted at the time that the city adopted its ordinance, nor do they use language similar to the city's ordinance.

1 providing telecommunication service on a 'for-hire basis' if it provides those services in  
2 exchange for payment." *Id.* Here, Comcast provides its cable modem services,  
3 necessarily including transmission of electronic information, in exchange for subscriber  
4 fees. Thus, common usage suggests that Comcast's cable modem services are  
5 "transmission for hire" of electronic data within the ordinary meaning of those words.

6           The surrounding text provides additional support for a broader, plain-  
7 meaning approach to the term "transmission for hire." The term "transmission for hire"  
8 appears in the first sentence of the definition of "[t]elecommunications services"; the  
9 second sentence of the definition provides that "[t]elecommunications service includes *all*  
10 *forms* of telephone services and voice, data and video transport" and then enumerates  
11 specific exceptions to that definition. (Emphasis added.) Thus, the structure of the  
12 definition of "telecommunications services" suggests that "transmission for hire" includes  
13 all forms of data transport--including transport as part of a combined offering--unless  
14 specifically excluded from the definition.<sup>12</sup>

15           The broader context of the ordinance likewise suggests that the city  
16 intended the ordinance to apply to any transmission of data for which the owner of the  
17 transmission facility is being paid. Section 6 of the ordinance adopts attached findings  
18 "in support of this Ordinance." Those findings include the following:

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<sup>12</sup> At oral argument, Comcast urged us to consider the "reseller" provisions of the ordinance as context that supports its interpretation of "transmission for hire." We are not persuaded by that argument and, as we will discuss later in this opinion, \_\_\_ Or App at \_\_\_ (slip op at 37), we disagree with Comcast's understanding of the term "reseller" as defined in the ordinance.

1                   "9. The City and its citizens are entitled to a fair return on their  
2 investment in the public right-of-way.

3                   "10. The compensation required by this ordinance for use of the  
4 rights-of-way is authorized by state statute and allowed by federal statute.  
5 It compensates the City and its citizens for:

6                   "\*accelerated deterioration of streets;

7                   "\*the use of a publicly-funded asset by private commercial  
8 enterprises;

9                   "\*increased complexity of the City's public works projects resulting  
10 from the presence of telecommunications facilities in the right-of-way;

11                   "\*inconvenience to the public from occupation of the streets by  
12 construction crews and equipment; and

13                   "\*aesthetic damage to the rights-of-way."

14 In light of the purpose of the ordinance to compensate the public for private commercial  
15 use of the city's rights-of-way, we see no basis for treating "transmission for hire" more  
16 narrowly simply because the operator is providing combined services; the operator is still  
17 using the public right-of-way for its private benefit.

18                   Text and context notwithstanding, Comcast urges us to consider a recurring  
19 feature of the adoption history of the amendment--namely, assurances from the city that  
20 the ordinance was not intended to cover ISPs. Although Kolb and others repeatedly  
21 stated that the ordinance did not affect ISPs, the statements must be considered in  
22 historical context. Cable modem services did not exist in Eugene at that time, and  
23 Internet access was generally provided by traditional "dial-ups," whereby the  
24 transmission facilities were not owned by the ISP. Viewed in light of the prevalent  
25 technology in Eugene when the city drafted its ordinance, contemporaneous statements

1 about ISPs provide little evidence that the city council intended to narrow the ordinary  
2 meaning of "transmission for hire" in a way that would exclude combined offerings of  
3 data transport and Internet access services.<sup>13</sup>

4           Thus, we conclude that the best evidence of the city's intent is the text of  
5 the ordinance itself. In its summary judgment ruling, the trial court correctly interpreted  
6 the ordinance to apply, based on the plain meaning of the words, to Comcast's cable  
7 modem services. It was error for the trial court, on reconsideration, to rule otherwise  
8 based on Hatfield's testimony and the FCC's interpretation of the Telecommunications  
9 Act.

10 B.           *Does the ITFA Bar the Application of the Ordinance?*

11           Throughout the litigation, Comcast has argued that, even if its cable modem  
12 services are "telecommunications services" under the city's ordinance, the ITFA  
13 precludes the city from imposing the license and registration fees on Internet services  
14 revenue. The trial court agreed in part with Comcast, concluding that the registration fees  
15 were precluded but that the license fees were not a tax for purposes of the ITFA. We  
16 address each of those rulings in turn.

17           1.       *Application of the ITFA to the license fee*

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<sup>13</sup>       The trial court discounted the differences between dial-up Internet access and cable modem service, reasoning that "just because the Internet has evolved, it does not mean that the City can suddenly interpret the Ordinance to include a new type of service. Clearly the intent behind the Ordinance was not to tax Internet access." The question, in our view, is not whether the Internet has evolved, but *how* it has evolved. In this case, the technology has evolved such that Comcast is providing Internet access services by transmitting data over its own telecommunications facilities.

1           The ITFA, which is summarized above, imposes a moratorium on certain  
2 state and local taxes related to the Internet. Section 1101(a) provides:

3           "Moratorium.--No State or political subdivision thereof shall impose  
4 any of the following taxes during the period beginning on October 1, 1998,  
5 and ending 3 years after the date of the enactment of this Act--

6           "(1) taxes on Internet access, unless such tax was generally imposed  
7 and actually enforced prior to October 1, 1998; and

8           "(2) multiple or discriminatory taxes on electronic commerce."<sup>14</sup>

9           The term "tax" is defined in the ITFA to include "any charge imposed by  
10 any governmental entity for the purpose of generating revenues for governmental  
11 purposes, and is *not a fee imposed for a specific privilege, service, or benefit conferred.*"  
12 ITFA § 1104(8)(i) (emphasis added). The trial court reasoned that the license fee--that is,  
13 the seven-percent fee that must be paid "as compensation for use of right-of-way," ECC  
14 3.415(2)--is a fee imposed for a specific benefit and therefore not a "tax" for purposes of  
15 the ITFA. We agree with the trial court's reasoning and reject Comcast's cross-  
16 assignment of error on that issue without further discussion. The ITFA does not bar the  
17 city's license fee, which is a fee imposed in exchange for using the city's right-of-way to  
18 provide a telecommunications service.

19           2.     *Application of the ITFA to the registration fee*

20           The two-percent registration fee, however, is a tax under the ITFA.

21 (Indeed, throughout its brief, the city refers to the registration fee as the "business tax.")

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<sup>14</sup> The moratorium was initially set to expire in 2001, but the act has been amended and the moratorium extended--most recently, until November 2014.



1 The trial court ruled that the tax is barred by the ITFA because it (1) is "discriminatory"  
2 and (2) even if not discriminatory, is a tax on Internet access that had not been generally  
3 imposed and actually enforced prior to October 1, 1998. We agree with the trial court's  
4 ruling in that latter respect and therefore do not address whether the tax is also  
5 discriminatory under the ITFA.

6 The ITFA expressly defines when a tax on Internet access has been  
7 "generally imposed and actually enforced." Section 1101(d) provides:

8 " \* \* \* For purposes of this section, a tax has been generally imposed  
9 and actually enforced prior to October 1, 1998, if, before that date, the tax  
10 was authorized by statute and either--

11 "(1) a provider of Internet access services had a reasonable  
12 opportunity to know by virtue of a rule or other public proclamation made  
13 by the appropriate administrative agency of the State or political  
14 subdivision thereof, that such agency has interpreted and applied such tax  
15 to Internet access services; or

16 "(2) a State or political subdivision thereof generally collected such  
17 tax on charges for Internet access."

18 In ruling on the parties' summary judgment motions, the trial court  
19 concluded that the city had "no rule interpreting and applying the Ordinance to apply to  
20 Internet access services," and that paragraph (1) of the statute was therefore inapplicable.  
21 The court concluded that questions of fact precluded summary judgment with regard to  
22 paragraph (2), so the parties proceeded to trial on whether the city had "generally  
23 collected" taxes for Internet access. Following trial, the court ruled that the city had  
24 failed to carry its burden of demonstrating that it generally collected taxes for Internet  
25 access.

1           On appeal, the city confines its argument to paragraph (1) of the statute,  
2 arguing that Comcast had a "reasonable opportunity to know" of the taxes on its cable  
3 modem services by virtue of the ordinance itself, as well as the rules promulgated under  
4 the ordinance. According to the city,

5           "[n]ot only did the Ordinance clearly proclaim that it covers all  
6 'transmission for hire, of information \* \* \* including \* \* \* voice, video or  
7 data \* \* \* wireline or wireless,' and 'all forms of \* \* \* voice, data and video  
8 transport,' but the City promulgated rules under the Ordinance that  
9 reiterated its definitions."

10           The city understates the "public proclamation" that the ITFA requires. It is  
11 not enough that the language of its ordinance, or even its rules, might be broad enough to  
12 encompass Internet access services. Rather, under the ITFA, a "rule or public  
13 proclamation" must give the provider of Internet access a reasonable opportunity to know  
14 that the "*agency has interpreted and applied such tax to Internet access services.*" ITFA  
15 § 1101(d)(1) (emphasis added). The city cannot point to any public proclamation that, as  
16 of October 1, 1998, provided notice that the city "interpreted and applied" its tax to  
17 Internet access services.

18           In fact, as we explained earlier when discussing the legislative history of  
19 the ordinance, the city repeatedly said the opposite: that the ordinance did not apply to  
20 Internet access services. At a public hearing on the ordinance, Kolb stated that Internet  
21 service providers would not be affected by the proposed fees. The city's "white paper,"  
22 which it generated shortly after the ordinance was enacted, stated in its first paragraph  
23 that "Internet and radio/television broadcasting are not applicable." Although we did not

1 find those statements to be helpful indicators of the city's legislative intent with respect to  
2 Comcast's cable modem services, a type of Internet access services that did not exist in  
3 Eugene when the ordinance was enacted, *see* \_\_\_ Or App at \_\_\_ (slip op at 29-30), the  
4 city's actions and pronouncements surrounding the adoption of the ordinance are flatly  
5 inconsistent with its suggestion that it had "interpreted and applied" its registration fee to  
6 Internet access services, let alone publicly communicated that to Internet access services  
7 providers.<sup>15</sup>

8           For that reason, we conclude that the trial court's alternative ruling  
9 regarding the registration fee was correct. The fee is a tax on Internet access that was not  
10 generally imposed and actually enforced prior to October 1, 1998. Accordingly, the tax  
11 is barred by the ITFA.

12 C.           *Does the City's Attempt to Collect the License Fee Discriminate against*  
13               *Comcast in Violation of Article I, Section 32, of the Oregon Constitution*  
14               *and the Equal Protection Clause?*

15           Having concluded that the registration fee is barred, we turn to the question  
16 whether the city has selectively enforced the license fee in violation of state and federal  
17 constitutional protections. Under Article I, section 32, "all taxation shall be uniform on  
18 the same class of subjects within the territorial limits of the authority levying the tax."

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<sup>15</sup> The city also argues that Comcast's predecessor, TCI, had actual notice that the tax would apply to cable modem services, as demonstrated by a comment that TCI made in response to the rules promulgated by the city manager. Suffice it to say that the comment, which mentions the potential for dual-use technologies, "including voice, internet, and data transfer," does not demonstrate actual notice that the city intended to apply the registration fee to cable modem services, which were not being offered in Eugene at that time and are not referenced anywhere in the city's response to the comment or the rules themselves.

1 Thus, "[t]he taxing authorities may not single out one taxpayer for discriminatory, or  
2 selective, enforcement of a tax law that should apply equally to all similarly situated  
3 taxpayers." *Penn Phillips Lands v. Tax Com.*, 247 Or 380, 385-86, 430 P2d 349 (1967).  
4 The Equal Protection Clause provides similar protection, making it unconstitutional for a  
5 state to "deny to any person within its jurisdiction the equal protection of the laws."  
6 Oregon courts have employed the same analysis under Article I, section 32, and the Equal  
7 Protection Clause. *See Kane v. Tri-Co. Metro. Transp. Dist.*, 65 Or App 55, 59, 670 P2d  
8 178 (1983), *rev den*, 296 Or 411 (1984) (citing, among other cases, *Jarvill v. City of*  
9 *Eugene*, 289 Or 157, 182-84, 613 P2d 1 (1980)).

10 To prove a violation of Article I, section 32, a taxpayer must "demonstrate  
11 an intentional and systematic pattern of discrimination." *Pacificorp Power Marketing v.*  
12 *Dept. of Rev.*, 340 Or 204, 219, 131 P3d 725 (2006). Proof of an error in judgment on the  
13 part of the taxing authority is not sufficient to show intentional discrimination; rather,  
14 "[t]he required element has been characterized as 'something that amounts to an intention,  
15 or the equivalent of fraudulent purpose, to disregard the fundamental principle of  
16 uniformity.'" *Freightliner Corp. v. Dept. of Rev.*, 275 Or 13, 20, 549 P2d 662 (1976)  
17 (quoting *Rowley v. Chicago & N.W. Ry.*, 293 US 102, 111, 55 S Ct 55, 79 L Ed 222  
18 (1934)).

19 The trial court concluded that, although the license fee was not a tax for  
20 purposes of the ITFA, it is a tax for purposes of state and federal constitutional  
21 protections. The court then concluded that the city's enforcement of the tax violated

1 Article I, section 32, and the Equal Protection Clause because "it attempts to exact a fee  
2 only from Comcast and not from similarly-situated providers of Internet access service  
3 within its class."

4 On appeal, the city argues that the trial court looked to the wrong class of  
5 providers when evaluating the city's enforcement of the license fee. According to the  
6 city, it did not enforce the license fee against dial-up ISPs because those providers do not  
7 "own or control, much less locate, facilities in the City's rights-of-way." When compared  
8 to the appropriate class--the registered providers who were transmitting data with  
9 telecommunications facilities in the city's rights-of-way--Comcast proved shortcomings  
10 in the city's collection of the license fee as to only two providers, Qwest Corporation and  
11 ELI, which the city contends is insufficient to establish an intentional and systematic  
12 pattern of discrimination.

13 Comcast responds that the city did not collect taxes from at least 34 Internet  
14 access service providers who were also subject to the license fee, because even those who  
15 do not locate facilities in the city's right-of-way are subject to the license fee as  
16 "resellers" of telecommunications services. ECC 3.410(4) provides:

17 "So long as it registers with the city as required by section 3.405 *and*  
18 *pays the registration and license fees required by section 3.415*, a reseller  
19 may use another person's facilities to engage in telecommunications  
20 activities in the right-of-way without obtaining a license, providing the  
21 reseller does not, either itself or through an affiliate, own or lease, control  
22 or manage any facilities in the right-of-way and is not involved in  
23 construction or repair of facilities in the right-of-way. For purposes of  
24 calculating the registration and license fees to be paid by a reseller, the  
25 amount of compensation paid by the reseller to the owner or manager of  
26 facilities in the right-of-way for the services it resells shall be deducted

1 from the reseller's gross revenues before applying the percentage rates  
2 described in section 3.415(1) and (2)."

3 (Emphasis added.) The ordinance defines a "reseller" as "[a]ny person that provides  
4 telecommunications services using a telecommunications facility *for which service a*  
5 *separate charge is made*, where that person does not own, lease, control or manage the  
6 telecommunications facility used to provide the service." (Emphasis added.) Comcast  
7 reasons that "there is undisputed evidence that dial-up ISPs do pay 'separate charges' for  
8 telecommunications facilities" and, therefore, "all of the [Internet access service]  
9 providers the City calls 'non-facilities-based' qualify as resellers and owe license fees."

10 The city replies that Comcast misunderstands the meaning of "reseller," and  
11 that the "separate charge" for services refers to a separate charge *made by the reseller*, not  
12 a separate charge *imposed on the reseller*. We agree with the city. As a matter of text  
13 and context, the phrase "for which service a separate charge is made" refers to a separate  
14 charge by the reseller. Textually, "for which service" plainly refers back to the  
15 telecommunications services provided by the reseller. Indeed, it is not the original  
16 purchase but rather the separate charge to a customer--the second sale--that makes a  
17 person a reseller. As a matter of context, ECC 3.410(4) refers to payments made by a  
18 reseller as "the amount of compensation paid by the reseller to the owner or manager of  
19 facilities" rather than a "charge."

20 We further agree with the city that Comcast, who has the burden of  
21 demonstrating intentional discrimination, *Freightliner Corp.*, 275 Or at 19, failed to  
22 prove that dial-up ISPs separately charged their customers for transmission services over

1 the city's right-of-way and therefore owed the license fee as "resellers." As we  
2 understand Comcast's argument, that leaves only two providers--ELI and Qwest  
3 Corporation--who provided Internet access services through their own facilities within  
4 the city's right-of-way and from whom the city did not seek the license fee. The parties  
5 did not extensively brief the constitutional issue as it applies to this small class of  
6 relevant taxpayers. The city asserts that Comcast failed to establish anything beyond a  
7 short-term clerical error, subsequently corrected. Comcast, for its part, argues that  
8 "[t]here is no evidence to support" the city's claim of mere mistake and that, in any event,  
9 "Comcast was not required to prove that the city acted in bad faith or with animus toward  
10 Comcast." Comcast, then, appears to misperceive both who has the burden to produce  
11 evidence, and what that evidence must demonstrate. As noted, to prove a violation of  
12 Article I, section 32, or the Equal Protection Clause, Comcast has the burden, and that  
13 burden requires it to prove "an intentional and systematic pattern of discrimination,"  
14 *Pacificorp Power Marketing*, 304 Or at 219, demonstrating "something that amounts to  
15 an intention, or the equivalent of fraudulent purpose, to disregard the fundamental  
16 principle of uniformity," as opposed to a mere error in judgment, *Freightliner Corp.*, 275  
17 Or at 20 (internal quotation marks and citation omitted). Thus, the fact that there is no  
18 evidence to support the city's claim of accident is irrelevant; the city had no obligation to  
19 produce such evidence. The relevant question is whether Comcast produced any  
20 evidence that the city's taxing decision amounted to an intentional and systematic pattern  
21 of discrimination or something akin to fraudulent purpose. Comcast's brief does not cite

1 any evidence to that effect. Thus, we hold that the trial court erred in concluding that the  
2 city's efforts to enforce the license fee violate Article I, section 32, and the Equal  
3 Protection Clause.<sup>16</sup>

### 4 III. CONCLUSION

5 In summary, we hold that the trial court erred when, on reconsideration, it  
6 interpreted the term "transmission for hire" in the city's ordinance as a term of art in the  
7 telecommunications industry; under the plain meaning of the words used in the  
8 ordinance, Comcast's cable modem service is the transmission for hire of data, thereby  
9 subjecting Comcast to the registration fee and license fee. However, the trial court  
10 correctly ruled that the ITFA bars enforcement of the registration fee because that fee is a  
11 tax on Internet access that was not generally imposed and actually enforced prior to  
12 October 1, 1998. Accordingly, we affirm the trial court's judgment as to the registration  
13 fee.

14 The trial court correctly ruled that the license fee is not a tax under the  
15 ITFA, but erred in concluding that the city's enforcement of the license fee was  
16 unconstitutional under Article I, section 32, and the Equal Protection Clause. Comcast's  
17 proof was not, on this record, enough to demonstrate the "intentional and systematic  
18 pattern of discrimination" that is necessary under those constitutional provisions.

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<sup>16</sup> In cross-assignments of error, Comcast advances two additional alternative bases for upholding the trial court's ruling regarding the license fees, one based on a federal statute, 47 USC section 542(b), and the other based on a provision of the ordinance, ECC 3.410(6). We reject those arguments without discussion.



- 1 Accordingly, we reverse and remand the judgment in regard to the city's efforts to collect
- 2 the license fee.
- 3                   Reversed in part and remanded.