THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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 REPLY TO RESPONDENT'S RESPONSE TO APPELLANT'S MOTION TO CONSOLIDATE APPEALS

This memo is in response to the Department of Revenue's Response to Appellant's Motion to Consolidate the Dish and DirecTV appeals.

Respondent first argues that Appellant Dish has abandoned its Motion to Consolidate the Appeals because it served an undated Proof of Service with its Motion. This Court made Appellant aware of the deficiency via letter dated October 3, 2016; Appellant received the letter October 5, 2016, and corrected the deficiency by providing an updated Proof of Service that day. Appellant served the Proof of Service on all parties, including Respondent, at that time. Surprisingly, Respondent's Response fails to include or even mention this correction.

Incredibly, Respondent also argues Appellant abandoned its Motion to Consolidate Appeals because Appellant failed to comply with Rule 208 as it had not filed

its Initial Brief as of October 6, 2016, the due date for the brief. In fact, on October 4 in advance of the mandatory evacuation due to Hurricane Matthew, the Governor of South Carolina directed the closure of State, County and Municipal Government Offices in twenty-six counties in South Carolina from October 5 through October 7. The Chief Justice of the South Carolina Supreme Court directed all levels of the Judicial System to comply with this closure at that time. Furthermore, by Order dated October 10, the Supreme Court declared Wednesday, October 5 through Friday, October 14 to be "holidays" for purposes of Rule 263 of the South Carolina Appellate Court Rules. Notwithstanding the Court's declared holidays, Appellant filed its Initial Brief on Monday, October 10. Based on the October 4 and October 10 directives of the Supreme Court, Appellant in fact filed its Initial Brief early and well within the designated filing period. Again, the Department surprisingly discloses none of this in its argument that Respondent has abandoned its Motion.

Regarding the merits of the Motion to Consolidate, Dish and DirecTV involve the identical legal issue: how to source income earned by Satellite television providers to South Carolina for corporate income tax purposes.

The facts are virtually identical. Both companies sell subscription services to South Carolina residents and broadcast the signals to subscribers via satellites to equipment furnished by the taxpayers in the homes of the subscribers. DirecTV is the largest satellite provider and Dish is the second largest.

The Department made the identical legal argument in both cases. The Department Determination in both cases noted that South Carolina sources such income based upon market or audience share.

The Department used the same expert witnesses in both ALC proceedings and their testimony was similar.

The ALC decisions reached the identical substantive result – that the only income-producing activity proved by either company at trial was the receipt of the satellite signal in the subscriber's homes. The ALC Order in Dish repeatedly cites the DirecTV decision.

The Appellants have very similar primary arguments – that the ALC erred in disregarding the numerous other income-producing activities of both companies.

Both Appellants made similar arguments regarding the imposition of penalties.

The legal arguments are, of course, not identical. Dish argues that the Department's economist expert witness's testimony should be excluded. Dish also argues that the *Lockwood Greene* pro-rata cost of performance decision applies to satellite television.

Rule 214 of the South Carolina Appellate Court Rules (SCACR) provides that "where the same question is involved in two or more appeals in different cases," this Court had the discretion to order an appeal to be consolidated. Although there is limited South Carolina case law regarding consolidation pursuant to Rule 214, SCACR, federal case law is instructive. The Federal Rules of Civil Procedure 42(a) provides in pertinent part that "[i]f actions before the court involve a common question of law or fact, the court may…(2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." F.R.C.P. 42(a).

In the federal context, the consolidation rule was designed to encourage consolidation where possible. *U.S. v. Knauer*, 149 F.2d 519 (1945), *rehearing denied* 329

U.S. 818 (1945); see also *Attala Hydratane Gas, Inc. v. Lowry Tims Co.*, 41 F.R.D. 164 (E.D. Miss., 1966) ("This rule is intended to encourage consolidation, and courts in the exercise of broad discretionary authority allowed by this rule should allow such remedy as a matter of convenience and economy whenever it is reasonable under the circumstances to do so," granting a motion for consolidation because there were a "substantial number of common issues of law and fact involved" in the two causes)).

Generally, consolidation is favored where it can lower the time and expense required for all parties and where policies favor judicial economy. *See Coyne & Delaney Co. v. Selman*, 98 F.3d 1457, 1473 (4th Cir.1996) (the "substantial overlap" between two related cases require consolidation in "the interests of justice."); see also *Dring v. Faust*, 2013 WL 657638 (D. Md. 2013) (granting a motion to consolidate by the defendants because the factual and legal issues in the cases were "virtually identical" and weighing the judicial resources, time, and expenses that would be required to try multiple suits as opposed to a single suit).

More importantly, consolidation should be ordered when it will avoid the possibility of "inconsistent adjudication of common factual and legal issues" among similar parties with similar facts and controversies. See *In re Cree, Inc.*, 219 F.R.D. 369 (M.D.N.C. 2003) (granting a motion to consolidate.)

The objective of the Court's consolidation directive is to give the court broad discretion in deciding how cases are to be tried so that the court may avoid delay and expense while providing justice to the parties. See *North Carolina Natural Gas Corp. v. Seaboard Sur. Corp.*, 284 F.2d 164, 167 (4th Cir. 1960) (acknowledging that "[c]onsolidation is within the sound discretion of the court"); see also *Dittus v. KEG, Inc.*,

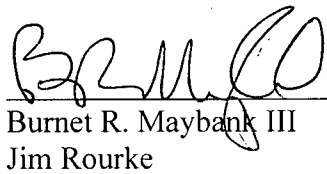
2014 WL 674913, *1 (D.S.C. 2014) (where the court exercised its discretion in denying a motion to consolidate two claims because it was "unable to determine whether plaintiff's two pending actions involved common questions of law or fact," where the plaintiff filed his actions pro se and the actions were "confusing."). The burden is on the movant to demonstrate that "consolidation is desirable." *Joe Hand Promotions, Inc. v. Dock Street Enterprises, Inc.*, WL 6141058, at *2 (D.Md. Dec.8, 2011) (quoting Servants of Paraclete, Inc. v. Great Am. Ins. Co., 866 F.Supp. 1560, 1572 (D.N.M.1994). The court, in exercising its discretion, should weigh the interests of "judicial convenience in consolidating the cases against the delay, confusion, and prejudice consolidation might cause" to the parties. See *Eldridge v. McCabe, Weisberg & Conway*, LLC, 2012 WL 1416642, at *1 (D. Md. Apr. 23, 2012) (quoting Joe Hand Promotions, Inc. v. Dock Street Enterprises, Inc., 2011 WL 6141058, at *2 (D. Md. Dec. 8, 2011)) (finding that consolidation is proper where both actions were pending against the same defendant, both plaintiff were represented by the same legal counsel, both cases involve common issues of law since they "essentially allege[d] similar violations of" the same federal act against the defendant, and both cases involved common issues of fact in that they arose out of foreclosure actions filed by the defendant in Maryland state courts.)

Federal case law makes clear that cases may be consolidated over the objection of one party or the objection of all parties. *Midwest Community Council, Inc., v. Chicago Park Dist.*, 98 F.R.D. 491 (D.C. III 1983) 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2388 ("The consent of the parties is not required by the rule to accomplish the consolidation. Rather, it is for the district court to weight the saving of time and effort that consolidation under Rule 42(a) would produce against any

inconvenience, delay, or expense that it would cause for the litigants and the trial judge."). Therefore, a court may order consolidation even though all parties object or even though all but one party objects.

While most of the authorities cited above dealt with consolidation at the trial court level, the same principals apply at the Appellate level. DirecTV is 6-8 months ahead of Dish at the Court of Appeals. If the matter is not consolidated, it is likely the Dish oral argument will be scheduled while the DirecTV decision is still pending. It's possible Dish would go a different panel at the Court of Appeals, and the two panels would be considering the case at the same time.

RESPECTFULLY SUBMITTED,



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October 17, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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.

PROOF OF SERVICE

This is to certify that the foregoing Motion to Consolidate was sent via U.S. Mail addressed as follows this 17th day of October 2016:

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October 17, 2016

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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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:

Please find enclosed herewith for filing the original and one copy of the Appellant's Reply to Respondent's Response to Appellant's Motion to Consolidate Appeals, together with Proof of Service, with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to my courier.

Very truly yours,

Burnet R. Maybank III

BRM/mw

Enclosures
cc: The Honorable Shirley C. Robinson
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