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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 14-ALJ-17-0158-CC

Appellate Case No. 2015-001509

DIRECTV, Inc. and its Subsidiaries,..... Appellant,

v.

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

AMENDED RECORD ON APPEAL

VOLUME III of III

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**AMENDED RECORD ON APPEAL
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Courses taught: State and Local Tax; International Tax; Federal Income Tax;
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Professor of Law
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James E. Rogers College of Law
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Associate Professor of Law
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Associate Professor of Law
The Appalachian School of Law
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Arizona State University
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NON-ACADEMIC LEGAL EXPERIENCE

Partner
Streich Lang (now Quarles & Brady)
Phoenix, Arizona
(Partner 1992-1998; Associate 1987-1992).

Associate
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Albuquerque, New Mexico
(1984-1987).

AWARDS AND HONORS

Named to "The All-Decade State and Local Tax Team," 55 ST. TAX NOTES 127 (Jan. 11, 2010).

Leslie F. and Patricia Bell Faculty Service Award (2010-11).

EXPERT WITNESS AND RELATED EXPERIENCE

Expert Witness, Nevada Department of Revenue, 2013 (Southern California Edison v. Nevada, Case No. 09-OC-00016 1B, 1st Jud. Dist., Carson City, Nevada) (Commerce Clause discrimination remedies).

Consultant to multinational telecommunications company regarding New York telecommunications tax matter (2012-13).

Consultant and Expert Witness, South Carolina Department of Revenue 2011-12 (Duke Energy Corp. v. South Carolina Dept. of Revenue, No. 10-ALJ-17-0270-CC, S.C. Admin. Law Ct.) (income tax apportionment).

Consultant and Expert Witness, Vodafone Americas Holdings 2011-12 (Vodafone Americas Holdings, Inc. v. Farr, Docket No. 07-1860-IV, Tenn. Chancery Court, 20th Jud. Dist., Davidson Cty., Tennessee) (income tax apportionment).

Consultant and Expert Witness, Trans-Alaskan Pipeline Owners, 2010-12 (BP Pipelines (Alaska) Inc. et al. v. State of Alaska Dept. of Revenue, et al. – Superior Court for the State of Alaska, Cause No. 3AN=06-8446 CI) (property tax valuation of Alaskan Pipeline).

Consultant and Expert Witness, State of Minnesota, 2004-06 (MBNA America Bank, N.A. v. Minnesota Commissioner of Revenue, No. 7598-R; and Providian Financial Corporation and Subsidiaries v. Minnesota Commissioner of Revenue, No. C3-03-010083) (income tax nexus cases)

Consultant, State of Mississippi, 2004-05 (WorldCom bankruptcy tax claim).

SCHOLARSHIP

BOOKS

STATE TAXATION (3d ed., Warren, Gorham & Lamont 2014) (co-author, with Walter Hellerstein).

STATE AND LOCAL TAXATION: CASES AND MATERIALS (10th ed., West 2014) (co-author, with Walter Hellerstein, Kirk Stark, & Joan Youngman).

THE STREAMLINED SALES AND USE TAX (co-author, with Walter Hellerstein) (4th ed. 2007/2008).

CHAPTERS

State and Local Tax Aspects of Bankruptcy, in 1A COLLIER ON BANKRUPTCY (15th ed. 1992).

ARTICLES

State Jurisdiction to Tax Nowhere Activity, 33 VA. TAX REV. 209 (2013) (with Walter Hellerstein).

The Questionable Constitutionality of Amazon's Distribution Center Deals, 62 ST. TAX NOTES 667 (2011) (co-author, with Walter Hellerstein).

The Market State Approach to the Attribution of Receipts from Services, 59 ST. TAX NOTES 331 (2011) (co-author, with Walter Hellerstein).

Misalignment of Substantive and Enforcement Tax Jurisdiction in a Mobile Economy: Causes and Strategies for Realignment, 63 NAT'L TAX J. 925 (2010).

Classifying State and Local Taxes: Current Controversies, 54 ST. TAX NOTES 35 (2009) (co-author, with Walter Hellerstein).

Reforming the State Corporate Income Tax: A Market State Approach to the Sourcing of Service Receipts, 83 TUL. L. REV. 285 (2008).

A Comparative Look at International and State and Local Taxation, 50 ARIZ. L. REV. 111 (2008).

Town Fair Tire and the Silliness of the Physical Presence Rule for Use Tax Collection Nexus, 50 ST. TAX NOTES 447 (2008) (co-author, with Walter Hellerstein).

Further Thoughts on the "Subject to Tax" Exception in State Corporate Income Tax Expense Disallowance Statutes, 48 ST. TAX NOTES 597 (2008) (co-author, with Walter Hellerstein).

The Federal Role in State Taxation: A Normative Approach, 60 NAT'L TAX J. 611 (2007) (co-author, with William Fox).

The Streamlined Sales Tax Project and the Local Sourcing Conundrum, 104 J. TAX'N 230 (2006) (co-author, with Walter Hellerstein).

The Political Economy of the Streamlined Sales and Use Tax, 58 NAT'L TAX J. 605 (2005) (co-author, with Walter Hellerstein).

Piercing the Veil to Assert Personal Jurisdiction over Corporate Affiliates: An Empirical Study of the Cannon Doctrine, 84 B. U. L. REV. 446 (2004) (co-author, with Edwin Aguilar).

Third-Party Payments and Bundled Transactions, 37 ST. TAX NOTES 659 (2005) (co-author, with Walter Hellerstein).

The Streamlined Sales and Use Tax Agreement's Sourcing Rules, 34 ST. TAX NOTES 375 (2004)(co-author, with Walter Hellerstein).

State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective, 45 WM. & MARY L. REV. 319 (2003).

State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the 21st Century, 38 GA. L. REV. 343 (2003).

Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?, 75 S. CAL. L. REV. 419 (2002).

The Taxation of Private Interests in Public Property: Toward a Unified Theory of Property Taxation, 2000 UTAH L. REV. 421.

Possessory Interests: A Systematic Valuation Approach, 11 J. PROP. TAX MGMT. 1 (2000) (co-author, with Joseph M. Davis).

National Nexus Program for Resolving Past State Tax Liabilities, 26 TAX'N FOR LAW. 324 (1998) (co-author, with Ronold P. Platner), reprinted in 60 TAX'N FOR ACCT. 206 (1998) and TAX IDEAS ¶ 850 (1998).

OTHER WRITINGS

It's Time to Abandon Retroactive Application of UDITPA Section 18, 73 ST. TAX NOTES 53 (2014).

Checkpoint Catalyst Topic #1007, Sales Factor (2014) (co-author with Melissa A. Oaks).

State Tax Apportionment: The Role of Congress in Developing Apportionment Standards, before the Subcomm. on Admin. and Commercial Law of the House Comm. On the Judiciary, 111th Cong., 2d Sess. (May 6, 2010), reprinted in 56 ST. TAX NOTES 416.

Riverboat Gambling and Use Tax Planning: When to Hold and When to Fold, 53 ST. TAX NOTES 105 (2009).

What Jim Cramer Can Teach us About State and Local Government Finance, 51 ST. TAX NOTES 1049 (2009).

Walter Hellerstein: the Annotation is in the Grooves, 51 ST. TAX NOTES 91 (2009) (tribute).

A Brief History of UDITPA and the Corporate Income Tax Uniformity Movement, 49 ST. TAX NOTES 759 (2008).

The Pumpkin Tax, 46 ST. TAX NOTES 363 (2007).

The Sales Taxation of Customer Loyalty Programs, 45 ST. TAX NOTES 717 (2007).

The Sales and Use Tax Dichotomy and the Streamlining Movement, 43 ST. TAX NOTES 129 (2007).

The Wages of Virtue: Voluntary Registration and Jurisdiction to Tax, 42 ST. TAX NOTES 131 (2006).

Local Sales Tax Sourcing and the Streamlining Movement, 41 ST. TAX NOTES 697 (2006).

What Is a "Sale" for Sales Tax Purposes? (Part 2), 40 ST. TAX NOTES 471 (2006).

What Is a "Sale" for Sales Tax Purposes? (Part 1), 38 ST. TAX NOTES 873 (2005).

The Three Most Important Things to Know about the Streamlined Sales Tax: Amnesty, Amnesty, and Amnesty, 38 ST. TAX NOTES 137 (2005).

Federalists, State Taxation, and the Story of the 17th Amendment, 37 ST. TAX NOTES 813 (2005).

Internet Travel Companies: Taxing the Middleman, 35 ST. TAX NOTES 477 (2005).

Sausage-Making Streamlining-Style: Coupons, Rebates, and other Third-Party Payments, 33 ST. TAX NOTES 794 (2004).

H.R. 3220: A Ringing Endorsement of Factor Nexus, 33 ST. TAX NOTES 61 (2004).

Retinking Entity Isolation: The Dangers of Pioneering, and of the Leading Case Method, 32 ST. TAX NOTES 197 (2004).

The Fox and the Chicken: 16 Tips for State Tax Administrative Practice, 31 ST. TAX NOTES 57 (2004).

Book review, *Property-Tax Exemption for Charities* (Evelyn Brody, ed.), 41 J. ECON. LIT. 1311 (2003).

State Income Tax Nexus: Making the Case for an Economic Presence Standard in Light of Quill, 9 MULTISTATE TAX REP. 965 (2002).

Reflections on the Possessory Interest Tax, Part 2: Toward a General Theory of Property Taxation, 26 ST. TAX NOTES 103 (2002).

Reflections on the Possessory Interest Tax, Part 1: Toward a General Theory of Possessory Interest Taxation, 24 ST. TAX NOTES 1189 (2002).

Real Property Tax Valuation Appeals: A Primer, 27 ARIZ. ATT'Y, Dec. 1990, at 17.

Municipal Sales and Use Taxes: Highlights of the New Model City Tax Code, 23 ARIZ. B.J., June/July 1987, at 12 (co-author, with Howard J. Kalson).

Efficacy of Illinois Vehicle Safety Inspection Program, YALE LEGIS. SERV. (1982).

PRESENTATIONS (SINCE 2000)

Panelist, *Practical and Policy Implications of the Trend Toward Single Sales Factor Apportionment* (37th Annual Advanced State and Local Tax Institute, Georgetown Law Center, Washington, DC, August 7, 2014).

Paper Presentation, *State Income Taxation of Out-of-State Corporate Partners* (Chapman Law Review Annual Symposium, Orange, CA Mar. 14, 2014).

- Keynote Speaker, *Can this End Well? Megatrends in State Taxation* (96th Annual Arizona Tax Conference, Flagstaff, AZ Sept. 26, 2013).
- Speaker, *State Taxation of Cloud Computing* (State Bar of California Annual Income Tax Seminar, University of San Diego School of Law, June 28, 2013).
- Speaker, *Retroactivity and Equitable Apportionment of Business Income for State Tax Purposes* (Federation of Tax Administrators, Albuquerque, NM, June 11, 2013).
- Keynote Panelist, *The Future of Amazon.com and the Implications for Traditional Retailers and E-Commerce Competitors* (Telsey Advisory Group's 5th Annual Spring Consumer Conference, New York, NY, April 8, 2013).
- Paper Presentation, *State and Local Taxation of Cloud Computing: A Normative Approach* (National Tax Association Annual Conference, Providence, RI, Nov. 17, 2012).
- Speaker, *Equity Challenges to Property Tax Assessments in Theory and Practice* (American Property Tax Counsel, San Francisco, CA, Oct. 13, 2012).
- Speaker, *The Federal Role in State Tax Reform: Overview of the State Budget Situation and the Federal Policies that Make State Budgets Worse* (AARP National Policy Council, Santa Fe, NM, June 8, 2011).
- Panelist, *Shall We Dance? Coordinating Federal and State Tax Policy* (American Bar Association, Section of Taxation, Midyear Meeting, Boca Raton, FL, Jan. 22, 2011).
- Panelist, *Taxing Internet Sales: The Battle Between States and Retailers* (Association of American Law School Annual Meeting, San Francisco, CA, Jan. 6, 2011).
- Witness, H.R. Subcomm. on Admin. and Commercial Law, Judiciary, *State Tax Apportionment: The Role of Congress in Developing Apportionment Standards*, 111th Cong. (May 6, 2010).
- Speaker, *Corporate Income Tax Apportionment*, (New Mexico Tax Research Institute, 7th Annual Tax Policy Conference, Albuquerque, NM, June 21, 2010).
- Discussant, *Checking in on Check the Box*, paper by Heather Field (National Tax Association, 101st Annual Conference on Taxation, Philadelphia, PA, Nov. 21, 2008).
- Speaker, *Walter Hellerstein: the Annotation is in the Grooves* (National Tax Association, 101st Annual Conference on Taxation, Philadelphia, PA, Nov. 21, 2008) (ceremony awarding Holland Medal to Walter Hellerstein).

Speaker, *Recent Federal Income Tax Developments* (Arizona Society of Certified Public Accountants, 24th Annual Federal Tax Institute Tax Conference, Phoenix, AZ, Nov. 7, 2008).

Paper Presentation, *State Tax Nexus Issues in a Mobile Economy: The Evolving Legal Landscape* (University of Tennessee conference on "Mobility and Tax Policy: Do Yesterday's Taxes Fit Tomorrow's Economy?", Oct. 2-3, 2008.)

Speaker and Panelist, *The Uniform Division of Income for Tax Purposes Act—Past and Present* (Multistate Tax Commission 41st Annual Meeting, Santa Fe, NM, July 31, 2008).

Speaker, *Amazon & Ecommerce: Sales Tax Overview & Potential Implications* (Oppenheimer Conference Call, July 1, 2008).

Speaker and Panelist, *Basic Constitutional Issue in State Taxation* (27th Annual State and Local Tax Conference, National Conference of State Tax Court Judges, Cambridge, Mass., Sept. 28-29, 2007).

Paper Presentation, *The Federal Role in State Taxation: A Normative Approach* (Annual Spring Symposium, National Tax Assn., Washington, D.C., May 19, 2007) (with William Fox, Ph.D.).

Moderator and Speaker, *A Cross-Border Colloquy: What State/Local and International Tax Lawyers Can Learn from Each Other* (American Bar Association, Section of Taxation, Midyear Meeting, Hollywood, Fl., Jan. 19, 2007).

Speaker, *Streamlined Sales Tax: The Fundamentals and the Future* (Annual Sales and Use Tax Symposium, Institute for Professionals in Taxation, Tucson Ariz., Sept. 27, 2006).

Paper Presentation, *The Political Economy of the Streamlined Sales Tax* (Annual Spring Symposium, National Tax Assn., Washington, D.C., May 20, 2005).

Speaker, *The Internet and the American Sales Tax* (University of Arizona Rogers College of Law and the Eller College of Management, Tucson, Ariz., November 3, 2004).

Enrichment Speaker, *Taxing Dotcom Affiliates of Brick and Mortar Retailers: The Personal Jurisdiction Analogue* (University of San Diego School of Law, San Diego, Cal., April 15, 2004).

Paper Presentation, *An Economic Nexus Standard for the 21st Century* (Tax Council Policy Institute Annual Symposium, Washington, D.C., Feb. 27, 2003).

Speaker, *Internet Taxation: Where Are We Now?* (Arizona Society of Certified Public Accountants 18th Annual Tax Conference, Phoenix, Ariz., Nov. 7, 2002).

Moderator, *Factor Presence Nexus or H.R. 2526?* (Multistate Tax Commission, Washington, D.C., Oct. 16 2002).

Presentation, *A Practical Approach to State Tax Administrative Proceedings in Arizona*, in *Practical Approach to Federal and State and Local Tax Litigation* (State Bar of Arizona, Phoenix, Ariz., Mar. 7, 2002).

Invited Participant, *Two-Tier Property Taxation* (Lincoln Inst. Land Policy, Cambridge, Mass., Nov. 2000).

Invited Participant, *Tax Exemptions for Charities: The War Within the States* (Urban Institute, Washington, D.C., June 2000).

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Member, University of Arizona Committee on Promotion and Tenure, 2014
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Chair, Budget Committee, 2013
Chair, Curriculum Committee, 2012-14
Chair, Peer Review Committee, 2011
Co-Chair, Strategic Planning Committee, 2009-10
Chair, Promotion and Tenure Committee, 2009-10
Member, Institutional Review Committee, 2009-2012 (university-wide committee)
Chair, Faculty Enrichment Committee, 2008-09
Member, Peer Review Committee, 2008-09
Chair, Faculty Retreat Committee, 2006-07
Chair, Awards Committee, 2006-07, 2005-06
Member, Admissions Committee, 2006-07, 2005-06
Advisor, Law School Community Service Bd., 2004-05, 2004-03, 2003-02, 2002-01
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Member, Faculty Recruitment Committee, 2002-03, 2001-02

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Master of Economics, Monash University; 1978.
Master of Arts, UCLA; 1980.
Ph.D. (Economics), UCLA; 1982.

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Risk perception and management, Risk and uncertainty, Experimental economics, Behavioral econometrics, Poverty and vulnerability, Behavioral finance

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Title: Studies in Economic Theory and Method.
Committee: Robert W. Clower (chair), Larry J. Kimbell, Edward E. Leamer, and Axel Leijonhufvud.

Fellowships, Awards & Prizes

- Foundation for Research in Economics and Education Graduate and Dissertation Fellowships, UCLA; 1978/82.
- Center for the Study of Futures Markets Research Grant; 1981/82.
- ASEAN-Australia Economic Relations Research Project Research Grant; 1983/85.
- Social Sciences and Humanities Research Council of Canada Research Grant, "Research in Applied General Equilibrium Analysis"; 1984/85.
- Social Sciences and Humanities Research Council of Canada Research Grant, "Research in Experimental Economics" (with Michael McKee); 1986/87.
- Academic Development Fund Research Grant, University of Western Ontario, "Applications of Computational Game Theory"; 1987/88.
- U.S. Department of Energy, Waste Education and Research Consortium Research Grant, "Assessing Risk-Costs for Nuclear Waste Transportation" (with Ronald G. Cummings); 1990/91.
- Resources for the Future Research Grant, Washington, DC, "Validating the Contingent Valuation Method with Statistical Bias Functions"; 1993/94.
- Richland County Government, "An Operational Survey of Richland County Government"; 1994/95.
- Center for International Business Education and Research, USC, "The Natural Environment and International Competitiveness" (with Eugene Chewing and Maribeth Collier); 1994/95.
- Westinghouse Savannah River Corporation: "Beneficially Reusing LLRW: The Savannah River Site Stainless Steel Program" (with Maribeth Collier); 1994/95.
- Cooperative Agreement, United States Environmental Protection Agency (Office of Policy, Planning & Evaluation), "Environmental CGE Modeling"; 1996/98.
- Danish Social Science Research Council, "Estimating Risk Attitudes and Discount Rates in Denmark" (with Morten I. Lau); Project #24-02-0124, 2002/05.
- Economic Policy Research Unit, University of Copenhagen, "Charactering Entrepreneurs in Denmark" (with Morten I. Lau and Lise Vesterlund); 2006.
- National Science Foundation, PI, "Cognition in Natural Environments: Using Simulated Scenarios in Complex Decision Making Experiments," Human and Social Dynamics Program, Directorate for Social, Behavioral, and Economic Sciences (with Stephen M. Fiore, Charles E. Hughes, Elisabet Rutström and Eduardo Salas); 2006-2009.
- National Science Foundation, PI, "Naturally Occurring Noise: Experimental Economics & Stochastic Production Frontier Models," Methodology, Measurement & Statistics Program, Directorate for Social, Behavioral & Economic Sciences (with Richard Hofler and Elisabet Rutström); 2006-2008.
- Danish Social Science Research Council, co-PI, "Intertemporal Choice in Denmark: A Longitudinal Field Experiment" (with Steffen Andersen, Morten I. Lau and Elisabet Rutström); 2009-2011.
- Carlsberg Foundation, co-PI, "Eliciting Social Trust in Denmark: A Field Experiment" (with Steffen Andersen and Morten I. Lau); 2009-2010.
- United States Federal Highway Administration, co-PI, "Behavioral Sciences Approach to testing, Validating and Establishing Best Practices for Alternative Highway Revenue Collection: Experiments on Driving Under Uncertain Congestion Conditions and the Effects on Traffic Networks from Congestion Pricing Initiatives," Cooperative Agreement DTFH61-09-H-00012 (with Essam Radwan, Elisabet Rutström and Ronald Tarr); 2009-2012.
- Danish Social Science Research Council, co-PI, "Revealing Economic Behavior with Register-Based Experiments" (with Steffen Andersen and Morten I. Lau); 2012-2015.

Danish Social Science Research Council, co-PI, "The Behavioral Identification and Preferences of Pathological Gamblers" (with Morten I. Lau and Don Ross); 2012-2015.

Employment Experience

Research Officer, Australian Treasury; 1975 - 1977.
Tutor, Department of Economics, Monash University; 1977 - 1978.
Research Associate, NSF Project "A General Equilibrium Appraisal of Property Tax Incidence" (Director: Larry Kimbell, GSM, UCLA); 1979 - 1981.
Staff Research Associate, UCLA Business Forecasting Project, GSM, UCLA; 1980 - 1982.
Reserve Bank of Australia Senior Fellow in Economic Policy, University of Western Australia; 1982.
Assistant Professor, Department of Economics, University of Western Ontario; 1983 - 1988.
Visiting Lecturer, Department of Economics, University of Canterbury (New Zealand); 1984.
Visiting Assistant Professor, Department of Economics, University of Arizona; 1985.
Visiting Fellow, Institute of Southeast Asian Studies, Singapore; 1985.
Visiting Senior Research Fellow, Department of Economics, University of Melbourne (Australia); 1986.
Visiting Professor, Department of Economics, University of Stockholm; 1988.
Associate Professor, Department of Economics, University of Western Ontario; 1988.
Associate Professor, Department of Economics, University of New Mexico; 1988 - 1990.
Erskine Fellow, Department of Economics, University of Canterbury, Christchurch, New Zealand, 1996.
Dewey H. Johnson Professor of Economics, Department of Economics, Moore School of Business, University of South Carolina; 1990 - 2003.
Senior Research Fellow, Institute for Simulation & Training, University of Central Florida; 2003 - 2005.
Professor of Economics, Department of Economics, College of Business Administration, University of Central Florida; 2003 - 2009.
Richard T. Crotty Orange County Endowed Chair, Department of Economics, College of Business Administration, University of Central Florida; 2008 - 2009.
Professor of Economics (part-time), Durham Business School, Durham University; 2007 - 2010.
Visiting Professor of Economics (part-time), Monash University; January 2011- present.

Miscellaneous Professional Experience

Assistant Editor, *Economic Inquiry*; 1979-1980.
Assistant Editor, *American Economic Review (Papers & Proceedings)*; 1980-1981.
Assistant Editor (Screening), *American Economic Review*; 1981-1982.
Associate Editor, *Journal of Regional Science*; 1989-2000.
Editorial Council, *Journal of Environmental Economics and Management*; 1990-1994, 2001-2011.
Editorial Board, *Journal of Economic Methodology*; 2010-2016.
Associate Editor, *Journal of Environmental Economics and Management*; 1994-1997.
Associate Editor, *Economics Letters*; 2012-present.
Consultant, Omniplan Corporation, "An Economic and Social Assessment of the Central Valley Irrigation Project"; Report prepared for the U.S. Department of the Interior (Water & Power Resources Service); 1979-1980.
Consultant, California Energy Commission, "The Impact of Petroleum Shortfalls on the U.S. and California

Economy"; 1980-1981.

Consultant, Atlantic Richfield Company, "Energy Efficiency, Conservation, and Elasticity Planning Study"; 1980-1981.

Consultant, Los Angeles Department of Water and Power, "Forecasting Energy Demand"; 1981.

Consultant, The Windsor Data Bank Project (University of Windsor, Ontario), "Windsor and Essex County Input-Output Industrial Linkage Study"; 1986-1987.

Consultant, Institute for Research on Public Policy, "Trade in Services and Domestic Regulation"; 1987-1987.

Consultant, Centre for International Economics, "Global Agricultural Trade Policy Study"; 1987-1988.

Consultant, The World Bank (Europe, Middle East and North Africa Department), "Trade Integration in Algeria, Morocco, Tunisia and Turkey"; 1988-1989.

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Consultant, Westinghouse Savannah River Company, "Feasibility Study for Transfer of Radioactive Scrap Metal Recycling Technologies in Support of the Beneficial Reuse Program"; 1994-1995.

Consultant, Swedish Treasury Department, "Carbon Taxes in Sweden"; 1995-1996.

Consultant, North-South Center, University of Miami, "Trade Policy Options for Chile;" 1995-1996.
 Consultant, Ministry of Business and Industry, Government of Denmark, Co-Director of the *MobiDK Project*; 1996-1999.
 Consultant, United States Environmental Protection Agency, "Carbon Taxes in the United States"; 1996-1998.
 Member, Second Generation Model Advisory Panel, Science Advisory Board, United States Environmental Protection Agency; 2004-2008.
 Testifying Expert; various private counsel; 1997 - present.
 Principal and Director, *Law & Economics Consulting Group, Inc.*, 1998 - 1999.
 President, *Harrison & Rutstrom Consulting, Inc.*, 1992 - present.
 Board of Directors, *American Civil Liberties Union of South Carolina*, 2001 - 2005.
 Secretary, *American Civil Liberties Union of South Carolina*, 2002 - 2003.
 Consultant, *South Carolina Department of Revenue*, 2007 - present.
 Fellow, IZA – Institute for the Study of Labor, Bonn, 2013 - present.
 Santa Claus (elected), Department of Economics Christmas Party, University of Western Ontario, 1986.

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- II. International Trade Policy & Public Finance
- III. Resource & Environmental Economics
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STIPULATION OF FACTS

The parties stipulate the following facts:

1. Plaintiff will be referred to as "the Taxpayer" and Defendant as "the Tax Commission".

2. The Taxpayer is a Massachusetts corporation in the business of providing engineering and related services. Such services primarily consist of designing manufacturing facilities. The Taxpayer has offices in South Carolina, Tennessee, Georgia, Texas and New York. It provides services from its various offices relating to projects located in numerous states, including South Carolina, and receives payments from clients located in numerous states, including South Carolina. The principal issue in this case is the amount of the Taxpayer's income which is subject to income taxation in South Carolina.

3. From 1942 to 1961, the Taxpayer used separate accounting, i.e., reported to South Carolina the total income of the South Carolina office less total expenses of the South Carolina office. In certain years, the Taxpayer had substantial income in South Carolina, but losses in other states. As a result, the Taxpayer's income reported to South Carolina in certain years was more than the Taxpayer's total net income from all states combined. Thus it became advantageous for the Taxpayer to switch

from separate accounting to apportionment. ("Apportionment" means attributing to this State a percentage of a taxpayer's total net income.) The Taxpayer asked permission of the Tax Commission to use apportionment but such request was denied. An auditor of the Tax Commission suggested instead a modified separate accounting method. The modified method allowed reporting gross income from the Taxpayer's work on client's projects located in South Carolina reduced by its costs of work on those projects, i.e., direct expenses and a percentage of overhead expenses. The Taxpayer accepted this modified separate accounting. That method, when applied to tax years 1958 through 1962, resulted in a net refund to the Taxpayer of \$14,687.05. The Taxpayer has used this method ever since.

4. In 1975, the Tax Commission audited the Taxpayer's returns for tax years 1972, 1973 and 1974. The auditor noted the use of the modified separate accounting method. No change was made in that method or in the tax liability.

5. In 1980, the Tax Commission audited the Taxpayer's 1977, 1978 and 1979 tax returns. The same method of accounting was accepted for those years. However, the audit report delivered to the Taxpayer in November of 1980 stated that future returns should reflect

income based upon where the work was performed rather than where the job was located.

6. The Taxpayer continued filing its returns under the modified separate accounting method. That is, the tax returns for the years at issue here, 1981-1983 (Exhibits A-1, A-2 and A-3), continued to treat as South Carolina income the Taxpayer's net income from work on projects located in this state, i.e. its revenue from work on those projects minus the costs of that work. Such method resulted in a tax liability for the 1981-1983 tax years of \$71,673 for income tax and \$2,027 for license fees or a total of \$73,700.

7. The Tax Commission audited the Taxpayer's returns for 1981, 1982 and 1983 and proposed an assessment of additional tax. (See the audit report, Exhibit B). The proposed assessment of additional tax required the Taxpayer to apportion its income to South Carolina based upon the gross receipts ratio of South Carolina Code of Laws, 12-7-1190.

8. The Taxpayer disagreed with the Tax Commission's interpretation of how "gross receipts from within this State" should be computed under § 12-7-1190. The Taxpayer filed amended returns (which constituted claims for refund) for the three years at issue, adopting an apportionment method based upon its interpretation of

"gross receipts from within this state" (Exhibits C-1, C-2 and C-3). One amended return showed more tax due, and two showed less. The Taxpayer claimed a refund for the net tax reduction shown by the three amended returns combined. The Tax Commission denied the claim for refund. Its decision is attached as Exhibit D-1 and the Transcript of the proceedings before the Tax Commission is attached as Exhibit D-2. Material presented by the Taxpayer at the hearing is attached as Exhibit D-3 and material presented by the Field Services Division of the South Carolina Tax Commission is attached as Exhibit D-4.

9. South Carolina Code § 12-7-1190 states:

"If the principal profits or income of a taxpayer, other than those described in former 1962 Code 65-256 or 12-19-100, are derived from sources other than manufacturing, producing, collecting, buying, assembling, processing, or selling, distributing or dealing in tangible personal property such taxpayer shall make returns and pay annually an income tax upon a proportion of its remaining net income computed on the basis of the ratio of gross receipts from within this State during the income year to the total gross receipts of such year within and without of the State."

10. The Taxpayer's amended returns apportioned a share of its income to South Carolina based on the percentage of its total gross receipts which were from payors located in this state, i.e., based on the location from which its fees were received. The Tax Commission

apportioned a share of the Taxpayer's income to South Carolina based on the view that the percentage of gross receipts from within South Carolina is the same as the percentage of services rendered in this state. Services rendered in this state were determined by the percentage of total direct job payroll represented by South Carolina direct job payroll.

11. Before its amendment in 1972, § 12-7-1190 referred to "receipts in this State" rather than "receipts from within this State".

12. The apportionment method specified by 12-7-1190 may be applicable to various multi-state businesses, including:

- (a) finance companies
- (b) radio and television broadcasters
- (c) building contractors
- (d) engineers and architects
- (e) law firms and accounting firms
- (f) entertainment and sports companies
- (g) hospital management companies
- (h) restaurant franchise companies

13. In determining when gross receipts are from within South Carolina for the above businesses, the following guidelines have been applied by the Tax Commission in prior instances:

*location
of borrower*

(a) Finance companies. Receipts are "from within this State" if the borrower lives in this state. For example, if a finance company in Augusta, Georgia, makes loans to South Carolina residents, payments on those loans are receipts "from within this State" and the company must apportion its income partly to this state on that basis. By the same token, a South Carolina finance company making loans to Georgia residents apportions its income partly to Georgia on the same basis. Before the 1972 amendment to § 12-7-1190 some out-of-state finance companies took the position that "receipts in this State" meant only payments actually received by them in this state, regardless of where payments originated. However, the reason for the 1972 amendment is not known.

*location of
purchaser*

(b) Radio and TV broadcasters. Advertising receipts (broadcasters' main source of revenue) are "from within this State" if and only if the purchaser of the advertising is in this state.

*where
performed*

(c) Building contractors. Receipts are "from within this State" if the services generating the receipts are performed in this state. In cases where services are rendered at the construction site, but fabrication of some materials occurs in another state, receipts are attributed in part to the state of fabrication since a portion of the work is performed there.

(d) Engineers and Architects (Multi-state). *Where performed*

Before August 24, 1977, receipts were considered "from within this State" if the client's project was located in this state, regardless of where services were rendered or where the client paid from. On that date the Tax Commission adopted a new interpretation of the statute and has from that date considered all such taxpayers' receipts to be "from within this State" to the extent that the services are performed in this state. A Regulation stating that interpretation was proposed but, after a hearing, was not adopted. Instead, the Commission adopted an internal policy, which was never published. (Exhibit E.)

(e) Law firms and Accounting firms (Multi-state). Receipts are "from within this State" to the extent the services are performed in the State. *Where performed*

(f) Entertainment and sports companies. A company furnishing the services of entertainers or athletes must treat its receipts as "from within this State" if the service of the entertainer or athlete is performed in this state. *Where performed*

(g) Hospital management companies. Receipts are "from within this State" to the extent that services are rendered here. *Where performed*

*Location
of franchise*

(h) Restaurant franchise companies. This category refers to companies which do not operate the restaurant themselves, but which franchise the name and operation to third parties. Receipts are treated as "from within this State" if the restaurant is located here, regardless of where the franchisor's services are performed or where payments originate.

14. In the present case the following methods of apportioning the Taxpayer's income have the following South Carolina income tax and license fee results:

Method A. Apportion the Taxpayer's total net income, based on the ratio of the Taxpayer's direct job payroll for services rendered in this state to its total direct job payroll for services rendered everywhere, i.e., based on where its services are rendered. This was the method used in the Tax Commission's audit report (See Exhibit B).

(1) Income taxes for three years	\$207,293
(2) License fees for three years	<u>5,029</u>
TOTAL	\$212,322

Method B. Apportion the Taxpayer's total net income, based on the ratio of receipts from payors located in South Carolina to total receipts, i.e. based on where receipts are paid from. This method was used on the Taxpayer's amended returns (See Exhibits C-1, C-2 and

C-3), but the numbers below reflect an adjustment made by the Tax Commission and accepted by the Taxpayer.

(1) Income taxes for three years	\$55,916
(2) License fees for three years	<u>1,387</u>
TOTAL	\$57,303

15. The following tax results occur if two other methods of arriving at the Taxpayer's South Carolina income are employed:

Method C. Instead of using an apportionment method, account separately for the income of the Taxpayer's office in South Carolina. That is, fees for work performed in the South Carolina office reduced by the expenses of that work. This is separate accounting (and is different from the modified separate accounting method used on the Taxpayer's original returns). The parties agree separate accounting is not appropriate for this taxpayer since its records do not "clearly reflect net income arising from sources within this state", as required by law for the use of separate accounting. This method is presented to demonstrate the tax result which would result from separate accounting if such a method were appropriate. Separate accounting is normally applied only to businesses with separate units where each unit functions independently and locally, with only minor central administration (e.g. hotel or restaurant chains).

(1) Income taxes for three years	\$208,726
(2) License fees for three years	<u>5,795</u>
TOTAL	\$214,521

Method D. Apportion the Taxpayer's entire net income partly to South Carolina, based on the ratio of receipts for work on client's projects located in South Carolina to total receipts, i.e., based on the location of the project.

(1) Income taxes for three years	\$87,313
(2) License fees for three years	<u>2,027</u>
TOTAL	\$89,340

The Tax Commission does not agree that the resolution of this case can or should be obtained by applying either of these methods.

16. The parties reserve their rights to object to any of the stipulations on the grounds of lack of relevancy or materiality.

AGREED AND STIPULATED.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

DIRECTV, INC. and Subsidiaries,)	Docket No. 14-ALJ-17-0158-CC
)	
Petitioners,)	
)	
vs.)	<u>STIPULATION</u>
)	
South Carolina Department of Revenue,)	
)	
Respondent.)	
)	
)	
)	

In order to (i) clarify for the Court the issues involved in this matter and (ii) stipulate to certain factual items, Petitioner, DIRECTV, Inc. and Subsidiaries, and Respondent, the South Carolina Department of Revenue, hereby enter into this Stipulation. The parties expressly reserve the right to raise and pursue additional issues for determination, and introduce evidence into the record, not inconsistent with this Stipulation.

The parties stipulate as follows:

1. One of the issues presented by the Petitioner for determination in this appeal is whether the Respondent is seeking an alternative method of apportionment to source Petitioner's subscription revenue from the provision of its direct broadcast satellite services ("Subscription Revenue").
2. In Petitioner's Request for Contested Case Hearing and Prehearing Statement filed with this Court, one of the issues presented for determination was whether Respondent satisfied its burden of proof for the use of an alternative

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apportionment methodology under South Carolina Code Annotated (“Code”) Section 12-6-2320.

3. The parties wish to clarify that Respondent does not assert that an alternative apportionment methodology under Code Section 12-6-2320 was used or should be used to source Petitioner’s Subscription Revenue for tax years 2006 through 2011 (the “Period at Issue”).
4. The sole remaining issue presented for determination with respect to the sourcing of Petitioner’s Subscription Revenue is how that revenue should be sourced under Code Section 12-6-2290.
5. As a result, Petitioner’s Prehearing Statement is deemed to be amended to remove the assertions set forth in Paragraph No. 3(b) and Paragraph No. 4(b).
6. Attached as Exhibit A is a schedule setting forth the amount of (i) Petitioner’s total Subscription Revenue for each year during the Period at Issue, (ii) Petitioner’s total Subscription Revenue from South Carolina Customers for each year during the Period at Issue, (iii) the total revenue from leases of set-top boxes and sales of tangible personal property to South Carolina customers for each year during the Period at Issue, (iv) Petitioner’s total revenue from leases of set-top boxes and sales of tangible personal property for each year during the Period at Issue, and (v) Petitioner’s total gross receipts for each year during the Period at Issue.
7. The parties will work together in good faith to verify and confirm the amounts set forth in Exhibit A and will provide this Court with a final version of Exhibit A within two weeks of the conclusion of the trial.

8. For each year during the Period at Issue, Petitioner included revenue from the leases of set-top boxes and sales of tangible personal property to South Carolina customers in the numerator of the gross receipts factor and the parties do not dispute the treatment of this revenue.

Respectfully submitted,

South Carolina Department
of Revenue

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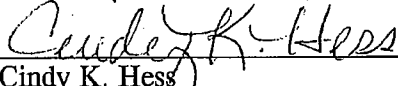
January 12, 2015

CERTIFICATE OF SERVICE

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for DIRECTV, INC. and Subsidiaries, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **STIPULATION**

Counsel Served: **U.S. Mail**
Nicole M. Wooten, Esq.
William J. Condon, Jr., Esq.
South Carolina Department of Revenue
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Post Office Box 12265
Columbia, SC 29211



Cindy K. Hess
Sr. Administrative Assistant

January 12, 2015

FILED

JAN 12 2015

SC ADMIN. LAW COURT

	S.C. Subscription revenue	Everywhere Subscription revenue	S.C. Lease/Sale Revenue from STBs	Everywhere Lease/Sale Revenue from STBs	Total Revenues
2006	265,155,289	13,583,081,711	3,376,851	160,263,938	13,743,345,649
2007	297,356,680	14,900,247,218	12,547,540	582,796,802	15,483,044,020
2008	334,652,301	16,321,615,758	19,605,211	923,326,252	17,244,942,010
2009	361,394,437	17,348,388,812	26,702,174	1,238,157,983	18,586,546,795
2010	392,627,654	18,654,864,389	31,565,700	1,444,720,825	20,099,585,214
2011	409,564,133	19,689,434,914	42,129,631	1,925,855,682	21,615,290,596

ROA_00954

EXHIBIT A.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

Ralph King Anderson, III, Chief Administrative Law Judge

RECEIVED

JUL 14 2015

Case No. 14-ALJ-17-0158-CC

SC Court of Appeals

DIRECTV, Inc. and its Subsidiaries, Appellant,

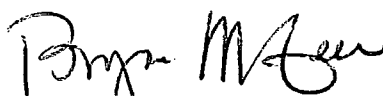
v.

South Carolina Department of Revenue, Respondent.

NOTICE OF APPEAL

Appellant, DIRECTV, Inc. & Subsidiaries, appeals the Amended Final Order and Decision of the Honorable Ralph King Anderson, III, dated June 12, 2015, a copy of which is attached at Exhibit A. Appellant received a copy of this decision on June 12, 2015. This Notice of Appeal is timely filed within 30 days of receipt of that order.¹

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¹ In accordance with S.C. Code Ann. § 12-60-3370, Appellant has posted an appeal bond with the Administrative Law Court.

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July 9, 2015

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DIRECTV, Inc. & Subsidiaries,)
)
Petitioner,)
)
vs.)
)
South Carolina Department of Revenue,)
)
Respondent.)
_____)

Docket No. 14-ALJ-17-0158-CC

AMENDED FINAL ORDER
AND DECISION

RECEIVED

JUL 14 2015

SC Court of Appeals

Appearances:

For the Petitioner: R. Gregory Roberts, Esq.; Andres Vallejo, Esq.; Bryson M. Geer, Esq.; and John von Lehe, Esq.

For the Respondent: Nicole M. Wooten, Esq.; William J. Condon, Jr., Esq.; Timothy C. Thompson, Esq.; and Mary Elizabeth Campbell, Esq.

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) following DIRECTV, Inc. & Subsidiaries' (DIRECTV or Petitioner) request for a contested case hearing under S.C. Code Ann. § 12-60-460 (2014). DIRECTV is contesting the South Carolina Department of Revenue's (Department or Respondent) Determination denying DIRECTV's claim for a refund of South Carolina corporate income and license fee taxes for the tax years 2006 through 2008 and the assessment of South Carolina corporate income and license fee taxes, interest, and penalties for the tax years 2009 through 2011 (Tax Periods at Issue).¹

The Department's Determination (Determination) concluded that applicable South Carolina law and long-standing Department policy require DIRECTV to source all of the gross receipts of its South Carolina subscription revenue to South Carolina because all of the income-producing activity related to DIRECTV's South Carolina customers occurs in South Carolina. DIRECTV asserts that little or no subscription revenue from South Carolina customers should be

¹ The tax years noted relate to income tax years. Income taxes are generally due in arrears, while license fees are due in advance. For clarity, when the Court refers to tax years, reference is being made to income taxes for that year and license fees due for the following year.

June 12, 2015

EXHIBIT A

ROA_00957

included in the numerator of the gross receipts ratio because the majority of the income-producing activity occurs outside of South Carolina.

A hearing was held before this Court on January 13 and 14, 2015.

ISSUES

The following issues are raised in this proceeding:

1. To what extent under S.C. Code Sections 12-6-2290 and 12-6-2295(A)(5) did Petitioner's applicable income-producing activity occur within South Carolina?²
2. Whether the Department properly assessed substantial understatement penalties against DIRECTV for taxes owed for 2009 through 2011.

STIPULATIONS OF FACT

At the hearing into this matter and pursuant to Rule 25(C) of the Rules of Procedure for the Administrative Law Court (ALC Rules), the parties entered the following written stipulations of fact into the Record:

1. One of the issues presented by Petitioner for determination in this appeal is whether Respondent is seeking an alternative method of apportionment to source Petitioner's subscription revenue from the provision of its direct broadcast satellite services (Subscription Revenue).
2. In Petitioner's Request for Contested Case Hearing and Prehearing Statement filed with this Court, one of the issues presented for determination was whether Respondent satisfied its burden of proof for the use of an alternative apportionment methodology under S.C. Code Ann. § 12-6-2320.
3. The parties wish to clarify that Respondent does not assert that an alternative apportionment methodology under Section 12-6-2320 was used or should be used to source Petitioner's Subscription Revenue for tax years 2006 through 2011 (Period at Issue).
4. The sole remaining issue presented for determination with respect to the sourcing of Petitioner's Subscription Revenue is how that revenue should be sourced under Sections 12-6-2290 and 12-6-2295(A)(5).
5. As a result, Petitioner's Prehearing Statement is deemed to be amended to remove the assertions set forth in Paragraph No. 3(b) and Paragraph No. 4(b).
6. The parties submitted Exhibit A, a schedule setting forth the amount of (i) Petitioner's total Subscription Revenue for each year during the Period at Issue, (ii) Petitioner's

² The parties agree that at least some income-producing activity occurred within South Carolina.

total Subscription Revenue from South Carolina Customers for each year during the Period at Issue, (iii) the total revenue from leases of set-top boxes and sales of tangible personal property to South Carolina customers for each year during the Period at Issue, (iv) Petitioner's total revenue from leases of set-top boxes and sales of tangible personal property for each year during the Period at Issue, and (v) Petitioner's total gross receipts for each year during the Period at Issue.

7. The parties agreed to work together in good faith to verify and to confirm the amounts set forth in Exhibit A to provide this Court with a final version of Exhibit A within two weeks of the conclusion of the trial.

8. For each year during the Period at Issue, Petitioner included revenue from the leases of set-top boxes and sales of tangible personal property (e.g., remote controls) to South Carolina customers in the numerator of the gross receipts factor and the parties do not dispute the treatment of this revenue.

After the hearing, the parties determined Exhibit A that was attached to the Stipulations did not need to be amended. Based upon the Stipulations of the parties, the Court adopts the schedule setting forth the amounts listed in Exhibit A, and these figures shall be used in calculating the gross receipts ratio:

	S.C. Subscription Revenue	Total Subscription Revenue	S.C. Lease/Sale Revenue from Set-top Boxes	Total Lease/Sale Revenue from Set-top Boxes	Total Revenues
2006	265,155,289	13,583,081,711	3,376,851	160,263,938	13,743,345,649
2007	297,356,680	14,900,247,218	12,547,540	582,796,802	15,483,044,020
2008	334,652,301	16,321,615,758	19,605,211	923,326,252	17,244,942,010
2009	361,394,437	17,348,388,812	26,702,174	1,238,157,983	18,586,546,795
2010	392,627,654	18,654,864,389	31,565,700	1,444,720,825	20,099,585,214
2011	409,564,133	19,689,434,914	42,129,631	1,925,855,682	21,615,290,596

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

DIRECTV's Business Operations

DIRECTV is a multistate taxpayer headquartered in Los Angeles, California that offers direct broadcast satellite video services to customers throughout the United States. DIRECTV

accomplishes this through four general types of activities: marketing and sales; content development (both original and acquired programming); broadcast operations; and customer service.³ Through DIRECTV's marketing and sales activities, it advertises its programming services to subscribers. DIRECTV engages in distinctive marketing activities on a national scale which includes South Carolina. The goal of DIRECTV's print and television advertising is to encourage customers to call a toll-free number to place an order for television services.

Customers pay DIRECTV a subscription fee for access to hundreds of television programming channels and other audio/visual options that are transmitted nationwide to customer's homes or businesses via satellites. DIRECTV receives its programming from third parties through satellite, fiber-optic cables, and over-the-air broadcast. DIRECTV also collects programming from local broadcast television stations through the use of local collection facilities throughout seven designated market areas (DMA). During the Tax Periods at Issue, DIRECTV had four to six local collection facilities in South Carolina.

The signals for the programming content are collected at broadcast and uplink centers. These broadcast centers and uplink facilities transmit the programming content signals to the satellites. The satellites then transmit the signals received from the broadcast centers and uplink facilities directly to DIRECTV satellite dishes mounted on or near customer homes. DIRECTV transmits its broadcast utilizing two types of beams from its satellites. One beam, the "CONUS" beam, covers the entire United States. It transmits the national programming sold to DIRECTV. The other beam is a narrow beam that transmits the local programming to the DMAs. Those signals are then relayed from the dish to a set-top box located in the customer's home or business, which delivers the signals to the customer's television set.

Customers pay a monthly subscription fee for access to basic channels and can also purchase premium channels and pay-per-view programs for an additional fee. In order to receive the receive programming, customers must contract with DIRECTV for the service, and then use a satellite dish, remote controls, and set-top box provided by DIRECTV in order to access DIRECTV's programming. During the Period at Issue, DIRECTV provided customer service support to customers in South Carolina through both owned-and-operated internal call centers and third-party call centers, none of which were located in South Carolina. DIRECTV also employed

³ Although several affiliated entities are involved in the provision of DIRECTV's programming services, this case involves only DIRECTV Inc., and thus, the Court's focus is upon the activities of that entity.

two employees in South Carolina and contracted with third-party home service providers who installed and serviced equipment in homes of new customers in South Carolina. Also during the Tax Periods at Issue, DIRECTV began leasing the set-top boxes to customers in exchange for a lease fee. However, the importance of these services as to income production has not been sufficiently explained.

DIRECTV's source of revenue is the subscription revenue it receives from its approximately twenty million subscribers. DIRECTV's revenue includes monthly fees for subscribing to one or more packages of video programming; revenue from pay-per-view programming; revenue from the sale or lease of the set-top boxes; revenue from optional warranty on the leased boxes (protection plans); and revenues from fees associated with high-definition set-top boxes, set-top boxes with DVR, and multi-room viewing. I find that the rental and sales receipts received from South Carolina customers are properly included in the numerator of the gross receipts ratio.⁴

DIRECTV's Income Tax Returns

For the 2006 through 2008 tax years, DIRECTV filed corporate income tax returns in South Carolina in which it sourced 100% of subscription receipts from South Carolina customers to the numerator of the gross receipts ratio. By doing so, DIRECTV used gross receipts ratios of 1.9539%, 2.0016%, and 2.0543% for years 2006 through 2008, respectively. In 2008, the Department began an audit of DIRECTV. As a result of the audit, the Department accepted DIRECTV's original 2006 through 2008 corporate income tax returns as filed (i.e., the Department did not make any adjustments to the tax returns). DIRECTV subsequently filed amended corporate income tax returns for the 2006 through 2008 tax years, and the single change was the removal from the gross receipts ratio of 100% of the subscription receipts from South Carolina customers that DIRECTV originally included in the numerator. The amended gross receipts ratios for years 2006 through 2008 were 0.0246%, 0.081%, and 0.1137%, respectively. DIRECTV explained the change in a statement attached to each of the three amended returns:

This return is being amended to apportion sales receipts to the state under S.C. Code Ann. § 12-6-2295 which sources sales of services under a pro-rata cost of

⁴ The parties do not dispute the treatment of the rental income of the set-top boxes and agree that all such rental income from the set-top boxes received by DIRECTV from South Carolina customers should be included in the numerator of the gross receipts ratio for apportionment purposes. *See* Stipulation of Facts, filed January 13, 2015.

performance method.⁵ The originally filed return incorrectly apportioned satellite television subscription receipts to South Carolina using market-based sourcing, rather than the cost of performance sourcing that is prescribed by statute.

Because of the amended returns for 2006 through 2008, DIRECTV decreased its tax and license fee liability by \$5,976,816.00 and sought a refund in this amount. In a field audit report dated November 29, 2011, the Department denied the amended returns and related refunds and accepted the original returns as filed.

DIRECTV then filed its original 2009 through 2011 corporate income tax returns using the same costs-of-performance method that it used on its 2006 through 2008 amended returns; the Department audited these returns as well.⁶ In a field audit report dated January 28, 2014, the Department assessed DIRECTV for income taxes and license fees for 2009 through 2011 using a gross receipts ratio that included all of the subscription receipts from South Carolina customers in the numerator.

The Department subsequently issued its Determination and found that the income-producing activity of DIRECTV was the delivery of the signal into the South Carolina customer's home or business and onto the customers' television sets and that, accordingly, DIRECTV should include 100% of the subscription receipts received from South Carolina customers in the numerator of the gross receipts ratio. DIRECTV subsequently requested a contested case hearing regarding this Determination.

CONCLUSIONS OF LAW

General Conclusions

This Court has subject matter jurisdiction in this case pursuant to S.C. Code Ann. §§ 1-

⁵ Both Petitioner and the Department originally erred in how they referenced South Carolina's apportionment method for receipts from services; Petitioner in its amended returns for 2006-2008 referred to it as a "cost of performance method," and the Department referred to it as "market base sourcing" in its Report of Field Audit of Petitioner's 2009-2011 receipts. However, both parties agree, and have subsequently clarified their positions to reflect, that South Carolina uses a method of apportionment based on the proportion of income-producing activity conducted within the State.

⁶ DIRECTV did not include any of the subscription receipts from South Carolina customers in the numerator of the gross receipts ratio on its amended 2006 through 2008 returns and on its original 2009 and 2010 returns. On its 2011 South Carolina return, DIRECTV changed its method again by including approximately \$22 million of its \$410 million subscription receipts from South Carolina customers in the numerator. DIRECTV did this by sourcing 0.11% of its total subscription receipts to South Carolina based on a ratio of its alleged payroll in South Carolina to its total payroll. From 2006 through 2010, DIRECTV did not source any subscription receipts to South Carolina because it claims that the vast majority of its payroll and property were located outside of South Carolina.

23-600(A) (Supp. 2014) and 12-60-460 (2014). The hearing before the ALC is a contested case hearing and is heard de novo. *Marlboro Park Hosp. v. S.C. Dep't of Health and Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (2004). This Court must make its factual findings based on the preponderance of the evidence. See S.C. Code Ann. § 1-23-600(A)(5) (Supp. 2014); see also *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375-78, 496 S.E.2d 17, 19-20 (1998); *Nat'l Health Corp. v. Dep't of Health and Envtl. Control*, 298 S.C. 373, 379, 380 S.E.2d 841, 844 (Ct. App. 1989). Because DIRECTV is challenging a determination by the Department that it must source its South Carolina subscription receipts from South Carolina customers to the numerator of the gross receipts ratio, DIRECTV has the burden of proof. See *Ford v. Atl. Coast Line R. Co.*, 169 S.C. 41, 168 S.E. 143, 167 (1932) ("The general rule is, in the absence of valid statutory enactment to the contrary, that the burden of proof rests upon him who has the affirmative of the issue. . . ."); see also *Leventis v. Dep't of Health and Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000). This burden requires DIRECTV to prove that the Department's determination is errant by a preponderance of the evidence. See, e.g., *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 346, 415 S.E.2d 384, 388 (1992) ("Findings of fact based upon a 'preponderance' of the evidence are those supported by the greatest 'weight, amount, credibility or truth' as reflected by the whole of the evidence before the court, or 'evidence which convinces as to its truth.'").

Applicable Law

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).⁷ 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 method of apportionment that a taxpayer must use depends upon the nature of the taxpayer's business in this

⁷ Generally, allocation refers to the assignment of nonbusiness income to a specific state. See S.C. Code Ann. § 12-6-2220; *Emerson Elec. Co. v. S.C. Dep't of Rev.*, 395 S.C. 481, 486, 719 S.E.2d 650, 652-653 (2011) (noting that a multistate corporation's "non-business income is not apportioned among various states. Rather, non-business income is allocated to or deemed to be earned in a particular state . . ."). Apportionment generally refers to the assignment of business income of a corporation that is taxable in more than one state. See S.C. Code Ann. § 12-6-2210(B); *Emerson*, 395 S.C. at 485, 719 S.E.2d at 652 (stating that "[a] corporation's business income is apportioned among the states in which it conducts business.").

State. During the Tax Periods at Issue, net income of a manufacturer or a dealer in tangible personal property was apportioned based on a three-factor formula and later on a single sales factor (see S.C. Code Ann. §§ 12-6-2250, -2252 (Supp. 2007)),⁸ while net income of substantially all other taxpayers was apportioned based on a single gross receipts formula (see S.C. Code Ann. § 12-6-2290 (Supp. 2007)). Accordingly, for service providers, South Carolina law mandates the following method of apportionment:

If the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2252 or Section 12-6-2310, 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. For purposes of this section, items included in gross receipts are as provided in Section 12-6-2295.

S.C. Code Ann. § 12-6-2290.⁹ Thus, service providers are required to use the single gross receipts apportionment formula. For tax years after 2006, the final sentence of Section 12-6-2290 directs taxpayers to S.C. Code Ann. § 12-6-2295 for a non-exclusive list of the items to be sourced, or included, in the gross receipts apportionment ratio.¹⁰ The relevant subsection in this matter is Section 12-6-2295(A)(5), which states:

(A) The terms “sales” as used in Section 12-6-2280 and “gross receipts” as used in Section 12-6-2290 include, but are not limited to, the following items if they have not been separately allocated:

* * *

(5) receipts from services if the entire income producing activity is within this State. If the income producing activity is performed partly within and

⁸ In 2006, the South Carolina Legislature enacted a change in the apportionment method provided in Section 12-6-2250 for taxpayers whose principal business in South Carolina is manufacturing or any form of collecting, buying, assembling, or processing goods and materials within South Carolina, or selling, distributing, or dealing in tangible personal property within South Carolina. The three-factor apportionment method for a multistate taxpayer (based on property, payroll, and double weighted sales) changed to a single-sales-factor apportionment method. This change was phased-in for income tax years beginning in 2007 through 2010. For income tax years beginning in 2011, the single-sales-factor apportionment method in Section 12-6-2252 replaced the three-factor apportionment method in Section 12-6-2250. See S.C. Rev. Ruling #09-15.

⁹ In 1995, the General Assembly repealed Chapter 7 and added Chapter 6 of Title 12. Accordingly, Section 12-6-2290 replaced Section 12-7-1190 as the statute that directed taxpayers how to apportion net income related to services. In 2007, the General Assembly amended Section 12-6-2290 by adding an additional sentence to the end of the existing statute. That sentence reads as follows: “For purposes of this section, items included in gross receipts are as provided in Section 12-6-2295.” 2007 South Carolina Laws Act 110 (S.B. 91).

¹⁰ 2007 South Carolina Laws Act 110 (S.B. 91) also added Section 12-6-2295, the companion statute to Section 12-6-2290. See 2007 South Carolina Laws Act 110, § 51.A; eff. June 21, 2007. These additions were effective for DIRECTV’s 2007 tax year.

partly without this State, sales are attributable to this State to the extent the income producing activity is performed within this State[.]

Taxpayer Is a Service Provider

DIRECTV provides direct broadcast satellite services to customers throughout the United States. Its income is subscription revenue from providing these services and is not from engaging in manufacturing or dealing in tangible personal property. In a similar case, a Texas administrative law court found that a direct broadcast satellite company was a service provider for purposes of its apportionment laws. *Anonymous Taxpayer v. Texas Comptroller of Pub. Accounts*, 2013 WL 3490605 (Tex. Cptr. Pub. Acct.) (May 17, 2013). As a service provider, Section 12-6-2290 is the applicable statute to apportion DIRECTV's adjusted net income to South Carolina. Further, after 2006, Section 12-6-2295(A)(5) is the supplemental sourcing statute when determining the numerator of the gross receipts ratio, and requires DIRECTV to source receipts from South Carolina customers to South Carolina if the income-producing activity occurs in this State. Therefore, for all Tax Periods at Issue, DIRECTV must apportion its net income to South Carolina using a gross receipts factor in Section 12-6-2290.

As noted above, since 1958, the applicable South Carolina apportionment statutes have always mandated that gross receipts be used when apportioning net income to South Carolina for a corporation whose income is generated from the provision of services.¹¹

Income-Producing Activity of DIRECTV

The Court must first determine whether any income-producing activity occurred in this State and then decide whether that activity occurred within or without South Carolina. Only after identifying the income-producing activity is there a need to quantify how much of the income-producing activity occurred in South Carolina.

Identification of the Income-Producing Activity

Effective for the 2007 tax year, Section 12-6-2295(A)(5) was applicable and supplemented Section 12-6-2290.¹² Section 12-6-2295(A)(5) added the "income producing activity" language

¹¹ Section 12-6-2295(A)(5) is the applicable sourcing statute for the 2007-2011 tax years at issue. Only Section 12-6-2290 is applicable for tax year 2006.

¹² Notably, when adding Section 12-6-2295(A) for the 2007 tax year, the General Assembly stated the following in 2007 South Carolina Laws Act 110, § 51.A, eff. June 21, 2007: "To Amend . . . by adding Sections 12-6-2252 and 12-6-2295 so as to further provide for allocation and apportionment of business income for state income tax purposes

to the apportionment statutes for service providers. The Department argues that the identity of DIRECTV's income-producing activity is the delivery of the signal into the homes and onto the television screens of its customers. Therefore, the Department contends that 100% of the subscription receipts from South Carolina should be sourced to the numerator of the gross-receipts ratio because there is no other income-producing activity related to DIRECTV's business in South Carolina. To the contrary, DIRECTV presented evidence that its income-producing activities in South Carolina could be identified using four "value drivers." Those "value drivers" are: 1) DIRECTV's content and programming; 2) DIRECTV's acquisition and distribution of the content to customers; 3) DIRECTV's marketing and sale of its service; and 4) DIRECTV's customer services.

The Court concludes that pursuant to Section 12-6-2295(A)(5), DIRECTV's income-producing activity includes the customers' subscriptions and delivery of the signal into the location and onto the television screens of its customers. In identifying this income-producing activity, the Court considered the activities of businesses in the direct broadcast services industry and the sources of income within the industry. DIRECTV derives income from monthly subscription receipts that customers pay to DIRECTV in order to view its video programs in their homes and businesses. These subscription receipts are received as a result of the delivery of the signal into the customer's home and onto the customer's television, and are therefore directly related to the income-producing activity of DIRECTV.

The Court, however, does not adopt the view of the Department that income-producing activity of businesses within the direct broadcast services industry is completely limited to the delivery of a signal into the customer's home and onto the customer's television. Rather, the Court agrees with Professor Richard D. Pomp that "opinions can differ on how to measure the extent to which income-producing activities take place in South Carolina, but answering that question by simply ignoring the outside activities is unacceptable."

In *Walter E. Heller W., Inc. v. Dep't of Revenue*, 161 Ariz. 49, 775 P.2d 1113 (1989), the Arizona Supreme Court analyzed how interest income earned on loans made to Arizona customers should be sourced under provisions that mirrored the Uniform Division of Income for Tax

by basing the determination only on a sales factor and to define the terms 'sales' and 'gross receipts' consistently and specifically for that purpose[.]"

Purposes Act (UDITPA).¹³ In reaching its decision, the Arizona Supreme Court did not simply look to the location of the customer as the Department does here. Rather, the court determined that the income-producing activities consisted of the solicitation of new customers, the investigation of credit records of potential customers, and the servicing of such contracts, all of which occurred in Arizona. *Id.* at 53-54, 775 P.2d at 1116-17. Therefore, the court's reasoning implies that the location of customers does not necessarily identify the income-producing activities of the taxpayer and therefore is not a reasonable method of identification.

In this case, the evidence also suggested that there may be other activities, such as advertising, that influence the customer's decision to make the purchase. In explaining those activities from DIRECTV's perspective, Dr. Brian J. Cody testified that he employed DIRECTV's payroll and net value of assets as proxies in identifying DIRECTV's income-producing activities. Dr. Cody explained the "[t]wo measures which are proxies . . . [a]re not perfect, but they're proxies" However, that evidence is simply insufficient to satisfy DIRECTV's burden of proof.

Our Supreme Court "has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as those of Appellant, and has declared that 'rough approximation rather than precision' is sufficient." *Covington Fabrics Corp. v. S.C. Tax Comm'n*, 264 S.C. 59, 66-67, 212 S.E.2d 574, 577-78 (1975). The Court also noted that "[a]lthough exactness in apportionment is desirable, all that is required is a reasonable approximation." Though this Court recognizes that an exact determination of the identity of the income-producing activities is not possible, I find that Dr. Cody's proxies in identifying DIRECTV's income-producing activities are so far from perfect as to be of no practical value. DIRECTV did not sufficiently explain the effect of its value drivers on income production in this State. In other words, DIRECTV's evidence is just too nebulous to properly identify whether DIRECTV's value drivers are income producing and the extent to which such production occurs. Therefore, though Section 12-6-2295(A)(5) provides "flexibility" in determining the relative amount of income-producing activities in the State, Dr. Cody's payroll-and-assets method does not provide a reasonable approximation of the income-producing activities performed by DIRECTV in South Carolina or the value attributable to such activities. Though its evidence did

¹³ UDITPA was created in 1957 by the Uniform Law Commission as a model statute for the division of income for income tax purposes. The goal of the Uniform Law Commission in drafting UDITPA was to develop a model act that would be widely adopted.

reflect that its advertising probably produced some income, the evidence did not reflect what portion of DIRECTV's cost was either attributable to South Carolina customers or may have influenced South Carolina customers to subscribe to DIRECTV. Instead, the Court was left to speculate as to the extent to which DIRECTV's content and programming, acquisition and distribution thereof, advertising, and customer service in installing and maintaining its equipment within this State influenced customers' decision to subscribe to DIRECTV.

Moreover, it does not appear that some of the activities that DIRECTV attributes to income production are actually income-producing activities. DIRECTV argues that its cost to produce the content and broadcast of signals into South Carolina should be considered as an income-producing cost. The Department, on the other hand, argues that only the delivery of the signal into the customer's home and onto the customer's television is income-producing activity. Thus, the pertinent issue here is at what point DIRECTV's activities become income-producing. Both parties assert that the holding in *Mercury Motor Express, Inc. v. S.C. Tax Comm'n*, 244 S.C. 134, 135 S.E.2d 756 (1964) is applicable to this case. In *Mercury*, the South Carolina Supreme Court addressed the income-producing activity of an interstate freight hauler. The taxpayer argued that the apportionment formula produced an unconstitutional result because it apportioned 17% of its income to the State (reflecting that 17% of its mileage was in the State), while revenue from freight either originating or delivered to South Carolina accounted for only 1% of its gross revenue. The taxpayer asserted that when its trucks were merely traveling through South Carolina, they were not engaged in any activity that contributed to the taxpayer's net income. Rather, the taxpayer argued that the taxable event should only occur if it was delivering freight in the State of South Carolina; otherwise the State's mileage formula produced "an arbitrary, discriminatory and unconstitutional results, in violation of the commerce clause. . . ." In other words, the taxpayer in *Mercury* contended that the incidental act of transporting freight through the State should not be considered as a taxable event.

The Supreme Court listed a series of transactions that occurred in the freight hauling business: solicitation of the freight, picking up the freight, hauling the freight, dropping off the freight, and collecting the hauling charges. The Supreme Court held that while each of these transactions was "necessarily incidental to the production of [the business's] income," the activity that "primarily earn[ed] the income" was the hauling of freight "through and over the highways of the State of South Carolina." *Id.* Thus, the Court focused upon the company's primary activity in

determining whether South Carolina's tax was arbitrary. However, that focus did not specifically equate to the issue to be determined in this case.

In *Mercury*, the Supreme Court found that both the "incidental" and "primary" activities of the appellant's business "contribute[d] to the earnings and net income of the appellant" and were "necessarily incidental to the production of its income." Presumably, the Court distinguished those activities for a reason.¹⁴ However, the Court gave no explanation of the distinction between the "incidental" versus "primary" activities or why such a distinction was made. Nevertheless, *Mercury* did not address activities occurring prior to the "solicitation of freight." Therefore, *Mercury* provides no guidance for activities occurring before the solicitation of DIRECTV's services.

Here, Petitioner engages in other "preparatory" activities that eventually lead to satellite signals being beamed into this State. But those activities have no bearing on a customer's decision to subscribe to, i.e. solicit, Petitioner's services, nor do they occur as a result of that decision to subscribe. For instance, the national programming through the CONUS beams would exist regardless of whether there were any subscribers in South Carolina. Thus, such "preparatory" activities are too attenuated to the production of income to be considered "income-producing activity" for purposes of Section 12-6-2295(A)(5).

Analogizing the facts in this case to the holding in *Mercury*, the beaming of the satellite signals through the air of South Carolina to the customer's dish, set-top box, and television screen, and the collection of charges for such service, are also analogous to the loading, hauling, and delivery of freight following the customer's solicitation of that freight, and the collection of charges therefor. However, the other prior activities that prepare the way for DIRECTV's provision of services, i.e., the infrastructure for producing and collecting the programming content and transmitting the signals would, in comparison to the facts in the *Mercury* case, be akin to the manufacturing and transfer of the freight through its infrastructure to a storage location, from which it is later – **only after an order is placed** (or "solicited," as the Supreme Court put it) – loaded, hauled, and delivered, and for which charges are collected. Though *Mercury* did not

¹⁴ It is notable that the Supreme Court was not considering the same issue that is before the ALC. The Supreme Court was seeking to determine whether the taxing method utilized by this State was constitutional. The Court's purpose in considering whether South Carolina was taxing the primary activity could simply have been a method to determine whether the statute had a rational basis. Therefore, the emphasis placed upon the Court's analysis of "incidental" versus "primary" activities appears to be undue.

address such pre-order activities, I find that the ones at issue in this case are too attenuated to be considered income-producing.

More importantly, the evidence failed to establish that these services directly related to the production of income. In sum, DIRECTV failed to sufficiently identify its outside income-producing activities.¹⁵ Even as to local programming, though it is almost completely geared towards South Carolina residents, DIRECTV failed to prove what impact the availability of local programming has on South Carolina customers' decision to subscribe to DIRECTV. Consequently, the remaining evidence is that the transmission of the beams to the customers, as well as the subsequent activities performed that allow South Carolina customers to experience DIRECTV's services – such as the sale/lease, installation, or repair of set-top boxes that are sold or leased to customers – are income-producing activities under Section 12-6-2295(A)(5); and all occur entirely within the State.

Sourcing of the Income-Producing Activity

DIRECTV argues that nearly all of the income-producing activities it identified in this matter occurring outside of South Carolina should be sourced to the location of the activities performed by DIRECTV. At the outset, the Court disagrees that DIRECTV has sufficiently identified its activities to be sourced.¹⁶ Furthermore, even if it had identified those activities, DIRECTV failed to sufficiently establish that those activities should be sourced elsewhere.

Pursuant to Section 12-6-2295(A)(5), a service provider's gross receipts are sourced to South Carolina based on the location of the income-producing activity according to one of two prongs. In the first prong, all of the gross receipts are sourced to South Carolina "if the entire income-producing activity is within this State." S.C. Code Ann. § 12-6-2295(A)(5) (Supp. 2007). In the second prong, "[i]f the income-producing activity is performed partly within and partly

¹⁵ For example, as will be discussed *infra*, advertising performed within or without the South Carolina could be considered income-producing activity. However, DIRECTV did not provide any evidence that reflected approximately how much of its advertising was directed at South Carolina and what impact such advertising had on revenue generated in South Carolina.

¹⁶ As noted above, DIRECTV argues its "value drivers," reflect its income-producing activity. While DIRECTV may rely heavily upon "value drivers" in determining the value of certain components within its company, DIRECTV has, as aforementioned, failed to sufficiently demonstrate whether and to what extent those value drivers are income-producing activities as required by the applicable and mandatory language of Section 12-6-2295(A)(5) when calculating the numerator of the gross receipts factor.

without this State, [gross receipts are sourced to South Carolina] to the extent the income-producing activity is performed in this State.” *Id.*

DIRECTV argues that its income should be sourced based upon payroll and assets/property factors, similar to the taxpayer in *Lockwood Greene Eng'rs, Inc. v. S. C. Tax Comm'n*, 293 S.C. 447, 361 S.E.2d 346 (Ct. App. 1987). The applicable statute for apportioning net income from a taxpayer whose principal profits were derived from services at the time of *Lockwood Greene* was Section 12-7-1190 (1976) which stated:

If the principal profits or income of a taxpayer . . . are derived from sources other than manufacturing, producing, collecting, buying, assembling, processing, or selling, distributing or dealing in tangible personal property such taxpayer shall make returns and pay annually an income tax upon a proportion of its remaining net income computed on the basis of the ratio of gross receipts from within this State during the income year to the total gross receipts of such year within and without the State.

S.C. Code Ann. § 12-7-1190 (1976).

The taxpayer in *Lockwood Greene* unsuccessfully argued that the then-applicable apportionment statute for net income related to services – Section 12-7-1190 – prescribed one rule (i.e., the origin-of-payment rule) for all businesses that do not deal in tangible personal property. The South Carolina Court of Appeals did not accept the taxpayer’s argument that Section 12-7-1190 was a one-rule statute and that all net income to be apportioned under Section 12-7-1190 must be apportioned under the same method. Several facts support the Court of Appeals’ determination: (1) the Court of Appeals did not believe that the use of different methods for different industries when applying Section 12-7-1190 created a constitutional problem;¹⁷ (2) the Court of Appeals clearly suggested a distinction between finance companies and media broadcasters on one hand and personal *professional* service firms, such as Lockwood, on the other when determining where to source service receipts;¹⁸ and (3) the Court of Appeals noted that the

¹⁷ After hearing the taxpayer’s argument (that the Department had not consistently applied Section 12-7-1190) and considering the guidelines (which illustrated the Department’s policy of allowing the use of different methods for different industries), the Court of Appeals stated, “[w]e discern no constitutional basis for Lockwood’s argument.” *Lockwood Greene*, 293 S.C. at 450 n.1, 361 S.E.2d at 348 n.1.

¹⁸ *Id.* at 450, 361 S.E.2d at 348 (“We are not persuaded [finance companies and media broadcasters] 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.”). *Implicit in this finding* is the fact that the only reason for the Court of Appeals to distinguish a taxpayer like Lockwood from companies in other industries was the Court of Appeals’ belief that Section 12-7-1190 was not a “one-rule statute,” and that different methods could be used for different industries when applying Section 12-7-1190.

Lockwood firm “provides services to its clients through highly trained engineers and personnel in various offices” and that a “client pays an engineering firm for the **expertise and time** of its employees.” *Lockwood Greene*, 293 S.C. at 449, 361 S.E.2d at 347 (emphasis added). Based on the specifics of Lockwood’s business, the Court of Appeals then concluded, “Therefore, an engineering firm’s business carried on in a state is reasonably measured by the services rendered by its personnel in the state,” which “is epitomized by the ‘place of activity’ test advanced by” the Department. *Id.* Again, it would not have been necessary for the Court of Appeals to address the specifics of Lockwood Greene’s business if Section 12-7-1190 was a “one-rule statute.”

On one hand, the Court’s decision in *Lockwood Greene* did **not** mandate that the net income of **all** service providers be apportioned based on a “place of activity” test that is quantified by a payroll factor or some other cost-based factor. The Court of Appeals specifically recognized that the Department’s audit guidelines at the time sourced revenues of personal *professional* service providers (e.g., engineering, law, and accounting firms) to the “place of activity.”¹⁹ *Lockwood Greene*, 293 S.C. at 450, 293 S.E.2d at 348. At the same time, the court was **not persuaded** that service industries, such as finance companies and media broadcasters, were comparable, thus implying that revenues of service industries were sourced to the “origin of payment” (i.e., location of the borrower or customer) *Id.* The Court of Appeals also held that no constitutional problem existed with the Department’s policy of sourcing revenues of services providers in a different manner for different industries. *Id.* at 450 n.1, 361 S.E.2d at 348 n.1.

Accordingly, the result of *Lockwood Greene* was the Court of Appeals’ holding that (1) a personal professional service firm should source its gross receipts to South Carolina based on the “place of activity” test; and (2) affirmation that the Department’s then-existing policy of using different methods for different industries to source service-related net income to South Carolina, was in compliance with Section 12-7-1190. Further, despite DIRECTV’s contention, the Court of

¹⁹ The Department argues that it has had a longstanding policy in place regarding the sourcing of service-related net income and that it is therefore entitled to deference. However, this policy, though once apparently written down and acknowledged by the Court of Appeals in *Lockwood Greene*, is no longer written anywhere and apparently has not been for some time. As the finding of fact in *Lockwood Greene* is the only evidence of this policy, I find that this finding of fact is insufficient as a basis for deference. Moreover, “[p]olicy or guidance issued by an agency other than in a regulation does not have the force or effect of law.” See S.C. Code Ann. § 1-23-10(4) (2005). See also *Kirven v. Cent. States Health & Life Co., of Omaha*, 409 S.C. 30, 45, 727 S.E.2d 794 802 (2014) (“[A]n agency guideline does not have the force of law, and in any event, can never trump a regulation.... *Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.*”) (quoting *Doe v. S.C. Dep’t of Health & Human Servs.*, 398 S.C. 62, 68 n.7, 727 S.E.2d 605, 608 n.7 (2011)).

Appeals in *Lockwood Greene* did not impose a one-rule “place of activity” test for apportioning service-related income in South Carolina on *all* multistate corporate taxpayers. The Court of Appeals clearly supported the Department’s use of different methods for different industries and did not reject Lockwood’s “one-rule” argument only to replace it with a different one-rule requirement.²⁰

Unlike the taxpayer in *Lockwood Greene*, a DIRECTV customer did not hire specific professionals and is not paying for those professionals’ expertise and time, or that of any other DIRECTV employee or contractor. Instead, the customer is paying for video programming to be viewed on the customer’s television at the time and place the customer demands. DIRECTV does not sell contract negotiations. It does not sell network management services. It does not sell broadcast infrastructure or satellite triangulation. Rather, 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. Indeed, as noted above, the national programming through the CONUS beams would exist regardless of whether there were any subscribers in South Carolina; therefore, such broadcasting is preparatory activity. As to local broadcasting in South Carolina, though it is almost completely geared towards South Carolina residents, DIRECTV provided no evidence of what impact the availability of local programming has on South Carolina customers’ decision to subscribe to DIRECTV.

Furthermore, as noted above, Dr. Cody testified that he employed DIRECTV’s payroll and net value of assets as proxies in determining and sourcing DIRECTV’s income-producing activities. However, as with the determination/identification of income-producing activities, the Court also rejects as too nebulous this approach to sourcing gross receipts to South Carolina. In sum, the payroll-and-assets method of Dr. Cody does not provide a reasonable approximation of the income-producing activities performed by DIRECTV in South Carolina, and the value attributable to such activities.

Moreover, the approach proposed by Dr. Cody unduly emphasizes what amounts to “costs of performance.” It is clear that South Carolina is not a UDITPA State, and it does not require

²⁰ When Section 12-6-2295(A)(5) was enacted, the distinction between “place of activity” and “origin of payment” became irrelevant and the question then became whether the income-producing activity occurred completely within the State of South Carolina, and if only partly within the State, in what proportion it was conducted within the State. *Lockwood Greene*, in light of Section 12-6-2295(A)(5), still suggests that income-producing activity is the acts of a business that directly result in the purchase of a product or service. Finally, as discussed *supra*, the location of income-producing activity will vary depending on the industry.

apportionment of the net income of service providers based upon costs-of-performance elements. Although South Carolina's Section 12-6-2295(A)(5) is similar to UDITPA's Section 17, the General Assembly specifically chose not to include the phrase "based on costs of performance." South Carolina's applicable statutes merely require the apportionment of a service provider's net income using a gross-receipts ratio, and the gross receipts are attributable to South Carolina if the income-producing activity occurs within South Carolina or, if the income-producing activity occurs both within and outside of South Carolina, to the extent that the income-producing activity is performed within South Carolina.

Likewise, the South Carolina courts have never imposed a costs-of-performance approach to sourcing receipts of service providers to South Carolina. In addition to not being a costs-of-performance state, South Carolina has never been a state that always sourced receipts to the state in which the market exists (i.e., to the location of the customer or where the benefit is received). While some states, such as California, have statutorily adopted a market-based approach to source gross receipts of a service provider,²¹ South Carolina has not adopted any such "blanket" approach, be it market-based, costs of performance, or otherwise. Rather, its policy has been one of apportioning net income "upon a base which reasonably represents the proportion of the trade or business carried on within this State." *Lockwood Greene*, 292 S.C. at 449, 361 S.E.2d at 347 (citing *Hertz Corp. v. S.C. Tax Comm'n*, 246 S.C. 92, 142 S.E.2d 445 (1979)); *see also* S.C. Code Ann. § 12-6-2320(A) (Supp. 2000). Thus, the Court agrees with Professor Pomp that instead of mandating one method (e.g., "costs of performance" or "market-based") for determining the amount and location of income-producing activities, S.C. Code Section 12-6-2295(A)(5) provides "flexibility" in determining the relative amount of income-producing activities in the State. This approach necessitates flexibility in application of law and policy to different and often diverse service industries. *See Dish DBS Corp.*, at *9-10 ("Lockwood Greene could be interpreted to apply a flexible standard based on where the income producing activity takes place, which varies upon industry type.").

Even in many states that **have** adopted the costs-of-performance language within their applicable statutes or regulations, such states have found that the income-producing activity was **not** located in the state(s) in which significant costs were incurred. For instance, in *Heller W.*,

²¹ *See* Cal. Rev. & Taxation Code (R&TC) § 25136; Cal. Code Regs. § 25136-2.

Inc., the Arizona Supreme Court determined that the taxpayer's income-producing activity occurred solely in Arizona despite the fact that the California-based commercial financing company that received income from loans it made to Arizona borrowers incurred most of its costs in California. 116 Ariz. at 51, 53, 775 P.2d at 1115, 1117. Importantly, the applicable Arizona statute was the same as S.C. Code Ann. § 12-6-2295(A)(5) except that the Arizona sourcing statute **actually used** the phrase "costs-of-performance." Even though this language in the Arizona statute gave that taxpayer's costs-of-performance argument more merit, it was not enough to convince the court to find that the income-producing activity occurred outside of Arizona. The taxpayer argued that its income-producing activity was the borrowing of money by Heller Western through its Los Angeles headquarters to make loans to customers in Arizona. *Id.* at 50, 775 P2d at 1114. The Arizona Supreme Court held that "[t]hough borrowing of funds [in California] may be an important step in Heller Western's financing process, the direct generation of the loans occurred in Arizona. We conclude that Heller Western's sales activity in Arizona constituted the income producing activity contemplated by our tax regulations." *Id.* at 53, 775 P2d at 1117. That court went on to provide the following reasoning:

Heller Western's costs in procuring the [product that it has sold to Arizona customers] are analogous to the costs of a merchandise retailer in procuring his inventory. Heller Western can no more argue that its receipts from Arizona loan consumers should not be taxed due to its out-of-state involvement in procuring its 'inventory' than a retailer who is engaged in extensive dealings out of state to buy his merchandise could argue that he should not be taxed on the goods he sells to consumers here."

Id. This reasoning is applicable in the instant case.

This is not to suggest that the Court should not consider out-of-state activity when determining whether activity is income-producing, nor does this suggest that no such out-of-state income-producing activity occurred in this case. For instance, it is possible that advertising performed within or without the South Carolina could be considered income-producing activity.²²

²² For example, in *Ameritech Publ'g, Inc. v. Wis. Department of Revenue*, 327 Wis.2d 798, 788 N.W.2d 383 (Ct. App. 2010) (unpublished), 2010 WL 2519583, the Wisconsin Court of Appeals affirmed the taxing authority's determination that the income-producing activity of a company that received advertising revenue by placing the advertisements in telephone directories distributed in Wisconsin "was performed in Wisconsin when the advertisement reached its intended, Wisconsin audience." *Id.* at 2010 WL 2519583, *5. Indeed, the court found that the income-producing activity occurred *solely* in Wisconsin, even though the vast majority of the taxpayer's costs to gather the advertising and to publish the telephone directory were incurred outside of Wisconsin and despite the fact that the applicable Wisconsin statute *included* the phrase "costs of performance" (unlike the South Carolina statute). The Court of Appeals concluded that the advertising company's customers were paying for the broad access that the

However, DIRECTV did not provide any evidence that reflected approximately how much of its advertising was directed at South Carolina and what impact such advertising had on revenue generated in South Carolina. Therefore, the Court cannot consider advertising in this case.

Finally, even if this Court ruled that South Carolina was a costs-of-performance state, and that costs of performance therefore applied in this case, DIRECTV did not present sufficient evidence to determine its income-producing activities or to quantify how much income-producing activity occurred in any applicable state. Furthermore, DIRECTV put no value on its subscriptions or the value perceived by its customers. DIRECTV simply did not provide sufficient information on how to apportion its subscription receipts between states in which it believes income-producing activities occur.

Substantial Understatement Penalties

Civil penalties are applied to every South Carolina tax law that requires a return unless otherwise provided. S.C. Code Ann. § 12-54-43. Such penalties are considered a tax owed to this State. *Id.* Further, “[i]f any tax is not paid when due, interest is due on the unpaid portion from the time the tax was due until paid in its entirety.” S.C. Code Ann. § 12-54-25(A). 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. “[T]here 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.* § 12-54-155(B)(1)(a). However, Section 12-54-155(B)(2)(b) adds the following:

The amount of the understatement . . . must be reduced by that portion of the understatement which is attributable to the tax treatment of an item: (i) by the taxpayer if there is or was substantial authority for that treatment, or (ii) with respect to which the relevant facts affecting the item’s tax treatment are adequately disclosed in the return or in a statement attached to the return and there is a reasonable basis for the tax treatment of the item by the taxpayer. . . .

company could provide to a Wisconsin audience, and that the taxpayer’s income-producing activity was thus “the provision of access to a Wisconsin audience.” *Id.* at *9-10

Moreover, subsection (D)(1) further adds that “[a] penalty must not be imposed pursuant to this section with respect to a portion of an underpayment if it is shown that there was a reasonable cause for the portion and that the taxpayer acted in good faith with respect to the portion.” Finally, “[u]nless specifically prohibited, the department may waive, dismiss, or reduce penalties provided for in this chapter.” S.C. Code Ann. § 12-54-160.

In the instant matter, the Department was correct in its calculation of the understatement of taxes owed for 2009-2011 (and interest thereon), and that amount was properly not reduced. I find that there was no substantial authority for DIRECTV’s treatment of subscription receipts. Also, though DIRECTV appropriately disclosed relevant facts affecting subscription receipts, I find that DIRECTV’s basis for its tax treatment of the subscription receipts to be unreasonable.

I also find that the Department was correct to apply a substantial understatement penalty for underpayment of taxes owed for 2009 through 2011. Though DIRECTV acted in good faith with respect to bringing its claim regarding the portions of the understated tax amounts, I find that DIRECTV did not have “**reasonable cause**” (emphasis added) for the underpaid taxes, i.e., DIRECTV’s method of calculating subscription receipts was unreasonable. Nevertheless, because the Court finds that DIRECTV acted with sufficient belief in bringing its claim regarding the portion of the understated tax amounts, the Court, pursuant to Section 12-54-160, concludes that a reduction in the penalty imposed upon DIRECTV should be reduced. Therefore, the Court shall reduce the penalty originally sought by the Department to 25% of that amount.

Conclusion

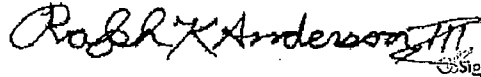
After considering the evidence in the record and the pertinent legal authorities, I conclude that based upon the reliable evidence, DIRECTV’s income-producing activity is the delivery of the signal into the homes and onto the television sets of DIRECTV’s customers. All of those income-producing activities related to South Carolina customers occurred entirely within South Carolina; therefore, 100% of DIRECTV’s subscription receipts from South Carolina customers must be sourced to the numerator of the gross receipts ratio. This Court rejects DIRECTV’s attempt to source the subscription receipts from South Carolina customers outside of South Carolina based upon costs of performance. Finally, DIRECTV is liable for substantial underpayment penalties.

ORDER

IT IS THEREFORE ORDERED that DIRECTV's refund requests for its amended 2006, 2007, and 2008 income tax returns are denied.

IT IS FURTHER ORDERED that DIRECTV be assessed \$6,646,168.00 in tax and license fees, \$653,425.00 in interest, and \$1,246,155.75 in penalties with regard to its 2009, 2010, and 2011 income tax returns.

AND IT IS SO ORDERED.

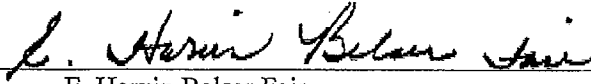
A handwritten signature in black ink that reads "Ralph King Anderson, III". The signature is written in a cursive style. To the right of the signature, there is a small, faint logo that appears to be a stylized "S" with the word "Sign" underneath it.

Ralph King Anderson, III
Chief Administrative Law Judge

June 12, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

June 12, 2015
Columbia, South Carolina

RECEIVED
JUL 14 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT COUNTY

Ralph King Anderson, III, Chief Administrative Law Judge

RECEIVED

JUL 14 2015

SC Court of Appeals

Case No. 14-ALJ-17-0158-CC

DIRECTV, Inc and its Subsidiaries, Appellant,

v.

South Carolina Department of Revenue, Respondent.

PROOF OF SERVICE

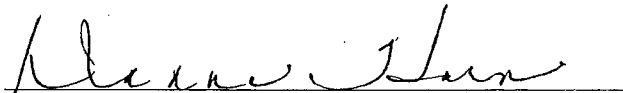
I the undersigned Administrative Assistant of the law firm of Nelson Mullins Riley & Scarborough, LLP, attorneys for DIRECTV, Inc. & its Subsidiaries, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

NOTICE OF APPEAL

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Nicole M. Wooten
Mary Beth Campbell
Timothy C. Thomson
Counsel for Litigation
South Carolina Department of Revenue
Office of General Counsel for Litigation
PO Box 12265
Columbia, SC 29211


Donna Horn
Administrative Assistant

July 9, 2015

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DIRECTV, Inc.,) Civil Action No. 14-ALJ-17-0158-CC
)
Petitioner,)
)
vs.) NOTICE OF FILING APPEAL BOND
)
South Carolina Department of Revenue,)
)
Respondent.)
)

DIRECTV, Inc. ("DIRECTV") hereby files the attached appeal bond in the amount of Seven Million Six Hundred Four Thousand Five Hundred Eighty-Nine and No/100 Dollars (\$7,604,589.00) issued by Westchester Fire Insurance Company [Bond No. K09106893] (the "Bond") as required by S.C. Code Ann. § 12-60-3370 (Law Co-op. 2006) (providing that "a taxpayer shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge before appealing the decision to the court of appeals"). (See Ex. A, Appeal Bond.) The Bond shall remain in effect during DIRECTV's appeal to the South Carolina Court of Appeals and thereafter until all appeals and remanded proceedings, if any, are finally concluded.

[Signature Block on Following Page]

FILED

JUL - 9 2015

SC ADMIN. LAW COURT

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Attorneys for DIRECTV, Inc.

Charleston, South Carolina

July 9, 2015

CERTIFICATE OF SERVICE

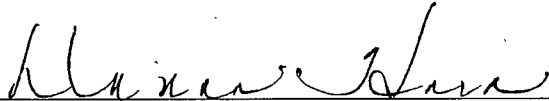
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for DIRECTV, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

NOTICE OF FILING APPEAL BOND

Counsel Served:

Nicole Wooten, Esq.
William J. Condon, Jr., Esq.
Timothy C. Thompson, Esq.
Counsel for Litigation
South Carolina Department of Revenue
PO Box 12265
Columbia, SC 29211



Donna Horn
Administrative Assistant

July 9, 2015

FILED

JUL -9 2015

SC ADMIN. LAW COURT

APPEAL BOND

DIRECTV, Inc. & Subsidiaries,)	Case No. 14-ALJ-17-0158-CC
Plaintiff,)	
)	Undertaking of Corporate Surety
v.)	
)	Bond No. K09106893
South Carolina Department of Revenue,)	
Defendant)	
)	

KNOW ALL BY THESE PRESENTS:

That we, DIRECTV, INC. & SUBSIDIARIES, as Principal(s), and WESTCHESTER FIRE INSURANCE COMPANY, a corporation authorized to transact surety business in the State of South Carolina, as Surety, are held and firmly bound unto SOUTH CAROLINA DEPARTMENT OF REVENUE, as Obligee, in the maximum penal sum, and which shall not exceed, SEVEN MILLION SIX HUNDRED FOUR THOUSAND FIVE HUNDRED EIGHTY-NINE AND 00/100 DOLLARS (\$7,604,589.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, legal representatives, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the above named DIRECTV, INC. & SUBSIDIARIES desires to give an undertaking for an appeal of an action previously decided in South Carolina Administrative Law court, wherein the said DIRECTV, INC. & SUBSIDIARIES is Plaintiff, and being numbered 14-ALJ-17-0158-CC on the docket thereof;


NOW, THEREFORE, the undersigned surety, does hereby obligate itself, jointly and severally, to South Carolina Department of Revenue under said statutory obligations in the maximum penal sum, and which shall not exceed, SEVEN MILLION SIX HUNDRED FOUR THOUSAND FIVE HUNDRED EIGHTY-NINE AND 00/100 DOLLARS (\$7,604,589.00).


IN TESTIMONEY WHEREOF, the condition of this obligation is such that if the Principals shall diligently prosecute its appeal to a decision, and shall promptly perform and satisfy the judgment, then this obligation will be void; otherwise to remain in full force and effect. PROVIDED, HOWEVER, that the aggregate liability of the Surety hereunder for any and all claims presented shall not exceed the penal sum of this bond.

IN WITNESS THEREOF, the said Surety has caused its corporate name and seal to be hereunto affixed by its duly authorized officer.

Signed, Sealed and Dated: July 1, 2015.

DIRECTV, INC. & Subsidiaries


 By: JANET L. Williamson
 ASSISTANT SECRETARY
 WESTCHESTER FIRE INSURANCE COMPANY


 By: Kari Davis, Attorney-In-Fact

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

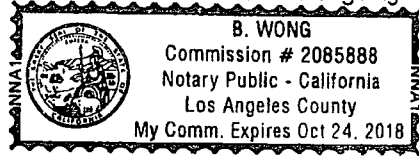
State of California
County of Los Angeles

On JUL 01 2015 before me, B. Wong, Notary Public
personally appeared, Kari Davis
who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Handwritten Signature]
SIGNATURE OF NOTARY



Notary Public Seal

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

DESCRIPTION OF ATTACHED DOCUMENT:

TITLE OR TYPE OF DOCUMENT: _____

NUMBER OF PAGES: _____ DOCUMENT DATE: _____

CAPACITY(IES) CLAIMED BY SIGNER(S)

Signer's Name: _____

Signer's Name _____

INDIVIDUAL

INDIVIDUAL

CORPORATE OFFICER
Title(s) _____

CORPORATE OFFICER
Title(s) _____

PARTNER(S) LIMITED GENERAL

PARTNER(S) LIMITED GENERAL

ATTORNEY-IN-FACT

ATTORNEY-IN-FACT

TRUSTEE(S)

TRUSTEE(S)

GUARDIAN/CONSERVATOR

GUARDIAN/CONSERVATOR

OTHER: _____

OTHER: _____

Signer is representing:

Signer is representing:

NAME OF PERSON(S) OR ENTITY(IES)

NAME OF PERSON(S) OR ENTITY(IES)

Power of Attorney

WESTCHESTER FIRE INSURANCE COMPANY

Know all men by these presents: That WESTCHESTER FIRE INSURANCE COMPANY, a corporation of the Commonwealth of Pennsylvania pursuant to the following Resolution, adopted by the Board of Directors of the said Company on December 11, 2006, to wit:

"RESOLVED, that the following authorizations relate to the execution, for and on behalf of the Company, of bonds, undertakings, recognizances, contracts and other written commitments of the Company entered into the ordinary course of business (each a "Written Commitment"):

- (1) Each of the Chairman, the President and the Vice Presidents of the Company is hereby authorized to execute any Written Commitment for and on behalf of the Company, under the seal of the Company or otherwise.
- (2) Each duly appointed attorney-in-fact of the Company is hereby authorized to execute any Written Commitment for and on behalf of the Company, under the seal of the Company or otherwise, to the extent that such action is authorized by the grant of powers provided for in such persons written appointment as such attorney-in-fact.
- (3) Each of the Chairman, the President and the Vice Presidents of the Company is hereby authorized, for and on behalf of the Company, to appoint in writing any person the attorney-in-fact of the Company with full power and authority to execute, for and on behalf of the Company, under the seal of the Company or otherwise, such Written Commitments of the Company as may be specified in such written appointment, which specification may be by general type or class of Written Commitments or by specification of one or more particular Written Commitments.
- (4) Each of the Chairman, the President and Vice Presidents of the Company is hereby authorized, for and on behalf of the Company, to delegate in writing any other officer of the Company the authority to execute, for and on behalf of the Company, under the Company's seal or otherwise, such Written Commitments of the Company as are specified in such written delegation, which specification may be by general type or class of Written Commitments or by specification of one or more particular Written Commitments.
- (5) The signature of any officer or other person executing any Written Commitment or appointment or delegation pursuant to this Resolution, and the seal of the Company, may be affixed by facsimile on such Written Commitment or written appointment or delegation.

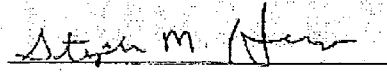
FURTHER RESOLVED, that the foregoing Resolution shall not be deemed to be an exclusive statement of the powers and authority of officers, employees and other persons to act for and on behalf of the Company, and such Resolution shall not limit or otherwise affect the exercise of any such power or authority otherwise validly granted or vested.

Does hereby nominate, constitute and appoint Brenda Wong, Jeffrey Strassner, Kari Davis, Natalie K Trofimoff, Patricia Talavera, Tenzer V Cunningham, all of the City of LOS ANGELES, California, each individually if there be more than one named, its true and lawful attorney-in-fact, to make, execute, seal and deliver on its behalf, and as its act and deed any and all bonds, undertakings, recognizances, contracts and other writings in the nature thereof in penalties not exceeding Twenty Five million dollars & zero cents (\$25,000,000.00) and the execution of such writings in pursuance of these presents shall be as binding upon said Company, as fully and amply as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its principal office.

IN WITNESS WHEREOF, the said Stephen M. Haney, Vice-President, has hereunto subscribed his name and affixed the Corporate seal of the said WESTCHESTER FIRE INSURANCE COMPANY this 23 day of September 2014.

WESTCHESTER FIRE INSURANCE COMPANY

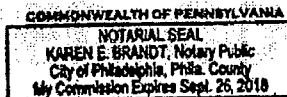


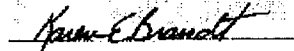

Stephen M. Haney, Vice President

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA ss.

On this 23 day of September, AD. 2014 before me, a Notary Public of the Commonwealth of Pennsylvania in and for the County of Philadelphia came Stephen M. Haney, Vice-President of the WESTCHESTER FIRE INSURANCE COMPANY to me personally known to be the individual and officer who executed the preceding instrument, and he acknowledged that he executed the same, and that the seal affixed to the preceding instrument is the corporate seal of said Company; that the said corporate seal and his signature were duly affixed by the authority and direction of the said corporation, and that Resolution, adopted by the Board of Directors of said Company, referred to in the preceding instrument, is now in force.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at the City of Philadelphia the day and year first above written.





Karen E. Brandt
Notary Public

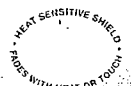
I, the undersigned Assistant Secretary of the WESTCHESTER FIRE INSURANCE COMPANY, do hereby certify that the original POWER OF ATTORNEY, of which the foregoing is a substantially true and correct copy, is in full force and effect.

In witness whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the corporate seal of the Corporation, this 23rd JUL 01 2015




William L. Kelly, Assistant Secretary

THIS POWER OF ATTORNEY MAY NOT BE USED TO EXECUTE ANY BOND WITH AN INCEPTION DATE AFTER September 23, 2016.



CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)

County of Los Angeles)

On July 8, 2015 before me, Stacey Magallanes, Notary Public,
Date Here Insert Name and Title of the Officer

personally appeared Janet Lee Williamson
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Handwritten Signature]
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____ Document Date: _____

Number of Pages: _____ Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

Corporate Officer — Title(s): _____

Partner — Limited General

Individual Attorney in Fact

Trustee Guardian or Conservator

Other: _____

Signer Is Representing: _____

Signer's Name: _____

Corporate Officer — Title(s): _____

Partner — Limited General

Individual Attorney in Fact

Trustee Guardian or Conservator

Other: _____

Signer Is Representing: _____

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Case No. 14-ALJ-17-0158-CC

Appellate Case No. 2015-001509

DIRECTV, Inc. and its Subsidiaries, Appellant,

v.

South Carolina Department of Revenue, Respondent.

CERTIFICATE OF COUNSEL

Pursuant to South Carolina Appellate Court Rule 210(g), the undersigned certifies that the foregoing Amended Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Bryson M. Geer

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(843) 853-5200

Attorneys for DIRECTV, Inc. & its Subsidiaries

Charleston, South Carolina

January 13, 2017

RECEIVED

JAN 20 2017

SC Court of Appeals

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