

WOOD CRAPO LLC
David J. Crapo #5055
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060

Attorneys for Petitioner

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

VERIZON WIRELESS,)	
)	<i>ORDER GRANTING PARTIAL SUMMARY</i>
Petitioner,)	<i>JUDGMENT ON THE ISSUE OF TAXING</i>
v.)	<i>SPECTRUM</i>
)	
PROPERTY TAX DIVISION OF THE)	Case No. 070402571
UTAH STATE TAX COMMISSION,)	
)	Judge Samuel D. McVey (Tax Judge)
Respondent.)	

This matter came before the Court on January 8, 2009 on Verizon Wireless' *Motion for Partial Summary Judgment on the Issue of Spectrum* and on the Tax Commission's *Motion for Partial Summary Judgment*. Verizon Wireless was represented by their attorneys David J. Crapo of the law firm of Wood Crapo, LLC and Douglas Reeves, Assistant General Counsel for Verizon Wireless admitted pro hac vice. The Utah State Tax Commission was represented by John C. McCarrey and Laron J. Lind, Assistant Attorneys General. The affected Counties were represented by Thomas W. Peters of the law firm Peters | Scofield.

NATURE OF THE CASE

1. This matter relates to the 2005 property tax assessment issued by the Property Tax Division (the "Division") of the Utah State Tax Commission against the operating property of Verizon Wireless. On February 2, 2007, the Utah State Tax Commission ("Commission")

entered its Findings of Fact, Conclusions of Law and Final Decision (“Final Decision”) wherein it affirmed the original assessment prepared by the Division and ruled that “[t]axation of spectrum was clearly not contemplated in the relevant statutory definitions of property set out at Utah Code Sec. 59-2-102, nor in 59-4-101. Spectrum is not real property that is defined as land and improvements at Utah Code Sec. 59-2-102(28) and no more fits under the definition of ‘personal property’ at Utah Code Sec. 59-2-102(25) than the air that we breathe.” Further, the Commission ruled that “[l]icenses are specifically exempt from tax as intangible property at Utah Code Sec. 59-2-102(18).” Order on Verizon’s Motion For Partial Summary Judgment, p. 9 (Utah State Tax Comm’n, June 12, 2006) incorporated into the Commission’s Final Decision, p. 2.

2. On February 28, 2007, Verizon Wireless filed a Petition for Judicial Review of the Commission’s Final Decision requesting a reduction in the Division’s original assessment.

3. On March 5, 2007, the Counties filed a Petition for Judicial Review of the Commission’s Final Decision and requested the appointment of a Tax Judge. One of the Counties’ primary arguments in its petition was that the Commission “failed to include the value of the electromagnetic spectrum ‘Spectrum,’ which the Counties assert is tangible property and/or a tangible property interest used and/or held by Verizon [Wireless] and is not exempt from Utah taxation.” Counties’ Petition For Judicial Review and Request For Tax Judge, p. 4 (Mar. 4, 2007).

4. On June 13, 2007, Verizon Wireless’ and the Counties’ Petitions were consolidated and were subsequently assigned to this Court.

5. On June 4, 2008, Verizon Wireless filed a Motion For Partial Summary Judgment on the Issue of Taxing Spectrum. Verizon Wireless asserted that “[b]ecause electromagnetic

spectrum does not qualify as taxable, tangible property under the laws of this State, there is no legal basis” for the Counties’ assertion that property or privilege tax should be imposed on “the value of the licenses which convey to Verizon Wireless the right to transmit electromagnetic radiation at a particular frequency of the electromagnetic spectrum.” Motion for Partial Summary Judgment, p. 2 (June 4, 2008).

6. On June 23, 2008, the Commission filed a Motion for Partial Summary Judgment on the same spectrum issue and asserted that “electromagnetic spectrum is not taxable property pursuant to Utah law” and the Counties’ request to tax spectrum “is inconsistent with Utah Constitutional and statutory law and federal decisions.” Motion for Partial Summary Judgment, p. 1 (June 23, 2008).

7. Both motions for partial summary judgment were fully briefed by the parties and came before the Court for oral argument on January 8, 2009.

ORDER

8. In support of its opposition to the motions for summary judgment, the Counties submitted declarations from two experts, Mr. Robert E. Dietrich and Mr. Brent Eyre.

9. Verizon Wireless and the Commission moved to strike both of these declarations on the grounds that the declarations were largely legal opinions and because neither declaration satisfied the competency and reliability requirements of Rule 56 of the Utah Rules of Civil Procedure and Rule 702 of the Utah Rules of Evidence.

10. The Court has reviewed the declarations of Messrs. Dietrich and Eyre and while not all portions of these declarations would be required to be stricken, for the most part they are legal opinions and fall short of the competency and reliability requirements of Rule 702 of the

Utah Rules of Evidence and Rule 56 of the Utah Rules of Civil Procedure. Accordingly, the Court grants Verizon Wireless' and the Commission's motions to strike the Declarations of Messrs. Dietrich and Eyre.

11. After considering the motions, the parties' memoranda and exhibits in support and opposition of said motions, the parties' oral arguments, and the reasons set forth below, the Court grants the Motions for Partial Summary Judgment.

12. Summary judgment is appropriate "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 and that the moving party is entitled to judgment as a matter of law." *N.M. on behalf of her son Caleb v. Daniel E and Safeco Prop. & Cas. Ins. Cos.*, 2008 UT 1, ¶ 5 (internal quotations and citation omitted). In assessing a motion for summary judgment, courts should view "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Id.* (internal quotations, citation and emphasis omitted).

13. Utah law also requires the Court to construe the tax imposition statute in this case in favor of the taxpayer Verizon Wireless. *County Bd. of Equalization of Wasatch County v. Tax Comm'n*, 944 P.2d 370, 373-74 (Utah 1997) (established rule for construing tax imposition statute "is to construe liberally in favor of the taxpayer, leaving it to the legislature to clarify an intent to be more restrictive if such intent exists." (Quoting *Salt Lake County v. State Tax Comm'n*, 779 P.2d 1131, 1132 (Utah 1989))).

14. The Court adopts the analytical framework that it must first look at Utah statutes to determine whether spectrum fits within the taxable nature of property set forth in those

statutes. As more fully set forth below, the Court concludes that spectrum is not within the taxable nature of property as set forth in Utah statutes and thus is not subject to either property or privilege tax.

15. Article XIII, § 2 of the Utah Constitution provides that “all tangible property in the State that is not exempt under the laws of the United States or under this Constitution shall be (a) assessed at a uniform and equal rate in proportion to its fair market value, to be ascertained as provided by law; and (b) taxed at a uniform and equal rate.”

16. Property is defined under Utah law as “property that is subject to assessment and taxation according to its value” and “does not include intangible property.” Utah Code Ann. § 59-2-102(28).

17. Utah statutes define two types “tangible property:” (a) “real property” or real estate which is “the possession of, claim to, ownership of, or right to the possession of land” or “improvements” Utah Code Ann. §59-2-102(30); and (b) “personal property” which is property that “is the subject of ownership and not included within the meaning of the terms ‘real estate’ and ‘improvements.’” Utah Code Ann. §59-2-102(27)

18. It is undisputed that Verizon Wireless is authorized to broadcast radio waves under licenses issued by the Federal Communications Commission (the “FCC Licenses”).

19. The Counties assert that the electromagnetic spectrum is tangible property and/or a tangible property interest. Accordingly, the Counties assert that the FCC Licenses cause Verizon Wireless to hold or use a tangible property interest in the electromagnetic spectrum and that this property right is subject to Utah property and/or privilege tax. The Court rejects the Counties’ assertions as inconsistent with Utah law.

20. Spectrum is neither real nor personal property under Utah law. Spectrum is not capable of ownership and a FCC License to broadcast radio waves does not convey a property interest in spectrum to Verizon Wireless. Furthermore, the Court agrees with the analysis of the Second Circuit Court of Appeals in *In re Nextwave Personal Communications*, 200 F.3d 43, 50 and 51 (2nd Cir. 1991) when it determined that (a) “[t]he radio or electromagnetic spectrum belongs to no one. It is not property that the federal government can buy or sell. It is no more government-owned than is the air in which Americans fly their airplanes or the territorial waters in which they sail their boats,” and (b) that an FCC “license does not convey a property right; it merely permits the licensee to use the portion of spectrum covered by the license in accordance with its terms.”

21. The Court also notes that federal law provides that FCC licenses are designed “to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof . . . and no such license shall be construed to create any right beyond the terms, conditions, and periods of the license.” 47 U.S.C. § 301.

22. Utah law provides that intangible property is not subject to property or privilege tax and is defined as “property that is capable of private ownership separate from tangible property, including . . . licenses.” Utah Code Ann. §59-2-102(20). Therefore the Court also rules that the FCC Licenses themselves are expressly identified as intangible property under Utah statutes and thus are not subject to either Utah property tax or Utah privilege tax.

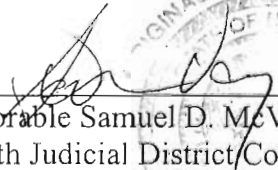
23. Having determined that Verizon Wireless and the Commission are entitled to summary judgment as a matter of law under the above statutory interpretation, the Court finds

that it is unnecessary to address the constitutional issues raised by Verizon Wireless and the Commission.

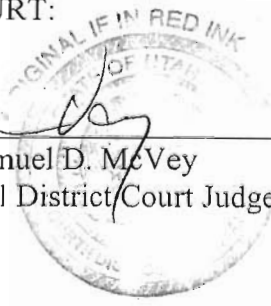
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the Motions for Partial Summary Judgment are **GRANTED**.

DATED this 9 day of March, 2009.

BY THE COURT:

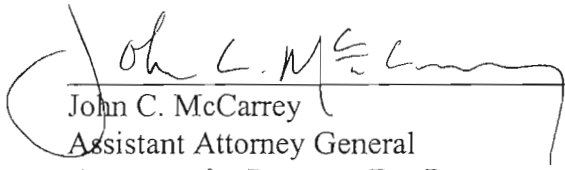


Honorable Samuel D. McVey
Fourth Judicial District Court Judge



APPROVED AS TO FORM:

UTAH ATTORNEY GENERAL



John C. McCarrey
Assistant Attorney General
Attorneys for Property Tax Division

PETERS | SCOFIELD

Thomas W. Peters
Attorneys for the Counties

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 2009, a true and correct copy of the foregoing *ORDER GRANTING PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF TAXING SPECTRUM* was mailed in the U.S. mail, postage prepaid, to the following:

John C. McCarrey, Esq.
Assistant Attorneys General
160 East 300 South, 5th Floor
P.O. Box 140874
Salt Lake City, Utah 84114-0874

Thomas W. Peters, Esq.
Peters | Scofield
2455 E. Parleys Way, Suite 115
Salt Lake City, Utah 84109