DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO City & County Bldg., 1437 Bannock St., Room 256 Denver, CO 80202	 **COURT USE ONLY** ▲ ▲
Plaintiffs: MILE HI CABLE PARTNERS, L.P.; COMCAST OF COLORADO IV, LLC; COMCAST OF COLORADO IX, LLC; COMCAST OF COLORAD, L.P.; and TCI MATERIALS MANAGEMENT, INC. v. **Defendants:** CITY AND COUNTY OF DENVER, COLORADO; and CLAUDE PUMILIA, in his official capacity as Manager of Finance of the City and County of Denver	**Case No.** 08CV6208 **Courtroom:** 14
ORDER	

This matter comes before the Court on plaintiffs' Motion for Summary Judgment on the joint claims of all plaintiffs, as well as an individual claim of defendant TCI Materials Management, Inc. ("TCIMM"). Defendants have crossed-moved for partial summary judgment as to the joint claims of all plaintiffs (*see* Denver's Opposition to Plaintiff's Motion for Summary Judgment, at 9), but argue that disputed factual issues preclude the entry of summary judgment as to the individual claim of TCIMM.

The Court has reviewed the file, including all motions, pleadings, and affidavits, and enters the following findings and orders.

I. History of the Case

This case involves an appeal filed by plaintiffs under C.R.S. §§ 29-2-106.1(8) and 39-21-105. Plaintiffs seek review of a sales tax assessment issued by defendant City and County of Denver, Colorado ("City" or "Denver") through its Department of Finance.

A. Taxation Assessment Against All Plaintiffs

Between approximately March 2006 and November 2007, the City conducted sales and use tax audits of Comcast Corporation and certain of its subsidiaries, including all plaintiffs.

On November 30, 2007, Denver issued a Notice of Final Determination, Assessment and Demand for Payment ("Assessment") with regard to taxation of cable high-speed internet ("CHSI") services provided by plaintiffs. Plaintiffs filed an appeal with the Denver Manager of Revenue.

On June 25, 2008, the Manager of Revenue's Hearing Officer dismissed plaintiffs' appeal and sustained the Assessment against plaintiffs in the amended amount of $3,286,527.07. The parties have stipulated to various amounts of the Assessment, of which $1,427,301.46 is the amount in dispute relating to the joint claims of all plaintiffs.

In his Findings of Fact, Conclusion and Order entered on June 25, 2008 ("Order"), the Hearing Officer determined that CHSI fell within the definition of "telecommunication services" contained in the Denver Revised Municipal Code, D.R.M.C. §§ 53-24(28) and 53-95(31)[1]. (Order, at 7-8). Moreover, the Hearing Officer found that the Assessment was permitted under the "grandfathering" provision of the Federal Internet Tax Freedom Act ("IFTA")[2] because (i) taxation of CHSI services was authorized by the Denver Revised Municipal Code ("D.R.M.C."), (ii) such taxation was generally imposed and actually enforced prior to October 1, 1998, and (iii) Denver had applied taxation to and was collecting taxes on the provision of internet access services (iv) prior to October 1, 1998[3], and (v) Denver generally collected and imposed taxes on CHSI services. (Order, at 7-9). The Hearing Officer held the City's imposition of sales and use taxes on plaintiffs' internet access sales was justified and upheld the Assessment for an amended which included interest and penalties. (*Id.*, at pp. 9-10).

B. Taxation Assessed Against Plaintiff TCIMM

An assessment in the amount of $87,062.39 issued against plaintiff TCIMM is also in dispute.

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[1] Both sections of the Denver Revised Municipal Code contain the identical definition, one for purposes of sales taxation (§ 53-24(28)) and the other for purposes of use taxation (§ 53-95(31)). The definition is discussed below, Section IV.A., *infra.*

[2] IFTA § 1104(a), P.L. 108-435 (enacted December 3, 2004), 47 U.S.C. § 151.

[3] The Order refers to the date of "October 1, 2002." (Order, at 8, ¶ C). The Court believes this was intended to refer to "1998."

The Hearing Officer found "the actions of [TCIMM] itself in voluntarily reporting transactions which occurred during November 2002 at a time after December 2002 is the event that gave rise to the imposition of the taxes assessed." *Id*. at 9. The Hearing Officer added that "[h]ad [TCIMM] filed its reports in a timely fashion, I would have found that the City was barred by the Consent. However, [TCIMM]'s own delinquency in filing resulted in those taxable transactions being subject to assessment." *Id*. Accordingly, the Hearing Officer upheld that portion of the Assessment as well.

II. Summary of Issues

A. Issue Common to All Plaintiffs

Plaintiffs filed this appeal on July 14, 2008.[4] On May 15, 2009, Plaintiffs jointly moved for summary judgment arguing that, as a matter of law, CHSI do not constitute "telecommunications services" as defined in the D.R.M.C.[5] Collectively, plaintiffs will be referred to as the internet service providers (ISPs).

In response, Denver has cross-moved for summary judgment, arguing that CHSI services fall within the broad definition of "telecommunications services" as defined in the D.R.M.C.. Denver requests the Court determine as a matter of law "that Comcast's sales of cable high-speed internet access services were properly subject to Denver's sales/use taxes on telecommunications services" and requests summary judgment. (Defendant's Reply in Opposition, at 9).

B. Issue as to TCIMM

TCIMM argues that this tax violated the applicable statute of limitations, D.R.M.C. § 53-68(a) and/or a Closing Agreement sent to TCIMM from the City on March 26, 2003. Denver asserts that there are disputed factual issues which preclude the entry of summary judgment on this issue.

III. Jurisdiction and Standard of Review

This Court has jurisdiction under C.R.S. § 29-2-106.1(8)(a) and 8(c), and C.R.S. § 39-21-105(2)(b).

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[4] In the appeal, plaintiffs also raise issues regarding the IFTA, whether the "grandfathering" provision of the IFTA bars the taxation in issue in this case, and whether the taxation is barred under Colo. Const. Art. X, § 20, the Taxpayer's Bill of Rights (TABOR).

[5] In the event the Court determines that CHSI services do fall within the D.R.M.C.'s definition of a "telecommunications service," plaintiffs acknowledge that the issue of whether or not the "grandfathering" provision of IFTA (*see fn.* 2, *infra*) permits or precludes Denver's taxation of CHSI services is not appropriate for summary judgment, as it involves disputed factual issues not appropriate for resolution by summary judgment. *See* plaintiffs' Motion for Summary Judgment, at 3.

The Court's review of this appeal is *de novo* as to all issues of law and fact. C.R.S. § 39-21-105(2)(b). *See M & J Leasing v. Dir. of Dept. of Rev.*, 796 P.2d 28, 30 (Colo. App. 1990)(A trial *de novo*, including "reviewing all issues of law and fact" requires "that the trial court must make new findings of fact and conclusions of law, independent of those in the department's final determination.") The plaintiffs have the burden of proof with regard to the issues raised in their appeal. C.R.S. § 39-21-105(2)(b).

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Colo. R. Civ. P. 56(c). "[S]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party in entitled to a judgment as a matter of law." *Andersen v. Lindenbaum*, 190 P.3d 237, 239 (Colo. 2007). Although not a substitute for a trial when there are genuine or disputed issues of fact, the objective of summary judgment is "to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with a trial when, as a matter of law, based on undisputed facts, one party could not prevail." *Ginter v. Palmer & Co.*, 196 Colo. 203, 585 P.2d 583, 584 (1978). "Its wholesome utility is, in advance of trial, to test, not as formerly on bare contentions found in the legal jargon of pleadings, but on the intrinsic merits, whether there is in actuality a real basis for relief or defense." *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218, 221 (1970)(citing *Construction Corp. v. U.S.*, 242 F.2d 873 (5th Cir. 1957).

Matters involving statutory interpretation constitute matters of law. *Colantuno v. Tenenbaum & Co., Inc.*, 23 P.3d 708, 711 (Colo. 2001). "When construing statutes, the court's goal is to give effect to the intent of the [legislating body]. Constructions that defeat the obvious legislative intent should be avoided." *People v. Webb-Johnson*, 113 P.3d 1253, 1253 (Colo.App. 2005). The Court "should attempt to give effect to all parts of a statute, and constructions that would render part of the statute meaningless should be avoided." *Id.*

IV. Undisputed Facts as to Common Issue

A. Stipulated Facts

The parties stipulated to the following facts:

1. On November 30, 2007, the City, through its Department of Finance, issued Plaintiffs the Assessment for additional sales and use taxes,

together with interest and penalties thereon, in the aggregate amount of $3,385,325.74.

2. On July 25, 2008, plaintiffs remitted two checks to the City. The first check, in the amount of $1,752,390.36, represented that portion of the Assessment which plaintiffs did not contest. The second check, in the amount of $1,632,935.38, represented the portion of the Assessment which plaintiffs contested. (Each check updated interest through the date of payment, and accordingly, the two checks together exceeded the amount of the original Assessment.)

3. Of the $1,632,935.38 which plaintiffs contested and paid under protest in July 2008, $118,571.53 is no longer contested by plaintiffs. Thus, $1,514,363.85 of the amounts paid by plaintiffs to the City on July 25, 2008 remains in dispute ("Amount in Dispute").

4. $1,427,301.46 of the Amount in Dispute relates to plaintiffs' claim that Denver's sales/use tax definition of "telecommunications services" does not allow taxation of plaintiffs' sale of CHSI.

5. If the Court grants plaintiffs' motion for summary judgment on this issue, plaintiffs will be entitled to a refund of the $1,427,301.46 paid, plus interest from the date of payment as allowed under the D.R.M.C.

6. The remainder of the amount in dispute -- $87,062.39 -- involves amounts assessed against TCIMM, which TCIMM claims are barred from assessment. If the Court grants plaintiffs' pending motion for summary judgment on this issue, plaintiffs will be entitled to a refund of the $87,062.39 paid, plus interest from the date of payment as allowed under the D.R.M.C.

(Joint Stipulation of Facts, June 15, 2009)

B. Other Non-Disputed Facts as to Common Issue

Based on a review of the parties' briefs and the affidavits and other documents submitted, the Court concludes the following facts are undisputed:

7. D.R.M.C. §§ 53-25(3) and 53-96(3) permit Denver to assess both sales and use taxes on the sale of "telecommunications services."

8. In 1987, the Denver City Council revised the D.R.M.C. to apply Denver's sale and use taxes from "telephone and telegraph" services to "telecommunications services." On December 9, 1991 and effective on January 1, 1992, the Denver City Council adopted the definition of "telecommunications services" (as applicable to sales and use taxation) currently contained in

D.R.M.C. §§ 53-24(28) and 53-95(31). (*See* Denver City Ordinance No. 922, Council Bill No. 937).

9. During all relevant periods, the ISPs sold CHSI to residential and business subscribers in Denver.

10. CHSI services permit subscribers to access the internet more quickly than traditional 'dial-up' service (which uses a telephone connection) or other internet access technologies which use the telephone network.

11. The CHSI product sold by the ISPs is an integrated package of services which enable subscribers to reach and connect to the internet and world-wide web, thereby permitting subscribers to access, retrieve, and interact with information hosted on computer hardware located throughout the world.

12. The CHSI integrated package of services sold by the ISPs also allows all subscribers to receive an e-mail account, to log into their on-line accounts and activate additional options such as (i) additional e-mail accounts, (ii) web creation and hosting services, (iii) web storage space, (iv) content controls, (v) firewall, and (vi) technical support.

13. CHSI relies in part on coaxial cable brought by the ISPs directly into the subscriber's home or business.

14. In the most typical configuration of CHSI, digital signals from a subscriber's computer ("PC") travel first through a network card within the PC, and then across an Ethernet connection to a cable modem.

15. The cable modem then operates as a bridge between the PC and the remainder of the ISPs' network.

16. The modem converts a digital signal from the PC into a modulated electronic signal.

17. From the subscriber's premises, the modulated electronic signal first travels along coaxial cables to a "node," which aggregates traffic from a local area or neighborhood.

18. At the nodes, the electronic signals are then converted into light signals and sent over fiber optic cables to a larger aggregation facility, known as a "hub."

19. Signals from the hubs are then sent, via fiber optic cable, to a larger, regional hub, known as a head end ("HE").

20. Signals received at the HE are processed by a Cable Modem Termination System ("CMTS").

21. The CMTS demodulates or changes the signals, converting them from light signals back into a digital format and breaking them into smaller packets.

22. From the HE, the data packets are then routed to yet another location that operates as a gateway to the internet known as either the internet Point of Presence ("POP") or internet Exchange Point ("IXP").

23. At the POP/IXP, the ISPs transfer their subscribers' traffic onto an internet "backbone" owned by unrelated parties.

24. The ISPs pay these backbone providers a fee for access to their facilities, generally based on the volume of "traffic" handled.

25. "Traffic" traveling in the reverse direction back to the ISPs' subscribers follows all the same steps, only in reverse.

26. The ISPs (or their affiliates) own all of the foregoing infrastructure, including the termination equipment located at the POP/IXP.

27. The ISPs sell a single product of internet access to its subscribers.

28. No transmission component of internet access is sold as a separate product by the ISPs.

IV. Applicable Law and Analysis as to Common Issue

A. Background

The ISPs acknowledge that D.R.M.C. §§ 53-25(3) and 53-96(3) authorize Denver to assess sales and use taxes on the provision of "telecommunications services." However, they assert the provision of CHSI access does not fall within the definition or meaning of "telecommunications services" as used in D.R.M.C. §§ 53-24(28) and 53-95(31), and that the City is therefore precluded, as a matter of law, from assessing sales and use taxes related to their sale of CHSI services.

Conversely, the City argues that the ISPs' provision of CHSI services falls within the broad definition of "telecommunications services" in D.R.M.C. §§ 53-24(28) and 53-95(31).

Both parties have moved for summary judgment on this issue and agree the issue is appropriate for resolution by the Court as a matter of law. Neither

party asserts that there are any genuine issues of material fact which would render summary judgment inappropriate as to this issue[6].

B. D.R.M.C.'s Definition of Taxable "Telecommuincations Services"

Denver imposes its sales tax under D.R.M.C. § 53-25(3), and its use tax under D.R.M.C. § 53-96(3), on "telecommunications services." Taxable "telecommunications services" are defined in D.R.M.C. §§ 53-24(28) (definition applicable to sales tax) and 53-95(31) (definition applicable to use tax) as:

> The transmission of any two-way interactive electromagnetic communications including, but not limited to, voice, image, data and any other information, by the use of any means but not limited to wire, cable, fiber optical cable, microwave, radio wave or any combinations of such media. 'Telecommunications service' includes, but is not limited to, basic local exchange telephone service, toll telephone service and teletypewriter service, including, but not limited to, residential and business service, directory assistance, cellular mobile telephone or telecommunication service, specialized mobile radio and two-way pagers and paging service, including any form of mobile two-way communication. 'Telecommunications service' does not include separately stated nontransmission services which constitute computer processing applications used to act on the information to be transmitted.

C. Does the Provision of CHSI Services Represent Taxable "Telecommunications Services" Within the Meaning of the D.R.M.C.?

1. Summary of Arguments

The ISPs argue the sale of CHSI is not "telecommunications services" within the meaning of the D.R.M.C. definition. First, they point out the D.R.M.C.'s definition includes only the 'transmission' of the defined communications, and argue their CHSI services constitute more than a mere 'transmission' of communications. They assert that CHSI involves multiple actions in converting digital signals into modulated electronic signals and light signals (and back again), and that these services, along with other services provided to its subscribers of CHSI (for example, e-mail, web creation, electronic storage, technical support) represent more than mere 'transmission'

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[6] If "telecommunications services" are taxable under the D.R.M.C., the parties concur that there are disputed issues of fact as to whether Denver's tax is barred by the IFTA, and/or whether such taxation is permitted as having been "grandfathered" under the IFTA which preclude summary judgment on these issues. *See* plaintiff's Motion for Summary Judgment, at 3.

of telecommunications services, as envisioned in the D.R.M.C. The ISPs assert the very nature of CHSI prevents it from being bifurcated into a separate, taxable, transmission aspect.

Second, the D.R.M.C. explicitly excludes from the definition of taxable "telecommunications services" any "separately stated nontransmission services which constitute computer processing applications used to act on the information to be transmitted." D.R.M.C. §§ 53-24(28) and 53-95(31). The ISPs assert that CHSI services fall within this exception, and thus cannot be classified as taxable "telecommunications services."

Denver argues that to qualify as "telecommunications services" under the D.R.M.C., communications need only be: two-way, interactive, electromagnetic, and include, but not be limited to, voice, image, data and any other information, as well as involve the use of any means, including but not limited to wire, cable, fiber optical cable, microwave, radio wave or any combinations of such media. Denver asserts that the sale of CSHI entails each of these elements, that the D.R.M.C.'s definition was drafted broadly in 1991 to encompass future technological developments (such as high-speed internet), and that the ISPs have not excluded their CHSI services from the definition of the provision of two-way interactive communications or utilization of electromagnetic bandwidths to exchange voice, image, data or other information by means of wire, cable fiber optical cable, microwave, radio wave or any combinations of such media.

2. Applicable Law

a. Colorado Law

Both parties acknowledge this question is apparently one of first impression in Colorado. Neither party has referred the Court to any Colorado case law on point.

b. Federal Communications Commission Interpretations

In determining whether the provision of CHSI falls within the D.R.M.C.'s definition of "telecommunications services," the Court finds helpful the history of the interpretation of related and similar terms by the Federal Communications Commission ("FCC") and United States Supreme Court.

In the 1970's, the FCC established rules to regulate data processing services offered or performed over telephone lines. *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967, 976 (2005)("*Brand X*"). Those rules "distinguished between 'basic service' (like telephone service) and 'enhanced service' (computer-processing services offered over telephone lines)." *Id*.

The FCC defined 'basic service' as "a *pure transmission capability* over a communications path that is virtually transparent in terms of its interaction with customer supplied information" – that is, "a communications path that enabled the consumer to transmit an ordinary-language message to another point, with no computer processing or storage of the information, other than processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting over the network – such as via a telephone or a facsimile." *Id.* (emphasis added); *see 77 F.C.C.2d 384, 419-420, PP94-95.* 'Basic service' was deemed subject to FCC common-carrier regulation. *Brand X, supra.*

In contrast, the FCC defined 'enhanced services' as one in which "computer processing applications [were] used *to act on* the content, code, protocol, and other aspects of the subscriber's information." *Brand X, supra,* 545 U.S. at 976-77 (emphasis added); *see 77 F.C.C.2d 384, 420-421, P97.* 'Enhanced services' included voice and data storage and 'protocol conversion,' that is, communications between networks using different formats for data transmission. *Id.* These services were held not to be subject to FCC common-carrier regulation. *Id.*

The test adopted by the FCC to distinguish between 'basic' and 'enhanced' services was to look to "how the consumer perceives the service being offered." *Brand X, supra,* 545 U.S. at 976.

In 1996, Congress enacted the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("1996 Act"). Expanding upon the previous distinction between 'basic' and 'enhanced' services, the 1996 Act distinguished between a "telecommunications service" on the one hand, 47 U.S.C. § 153(43) and (46), and "information service" on the other, 47 U.S.C. § 153(20). "Telecommunications" (the analog to 'basic' services) were defined as "the transmission, between or among points, specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received", 47 U.S.C. § 153(43); *Brand X, supra.* "Information service" (the analog to 'enhanced' services) was defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20); *Brand X, supra.*

Thus, the key distinction used by Congress was between the 'transmission without change' or 'pure transmission of information' (telecommunications), versus the generation, acquisition, storage, transformation, utilization or making available of information *via* telecommunications (information service).

In 1998, the FCC issued an interpretation of core terms in the 1996 Act, extending those terms to specific and expanding communications technologies, including internet access. *See In re Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (FCC 1998) ("USR"). In the USR, the FCC determined that "Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service'" previously used by the FCC. *Id*., at 11511 (¶21). The USR elaborated on this point:

> [T]he categories of "telecommunications service" and "information service" in the 1996 are mutually exclusive. Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications." By contrast, when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications. Rather, it offers an "information service" *even though it uses telecommunications to do so.*

Id. at 11520 (¶39) (emphasis added) (quoting 47 U.S.C. § 153(20)).

Thus, the FCC concluded that "Internet access services are appropriately classed as information, rather than telecommunications, services. Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport." *Id*. at 11536 (¶73).

CHSI was not included within the services discussed in the USR 1998 because that technology was so new at the time.

In 2002, in the *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798, 4822 (¶38), the FCC explained that a "the classification of cable modem service turns on the nature of the functions that the end user is offered. We find that cable modem service is an offering of Internet access services, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications." *Id*., at 4824 (¶41). Moreover, the "cable operator providing cable modem service over its own facilities, as described in the record, is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service." *Id*. The FCC concluded:

> We disagree with the commentators that urge us to find a telecommunications service inherent in the provision of cable

> modem service. Consistent with the statutory definition of information service, cable modem service provides the capabilities described above "via telecommunications." That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.

Id., at 4823 (¶39).

Thus, the FCC has (at the time of its the original differentiation between 'basic' and 'enhanced' communications services) and in more recent definitions of CHSI, drawn a distinction between, on the one hand, pure transmission services without modification or transformation of the data and, on the other, services which may utilize telecommunications but which provide an inherently different product or service such as access to information, the internet, e-mail, and storage and manipulation of data by the end user.

c. Case Law

In *Brand X*, *supra*, the United States Supreme Court affirmed a FCC ruling holding that CHSI services were not (for regulatory purposes under the Federal Communications Act) "telecommunications[7]," but instead an exempt "information service." 545 U.S. at 973. Following an extensive review of the history of internet communications and FCC classifications and distinctions, the Supreme Court held that the FCC's conclusion[8] was reasonable. *Id*. at 997. While the definition of "telecommunications" under consideration in *Brand X* was different than the definition of "telecommunications" contained in D.R.M.C. §§ 53-24(28) and 53-95(31), one factor which the Supreme Court found weighed in favor of the FCC's ruling was the "traditional distinction between basic and enhanced service." *Id*. at 992.

In *Cmty. Telecable of Seattle v. City of Seattle*, 186 P.3d 1032 (Wash. 2008), the Washington State Supreme Court ruled CHSI services were not a taxable network telephone service under Seattle's municipal code. At the relevant time, the Seattle municipal code allowed taxation of network telephone

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[7] "Telecommunications" is defined under the Federal Communications Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," 47 U.S.C. § 153(43), and excludes "information service," which is "the offering of a capability for generating, acquiring, storing, transforming, processing retrieving, utilizing, or making available information via telecommunications. . . ." 47 U.S.C. § 153(20).

[8] "Seen from the consumer's point of view, the [FCC] concluded that cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and not because the transmission is a necessary component of Internet access." *Brand X, supra*, 545 U.S. at 988.

service, "includ[ing] the provision of transmission. . . via a telephone network, toll line, or channel, cable, microwave, or similar communication or transmission system." 186 P.3d at 1036. At the time of the city audit in question, the Seattle municipal code did not exclude the provision of internet services.[9] In addition to holding that the taxation was barred by state law, the Washington Supreme Court held "[t]he transmission component of Internet service cannot be separated from the actual service." 186 P.3d at 1036-37. In part, this was because internet services "'transforms' and 'manipulates' data as it passes through the [CHSI] network; this manipulation is an integral and necessary part of the provision of Internet services." *Id.*, at 1037. The Washington Supreme Court also noted that this ruling was "consistent with the F.C.C. and the United States Supreme Court's view of high-speed Internet services." *Id*.

The Court in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) reached a different conclusion in a case not involving taxation of CHSI services. The *Portland* Court found an ISP "consists of two elements: a 'pipeline' (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. . . . [T]o the extent that [an ISP] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Federal Communications Act." *Id.* However, in light of the *Brand* X decision by the United States Supreme Court, the continued vitality of *Portland* is doubtful. *See Brand X*, 545 U.S. at 985.

3. Analysis of D.R.M.C. Definition of "Telecommunications" for Taxation Purposes

The D.R.M.C.'s definition of taxable "telecommunications services," adopted effective January 1, 1992, distinguishes between "transmission" and "nontransmission services" which are "computer processing applications used to act on the information to be transmitted."

"Telecommunications services" are subject to sales and use taxation. These are defined as: the "*transmission* of any two-way interactive electromagnetic communications including, but not limited to, voice, image, data and any other information, by the use of any means but not limited to wire, cable, fiber optical cable, microwave, radio wave or any combinations of such media. . . . includ[ing] but is not limited to, basic local exchange telephone service, toll telephone service and teletypewriter service, including, but not limited to, residential and business service, directory assistance, cellular mobile telephone or telecommunication service, specialized mobile

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[9] Washington State law, RCW 35.21.717 and 18.04.297(3), adopted in 1997, did prohibit any new taxation on internet services during the relevant time in question. 186 P.3d at 1035, 1036.

radio and two-way pagers and paging service, including any form of mobile two-way communication." D.R.M.C. §§ 53-24(28) and 53-95(31)(emphasis added).

However, "separately stated nontransmission services which constitute computer processing applications used to act on the information to be transmitted" are excluded from sales and use taxation. *Id*.

The D.R.M.C. does not contain or provide any definition of "nontransmission services which constitute computer processing applications used to act on the information to be transmitted." Neither side has provided the Court with any legislative history regarding the adoption of the new definition of "telecommunications services" by the Denver City Council effective January 1, 1992.

Clearly, however, some distinction is intended in §§ 53-24(28) and 53-95(31) between "transmission," on the one hand, and "nontransmission. . . computer processing applications used to act on the information to be transmitted." To fail to give separate effect to the last sentence of §§ 53-24(28) and 53-95(31) would render that sentence, and the distinction drawn by the Denver City Council, mere surplusage.

Given the original distinction drawn by the FCC in the 1970's between 'basic' and 'enhanced' services, it appears most reasonable to conclude that the definition, and exclusion, adopted by the Denver City Council in D.R.M.C. §§ 53-24(28) and 53-95(31) were intended to reflect and adopt the then-current distinctions between 'basic' and 'enhanced' services as then used by the FCC. The Court cannot attribute any other meaning to the exclusion of "separately stated nontransmission services which constitute computer processing applications used to act on the information to be transmitted" from "telecommunications" in D.R.M.C. §§ 53-24(28) and 53-95(31), other than the distinction drawn by the FCC between 'basic' and 'enhanced' services. In other words, for purposes of D.R.M.C. §§ 53-24(28) and 53-95(31), "telecommunications" services refer to pure transmission functions. "Separately stated nontransmission services" refer to computer services which act on and transform information (even if that information is also transmitted).

Accordingly, the Court concludes that the provision or sale of CHSI services by plaintiffs falls within the exception to the definition of "telecommunications" contained in D.R.M.C. §§ 53-24(28) and 53-95(31), and that the provision or sale of CHSI is therefore not a taxable service or use within the meaning of the D.R.M.C.

Denver's arguments will be addressed.

a. Denver argues that plaintiffs' CHSI services are "telecommunications services" within the meaning of D.R.M.C. §§ 53-24(28) and 53-95(31) so long as they include (1) two-way (2) interactive (3) electromagnetic communications (4) involving voice, image, data or any other information, and (5) use any means of transmission, including but not limited to wire, cable, fiber optical cable, microwave, radio wave or any combination of such media. The Court disagrees. A deliberate distinction is made and intended in D.R.M.C. §§ 53-24(28) and 53-95(31) between "transmission" services, on the one hand, and "nontrasmission services which constitute computer processing applications used to act on the information to be transmitted," on the other. The test proposed by Denver overlooks this distinction and blurs the fact that CHSI involves aspects of both information services and processing *and* transmission. Although transmission of data is certainly inherent in CHSI, the undisputed facts show that much more occurs – including data demodulation, acquisition, manipulation and storage. That this occurs *via* transmission does not transform CHSI into an activity of "transmission." To paraphrase an analogy used by the majority decision in *Brand X*, although a car necessarily includes an engine and chassis, the sale of a car is the sale of the integrated product, and not engines, chassis or other constituent parts of cars. *See Brand X*, 545 U.S. at 990. A consumer cannot purchase a car without the engine or chassis, just like a "consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with the information processing." *Id.* That CHSI may involve the above five components does not make it any one of those components alone.

b. Denver argues that the D.R.M.C. was written broadly, that the Denver City Council could not have predicted in 1991 how specific communications technologies would evolve over time, and that by adopting a 'functional' definition, Denver has not been required to change its ordinance with each new technological development.

Denver's proposed 'functional' definition overlooks the history of the FCC's nomenclature in distinguishing between 'basic' and 'enhanced' services – a distinction which appears to serve as the basis for the distinction adopted in the D.R.M.C. between "transmission" services, on the one hand, and "nontrasmission services which constitute computer processing applications used to act on the information to be transmitted," on the other. It appears that the Denver City Council used the FCC's differentiation between 'pure transmission' services or a 'communications path,' on the one hand, and 'protocol conversion' with voice and data storage, on the other. While it is beyond cavil that the City Council could not have foreseen CHSI services in 1991, the distinction drawn in the D.R.M.C. appears to track and parallel the then-prevailing definitions of the FCC: was the primary objective of the service one of 'pure transmission on a communications pathway' on the one hand, or

'data manipulation and storage,' on the other? While CHSI uses transmission, it is not essentially a "transmission" service; rather, it falls within the exclusion adopted in §§ 53-24(28) and 53-95(31). If this Court were to adopt Denver's proposed 'functional' definition, the rule would swallow the exception, making it difficult to understand what was intended within the exclusion in §§ 53-24(28) and 53-95(31).

c. Denver argues that the Court should give deference to its administrative interpretation of its code provision. While this is true and the Court must "give effect to the intent of the [drafting body]," *Webb-Johnson*, 113 P.3d at 1253, the court must also "attempt to give effect to all parts of a statute, and constructions that would render part of the statute meaningless should be avoided." *Id*.

The D.R.M.C.'s broad definition of "telecommunications services" obviously intends *something* to be left out by the exclusion of "separately stated nontransmission services which constitute computer processing applications used to act on the information to be transmitted." Denver's argument that CHSI are not included within this *something* is not persuasive, given the FCC's nomenclature, apparently incorporated by the D.R.M.C., distinguishing between 'basic' and 'enhanced' services. In the absence of any legislative history or anything else to support Denver's position, the Court believes that adoption of Denver's construction would render the last sentence of §§ 53-24(28) and 53-95(31) meaningless.

d. Denver further asserts that this Court should defer to Denver's interpretation of the D.R.M.C.'s definition because the FCC rulings and other decisions cited by the ISPs do not pre-empt or supersede Denver's home rule authority to enact its own tax code and definitions.

While this Court agrees with Denver's assertion that the rulings and decisions discussed above in no way supersede Denver's home rule authority to enact its own tax code[10], that argument begs the question. Rather, the question is whether CHSI services fall within the definition or the exclusion from "telecommunications services" of the definition in D.R.M.C. §§ 53-24(28) and 53-95(31). This Court determines CHSI fall within the exclusion.

C. Conclusion

As a result, the CHSI services provided by the ISPs were not subject to sales or use taxation by Denver, and the Assessment was improper.

Having determined that issue, it is unnecessary for the Court to address whether or not the IFTA bars Denver from taxing CHSI, or whether Denver falls

[10] Except to the extent that internet taxation may be barred under the ITFA.

within the grandfathering clause of the IFTA. Additionally, it is not necessary for the Court to rule whether the taxation of CHSI services constitutes a new tax revenue gain to Denver, in violation of TABOR.

The Order of the Hearing Officer is reversed. Plaintiff's motion for partial summary judgment as to the assessment of $1,427,301.46 is **granted**, and Denver's cross-motion for partial summary as to that amount is **denied.** Plaintiffs are hereby entitled to a refund of the $1,427,301.46 paid, plus interest from the date of payment as allowed under the D.R.M.C.

V. Denver's tax assessment against TCIMM

After reviewing the affidavits of Ms. Crawford and Ms. Solger, the Court concludes there are factual questions as to whether the payments and assessment as to TCIMM relate to a return filed by TCIMM for taxes due in November 2002 or December 2002. While TCIMM claims that the assessment as to TCIMM issued on November 30, 2007 is barred by the applicable three year statute of limitations, D.R.M.C. § 53-68, it is undisputed that TCIMM agreed to a tolling of the statute of limitations until November 30, 2007 (affidavit of Ms. Crawford, Ex. B) on "the amounts due or refund due to or from" TCIMM "for the taxable period beginning December 1, 2002." (*Id*.) Because the date(s) of the return(s) for which the TCIMM assessment was issued remains disputed, resolution of this issue by summary judgment would not be appropriate and the motion for summary judgment as to TCIMM is **denied**.

VI. Further proceedings

The parties shall set this matter for a telephone status conference with the Court to occur within 10 days of the date of this Order, to include discussion regarding the October 8-9, 2009 trial date and what trial time is necessary in light of the Court's rulings.

Dated this 7th day of August, 2009.

BY THE COURT:

Edward D. Bronfin
District Court Judge

cc: Counsel for parties by Lexis-Nexis and Fax