

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
151 Meeting Street / Sixth Floor / Charleston, SC 29401-2239  
Tel: 843.853.5200 Fax: 843.722.8700  
www.nelsonmullins.com

Bryson M. Geer  
(Admitted in NC & SC)  
Tel: 843.720.4306  
[bryson.geer@nelsonmullins.com](mailto:bryson.geer@nelsonmullins.com)

October 10, 2016

**Via Hand Delivery**

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

**RECEIVED**  
OCT 10 2016  
SC Court of Appeals

RE: Dish DBS Corporation v. South Carolina Department of Revenue  
Appellate Case No. 2016-1642

DIRECTV, Inc. v. South Carolina Department of Revenue  
Appellate Case No. 2015-1509  
Our File No.: 43370/09000

Dear Ms. Kitchings:

We are in receipt of the Motion to Consolidate the appeal filed by Appellant Dish DBS Corporation, f/k/a EchoStar DBS Corp., and Affiliates ("Dish") in its appeal versus the South Carolina Department of Revenue ("SCDOR") bearing Appellate Case No. 2016-1642 with DIRECTV's pending appeal (also versus SCDOR) bearing Appellate Case No. 2015-1509. For the reasons set forth below, this Court should not consolidate these appeals as suggested by Dish.

First, DIRECTV opposes consolidation of these matters based on the procedural posture of the two cases and the fact that consolidating them would result in unnecessary delay to the DIRECTV matter, which is set for oral argument to be scheduled. More specifically, briefing in the DIRECTV matter was completed in early March 2016, and the parties have received notices from the Court that it may be scheduled for oral argument in November or December of 2016. On the other hand, no briefs have yet been filed in the Dish matter. Dish's Initial Brief was scheduled to be due October 7, 2016, but that deadline has been postponed due to Hurricane Matthew. Even if no further extensions are sought by either party for any future filings, the briefing in that matter would not be completed until January or February 2017 at the earliest, and with extensions, it could easily be April 2017 or later.

Second, DIRECTV's appeal was filed on July 9, 2015. It has thus been pending with this Court for 15 months. In comparison, Dish's appeal was just noticed on August 8, 2016, and

The Honorable Jenny Abbott Kitchings  
October 10, 2016  
Page 2


has only been pending two months. The disparity in the length of time the appeals have been pending further counsels against consolidating them.

Third, the factual findings by the Administrative Law Court in each matter vary as shown by the orders entered in both cases. *See* Ex. A, Am. Final Order in Dish dated July 11, 2016; Ex. B, Am. Final Order and Decision in DIRECTV dated June 12, 2015. Hence, the cases necessarily must be decided independently on their respective records no matter the similarities in the legal issues, and hearing them together could cause confusion.

Fourth, despite the fact that a similar issue is involved, the taxpayers in these appeals have made different legal arguments. DIRECTV has argued that its income must be sourced to the place where the activities that earn the income take place and used a method referred to by its economist as the "payroll and assets" method. Under this method, the income-producing activities of DIRECTV are determined from an economic perspective by analyzing DIRECTV's "primary value drivers," and then the location of those income-producing activities is determined by using a formula based on DIRECTV's payroll and assets. *See* DIRECTV's Brief (filed in Appellate Case No. 2015-1509) at pp. 8-13 and 22-39. In contrast, it appears that Dish argued its case based solely on a pro rata cost of performance theory, which would look only at where Dish incurred the costs that led to its income. *See* Ex. A, Am. Order in Dish, at p. 13. Thus, hearing the cases together could cause confusion and will not likely result in any efficiencies as the legal arguments asserted will be different.

In conclusion, DIRECTV respectfully requests that the cases not be consolidated in order to avoid any delay in its long-pending appeal and avoid any confusion or inefficiencies as discussed above. DIRECTV is not opposed to the Court granting a stay in the Dish matter pending resolution of the DIRECTV case to assist with efficiencies and reduce costs for both the SCDOR and Dish in their appeal.

With kind regards,

  
Bryson M. Geer  
by Matt Bogen w/ express permission

BMG:dh

cc: Nicole Wooten, Esq. (Nichole.Wooten@dor.sc.gov)  
William J. Condon, Jr., Esq. (William.Condon@dor.sc.gov)  
Milton G. Kimpson, Esq. (Milton.Kimpson@dor.sc.gov)  
Burnet R. Maybank, III, Esq. (BMaybank@nexsenpruet.com)  
Jim Rourke, Esq. (JRourke@nexsenpruet.com)