Supplemental Submission

on behalf of DIRECTV, Inc. and DISH Network

before the

House Judiciary Committee

Subcommittee on Commercial and Administrative Law

Hearing on

H.R. 3679, the "State Video Tax Fairness Act of 2007"

Submitted February 25, 2008

One question dominated the Subcommittee's hearing on H.R. 3679 last week:

Is a franchise fee a tax?

The battle lines were sharply drawn. Satellite TV providers and their supporters testified that franchise fees are rents for valuable rights of way, and nothing like a tax. Cable testified that "all franchise fees . . . levied on cable operators must be viewed as taxes." Testimony of Howard J. Symons at 6 (internal citations omitted). At every turn, cable's testimony referred to "taxes and fees" in the same breath as if they were equivalent. *See, e.g., id.* at 1, 2, 3, 8, 9, 10. And then, in its tally of the state and local taxes that cable pays, cable included franchise fees on almost every line. *See id*. at 3.

The dispute goes to the heart of H.R. 3679. The bill simply says: "No State shall impose a discriminatory tax on any means of providing multichannel video programming distribution services." It demands tax parity. Cable opposes the bill, protesting that it, too, is for "tax parity." The only way cable can support that claim, though, is by insisting that franchise fees *are* taxes. So, cable argues, if cable pays a franchise fee, it is only fair that satellite customers should pay an offsetting amount in taxes.

So which is it—a fee or a tax? Several authorities on the subject had this to say:

- "Franchise fees . . . are commonly understood to be consideration for the contractual award of a government benefit."
- "[F]ranchise fees [are] a form of 'rent.'"
- Cable's "largest asset[s]" are "cable franchise rights" purchased with franchise fees.
- In contrast, "[t]axes simply have no contractual element; they are a demand of sovereignty."

Are these the words of satellite TV partisans? No. These are the words of *cable companies*. In this supplemental submission we demonstrate: (I) that franchise fees are not taxes; (II) that cable consistently and emphatically tells everyone else that franchise fees are not taxes; and (III) that Congress and the courts consistently agree that franchise fees are not taxes.

I. Franchise Fees Are Not Taxes

Franchise fees do not look anything like taxes. Consider the facts:

1. Local governments do not impose franchise fees the way they impose taxes. Cable companies voluntarily undertake to pay these fees as part of a negotiated contract.
2. Cable companies pay these franchise fees in return for a direct benefit—a property right—that the cable companies, alone, enjoy. Not just anyone can dig up a public street or hang wires from a public utility pole. Local governments own that property, and they charge rent for it.

3. The property rights that cable companies buy with franchise fees are highly valuable. Cable companies treat them as prized assets.

4. The franchise agreements that are negotiated at arms-length between cable and local governments look nothing like tax codes. They are intricate contracts that include all sorts of terms that one would never find in a tax code.

You don't call it a "tax" when a merchant pays rent for the right to set up a bodega on public property or a hot dog franchise at a public stadium. You don't call it a "tax" when an advertiser pays to post an ad on the side of a bus or on the Metro. And it is not a tax when cable negotiates an arms-length contract to purchase prized property rights necessary to sell its service.

II. The Two Faces of Cable

The simple truth is that cable doesn't call it a "tax" anywhere outside the confines of this debate over tax parity. Cable's current definition of a franchise fee is a transparent ploy to defeat a bill designed to level yet another unfair advantage that cable has managed to garner. We know this because in every other forum, to every other audience, cable tells a different story—from court filings to SEC filings to local government negotiations.

Cable tells courts: Franchise fees are NOT taxes

Cable routinely tells courts that franchise fees are *not* taxes. The question has been relevant, for example, in cases where cable has litigated over how much it will have to pay.[1] As one cable company successfully explained to a federal court:

> Municipal franchises have long been understood to be contracts. Franchise fees, in turn, are commonly understood to be consideration for the contractual award of a government benefit. Many cases have treated franchise fees as a form of "rent." Cable franchises are enforceable as contracts, even though they are traditionally awarded by ordinance. . .. The contractual nature of cable franchise fees removed them far from "taxes." Taxes simply have no contractual element; they are a demand of sovereignty. The consent of the taxpayer is not necessary to their enforcement.

Exhibit A at 15 (internal quotations and citations omitted). We could not say it any better ourselves.

[1] *See, e.g.*, Opp. Br. to Def's Mot. for Summary Judgment at 14 in *Time Warner Ent't – Advance Newhouse P'ship v. City of Lincoln*, Case No. 8:04- CV-2049 (D. Neb. 2004) (attached at Exhibit A); *Texas & Kansas City Cable Partners, L.P v. City of West University Place*, Civ. Action No. 7-05-4177 (S.D. Tex. April 14, 2006), *available at* 2006 WL 1437647.

Cable tells shareholders and the SEC: Franchise fees are payments for valuable property rights

Cable tells the same story to its shareholders and to the SEC. It admits that the rights it obtains from local governments in exchange for "franchise fees" are valuable assets. According to cable companies, franchise fees buy local rights of way worth *billions of dollars*—assets that are *more valuable than all their other assets combined.* Here's what cable executives say:

- "*Our largest asset, our cable franchise rights*, results from agreements we have with state and local governments that allow us to construct and operate a cable business within a specified geographic area."[2]

- "As of December 31, 2006, [Time Warner Cable] had approximately $41.0 billion of unamortized intangible assets, including . . . franchises of $38.1 billion on its balance sheet. At December 31, 2006, *these intangible assets represented approximately 74% of TWC's total assets*."[3]

- "Cox believes that the franchises, although contractually non-exclusive, *provide economic exclusivity* for broadband video services to an incumbent cable operator." In other words, Cox tells its investors and the SEC that it is using franchise fees to buy itself a monopoly.[4]

Scan the SEC filings of any cable company for any year, and you will see similar statements.[5] When you pay money to governmental entities as a quid pro quo for property that represents three-quarters of your company's total value, it is ludicrous to characterize the money you pay as a tax.

In those same SEC filings, cable companies also depict franchise fees as a cost of doing business—not as a tax. Cable treats franchise fees the way they treat any other business expense,

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[2] Comcast Corp. Annual Report (Form 10-K for 2007) at 32 (Feb. 20, 2008) ("Comcast 2007 Annual Report") (emphasis added).

[3] Time Warner Cable, Inc. Annual Report (Form 10-K for 2006) ("TWC 2006 Annual Report") at 38 (Feb. 23, 2007) (emphasis added).

[4] Cox Communications, Inc. Annual Report (Form 10-K for 2005) at 71 (Mar. 29, 2006).

[5] *See, e.g.*, Time Warner Cable Inc. Quarterly Report (Form 10-Q for Q3 2007) at 27 (Nov. 7, 2007) (franchise rights valued at $38.1 billion); Charter Communications Holdings, LLC, Quarterly Report (Form 10-Q for Q3 2007) at 4, 10 (Nov. 13, 2007) (franchise rights valued at $9.1 billion); Comcast Corp. Quarterly Report (Form 10-Q for Q3 2007) at 2 (Oct. 26, 2007) (franchise rights valued at $58 billion); CSC Holdings Inc. Quarterly Report (Form 10-Q for Q3 2007) at 3, 13 (Nov. 8, 2007) (franchise rights valued at $731.8 million); Mediacom Broadband LLC, Annual Report (Form 10-K for 2006) at 27 (Mar. 27, 2007) (franchise rights valued at $1.26 billion).

such as payments to purchase TV programs and salaries they negotiate with employees. Once again, here are cable's own words from a representative SEC filing:

- "Costs of revenue include: video programming costs . . . high speed data connectivity costs; Digital Phone network costs[;] maintenance of the Company's delivery systems; *franchise fees*, and other related expenses." TWC 2006 Annual Report at 66-67 (emphasis added).

The franchise agreements speak for themselves

Perhaps the best evidence of what cable thinks franchise fees are—and what they pay for—can be drawn from the franchise agreements themselves. Teams of cable lawyers pore over these documents. Cable companies own every word that appears in these documents.

The first characteristic that is evident from scanning any one of these franchise agreements is that they are, well, agreements. They waddle, smell, and quack like contracts. They do not look anything like tax ordinances. For example, Monterey, California's franchise agreement with Cablevision is 51 pages. It is rife with terms that you would never find in any tax code, provisions about: acceptance; the rights reserved by the city; waivers; construction standards; the method and timing of fee payments; termination, revocation and forfeiture; liquidated damages and other remedies; maintenance and inspection of books and records; time of the essence; and force majeure. *See* http://www.monterey.org/cable/final.pdf.

As important as the contractual nature of these agreements is how they describe the deal. Invariably, they describe these deals as payments for valuable rights of way, not as taxes for the general public welfare. They almost always have clauses that read something like this one (drawn from Comcast's 151-page contract with Fairfax, Virginia):

> *Grant of Authority*. . . . [T]he County hereby grants the Grantee *the right to own, install*, [and] . . . operate, a Cable System *along . . . the Public Rights-of-Way or public land* within the Franchise Area.

http://www.fairfaxcounty.gov/cable/regulation/franchise/comcast/comcast_franchise_2005.pdf (emphasis in original). Translation: Cable is paying money to rent public land.

The same features appear in most any franchise agreement one might randomly choose.

* * *

In short, cable has two stories about franchise fees. One story is what cable is telling this Subcommittee. The other story is what cable tells everyone else: courts, its owners and investors, the SEC, and its contracting partners. The two stories are irreconcilable—but the truth is clear: Franchise fees are simply not taxes.

III. Congress, the Courts, and the FCC Agree that Franchise Fees are Not Taxes

Congress, the courts, and the FCC consistently agree that cable's franchise fees are not taxes, but are a cost of cable's business. And they often do so at *cable's* prodding. Here are some examples:

- Congress defined the term "tax" in the Internet Tax Freedom Act of 1998—a bill cable vocally supported. In the definition, Congress declared that "such term does not include any franchise fee or similar fee imposed by a State or local franchising authority." Pub. L. No. 105-277, § 1105(8), 112 Stat. 2681-719 (codified as amended at 47 U.S.C. § 151 note).

- Just last year, the FCC confirmed that "[o]ne of the primary justifications for cable franchising is the [local government's] need to regulate and receive compensation for the use of public rights-of-way."[6]

- Federal courts have distinguished between proceeds collected to pay franchise fees and those collected to pay taxes, invoking the same reasoning that cable itself propounds in its filings: "*Franchise fees are* not a tax . . . but essentially a form of rent [i.e.,] *the price paid to rent use of public right-of-ways.*" *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) (citations omitted; emphasis added).[7]

- Counties and municipalities agree. They frequently try to persuade state courts that franchise fees are costs, not taxes, when defending the imposition of those fees without following procedural requirements for tax increases. *See Bruce v. Colorado Springs*, 131 P.3d 1187 (Colo. App. 2005); *Kowalski v. Livonia*, 705 N.W. 2d 161, 162 (Mich. App. 2005).

- The courts routinely side with these authorities. As a Michigan appellate court recently held: "Plaintiffs [i.e., cable subscribers] accurately and unreservedly admit that the cable 'franchise fees' are voluntary. This is true whether viewed from the perspective of the subscriber or the supplier, because each pays the charge in exchange for a service: the provider pays the city for its valuable franchise and the subscriber, in turn, pays the supplier for the privilege of receiving cable programming. Therefore, the 'franchise fee' is a voluntary payment and consideration in exchange for a commodity." *Kowalski*, 705 N.W. 2d at 162.

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[6] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 23 (Mar. 5, 2007).

[7] *See, e.g., Time Warner Ent't – Advance/Newhouse Partnership v. City of Lincoln*, 360 F. Supp. 2d 1012, 1017 (D. Neb. 2004); *cf. Qwest Comm. Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1092 (N.D. Cal. 2001) (franchise fee described as "annual rent compensation").

Conclusion

A vote for H.R. 3679 is a vote for "tax parity." Cable is just plain wrong when it asserts that it is protecting "tax parity" by advocating against the bill. Its position is based on the assumption that franchise fees are taxes, and that they, too, must be equalized. Cable is wrong. Franchise fees are not taxes. Congress has said it. Courts, the FCC, and local governments say it. Cable says it, too—but only when it serves its purposes. Congress should not be fooled by cable's contrary position here.

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

TIME WARNER ENTERTAINMENT - ADVANCE/NEWHOUSE PARTNERSHIP,	)	Case No. 8:04-CV-00219
Plaintiff,	)	
vs.	)	
CITY OF LINCOLN,	)	
Defendant.	)	

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON JURISDICTIONAL GROUNDS

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on services furnished by the franchisee payable to . . . any governmental unit . . . and collected on behalf of said governmental unit . . . ."

In the *City of Dallas* case in 1997 the court held that cable franchise fees collected from cable customers are themselves part of "gross revenues" under standard "industry accounting principles" – otherwise known as generally accepted accounting principles, or GAAP. Following that decision, the City of Lincoln insisted that TWEAN treat franchise fee payments as part of "gross revenues" under the Cable Franchise and Ordinance and pay a franchise fee on them. After the City threatened to call TWEAN's letter of credit to collect back payments of fees due on past franchise fees, TWEAN paid $162,000 to the City in settlement of the issue of past payments in April 1999. Exhibit F at ¶ 12. Since then, TWEAN has paid additional franchise fees of more than $525,000 on the revenue received from franchise fee collections. *Id.* These amounts would not have been due the City under TWEAN's franchise and Sections 5.16.040 and 5.16.170 of the Cable Ordinance if the franchise fee is a "tax." Having required TWEAN to pay these amounts by taking the position that the franchise is NOT A TAX, the City should not be heard to argue now, when it has another reason to do so, that the franchise fee actually is a tax.

A. The Franchise Fee Does Not Meet Any of the Criteria of a Tax.

"Taxes" are generally considered to be "enforced contribution[s] for the support of government." *United States v. La Franca*, 282 U.S. 568, 572 (1931); *United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993); *see also*

Alpert v. Boise Water Corp., 795 P.2d 298, 307 (Id. 1990) ("a tax . . . is a forced contribution by the public-at-large . . . "). "User fees," on the other hand, are "payments given in return for a government-provided benefit." *City of Huntington,* 999 F.2d at 74. "Regulatory fees" are imposed to discourage particular conduct or to raise money to defray the cost of regulation. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n,* 967 F.2d 683, 685 (1st Cir. 1992).

The most widely-cited test for determining whether monies are regulatory fees or taxes under the Tax Injunction Act was articulated in the 1992 opinion written by then-Chief Judge Breyer of the First Circuit in the *San Juan Cellular* case. *Id.* The *San Juan Cellular* test considers three primary criteria. An exaction is a "classic tax" when it is (i) imposed by the legislature (ii) "upon many, or all, citizens" and (iii) "raises money, contributed to a general fund, and spent for the benefit of the entire community." *Id.* As explained below, the Lincoln cable franchise does not meet any of these three factors.

Before turning to an examination of these specific criteria, we note the obvious – not all monies collected by state and municipal governments are even arguably taxes or regulatory fees. TWEAN has found no cases, for example, where courts have held that collection on a contract is a tax. No wonder, therefore, that no court has even felt the need to fully analyze cable franchise fees, which are enforced under contract, under the Tax Injunction Act.

A second point, perhaps less obvious, is that the *San Juan Cellular* case concerned action by the Puerto Rico Public Service Commission and did not

specifically address the application of the Tax Injunction Act to actions by municipalities. Yet it is apparent that municipal governments are structured differently from state governments and do not handle similar tasks in the same ways. Thus, for example, although most states have a fully developed administrative agency structure, many municipalities do not. What a state may do through an administrative agency, a municipality may often do through its city council. And where a state may create a special fund for handling certain monies for a variety of reasons, a municipality's simpler fiscal structure may dictate that the monies be simply placed in the general fund. Accordingly, the *San Juan Cellular* factors must be viewed somewhat differently when dealing with a municipality than when dealing with a state.

1. Although Issued Pursuant to an Ordinance, Lincoln's Cable Franchise and its Associated Fee is a Contractual Undertaking.

The City's Brief relies heavily on the fact that its cable franchise fee is contained in its Cable Ordinance. But the City ignores the fact that the fee is also specified in the Franchise Agreement and is a contractual requirement. From the first cable ordinance enacted by Lincoln in 1967, the Cable Ordinance and the Franchise Ordinance/Agreement have been inextricably intertwined. Were the Lincoln franchise fee truly "in the nature of a tax," there would be no need to require TWEAN to agree to it in a franchise contract.

Municipal franchises have long been understood to be contracts. *See, e.g., City of Owensboro v. Top Vision Cable Co. of Kentucky,* 487 S.W.2d 283,

287 (Ky. 1972)(cable television franchise is a contract); *Alpert v. Boise Water Corp.*, 795 P.2d 298, 306 (Id. 1990) ("[f]ranchise is a contract"). Franchise fees, in turn, are commonly understood to be consideration for the contractual award of a government benefit. *See, e.g., City of Calhoun v. North Georgia Elec. Membership Corp.*, 443 S.E.2d 469, 471 (Ga. 1994)("A franchise [fee] is [payment in consideration of] a contract creating property rights."), *quoting Macon Ambulance Serv. Inc. v. Snow Properties, Inc.*, 127 S.E.2d 598, 600 (Ga. 1962)(emphasis and brackets supplied by *City of Calhoun* court); *City of Plant City v. Mayo,* 337 So.2d 966, 973 (Fla. 1976) (franchise fees are "bargained for in exchange for specific property rights relinquished by the cities"). Many cases have treated franchise fees as a form of "rent." *See, e.g., City of Dallas,* 118 F.3d at 397; *Qwest Comm. Corp. v. City of Berkeley,* 146 F. Supp. 2d 1081, 1092 (N.D. Calif. 2001)(franchise fee described as "annual rent compensation"); *TCG New York, Inc. v. City of White Plains,* 125 F. Supp. 2d 81, 96 (S.D.N.Y. 2000) ("nothing inappropriate with cities charging 'rent' for the use of city-owned property for private purposes"); *Telesat Cablevision, Inc. v. City of Rivera Beach,* 773 F. Supp. 383, 407 (S.D. Fla. 1991) (using "rental" terminology in discussing franchise fee); *Erie Telecomms., Inc. v. City of Erie,* 659 F. Supp. 580, 594 (W.D. Pa. 1987)(same). 13/ Cable franchises are enforceable as contracts, even though they are traditionally awarded by ordinance. *Illinois Broad. Co. v. City of*

13/ Some recent cases have criticized treating franchise fees as "rent." *See, e.g., City of Chattanooga v. BellSouth Telecomms., Inc.,*1 F. Supp. 2d 809, 814 n.3 (E.D. Tenn. 1998). Nevertheless, the practice unquestionably continues.

Decatur, 238 N.E.2d 261, 262 (Ill. App. Ct. 1968)(discussing cable television "franchise ordinance"); *see also* Exhibit A.

The contractual nature of cable franchise fees remove them far from "taxes." Taxes simply have no contractual element; they are "a demand of sovereignty," *City of St. Louis v. Western Union Tel. Co.,* 148 U.S. 92, 97 (1893). "The consent of the taxpayer is not necessary to their enforcement." *State of New Jersey v. Anderson,* 230 U.S. 483, 492 (1906); *see also City of Gary v. Indiana Bell Tel. Co.,* 732 N.E.2d 149, 156 (Ind. 2000), *quoting Ace Rent-a-Car, Inc. v. Indianapolis Airport Auth.,* 612 N.E.2d 1104, 1108 (Ind. Ct. App. 1993) ("A tax is compulsory and not optional"). Disputes about collections on contracts, therefore, do not trigger the Tax Injunction Act. *See Lipscomb v. Columbus Mun. Separate School Dist.,* 269 F.3d 494, 500 n.13 (5th Cir. 2001) (lease payments are not taxes for purposes of the Tax Injunction Act because such obligations "are a creature of contract, not a mandatory obligation imposed by the state as taxes are").

Furthermore, it is of no particular significance that the City has acted through ordinances enacted by its City Council. The City generally acts through its City Council, and the Mayor has only those responsibilities explicitly authorized by statutes of the State of Nebraska or the Charter or Ordinances of the City. LINCOLN, NE, CHARTER Art. IV § 12; LINCOLN, NE, MUN. CODE §

2.06.100.14/ On August 5, 1985, by Ordinance No. 14153, the City Council "authorized and directed" the Mayor "to execute . . . [the cable franchise with T-V Transmission] on behalf of the City." Exhibit C. Presumably, the Mayor had no such authority without that action by the Council. In the circumstances, that the City legislature – by ordinance – authorized the Mayor to execute the franchise contract is not meaningful in the *San Juan Cellular* analysis.

That the franchise fee requirement is contained in two ordinances enacted by the City Council in this case, therefore, is entitled to no weight in considering whether the franchise fee should be deemed a "tax." It appears that the City could have proceeded in no other way, and the contractual nature of the fee is compelling. The contractual nature of the undertaking alone means that the Lincoln cable franchise fee does not meet the first prong of the *San Juan Cellular* test.

2. The Lincoln Franchise Fee Applies Only to a *Single* Entity.

The City's Brief is noticeably silent regarding the second prong of the *San Juan Cellular* test – the breadth of the application of the exaction. The *San Juan Cellular* court noted that a tax is "imposed on many, or all, citizens." 967 F.2d at 685. In a similar statement, the court in *Chicago & Northwestern Transp. Co. v. Webster County Bd. of Supervisors,* 880 F. Supp. 1290, 1302 (N.D. Ia. 1995),

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14/ LINCOLN, NE CHARTER Art. IV § 12, *available at* http://www.lincoln.ne.gov/city/attorn/lmc/charter.pdf. LINCOLN, NE MUN. CODE § 2.06.100, *at* http://www.lincoln.ne.gov/city/attorn/lmc/ti02/ch206.pdf.

described this aspect of the test as whether the exaction is raised "from similarly situated persons." Although TWEAN currently operates with significant competition from the national direct broadcast satellite companies Echostar and Direct TV, 15/ no more than one cable television company at a time has ever served the City of Lincoln. 16/ And no more than one entity at a time has ever paid a cable television franchise fee.

The City has used other means for exacting consideration and fees from other types of companies that make similar use of Lincoln's streets. Pursuant to a franchise issued to Peoples Natural Gas Co. in 1994, the local gas company agreed to pay a franchise fee of $0.39 per foot of gas distribution main in the City. Exhibit K. 17/ Lincoln does not require telecommunications companies, which are regulated by the Nebraska Public Service Commission, to obtain a municipal franchise. In 2001, in recognition of the number of competitive telecommunications companies emerging pursuant to the Telecommunications Act of 1996, the City passed an ordinance imposing a tax on all telecommunications providers in the City. This tax, codified at Section 3.24.080

15/ Direct Broadcast Satellite operators currently have a 22-percent share of the multi-channel video market nationally. *Tenth Annual Report on the Status of Competition in the Market for Delivery of Video Programming,* FCC MB Docket No. 03-172, ¶ 8 (rel. Jan. 28, 2004).

16/ Exhibit F at ¶ 4.

17/ The charge is subject to being increased, and TWEAN does not know what amount per foot is currently being charged.

of the City's Ordinance dealing with "Occupation Taxes," is 5.5 percent of "gross receipts." 18/

It is not surprising that the City has ignored this prong of the *San Juan Cellular* test. Not only does the cable franchise fee apply to only a single entity, but it is different from the fees and taxes that are applied to other similar users of the rights-of-way. The Sixth Circuit has noted that a characteristic of a tax is that it is "universally applicable to similarly situated persons or firms." *In re Suburban Motor Freight, Inc.,* 998 F.2d 338, 342 (6th Cir. 1993). The cable franchise fee is not collected from similarly situated firms; it is collected from only one user of the City rights-of-way. No case that we have found has applied a "tax" label to a municipal fee in similar circumstances. 19/

3. There is No Evidence that the City's Cable Franchise Fee Is "Revenue Generating" Beyond the Costs of Regulation.

The City's observation that TWEAN's franchise fee is placed in the City's General Fund is unpersuasive here. *Tindal v. Block,* 717 F.2d 874, 887 (4th Cir.

18/ Although it is not absolutely clear that the City's "telecommunications occupation tax" would be considered to be a "tax" under the Tax Injunction Act, that exaction is very different from the cable franchise fee, in any event. Unlike the cable franchise fee, the telecommunications tax is not authorized by federal law, and it is not agreed to by the companies as part of a contractual franchise. The telecommunications tax is not deemed to be consideration for use of the streets or "rent" because telecommunications companies have authority to occupy the streets already under the certificates of convenience and necessity awarded by the Nebraska Public Service Commission. *See* NEB. ADMIN. CODE Ch. 5, § 001.02.

19/ The situation presented here by a single company being contractually obligated to pay a franchise fee is very different from the situation presented in *Burris v. City of Little Rock,* 941 F.2d 717 (8th Cir. 1991), cited at pages 3 and 11 of the City's Brief. *Burris* involved a special tax assessment levied on all properties within a sewer district.

1983, *cert. denied,* 465 U.S. 1080 (1984); *BellSouth Telecomms., Inc. v. City of Orangeburg,* 522 S.E.2d 804, 806 (S.C. 1999) ("The fact that the [telecommunications] fees are placed in the City's general fund is irrelevant [to whether the fees are a tax]."). Especially when dealing with a municipality, the placement of the monies is not controlling. "Rather than a question solely of *where* the money goes, the issue is *why* the money is taken." *Hager v. City of West Peoria,* 84 F.3d 865, 870-71 (7th Cir. 1996); *see also Hexom v. Oregon Dep't of Transp.*, 177 F.3d 1134, 1138 (9th Cir. 1999).

The City's affidavits do not address whether the cable franchise fee here is revenue generating beyond the costs incurred by the City related to cable television. And there is no reason to assume here that the fees clearly raise revenues in excess of the costs imposed by TWEAN's presence. As noted above, on a number of occasions, the FCC has authorized franchise fees of 5 percent of gross revenues after demonstrations that fees of this magnitude were necessary to cover regulatory expenses. 20/

The City bears the burden of demonstrating the merits of its motion here, *see San Juan Cellular*, 967 F.2d at 687, and it has made no effort to assert, much less demonstrate, that the franchise fee is "revenue generating" beyond the costs of regulation. TWEAN recently asked the City to estimate its administrative costs related to cable television regulation, and the City responded that it did not know. Exhibit L. We do know, however, that the City has spent

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20/ See discussion *supra* at 2-3.

more than $500,000 on the costs of outside consultants alone related to negotiations and formal proceedings in connection with the renewal of the cable franchise. Defendant's Answers to TWEAN's Second Set of Interrogatories at No. 2, Exhibit M. In the absence of uncontested facts demonstrating that the cable franchise fees are "revenue generating," this Court would have no basis for finding on summary judgment that the City has met this prong of the *San Juan Cellular* test.

B. The Cases Involving Telecommunications Fees are Split and Do Not Control Here.

The City cites several cases in which federal courts have ruled that the Tax Injunction Act removed their jurisdiction to adjudicate requests for declaratory and injunctive relief regarding revenue generating fees imposed by municipalities on telecommunications companies. In fact, as the City's Brief reflects, the cases explicitly addressing whether the Tax Injunction Act bars federal jurisdiction regarding local telecommunications fees are split. *Compare, e.g., Qwest Comm. Corp. v. City of Berkeley,* 146 F. Supp. 2d 1081 (N.D. Cal. 2001)(Tax Injunction Act does not apply to annual rent compensation imposed through franchise fees) *with Lightwave Techns., L.L.C. v. Escambia County,* 43 F. Supp. 2d 1311 (S.D. Ala. 1999)(Tax Injunction Act held to apply to fee that was uncontested to be "revenue raising"); *Diginet, Inc. v. Western Union ATS, Inc.*, 845 F. Supp. 1237 (N.D. Ill. 1994)(same). 21/

21/ The City also cites two other cases. The court's decision in *Robinson Protective Alarm Co. v. City of Philadelphia,* 581 F.2d 371 (3d Cir. 1978), involved five plaintiffs and

The City does not address the many cases in which the federal courts have recently ruled on the merits of requests for injunctive and declaratory judgment relief related to municipal telecommunications fees. TWEAN is aware of 18 such cases, including decisions on the merits by the Second, Third, Sixth, Ninth, Tenth and Eleventh Circuits. *See TCG. New York, Inc. v. City of White Plains,* 305 F.3d 67 (2d Cir. 2002)(fee of 5 percent of gross revenues); *New Jersey Payphone Ass'n v. Town of West New York*, 299 F.3d 235 (3d Cir. 2002) (unspecified percentage of revenue generated by pay telephones); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000)(fee of 4 percent of gross revenues); *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004) (fee of 7 percent of gross revenue); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001)(fee of 6 percent of gross revenues); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) (fee of 2 percent of gross receipts plus rental fees); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001)(fee of 10 percent of gross revenues). 22/ The only conceivable

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was reached well prior to the First Circuit's analysis of the Tax Injunction Act in *San Juan Cellular.* In *Keleher v. New England Tel. & Tel. Co.,* 947 F.2d 547 (2d Cir. 1991), the court offered no analysis regarding the general application of the Tax Injunction Act to requests for injunctive or declaratory relief against collection, and its determination that the Act prohibited federal jurisdiction over collection of taxes was abrogated by the Supreme Court. *See Jefferson County v. Acker,* 527 U.S. 423 (1999).

22/ *See also XO Missouri, Inc. v. City of Maryland Heights,* 256 F. Supp. 2d 987 (E.D. Mo. 2003);. *TC Sys., Inc. v. Town of Colonie*, 263 F. Supp. 2d 471 (N.D.N.Y. 2003); *Cox Comm. PCS v. City of San Marcos*, 204 F. Supp. 2d 1260 (S.D. Cal. 2002); *Bd. of County Comm'rs v. Qwest Corp.*, 169 F. Supp. 2d 1243 (D.N.M. 2001); *BellSouth Telecomms., Inc. v. City of Mobile*, 171 F. Supp. 2d 1261 (S.D. Ala. 2001); *AT&T Comm. of the Southwest, Inc. v. City of Austin*, 40 F. Supp. 2d 852 (W. D. Tex. 1998), *vacated as moot on other grounds*, 235 F.2d 241 (5th Cir. 2000); *City of Dallas v. Metro. Fiber*

explanation for so many recent decisions on the merits, without even a discussion of the Tax Injunction Act, is that federal jurisdiction has been considered apparent to these courts – and to all parties involved in the disputes. 23/

In any event, none of the telecommunications fee cases relied on by the City involved a fee, like the cable franchise fee, expressly authorized by Congress. In none of the cases was the obligation confirmed in a franchise contract, agreed to by both parties. In none of the cases had the revenue-generating effect of the imposition apparently been questioned. 24/ And in none of the cases is there evidence that the exaction applied only to a single company, ignoring other similar users of the rights-of-way. In short, the

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Sys. of Dallas, Inc., 2000 WL 198104 (N.D. Tex. Feb. 17, 2000); *PECO Energy Co. v. Township of Haverford*, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999); *Bell Atlantic Maryland v. Prince Georges County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000); *Omnipoint Comm., Inc. v. Port Auth. of New York & New Jersey*, 1999 WL 494120 (S.D.N.Y. Jul 13, 1999); *AT&T Comm. of the Southwest v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998),

23/ It must be assumed that federal district courts are not only aware that issues of jurisdiction may be raised at any time and by the court *sua sponte,* but also of the jurisdictional limitations of the Tax Injunction Act.

24/ The role of municipalities in the regulation of telecommunications companies is much more limited than with cable operators, and thus the costs of municipal regulation of telecommunications companies is much lower. *See, e.g., AT&T Communications of the Southwest,* 8 F. Supp 2d at 591. Furthermore, in almost every case in which telecommunications companies have challenged municipal fees under Section 253 of the Communications Act, they have alleged that the fees exceeded the cost of regulation.

telecommunications fee cases cited by the City would not control here, even if they represented a consistent and widely-held approach. 25/

III. TWEAN's Request for Declaratory Ruling on the Application and Grant Fees is Ripe.

TWEAN's Amended Complaint also seeks declaratory judgment that fees imposed *in addition to* the 5-percent federal franchise fee ceiling are unenforceable. Specifically, the City's RFRP requires that TWEAN agree to pay an "application fee" of $15,000 and a "grant fee" equal to the "direct" costs incurred by the City in the franchise renewal process. Exhibit I at 6. These fees are assessed above and beyond the federal fee limit. The City concedes that, while it has not yet determined the exact amount of the "grant fee," it has already expended more than $500,000 in consultants costs alone in the franchising process. Exhibit M at No. 2. The City's position that TWEAN's challenge to the validity of these additional fees is not ripe for adjudication is not supportable.

A case is ripe for judicial intervention where there exists "a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1037-38 (8th Cir. 2001). The Supreme Court has directed that the ripeness inquiry requires examination of both the "fitness of the issues for judicial decision" and "the hardship to the parties of

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25/ TWEAN does not contend that it would not have an effective remedy in state court.