

City of Portland v. Electric Lightwave, US District Court of Oregon
Case No. CV 03-538 AS

On May 6, 2005, federal Magistrate Donald Ashmanskas issued a 72 page opinion on cross-motions for summary judgment in the case of City of Portland v. Electric Lightwave. Portland had sued Electric Lightwave (ELI), a competitive telecommunications provider, after the company began withholding franchise fee payments to the City in 2001. ELI counterclaimed against the city arguing that most of the franchise requirements were preempted under the 1996 Federal Telecommunications Act.

In its opinion, the court separately reviewed each of the City's franchise requirements, in keeping with its understanding of the mandate of the 9th Circuit in Qwest v. City of Portland. The court upheld substantially all of the franchise requirements.

The court upheld the 5% gross revenue franchise fee. The franchise fee holding is significant, as the court discussed at length how Section 253 does not limit cities to recovery of costs under federal law, and how a gross revenue based fee is a form of fair and reasonable compensation. The court also discussed how the gross revenue based fee imposed on the CLEC was not discriminatory although it differed from the limits upon city right of way fees for incumbents established under Oregon statute.

The court upheld all of the standard franchise requirements, such as providing maps of where facilities have been built in the right-of-way, relocation of facilities, insurance and indemnification provisions and handling of hazardous substances.

The court found that two provisions of the franchise were preempted under the federal law, and severed those provisions from the franchise agreement. These two provisions included a "most favored community" requirement that ELI provide the City with telecommunications services at the best rates given to comparable customers, and that ELI provide "in-kind" facilities such as conduit. The court held that, under the Ninth Circuit's current interpretation of the federal law, these provisions constituted a "prohibition" of ELI's provision of telecommunications services, were not reasonable compensation for use of the streets and did not constitute management of the right-of-way.

The court also ruled in the city's favor in regard to the parties' dispute over interpretation of the franchise contract terms. The court interpreted the franchise definition of gross revenues as including revenues from services that ELI had argued were excluded. The court held that finance charges imposed on late payments from ELI's customers were not included in gross revenues from telecommunications services, i.e., that the city could not collect 5% of the finance charges as part of the franchise fee.

Portland has filed a motion for reconsideration by the court of its in-kind ruling. Regardless of the court's ultimate decision, ELI has indicated that it will appeal the court's ruling.