

JAN 23 2008

SALT LAKE COUNTY

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

By WPG  
Deputy Clerk

T-MOBILE USA, INC.,

Petitioner,

vs.

UTAH STATE TAX COMMISSION,

Respondent.

MEMORANDUM DECISION

Case No. 060900560

Hon. Deno G. Himonas

INTRODUCTION

¶1 T-Mobile USA, Inc. (“T-Mobile”) petitions the court to review by trial *de novo* the assessment of the Utah State Tax Commission (the “Commission”) of T-Mobile’s taxable Utah property for tax year 2003. *See* Utah Code Ann. § 59-1-601. Beaver County, *et al.* (the “Counties”), as parties in interest, also contest the Commission’s assessment. *See id.*, § 602(2).

¶2 The Counties and T-Mobile have, subsequent to T-Mobile seeking judicial review in this matter, “produced new appraisals of T-Mobile’s taxable property as of January 1, 2003.” Memorandum in Support of Plaintiff T-Mobile’s Motion for Partial Summary Judgment on the Issue of Taxing Spectrum Licenses (“Spectrum License Supporting Memorandum”), p. 2.<sup>1</sup> The Counties’ appraisal raises as an issue whether “T-Mobile’s licenses to use certain frequencies of electromagnetic spectrum . . . should be valued and included” in T-mobile’s 2003 tax assessment. *Id.* T-Mobile contends that neither its “interest” in the spectrum nor its spectrum licenses are subject to Utah property or privilege tax. To this end, T-Mobile has moved for partial summary judgment on the issue of (1) including its spectrum licenses in its 2003 property tax assessment and (2) taxing the spectrum (collectively, the “Motions”).<sup>2</sup> For the reasons set forth below, I grant the Motions in their entirety.

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<sup>1</sup>The term “spectrum licenses” refers to “the right to transmit radio waves at a particular frequency” on the electromagnetic spectrum. Spectrum License Supporting Memorandum, p. 8. “Because there are a limited number of frequencies within the spectrum that are useful for mobile communications, the federal government, through the Federal Communications Commission (“FCC”) regulates the use of frequencies . . . within a given area by issuing spectrum licenses. *Id.*”

<sup>2</sup>The Counties disagree with T-mobile’s position. The Commission, however, agrees in significant part and therefore has partially joined in the Motions.

## ANALYSIS

¶3 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, P 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).

### I. Summary Judgment re Taxing Spectrum Licenses

¶4 With respect to the issue of including its spectrum licenses in its 2003 property tax assessment, T-Mobile advances three arguments. First, it argues that “as a matter of law, spectrum licenses cannot be included in [its] . . . assessment because spectrum licenses are specifically excluded by the Utah Constitution and statutes from the Utah property tax base.” Spectrum License Supporting Memorandum, p. 12. Second, it argues that “retroactively assessing property tax on T-Mobile’s spectrum licenses would violate the uniformity and equality provisions of the Utah Constitution.” *Id.*, p. 15. And third, it argues that “the Counties’ spectrum argument must also be barred because the Counties failed to exhaust their administrative remedies.” *Id.*, p.16. T-Mobile’s first argument is dispositive of this issue.<sup>3</sup>

¶5 T-Mobile has several “spectrum licenses applicable to Utah.” Spectrum License Supporting Memorandum, p. 9. Utah, by statute, defines licenses as “intangible property.” Utah Code Ann. § 59-2-102.<sup>4</sup> As a matter of law, “intangible property” is tax exempt. *See Beaver County, et al., v. WilTel, Inc.*, 2000 UT 29, 995 P.2d 602. The reason for the exemption is that “the State has chosen to tax the income from intangible property.” *Id.*, P 34. Therefore, “it is prohibited from taxing the tangible property itself.” *Id.*

### II. Summary Judgment re Taxing the Spectrum

¶6 As T-Mobile points out, “the Counties essentially concede” in their memorandum that the Commission should not include spectrum licenses in the at-issue property tax assessment. Reply Memorandum in Support of Plaintiff T-Mobile’s Motion for Partial Summary Judgment on the Issue of Taxing Spectrum Licenses (“Spectrum License Reply Memorandum”), p. 1. Instead, the Counties rephrase the issue as “whether T-Mobile’s exclusive right to use specific portions of the [S]pectrum

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<sup>3</sup>Because it is not necessary for me to decide the constitutional question, I decline to do so. *See State ex rel Z.C.*, 2007 UT 54, P. 5 (“this court should avoid addressing constitutional issues unless required to do so.”) (internal quotations and citations omitted).

<sup>4</sup>The definition of “intangible property” is currently set forth at Utah Code Ann. § 59-2-102(20) (2007). T-Mobile represents that it was located at subsection 17 in 2003. Spectrum Licensing Supporting Memorandum, p. 13.

constitutes a taxable asset.” Counties’ Response to T-Mobile’s Motion for Partial Summary Judgment and the Tax Commission’s Response to and Partial Joinder in T-Mobile’s Motion for Partial Summary Judgment (“Spectrum License Opposing Memorandum”), p. 3. *See also id.*, p. 4 (“[I]t is the exclusive right ‘to use’ a portion/property of the [s]pectrum—which is at issue in this proceeding.”).

¶7 In response, T-Mobile contends that any “interest” T-Mobile may have in the spectrum “[i]s [n]ot [s]ubject to Utah [p]roperty [t]ax.” Memorandum in Support of Plaintiff T-Mobile’s Motion for Partial Summary Judgment on the Issue of Taxing Spectrum (“Spectrum Supporting Memorandum”), p. 17. It further contends that its “[u]se and [c]ommercial [e]xploitation’ of the [e]lectromagnetic [s]pectrum is [n]ot [s]ubject to Utah [p]rivilege [t]ax.” *Id.*, p. 26. T-Mobile is correct on both grounds.

¶8 It is undisputed that T-Mobile’s interest in the spectrum is derived through its spectrum licenses. These licenses, as pointed out above, bestow upon T-Mobile the right to use the spectrum to transmit radio waves at a particular frequency in a given area. This limited, exclusive right of use, however, simply does not create a taxable asset.

¶9 To begin with, the spectrum is not property subject to Utah property tax. *See In re Nextwave Pers. Commc’ns, Inc.*, 200 F.3d 43, 50 (2<sup>nd</sup> Cir. 1999). And even if it was, a spectrum license does not convey a property interest in the spectrum. *Cf. Mobile Relay Assocs. & Skitronics, L.L.C. v FCC*, 457 F.3d 1, 11-12 (D.C. Cir 2006) (reconfiguring the 800 MHz band of the spectrum not a “taking” because spectrum licenses do “not constitute a property interest protected by the Fifth Amendment.”).

¶10 Likewise, T-Mobile’s use of the spectrum is not subject to privilege tax. Utah Code Ann. § 59-4-101(1)(a) is controlling. It provides as follows:

Except as provided in Subsections (1)(b) and (c), a tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property which for any reason is exempt from taxation, if that property is used in connection with a business conducted for profit

(Emphasis added.) Consequently, because the electromagnetic spectrum is neither real or personal property (*see In re Nextwave Pers. Commc’ns, Inc.*, 200 F.3d at 50), it is not subject to Utah privilege tax.<sup>5</sup>

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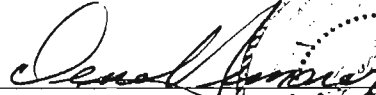
<sup>5</sup>The result would be the same if I were to conclude that the spectrum constitutes intangible property. *Beaver County, et al., v. WilTel, Inc.*, 2000 UT 29, P 34.

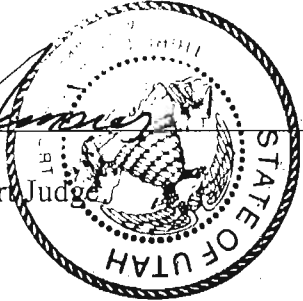
CONCLUSION

¶11 For the reasons set forth above, I grant the Motions. No further order is necessary to effectuate this decision.

DATED this 23 day of January, 2008.

BY THE COURT

  
Deno G. Himonas  
Third District Court Judge

The seal of the State of Utah, Third District Court, is circular with a rope-like border. Inside the border, the words "STATE OF UTAH" are written in a circle. In the center of the seal is a depiction of a Native American figure on horseback, holding a bow and arrow. The words "THIRD DISTRICT COURT" are written in a smaller circle around the central figure.

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.

METHOD	NAME
Mail	LARON J LIND Attorney DEF 160 E 300 S 5TH FLR POB 140874 SALT LAKE CITY, UT 84114-0874
Mail	THOMAS W PETERS Attorney PLA 111 E BROADWAY STE 340 SALT LAKE CITY UT 84111-5250
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Dated this 23 day of January, 2008.

  
Deputy Court Clerk