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SALT LAKE COUNTY

In the Third Judicial District Court, Salt Lake County, State of Utah

SALT LAKE COUNTY

By

Deputy Clerk

Deputy Cl

T-MOBILE USA, INC.,

Plaintiff,

vs.

UTAH STATE TAX COMMISSION,

Defendant,

BEAVER COUNTY, *et al.*,

Affected Parties in
Interest

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND FINAL
DECISION

Case No. 060900560

Hon. Deno G. Himonas

INTRODUCTION

¶1 The principal issue before me is the fair market value of the taxable property of T-Mobile USA, Inc. ("T-Mobile") for Utah property tax purposes for the lien date of January 1, 2003. The parties tried the issue from December 2, 2008, through December 10, 2008. Mark Buchi and Steve Young of HOLME ROBERTS & OWEN represented T-Mobile; Laron Lind of the Office of the Utah Attorney General represented the Utah State Tax Commission ("the Tax Commission"); and David Scofield and Thomas Peters of PETERS SCOFIELD represented the affected counties ("the Counties"). Based on the evidence adduced at trial and the arguments of counsel, I enter these findings of fact and conclusions of law and a final decision.

FINDINGS OF FACT

¶2 In addition to the factual determinations implicit in the Conclusions of Law, I make the findings of fact set forth below.

Background and Procedural History

¶3 The tax type is ad valorem property tax. The lien date, as noted, is January 1, 2003.

¶4 On May 1, 2003, the Property Tax Division of the Tax Commission issued an assessment for the lien date on T-Mobile's property.¹ The Utah taxable value in the Property Tax

¹T-Mobile "provides personal communications services . . . primarily in major urban markets in the United States using . . . Global System for Mobile Communications . . . technology." Ex. 1, p. 3.

Division's assessment was \$124,577,850 (based on a system value of \$9,450,000,000, before allocation and adjustments).

¶15 T-Mobile and the Counties both appealed the Property Tax Division's assessment to the Tax Commission, which held a formal hearing from March 14, 2005, through March 17, 2005, and issued its Findings of Fact, Conclusions of Law, and Final Decision on November 1, 2005. In its decision, the Tax Commission determined that T-Mobile, the national unit advocated by the Counties and the Property Tax Division, was the proper appraisal unit. The Tax Commission also allocated the goodwill on T-Mobile's books between non-current tangible and intangible assets on a pro-rata basis.² T-Mobile appealed the Tax Commission's decision by requesting this trial de novo. The Counties also contested the Tax Commission's assessment.

¶16 Prior to the trial in this matter, the parties sought to winnow the sub-issues through the use of pretrial motions. To this end, I granted T-Mobile's Motion for Partial Summary Judgment on the Issue of Taxing of Spectrum Licenses and Motion for Partial Summary Judgment on the Issue of Taxing Spectrum in a Memorandum Decision dated January 23, 2008. T-Mobile had contended that the electromagnetic spectrum and spectrum licenses³ are not taxable property in Utah or subject to Utah privilege tax. The Tax Commission joined in T-Mobile's motion in large part.

¶17 The following individuals testified at trial: David Van Ness, Director of State and Local tax for T-Mobile; J. Philip Cook, an appraisal expert hired by T-Mobile; Brent Eyre, an appraisal expert hired by the Counties; Dr. Ben Johnson, an economic and valuation expert hired by the Counties; and Arthur Brownell, an appraisal expert and employee of the Tax Commission.

¶18 At trial, T-Mobile submitted an appraisal prepared by Mr. Cook that concluded that the fair market value of T-Mobile's Utah property was \$73,330,000. The Counties submitted an appraisal prepared by Mr. Eyre that concluded that the value of T-Mobile's Utah property was \$174,240,000 (based on a system value of \$13,200,000,000 before allocation to Utah). The Tax Commission did not submit an appraisal; however, Mr. Brownell testified as to the Tax Commission's decision.

The History, Structure and Operation of T-Mobile

¶19 T-Mobile is a wholly owned subsidiary of Deutsche Telekom AG ("DT"), an international communications company based in Bonn, Germany. T-Mobile is based in Bellevue, Washington.

²Thus, approximately 24.5% of the goodwill on T-Mobile's books was allocated to tangible property and was deemed taxable.

³The term "spectrum licenses" refers to "the right to transmit radio waves at a particular frequency" on the electromagnetic spectrum. Memorandum in Support of Plaintiff T-Mobile's Motion for Partial Summary Judgment on the Issue of Taxing Spectrum Licenses, p. 8.

¶10 The predecessor to T-Mobile was Western Wireless Corporation (“Western Wireless”). Through Federal Communications Commission auctions of broadband licenses, Western Wireless acquired the same through a subsidiary called VoiceStream Wireless Corporation (“VoiceStream”).

¶11 Utah was one of the first markets launched by VoiceStream. VoiceStream began building its infrastructure and operating in Utah in 1996.

¶12 On May 3, 1999, VoiceStream was spun off from Western Wireless. Just over two years later, on May 31, 2001, DT acquired the common stock of VoiceStream and Powertel, Inc. (“Powertel”)⁴ and transferred the stock to a mobile telecommunications subsidiary, T-Mobile International (“T-Mobile Int’l”).⁵

¶13 On September 30, 2002, T-Mobile completed an impairment test of its goodwill and indefinite life intangible assets. The impairment test was performed which performed the test based on a discounted cash flow analysis prepared by DT. The analysis assumed that T-Mobile and Powertel would spend billion from 2003 to 2012 on capital improvement.

¶14 T-Mobile does not have a subsidiary limited to Utah’s geographical boundaries.

¶15 T-Mobile is the smallest subsidiary in the chain of the DT group of companies that owns the Utah property at issue for which publicly reported financial statements are available.

¶16 T-Mobile is the entity with employees in Utah.

¶17 T-Mobile does not provide a calling plan limited to Utah’s geographical boundaries.

¶18 T-Mobile’s Basic Trading Area and Major Trading Area licenses that cover Utah extend beyond Utah’s boundaries and cover parts of other states.

⁴Both Powertel and T-Mobile are wholly owned by T-Mobile Int’l. Powertel “provides the same services [as T-Mobile] under the T-Mobile brand in the southeastern United States.” “Powertel’s results are not consolidated with . . . [T-Mobile’s], [but T-Mobile] provides management and other services to Powertel.” Ex. 1, p. 32.

⁵Based on the purchase price paid by DT, VoiceStream included \$16,265,790,000 on its balance sheet for goodwill, \$18,791,696,000 for licenses, and \$3,390,103,000 in property and equipment. Pursuant to accounting definitions, the \$16.3 billion in goodwill recorded on T-Mobile’s books consisted of value that T-Mobile’s accountants felt was over and above the fair value of T-Mobile’s tangible and identifiable intangible assets in 2001, and potentially included such things as assembled workforce, customer base, customer service capability, presence in geographic markets or locations, nonunion status, ongoing training or recruiting programs, outstanding credit rating, and access to capital markets.

¶19 The highest and best use of T-Mobile's Utah property is as part of a national wireless network operated by T-Mobile.

¶20 The trend in the wireless industry has been toward consolidation and larger companies.

¶21 T-Mobile's financial statements are audited. This is not true at the Utah level; moreover, year end consolidating and eliminating accounting entries are not done at the Utah level.

¶22 T-Mobile's customers' calls made outside of a state are attributed back to their home state.

¶23 As of May, 2001, and the lien date, T-Mobile had sufficient infrastructure to service its existing customer base. But without adding more radios, cabinets, receivers, etc., T-Mobile could not accommodate future customers for more than three to six months because there was a limitation on the number of calls the existing network could handle.⁶

¶24 Even after several years of operations, T-Mobile only had approximately customers in Utah, whereas in other markets, like California, it had accumulated over customers in a few months. This further illustrates that there was limited future growth potential in the Utah market.

¶25 The premium paid by DT in its acquisition of VoiceStream is largely attributable to VoiceStream's licenses and other intangible assets. These licenses allow T-Mobile to obtain new customers and to realize future growth opportunities. As noted, and to enable the future growth opportunities, T-Mobile planned to spend billion on capital improvements from 2003-2012 (property not in existence on the lien date) to meet projected future demand.

¶26 T-Mobile had lost money each year of its existence up to and including the lien date of January 1, 2003.

¶27 "[A] unitary approach is appropriate when properties are functionally dependent on the existence of other properties in order to be operated at their highest and best use," the case here. Ex. 46, p. 5.

Goodwill and the Report

¶28 In June 2001, the Financial Accounting Standards Board ("FASB") issued Financial Accounting Standard ("FAS") 141 and FAS 142. FAS 141 is entitled "Business Combinations" and FAS 142 is entitled "Goodwill and Other Intangible Assets."

⁶In addition, T-Mobile's equipment in Utah is some of its oldest and, consequently, has less capacity to capture future growth than that in newer markets.

¶29 FAS 141 describes how goodwill appears on a company's books or accounting records. Paragraph 43 of FAS 141 provides as follows:

The excess of the cost of an acquired entity over the net of the amounts assigned to assets acquired and liabilities assumed shall be recognized as an asset referred to as goodwill. An acquired intangible asset that does not meet the criteria in paragraph 39 shall be included in the amount recognized as goodwill.

Ex. 60, p. 18. The resulting figure is often referred to as 'booked' or 'accounting goodwill'.

¶30 Under FAS 141, certain intangible assets must be booked separately from goodwill. In order to be booked separately, the intangible asset must arise from a contractual or legal right, or be capable of being separated and sold, transferred, licensed, rented, or exchanged. Intangibles that do not arise from a contractual or legal right, or are not capable of being separated and sold, transferred, licensed, rented, or exchanged, are not separately identified or valued for accounting purposes (e.g., assembled workforce, customer base, customer service capability, presence in geographic markets or locations, nonunion status, ongoing training or recruiting programs, outstanding credit rating, and access to capital markets).

¶31 FAS 142 requires an annual two-step impairment study be conducted of a company's goodwill and indefinite life intangible assets. As previously referenced, the firm performed an impairment test for the reporting unit T-Mobile US in November 2002. (The reporting unit was comprised of T-Mobile and Powertel.) The impairment test resulted in a \$ write down in accounting goodwill from \$ to \$. T-Mobile's portion of the remaining accounting goodwill was \$9,868,082,000.

¶32 T-Mobile's goodwill was capable of private ownership apart from tangible property because it could be sold and owned in connection with intangible property.

T-Mobile's Appraisal

¶33 T-Mobile hired Mr. Cook to appraise its Utah property. Utilizing the "Utah only unit" as his appraisal unit, Mr. Cook arrived at a value of \$73,330,000. Ex. 39, p. 3.

¶34 Mr. Cook's appraisal of T-Mobile was his first unitary appraisal of a wireless telecommunications company and his third unitary appraisal in his 28 years of experience, not including some assistance on a few other appraisals. Most of his experience is in real estate.

¶35 Mr. Eyre, Dr. Johnson, and Mr. Brownell provided reports or testified that Mr. Cook's methodology did not comply with unitary appraisal methodology because it clearly used a specific geographical division bearing no relationship to the subject property's highest and best use. This is a valid criticism and, as a consequence, I find that much of Mr. Cook's appraisal does not survive his selection of an improper unit. In the words of Mr. Brownell: "[i]f you appraise the wrong thing,

you've got the wrong answer . . . [and] [i]f the number is close to the right answer, it's just by coincidence." Tr., p. 984.⁷

The Counties' Appraisal

¶36 The Counties hired Mr. Eyre to appraise T-Mobile's Utah property. Mr. Eyre correctly chose T-Mobile as his appraisal unit. He determined that this unit had a system wide value of \$13,200,000,000. Of this system wide value, he determined that 1.32% was allocable to Utah. Based on the foregoing, he arrived at a value of \$174,240,000.

¶37 Mr. Eyre was employed with the Tax Commission for approximately 28 years, 14 of which he spent with the Property Tax Division where he rose to the position of Assistant Director. He has testified in Utah and in other states on multiple occasions in the area of unitary appraisal and unitary appraisal principles. He has also taught unitary appraisal principles dealing with ad valorem taxation throughout the United States.

¶38 Mr. Eyre performed a discounted cash flow analysis based on cash flow projections on which he placed primary weight. The projections on which he relied had capital expenditures that exceeded depreciation except for the terminal year.⁸ I find that much of Mr. Eyre's discounted cash flow analysis does not survive his decision to rely on these capital expenditures.⁹ (He also performed a historic cost less depreciation cost approach on which he placed less weight and a stock and debt market approach on which he placed no weight.)

The Tax Commission's Assessed Value

¶39 The value established by the Tax Commission for the lien date was \$117,850,000 for the Utah taxable property at issue in this matter. The Tax Commission's value was based in part on information in the original assessment prepared by the Property Tax Division.

⁷Mr. Cook did do a valuation based on an allocation of T-Mobile to the Utah portion utilizing the 'historic cost less depreciation' ("HCLD") method. See Ex. 33, Add. XXIX. This approach yielded a value of \$73,000,000, after allocation. *Id.*, p. 29.

⁸It bears repeating that the cash flow projections utilized by Mr. Eyre assumed T-Mobile would spend _____ billion from 2003-2012 on capital improvements, while recognizing _____ billion in depreciation over that same period.

⁹In 2008, the Tax Commission promulgated an amendment to Rule R884-24P-62 which prohibits including expansionary assets in a discounted cash flow analysis as Mr. Eyre has done. The 2008 Rule 62 expressly provides that it is a clarification, and the Tax Commission witness, Mr. Brownell, testified (and I credit the testimony) that the Tax Commission policy and practice on the 2003 lien date was consistent with the 2008 Rule 62.

¶40 The Tax Commission's assessment was based on an historical cost approach. The Tax Commission did not rely on an income approach because "the Company [had] incurred a net operating loss in each year of operation." Ex. 4, p. 2. According to Mr. Brownell:

Well, we didn't feel like we could reliably project next year's income figure and have it be reflective of what the long-term prospects of this company were. Again, they had losses every year. If you project a loss, then you're projecting that they really should be out of business. So we didn't figure that that was T-Mobile's management goal, . . . to be out of business.

Tr., p. 996. Consequently, application of the income approach would have likely produced a negative value.¹⁰

¶41 The historical cost approach the Tax Commission relied upon was based on information reported by T-Mobile on its Form 10-K for the year ending December 31, 2002. From the 10-K information, the Tax Commission added the net book value of the total plant in service, construction work in progress at cost, and a pro rata portion of goodwill to determine the cost of the system wide property as follows:

Total plant in service @ nbv	\$3,583,989,000
Construction work in process @ cost	\$ 791,678,075
<u>Goodwill, net</u>	<u>\$2,367,836,645</u>
TOTAL	\$6,743,503,720 ¹¹

¶42 The Tax Commission reduced its 'construction work in progress' figure from the \$843,126,000 on T-Mobile's 10-K to \$791,678,075 by applying a present value factor to account for the fact that property under construction was available for use on the lien date.

¶43 The Tax Commission reduced its 'goodwill' figure from the \$9,868,082,000 on T-Mobile's books to \$2,367,836,645 by applying a pro rata allocation of goodwill to T-Mobile's tangible and intangible assets and concluding that the resulting \$2,367,836,645 was attributable to T-Mobile's tangible, taxable property. Ex. 35, pp. 30-32.

¹⁰The cost, income[,] and market approaches are the three generally accepted "approaches to determine fair market value." *Mallinckrodt v. Salt Lake County, et al.*, 1999 UT 66, P 8. As set forth above, the Tax Commission rejected the income approach. It also found that the market approach was "[n]ot applicable." Ex. 4, p. 2.

¹¹The Tax Commission performed various calculations to determine that 1.75% of the \$6,743,503,720 system wide value (\$118,011,315) was taxable to Utah. The Tax Commission then deducted the value of motor vehicles from this value to derive a taxable value of \$117,850,000.

Enhancement Value

¶44 The total value of assembled assets, including intangible assets, can be greater than the sum of the individual values of the assets. Indeed, it is generally the case that the value of income-generating assets being used as a successful going concern will exceed the stand alone economic cost, or market value, of the individual elements that make up the whole. "The portion of the total Going Concern Value which represents an increase over the sum of the parts can be described as the 'enhancement value.'" Ex. 46, p. 4.

¶45 Because 'accounting goodwill' is a catch-all entry for all value not otherwise accounted for under FAS 142, it may include 'enhancement value'. The Counties take the position based on, among other things, their reading of the report, that all of the roughly \$9.9 billion in accounting goodwill on T-Mobile's books is enhancement value. T-Mobile takes the position based on, among other things, its reading of the report, that none of the roughly \$9.9 billion in accounting goodwill on T-Mobile's books is enhancement value.

Miscellaneous

¶46 On January 1, 2003, Title 59, Chapter 7, of the Utah Code imposed a corporate income tax on all of T-Mobile's income from all sources (including its income from intangible property/goodwill).

¶47 As of January 1, 2003, the Utah Legislature had imposed no property tax on intangible property, and had imposed no tax rate of .005 or lower on intangible property.

CONCLUSIONS OF LAW

¶48 In addition to the legal conclusions implicit in the Findings of Fact, I reach the conclusions of law forth below.

I. Standard of Review and Burden of Proof

¶49 The parties have taken the position that the "Utah Supreme Court has determined that the petitioning party has a dual burden of proof in a property tax valuation case, stating in *Utah Railway Company v. Utah State Tax Commission*, 2000 UT 49, . . . [P 6], as follows: 'the protesting taxpayer is required not only to show substantial error or impropriety in the assessment, but also to provide a sound evidentiary basis upon which the [Tax] Commission could adopt a lower valuation.'" (Citation and internal quotations omitted.) T-Mobile's Proposed Findings of Fact, Conclusions of Law, and Final Decision, pp. 26-27; *see also* Tax Commission's Proposed Findings of Fact and Conclusions of Law, p. 21; Counties' Proposed Findings of Fact, Conclusions of Law, and Final Decision, pp. 27-28. This is not a correct statement of the law where, as here, the parties have elected to have the Tax Commission's decision reviewed, at least in the first instance, by a district (versus appellate) court.

¶50 Section 59-1-602(1)(a) (2008) of the Utah Code Ann. allows “[a]ny aggrieved party appearing before the [Tax] [C]ommission or county whose tax revenues are affected by the decision” to “at that party’s option petition for judicial review in the district court pursuant to . . . [Utah Code Ann. § 59-1-601 (2008)], or in the Supreme Court or the Court of Appeals pursuant to . . . [Utah Code Ann. § 59-1-610 (2008)].” Where the parties have invoked the jurisdiction of the appellate courts, those courts “must grant the [Tax] [C]ommission deference concerning its written findings of fact, applying a substantial evidence standard on review.” *Id.*, § 610(1)(a) (2008). The district courts, however, are to “review by trial de novo” the decisions of the Tax Commission. Utah Code Ann. § 59-1-601(1) (2008).¹²

¶51 In this setting, “‘trial de novo’ means an original independent proceeding, and does not mean a trial de novo on the record.” Utah Code Ann. § 59-1-601(2) (2008). And the burden of proof “fall[s] upon the parties seeking affirmative relief and the burden of going forward with the evidence . . . shift[s] as in other civil litigation.” *Id.*, § 604. “[A] preponderance of the evidence shall suffice to sustain the burden of proof.” *Id.*¹³ With these standards and burdens in mind, I proceed to evaluate the parties’ arguments.

II. Goodwill

¶52 Relying on Utah Code Ann. § 59-2-102(17), the Counties argue that “T-Mobile’s goodwill was taxed correctly and constitutionally under the statute in effect during the 2003 tax year.” Counties’ Proposed Findings of Fact, Conclusions of Law, and Final Decision, p. 31. The Counties are incorrect for at least the two reasons set forth below.

¶53 Utah Code Ann. § 59-2-1101 specifically provides that “[t]he following property is exempt from taxation: . . . (g) intangible property. Utah Code Ann. § 59-2-102(17) goes on to define “‘intangible property’ . . . [as] property that is capable of private ownership separate from tangible property.” Having found that T-Mobile’s goodwill was capable of private ownership apart from tangible property because it could be sold and owned in connection with intangible property, and given that goodwill is commonly understood to be the quintessential intangible property, the Counties argument fails as a matter of statutory interpretation. *See, e.g.*, Richard A. Posner *Economic Analysis of Law*, p. 460 (Little, Brown and Co. 3rd ed.) (“The latter is the approach used; and if the assets are valued at less than the purchase price of the business, the difference is assigned to an intangible asset called goodwill or going-concern value and cannot be depreciated for tax purposes.”); Black’s Law Dictionary (5th ed.) (“Good will is an intangible asset.”).

¹²Unless otherwise noted, all citations to the Utah Constitution and the Utah Code are to the 2003 version.

¹³The district courts are empowered to “affirm, reverse, modify, or remand any order of the [Tax] [C]ommission, and shall grant other relief, invoke such other remedies, and issue such orders, in accordance with its decision, as appropriate.” Utah Code Ann. § 59-1-604.

¶54 It fails as a matter of constitutional law as well. The Utah Constitution states:

So that each person and corporation pays a tax in proportion to the fair market value of his, her, or its **tangible property**, 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.

Utah Const. art. XIII, § 2(1) (emphasis added). Subsection 2(2) of article XIII re-emphasizes the point:

Each corporation and person in the State or doing business in the State is subject to taxation on the **tangible property** owned or used by the corporation or person within the boundaries of the State or local authority levying the tax.

(Emphasis added.) The Utah Constitution also provides, however, that:

The Legislature may by statute determine the manner and extent of taxing or exempting intangible property, except that any property tax on intangible property may not exceed .005 of its fair market value. If any intangible property is taxed under the property tax, the income from that property may not also be taxed.

Utah Const. art. XIII, § 2(5).

¶55 Taken together, these provisions mean that intangible property is not subject to property tax if the income it generates is subject to income tax. There is no question that at the time in question, January 1, 2003, the Utah Code imposed a corporate income tax on all of T-Mobile's income from all sources (including its income from intangible property/goodwill).

¶56 In short, T-Mobile's goodwill is not subject to Utah property tax. This does not mean, however, that all of T-Mobile's 'accounting goodwill' may escape property tax. To the extent that T-Mobile's accounting goodwill reflects 'enhancement value', (*i.e.*, something more than economic goodwill) it may be subject to property tax. *See Beaver County, et al., v. WilTel, Inc., et al.*, 2000 UT 29.

III The WilTel Decision

¶57 In *WilTel*, 2000 UT 29, WilTel, "a provider of long-distance telecommunications services," sought review of the Tax Commission's "decision that unitary assessment . . . was the appropriate method for determining the value of WilTel's property" and inclusion of "nontaxable

intangibles” in the assessment. *Id.*, PP 2 & 14. WilTel also challenged, *inter alia*, the Tax Commission’s decision that the Property Tax Division “was not obligated to use a cost basis for assessment.” *Id.*, P 14.

¶58 A unanimous Utah Supreme Court determined that, with respect to the unitary assessment question, WilTel “failed to overcome the presumption in favor of the [Tax] Commission’s factual finding that WilTel properly belongs in the class of asset-based, centrally assessed taxpayers” and that “central assessment on a unitary basis” was therefore proper. *Id.*, PP 21 & 26.¹⁴ The court further determined, with respect to the remaining questions, that while intangibles (*e.g.*, goodwill) are not taxable, “statutory and constitutional fair market value requirements recognize some element of value that is not attributable to either intangibles or simple costs and that this enhanced value is taxable.” *Id.*, P 40. Put somewhat differently, the court concluded that, “even excluding intangibles, the network structure of WilTel’s physical transmission facilities makes them worth far more on the open market than mere wires, trenches, and transformer stations could command;” consequently, the Tax Commission was “not required to assess WilTel’s property solely on the basis of cost.” *Id.*, PP 35 & 41.

IV. Valuation Conclusions

¶59 The issue, thus, becomes the question of the taxability of T-Mobile’s accounting goodwill. Not surprisingly, and as previously noted, T-Mobile and the Counties take a diametrically opposed view of the issue. T-Mobile contends that none of its accounting goodwill is enhancement value taxable under *WilTel*, and the Counties argue that all of T-Mobile’s accounting goodwill is enhancement value taxable under *WilTel*.

¶60 The Tax Commission steered toward the middle of the road with respect to this issue and, as noted at ¶ 43, concluded that \$2,367,836,645 of T-Mobile’s accounting goodwill was attributable to T-Mobile’s tangible, taxable property. Ex. 35, pp. 30-32. The rationale behind the Tax Commission’s decision is not entirely clear; however, the primary basis appears to be that the \$2.4 billion represents that portion of T-Mobile’s accounting goodwill that, in the Tax Commission’s opinion, “is not capable of ownership apart from tangible property.” Ex. 35, p. 21; *see also, e.g., id.*, p. 27 (“The evidence also indicated that there was a portion of the goodwill that was not capable of separate ownership.”).

¶61 I am not satisfied with the approach taken by any of the parties. By way of example only, T-Mobile’s principal analysis suffers from the selection of the wrong unit;¹⁵ the Counties’ principal analysis suffers from the decision to rely on capital expenditures that greatly exceed depreciation and their insistence that all of T-Mobile’s accounting goodwill is taxable or constitutes

¹⁴Unitary appraisal is proper in the case at bar, too.

¹⁵Recall, however, that Mr. Cook did include an HCLD valuation of T-Mobile as a unit. Ex. 33, Add. XXIX. And that under this approach, he found a value of \$73 million based on a system value of roughly \$4.4 billion and a 1.657% allocation factor.

enhancement value;¹⁶ and the Tax Commission's decision suffers from the erroneous legal conclusion that a portion of T-Mobile's goodwill is subject to Utah's property tax and its pro rata allocation, which is not based on any standard valuation approach.

¶62 As a result, I am left without an appropriate unitary appraisal that is based on anything other than a cost approach to valuation that excludes T-Mobile's accounting goodwill. In other words, I am left with Mr. Cook's HCLD valuation of T-Mobile and Mr. Eyre's reworking of the Tax Commission's cost approach to exclude goodwill.¹⁷ Basing a determination of fair market value of the taxable property of T-Mobile for Utah property tax purposes "solely on the basis of cost" will fail to fairly capture taxable enhancement value. *WilTel*, 200 UT 29, P 41. This, however, cannot be avoided where, as here, a methodologically valid income approach to value is unreliable and would have likely produced a negative value because the company had "incurred a net operating loss in each year of operation" (*supra*, ¶ 40) and where all parties have essentially eschewed the market approach.¹⁸

¶63 As noted, Mr. Cook's HCLD value is \$73,000,000, based on a system value of \$4,427,115,000 and an allocation factor of 1.657%. Mr. Eyre's adjusted cost approach to value would be approximately \$76,500,000, based on a system value of \$4,375,667,000 and an allocation factor of 1.75%. An average of these two calculations yields a value of \$74,750,000, which I conclude is the most sound appraisal of the fair market value of T-Mobile's taxable property.¹⁹

¶64 This result also makes sense from a policy perspective. It would be unfair to impose property tax directly on accounting goodwill through the cost approach, which is what the Tax

¹⁶The Counties take this position despite the fact that accounting standards place certain intangibles (*e.g.*, assembled workforce, customer base, customer service capability, presence in geographic markets or locations, nonunion status, ongoing training or recruiting programs, outstanding credit rating, and access to capital markets) in the accounting goodwill category.

¹⁷In response to questions from Mr. Buchi, Mr. Eyre adjusted his cost and income approaches to value to take out all of T-Mobile's accounting goodwill. For the reasons set forth in ¶¶ 61 and 62, I am not considering Mr. Eyre's adjusted income approach.

¹⁸In *WilTel* it appears that the Tax Commission was able to rely on an approach to value based on cost ("historical cost indicator) and income ("yield capitalization approach minus any growth factor"). Brief of Petitioners in *WilTel*, App. 3, p. 14. Thus, as T-Mobile correctly points out in its Proposed Findings of Fact and Conclusions of Law and Final Decision at page 40, in *WilTel* "a yield cap approach, with no growth factor, produced a value higher than the cost approach value." And it is that positive difference in value that the Utah Supreme Court held constituted "enhanced value." *WilTel*, 2000 UT 29, P 38. Because T-Mobile's predecessor never enjoyed positive income, there is no positive difference here.

¹⁹Given my ruling, it is not necessary to reach the question of whether taxing T-Mobile's booked goodwill violates the uniform and equal clause of article XIII, section 2(1) of the Utah Constitution. Indeed, this ruling, in my view, fully resolves any and all open motions and issues.

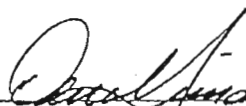
Commission did, because goodwill is booked only if a company has been acquired. T-Mobile could have a direct competitor that is similarly situated to T-Mobile with identical physical property, plant, and equipment, but that had not been acquired, which would place T-Mobile at a serious competitive disadvantage. It strains reason to make T-Mobile pay property tax on accounting goodwill just because T-Mobile was acquired.


CONCLUSION AND FINAL DECISION OF VALUE

¶65 For the reasons set forth above, I conclude that the fair market value of the taxable property of T-Mobile for Utah property tax purposes for the lien date of January 1, 2003, is \$74,750,000. No further order is necessary to effectuate this decision.

DATED this 11th day of March, 2009.

BY THE COURT


Deno G. Himenas
Third District Court Judge



CERTIFICATE OF NOTIFICATION

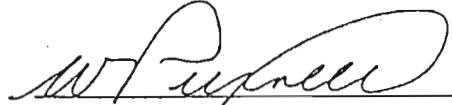
I certify that a copy of the attached document was sent to the following people for case 060900560 by the method and on the date specified.

MAIL: LARON J LIND 160 E 300 S 5TH FLR POB 140874 SALT LAKE CITY, UT 84114-0874

MAIL: THOMAS W PETERS 111 E BROADWAY STE 340 SALT LAKE CITY UT 84111-5250

MAIL: STEVEN P YOUNG 299 S MAIN ST STE 1800 SALT LAKE CITY UT 84111-2263

Date: 3-11-09



Deputy Court Clerk