IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
TAX COURT DIVISION

DIRECTV, INC. and DISH NETWORK, LLC, Plaintiffs, vs. UTAH STATE TAX COMMISSION and STATE OF UTAH., Defendants.	ORDER GRANTING MOTION TO DISMISS Civil No. 110402039 Judge SAMUEL D. MCVEY

The Court, having heard arguments of counsel and having carefully reviewed the motion, memoranda and record, makes the following Ruling and Order on Defendants' Motion for Judgment on the Pleadings Under Rule 12(c).

I. Procedural Setting

Plaintiffs DIRECTV and DISH Network ("Satellite Companies") brought suit on December 16, 2010 asking the Court for a declaratory judgment setting aside a tax credit for franchise fee payments made by their cable TV competitors under Utah Code Annotated 59-26-104.5. Plaintiffs argued the credit violates the Federal Constitution's Commerce Clause, including the Dormant Commerce Clause, and the Equal Protection Clause along with the congruent Uniform Operation of Laws provision of the Utah State Constitution. Plaintiffs also asked the Court to grant them an equivalent credit to remedy an uncompetitive situation, presumably by ordering the Tax Commission to grant them an equivalent non-refundable credit.

Defendants Utah State Tax Commission and the State of Utah ("State") filed a Motion for Judgment on the Pleadings on November 16, 2012, along with a Memorandum in Support, and a Supplement to their Memorandum on January 3, 2013. The Satellite Companies filed their Memorandum in Opposition on January 15, 2013. The State filed its Reply Memorandum on February 19, 2013 and a Supplement to its Reply Memorandum on March 6, 2013. The parties presented oral arguments on April 19, 2013.

The State claimed the credit does not burden interstate commerce, does not benefit in-state economic interests to the exclusion of interstate actors under the Dormant Commerce Clause's anti-mercantilist requirements and is not discriminatory under our constitutions. In addition they now claim the Eleventh Amendment to the United States Constitution cloaks them with sovereign immunity against this action. Satellite Companies assert that the State's motion is unripe because discovery is not yet complete.

II. Factual Background

The Utah State Legislature enacted Utah Code Annotated section 59-26-104.5 with an effective date of January 1, 2008. The law grants a tax credit to multichannel video providers who pay county or municipal franchise fees. These are the fees charged to run cable and construct hubs on public property such as roads. Effectively, this tax credit only goes to cable television providers and not satellite television providers who need little or no in-state infrastructure to provide services. The credit amounts to about 40% of the excise tax multichannel providers pay. Satellite Companies complain that this credit gives cable providers an unfair pricing advantage because it allows cable providers to lower their prices substantially since they do not pass all of the excise tax through to their customers.

III. Analysis

Before the Court considers the State's Motion for Judgment on the Pleadings, it must first consider State's sovereign immunity defense. If the State is immune from suit under the Satellite Companies' claims, the Court need not reach the State's Motion.

A. Sovereign Immunity.

The State argues that the Court lacks jurisdiction to hear the Satellite Companies' claims because of sovereign immunity. According to the State, it has only waived immunity for tax purposes under two conditions, provided in UCA §§ 59-1-301 and 59-1-1410(8), neither of which are applicable in this case. While it is true that the Satellite Companies' claims do not fall under either of these statutes, it does not necessarily follow the State therefore has immunity.

The State argues that it may not be sued directly under the Federal Constitution, citing *Alden v. Maine*, 527 U.S. 706, 754 (1999). The State provides little analysis on this point but it is sufficient to say that the Eleventh Amendment protection states enjoy from suit in their own courts "does not confer on the states a concomitant right to disregard the Constitution." *Id.* at 754–55. Here, the inquiry is whether the statutory credit violates the federal constitution. The state constitutionality of a statute is, of course, within the jurisdiction of district courts to adjudicate. Utah Code Ann. §78A-5-102. "[T]he law is well settled that a state immunity statute cannot protect conduct that is alleged to be a constitutional violation." *Wilderness Society v. Kane County*, 470 F.Supp.2d 1300, 1307 (D. Utah 2006). *See also Bennett v. Bow Valley Dev. Corp.*, 797 P.2d 419, 424 (Utah 1990).

Further, the Satellite Companies are seeking prospective, equitable relief. Sovereign immunity is not generally a defense to equitable claims. *See Bowles, v. State*, 652 P.2d 1345, 1346 (Utah 1982). Because Plaintiffs are seeking only a declaratory judgment and an injunction, both equitable remedies, the State cannot use sovereign immunity as a defense. The Court moves to the motion itself.

B. Standard

"The grant of a motion for judgment on the pleadings is reviewed under the same standard as the grant of a motion to dismiss . . ." The motion is granted when, as a matter of law,

the plaintiff could not recover under the facts alleged." *Thimmes v. Utah State Univ.*, 2001 UT App 93,¶4, 22 P.3d 257 (quotations and citation omitted).

C. Ripeness.

The Satellite Companies claimed during oral argument that the Motion for Judgment on the Pleadings is not yet ripe for decision because discovery is still incomplete. Here, with one exception of judicially noticed legislative history, the State does not seek to go outside the facts of the Amended Complaint in bringing its motion and the nature of such a motion really renders discovery immaterial to its resolution. The Court accepts the facts of the Amended Complaint as true for purposes of the motion. The parties agree that discovery is nearly complete and no one has filed a motion to amend any pleadings. Thus, the Court determines the Motion is ripe for decision and it will consider the Motion in its entirety. The issue presents legal questions regarding the sufficiency of what the Amended Complaint alleges. If the Satellite Companies come across facts during discovery which affect the Motion they are supposed to either move to have it transformed to a summary judgment motion or move to amend their complaint. However, as noted in the Order below, if they have obtained salient facts through discovery, the Court will accommodate their use of them.

D. Commerce Clause.

Plaintiffs Satellite Companies present a classic Dormant Commerce Clause claim by alleging that the State violated the Interstate Commerce Clause because the 2008 statute burdens Satellite Companies, who have minimal local operations, and benefits cable companies, who have extensive local operations. Simply put, the statutory credit depends on how a provider delivers signals to consumers—either through wired networks or the electromagnetic spectrum—and thus discriminates in the realm of interstate commerce. A state tax law complies with the Commerce clause, for purposes of this case, if it does not discriminate against interstate commerce in favor of intrastate commercial activity. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

A state statute may not favor in-state business over out-of-state business based solely on the location of the business unless the state can establish a legitimate state interest that cannot reasonably be served by non-discriminatory means. *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality.* 511 U.S. 93, 114 (1994). Here, the State does not lodge such an interest or means because it contends the credit is non-discriminatory.

Because all of the multichannel television providers in the present case are out-of-state entities and engage in interstate commerce, Satellite Companies rely on the line of Commerce Clause jurisprudence that prohibits discrimination based on the extent of local operations. They present three ways in which a statute may violate the Commerce Clause: facial discrimination, discriminatory purpose, and discriminatory effect. Plaintiffs claim the 2008 statute violates the Commerce Clause in all three ways. The Court examines each in turn.

1. Facial Discrimination. We have no Utah authorities directly on point in this matter. However, sister state appellate courts have addressed the facial discrimination question in almost identical circumstances as those before the Court. Facially discriminatory state tax laws explicitly refer to state boundaries or use language that "inherently indicates the tax is based on

the in-state or out-of-state location of an activity" although entities are similarly situated. *DirecTV, Inc. v. State*, 178 N.C. App. 659, 663, 632 S.E.2d 543, 547 (2006). For example, in *DirecTV, Inc. v. State*, the North Carolina Court of Appeals held that a tax provision that explicitly taxed satellite companies and not cable companies was not facially discriminatory because it resulted "solely from differences between the nature of the businesses, [and] not from the location of their activities." 178 N.C. App. at 660 (citations omitted). A similar Ohio statute was challenged and found not to violate the commerce clause because its application "[depended] on the technological mode of operation, not geographic location." *DirecTV, Inc. v. Levin*, 128 Ohio St. 3d 68, 76, 941 N.E.2d 1187 (2010).

A company qualifies for the Utah tax credit based on the payment of franchise fees rather than on its location or whether it operates interstate or intrastate. Although the Utah franchise fees that trigger the credit fall overwhelmingly, if not exclusively, on cable providers, the statutory language of section 59-26-104.5 makes no mention of state boundaries or other terminology limiting the credit based on in-state or out-of-state location of activity. Thus, there is no facially discriminatory design based upon geographic location. On its face, the Utah credit depends upon differences in the technological mode of operation of satellite and cable providers, as did the statute at issue in *DirecTV, Inc. v. Levin*. Different tax treatment of "two categories of companies result[ing] solely from differences between the nature of their businesses, [and] not from the location of their activities'" does not run afoul of the Dormant Commerce Clause. *Amerada Hess v. New Jersey Dept. of the Treasury*, 490 U.S. 66, 78 (1989).

The statute only allows credit for franchise fees paid to political subdivisions within the state of Utah, but that is different than saying it only applies to companies conducting business within Utah. It is the protection of the underlying commerce conducted within the state rather than how or where a credit arises that raises facial discrimination scrutiny. The Utah tax credit is not facially discriminatory because it does not contain any explicit language referring to conducting business sales of television signals within state boundaries, but is instead based upon differences between the respective mode of delivery of services used by cable and satellite providers.

2. Discriminatory Purpose. The discriminatory purpose inquiry relates to legislative intent and purpose. Legislation enacted with discriminatory purpose against out of state commerce interests is per se invalid. *Amerada Hess*, 490 U.S. at 75. In Utah, to determine a legislative body's purpose in enacting legislation, a court looks at the plain language of the statute. *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995). The plain language of section 59-26-104.5 contains no language evidencing discriminatory purposes.

Utah courts may also look at the words of sponsors of the legislation for a discriminatory purpose, but where such words contradict the plain language they are to be disregarded. *Stavros v. Office of Leg. Research and Gen. Counsel*, 2000 UT 63, ¶ 18, 15 P.3d 1013, 1017. The State points to the legislative sponsor's language that the purpose of the bill was to equalize state and local taxes. The sponsor never touched on the topic of interstate commerce. While this language was perhaps not properly authenticated, coming from a web page, and raises concern about injecting evidence outside the pleadings into a motion for judgment on the pleadings, the Satellite Companies did not object to it and the Court can therefore take judicial notice of it at the State's request. The Amended Complaint did allege discriminatory purpose in conclusory terms, which is now under Utah law usually enough to withstand a motion attacking the complaint. *See Mower v. Simpson*, 2012 UT App 149, ¶ 24, 278 P.3d 1076, 1085. However, as a

matter of law, looking at the uncontested transcript of the floor debate, there is no expression of discriminatory purpose. In fact, the language of the statute in question requires the tax credit to be passed on to consumers, which indicates the purpose of the statute was to *equalize* the tax burden between cable and satellite consumers. Whether it does so in practice is not relevant to discriminatory purpose.

The Satellite Companies also allege cable lobbyists prepared charts and messages for legislators to persuade them to enact the statute, but there is no authority in Utah for deriving legislative intent or purpose from what lobbyists say and do. Lobbyists statements are not part of the legislative record viewed under *Stavros*, 2000 UT 63. If the statute had been intended to benefit cable companies at the expense of Satellite Companies, it would have allowed cable companies to receive a windfall by taking a tax credit while continuing to tax consumers at the same rate. It does not. It requires the credit to be passed on to consumers.

3. Discriminatory Effect. For a statute to have a discriminatory effect, it must discriminate against interstate commerce by benefitting in-state economic interests or goods while burdening similarly situated out-of-state economic interests or goods. *Amerada Hess*, 490 U.S. at 75–76. Here, all providers operate in interstate commerce with out of state economic interests. As noted above, the way they operate is simply different. The Sixth Circuit in a congruent case, considered the products offered by cable and satellite providers and found them to be distinct goods because of their "very different means of delivering broadcasts." *Directv, Inc. v. Treesh*, 487 F.3d 471, 480 (6th Cir. 2007). This difference is key because the federal Supreme Court has held that "the Commerce Clause does not [protect] the particular structure or methods of operation in a retail market." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 177, 127 (1978).

The United States Supreme Court further clarified that differential tax treatment of two companies based solely upon differences in the nature of their business does not violate the Dormant Commerce Clause, as long as the difference is not based upon the in-state/out-of-state locations of their activities. *Amerada Hess*, at 75. The Commerce Clause "is intended to protect interstate commerce, and not particular firms engaged in interstate commerce, or the modes of operation used by those firms." *Directv, Inc. v. Treesh*, 487 F.3d at 481.

Utah's 2008 statute does not discriminate against interstate companies because it does not benefit in-state interests by burdening out-of-state interests. As in *Treesh*, where both satellite and cable companies were out-of-state entities because neither were headquartered in Kentucky, both types of providers are also out-of-state entities in Utah because neither is headquartered here and, in fact, conduct much more business outside the state than within the state. As such, no in-state/out-of-state distinction can be made between the two.

Although the Satellite Companies assert that the tax credit is based upon performance of specific in-state activities, the *Treesh* court rejected a substantially similar claim holding payment of franchise fees did not result from a geographic distinction, but rather from a difference in the mode of operation. The situation before this Court is the same. As a matter of law, there is no violation of the Commerce Clause under any of the theories advanced under the facts alleged in the Amended Complaint.

E. Equal Protection Clause and Uniform Operation of Laws.

The Satellite Companies argue that both the Fourteenth Amendment and the Utah Uniform Operation of Laws clause provide them relief from the statute. They note that the Utah Constitutional provision is more inclusive than the federal Constitution. While this may be true in some circumstances, there appears to be no guidance making the standards of application different in a taxation case. Application of the Equal Protection Clause requires that "all persons similarly situated should be treated alike," *see, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Utah Uniform Operation of Laws statute demands that "persons similarly situated should be treated similarly," *Malan v. Lewis*, 693 P.2d 661, 669 (Utah 1984). For the purposes of this case, the Court can see no meaningful difference in the application of these standards and treats them as the same.

To determine whether the Satellite Companies have stated a claim for violation of either the federal or state constitutions, the Court considers three things: first, whether the Satellite Companies are similarly situated to cable companies, or in other words whether the classification is reasonable; second, whether the objectives of the legislative action are legitimate; and third, whether there is a relationship between the classification and the legislative purposes. *Merrill v. Utah Labor Comm'n,* 2009 UT 26, ¶ 7, 223 P.3d 1089. Of note, no actor relevant in this case is in a suspect class and the scrutiny given to the legislative action is not strict.

1. Similarly Situated/Reasonable Classification. While it is true the Satellite Companies compete with cable companies for business and both are multichannel video providers offering a range of paid television channels, the similarities end there. There is a noteworthy difference between their delivery systems. This difference in delivery systems is the underlying basis for different classifications, not the location of the respective companies or the amount of infrastructure each company has within the state. As noted, all providers are national businesses. Further, though outside the scope of the pleadings, the State argues that Satellite Companies and cable companies may not be competing for the same customers since cable companies can offer opportunities to bundle internet and home phone service that Satellite Companies cannot. While the Court does not include this factor in its reasoning because this is a motion on the pleadings, the parties should consider this factor in deciding how to proceed following this order. It is reasonable to classify these companies differently because of the way they do business.

2. Legitimate Objectives. The Satellite Companies argue that the objectives of the legislative action were not legitimate because it is clear that the only objective was to benefit cable companies, who of necessity build a large infrastructure and hire many employees within the state, at the expense of Satellite Companies, who have little to no infrastructure within the state and hire only minimal numbers of residential employees. Although this point may be alleged, there is no evidence in the statute or the un-objected to legislative record of this proposed objective. The legislative record actually indicates that lawmakers' objective was creation of tax parity between Satellite Companies and cable companies. The only indication otherwise is the lobbyists' chart given to legislators comparing the in-state benefits afforded by cable companies and Satellite Companies. The Court is unaware of any principle allowing lobbyist action to determine legislative intent.

The Satellite companies try to bring a strict scrutiny standard into the case but really argue that a statute must rationally further a legitimate state interest to pass constitutional muster

The state interest must be a reasonable or actual purpose, not simply a conceivable one. In this case, the Court notes as a matter of law that the only legislative objective advanced was to create tax parity between cable and satellite companies, making Utah a more competitive market for television providers. Bringing business to the state is a legitimate state interest as is the need to show the equity in taxation that the legislative record supports.

3. Relationship Between Classification and Objectives. There is a reasonable relationship between the classification and the legislative objectives. The fundamental difference between cable and satellite, as discussed above, is the method of delivery of services. Cable companies incur far greater in-state expenses than satellite Companies because they pay franchise fees to local governments for rights of way to lay cable and set up other infrastructure. Satellite Companies do not pay franchise fees because they have little to no infrastructure within the state. In order to lessen the burden on cable companies and to equalize the fees cable and satellite companies pay to state entities, it was reasonable for lawmakers to classify the companies according to the statutory scheme. If the State were unable to create tax parity between cable companies and satellite companies, cable providers might be deterred from doing business in the State and both residents of the State and the State itself would suffer from the lack of competition in the multichannel video provider market. Taking all factors into consideration, section 59-26-104.5 does not violate the Equal Protection Clause or the Utah Uniform Operation of Laws provision.

IV. Order

Wherefore it is ordered, the State's Motion for Judgment on the Pleadings is GRANTED. However, this result was achieved through taking judicial notice of the legislative record which was not included in the pleadings. While the Court may take judicial notice and rule as a matter of law, in accordance with the long standing practice regarding dispositions of cases on the pleadings the Satellite Companies may have leave to amend their Amended Complaint within 10 days to incorporate any salient facts obtained in discovery including points of the legislative record which might give rise to a claim. If no amendment is filed, this ruling and order will dismiss the case and be final on July 10, 2013. No further order will be necessary to implement the dismissal.

DATED this 26th day of JUNE, 2013

BY THE COURT:

Samuel D. McVey
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 110402039 by the method and on the date specified.

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/s/ CALLI WALKER

Deputy Court Clerk