

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

**RECEIVED**

SEP 28 2016

SC Court of Appeals

Case No. 14-ALJ-17-0285-CC  
Appellate Case No. 2016-001642

Dish DBS Corporation, f/k/a EchoStar, DBS Corp., and Affiliates..... Appellant,

v.

South Carolina Department of Revenue..... Respondent.

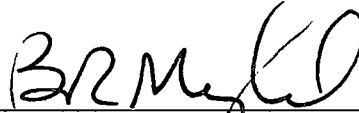
APPELLANT'S MOTION TO CONSOLIDATE APPEALS

Appellant, Dish DBS Corporation, f/k/a EchoStar, DBS Corp., and Affiliates, pursuant to Rule 214 of the South Carolina Appellate Court Rules (SCACR), requests that this appeal be consolidated with *DIRECTV, Inc. and its Subsidiaries v. South Carolina Department of Revenue*, Case No. 14-ALJ-17-0158-CC (Appellate Case No. 2015-001509), which is currently pending before this Court. The grounds for the motion are that these separate matters involve the identical question regarding the proper apportionment method of satellite television companies for purposes of South Carolina state corporate income tax. Rule 214, SCACR, provides that where the same question is involved in two or more appeals in different cases, this Court may consolidate appeals at its discretion. Appellant and DIRECTV are challenging Respondent's interpretation and application of apportionment methodology, which it has taken on a consistent basis in

both matters throughout the adjudicative process. In fact, the Department Determinations for each matter (copies of which are attached under Tab 1 and Tab 2), which serve as the basis for each appeal, make virtually identical conclusions and rely on virtually identical case law and authority.

Based on the foregoing, Appellant respectfully requests this Court consolidate the above-referenced matters pursuant to Rule 214, SCACR. The orders that are the subject of the two appeals in this case involve common questions of law and facts, and it will avoid confusion and promote judicial economy to consolidate the appeals for purposes of argument and disposition.

RESPECTFULLY SUBMITTED,



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*Attorneys for Appellant Dish DBS Corporation,  
f/k/a EchoStar, DBS Corp., and Affiliates*

September 28, 2016  
Columbia, South Carolina

## DEPARTMENT DETERMINATION

### Taxpayer:

Dish DBS Corporation,  
f/k/a Echostar DBS Corp. and Affiliates  
9601 South Meridian Blvd.  
Englewood, CO 80112

By and Through: John Galloway  
Deloitte Tax LLP  
Suite 550 South Tryon St.  
Charlotte, NC 28202

### Periods Involved:

Income Tax periods ending 2004 through 2010; License Fee periods ending 2006 through 2011.

### Matter in Dispute:

Is the Taxpayer entitled to source its income related to the sale of television broadcast subscriptions in South Carolina to another state?

### Amounts in Dispute:

	TAX	INTEREST*	PENALTY*	TOTALS
Income Tax	\$544,286.00	\$399,496.00	\$276,307.00	\$1,220,089.00
License Fee	90,551.00	32,196.00	21,846.00	144,593.00
<b>TOTALS</b>	<b>\$634,837.00</b>	<b>\$431,692.00</b>	<b>\$298,153.00</b>	<b>\$1,364,682.00</b>

\*Interest and Penalty calculated through May 31, 2014 and will continue to accrue until this matter is resolved.

### Determination:

The Taxpayer is not entitled to source its income related to the sale of television broadcast subscriptions in South Carolina to another state.

### Relevant Facts:

1. Dish DBS Corporation (hereinafter "Dish Corp" or "Taxpayer") is headquartered in Englewood, Colorado, and provides access to digital television entertainment to South Carolina customers. It operates throughout the United States.

2. Dish Corp grants its subscribers access to hundreds of television programming channels and other audio/visual options that are transmitted nationwide to subscriber's homes or businesses via high-powered satellites. Subscribers pay a monthly fee for access to basic channels and can also purchase premium channels and pay-per-view programs for an additional fee.
3. Each South Carolina subscriber rents a satellite dish, remote controls, and receiver box in order to access Dish Corp's programming from their home.
4. Dish Corp filed its original 2004-2010 income tax returns with little consistency. For some years it filed to reflect an approach which sourced its subscription receipts to the origin of its customers. Other years it utilized a sourcing method based upon a cost of performance to establish the income producing activity, sourcing its revenue to its corporate headquarters. The Taxpayer also oscillated between using the standard four-factor apportionment method and the gross receipts method for the tax years at issue.
5. The Department of Revenue (Department) audited the Taxpayer's returns and in a letter dated June 29, 2012, issued proposed notice of assessment. That notice asserted that the taxpayer should be filing using the gross receipts apportionment method and sourcing its receipts from South Carolina subscribers to this State. It also assessed substantial understatement penalties pursuant to S.C. Code Ann. § 12-54-155 (2014).
6. The Taxpayer timely protested the Department's denial of the refund claim and adjustments on the returns in a letter dated September 26, 2012.

**Discussion:**

Dish Corp objects to the inclusion of its South Carolina subscription receipts as part of its numerator in the calculation of its state tax liability and contends that only the receipts from equipment rentals should be sourced here. As discussed below, the Taxpayer's assertions are without merit and inconsistent with South Carolina law and jurisprudence.

Because Dish Corp is a media broadcasting company not regularly engaged in the sale of tangible personal property, its apportioned net income is determined pursuant to S.C. Code Ann. § 12-6-2290 (2014). For tax years prior to 2010,<sup>1</sup>

[i]f the principal profits or income of a taxpayer are derived from sources other than [manufacturing or

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<sup>1</sup>In 2007, Section 12-6-2290 was amended by replacing "12-6-2252" for "12-6-2250" and adding the language "For purpose of this section, items included in gross receipts are as provided in Section 12-6-2295". These amendments, however, are effective for tax years after 2010.

dealing in tangible personal property] or [certain industries], the taxpayer shall apportion its remaining net income using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year.

Section 12-6-2290 (citations omitted) (emphasis added). It is well settled law that the purpose of the South Carolina allocation and apportionment provisions is to provide for imposition of income tax “upon a base which reasonably represents the proportion of the trade or business carried on within this State.” Hertz Corp. v. S.C. Tax Comm’n, 246 S.C. 92, 142 S.E.2d 445 (1965). Furthermore, a statutory provision must be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm’n, 273 S.C. 269, 255 S.E.2d 837 (1979).

The operative question that remains upon application of Section 12-6-2290’s plain language to the facts of this case is quite simple: are Dish Corp’s subscription receipts from South Carolina customers generated “from within this State?” The Department’s auditor contends the question should be answered in the affirmative. Dish Corp believes that these subscription receipts should be deemed produced in California, based upon its interpretation of Lockwood Greene Engineers, Inc. v. South Carolina Tax Comm’n, 293 S.C. 447, 361 S.E.2d 346 (Ct. App. 1987). The analysis required to reach the appropriate answer to this argument rests squarely upon a determination of what is the “income producing activity” in relation to the generation of the subscription receipts at issue.

#### **I. The Income Producing Activity for Dish Corp Occurs Within This State.**

In Lockwood, the Court of Appeals determined that the gross receipts of an engineering firm must be apportioned according to the location where the services were performed rather than to where its customers were located. The court referred to this as the “place of activity” test and held that Lockwood’s income producing activity was the provision of personal engineering services. The court further held that because the engineer rendered the services where he physically worked, then the income derived from those services was part of the receipts of the state-in which the engineer was located – meaning, work performed in South Carolina was held to be South Carolina receipts.

The Taxpayer erroneously contends that Lockwood “solidified the ‘place of activity’ test as the operative test to determine the portion of a taxpayer’s income producing activities occurring within South Carolina for the purpose of assigning receipts to the South Carolina apportionment factor.”<sup>2</sup> This argument, however, completely disregards the clear limitations of the Lockwood Court’s holding:

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<sup>2</sup>Taxpayer’s Letter dated September 26, 2012 at 3.

Lockwood also argues the statute has not been consistently interpreted by the Tax Commission. Lockwood refers to Tax Commission guidelines concerning computation of the gross receipts of finance companies and media broadcasters. We are not persuaded these businesses are comparable to Lockwood. By contrast, the Tax Commission guidelines concerning law firms, accounting firms, entertainment and sports companies, and hospital management companies all focus on whether the services are performed in South Carolina. These situations are analogous and consistent with the situation of Lockwood

Lockwood, 293 S.C. at 450, 361 S.E.2d at 348 (emphasis added). The Lockwood Court's decision was based on the Department's long standing administrative practice of apportioning income for certain taxpayers. For example, income from finance companies is apportioned in South Carolina based on whether the borrower resides in this state. Engineers and architects are taxed here if they perform any services in the state. Law firms and accounting firms are subject to tax based on where they perform the personal services for which they are paid. Restaurant franchise companies that have no activity in this state except the presence of their franchise name from which they derive their income are subject to tax in South Carolina. Based on this language, it is abundantly clear that the Court of Appeals intended to limit its holding to certain types of personal service providers. Lockwood logically stands for the proposition that personal service providers should apportion their South Carolina income based on a "place of activity" approach, as that type of service has a direct causal link to the production of income. Here, however, Dish Corp is not a personal service provider; therefore, Lockwood is wholly inapplicable.

The Taxpayer further argues that it should apportion its income pursuant to S.C. Code Ann. § 12-6-2280 (2014), which is the sales factor for businesses whose principal business is manufacturing or dealing in tangible personal property who are apportioning their income pursuant to the three-factor formula under S.C. Code Ann. § 12-6-2250 (2014). However, as demonstrated above, Dish Corp's principal business is the provision of television programming via satellite and, therefore, must apportion its income pursuant to Section 12-6-2290. Nonetheless, Dish Corp further relies on S.C. Code Ann. § 12-6-2295(A)(5) (2014) which reads "sales are attributable to this State to the extent the income-producing activity is performed within this State." It is this very language that provides the basis for Dish Corp's suggestion that its income should be sourced based on a cost of performance approach. While some jurisdictions, including the Multistate Tax Commission, have enacted statutes or regulations with identical language, those jurisdictions have also included the express language "based on cost of performance" in the sourcing provisions. The South Carolina General Assembly, however, chose not to include such language, meaning Section 12-6-2295(A)(5) does not require that income be

sourced for South Carolina apportionment purposes based on a cost of performance, but rather turns upon a factual analysis of the income producing activity.<sup>3</sup>

To that end, Dish Corp argues that its activities (a majority of which occur outside the State), including (1) selecting, negotiating, acquiring, and managing broadcast programming; (2) managing and servicing the subscriber network; (3) managing the broadcast infrastructure; and (4) receiving programming content (which is then uplinked to the satellites) are its actions that produce income. However, as noted above, Dish Corp's business is one centered upon broadcasting television programming via satellites into the homes of its customers. All of the specific activities identified by Dish Corp lack any and all intrinsic value without the actual provision of television programming to South Carolina customers. It is vital to note here that each and every one of the activities the Taxpayer attempts to characterize as "income producing" has no direct causal effect upon the generation of income. All of them are inherently indirect activities, or rather, precursors to the only direct activity that creates Dish Corp profit. It is *the final act*, the culmination of those enumerated activities – the delivery of the signal into the homes and onto the television screens of its customers – that produces income for Dish Corp. It does not sell contract negotiations. It does not sell network management services. It does not sell broadcast infrastructure or satellite triangulation. Dish Corp is in the business of selling television broadcast subscriptions to customers, and without the actual delivery of that broadcast signal into South Carolina homes it would not have generated the income at issue here. It is that act alone for which South Carolina customers sign contracts and pay their monthly fees.

South Carolina is not alone in this method of sourcing receipts for taxpayers like Dish Corp. Twenty-three states have adopted the "audience approach" for assigning receipts from programming and broadcasting companies.<sup>4</sup> Florida, for example, adopted the following language:

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<sup>3</sup> In fact, in 1995 language about "cost of performance" was removed from the sales factor statute by our legislature, which shows a clear legislative intent that the phrase "income producing activity was not to be limited in such a fashion.

<sup>4</sup> See e.g., Alabama - Ala. Admin. Code R. 810-27-1-4.18(h) (2013); Arkansas - Ark. Admin. Code § 006.05.308-26-51-718(d)(2.26-51-718(d)) (2013); Colorado - 1 Colo. Code Regs. § 201-3, Spec. Reg. 5A (2013); Connecticut - Conn. Gen. Stat. § 12-218(l) (2013); Florida - Fla. Admin. Code Ann. R. 12C-1.0155(2)(i) (2013); Georgia - Ga. Comp. R. & Regs. 560-7-7.03(5)(c) 6(vii) (2013); Hawaii - Haw. Code R. § 18-235-38-06.04 (2013); Idaho Admin. Code R. 35.01.01.580(01)(e) (2013); Iowa Admin. Code R. 701-54.7(5)(422) (2013); Maryland - Md. Code Regs. 03.04.03.09 (2013); Michigan - Mich. Comp. Laws Ann. § 208.1305(20) (2013); Montana - Mont. Admin. R. 42.26.1103 (2013); New Hampshire - NH Code R. Rev. 304.09 (2013); New Mexico - NM Code R. § 3.5.19(18) (2013); North Dakota - ND Admin. Code R. 81-03-09-38 (2013); Oregon - Or. Rev. Stat. § 314.684 (2013); Or. Admin. R. 150-314.684(4) (2013); California - 18 CA ADC § 25137-8.1 (2013); Illinois - 35 ILCS 5/305(B7) (2013); Louisiana - La. Rev.

Television and Radio Broadcasting. Gross receipts, including advertising revenues, from broadcasting within and without the state will be attributed to the numerator of the sales factor on the basis of the ratio of the audience within the state to the audience everywhere.

Fla. Admin. Code Ann. R. 12C-1.0155(2)(i) (2013). This approach has been tested in adjudicative proceedings as well, and courts in other jurisdictions have held that audience based sourcing for taxpayers like Dish Corp is the proper method. For example, in Texas an Administrative Law Judge illuminated the income producing activity when he held:

The act Petitioner's customer contracts and pays to receive, and the act that produces the receipts at issue, is the act performed by the receiver (i.e., the set top box) that Petitioner sells or leases to its subscribers. Petitioner's customers contract for the receipt of television programming. Petitioner contracts to provide the programming, and it is the microchips within the receiver that unscramble and decode the satellite's encrypted signal that completes the transaction and produces the programming receipt. It is undisputed that each of the programming receipts scheduled within the audit are receipts Petitioner received from Texas subscribers. The ALJ finds the auditor correctly apportioned the receipts at issue.

Anonymous Taxpayer v. Texas Comptroller of Public Accounts, 2013 WL 3490605 (Tex. Cptr. Pub. Acct.) (May 17, 2013) (emphasis added). The approach the auditor has taken here is identical to the Texas ALJ's rationale. Dish Corp produces income in South Carolina by providing receiver boxes that interpret a broadcast signal for South Carolina customers. To that extent, and in complete consistency with Section 12-6-2290, those gross receipts should be sourced to South Carolina.

## II. The Penalties Assessed were Proper.

Civil penalties are applied to every South Carolina tax law which requires a return unless otherwise provided. S.C. Code Ann. § 12-54-43 (2014). Such penalties are considered a tax owed this State. Id. Further, "[i]f any tax is not paid when due, interest is due on the

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Stat. Ann. § 47:287.95(K)(2)(c)(i) (2013); New Jersey - Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 478 A.2d 742 (1984) (citing N.J. Stat. Ann. § 54:10A-8.(2013)); Ohio - Ohio Admin. Code 5703-29-17(9)(a) (2013); Rhode Island - R.I. Admin. Code § 60-1-194:1 (2013); Washington - Wash. Admin. Code 458-20-241(2013).

unpaid portion from the time the tax was due until paid in its entirety." S.C. Code Ann. § 12-54-25(A) (2014). Section 12-54-155(A)(1) states that "[i]f there is an underpayment attributable to...a substantial understatement of tax for a taxable period...there must be added to the tax an amount equal to twenty-five percent of the amount of the underpayment." (Emphasis added.) For purposes of this subsection, "understatement" means the excess of the amount of the tax required to be shown on the return for the taxable period over the amount of the tax imposed which is shown on the return. There is a substantial understatement of tax for a taxable period if the amount of the understatement for the taxable period exceeds the greater of ten percent of the tax required to be shown on the return for the taxable period or five thousand dollars. Id. In the instant matter, the Department applied a substantial understatement penalty for underpayment of taxes owed.

**Conclusion:**

The gross receipts that Dish Corp generates from the sale of subscriptions are directly produced from activity that occurs within this state. The Taxpayer's attempts to argue its out-of-state activities create the income at issue, based upon its strained interpretation of Lockwood, lack all merit. Subscription receipts should be sourced to South Carolina, and the assessment, including penalties, is upheld.

May 13, 2014.

**DEPARTMENT DETERMINATION**

**Taxpayer:**

DIRECTV, Inc. & Subsidiaries  
2250 E. Imperial Highway  
El Segundo, CA 90245

By and Through: John Galloway  
Deloitte Tax LLP  
Suite 550 South Tryon St.  
Charlotte, NC 28202

**Periods Involved:**

Income Tax Periods Ending 2006 through 2011,  
License Fee Periods Ending 2010 through 2012.

**Matter in Dispute:**

Is the Taxpayer entitled to source its income related to the sale of television broadcast subscriptions in South Carolina to another state?

2006 through 2008 Requested Refund Amount: **\$5,976,816.00**

2009 through 2011 Tax Years:

	<b>TAX</b>	<b>INTEREST</b>	<b>PENALTY</b>	<b>TOTALS</b>
Income Tax	\$6,613,067.00	\$651,397.00	\$1,653,233.00	\$8,917,730.00
License Fee	33.101.00	2,028.00	8,725.00	43,404.00
<b>TOTALS</b>	<b>\$6,646,168.00</b>	<b>\$653,425.00</b>	<b>\$1,661,541.00</b>	<b>\$8,961,134.00</b>

**Determination:**

The Taxpayer is not entitled to source its income related to the sale of television broadcast subscriptions in South Carolina to another state.

**Facts:**

1. DIRECTV, Inc. & subsidiaries (DIRECTV) is headquartered in El Segundo, California, and provides access to digital television entertainment to South Carolina customers. It operates throughout the United States and Latin America.

2. DIRECTV grants its subscribers access to hundreds of television programming channels and other audio/visual options that are transmitted nationwide to subscriber's homes or businesses via high-powered satellites. Subscribers pay a monthly fee for access to basic channels and can also purchase premium channels and pay-per-view programs for an additional fee.
3. Each South Carolina subscriber rents a satellite, remote controls, and receiver box in order to access DIRECTV's programming from their home.
4. Originally, DIRECTV filed its 2006, 2007, and 2008 returns to reflect a market based sourcing method for its subscription revenue, which sourced its subscription receipts to the origin of its customers.
5. DIRECTV subsequently amended those returns to reflect a cost of performance approach, sourcing its income generated from customer subscriptions to its headquarters in California. Based upon the amended approach, the taxpayer's South Carolina tax liability was substantially decreased and it claimed a sizable refund for those years. The taxpayer also filed its original 2009 through 2011 returns to reflect the same cost of performance sourcing scheme.
6. The Department of Revenue (Department) audited the taxpayer's amended returns and in a letter dated November 29, 2011, denied the refunds claimed, asserting the taxpayer's receipts from South Carolina subscribers should be sourced to this State. Subsequent to that audit, and prior to the issuance of this Determination, the Department audited the taxpayer's returns for 2009 through 2011 and issued an assessment on the same legal basis as the refund denial.
7. The taxpayer timely protested the Department's denial of the refund claim and adjustments on the returns in a letter dated February 27, 2012. The taxpayer has also protested the additional assessment for its subsequent returns.

**Discussion:**

DIRECTV does not contest its duty to file for engaging in business in South Carolina. Rather, it raises a new objection to the inclusion of its South Carolina subscription receipts as part of its apportioned net income for its state tax liability and contends that only the receipts from equipment rentals should be sourced here. As discussed below, the taxpayer's assertions are without merit and inconsistent with South Carolina law and jurisprudence.

Because DIRECTV is a media broadcasting company and is not regularly engaged in the sale of tangible personal property, its apportioned net income is determined pursuant to S.C. Code Ann. § 12-6-2290 (Supp. 2006). For tax years prior to 2010:<sup>1</sup>

[i]f the principal profits or income of a taxpayer are derived from sources other than [manufacturing or dealing in tangible personal property] or [certain industries], the taxpayer shall apportion its remaining net income using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year.

Section 12-6-2290 (citations omitted) (emphasis added). It is well settled law that the purpose of the South Carolina allocation and apportionment provisions is to provide for imposition of income tax “upon a base which reasonably represents the proportion of the trade or business carried on within this State.” Hertz Corp. v. S.C. Tax Comm’n, 246 S.C. 92, 142 S.E.2d 445 (1965). Furthermore, a statutory provision must be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm’n, 273 S.C. 269, 255 S.E.2d 837 (1979).

The operative question that remains upon application of Section 12-6-2290’s plain language to the facts of this case is quite simple: are DIRECTV’s subscription receipts from South Carolina customers generated “from within this State?” The Department’s auditor contends the question should be answered in the affirmative. DIRECTV believes that these subscription receipts should be deemed produced in California, based upon its interpretation of Lockwood Greene Engineers, Inc. v. South Carolina Tax Comm’n, 293 S.C. 447, 361 S.E.2d 346 (Ct. App. 1987). The analysis required to reach the appropriate answer to this argument rests squarely upon a determination of what is the “income producing activity” in relation to the generation of the subscription receipts at issue.

#### **I. The Income Producing Activity for DIRECTV Occurs Within This State.**

In Lockwood, the Court of Appeals determined that the gross receipts of an engineering firm must be apportioned according to the location where the services were performed rather than to where its customers were located. The court referred to this as the “place of activity” test. Lockwood’s income producing activity was the provision of personal engineering services. The court held that because the engineer rendered his services where he physically worked, then the income derived from those services was part of the

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<sup>1</sup>In 2007, Section 12-6-2290 was amended by replacing “12-6-2252” for “12-6-2250” and adding the language “For purpose of this section, items included in gross receipts are as provided in Section 12-6-2295”. These amendments, however, are effective for tax years after 2010.

receipts of the state in which the engineer was located – meaning, work performed in South Carolina was held to be South Carolina receipts.

DIRECTV erroneously contends that Lockwood “solidified the ‘place of activity’ test as the operative test to determine the portion of a taxpayer’s income producing activities occurring within South Carolina for the purpose of assigning receipts to the South Carolina apportionment factor.”<sup>2</sup> Such belief, however, completely disregards the clear limitations of the Lockwood Court’s holding:

Lockwood also argues the statute has not been consistently interpreted by the Tax Commission. Lockwood refers to Tax Commission guidelines concerning computation of the gross receipts of finance companies and media broadcasters. We are not persuaded these businesses are comparable to Lockwood. By contrast, the Tax Commission guidelines concerning law firms, accounting firms, entertainment and sports companies, and hospital management companies all focus on whether the services are performed in South Carolina. These situations are analogous and consistent with the situation of Lockwood

Lockwood, 293 S.C. at 450, 361 S.E.2d at 348 (emphasis added). The Lockwood Court’s decision was based on the Department’s long standing administrative practice of apportioning income for certain taxpayers. For example, finance companies are taxed in South Carolina based on whether the borrower resides in this State. Engineers and architects are taxed here if they perform any services in the state. Law firms and accounting firms are subject to tax based on where they perform the personal services for which they are paid. Restaurant franchise companies that have no activity in this State except the presence of their franchise name from which they derive their income are subject to tax in South Carolina. Based on this language, it is abundantly clear that the Court of Appeals intended to limit its holding to certain types of service providers. Lockwood logically stands for the proposition that personal service providers should apportion their South Carolina income based on a cost of performance approach, as that type of service has a direct causal link to the production of income. Here, however, DIRECTV is not a personal service provider and, therefore, Lockwood is wholly inapplicable.

DIRECTV further argues that it should apportion its income pursuant to S.C. Code Ann. § 12-6-2280 (Supp. 2006), which is the sales factor for businesses whose principal business is manufacturing or dealing in tangible personal property who are apportioning their income pursuant to the three-factor formula under S.C. Code Ann. § 12-6-2250 (Supp. 2006). However, as demonstrated above, DIRECTV’s principal business is the provision of television programming via satellite and, therefore, must apportion its

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<sup>2</sup>Taxpayer’s Letter dated October 5, 2012 at 2.

income pursuant to Section 12-6-2290. Nonetheless, DIRECTV further relies on S.C. Code Ann. § 12-6-2295(A)(5) (Supp. 2006) which reads “sales are attributable to this State to the extent the income-producing activity is performed within this State.” It is this very language that provides the basis for DIRECTV’s suggestion that its income should be sourced based on a cost of performance approach. While some jurisdictions, including the Multistate Tax Commission (MTC), have enacted statutes or regulations with identical language, those jurisdictions have also included the language “based on cost of performance” in the sourcing provisions. The South Carolina General Assembly, however, chose not to include such language, meaning Section 12-6-2295(A)(5) does not require that income be sourced for South Carolina apportionment purposes based on a cost of performance.

Furthermore, DIRECTV argues that its activities, a majority of which occur outside the State, including (1) selecting, negotiating, acquiring, and managing broadcast programming; (2) managing and servicing the subscriber network; (3) managing the broadcast infrastructure; and (4) receiving programming content (which is then uplinked to the satellites) are its income producing undertakings. However, as noted above, DIRECTV’s business is one centered upon broadcasting television programming via satellites into the homes of its customers. Meaning, all of the specific activities identified by DIRECTV lack any and all intrinsic value without the actual provision of television programming to South Carolina customers. It is vital to note here that each and every one of the activities the taxpayer attempts to characterize as “income producing” has no direct causal effect upon the generation of income. All of them are inherently indirect activities, or rather, precursors to the only directly engaged activity that creates DIRECTV profit. It is *this final act*, the culmination of those enumerated activities – the delivery of the signal into the homes and onto the television screens of its customers – that produces income for DIRECTV. It does not sell contract negotiations. It does not sell network management services. It does not sell broadcast infrastructure or satellite triangulation. DIRECTV is in the business of selling television broadcast subscriptions to customers, and without the actual delivery of that broadcast signal into South Carolina homes it would not have generated the income at issue here. It is that act alone for which South Carolina customers sign contracts and pay their monthly fees.

South Carolina is most certainly not alone in this method of sourcing receipts for taxpayers like DIRECTV. Twenty-three states have adopted the “audience approach” for assigning receipts from programming and broadcasting companies.<sup>3</sup> Florida, for example, adopted the following language:

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<sup>3</sup>See e.g., Alabama - Ala. Admin. Code R. 810-27-1-4.18(h) (2013); Arkansas - Ark. Admin. Code § 006.05.308-26-51-718(d)(2.26-51-718(d)) (2013); Colorado - 1 Colo. Code Regs. § 201-3, Spec. Reg. 5A (2013); Connecticut - Conn. Gen. Stat. § 12-218(l) (2013); Florida - Fla. Admin. Code Ann. R. 12C-1.0155(2)(i) (2013); Georgia - Ga. Comp. R. & Regs. 560-7-7.03(5)(c) 6(vii) (2013); Hawaii - Haw. Code R. § 18-235-38-06.04 (2013); Idaho Admin. Code R. 35.01.01.580(01)(e) (2013); Iowa Admin. Code. R. 701-54.7(5)(422) (2013); Maryland - Md. Code Regs. 03.04.03.09 (2013); Michigan -

Television and Radio Broadcasting. Gross receipts, including advertising revenues, from broadcasting within and without the state will be attributed to the numerator of the sales factor on the basis of the ratio of the audience within the state to the audience everywhere.

Fla. Admin. Code Ann. R. 12C-1.0155(2)(i) (2013). This approach has been tested in adjudicative proceedings as well, and courts in other jurisdictions have held that audience based sourcing for taxpayers like DIRECTV is the proper method. In Texas, an Administrative Law Judge illuminated the income producing activity when he held:

The act Petitioner's customer contracts and pays to receive, and the act that produces the receipts at issue, is the act performed by the receiver (i.e., the set top box) that Petitioner sells or leases to its subscribers. Petitioner's customers contract for the receipt of television programming. Petitioner contracts to provide the programming, and **it is the microchips within the receiver that unscramble and decode the satellite's encrypted signal that completes the transaction and produces the programming receipt.** It is undisputed that each of the programming receipts scheduled within the audit are receipts Petitioner received from Texas subscribers. The ALJ finds the auditor correctly apportioned the receipts at issue.

Anonymous Taxpayer v. Texas Comptroller of Public Accounts, 2013 WL 3490605 (Tex. Cptr. Pub. Acct.) (May 17, 2013) (emphasis added.). The approach the auditor has taken denying the refund claimed by DIRECTV's amended returns and in auditing its originally filed returns is identical to the Texas ALJ's rationale. DIRECTV produces income in South Carolina by providing receiver boxes that interpret a signal and provide television services to South Carolina customers. To that extent, and in complete

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Mich. Comp. Laws Ann. § 208.1305(20) (2013); Montana - Mont. Admin. R. 42.26.1103 (2013); New Hampshire - NH Code R. Rev. 304.09 (2013); New Mexico - NM Code R. § 3.5.19(18) (2013); North Dakota - ND Admin. Code R. 81-03-09-38 (2013); Oregon - Or. Rev. Stat. § 314.684 (2013); Or. Admin. R. 150-314.684(4) (2013); California - 18 CA ADC § 25137-8.1 (2013); Illinois - 35 ILCS 5/305(B7) (2013); Louisiana - La. Rev. Stat. Ann. § 47:287.95(K)(2)(c)(i) (2013); New Jersey - Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 478 A.2d 742 (1984) (citing N.J. Stat. Ann. § 54:10A-8.(2013)); Ohio - Ohio Admin. Code 5703-29-17(9)(a) (2013); Rhode Island - R.I. Admin. Code § 60-1-194:1 (2013); Washington - Wash. Admin. Code 458-20-241(2013).

consistency with Section 12-6-2290, those gross receipts should be sourced to South Carolina.

**Conclusion**

The gross receipts that DIRECTV generates from the sale of subscriptions are directly produced from activity that occurs within this state. The taxpayer's attempts to argue its out-of-state activities create the income at issue, pursuant to its strained interpretation of Lockwood, lack all merit. The refund claimed by the taxpayer in this matter was properly denied, and its revenue from subscription receipts should be sourced to South Carolina.

February 18, 2014

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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Case No. 14-ALJ-17-0285-CC  
Appellate Case No. 2016-001642

**RECEIVED**

SEP 28 2016

SC Court of Appeals

Dish DBS Corporation, f/k/a EchoStar, DBS Corp., and  
Affiliates.....

Appellant,

v.

South Carolina Department of Revenue.....

Respondent.

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PROOF OF SERVICE

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This is to certify that the foregoing Motion to Consolidate was sent via U.S. Mail  
addressed as follows this \_\_\_\_ day of September 2016:

William J. Condon, Jr., Esquire  
Nicole Martin Wooten, Esquire  
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Office of General Counsel for  
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The Honorable Shirley C. Robinson  
South Carolina Administrative Law Court  
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Columbia, SC 29201

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*Sharon Dodgins*

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Sharon Dodgins  
Legal Practice Assistant to Burnet R.  
Maybank, III

# NEXSEN | PRUET

Jim Rourke, J.D., LL.M (Tax)  
Associate

September 28, 2016

**RECEIVED**

SFP 28 2016

SC Court of Appeals

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

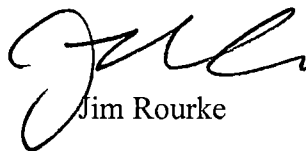
Re: Dish DBS Corporation, f/k/a EchoStar DBS Corp., and Affiliates v. South Carolina Department of Revenue  
Appellate Case No. 2016-001642  
DIRECTV, Inc. and its Subsidiaries v. South Carolina Department of Revenue  
Appellate Case No. 2015-001509

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Motion to Consolidate Appeals and Proof of Service. Also enclosed is our firm's check in the amount of \$25.00 to cover the filing fee. Please return a clocked-in copy to me via our courier.

By way of copy, I am serving counsel of record with the same. Thank you for your assistance.

Very truly yours,



Jim Rourke

JR/mw

Enclosures

cc w/ enc.:

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