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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

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SC Court of Appeals

Case No. 14-ALJ-17-0285-CC

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

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This matter was before the South Carolina Administrative Law Court ("the ALC" or "the Court") pursuant to a Request for a Contested Case Hearing filed by Dish DBS Corporation, f/k/a EchoStar DBS Corp., and Affiliates ("Petitioner") challenging the South Carolina Department of Revenue's ("Respondent's," "the Department's" or "the DOR's") final determination, in which the Department assessed Petitioner taxes, interest, and understatement penalties following an audit for tax years 2004-2010. In its determination, the Department assessed Petitioner $544,286.00 in income taxes, $399,496.00 in related interest, and $276,307.00 in related penalties for tax years 2004-2010. It also assessed Petitioner $90,551.00 in license fee taxes, $32,196.00 in related interest, and $21,846.00 in related penalties for tax years 2006-2011. The Department assessed Petitioner a total of $1,364,682.00 in taxes, interest, and related penalties. Appellant also filed a Motion in Limine on March 5, 2015 to exclude the testimony of Dr. Glen Harrison, which the ALC denied on March 25, 2015.

The Department issued its final determination on May 13, 2015. Petitioner timely

appealed to the ALC on June 12, 2015. Subsequently, the parties filed cross motions for summary judgment, which this Court denied in an order dated February 10, 2015. Thereafter, on September 23-25, 2015, this Court held a hearing on the merits of the case.

On May 20, 2016, the ALC issued its Order and Appellant filed a Motion for Reconsideration on May 31, 2016. On July 11, 2016, the ALC issued its Amended Final Order after consideration of Appellant's Motion for Reconsideration. The Amended Final ALC Order upheld the Department's entire Assessment of Taxes, penalties and interest.

Appellant subsequently timely appealed.

STATEMENT OF FACTS

Dish Network Corporation is a publicly-traded holding company organized in 1995 under the laws of the State of Nevada. (Pet. Ex. 19 (hereinafter "Dish 10-K"); R. p. 1280). Its principal executive offices are located in Englewood, Colorado. (*Id.*) Its subsidiaries (including the Petitioner) operate two primary business segments: its Dish-branded satellite television service and its wireless service. As of December 31, 2010, Dish Network Corporation had approximately 22,000 employees, most of whom were located in the United States. (R. p. 1292). The vast majority of the employees are located outside South Carolina, and instead are located principally in Colorado and 11 call centers, none of which are located in South Carolina. (ALC Amended Final Order, Statement of Facts, R. p. 6–7; Dish 10-K, R. p. 1311).

The Petitioner operates the Dish Network pay-television service and provides its 14 million subscribers with a wide selection of local and national programming accessible by the subscriber via direct satellite communications. (Dish 10-K, R. p. 1299).

The channels provided include:

1. 280 basic video channels
2. 60 Sirius satellite radio music channels
3. 30 premium movie channels
4. 35 regional and specialty sports channels
5. 2,800 local channels
6. 250 Latino and international channels; and
7. 55 channels of pay per view. (Dish 10-K, R. p. 1280)

The direct-to-home satellite system at issue includes five major elements: the programming source, the uplink center, the satellite, the receiving antennae (dish), and the in-home receiver. Petitioner does not create original programming—instead, it purchases the right to broadcast news and entertainment programming produced by others. Those programming providers (e.g., ESPN, Disney, HBO, Local ABC, CBS and NBC) transmit content to Petitioner's uplink centers (none of which are located in South Carolina). Petitioner also purchases programming from local broadcast television stations but captures the local programming by utilizing either a fiber network or antennas. (ALC Amended Final Order, R. p. 6–7).

Equipment at the uplink centers processes the incoming programming signals to assure quality (e.g., amplifying the signal), to protect copyrights (e.g., by encrypting the data), to insert content (e.g., public service announcements), and to put the signal into a form that can be transmitted from the uplink centers to satellites orbiting the Earth. To capture and view the satellite signal, a consumer must sign a subscriber agreement and purchase or lease certain specialized equipment consisting primarily of a compatible satellite antenna dish, receiver, and remote control. (*Id.*, R. p. 6–7).

The Petitioner's principal digital broadcast facilities that it uses are EchoStar's facilities in Cheyenne, Wyoming and Gilbert, Arizona. The Petitioner also uses six

regional digital broadcast operations facilities owned and operated by EchoStar that allows it to maximize the use of the spot beam capabilities of certain owned and leased satellites. Non-local and local programming is delivered to these facilities by fiber or satellite transmission. None of these regional broadcast centers are located in South Carolina. The Petitioner then processes, compresses, encrypts and uplinks the programming to owned or leased satellites for subsequent direct broadcast to its subscribers. (Dish 10-K, R. p. 1281, 1284, 1314; ALC Amended Final Order, R. p. 7).

Petitioner's direct competition includes:

1. Local free television.

2. DirecTV, which is the largest satellite provider. It represents 20% of pay TV subscribers.

3. Cable TV. 98% of the 130 million housing units have access to cable. More than 95 million households subscribe to pay TV service and approximately 63% of pay TV subscribers receive programming from a cable operator.

4. Telecommunications companies. Both AT&T and Verizon have built in fiber-optic networks to provide video services in substantial portions of their service areas; and

5. Internet delivered video. This has become an increasing source of competition as broadband networks have improved. (Dish 10-K, R. p. 1282, 1295).

Petitioner also competes with various indirect competitors including free (local library, local television) and paid (Netflix, RedBox, Hulu) providers of movies, as well as numerous news and sporting events on paid and free radio stations. (*Id.*)

The Petitioner broadcasts the non-local and local programming to subscribers using satellites that operate in the microwave radio spectrum. As of December 31, 2013,

the Petitioner owned or leased capacity on 15 satellites. During the audit period, Petitioner used 13 satellites. (Dish 10-K, R. p. 1281, 1284–85).

In order to receive Petitioner's signal, subscribers must have a set-top box, a remote and an antenna. These products contain over 480 patents, and over 200 trademarks, and copyrights. (R. p. 494, lines 3–6).

The Petitioner had eight income producing activities. These include:

1. Programming/content;
2. Satellites/uplink;
3. Advertising;
4. Subscriber Equipment;
5. Installation;
6. In-home repair; and
7. Call centers (R. p. 600, line 4–p. 608, line 21).

Appellant also had considerable General and Administrative (G&A) expenses. Programming and content include the basic programs (movies, television programs, sports and numerous specialty programming channels aimed at viewers in South Carolina and the Southeastern United States (ESPN, Fox, NASCAR, hunting, African-American, weather, golf, religious) which Dish broadcasts to customers. Virtually all of this was licensed from third parties. (R. p. 582, lines 1–2). For example, in 2010 Dish paid ESPN over $725 million for sports programming (R. p. 503, lines 11–16) and Fox some $600 million for news and other sports programming. (R. p. 512, line 21–p. 513, line 6). The programming was acquired in Colorado. (R. p. 584, lines 7–12). Obviously programming is an income producing activity. ESPN (Dish's largest programming contract) was particularly helpful in attracting subscribers in South Carolina. Attendance at University of South Carolina home games was 14th in the country and Clemson was 16th. The USC women's basketball program led the nation in home attendance. Such fans want to watch

away games and Dish licenses the SEC network to attract the viewers in South Carolina and other states with an SEC program. (R. p. 603–04). Dish's total cost for programming was $4.4 billion in 2010. (Pet. Ex. 36 (hereinafter "SC IPA Analysis"), R. p. 3148).

Satellite and uplinks were necessary to program the program event from the provider (*e.g.*, ESPN for a University of South Carolina football game) to subscriber's homes in South Carolina. Dish's total expenses in this regard for 2010 was $1.6 billion. (*Id.*) This included the cost of creating and maintaining uplink, downlink and satellites across the United States. None of these facilities were in South Carolina. (Dish 10-K, R. p. 1284–86).

Advertising included direct mail and numerous other advertising outlets. Advertising was designed to attract new subscribers and to retain existing subscribers in a highly competitive market. Dish expended $17 million in 2010 in retention marketing and $309 million in subscriber acquisition marketing. (SC IPA Analysis, R. p. 3148; ALC Amended Final Order, R. p. 7). This includes $65 million paid to third party marketers. These advertising contracts were executed in Colorado. (R. p. 482, line 8–p. 483, line 21).

Subscriber equipment primarily included the outside antennae, receiver box, and remote, which Dish leased to South Carolina subscribers. This equipment was necessary to get the signal onto the subscriber's television and included a number of other critical functions. These included quality control of the signal, numerous apps, billing and anti-fraud devices. Fraud is a significant concern to satellite television providers. Dish expended $822 million in 2010 in this regard. (SC IPA Analysis, R. p. 3148). None of

this equipment is manufactured or acquired in South Carolina (R. p. 490, line 10–p. 494, line 6).

Installation involved installing the antennae, receiver box, and remote in subscribers' homes, as subscribers are no longer able to install this equipment themselves. Installation is done by third parties, typically local South Carolina businesses. Installers also play a critical role in attracting new subscribers. A majority of Dish customers come from installers and they receive payments for such. Dish expended $58 million in South Carolina 2010 for installation expenses. (SC IPA Analysis, R. p. 3148).

In-home repair involves repairs at subscribers' homes. Dish expended $89 million for in-home repairs in South Carolina in 2010. (*Id.*)

Call centers included 11 call centers (none located in South Carolina) (R. p. 474, lines 6–11), with some 8,000-9,000 employees. Call centers were critical during the audit period as no on-line subscription service existed and new customers were required to go through a call center. (R. p. 484, lines 12–15). The call centers explained the set up procedures and took the credit card information from every single South Carolina customer during the audit period. (ALC Amended Final Order, R. p. 8). Call centers also were also responsible for billing, customer complaints, inquiries, and promotion of optional plans and services. The employees were incentivized to sell optional programs. (R. p. 766, lines 19–25). The call centers also were authorized in various ways to prevent "churning" *i.e.*, persons who frequently switched back and forth from Dish, cable companies, and DirecTV. Dish expended $1.1 billion for call centers in 2010. (SC IPA Analysis, R. p. 3148).

General and Administrative ("G&A") primarily involved the Dish corporate headquarters in Englewood, Colorado. The ALC determined that G&A was not an income producing activity, and Appellant has not contested this point.

Dish had 14 million subscribers in 2010, which included approximately 227,000 South Carolina subscribers. The 14 million subscribers represented about 15% of the paid TV subscribers in the United States. (R. p. 473, lines 8–11). Comcast Cable was the largest paid television provider, DirecTV second and Dish third. (R. p. 474, line 20–p. 475, line 4).

A total of 1.6% of Dish subscribers are located in South Carolina. Based on census data for the periods at issue, South Carolina's population was approximately 1.5% of the national population. (R. p. 614, line 13–p. 615, line 12).

During the periods at issue, the Petitioner sourced and reported income on its amended returns under the *pro rata* Cost of Performance ("COP") method. (R. p. 598, lines 2–5). On audit, the Respondent determined that the proper method of reporting for corporate income and license tax purposes is the location of the subscriber, *i.e.*, market share approach.

STANDARD OF REVIEW

Tax appeals to the ALC are subject to the Administrative Procedures Act. *Long Cove Home Owners' Ass'n v. Beaufort Cty. Tax Equalization Bd.*, 327 S.C. 135, 139, 488 S.E.2d 857 860 (1997). Accordingly, review of the ALC decision is governed by S.C. Code Ann. § 1-23-380(5) (Supp. 2010), which states: "The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions;* * * (d) affected by other error of law; (e) clearly

erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Questions of statutory interpretation are questions of law, which the appellate court may decide without any deference to the court below. *CFRE, LLC v. Greenville Co. Assessor*, 2011 WL 3804517 (S.C. 2011) (*citing City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)).

ARGUMENTS

I. The ALC erred in denying Petitioner's Motion in Limine and objections and allowing the testimony of Dr. Glen Harrison.

Petitioner filed a Pre-Trial Motion in Limine to the testimony of the Department's expert witness Dr. Harrison and made numerous objections at trial to his testimony, all of which were denied. Harrison has a Ph.D. in economics. His current responsibilities are "teaching and research in the field of risk management and insurance."[1] He was qualified as "an expert in applied economics."[2] He has never taken,[3] taught,[4] or published[5] in the area of state taxation, apportionment of income for multi-state taxpayers or the calculation of the numerator in a state tax apportionment scheme. He has also never taken a course,[6] taught a course,[7] or published[8] an article on the calculation or definition of "income producing activities" for state tax purposes. His testimony consisted of his opinion "from an applied economic perspective" to the legal correctness of the DOR's

[1] R. p. 676, lines 3–4.
[2] R. p. 696, lines 17–24.
[3] R. p. 691, lines 3–11.
[4] R. p. 691, lines 12–24.
[5] R. p. 691, line 25–p. 692, line 6.
[6] R. p. 693, line 23–p. 694, line 1.
[7] R. p. 694, lines 6–13.
[8] R. p. 694, lines 15–18.

sourcing of gross receipts.

At his deposition, Dr. Harrison cited two treatises that he based his opinion on: *Welfare Economics* and *Advanced Economic Theory*.[9] At trial, he conceded neither treatise discussed income producing activities.[10] He further conceded no economic treatise supports his testimony that Petitioner's only income producing activity was the mailing of the bill.[11]

The ALC Order relies heavily on Dr. Harrison's testimony. For example, the Order states that "Dr. Harrison testified that in his opinion subscriber revenue is the simplest way to determine petitioner's income-producing activity." The Order also states "I agree with Dr. Harrison and the Department's description of Petitioner's income producing activity." (ALC Amended Final Order, R. p. 25). The Order further states, "I find it appropriate, as Dr. Harrison opined, to distinguish the income producing activity of media broadcasting company services from other services, like professional engineering services." (ALC Amended Final Order, R. p. 26).

South Carolina Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise.

South Carolina courts make three inquiries when determining the admissibility of expert testimony: (1) The "court must determine whether 'the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.'" *Graves v. CAS Medical Systems, Inc.*, 401 S.C 63, 74, 735 S.E.2d 650, 655

[9] R. p. 726, lines 20–25.
[10] R. p. 726, line 24–p. 727, line 12.
[11] R. p. 728, line 21–p. 729, line 14.

(2012); (2) The "expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,' although he 'need not be a specialist in the particular branch of the field;'" *Id.* and (3) The "substance of the testimony must be reliable." *Id.* This is the central feature of the analysis. *Id.* "The party offering testimony has the burden of showing the witness possesses the necessary learning, skill or practical experience to enable the witness to give opinion testimony." *White,* 372 S.C. at 375, 645 S.E.2d at 612.

See *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), where the court concluded that it would consider the admissibility of scientific evidence, looking at the following factors: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *Id.* at 19, 151 S.E.2d at 517, quoting *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781. Dr. Harrison testified that his opinions were based upon scientific principles. (R. p. 710, line 5–7).

The expert witness must have "acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." *State v. White*, 372 S.C. 364, 374, 642 S.E.2d 607, 612 (Ct. App. 2007).

In *State v. Morris*, the South Carolina Supreme Court held that in a securities fraud case, a law professor was qualified to testify as an expert witness on corporate and securities laws where he had taught at the university for more than twenty-five years,

with experience teaching corporate and securities law classes, and had served as one of the author on many corporate law publications in the state. *State v. Morris*, 376 S.C. 189, 204, 656 S.E.2d 359, 367. By contrast, Dr. Harrison has never published or taught in the area of state income tax apportionment.

Simply put, Dr. Harrison freely admitted he had no "requisite skill or knowledge" in the area of state income tax apportionment, and freely admitted no economic publications supported his testimony.

Regarding his testimony that subscriber revenue is the "simplest way" to determine income, true, but so is a flat tax. Given that tax returns are prepared by the taxpayer (and not the DOR), and only a tiny percentage of returns are audited, is it good tax policy for taxpayers to self-assess their income or sales tax liability based upon "the simplest way?" Rest assured the "simplest way" will frequently result in less income going onto an income or sales tax return.

Dr. Harrison also stated: "The only thing that is necessary and sufficient to produce income is the subscriber in Edisto Island or me in Irmo . . . paying the revenue." This, on its face is absurd. Why would anyone pay Dish any income unless it had spent billions of dollars for the satellites and box technology to get an adequate signal into the home? And why would anyone pay Dish any income if it was merely replicating free television? People pay Dish income to watch ESPN and Fox News, which together cost Dish over $1.2 billion a year. (R. p. 592, lines 8–10 (ESPN); R. p. 512, line 22–p. 513, line 7 (Fox News)). And the subscriber in Edisto or Irmo signed up and paid the subscription revenue to a call center, which cost Dish over a billion dollars a year to operate.

While it might be understandable for the South Carolina General Assembly to hash out whether market sourcing is "economically reasonable" as an apportionment method, it is of no relevance to the ALC or this Court. Similarly, the General Assembly might debate whether "From an economic perspective, . . . it is appropriate for the taxpayer's income from South Carolina subscription revenue to be sourced to South Carolina" (R. p. 177; p. 187) and consider adopting the market share approach in legislation, but it is of no relevance once the General Assembly drafts and passes apportionment legislation. Once the Governor signs the Act into law, the economic reasonableness – or lack of economic reasonableness – becomes irrelevant.

II. Did the ALC err in holding that South Carolina is not a Pro Rata Cost of Performance State?

A. Burden of Proof.

Although a tax assessment is initially presumed correct, once a taxpayer has established that an assessment is incorrect, either by proving the actual valuation or through other evidence establishing that the assessment is incorrect, the presumption of correctness is removed and the taxpayer is entitled to appropriate relief. *See Cloyd v. Mabry*, 295 S.C. 86, 88-89, 367 S.E.2d 171, 173 (Ct. App. 1988) (explaining that "[a] taxpayer contesting an assessment has the burden of showing that the valuation of the taxing authority is incorrect" and that, although "[o]rdinarily this will be done by proving the actual value . . . [t]he taxpayer may, however, show by other evidence that the assessing authority's valuation is incorrect" and "[i]f he does so, the presumption of correctness is then removed and the taxpayer is entitled to appropriate relief").

B. Ambiguity in Statute to be Resolved in Favor of Taxpayers.

"If a statute's language is plain, unambiguous, and conveys a clear meaning 'the

rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Id.* "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Id.*

In the context of a tax statute, it is a settled rule that ambiguities are resolved "against the government and in favor of the taxpayer." *See Mead v. Beaufort Cty. Assessor*, Docket No. 13-ALJ-17-0585-CC (filed Aug. 19, 2014) and *Hadden v. S.C. Tax Comm'n*, 183 S.C. 38, 46-47, 190 S.E.249, 251 (1937) (noting that "where a tax statute is ambiguous or is reasonably susceptible of an interpretation that would exclude the person or subject sought to be taxed, any substantial doubt must be resolved against the government in favor of the taxpayer"); *see also Clark v. S.C. Tax Comm'n*, 259 S.C. 161, 169, 191 S.E.2d 23, 26 (1972) ("Revenue laws are generally construed in favor of the taxpayer and against the taxing authority."); and *Sutherland Statutory Construction* § 66:1 (6th ed.).

"In the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." *Alltel Commc'ns v. S.C. Dep't of Rev.*, 399 S.C. 313, 321, 731 S.E.2d 869, 872 (citing *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989). "[W]here the language relied upon to bring a particular person within a tax law is ambiguous or is reasonably susceptible of an interpretation that will exclude such person, then the person will be excluded, any substantial doubt being resolved in his favor." *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508,

509–510; see also *SCANA Corp. v. S.C. Dep't of Revenue*, 384 S.C. 388, 394 n. 3, 683 S.E.2d 468, 471 (2009) (Beatty, J., dissenting) (noting general rule that where substantial doubt exists as to the construction of tax statutes, the doubt must be resolved against the government). Significantly, this case does not involve the statutory construction of an exemption, credit or deduction, where doubt is resolved against the taxpayer.

C. Apportionment of Income in South Carolina – General.

"A corporation's taxable income in South Carolina in computed using the Internal Revenue code with modifications as provided by South Carolina law, and this amount is 'subject to allocation and apportionment as provided in Article 17 of this chapter.'" *Media Gen. Commc'ns. Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 145, 694 S.E.2d 525, 528 (2010) (citing S.C. Code Ann. § 12-6-580 (2000)). Further, when "a taxpayer is transacting or conducting business partly within and partly without this State, the South Carolina income tax is imposed upon a base which reasonably represents the proportion of the trade or business carried on within this State." S.C. Code Ann. § 12-6-2210(B) (2014). *See Lockwood Greene Engineers, Inc. v. S.C. Tax Comm'n*, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987) ("The purpose of the allocation statutes is to provide for imposition of South Carolina income tax 'upon a base which reasonably represents the proportion of the trade or business carried on within this State.'" (citation omitted)).

Generally, there are two predominant apportionment methods for sourcing income from the sales of services: the "cost of performance" method and the "market share" method. First, the cost of performance method:

> requires the taxpayer first to determine which of its activities are the income-producing activities for its service income and then to determine where the costs of performing those income-producing activities were

> incurred. The taxpayer then compares the amount of costs of performance incurred in the taxing state to the amount of such costs in the other individual states. The sales are attributed to the state with the greatest amount of costs of performance.

Hellerstein & Hellerstein, *State Taxation* ¶ 19.8, 46 (3rd ed. 2014). Cost of performance is the method utilized in the Uniform Division of Income for Tax Purposes Act ("UDITPA"). Section 17 of UDITPA utilizes standard cost of performance language:

> Sales, other than sales of tangible personal property, are in this state if:
>
> (a) the income-producing activity is performed in this state; or
>
> (b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, *based on costs of performance*.

Uniform Division of Income for Tax Purposes Act § 17 (Supp. 2013) (emphasis added). Therefore, under the cost of performance method, income is sourced based on where the costs occurred for the income producing activity. Moreover, the provision creates an all-or-nothing situation because, if the greater portion of the costs of performance takes place outside the taxing state, then income cannot be sourced to the taxing state.

There is a modified version of cost of performance known as pro rata cost of performance, which Petitioner utilized in filing its amended returns. This approach eliminates the "all-or-nothing" factor associated with strict cost of performance and allocates the costs of performance between states. See Sutton et al., *The Increasingly Complex Apportionment Rules for Service-Based Businesses: Basic Issues*, 17-OCT JMTAX 24, 30-31 (2007 WL 3201540) ("Under the pro rata cost-of-performance approach, in contrast to the 'all-or-nothing' methodology, gross receipts derived from the

performance of a service are prorated among multiple states based on the cost of performing the service in each state."). South Carolina has been described as a pro-rata cost of performance state. For example, Hellerstein, *supra*, in FN 1227 of ¶ 9.18, states:

> Although South Carolina is not a state that generally follows UDITPA or the MTC regulations . . . its single-factor sales formula, as applied to receipts for services, generally resembles UDITPA's income-producing activity rule for attributing receipts from services. See S.C. Code Ann. § 12-6-2295(A)(5) (Westlaw 2014) (attributing receipts from services to the state "if the entire income-producing activity is within this State," and if the income-producing activity is performed partly within and partly without this state, receipts are attributable to the state "to the extent the income-producing activity is performed within this State").

Hellerstein also notes in FN 1187 of ¶ 9.18:

> According to two knowledgeable observers, as of late 2010 "[f]our states use a proportionate costs-of-performance method: Arkansas, Mississippi, North Carolina (services only) *and South Carolina* (services only)." P. Mata & M. Smith, "The Implementation of 'Market' Sourcing Rules: Practical Concerns," State Tax Notes, Sept. 6, 2010, p. 649 (citing statutes and regulations). (Emp. added.)

The South Carolina Corporate Income Tax Manual co-authored by senior members of the Policy Section of the South Carolina Department of Revenue, cites and discusses the *Lockwood Greene Engineers Inc.* case as the leading authority on the sourcing of receipts using the single sales factor apportionment methodology. The authors concluded that:

> [c]onsidering *Lockwood Greene* and *Geoffrey*, together, it appears that gross receipts are sourced to the state which is most significantly associated with the production of the income, *e.g.*, personal services, where those services are performed; intangibles, where those intangibles are used in a business for the production of income. *Id.* at Chapter 05-20.

Furthermore, the Administrative Law Court's decision in *Rent-A-Center Texas, L.P. vs. South Carolina Department of Revenue*, Docket No. 09-ALJ-0206-CC (filed January 6, 2012) reaffirmed the "COP" test as the proper means of sourcing sales from services. In that case, Rent-A-Center Texas, L.P. performed management services for a related entity doing business in South Carolina. These management services were performed by professionals located in Texas. The court reasoned that the related entity was compensating Rent-A-Center Texas, L.P. for the time and knowledge of the personnel located in Texas. Therefore, the Court found that by applying the ruling of *Lockwood Greene* to the facts the revenue received by Rent-A-Center Texas, L.P. for work performed in Texas must be sourced to Texas. (Unlike Rent-A-Center Texas, L.P., Dish has no related entity performing services in South Carolina.) The ALC decision plainly states: "In conclusion, the revenue received by RAC Texas from the Management Services Agreement must be apportioned to Texas pursuant to *Lockwood Greene*. RAC Texas provided its management services to RAC East stores through skilled professionals located in Texas."

In contrast, the market share method, or, as it has been referred to in this State, the "origin of payment" method, sources receipts "to where a taxpayer's customers are located and payments made." *Lockwood Greene Engineers, Inc.*, 293 S.C. at 448, 361 S.E.2d at 347. Under this method, even if all the costs of performance takes place in a foreign state, the taxing state can source income from the receipts of in-state purchasers.

D. Cost of Performance and Market Based Sourcing.

In South Carolina, the applicable apportionment statute provides:

> 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 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 (2015) (emphasis added). Section 12-6-2295 defines "gross receipts" depending upon the type of business in which the corporation is engaged. S.C. Code Ann. § 12-6-2295 (2015).[12] For corporations that provide services, subsection (A)(5) applies and provides the following:

> (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 partly without this State, sales are attributable to this State to the extent the income-producing activity is performed within this State....*

§ 12-6-2295(A)(5) (emphasis added).

The only case to address the meaning of Section 12-6-2295(A)(5) to any extent is the South Carolina Court of Appeals' decision in *Lockwood Greene Engineers, Inc. v. S.C. Tax Comm'n*, 293 S.C. 447, 361 S.E.2d 346, (Ct. App. 1987), which holds that South Carolina is a cost of performance state. In *Lockwood Greene*, the issue was how to define "gross receipts from within this State" under what is now codified as Section 12-6-2290. Importantly, at the time *Lockwood Greene* was decided, South Carolina had not yet adopted Section 12-6-2295(A)(5) defining "gross receipts," but *Lockwood Greene* is

[12] Section 12-6-2295 was not adopted until 2007. 2007 Act Nos. 110-116.

relevant because, in defining "gross receipts within this State," and the ALC Order holds the court was essentially providing the definition later codified in Section 12-6-2295(A)(5). 293 S.C. at 448, 361 S.E.2d at 347. In *Lockwood Greene* the petitioner asserted "receipts" were sourced to where a taxpayer's customers are located and payments made. *Id.,* i.e. the exact position asserted by the DOR in this case. This was a version of the market share method or, as the court phrased it, the "origin of payment" method. In contrast, the Tax Commission asserted "receipts" were sourced to the place where the services were performed, or what the court phrased the "place of activity" method, i.e. the exact position asserted by Appellant in this case. The Court of Appeals agreed with the Commission. Specifically, the Court determined:

> A client pays an engineering firm for the expertise and time of its employees. Therefore, an engineering firm's business carried on in a state is reasonably measured by the services rendered by its personnel in the state. This approach to "gross receipts from within this State" is epitomized by the "place of activity" test advanced by the Tax Commission. *Id.*, 293 S.C. at 449, 361 S.E.2d at 347.

While the ALC held that South Carolina is not a market share state, the ALC accordingly erred in basically reversing *all* prior law on the subject and holding that South Carolina is not a pro-rata cost of performance state. The Department's own expert witness, Prof. John Swain, flatly testified "South Carolina has a proportionate rule." (R. p. 932, line 12). Just three years ago, in PLR #13-3, the DOR reiterated that South Carolina is a cost of performance state.

Note that the Department has the authority to invoke a market share approach in appropriate cases under S.C. Code Ann. § 12-6-2320(A)(4). This equitable apportionment statute is discussed by the South Carolina Supreme Court in *Media General Communications v. S.C. Dep't of Revenue*, 388 S.C. 138, 694 S.E.2d 525 (2010)

and very recently in *Carmax Auto Superstores v. S.C. Dep't of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014), affirming as modified *Carmax Auto Superstores v. S.C. Dep't of Revenue*, 397 S.C. 604, 725 S.E.2d 711 (Ct. App. 2012). A number of Department of Revenues have asserted their version of this statute to invoke market sourcing, *e.g.*, *Bell South Advertising & Publishing Corp. v. Chumley*, 308 S.W.3d 350 (2010). The Department chose not to do so in this case.

III. Did the ALC Err in Adopting a Market Share Approach to Apportioning Income?

The Department's audit sourced all income from South Carolina subscribers to South Carolina (*i.e.*, market share).

The Department Determination in this matter plainly states: "South Carolina is not alone in this method of sourcing receipts for taxpayers like Dish corporation. Twenty-three states have adopted the 'audience approach' for assigning receipts from programming and broadcasting companies.[4]" Footnote 4 cites the audience or market share statutes for the 23 states.

In addition, the auditor Orville Sharpe and his supervisor testified that the Dish audit was based purely on customer location. (R. p. 818, lines 19–21; R. p. 823, lines 13–20).

By contrast, Dish produced substantial evidence regarding its income-producing activities and the location from which these activities were conducted. The Department controverted none of this evidence (other than to argue that the payment of the bill was the only income-producing activity). The DOR auditor admitted that he didn't meet with the technical people at Dish to talk about the satellites and call center (R. p. 848, lines 11–15) nor was he aware that a customer had to telephone a call center to sign up for

service (R. p. 848, line 21–p. 849, line 15). Audit Supervisor Tim Donovan admitted he was not familiar with Dish's business model, or that Dish signed up customers and collected late bills only through call centers. (R. p. 902, line 7–p. 903, line 1).

While the ALC repeatedly stated the Department's market share assessment was incorrect, and that South Carolina is not a market share state, the ALC nevertheless verbatim adopted the DOR's market share audit results. The DOR's own expert witness Prof. Swain testified, "It [South Carolina] has not adopted a market share statute. For example, it's reaching that result in this case." (R. p. 975, line 5–7).

By affirming the Department's market share methodology of apportioning income in South Carolina, the ALC and the Department have radically changed the taxation of domestic (South Carolina) service providers in this state. Such service providers will no longer source income to South Carolina where their customers are located in other states. For example, if Dish (with its approximately 22,000 employees (Dish 10-K, R. p. 129), its $13,327,671,707 in gross revenue (Respondent's Exhibit 2, R. p. 3067), its $5,916,869,000 in investment of property and equipment (Dish 10-K, R. p. 1381), and its $1,087,225,687 in income (Respondent's Exhibit 2, R. p. 3057)[13]) was located in South Carolina instead of Colorado, it would apportion only 1.6% of its income to South Carolina under a market share apportionment theory. So even with the increased burden and demand for public services a company like Dish (and its $5.9 billion in capital investment and 22,000 employees – which, by population, would amount to the 19th biggest municipality in South Carolina) would impose on this State, it would only apportion a miniscule proportion of its income to South Carolina because the Department approximates that 1.6% of its customers are located in South Carolina. DOR Auditor

[13] Using 2010 figures.

Sharpe conceded that this would be the result. (R. p. 838, line 20–p. 839, line 12).

While it may be a good thing that a corporation with 22,000 employees and $5.9 billion in capital investment in this state would pay taxes on only 1.6% of its income, presumably this result should be the decision of the General Assembly, or at a minimum the promulgation of a Regulation by the DOR and approved by the General Assembly, rather than the result of an audit!

By contrast, under the pro-rata cost of performance method, if Dish was located in South Carolina would apportion the great majority of its $1 billion in gross income to South Carolina.

IV. Did the ALC Err in Disregarding All of Appellant's Income Producing Activities?

Primarily relying on the testimony of Dr. Harrison, the ALC Order found that "Petitioner's income-producing activity is [1] the delivery of its signal into subscriber's homes and [2] onto their television screens." (ALC Amended Final Order, R. p. 27). The Order then disregards these two income-producing activities (outlined below under Satellites/Uplink and Subscriber Equipment) and adopts the Department's market share theory that subscription receipts are the only income-producing activity.

A. General.

As previously stated "income producing activity" is not defined in our Code, or in any Department Regulation or Policy Document. Because the "cost of performance" test is an attempt to identify the *costs* incurred while *performing* the income producing activities, the cost of performance test invariably looks at income producing activity. Even if South Carolina is not a cost of performance state, cost of performance, then, is useful for measuring a taxpayer's income producing activities incurring inside and

outside a state.

In Journal of Multistate Taxation and Incentives, *The Increasingly Complex Apportionment Rules for Service based Business: Basic Issues*, at 28 (Oct. 2007) the authors state as follows:

> *"Under the income-producing activity rule, service receipts are sourced to the state where that activity is performed."* (Emp added).

Hellerstein & Hellerstein, State Taxation (3d. Ed.) describes income-producing activities as follows:

> Despite the theoretical and practical objections to UDITPA's "income-producing activity"/ "costs of performance" rule for attributing receipts from services to the numerator of a state's sales factor, most states with corporate income taxes still take this (or a closely analogous) approach. Unless modified by statute or regulation, *this approach requires the taxpayer first to determine which of its activities are the income-producing activities for its service income* and then to determine where the *costs of performing those income-producing activities* were incurred.

Id. at 46 (¶ 9.18[3][b]) (emphasis added).

Hellerstein further notes that "[f]or service providers, the clearest examples of income-producing activities are the activities involved in actually performing the services for which they are paid. Many state regulations expressly provide that income-producing activity includes the rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service." *Id.* at 48 (¶ 9.18[3][b][ii]).

The Multi-State Tax Commission (MTC) is a Commission composed of State Revenue Departments. It issues various policy documents. The MTC has a longstanding regulation, MTC Reg. IV.17(2) which defines "income producing activity" as follows:

> (2) Income producing activity: defined. *The term "income producing activity"* applies to each separate item of income and *means the transactions and activity engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of producing that item of income.* Such activity includes transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor. Accordingly, income producing activity includes but is not limited to the following:
>
> (A) *The rendering of personal services by employees or by an agent or independent contractor acting on behalf of the taxpayer or the utilization of tangible and intangible property by the taxpayer or by an agent or independent contractor acting on behalf of the taxpayer in performing a service.*
>
> (B) The sale, rental, leasing, licensing or other use of real property;
>
> (C) The rental, leasing, licensing or other use of tangible personal property; [and]
>
> (D) The sale, licensing or other use of intangible personal property.

The resolution of this case depends upon identifying the income producing activities of Petitioner and where they occurred.

As detailed below, Petitioner has provided substantial factual and economic evidence regarding both the extent of its income producing activities and the location of those activities. Mr. Rex Povenmire described in significant detail the activities required to attract customers, acquire programming, uplink the programming to uplink centers and satellites, and then broadcast the signal into the homes of customers. (R. pp. 479–542). Additionally, Mr. Matthew Sheers emphasized the role of programming/content acquisition, call centers, advertising, and other activities central to Petitioner's production of income. (R. pp. 595–656). The Department's witnesses conceded many of these

points. Appellant's expert witness Ray Stevens testified all met the definition of income-producing activities. (R. p. 764, line 5–p. 767, line 6).

Appellant's 2010 Form 10-K is also very illustrative as to Appellant's income producing activities. The Court noted that the Auditor, Orville Sharpe's definition of income producing activity was based on S.C. Code Ann. § 12-6-2295 and the taxpayer's Form 10-K.[14] For example, Department auditor Orville Sharpe stated:

> Q: Well, isn't that what you said earlier, you relied on the 10-K in saying what's an income-producing activity?
> A: Right.[15]

Dr. Harrison repeatedly referenced the Form 10-K in his testimony.[16]

B. Petitioner's Income Producing Activities.

Petitioner identified what it believes are its income producing activities and where such activities occur. The income producing activities are straightforward:

(1) Programming/content
(2) Satellites/uplink
(3) Advertising
(4) Subscriber Equipment
(5) Installation
(6) In-home repair; and
(7) Call centers.

(1) Programming/Content

Dish's licenses virtually all of its programming from third parties. In 2010, it paid over $1.2 billion to just two entities (ESPN and Fox). The Department's expert witness, Dr. Harrison acknowledged programming (and advertising) were income producing activities on three separate occasions. First, when addressing advertising and

[14] R. p. 846, lines 20–21.
[15] R. p. 862, lines 14–17.
[16] E.g., R. p. 707, lines 6–8; p. 718, lines 17–24.

programming as income producing activities, Dr. Harrison testified:

> Q: Okay. And let's turn to advertising then. We spend a lot of money to advertise because we've got to convince people they've got a lot of what we offer for free, but they should sign up for us. Now obviously *if we did no advertising we'd have a – we'd have less revenue, would we not*?
> A: *That's a very reasonable statement.*
> Q: Okay. *And if we offered shabby programming, we might get some revenue but we would have less revenue*, correct?
> A: *If there is justice in the world, that's also a reasonable statement.*[17] (Emp. added)

Dr. Harrison next testified:

> Q: Okay. And – all right. And so in your opinion then, the income-producing activity, *the sole income-producing activity is the mailing of the bill, correct*?
> A: No, *it's actually providing the – it's providing the programming services*, which is then leading to --[18] (Emp. added)

He again affirmed that programming is an income producing activity for a third time when he stated:

> Q: Okay. And *so our income-producing activity is the provision of the content and the paying the bill*?
> A: *That's correct.*[19] (Emp. added)

Manager of foreign audit appeals for the Department Tim Donovan stated:

> Q: You agree with the notice that Clemson and Carolina, we love our football, don't we?
> A: Pretty much.
> Q: And were you aware Lady Gamecocks basketball team led the nation in attendance last year?
> A: I may have heard that but I don't think - - -
> Q: But you're certainly aware the USC baseball team won two national championships?
> A: Yes.

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[17] R. p. 722, line 19–p. 723, line 6.
[18] R. p. 723, lines 19–25.
[19] R. p. 724, line 23–p. 725, line 1.

Q: And so you would agree that Dish paying $800 million to ESPN to broadcast those games probably led to greater South Carolina customer subscribers; is that a fair statement?
A: My understanding yes, that people like their sports and want access to them.[20]

DOR auditor, Sharpe agreed that content and advertising were income producing activities:

Q: ... I wouldn't abandon my beloved free TV and start paying for it unless the pay TV had something more than the free TV, correct?
A: Correct.
Q: Okay. And then I've got to battle with Direct and cable. *You would agree that advertising plays some role in getting people to sign up for Dish*?
A: *Yes, sir.*
Q: *And we paid 700 million to ESPN and 600 million to Fox. In a state like South Carolina, that helps gin up a few more subscribers in South Carolina, doesn't it*?
A: *Right....*[21] (Emp. added)

(2) Satellites/Uplink

In 2010, Dish expanded $1.6 billion for satellite and Uplink facilities. The DOR contended and the ALC Order holds "that the delivery of the signal into the customer's home and onto the customer's television is the only income-producing activity." (ALC Amended Final Order, R. p. 25). Petitioner certainly agrees that the "delivery of the signal into the home" is an income producing activity under Satellite/Uplink.

The Department witnesses agreed. For example, Department Auditor Orville Sharpe testified:

A: ... *I don't think income-producing activity occurs until the taxpayer gets what they purchase, which is the programming* via the satellite signal that they

[20] R. p. 883, lines 4–18.
[21] R. p. 851, line 16–p. 852, line 4.

have and that that's – and that they don't get any income until the taxpayer receives that programming via the signal, the satellite signal. [22] (Emp. added)

Sharpe also stated with regard to Satellite/Uplink and Subscriber Equipment:

Q: Right, I'll agree with that, providing the access to the signal is the income-producing activity, correct?
A: Right.
Q: And then *of course the box itself is income producing*?
A: *Right*.
Q: And *the installation of the box is income* producing where warranty and repair, those are all income producing, correct?
A: *Right*, those are separately charged.[23] (Emp. added)

Sharpe agreed that subscriber equipment and installation (as well as advertising, installation and call centers) were income producing activities, as he stated below:

Q: All right. You would agree that acquiring content – from listening to testimony requiring content, that's in the regular course of Dish's business, isn't it?
A: Yes.
Q: And it was done for the purposes of producing a buck?
A: It's embodied, yes, into the subscriber receipts, yes.
Q: And you'd agree that acquiring satellites and advertising, subscriber equipment, installation and repair, call centers, all of that's done in the regular course of Dish's business?
A: Yes, sir.
Q: And all that was done for the purpose of making a buck, correct?
A: Ultimately embodied in the cost of the subscription receipts. [24]

(3) Advertising

Dish expanded $326 million in 2010 in retention and new subscriber marketing. The

[22] R. p. 822, lines 15–22.
[23] R. p. 827, lines 15–25.
[24] R. p. 850, line 12–p. 851, line 4.

Dish 10-K states:

> **Acquisition of New Subscribers**
>
> *We incur significant upfront costs to acquire subscribers, including advertising, retailer incentives, equipment and installation....*[25]
>
> **Advertising**
>
> *We use print, radio, television and Internet media, on a local and national basis to motivate potential subscribers to call Dish Network*, visit our website or contact independent third party retailers.[26]

(4) Subscriber Equipment

Dish produced extensive testimony at trial regarding the importance of their subscriber equipment. Subscriber equipment plays a critical role in (1) making sure the viewer receives an excellent signal; (2) the subscriber has access to the correct subscription package; (3) billing purposes, i.e. viewers get billed only for the subscription package they purchase; (4) anti-fraud devices to e.g., ensure neighbors are not stealing their signal; and (5) preventing unauthorized use by the viewer and third parties. Dish expended $822 million for subscriber equipment in 2010. (SC IPA Analysis, R. p. 3148). The Department's witnesses all conceded these were income-producing activities. Department witness and former foreign audit supervisor John Swearingen stated:

> Q: My point is if you pay a creditor and he misapplies your credit, your check or your credit card, you care about that, don't you?
> A: Yeah.
> Q: Okay. In fact, Director Reames was quoted in the paper just last week, people getting mad when they pay a bill and it's not correctly credited to their account, correct?
> A: Correct.

---

[25] Dish 10K, R. p. 1339.
[26] *Id.*, R. p. 1283.

Q: And you care when you call up and you pay for premium package two they give you premium package two and not premium package one, don't you?

A: Yeah.

Q: And you care if the signal comes in perfectly, doesn't have the snow, you're as old as me, you remember the day when you had to put aluminum foil around your antenna; people care about that, too, don't they?

A: Yeah.

Q: And they care about the fact that the USC game starts at 7:30 and that their cable doesn't – their Dish doesn't start until 8:00, correct? They care about that, don't they?

A: Yeah.

Q: And they care that the fraud, the neighbor isn't getting their satellite on your bill; they care about that too, don't they?

A: I presume they might. I don't know how they would tell.

Q: Unfortunately, it happens. In fact, a lot of people seem to spend a lot of time and effort putting their service on somebody else's bill. But you care your bill is accurate, that its' not a victim of fraud, correct?

A. Yeah.

Q: All right. So they do care about – people do care about a bit more than just signal coming across the TV, correct?

A: Probably, yeah.[27]

Sharpe testified:

Q: And of course that all costs Dish a lot of money to make that higher quality signal. And *you'd agree that people would cancel or non-renew if the reception for their SEC or their ACC games was poor*?

A: *Correct.*

Q: Okay. *And you'd agree subscribers would be furious if you paid your bill and Dish either misapplied it or lost the payment; you wouldn't be happy with that, would you*?

A: *No.*

[27] R. p. 905, line 12–p. 906, line 1.

Q: *And so subscribers demand or expect a high quality billing department* when they pay their money is going to be – they're going to get the channels they pay for, correct?
A: *Correct.*
Q: And that they're not going to take my payment and apply it to – mistakenly, not fraudulently, apply it to your account?
A: Right.
Q: All right. And all of that, of course, costs Dish money, costs Dish a lot of money, but that's something that our subscribers expect and if we didn't give it to them they'd cancel or non-renew, would you agree?
A: Yes, sir.[28] (Emp. added)

Similarly, Sharpe testified:

Q: What's your definition of income-producing activity?
A: Okay. In this situation the definition is there's an event that triggers the production of the income, and that's *the delivery of the signal to the taxpayer's satellite, which is then transferred to the taxpayer's set-top box and ultimately allows the South Carolina subscriber to view the box.* That's the income-producing activity for the subscription receipts. . . .[29] (Emp. added)

He accordingly agreed that satellite/uplink and subscriber equipment were income producing activities.

(5) Installation

Installation plays a critical role in acquiring new subscribers as well as installing equipment. Dish expended $58 million for installation in South Carolina. Petitioner's Form 10-K accordingly states (R. p. 1282–83):

Distribution Channels.

While we offer receiver systems and programming through direct sales channels, *a majority of our new subscriber*

[28] R. p. 853, line 15–p. 854, line 15.
[29] R. p. 841, line 21–p. 842, line 6.

acquisitions are generated through independent third parties such as small satellite retailers, direct marketing groups, local and regional consumer electronics stores, nationwide retailers, and telecommunications companies. *In general, we pay these independent third parties a mix of upfront and monthly incentives to solicit orders for our services.* In addition, we partner with telecommunications companies to bundle Dish Network programming with broadband and voice services on a single bill.

* * * *

Retailer Incentives.

We pay retailers an upfront incentive for each new subscriber they bring to Dish Network and, for certain retailers, we pay small monthly incentives for up to 60 months provided, among other things, the customer continuously subscribes to qualified programming.

* * * *

Customer Retention.

We incur significant costs to retain our existing customers, mostly by upgrading their equipment to HD and DVR receivers. As with our subscriber acquisition costs, our retention upgrade spending includes the cost of equipment and installation. In certain circumstances, we also offer free programming and/or promotional pricing for limited periods for existing customers in exchange for a contractual commitment. A component of our retention efforts includes the installation of equipment for customers who move. Our subscriber retention costs may vary significantly from period to period.

Dish witnesses testified that independent third party installers were actually a significant source of producing new customers, and were financially incentivized to do so. Dr. Harrison conceded that the number of third party installers and suppliers affected the Petitioner's ability to generate income. With respect to third party installations as income producing activities, Dr. Harrison agreed that installation was an income-

producing activity:

> Q: Okay. All right. One other – two small points. I wasn't aware of it until I started gearing up for trial that actually a majority of Dish's customers come not through direct sources but through third-party suppliers. You probably saw that in the 10-K as well. Is that correct?
> A: That's true. ...
>
> * * * *
>
> Q: But obviously Dish would have a lot – would have fewer subscribers, 51 percent fewer subscribers but for the third-party suppliers, correct? That's what their 10-K says.
> A: Well, without the – without – we don't need to disagree about the exact numbers, because --
> Q: Right.
> A: -- there would be other ways to provide it. *It's completely reasonable without those third-party suppliers and other intermediate inputs there would be less revenue and less income.* There's no question about that.[30] (Emp. added)

(6) In-Home Repair

The Dish 10-K states:

> ***Installation and Other In-Home Service Operations.***
>
> *High-quality installations, upgrades, and in-home repairs are critical to providing good customer service.* Such in-home service is performed by both Dish Network employees and a network of independent contractors and includes, among other things, priority technical support, replacement equipment, cabling and power surge repairs for a monthly fee.[31] (Emp. added)

(7) Call Centers

During the audit period new customers could not sign up on line but were required to go through a call center. New customers paid for their initial service by

[30] R. p. 725, lines 2–9; p. 726, lines 6–18.
[31] Dish 10K, R. p. 1283.

giving their credit cards to a call center. Call centers were also used to sell optional packages as well as to prevent churning. Dish some 8-9,000 employees in call centers and expended $1.1 billion on them in 2010. The Dish 10-K states:

> **Customer Service**
>
> ***Customer Service Centers.***
>
> *We use both internally-operated and outsourced customer service centers to handle calls from prospective and existing customers.* We strive to answer customer calls promptly and to resolve issues effectively on the first call. We intend to better use the Internet and other applications to provide our customers with more self-service capabilities over time.[32] (Emp. added.)

The Department's expert witness, Dr. Harrison acknowledged that the charging of credit cards by the call centers was an income producing activity:

> Q: An activity that involves I *hand my credit card, and they run my credit card and they take my money, that's obviously income-producing activity, isn't it*?
> A: *That is income-producing activity, yes, as usually defined.*[33]

He further stated:

> Q: Okay. So when I call the call center I give them my credit card, they turn on my subscription, and they run my credit card, that's obviously income-producing activity?
> A: That's – having a call center wherever it's located, and let's just agree that it's located outside of South Carolina, is certainly a necessary input using their current technology to produce the revenue stream that comes from Edisto Island, yes.[34] (Emp. added)

C. Decisions on Income Producing Activities from Other Jurisdictions.

Other jurisdictions have rejected the ALC's decision that the only income-

[32] Dish 10K, R. p. 1283.
[33] R. p. 710, line 25–p. 711, line 5.
[34] R. p. 713, lines 10–19.

producing activity is the customers paying a bill. In *Boston Professional Hockey Association, Inc. v. Commissioner of Revenue,* 443 Mass. 276, 820 N.E.2d 792 (2005), the Massachusetts Supreme Judicial Court held that taxpayer's main income producing activity was the operation of an NHL franchise, including "many subsidiary activities necessary to create a viable NHL franchise." *Id.* Those activities include managing administrative offices, collection of gate receipts, paying salaries to staff members who worked in production studios, and selling broadcasting licenses. *Id.*

In *Howard Cotton Co. v. Olsen*, 675 S.W.2d 154, 160 (Tenn. 1984) the Supreme Court of Tennessee after reviewing the income producing activities of a multi-state entity selling cotton, the court stated:

> At this point we note that the plaintiff engaged in substantial income producing activities in Arkansas, Texas and other states during the taxable years in question, consisting in the purchase of cotton in those states, in the warehousing of cotton in those states for long periods of time, in the sale of cotton in Canada and Georgia and in the transportation of cotton from points of purchase to points of delivery, albeit these activities were directed from plaintiff's home office in Memphis, Tennessee. *Of course, it is the sale of cotton that produces income but there can be no sales without prior purchases, so that, purchasing cotton is likewise an "income producing activity."* (Emp. added.)

In *BellSouth Advertising & Publishing Corp. v. Chumley*, 308 S.W.3d 350, 364 (Tenn. Ct. App. 2009), the Court of Appeal for the First District of Tennessee noted that "BAPCO's earnings producing activity is not just the distribution of the Yellow Pages, as its earning producing activity is a series of integrated, interdependent steps to the satisfaction of the advertisers from whom BAPCO derives its income. Without these numerous steps BAPCO would have no advertising to include in a directory, regardless

of the mode of delivery."

In *Arkla Indus., Inc. v. Franchise Tax Bd.*, 188 Cal. App. 3d 530, 233 Cal. Rptr. 495, 499 (Ct. App. 1986) (Review denied and ordered not to be officially published), another California appeals court held that the "[u]nity of operation is characterized by a centralization of all the major income producing activities, i.e., management, purchasing, accounting, advertising, personnel, and research and development departments, to name a few."

Administrative rulings are to the same effect. In *Storer Communications, Inc. v. Limbach*, 1986 WL 28659, the Board of Tax Appeals of Ohio affirmed a commissioner's finding that "income producing activity" is a term that includes more than the mere solicitation of sales, but also consists of broadcasting of advertisements and network programming.

> [The taxpayer] argues that its income-producing activity consists of the sale of advertising time to national advertisers (national revenues) and broadcasting time devoted to the transmission of network programming (network revenues), and since these sales are solicited by it or its agent from an office outside Ohio, they should not be allocated to Ohio. The applicant's argument is fallacious in that *its income-producing activity consists of more than the solicitation of sales; its activity also consists of broadcasting of the advertisement and network programming*; * * * *

Storer Commc'ns, Inc., 1986 WL 28659, at *1.

State revenue agencies have similarly concluded regarding the definition of "income producing activities." In a 2012 Revenue ruling, the Department of Taxation for the Commonwealth of Virginia addressed how to apportion income of a website ran by an out of state corporation but operated on servers located in Virginia. VA Public Document (P.D.) 12-36, *available at* 2012 WL 1257362, at *3 and stated officer's

salaries, solicitation, advertising, and administration (including depreciation, overhead and taxes) are income producing activities for generating advertising fees and subscription charges.

A February 23, 1990, revenue ruling by the Illinois Department of Revenue also interpreted "income producing activities" as having a much broader scope than advocated by the Department. The taxpayer maintained an earth station in Illinois which receives a signal from the satellite, performs a service enabling the signal to be picked up by various radio stations throughout the country, while sending the signal back to the satellite. The taxpayer receives revenue from the radio stations throughout the country, including Illinois, which broadcast the programs and advertisements.

> The taxpayer engages in various income-producing activities in order to sell advertising time and to sell radio programs. . . . *It would appear that the income producing activity of the earth station is an income-producing activity necessary to all of the sales, since it enables the various radio stations to pick up the radio signal from the satellite.* State of Illinois, 1990 WL 99829.

While it dealt with a constitutional issue, of interest is the South Carolina Supreme Court decision in *Mercury Motor Exp., Inc. v. S.C. Tax Commission*, 244 S.C. 134, 135 S.E.2d 756 (1964). In that case, the taxpayer, a trucking company, was taxed on its proportion of mileage in South Carolina (17%) even though its revenue from freight originating in or delivered to South Carolina customers was only slightly more than 1%. The taxpayer made virtually the identical argument as the Respondent in this case: namely, that its trucking income attributable to its mileage driving on interstate highways through South Carolina to customers in other states was in no way connected to its trucking activities with South Carolina customers. The Supreme Court held that its

income producing activities were far beyond the mere delivery or pick-up of freight from South Carolina customers (or the mere delivery of satellite signals into South Carolina homes). The Supreme Court stated:

> The [taxpayer] operates a unitary business and its gross income and, therefore, its net income, is derived from a series of transactions. . . . Here the series of transactions consists of the solicitation of freight, the picking up of freight, the hauling of freight, the delivery of the same and the collections of charges therefor. Each transaction in the series contributes to the earnings and net income of the appellant, and, while each transaction is necessarily incidental to the production of its income, the transaction which primarily earns the income is the hauling of the freight. It seems to us to follow that as the trucks of the [taxpayer] move along, through and over the highways of the State of South Carolina, the [taxpayer] is engaged in income producing activity actually done and performed within the borders of the State of South Carolina.
>
> There is nothing in the record to even indicate that the trucks of the [taxpayer], while traveling seventeen per cent of its total mileage within the State of South Carolina, are failing to contribute to [taxpayer's] income, or that, while so traveling, they are earning a lesser percentage of [taxpayer's] net income than seventeen per cent.

Id. at 141, 135 S.E.2d at 759-60.

The Department contends *Mercury Motor* supports its assertion that this court should distinguish between preparatory, incidental, and primary activities with respect to Petitioner's income producing activities. Instead, as Petitioner's Expert Witness Mr. Ray Stevens provided, the income producing activities in that case include "the entire transaction from the beginning of the pick-up of the freight, as well as the solicitation of the orders all the way through to the delivery of the freight." (R. p. 758, lines 12–16). The solicitation, picking up, hauling, and delivery of freight and the collection of charges identified by the Supreme Court as income producing activities are analogous to the

advertising, solicitation of customers, acquisition of content, and delivery of satellite television service provided by the Petitioner.

D. Petitioner's 2010 Form 10-K

The Amended Final ALC Order (R. p. 24), quoting Dr. Harrison, found that, according to Appellant's Form 10-K, "Dish DBS "recognizes[s] revenue when ... the goods and services have been delivered. Revenue from our subscription television services is recognized when programming is broadcast to subscribers." However, the revenue recognition note cited in Petitioner's Form 10-K is a purely accounting concept which addresses the ***timing*** of Petitioner's revenue recognition. In respect to the timing of revenue recognition, according to the U.S. Securities and Exchange Commission's Staff Accounting Bulletin Topic 13: Paragraph A.1., Revenue Recognition (referred to as "SAB Topic 13") revenue can be realized only when all of the following criteria are met:

1) Persuasive evidence of an arrangement exists,
2) Delivery has occurred or services have been rendered,
3) The seller's price to the buyer is fixed or determinable, and
4) Collectability is reasonably assured.

Available at https://www.sec.gov/interps/account/sabcodet13.htm.

More importantly, in the ALC Order, when quoting Petitioner's Form 10-K, the Order states that Petitioner "recognizes revenue when . . . the goods and services have been delivered. Revenue from our subscription television services is recognized when programming is broadcast to subscribers." However, note the ellipses in the quotation. In fact, the full text of that sentence in the Form 10-K tracks the Accounting Bulletin as follows:

"We recognize revenue when ***an arrangement exists,***

> ***prices are determinable, collectability is reasonably assured and*** the goods and services have been delivered . . ."[35] (Emp. added).

The timing of when a public company can book revenue has nothing to do with the income producing activities used to produce the revenue, and it is very misleading to suggest that the timing of the revenue recognition is dependent only upon delivery of the programming, and not upon the other factors listed in the note. For example, in order for an "arrangement [to] exist[]," employees of the Petitioner must secure subscription agreements through call centers with customers, and in order for "collectability [to be] reasonably assured," the call center must collect the customer's information, input in Petitioner's computer system, and ensure that bills are being sent to the customer and that Petitioner has the information required in order to charge customer's credit cards, send notices to the customer in the event of nonpayment, and then shut off service in the event of continuous nonpayment. It is significant the activities which produce the other criteria necessary to recognize revenue all occur *outside South Carolina.*

V. Did the ALC Err in Upholding the Imposition of Substantial Understatement Penalties?

Section 12-54-155(A)(1) stated 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." However, under § 12-54-155(B)(2)(b):

> (B) The amount of the understatement under subparagraph (A) must be reduced by that portion of the understatement which is attributable to (i) the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment or (ii) any item with respect to which the relevant facts affecting the item's tax treatment are adequately

[35] Dish 10K, R. p. 1372.

> disclosed in the return or in a statement attached to the return.

Moreover, under subsection (D)(1), "[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."[36]

This Court should waive penalties because it had (1) substantial authority and (2) reasonable cause and good faith for its tax position.

Also of significance is that the Department's Determination which contained the penalties was based upon the market share method which the ALC repeatedly said was not the law in South Carolina!

A. Petitioner Had Substantial Authority for the Positions Taken on its Returns.

Treasury Regulation § 1.6662-4(d) governs the determination of what is substantial authority for purposes of South Carolina law. 26 C.F.R. § 1.6662-4(d); *Telespectrum, Inc. v. SC Dep't of Rev.*, 07-ALJ-17-0302-CC (April 22, 2008). "The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts." *Id.* Although it requires more than a reasonable basis, "the substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld)." *Id.* Thus, "[t]here is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of the authorities supporting contrary treatment."

[36] In addition to the waiver mandate in § 12-54-155(D)(1), the Department is granted general authority to "waive, dismiss, or reduce penalties provided for" under Chapter 54. § 12-54-160.

26 C.F.R. § 1.6662-4(d)(3)(i). Substantial authority is an objective standard and "a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision." 26 C.F.R. § 1.6662-4(d)(3)(i)-(ii). The regulations anticipate there may be substantial authority for more than one position with respect to the same item. *Id.*

As an initial matter, Petitioner's methodology to identify and quantify the extent of its "income producing activities" in South Carolina is based on a well-reasoned construction of §§ 12-6-2290 and 12-6-2295, which require taxpayers identify "income-producing activit[ies] . . . performed" both inside and outside South Carolina.

Petitioner has identified no less than 18 cases, rulings, and departmental guidance from other jurisdictions which take a more expansive view of "income producing activities" than Respondent has imposed in this case. *See Boston Prof'l Hockey Ass'n, Inc. v. Comm'r of Revenue,* 443 Mass. 276, 820 N.E.2d 792 (2005); *World Airways, Inc. v. Gov't of Virgin Islands*, 315 F. Supp. 746 (D.V.I. 1970); *Pan Am. World Airways, Inc. v. Duly Authorized Gov't of Virgin Islands*, 459 F.2d 387 (3d Cir. 1972); *Howard Cotton Co. v. Olsen*, 675 S.W.2d 154 (Tenn. 1984); *Dental Ins. Consultants, Inc. v. Franchise Tax Bd.*, 1 Cal. App. 4th 343, 1 Cal. Rptr. 2d 757 (1991); *BellSouth Adver. & Publ'g Corp. v. Chumley*, 308 S.W.3d 350 (Tenn. Ct. App. 2009); *Schonwetter v. Comm'r of Revenue*, 316 N.W.2d 273 (Minn. 1982); *Comm'r of Revenue v. AT&T Corp.*, 82 Mass. App. Ct. 1106, 970 N.E.2d 814 (2012) (unpublished); *Interface Grp. v. Comm'r of Revenue*, 75 Mass. App. Ct. 1116, 918 N.E.2d 97 (2009); *Gen. Mills, Inc. v. Comm'r of Revenue*, 440 Mass. 154, 795 N.E.2d 552 (2003); *Arkla Indus., Inc. v. Franchise Tax Bd.*, 188 Cal. App. 3d 530, 233 Cal. Rptr. 495 (Ct. App. 1986); *Commc'ns Satellite Corp. v.*

Franchise Tax Bd., 156 Cal. App. 3d 726, 203 Cal. Rptr. 779 (Ct. App. 1984); *Storer Commc'ns, Inc. v. Limbach*, 1986 WL 28659; *Toner v. C. I. R.*, 60 T.C.M. (CCH) 1016 (T.C. 1990); VA Public Document (P.D.) 12-36, *available at* 2012 WL 1257362; *State of Illinois*, 1990 WL 99829; *State of Illinois*, 2004 WL 2732081; and VA P.D. 08-137, *available at* 2008 WL 3538256.

Other commentators (including Respondent's own expert witness, Prof. Swain), agree with Petitioner that South Carolina is a pro rata cost of performance state. Hellerstein, in FN 1227 of ¶ 9.18, states:

> Although South Carolina is not a state that generally follows UDITPA or the MTC regulations . . . its single-factor sales formula, as applied to receipts for services, generally resembles UDITPA's income-producing activity rule for attributing receipts from services.

Hellerstein also notes in FN 1187 of ¶ 9.18:

> According to two knowledgeable observers, as of late 2010 "[f]our states use a proportionate costs-of-performance method: Arkansas, Mississippi, North Carolina (services only) *and South Carolina* (services only)."

Furthermore, the Administrative Law Court's decision in *Rent-A-Center Texas, L.P. vs. South Carolina Department of Revenue* reaffirmed the "COP" test as the proper means of sourcing sales from services.

Appellant's expert witness, Ray Stevens, testified that South Carolina was a pro-rata cost of performance state, based upon the above authorities. (R. p. 774, line 21–p. 775, line 1).

DIRECTV, Inc. & Subsidiaries v. Dep't of Rev., Docket No. 14-ALJ-17-0158-CC (June 12, 2015), is the only published South Carolina case dealing with "income-producing activity" which supports the Department's market share approach and it was

issued some 2 years *after* the Department's audit and some 5-6 years after the Appellant filed its returns. Based on the foregoing, given the number of cases, revenue rulings, and guidance in other jurisdictions supporting Petitioner's position, and given the dearth of guidance from the Department, this Court should find that Petitioner had substantial authority to take the tax positions it has taken in this case.

B. Petitioner Had Reasonable Cause and Acted in Good Faith

Petitioner also had reasonable cause for the tax positions it has taken in its filing. "Reasonable cause" is a far lower standard than "substantial authority" described above. The Department has provided examples of "reasonable cause" which warrant the full waiver of penalties in S.C. Rev. Proc. #08-6. According to the Department's published guidance: "The . . . failure was caused by ignorance of the law in conjunction with other facts and circumstances such as limited education of the taxpayer or the lack of previous tax and penalty experience." For example, the taxpayer may have reasonable cause for noncompliance *where difficult and complex issues are involved when reasonable persons differ as to the appropriate tax treatment of the issue and there is no Department guidance with respect to the issue.*" *Id.* (emphasis added).

Additionally, with respect to the determination of whether Petitioner had reasonable cause, it is important to note that the Department fails to cite to a single Regulation, Policy Document, Publication or Instruction in its tax form which states it is the Department's position that "income producing activities" should be interpreted as market share. To the extent the Department contends it is relying on its own unwritten, unpublished, and unpublicized guidance, such "long-standing policy" does not have the force of law and should not be entitled to deference. See *Joseph v. LLR*, Op. No. 27666

(S.C. Supreme Court (2016)); "Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." *DIRECTV, Inc. & Subsidiaries v. Dep't of Rev.*, Docket No. 14-ALJ-17-0158-CC (June 12, 2015) (citing S.C. Code Ann. § 1-23-10(4) (2005); *Kirven v. Cent. States Health & Life Co., of Omaha*, 409 S.C. 30, 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)). Moreover, policy that is "once apparently written down [but is] no longer written anywhere and apparently has not been for some time . . . is insufficient as a basis for deference" for purposes of relying on a so-called longstanding policy. *See id.*

Indeed, the DOR auditor, Orville Sharpe, testified:

> Q. But your definition [of income-producing activity] is not found in any regulation, correct?
> A. No
> Q. Not found in any DOR Policy document?
> A. No
> Q. It's not found in any DOR Policy document?
> A. No
> Q. It's not found in any DOR Publication?
> A. No
> Q. Not found in any MTC Reg?
> A. No[37]

DOR audit Supervisor Tim Donovan testified:

> Q. The Department obviously doesn't have any written guidelines or rules or policy documents on what's income-producing for satellite TV?
> A. I'm not aware of any.[38]

DOR Audit Supervisor John Swearingen testified:

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[37] R. p. 847, lines 14–22.
[38] R. p. 876, line 23–p. 877, line 2.

Q. Okay. And income-producing activity is not defined in statute or regulation in South Carolina?
A. I am not aware that it's defined, no, sir.[39]

Swearingen also testified:

Q. What audit guidelines related to the apportionment of net income of a service provider does the Department use?
A. We really don't have any published ones.[40]

Moreover, as discussed above, a number of national commentators reviewing *Lockwood Greene* and its progeny concluded that South Carolina was a proportionate costs of performance state. Just three years ago, the DOR cited *Lockwood Greene* COP in PLR #13-3. Even the Department's expert witness agreed that it was not unreasonable to rely on these authorities when taking the tax position taken by the Petitioner in its returns.[41]

Flipping the situation around, domestic South Carolina service providers with out of state customers pay less taxes under the market share method. If a taxpayer went to his accountant prior to the DirecTV and Dish decisions and said, "Hey, I don't want to pay South Carolina income taxes on income earned from my out-of-state customers, the accountant would tell him, no South Carolina statute or DOR Regulation supports that position; the income tax form doesn't support that; and the *only* South Carolina Appellate Court decision (*Lockwood Greene*) says directly to the contrary!" And none of the numerous DOR Policy Documents and publications then or now support this position.

CONCLUSION

It is not a good idea for economists who have never taken, taught or published in the area of state taxation to give opinion testimony on the calculation of state taxes and

[39] R. p. 899, lines 22–25.
[40] R. p. 887, lines 14–17.
[41] Testimony of Professor John Swain, R. p. 977, line 21–p. 978, line 15.

especially advocate the "simplest method." As previously stated, taxpayers prepare their own returns and only a small percentage are audited. Should taxpayers retain economists to prepare their returns based upon the simplest method? Rest assured such will happen if this Court doesn't address such expert witness testimony.

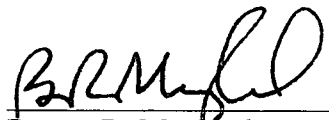
Is South Carolina a pro-rata cost of performance state? According to the Court of Appeals (*Lockwood Greene*), the DOR (in its corporate practice manual, and PLR #13-3), the leading state and local tax treatise (Hellerstein), and the Department's own expert witness (Prof. Swain) it is indeed.

If South Carolina is not a pro-rata cost of performance state, should the DOR be able to convert it to a market share state merely on audit without the support of a single statute, DOR Regulation, Policy Document or instruction in the corporate income tax form?

Are Programming, Satellite/Uplink, advertising, subscriber equipment, installation and call centers income-producing activities? Virtually every witness – both Dish and the DOR's own witnesses – testified they were.

If Dish's 22, 000 employees and $5.9 billion of real and personal property were all located in South Carolina, should they pay taxes on just 1.6% of their income? That's the issue before the Court.

Lastly, did Dish have substantial authority to file taxes based upon pro-rata Cost of Performance so as to justify waiver of penalties? Prior to the DirecTV decision which was issued some 5-6 years after Dish filed its returns there was *no* authority to the contrary!



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February 6, 2017

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 14-ALJ-17-0285-CC

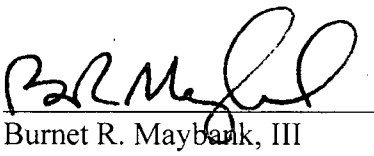
Dish DBS Corporation f/k/a EchoStar, DBS Corp. and Affiliates.....Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Final Brief of Appellant** complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I served the **Final Brief of Appellant** on the Respondent by depositing copies of it in the United States Mail, postage prepaid, on February 6, 2017 addressed to their attorneys of record as follows:

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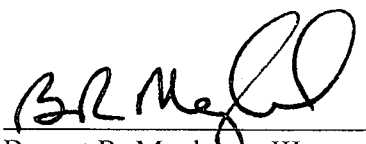

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