

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 08 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TIME WARNER TELECOM OF
OREGON, LLC, an Oregon limited
liability company,

Plaintiff,

and

QWEST COMMUNICATIONS
CORPORATION, a Delaware corporation
QWEST CORPORATION, a Colorado
corporation,

Plaintiffs - Appellants,

v.

CITY OF PORTLAND, an Oregon
municipal corporation,

Defendant - Appellee.

No. 06-36023

D.C. Nos. CV-04-01393-PA
CV-05-01386-PA

MEMORANDUM*

TIME WARNER TELECOM OF
OREGON, LLC, an Oregon limited
liability company,

No. 06-36024

D.C. Nos. CV-04-01393-PA
CV-05-01386-PA

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Plaintiff - Appellant,

and

QWEST COMMUNICATIONS
CORPORATION, a Delaware corporation
QWEST CORPORATION, a Colorado
corporation,

Plaintiffs,

v.

CITY OF PORTLAND, an Oregon
municipal corporation,

Defendant - Appellee.

TIME WARNER TELECOM OF
OREGON, LLC, an Oregon limited
liability company; QWEST
COMMUNICATIONS CORPORATION,
a Delaware corporation; QWEST
CORPORATION, a Colorado corporation,

Plaintiffs - Cross/Appellees,

v.

CITY OF PORTLAND, an Oregon
municipal corporation,

Defendant - Cross/Appellant.

No. 06-36061

D.C. Nos. CV-04-01393-PA
CV-05-01386-PA

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding

Argued and Submitted February 4, 2009
Portland, Oregon

Before: PAEZ and RAWLINSON, Circuit Judges, and JENKINS^{**}, District Judge.

As clarified at oral argument, Qwest Communications Corporation (Qwest) appeals the district court's judgment in favor of the City of Portland (the City) on Qwest's challenge to the franchise fees based on per-foot usage, and the "in-kind" provisions of its franchise agreement.

Time Warner Telecom of Oregon, LLC (TWT) appeals the district court's judgment in favor of the City on TWT's challenge to the five percent gross revenue fee included in its franchise agreement, and the district court's determination that the services provided by TWT were included within the agreement's definition of "telecommunication services."

The City cross-appeals the district court's determination that TWT's "in-kind" requirement violated the Telecommunications Act.

^{**} The Honorable Bruce S. Jenkins, Senior U.S. District Judge for the District of Utah, sitting by designation.

1. The in-kind requirements that Qwest challenges, which were provided to the City twelve years ago, do not vest the City with broad discretion, and they do not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation. *See Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (setting the standard for whether a requirement violates the Telecommunications Act). Therefore, these requirements do not violate § 253(a) of the Telecommunications Act.

2. Similarly, because the annual fees imposed on Qwest, calculated on per-foot usage, do not have the effect of prohibiting Qwest from providing telecommunications services, they do not violate § 253(a).

3. The five percent gross revenue fees imposed on TWT by the City were taxes within the meaning of the Tax Injunction Act. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir. 2006) (describing factors to consider in determining whether a fee constitutes a tax). Therefore, we agree with the district court that the Tax Injunction Act deprived it of jurisdiction to review the specific provisions of the telecommunications franchise agreements. *See id.*

4. The district court committed no error when it decided that the information services provided by TWT fell within the broad definition of “telecommunications system” in the franchise agreement. *See Bernard v. First Nat’l Bank of Oregon*, 550 P.2d 1203, 1210 (Or. 1976) (holding that under Oregon law, contract terms are presumed to have been used “in their primary and general acceptance” absent evidence to the contrary).

5. Ruling without the benefit of *Sprint*, the district court erred in determining that TWT’s in-kind requirements violated § 253 of the Federal Telecommunications Act. Under the standard adopted in *Sprint*, these requirements did not have the effect of prohibiting the provision of telecommunications services.

AFFIRMED IN PART AND REVERSED IN PART. EACH PARTY SHALL BEAR ITS COSTS ON APPEAL.