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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

QWEST CORPORATION,

Plaintiff,

v.

UTAH TELECOMMUNICATION OPEN INFRASTRUCTURE AGENCY, an interlocal cooperative governmental agency; and the CITY OF RIVERTON, a Utah municipal corporation,

Defendants.

UTOPIA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Case No. 2:05-cv-00471 PGC
Magistrate Judge David Nuffer

BACKGROUND

The Telecommunications Act of 1996 ("TCA" or "the Act") passed with vast majorities in both the House of Representatives (414-16) and the Senate (91-5), in large part because the major incumbent local telephone companies agreed to a landmark compromise. The incumbents agreed to relinquish their entrenched monopolies in local markets, and in return, they received many significant concessions. These included the right to operate under substantially less

regulation, the right to enter into vast new geographic and product markets -- including long distance, equipment manufacturing and cable television -- and the right to form strategic partnerships and other business relationships that had previously been foreclosed to them. Soon after the Telecommunications Act became law, however, the incumbents, including Qwest, undertook an effort to have the courts rewrite the Act beyond the limits intended by Congress.

Specifically, as in this instance, Qwest's approach has been to ignore its vast advantages of incumbency and pretend that it is at a severe *disadvantage* because of the supposed tax advantages that UTOPIA allegedly enjoys. In Utah, Qwest took an active legislative role in drafting and supporting the very legislation that permitted UTOPIA to be formed. However, as evidenced by this litigation, Qwest has done exactly what it has done with the federal Act – support it when it serves its purpose and then adopt a corporate policy of doing whatever it can to stifle competition under the banner of a "level playing field."

Subjecting entities that are not similarly situated to the same regulatory requirements does not achieve a "level playing field." To the contrary, doing so works decisively in the incumbents' favor and destroys or significantly impairs any real prospect of competition. In fact, the Supreme Court has expressly recognized that the Telecommunications Act "proceeds on the assumption that incumbent monopolists and contending competitors are unequal." *See Verizon Communication, Inc. v. FCC*, 535 U.S. 366, 532 (2002). Thus, the Act not only gives new entrants, the FCC, and state regulators "powerful tools" to pry open local telecommunications markets, but it also uses the same approach to assist *incumbents* in becoming more effective competitors in markets from which they were previously excluded – long distance, equipment manufacturing, etc.

In spite of Congress's intent and a body of case law to the contrary, Qwest has adopted a corporate philosophy of serial litigation, including this case. Such a philosophy evidences not only Qwest's true anti-competitive nature but its undaunted attempt to turn the federal Telecommunications Act on its head. Qwest's Telecommunications Act claims are simply not supported by the Act or any administrative or judicial pronouncement. Qwest's remaining claims, for the reasons stated herein, are equally without legal merit. UTOPIA is entitled to a judgment of dismissal, with prejudice, of Qwest's Amended Second Amended Complaint.

STATEMENT OF FACTS

1. Qwest is a telecommunications corporation organized and existing under the laws of the state of Colorado, with its principal place of business in Denver, Colorado. Qwest is a telecommunications carrier as defined in the FTA. Qwest provides telecommunications services in the state of Utah as a local exchange carrier, and is therefore subject to the jurisdiction of the Public Service Commission of Utah (the "PSC"). *See* Amended Second Amended Complaint ¶ 12.

2. UTOPIA is an interlocal cooperative governmental agency and political subdivision of the state whose members are various municipalities organized and existing under the laws of the state of Utah. UTOPIA was formed for the purpose of constructing, owning, and operating an advanced communications network to provide high-speed broadband voice, video, and data access on a wholesale basis within the boundaries of its members. UTOPIA's members are governed by an Interlocal Cooperative Agreement. *See* Amended Second Amended Complaint ¶ 13.

3. The modern telecommunications industry has rapidly developed from a monopoly environment to an increasingly competitive market. In the past 20 years, the industry has

experienced substantial deregulation and technological change. Customers can now choose from a variety of services, including wireless services, services through existing telephone and cable lines, and services through high-speed fiber-optic cables. *See* Amended Second Amended Complaint ¶ 16.

4. On February 8, 1996, Congress passed the FTA. The stated purpose of the FTA is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." FTA, Publ. L. No. 104-104, pmbl., 110 Stat. 56 (1996). Congress sought to facilitate this reshaping of the telecommunications industry landscape by introducing sweeping changes to remove barriers to entry, eliminate local monopolies, and stimulate fair and nondiscriminatory competition among telecommunications service providers. *See* Amended Second Amended Complaint ¶ 17.

5. The FTA amended the TCA by adding new sections, including 47 U.S.C. §§ 251-72, which were designed to remove local barriers to entry and open local telecommunications markets to competition as a matter of federal law. To this end, Congress initially preempted all local statutes, regulations, and other legal requirements that prohibit or have the "*effect of prohibiting*" any entity from providing telecommunications service:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a). *See* Amended Second Amended Complaint ¶ 18. (Emphasis added.)

6. In enacting the FTA, Congress preserved the authority of state and local governments to act in certain limited ways that might otherwise violate 47 U.S.C. § 253(a). Thus, in Section 253(b), Congress provided:

> State regulatory authority -- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Similarly, Section 253(c) states:

> State and Local Government Authority - Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of pubic rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). *See* Amended Second Amended Complaint ¶ 19. (Emphasis added.)

7. These clauses established "safe harbors" within which state and local governments could operate free from successful challenges under Section 253(a) to manage the rights-of-way and to recover actual costs related to the use of the rights-of-way . *See* Amended Second Amended Complaint ¶ 20.

8. In 2002, several Utah municipalities entered into the Interlocal Cooperative Agreement to create UTOPIA. UTOPIA was created to build, own, and operate a fiber-to-the-home network to provide voice, video, and data services to the member cities and the residents and businesses within the boundaries of the member cities. UTOPIA provides its network services to retail customers by selling those services on a wholesale basis to other telecommunications providers that, in turn, deliver services to individual retail customers. *See* Amended Second Amended Complaint ¶ 26.

9. UTOPIA has entered into agreements with communications service providers which allow such companies to utilize UTOPIA's wholesale network to serve retail customers; UTOPIA has invited Qwest to enter into such an agreement, but Qwest has refused. UTOPIA

has adopted and published a Policy for Service Provider Opportunities on the UTOPIA Network which provides both for fair and equitable treatment of all providers seeking to obtain access to UTOPIA's network, and an appeal process to providers aggrieved by UTOPIA's selection criteria. Qwest has never requested any agreement with UTOPIA nor utilized the process available to allow it to be considered for such an agreement. *See* UTOPIA's Answer to Amended Second Amended Complaint ¶ 4.

ARGUMENT

I.

THE TELECOMMUNICATIONS ACT

Qwest asserts that UTOPIA "creates an uneven telecommunications market that is neither fair and reasonable nor competitively neutral and nondiscriminatory, as required by § 253." Amended Second Amended Complaint ¶ 5. Qwest fails, however, to allege any specific negative effect on its ability to provide telecommunications services to it present and future subscribers. Qwest grossly overstates and misrepresents the scope and application of the Telecommunications Act generally and § 253 specifically. Qwest also ignores other provisions of the Act, such as § 601(c)(2), that directly undercut it claims.

Qwest acknowledges that the paramount purpose of the Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *See* Amended Second Amended Complaint ¶ 17.

Qwest, however, ignores the true import of this language and instead appears to argue that, under Utah law, UTOPIA has a material financial advantage that contravenes the intent of the Federal Telecommunications Act. Qwest erroneously suggests that the Federal

Telecommunications Act was enacted to protect the mega-incumbents such as Qwest, BellSouth, Verizon and the like. Rather, to counteract the incumbents' overwhelming advantage, Congress armed new entrants, such as UTOPIA, with "powerful tools to dismantle the legal, operational and economic barriers" that new entrants face. Indeed, "[t]he 1996 Act can be read to grant most promiscuous rights . . . to competing carriers vis-à-vis the incumbents." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).

Qwest submits that certain characteristics of Utah law preclude it from being able to compete competitively with UTOPIA. Qwest correctly alleges that, pursuant to the Utah Constitution, UTOPIA does not pay *ad valorem* taxes. Qwest, however, incorrectly claims that UTOPIA is advantaged because it does not pay sales tax. *See* Amended Second Amended Complaint ¶ 31. This allegation was inaccurate at the time of Qwest's Complaint and is more so today. UTOPIA is provided a sales tax exemption but such exemption only applies to "construction materials purchased by the state, its institutions, or its political subdivisions which are *installed or converted to real property by employees* of the state, its institutions, or its political subdivisions." *See* Utah Code § 59-12-104(2)(a)(ii). (Emphasis added.) Since UTOPIA's construction is contracted to private companies rather that performed by its employees, the sales tax exemption complained of by Qwest *does not apply.* Further, the allegation becomes wholly irrelevant in light of the passage of S.B. 29 by the 2006 Legislature that provided Qwest with sweeping sales tax exemptions at least equivalent to those purportedly enjoyed by UTOPIA. *See* Utah Code §§ 59-12- 102 (86-90) and 59-12-104 (68).

While complaining about perceived advantages enjoyed by UTOPIA, Qwest fails to catalogue the numerous, varied and substantial benefits which it possesses as a non-

governmental entity. For instance, in its Local Competition Order[1], the FCC listed the following advantages that incumbents have over new entrants:

- An incumbent local exchange carrier (LEC)'s existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers.

- An incumbent LEC currently serves virtually all subscribers in its local serving area.

- An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.

- The incumbent LEC's have economies of density, connectivity, and scale.

Other benefits enjoyed by Qwest but not available to UTOPIA include:

- Qwest's substantial name recognition.

- Economies of Scale – Incumbents and other major communications companies operate in large multi-state markets. This allows them to achieve economies of scale in finance, management, workforce, R&D, administration, etc. They can purchase plant equipment and supplies, advertising and other requirements in sufficient amounts to support regional or national operations and at substantial quantity discounts. In the absence of effective competition, they can also control the price, quality and content of the services they provide. Municipal providers must live within the constraints posed by their relatively small size and can succeed only if they can offer advantages in price and quality of service.

- Confidential Operations – All private-sector providers are largely free to operate behind closed doors, subject only to general corporate record-keeping and reporting requirements. They need not disclose their marketing strategies, prospective partners or customers or even the details of their ongoing business arrangements. Their leaders are

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶¶ 10-11(rel. Aug. 8, 1996), 61 Fed. Reg. 45476 (Aug 29, 1996).

appointed rather than elected and therefore are not subject to constant public scrutiny and criticism. Municipal providers, as custodians of the public interest, must comply with all relevant sunshine and open public records requirements, and they must inform the public fully about all major decisions and win approval before proceeding.

- Flexibility in Employment – Subject only to routine labor laws, private-sector providers are free to hire and promote whomever they wish, to offer competitive salaries and benefits, and, with relative ease, to remove persons who are not performing up to expectations. Municipal employees are typically not "at will;" have relatively inflexible compensation programs and significant budgetary limitations.

- Advantages in Obtaining Financing – Incumbents and other large communications companies can usually arrange for financing more quickly and privately, and, because of their size and market power, can often secure preferred rates and flexible terms. While opponents of municipal involvement in telecommunications often complain that municipalities have a substantial advantage because they have access to tax-exempt financing, obtaining such financing is a complex, time-consuming and burdensome process requiring public disclosure, extensive debate and prior public approval. Such financing also typically is accomplished through bond agreements that impose substantial limitations on the uses of the funds in question. More importantly, UTOPIA does not enjoy the perceived advantages of municipal tax-exempt financing since its bonds are taxable.

- Flexibility in contracting – Private-sector providers are free to enter into any lawful contracts that they believe to be in their best interests. Municipal providers are typically subject to cumbersome competitive bidding requirements; restrictions in bond agreements; conditions on wages imposed by the requirements such as the Davis-Bacon Act; obligations under "Buy American" and similar programs; and restrictions on the kinds of relationships that publicly-owned utilities can enter with private entities.

- Tax Advantages – Incumbents and other major communications companies have access to billions of dollars of tax credits, deductions and other incentives, and these benefits will increase even more. Claims that municipal providers have a significant competitive advantage because they are not subject to federal, state and local taxation do not account for the transfers to the general fund in lieu of taxes that municipal utilities typically pay. Municipal providers do not pay income taxes because they do not earn profits.

In short, if there is an "unlevel playing field" here, it is one that tips substantially in Qwest's favor. Qwest and its predecessors, U.S. West and Mountain Bell, have had generations of economic opportunity in a virtually monopolistic environment. That interstate environment has created advantages for Qwest that can never be enjoyed by an in-state municipally-backed provider such as UTOPIA that has significant geographical and legislative limitations on its administrative and operational processes.

Furthermore, establishing an absolutely level playing field is simply not within the purpose or effect of the Federal Telecommunications Act. The FCC has found that, "it is not necessary for a state to treat all entities in the same way for a requirement to be competitively neutral. In fact, treating differently situated entities the same can contravene the requirement for competitive neutrality."[2] A former senior FCC official has further explained that,

> [W]e hear all the time, the argument by incumbents, that . . . "Well, we are regulated, but these new entrants, providing new services, are not regulated, and we need to have a level playing field. We need to make sure that everybody is treated the same." This is the argument about asymmetric regulation. There are two kinds of asymmetric regulation. One is where you have firms that are similarly situated and treated differently. That is a bad thing; it leads to all kinds of distortions. *Likewise, if you have two firms that are not similarly situated and are radically different in their circumstances, but you treat them the same, that also leads to all kinds of distortions.*[3]

Similarly, courts reviewing level playing field claims have frequently held that, given the significant advantage of incumbency, it is neither necessary nor appropriate to impose exactly the same requirements on new entrants and incumbents. For example, in a case involving cable franchising, which involved many of the same considerations at issue here, the court found:

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[2] *In the Matter of the Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way,* ¶ 52, 14 FCC Rcd 21697, 1999 FCC LEXIS 6558 (1999).

[3] R. Pepper, *Policy Changes Necessary to Meet Internet Development,* 2001 L.Rev. M.S.U.-D.C.L. 255, 257 (2001) (emphasis added).

> Plaintiff's argument that the advantage of incumbency is not supported in the record ignores undisputed evidence in the record. The record reveals that Comcast has been the monopoly cable television provider in the franchised area, with 68,000 customers and "is a subsidiary of one of the largest cable provider in the United States. Is marketing power is massive …."

Comcast Cablevision of New Haven, Inc. v. Connecticut DPUC, 1996 WL 6611805 at 4 (Conn. Super. Ct. 1996); *See also New England Cable Television Ass'n, Inc. v. Department of Public Utility Control*, 27 Conn. 95, 717 A.2d 1276, 1292 n.27 (1998) ("there are certain benefits that inherently inure to the plaintiffs' status as incumbents"); *Insight Communications, L.P. v. City of Louisville, KY*, No. 2002-CA-000701-MR (Ky. App., June 25, 2003), *appeal pending*, No. 2003-SC-000557 (Ky.) ("There will never be an apple-to-apple comparison for [the incumbent] and another franchisee simply because [it] is the incumbent which in its own rights and through its predecessors has been the exclusive provider of cable television services for almost thirty years. No new cable television franchisee can ever be in the same position as a thirty-year veteran.")

In short, there is simply no requirement that the business environment for Qwest be a clone of UTOPIA's. The Federal Telecommunications Act does not require it, and this Court should reject Qwest's claim to the contrary. There is no means by which this Court could empirically evaluate the respective burdens and benefits of Qwest and UTOPIA, and any attempt to do so would amount to little more than an unnecessary effort in futility.

Finally, Qwest is further barred from complaining about any *de minimis* advantages that UTOPIA may enjoy because Qwest is not prohibited from similarly enjoying those benefits. UTOPIA is a *wholesale* provider whose services are available to Qwest. Qwest's corporate decision to build, own and operate its own infrastructure rather than lease UTOPIA's, like other telecommunications providers have chosen to do, does not amount to any federally prohibited

violation of the Federal Telecommunications Act. Qwest confuses its own corporate business model with a violation of the Act.

II.

SECTION 253

The relevant portions of Section 253 of the Communications Act read as follows:

> SEC. 253. [47 U.S.C. 253] REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

In *Qwest Communications v. City of Santa Fe, NM*, 380 F.3d 1258 (10th Cir. 2004), the Tenth Circuit, focusing on the relationship between Sections 253(a) and 253(c), stated:

> [A] two part test is in order. First, it must be determined whether the state or local provision in question is prohibitive in effect. *If the provision is not prohibitive, there is no preemption under § 253.* A regulation need not erect an absolute barrier to entry in order to be found prohibitive. [*RT Communications, Inc. v. FCC,* 201 F.3d 1264, 1268-69 (10th Cir. 2000)]. If a regulation is prohibitive, the second part of the test is applied: the regulation may be saved from preemption if it fits within the requirements of § 253(c). *See* [*BellSouth Telecomms., Inc. v. Town of Palm Beach,* 252 F.3d 1169, (11th Cir. 2001)] at 1191-92; *RT Communications*, 201 F.3d at 1269 (using a similar approach to § 253(a) and § 253(b)).[4]

[4] The Federal Communications Commission (FCC) follows a similar approach. The FCC first determines whether the regulation facially prohibits provision of services. *In the Matter of the Public Utility Comm'n of Texas*, 13 F.C.C.R. 3460, ¶ 22 (1997), *review denied sub nom. City of Abilene v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999). If the

(Emphasis added).

Following the Tenth Circuit's approach, it is clear that the Court must first determine whether UTOPIA's structure and service offerings would somehow prohibit, or have the effect of prohibiting, the ability of Qwest to provide any telecommunications service. The answer to that question is an unequivocal "No."

A.

Qwest Cannot Show That UTOPIA Violated Section 253(a)

Qwest's Amended Second Amended Complaint is devoid of any allegations that it is effectively prohibited from providing even a single telecommunications service. Of course, Qwest can make no such allegation because there is no prohibition. Qwest is simply not prohibited from operating in any rights-of-way or from providing telecommunications services to any present or prospective subscriber.

Qwest is firmly entrenched in the marketplace served by UTOPIA and has not alleged that it plans to do anything other than continue to provide services to existing customers and to offer such services to prospective customers – even if it fails to prevail in this matter. The claims raised by Qwest in its Complaint are simply not the type, either by their characteristics or their magnitude, intended to be addressed by the TCA.

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regulation is not facially prohibitory, the FCC then considers whether "the requirement in question materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In the Matter of California Payphone Ass'n,* 12 F.C.C.R. 14191, 14206 (1997). To meet this burden, the proponent must "supply . . . credible and probative evidence that the challenged requirement falls within the proscription of section 253(a)." *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, 21440 (1997); *see also In the Matter of California Payphone Assn.* (denying challenger's petition to invalidate city ordinance under Section 253(a) where challenger presented virtually no evidence to support allegation of prohibitive effect). The FCC directs the party challenging a local requirement to present evidence showing, for instance, what services have been effectively prohibited, which providers have been prohibited, which customers are or will be denied access to services, and what factual circumstances and legal requirements are causing the alleged prohibition. This approach was formalized by the FCC in its *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, 13 F.C.C.R. 22970 (1998).

Similar to its inflation of the purpose of the Federal Telecommunications Act, Qwest overstates the purpose of § 253. As indicated above, § 253(a) states simply:

> No state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Qwest characterizes the scope of § 253 in its Amended Second Amended Complaint ¶ 19:

> Under the FTA, local governments are limited to exercising reasonably and competitively neutral management of the public rights-of-way, i.e. to regulating the physical process of installing and maintaining facilities in the public rights-of-way and to recover the actual costs for such management access.

According to Qwest, UTOPIA has violated § 253, but Qwest fails to point to any right-of-way measure that UTOPIA has even applied to Qwest, much less misapplied. In fact, as an interlocal cooperation entity (as opposed to a municipality) UTOPIA has *no* authority to enact or enforce *any* right-of-way measures. Further, UTOPIA neither owns nor controls any rights-of way to which § 253 could apply. Thus, by Qwest's own characterization of 253, its claims against UTOPIA must fail.

Furthermore, § 253(a) on its face applies only to state or local governments acting in a regulatory capacity and not in a proprietary capacity. As an interlocal agency, UTOPIA has *no* regulatory authority but rather operates as a proprietary provider of wholesale communication services – a role to which § 253 does not apply.[5]

Although Qwest attempts to ignore this critical distinction between regulatory and proprietary activities, it cannot claim to be unaware of the distinction. In *Time Warner Telecom of Oregon, Inc. v. City of Portland,* No. CV 04-1393-PA, and the consolidated case of *Qwest*

[5] UTOPIA acknowledges that Qwest, in the future, may be required to comply with certain *contractual* obligations but only when or if Qwest *voluntarily* determines to avail itself of UTOPIA's wholesale services.

Corp. v. City of Portland, No. CV 05-1386-PA, 2006 U.S. Dist. LEXIS 12622 (D. Ore., March 8, 2006), the Court reviewed Time Warner's and Qwest's § 253 challenge of Portland's municipal fiber optic network ("IRNE") and found that § 253(a) did not apply to the City's provision of communications services:

> The problem with plaintiffs' preemption argument is that § 253(a) does not apply to IRNE. Section 253(a) preempts any "State or local statute or regulation, or other State or local legal requirement" that may have the effect of prohibiting the provision of a telecommunications service. Plaintiffs fail to show that IRNE regulates plaintiffs or imposes legal requirements on plaintiffs. Although the City used in-kind compensation to create IRNE, none of the in-kind compensation came from plaintiffs. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1180 (9th Cir. 2006) (City of Surprise) ("Qwest suffers no injury when its competitors are subjected to additional, costly requirements"). In any event, the in-kind compensation does not form a significant part of IRNE's network.

The Court went on to say:

> Plaintiffs seem to treat § 253 as an antitrust statute that targets only state and local governments. Plaintiffs argue that the City, because of its status as a local government, has unfair competitive advantages over private carriers. It's true that unlike private carriers, the City may enter into intergovernmental agreements to share resources with other governments. (Of course, as noted, private carriers may enter into similar arrangements with other private carriers.) The City controls the public rights of way, and has the authority to grant franchises. (NOTE: UTOPIA is not vested with similar regulatory authority). However, federal law allows local governments to compete with private carriers, even though most if not all local governments enjoy these potential competitive advantages. Also, as the City points out, private carriers have their own competitive advantages over local governments.
>
> * * *
>
> Plaintiffs have not shown how the City's operation of IRNE "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Time Warner Telecom at 20-21.[6]

[6] While *Time Warner Telecom* involved sales to public entities and not to private parties, the court's rationale applies equally to sales to private entities – particularly sales of wholesale services rather than retail services.

Furthermore, the term "telecommunications service" in Section 253 is a term of art[7] that does not apply to "cable service"[8] or "information service."[9] The FCC has ruled, and the Supreme Court of the United States has upheld its conclusion, that the term "information service" includes the Internet access services that cable operators and telephone companies typically offer to consumers.[10] Thus, with respect to *cable* and *internet services*, UTOPIA cannot violate Section 253 as a matter of law because that provision simply does not apply, and this Court has no jurisdiction under the Telecommunications Act to rule on Qwest's Complaint as to such services. As to *telecommunications services*, UTOPIA could violate Section 253 only if its fiber initiative somehow adversely affected Qwest's ability to provide *telecommunications services* over its own network. Qwest does not allege, and could not show, that UTOPIA's fiber initiative in any way impairs Qwest from doing so. In fact, UTOPIA is required by the municipalities where it deploys its network to follow the same permitting and rights-of-way processes as other providers, including Qwest.

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[7] The term "telecommunications service" is defined in 47 U.S.C. § 153(46) as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." The embedded term "telecommunications" is defined in 47 U.S.C. § 153(43) as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

[8] The term "cable service" is defined in 47 U.S.C. § 522(6) as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."

[9] The term "information service" is defined in 47 U.S.C. § 153(20) as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

[10] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, at ¶ 40, 17 FCC Rcd 4798; 2002 FCC LEXIS 4534 ("*Cable Modem Declaratory Ruling*"), *aff'd Brand X Internet Services Inc. v. Federal Communications Commission*, 125 S.Ct. 2688; 2005 U.S. LEXIS 5018; *accord In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities . . .*, at ¶ 13, 20 FCC Rcd 14853; 2005 FCC LEXIS 5257 (rel. September 23, 2005).

To be sure, some courts outside the Tenth Circuit have found, in right-of-way management cases, that a municipality can violate Section 253(a) without completely disabling an entity from providing telecommunications services. *See, e.g., Qwest Corp. v. City of Portland,* 385 F.3d 1236, 1241 (9th Cir. 2004). At the very least, however, Qwest must show that UTOPIA has imposed significant *regulatory* burdens, such as onerous right-of-way reporting or fee obligations that pose barriers to entry or continuation of business in the local telecommunications market. UTOPIA has not done so and Qwest cannot plead to the contrary.

In the present matter, UTOPIA has full authority to operate in the competitive wholesale market through its operation of a fiber optic network. Such proprietary operation is not within the contemplated gambit of § 253. At the retail level, Qwest is not placed at any competitive disadvantage for the simple reason that UTOPIA does not (and cannot) operate in that market.

B.

If Section 253 Applied Here, UTOPIA Would Qualify For the "Safe Harbors" of Section 253 (b) and (c)

As shown above, unless the Court finds that UTOPIA has violated § 253(a), it need not consider whether the "safe harbors" set forth in §§ 253(b) and 253(c) would apply and override any liability that UTOPIA would have for any such violations. As it happens, assuming, *arguendo,* that Section 253 applied here at all, UTOPIA would come well within both of those safe harbors.

Turning first to § 253(b), that provision reads as follows:

> (b) State regulatory authority -- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

On its face, § 253(b) appears to refer only to state requirements, and the Tenth Circuit has held that § 253(b) applies to states and not to local governments. *Southwestern Bell Wireless v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1192 (10th Cir. 1999). If, however, the Court finds that UTOPIA is not performing "municipal functions" under *Utah Associated Mun. Power Sys. v. Public Serv. Comm'n*, 789 P.2d 298 (Utah 1990) -- because UTOPIA is a political subdivision of the State operating in multiple localities – then it follows that UTOPIA should be treated as a state under § 253(b). *See Time Warner v. City of Portland*, *supra*, 2006 U.S. Dist. LEXIS 12622 at * 14 (applying § 253(b) to a municipality to which a state granted authority to own and operate a telecommunications system). As such, UTOPIA's operations as a provider of wholesale communications services meet all of the criteria for protection under § 253(b).

UTOPIA's services are available to all retail service providers – including Qwest – on a non-discriminatory and competitively neutral basis. UTOPIA will increase both the number and kinds of services available to consumers, thus meeting the goals and increasing the revenues of the federal Universal Service Program. UTOPIA will also enhance and protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory

basis, if the compensation required is publicly disclosed by such government.

If Qwest is correct that UTOPIA's operations should be viewed as right-of-way management activities – with which UTOPIA and the facts vigorously disagree – then it is clear that § 253(c) preserves such activities from challenge. Again, the key point is that UTOPIA's wholesale services are available to all retailers on a non-discriminatory and competitively neutral basis, including Qwest, and Qwest does not suggest that UTOPIA's rates are excessive, discriminatory, or exclusionary. Indeed, to the extent that Qwest believes that UTOPIA's retail providers have a significant competitive advantage over Qwest, it can readily eliminate any such perceived advantage by simply availing itself of the opportunity to operate on UTOPIA's network. UTOPIA has repeatedly offered Qwest a non-discriminatory and competitively neutral opportunity to provide its retail services over the UTOPIA network, but Qwest has steadfastly declined to alter its corporate policy of owning its own network. Of course, Qwest has every right to make such a policy but it has no concomitant right to claim actionable disadvantage by way of such policy.

In summary, given the characteristics of UTOPIA's existence and operations, § 253 simply and unequivocally, is not relevant to this litigation, and if it were, UTOPIA would be entitled to the safe harbors of §§ 253(b) and (c).

III.

SOME OF QWEST'S REQUESTED RELIEF IS BARRED BY THE FEDERAL TAX INJUNCTION ACT

In its Request for Relief, ¶ 3, Qwest seeks an order of this Court compelling UTOPIA to "pay sales and property taxes or impute the amount of the taxes into its rates." As the Ninth Circuit has made clear to Qwest, federal courts lack jurisdiction to interfere with local taxing

schemes when a remedy can be had in the courts of that state. *See Qwest Corp. v. City of Surprise,* 434 F. 3d 1176 (9th Cir. 2006). In *City of Surprise*, the Ninth Circuit stated:

> The Tax Injunction Act provides, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Supreme Court interpreted the Tax Injunction Act as a "broad jurisdictional barrier." *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825 (1997) (quotation marks omitted). As the Court noted, the Act is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Id.* at 826 (internal quotation marks omitted).
>
> * * *
>
> Additionally, there is no evidence suggesting an adequate remedy is not available in Arizona courts. In fact, Qwest already challenged Tucson's tax in state court and lost. *U.S. West Commc'n v. City of Tucson,* 11 P.3d 1054, 1060-63 (Ariz. Ct. App. 2000). Therefore, we hold that the charges imposed upon Qwest are taxes, and that the Tax Injunction Act deprived the district court of jurisdiction to invalidate the taxes.

City of Surprise, at 1184.

Similarly, our own Tenth Circuit has held:

> The Tax Injunction Act is based on principles of federalism and is designed to prevent a federal court from interfering with the administration of a state tax system. Thus, the TIA operates to divest federal courts of subject matter jurisdiction over claims challenging state taxation procedures where the state courts provide a plain, speedy and efficient remedy.

See Marcus v. Kansas Department of Revenue, 170 F.3d 1305, 1309 (10th Cir. 1999). *See also Brooks v. Nance,* 801 F.2d 1237, 1239 (10th Cir. 1986) (holding that the TIA is a broad prohibition against the use of the equity powers of federal courts involving state tax matters.)[11]

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[11]Consistent with such concept, in *J.B. ex. rel. Hart v. Valdez,* 186 F.3d 1280, 1286-87 (10th Cir. 1999) the Court stated: "In that case, [ANR Pipeline] we held that the power to assess and levy personal property taxes on land within the state of Kansas constituted a special sovereignty interest. *See* ANR Pipeline Co., 150 F.3d at 1190-94. After declaring that 'a state's sovereign power to tax its citizens has been a hallmark of the western legal tradition,' and that 'Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system,' *id.* at 1193, we stated: 'We do not doubt, therefore, that a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty.'"

Further, although its title refers only to injunctions, the Act also precludes federal courts from granting declaratory or monetary relief. *See National Private Truck Council, Inc. v. Oklahoma Tax Commission,* 515 U.S. 582, 586-87 (1995).

The Sixth Circuit has similarly held:

> The TIA reflects "the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 103 (1981). This exclusion of federal courts from the state taxation area is so far reaching it precludes federal courts from declaring state tax laws unconstitutional.

See Thiokol Corp. v. Department of Treasury, State of Michigan, 987 F.2d 376, (6th Cir. 1993).[12]

Qwest's prayer, in practical effect, is to have this Court declare unconstitutional the constitutional and statutory tax schemes of the State of Utah. For the reasons set forth in this Memorandum, this Court must decline Qwest's invitation to do so.

Finally, as Qwest is likely well-aware, Utah has specifically authorized the initiation of declaratory judgment actions in state court permitting any person to "have determined any question of construction or validity arising under the instrument, *statute*, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relationship hereunder." *See* Utah Code § 78-33-2. In addition, the Legislature has determined that declaratory judgment actions are "declared to be remedial; [the] purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." *See* Utah Code § 78-33-2. Qwest may not legitimately be

[12] It is reasonable to assume that Qwest will respond to this argument by submitting that it is not trying to enjoin, suspend or restrain the assessment of any tax but rather to compel the collection thereof. Such an argument, however, amounts to a distinction without a difference. The very purpose of the Tax Injunction Act, as universally noted by federal courts, is to drastically limit the interference of federal courts in the local concern of tax policy. That would include the real or imputed imposition of a tax contrary to state tax policy.

heard to claim that this Court has any greater capacity to resolve the tax related issues before it than do the courts of the State of Utah. To the extent its claim has merit, which UTOPIA categorically contests, Utah courts offer a forum for a plain, speedy and efficient remedy. *See Qwest v. City of Surprise.*

IV.

QWEST'S PRAYER FOR RELIEF WOULD REQUIRE A VIOLATION OF THE SEPARATION OF POWERS

As indicated, Qwest prays, *inter alia*, that this Court order UTOPIA to "pay sales and property taxes or impute the amount of the taxes into its rates." *See* Amended Second Amended Complaint Request for Relief ¶ 3.[13] Qwest's prayer thus asks this Court to do something that it has no power to do – create a tax scheme that neither Congress nor the Utah Legislature has seen fit to enact. Simply stated, this Court has no power to intrude into the exclusive realms of the respective federal or state legislative bodies.

As Justice Thomas wrote:

> In this case, not only did the District Court exercise the legislative power to tax, it also engaged in budgeting, staffing, and educational decisions, in judgments about the location and esthetic quality of the schools, and in administrative oversight and monitoring. These functions involve a legislative or executive, rather than a judicial, power. (Citations omitted). As Alexander Hamilton explained the limited authority of the federal courts: "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." The Federalist No. 78, at 526.

See Missouri v. Jenkins 515 U.S. 70, 134 (1995).

Qwest seeks just such a result and the Court should summarily deny Qwest prayer to turn this Court into a state legislative body.

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[13] Qwest's prayer, if granted, would actually have the ironic result of increasing UTOPIA's revenue with no corresponding cost. Since UTOPIA is not required to remit any taxes, the collection or imputation of such taxes would simply increase UTOPIA's "profit" – a result that Qwest would likely argue is equally unfair.

In addition to the constitutional bar of separation of powers, Congress saw fit to specifically recognize such bar statutorily. The Telecommunications Act makes clear that absent an express statement in the Act to the contrary federal, state and local law remain in effect. Specifically, Section 601(c)(1) states:

> No implied effect.-- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

See, City of Dallas, Tx. v. FCC, 165 F.3d 341 (5th Cir. 1999) (upholding local franchising of open video service providers in absence of express prohibition in Act).

When it adopted Section 253 of the TCA, Congress also adopted § 601(c)(2). In § 601(c)(2) Congress specifically and intentionally affirmed the continuation of state taxing authority. The state tax savings provision of § 601(c)(2) provides,

> Notwithstanding paragraph (1), nothing in the Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authority the modification, impairment, or suppression of, any State or local law pertaining to taxation, . . . Telecommunications Act of 1996, Pub.L.No. 104-104, sec. 601(c)(2), 110 Stat. 56, 143 (47 U.S.C.A. § 152 advisory note (West Supp. 1997)).[14]

As the Ninth Circuit noted in *City of Surprise,* even in the absence of the Tax Injunction Act, Section 601(c)(2) of the TCA would preclude preemption of Utah's taxing authority.

> We recognize also that if the Tax Injunction Act did not apply, the district court correctly concluded that § 601 of the FTA saved the taxes from preemption.

City of Surprise at footnote 3.

This Court's power to grant Qwest's requested relief is barred not only by the concept of separation of powers but by a clear and specific statutory prohibition of § 601(c)(2).

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[14] Congress provided three exceptions but none are germane to the matter at bar.

V.

QWEST HAS FAILED TO JOIN AN INDISPENSABLE PARTY

Qwest complains that UTOPIA benefits from its status as a political subdivision of the State of Utah and specifically alleges that the State has bestowed such benefits upon UTOPIA. Qwest has, however, intentionally omitted the very party whose conduct created the alleged benefit and whose participation in this lawsuit would be required to administer the relief requested by Qwest – the State of Utah.

F.R.C.P. 19 provides factors to be considered for joining a party to an action. In *Provident Tradesman Bank and Trust v. Patterson*, 390 U.S. 102, 109-11 (1968) the Supreme Court noted that the factors represent:

> [F]our distinct interests: (1) "the interest of the outsider whom it would have been desirable to join." (2) the interest of the defendant in avoiding "multiple litigation, . . . inconsistent relief, or sole responsibility for a liability he shares with another,". . . ; (3) "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies[,] . . . settling disputes by wholes, whenever possible . . ." and (4) the plaintiff's interest in having a forum in which to present the claims . . .

See also Davis v. U.S., 343 F.3d 1282, 1290 (10th Cir. 2003).

Without the presence of the State in this litigation, any result will not resolve the underlying conflict and will, in fact, foster the need for further judicial activity among the various parties. The State is a necessary and indispensable party for the full and equitable resolution of this litigation. Its Constitutional provision relating to *ad valorem* tax exemptions and its sales tax legislation relating to exemptions are under attack by Qwest. Although not stated as such, the practical effect of Qwest's claims are "as applied" challenges to Utah's constitutional and statutory tax policies based upon federal preemption.

In addition, the federal District Court for Utah ha recognized the importance of the State's interest in protecting its statutes.[15] DUCiv Rule 24-1(b) sets forth a specific procedure to notify the State so that it may be heard on such matters. Qwest has failed to comply and any consideration of its claims of the unconstitutionality of Utah's tax laws are premature until Qwest has met the requirements set forth in the Court's rule.[16]

Qwest's prayer requires the presence of the State of Utah both for a determination of the legal issues as well as the implementation of Qwest's prayed-for remedy.[17]

VI.

UTOPIA HAS NOT TRESPASSED ON QWEST'S PROPERTY OR, ALTERNATIVELY, IS IMMUNE FROM SUCH TRESPASS

For the reasons set forth in its Arguments contained in UTOPIA's and Tetra Tech's Joint Memorandum in Opposition to Qwest's Motion for Summary Judgment, which Arguments are adopted herein by reference, UTOPIA is entitled to Summary Judgment on all trespass and trespass derivative claims.

CONCLUSION

After being an active participant in and supporter of the very legislation that permitted UTOPIA to exist and to operate in precisely the manner it has, Qwest has now decided that the legislation that it supported puts it at a significant competitive disadvantage. UTOPIA, and

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[15] Qwest not only challenges certain tax laws of the State, but, as evidenced by its Reply Memorandum in Support of Partial Summary Judgment, it is also challenging certain provisions of the Governmental Immunity Act as well. As it has failed to do in this instance, it has similarly failed to comply with the Court's Rule and state law in asserting that challenge.

[16] Similarly, the Utah Legislature has demonstrated its interest in protecting its laws by assuring that it is represented in litigation challenging the same. *See* Utah Code § 78-33-11 ("...if a statute or state franchise or permit is alleged to be invalid the attorney general shall be served with a copy of the proceeding and be entitled to be heard.

[17] Any assessment of UTOPIA's property would have to be performed and administered by the State Tax Commission. In addition, any collection or imputation would similarly have to be done by the Commission, just as it is for Qwest.

hopefully this Court, must wonder why the change of direction. The most apparent reason would appear to be Qwest's desire to return to its old monopolistic ways – a desire that is wholly contrary to the very Act of Congress under which Qwest now seeks to throttle UTOPIA's fledgling competitive efforts.

The Telecommunications Act was *not* enacted as protectionist legislation for the incumbents but rather as protection *from* the incumbents. Congress also saw the need to provide all telecommunication providers, Qwest and UTOPIA alike, with certain levels of protection from local governments in the field of regulatory control of governments' rights-of-way and franchising authority – thus § 253 was enacted. That section, however, has no place in this litigation because UTOPIA has no authority to regulate rights-of-way or to issue franchises. In point of fact, UTOPIA has no ability to exercise *any* governmental authority that materially inhibits Qwest's ability to compete in the marketplace. However, even assuming, *arguendo,* that there is some remote basis for the application of § 253 to UTOPIA, such application is rendered moot pursuant to the "safe harbor" provisions of § 253.

Qwest also seeks to have this Court do something it cannot do – intrude itself into the tax affairs of the State of Utah. This Court may not do so because: (1) the separation of powers doctrine forbids it; (2) § 601 of the Telecommunications Act forbids it; (3) the Tax Injunction Act forbids it; (4) Qwest has failed to join the State of Utah whose statutes are under attack; and (5) Qwest has failed to comport its challenge of the State's statutes to Court Rule and Utah law.

Finally, for the reasons more fully set forth in UTOPIA's Memorandum in Opposition to Qwest's Motion for Partial Summary Judgment, Qwest's trespass claims and claims derivative of the trespass claims are not only subject to the Governmental Immunity Act but are not trespass at all.

UTOPIA is entitled to the entry of a Judgment of Dismissal with prejudice on Qwest's Amended Second Amended Complaint.

Dated this 11th day of July, 2006.

/s/ Steven W. Allred
Attorney for Defendant Utah Telecommunication Open Infrastructure Agency

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Memorandum in Support of Motion for Summary Judgment by e-mail transmission via CM/ECF to the following on the date set forth below:

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DATED this 11th day of July, 2006.

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