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

RODNEY J. AYCOCK, DIRECTV, INC. and DISH NETWORK, LLC, Plaintiffs, vs. UTAH STATE TAX COMMISSION and STATE OF UATH., Defendants.	ORDER DENYING MOTION TO INTERVENE Civil No. 110402039 Judge SAMUEL D. MCVEY

The Court heard argument on proposed intervenor, Utah Cable and Telecommunications Association's ("UCTA") Motion to Intervene. UCTA's position was argued by Amelia T. Rudolf, Esq.; Robert M. Yablon, Esq., argued for plaintiffs. Defendants were represented by Timothy Bodily, Esq., and did not argue on the motion.

INTRODUCTION

Plaintiffs sued the State Tax Commission seeking a judicial declaration invalidating Utah Code Ann. section 59-26-104.5 under the Commerce and Equal Protection Clauses of the United States Constitution as well as the Uniform Operation of Laws requirement of the Utah Constitution. The complaint alleges the statute is unconstitutional because it provides a tax credit to cable television providers but not to satellite television providers such as two of the plaintiffs. In addition to declaratory relief, plaintiffs seek "equal" treatment under the statute in the form of an equivalent tax credit for satellite television providers.

UCTA seeks to intervene as a defendant as a matter of right under Rule 24(a)(2) of the Utah Rules of Civil Procedure. UCTA maintains intervention is necessary to help protect its member cable television providers' revenue streams and to ensure equitable competition between cable television providers and satellite television providers. (UCTA did not seek permissive intervention.)

FACTUAL BACKGROUND

Utah Code Ann. § 59-26-104.5 grants a tax credit to multi-channel video or audio service providers in an amount equal to 50% of the county or municipality franchise fees a given provider pays during a calendar quarter. The statute requires this credit to be passed from the

provider to its customers. In effect, the tax credit only benefits cable television providers and their customers because the only in-state multi-channel video service providers actually paying franchise fees are cable television providers. By beaming television programming directly into satellite dishes attached to customers' homes, satellite television providers avoid paying the franchise fees associated with running vast networks of cables under public roadways, etc. Such avoidance, however, precludes satellite television providers from enjoying the tax credit.

Plaintiffs allege the tax credit is a protectionist measure which unconstitutionally burdens interstate commerce and discriminates against out of state business such as satellite providers. UCTA, is a trade association that represents in-state cable television, internet, and telephone providers such as Comcast of Utah, II, Inc., Baja Broadband, and Bresnan Communications.

ANALYSIS

I. STANDARD FOR INTERVENTION AS OF RIGHT

Rule 24(a)(2) of the Utah Rules of Civil Procedure allows an applicant to intervene as a matter of right when (1) he timely files an application to intervene, (2) he has an interest that relates to the property or transaction which is the subject of the action, (3) the disposition of the action may as a practical matter impair or impede his ability to protect that interest, and (4) his interest is not adequately represented by existing parties. *Beacham v. Fritzi Realty Corp.*, 131 P.3d 271, 273 (Utah Ct. App. 2006).

The parties have not put UCTA's motion's timeliness into question. At issue here is whether the UCTA has a sufficient interest to allow for its intervention and, if a sufficient interest exists, whether it is adequately represented by existing parties.

II. ANALYSIS: UCTA'S INTEREST RELATING TO THE TRANSACTION AND IMPACT OF THE CASE OUTCOME ON UCTA

A. Utah law.

Under Utah law, to be allowed to join the case as a matter of right, an applicant's interest relating to the transaction has traditionally had to be a direct claim upon the subject matter "such that the applicant will either gain or lose by direct operation of the judgment." *Interstate Land Corp. v. Patterson*, 797 P.2d 1101, 1108 (Utah Ct. App. 1990). Conversely, an indirect interest that possessed only some "consequential, remote or conjectural" chance of being affected by the outcome of the dispute is insufficient for such intervention. *Id.*; *Lima v. Chambers*, 657 P.2d 279, 282 (Utah 1982). Some factors to consider under Rule 24(a) motions included whether

intervention would eliminate duplicative unnecessary litigation and further fairness and economy in judicial administration. *Lima v. Chambers*, 657 P.2d 279, 284 (Utah 1983). Now, an applicant need not go so far as to prove standing to intervene in a case. *Taylor-West Weber Water Improvement Dist. v. Olds*, 2009 UT 86, ¶6 n.2, 224 P.3d 709, 711 n.2, 712.

Despite authorities requiring a "direct claim" on the subject matter of the litigation, Utah case law provides little guidance for purposes of our facts on differentiating between sufficient and insufficient direct interests. As described below, it appears our courts would currently adopt the more expansive reasoning of the Tenth Circuit of the Federal Court of Appeals on the question of the nature of interests sufficient to allow intervention as a matter of right.

B. Federal law

Federal circuit courts of appeal have examined the Rule 24(a) issue in detail,[1] but have produced conflicting positions. *Compare Utahns For Better Transp. v. United States Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002) ("The threat of economic injury from the outcome of the litigation undoubtedly gives a petitioner the requisite interest."), with *Standard Heating and Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998) ("The [proposed intervenor's] general reliance on economic forces is insufficient to constitute a legally protectable claim."). The parties here have cited to a wide array of federal authorities to bolster their respective positions. UCTA argues the somewhat less strict Tenth Circuit precedent supports the sufficiency of UCTA's asserted interests in preserving cable companies' revenue and maintaining competitive parity. Tenth Circuit interpretation of the interest requirement appears inconsistent with the prevailing position at the federal circuit level and possibly with the old "direct claim upon the subject matter" requirement of Utah case law. Plaintiffs, on the other hand, assert mere economic interests are insufficient to allow intervention as a matter of right.

Most of the federal circuits, and formerly the Tenth Circuit, hold an interest in the subject matter must be "direct, substantial, and legally protectable."[2] *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001); *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*,

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[1] Federal courts interpreted the federal version of Rule 24. The Utah provision is nearly identical. Moreover, Utah courts look to federal interpretation of equivalent federal Rules of Civil Procedure for guidance. *E.g.*, *Beacham*, 131 P.3d at 273-74 ("we look to the federal cases interpreting the federal rule for guidance").

[2] The "direct, substantial and legally protectable test" has developed from the Supreme Court's exclusive and fairly obscure holding on the interest requirement in *Donaldson v. United States*, 400 U.S. 517 (1971). *Donaldson* held that the requisite interest must be a "significantly protectable interest." *Id.* at 531.

732 F.2d 452, 463 (5th Cir. 1984); *Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2nd Cir. 1990); *Standard Heating*, 137 F.3d at 571. The Tenth Circuit now follows a more "liberal line" in allowing intervention. Most recently, it states it does not rigidly require an applicant have a direct, significant or legally protectable interest in the transaction litigated, S*an Juan County v. U.S.*, 503 F.3d 1163, 1192-93 (10th Cir. 2007), because it views the interest requirement "as a prerequisite rather than . . . a determinative criterion for intervention." *Id.* at 1196. Consequently, the Tenth Circuit seeks to avoid any type of mechanical application of Rule 24 and instead focuses on "the practical effect of the litigation on the applicant for intervention." *Id.* at 1193. Under this approach, interests that are not direct, substantial and legally protectable can still satisfy the interest requirement. *Id.* at 1195. For example, a substantial interest that is contingent upon the outcome of the litigation may be sufficient. *Id.* at 1203. It is a more equitable weighing approach considering practical effects and weighing the risk of injury when considering applications to intervene, *San Juan County*, 503 F.3d at 1193, 1199. Two years ago, the Utah Supreme Court cited *San Juan County* for the proposition that an applicant need not prove standing to intervene in a case. *Taylor-West Weber Water Improvement Dist. v. Olds*, 2009 UT at ¶6 n.2. This citation seems to have the effect of easing the burden on prospective intervenors when compared to the Utah "direct claim" rule cited above.

The Tenth Circuit traditionally has also allowed intervention where a potential intervenor has a direct economic stake in the property that is the subject matter of the dispute. *Utahns For Better Transportation*, 295 F.3d at 1115; *WildEarth Guardians v. United States Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009); *see Nat'l Farm Lines*, 564 F.2d at 382,84. In *WildEarth Guardians*, for example, a coal company sought to intervene when a conservation organization brought suit against the Forest Service for alleged violations of the National Environmental Policy Act. 573 F.3d at 994. The Forest Service had approved the venting of methane gases from a seam of coal that was mined by the intervening coal company. *Id.* Despite WildEarth's opposition, the court found the coal company to possess a sufficient interest. *Id.* at 996. Without any detailed explanation, the court simply noted the coal company had a "direct economic stake in the subject of this litigation." *Id.*

Allowing intervention based upon mere economic interests is at odds with other federal circuits' interpretation of the interest requirement. *E.g. Standard Heating, supra*, 137 F.3d at 571 "general reliance on economic forces is insufficient to constitute a legally protectable claim"); *Greene v. U.S.*, 996 F.2d 973, 976 (9th Cir. 1993) ("An economic stake in the outcome of the litigation, even if significant, is not enough."); *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220-21 (3rd Cir. 2005)[3]. Yet notwithstanding the Tenth Circuit's position on the

[3] The Court can find no other circuit that has expressly stated that a direct economic stake in the outcome, without more, is enough to constitute a sufficient interest.

sufficiency of economic interests, in a 1996 case, *City of Stillwell v. Ozarks Rural Elec. Coop. Corp.*, a city sought to force Ozarks Rural Electric Cooperative Corporation to agree to a transfer of its facilities, pursuant to a condemnation action. 79 F.3d 1038, 1041 (10th Cir. 1996). Another cooperative corporation, KAMO, which was owned by Ozarks and seventeen other member cooperatives, sought to intervene. *Id.* at 1042. KAMO supplied power to its member cooperatives, including Ozarks, at wholesale rates, and those cooperatives in turn sold power to their customers. *Id.* The court stated KAMO's only interest in the dispute was its financial interest in Ozarks' continued productivity and revenue stream. *Id.* Despite what appears to have been a clear economic interest in the outcome of Ozarks' case, the court reasoned KAMO's interest was "too attenuated" to satisfy the direct and substantial requirements of Rule 24. *Id.*

Even the Tenth Circuit's traditional more liberal approach in most of its cases does not authoritatively weigh in favor of recognition of a mere indirect impact on economic interests as a sufficient interest in the transaction to satisfy rule 24(a)(2). UCTA's reliance on *National Farm Lines, supra,* to support its asserted economic interest is hampered by the Tenth Circuit's rejection of an economic interest argument similar to UCTA's in the 1996 *City of Stillwell* case where, as noted, the 10th Circuit deemed an attenuated economic interest in payments from one of the affected parties insufficient to justify intervention. [4]

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[4]It may be possible to distinguish *City of Stillwell* from *National Farm Lines* and other Tenth Circuit cases by noting that circuit makes application of a direct interest test for intervention easier when an actual property interest is involved, as in *National Farm Lines,* than when a mere economic interest in the transaction is involved, as in *City of Stillwell*. The *Wildearth Guardians* case, relied on by UCTA to support intervention involved an interest relating to property at issue rather than merely in a "transaction" and thus fell under the property provision of rule 24(a). Also, *Utahns for Better Transportation* (existing contracts would be directly affected by transportation plan), *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001) (use of national monument) and *San Juan County* (use of property) involved an interest relating to property. Intervention was not permitted in each case, but the "direct, substantial and legally protectable interest" ("DSL") test was more appropriate to resolve the question *ab initio* where property was involved. *WildEarth Guardians* followed *San Juan County* in time, and cited it, but since the intervenor could satisfy the DSL test, possibly because it is easier to apply that test to an interest relating to property, the Court did not need to range into the more "metaphysical" weighing described in *San Juan County* at 1192-93. It was able to find the applicant would be substantially affected in a practical sense by the outcome of the case after discounting exclusive application of the DSL test referring to it as a mere preliminary step in the analysis, *id*.

C. *San Juan County* Provides Law Applicable to this case.

The Tenth Circuit's otherwise liberal stance on the direct, substantial and legally protectable test, as well as its regular acceptance of mere economic interests, appears to conflict with older Utah case law noted above. Although Utah courts have not spoken at length on the interest requirement under Rule 24(a)(2), their case law has required a "direct claim upon the subject matter of the action." *Interstate Land Corp.*, 797 P.2d at 1108. Such a claim cannot be based upon "'consequential, remote or conjectural possibilit[ies] of being in some manner affected by the result.'" *Id.* (quoting *Lima*, 657 P.2d at 282). However, having examined the approaches to ruling on rule 24(a) motions, the Court believes our Utah Supreme Court's reliance in *Olds*, 2009 UT 86, on the an applicable (to the *Olds* case) part of the Tenth Circuit's recent decision in *San Juan County, supra*, clarifies Utah law and indicates we should follow the equitable approach defined by *San Juan County*, particularly where the basis for intervention does not involve an interest in a specific piece of property, but rather an economic interest relating to the transaction which is the subject of the case.

To be more specific, when applying the 10th Circuit rule this Court does not solely look to see whether the alleged interest is "direct, substantial, and legally protectable" because that rule, which has "considerable currency" in the federal circuits has a "questionable pedigree and has the goal of disposing of lawsuits by involving as many apparently concerned parties as is compatible with efficiency and due process." *Id*. at 1192-93, 1195. Rather, "[t]he central concern in deciding whether intervention is proper is the practical effect of the litigation on the applicant for intervention." *Id*. at 1193. The Court keeps in mind the *San Juan County* statement, "when no one could dispute that the applicant's interest is direct, substantial and legally protectable, intervention is highly likely to be proper (subject, of course to Rule 24(a)'s other requirement.)" *Id.* But, these factors are are flexible, and "intended to capture the circumstances in which the practical effect of the prospective intervenor justifies its participation in the litigation." *Id*. at 1195. There is balancing involved in looking at the practical effect of the litigation. Thus, a lesser showing of practical impairment may be required if the applicant's interest is very strong while intervention may be allowed if the applicant's claimed interest could be significantly impaired but there is some uncertainty about the sufficiency of the interest, *id*.

D. UCTA's claimed interest in competitive parity and revenue preservation is fairly attenuated, and is not substantially affected in a practical sense by the outcome of the case.

Here, UCTA seems to allege no real or direct interest relating to actual property so as to allow a straightforward assessment based on property rights; rather, an interest in the transaction

based primarily on anticipated economic harm, including harm to competitiveness, is the issue. Under former Utah "direct claim" law and a strict application of the "direct, substantial and legally protected interest" test, there would be no standing. UCTA would not lose competitiveness by direct operation of the judgment but as a result of potential legislation following it or as a result of a price reduction resulting not only from the judgment but from a from a number of factors noted below. Further, a loss of competitiveness has not to this Court's knowledge been recognized as a direct, substantial or legally protectable interest. While UCTA may bring duplicative litigation, judicial efficiency would not necessarily be impaired becuase allowing it to join this case would add at least one party and extend the litigation. So there is something of a balance on that point. But, as in *San Juan County*, this does not end the inquiry. Where these more conventional factors do not support intervention, we must proceed to a more normative process of looking at whether a practical outcome in the case might substantially affect UCTA's legitimate interests.

First, a liberal application of the direct, substantial and legally protected interest test is a prerequisite step. UCTA contends the cable companies it represents "stand to lose revenue" if the tax is invalidated and an invalidation of the credit will result in a "judicially-bestowed competitive advantage" for satellite companies. (Memorandum in Support, pg. 10). The claimed interests, however, are too speculative and contingent upon external events to be considered sufficiently direct or substantially affected by this litigation**.** Asserted interests in competitive parity and revenue preservation are purely economic and are not enough, without more, to be a direct interest. This point may be further fleshed as we go to the second step: would UCTA's members' economic interest be substantially harmed as a practical matter by the potential outcome in the case. Here, some of the directness analysis will bear somewhat on this issue.

The case will determine whether the tax credit should be extended to the satellite providers and whether its denial to them is an unconstitutional act. The credit's potential extension to satellite television providers does not immediately impact UCTA. Although invalidation of the tax credit could eventually affect UCTA's financial position, that effect would come as a result of uncertain economic market forces and further legislation. In the event plaintiffs prevailed and satellite television providers received the tax credit, UCTA would only feel any effects if and when satellite television's presumed lower prices enticed customers to choose satellite over cable or to switch from cable to satellite. This possibility is at this point a normative economic forecast and not what economists would call a positive, or empirically based, economic prediction.

UCTA's position that plaintiffs argue price is the major tipping point in customers' selection of cable or satellite television somewhat misses the mark**,** because price is not the only factor weighing on customers demand. For instance, cable providers, such as Comcast, usually offer products satellite television providers do not. Those products include high-speed internet and telephone service. When it bundles its products together, Comcast can offer an array of

product packages that differ not only in price from satellite television providers, but also in a variety of other ways. Customers can also consider the quality of customer service as well as the functionality of the respective providers' offered products in making their purchasing decisions. As such, invalidation of the tax credit, standing alone, will not guarantee cable television providers will be affected.

Thus, regarding the practical outcome of the case substantially affecting UTCA's legitimate interests, it does not appear UCTA's post-litigation position would be substantially impaired to the extent to make a sufficient case for intervention. Competitive parity and revenue preservation do not speak to any interest other than a speculative financial one. While the Tenth Circuit test may accept UCTA's interest as being impaired to an extent, the impairment would not be substantial as a result of this case's outcome. Significantly, the prayer in plaintiffs' complaint seeks only two forms of relief. One is that they receive the credit currently enjoyed by the UCTA members. They are not seeking to deny UCTA's members the credit. Since the cable companies would retain the credit if the plaintiffs prevailed and got the credit, the outcome would affect them only to the extent the satellite providers could offer their product slightly more cheaply each month. Given the other services UCTA members provide, and the reliability of their product quality compared to satellite as noted in the memoranda, it would be speculative to say the outcome of the litigation would significantly affect their customer relationships, profitability and competitiveness.

The second form of relief sought by plaintiffs is a declaration the credit granted to cable companies is an unconstitutional burden on interstate commerce and a denial of equal protection or uniform operation of the laws. Even if plaintiffs succeeded on the merits, which UCTA views as highly unlikely given the outcome of similar satellite plaintiff cases around the country, the outcome could indirectly set in motion forces to make cable rates slightly increase. But this is not a sure outcome given the need for legislation and rulemaking to make this happen. In other words, the outcome of this case would not make rates increase. Rather, some other arm of government would have to act to make that happen, as the plaintiffs and UCTA seen to acknowledge. This is because the credit is an integral part of the current law and state financing scheme and the law would have to be redrafted to account for the change in the credit. UCTA could be actively involved in the legislative process where there is no intervention rule and could protect its interest. There is not a significant risk of substantial harm to legitimate interests. An attenuated affect on competitiveness is, again, not one recognized as a protected legitimate interest.

UCTA has shown only one case around the country where a local cable representative trade association has successfully intervened in one of Plaintiffs' suits.[5] There are many other

[5] Plaintiffs indicated that a Florida trial court allowed intervention by a representative trade association in a satellite tax-discrimination suit. (Plaintiffs' Opposition, at pg. 7 n.3)

cases where intervention was denied. Even in the cases offered by the UCTA to demonstrate that plaintiffs' claims are being rejected in other states, (Memorandum in Support, pg. 3), representative trade association attempts to intervene are being denied. As in *Stillwell, supra*, UCTA's economic interests are not sufficient to get around Rule 24(a)'s interest analysis and as in *San Juan County*, the possible outcomes caused by orders of the Court would only remotely impact UCTA and it membership and would not significantly affect a legitimate interest..

CONCLUSION

Affirmance or invalidation of the tax credit will not directly affect the UCTA without other intervening actions and events. UCTA's interest in the relief plaintiffs pray for is attenuated in that it necessarily relies on speculative post-judgment intervening market forces and actors for the outcome of this suit to have a substantial effect on it. This case could only potentially set those forces and actions in motion and would not necessarily cause them to happen or control their ultimate outcome. UCTA's interest is also purely economic in nature and, without more, presents an indirect interest in the transaction at hand and a competitiveness concern which is not a legally protectable or legitimate interest for purposed of intervention under Rule 24(a). Weighing these points, the potential outcome in this case does not substantially impact UCTA's members in a manner recognized as significant. Because UCTA does not hurdle the first standard of Rule 24(a)(2), the Court does not address whether its interests would be adequately represented by any of the existing parties.

WHEREFORE IT IS ORDERED the motion to intervene is denied.

Dated this 13th day of September 2011

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Samuel D. McVey
District Court Judge

Plaintiffs pointed out that the Florida intervention statute is much more expansive than the Utah statute or the federal statute by providing that "[a]nyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention." *Id.*