

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable Shirley C. Robinson, Administrative Law Judge

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

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

v.

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

RESPONSE BRIEF OF RESPONDENT TO THE AMICUS CURIAE BRIEF OF THE SOUTH
CAROLINA CHAMBER OF COMMERCE

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STATEMENT OF THE CASE

Pursuant to Rule 213 of the South Carolina Appellate Court Rules and this Court's May 3, 2018 Order, Respondent, South Carolina Department of Revenue (Department), files this response brief to the South Carolina Chamber of Commerce's (Chamber) Amicus Curiae Brief. The Department objects to the Chamber's amicus brief because it is filed primarily to have this Court allow the Chamber to choose which expert witnesses the Department must use in future litigation. Further, the Chamber's amicus brief mischaracterizes Dr. Harrison's testimony and includes speculative opinion testimony. Further, while the Chamber asserts that it is merely interested in "preventing testimony from unqualified experts," the Chamber's substantive tax arguments establish its brief is filed as a "friend of a party" rather than a "friend of the court." Finally, the Chamber's brief includes flawed analyses of recent Department cases in which Dr. Harrison testified on behalf of the Department.

ARGUMENTS

I. DR. HARRISON'S "IMPRESSIVE" CURRICULUM VITAE AND TESTIMONY AT THE ADMINISTRATIVE HEARING DEMONSTRATE THAT HE IS QUALIFIED TO GIVE EXPERT TESTIMONY IN THE AREA OF APPLIED ECONOMICS.

The Chamber's primary argument – if not the only argument – is that the ALC erred in admitting Dr. Harrison as an expert at the hearing because he is "unqualified on state tax matters[.]" (Chamber's Br., p. 3.) Notably, Dr. Harrison was qualified as an expert in **applied economics**, and he was neither offered nor admitted as an expert in "state taxation." Moreover, Dr. Harrison did not provide any testimony regarding "state taxation" or a legal interpretation of the statutes at issue.

As discussed below, the ALC was required to determine the income-producing activity of Appellant Dish DBS Corporation f/k/a EchoStar, DBS Corp. and Affiliates (Dish DBS) in this

matter, and Dr. Harrison, “an expert by knowledge, skill, experience, training, or education,” assisted the ALC in understanding the evidence or determining a fact in issue. *See* Rule 702, South Carolina Rules of Evidence (SCRE). The “[q]ualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the trial court.” *Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). The trial court’s qualification of an expert and admission of his testimony “will not be disturbed on appeal absent an abuse of discretion.” *Id.* (citations omitted). “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support.” *Id.* at 26, 609 S.E.2d at 509. *See also Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 37, 691 S.E.2d 135, 142 (2010) (“Reversal of a trial judge’s qualification of an expert witness requires the complaining party to prove both an abuse of discretion and prejudice.”) Moreover, in order to demonstrate prejudice, there must be a “reasonable probability the jury’s verdict was influenced by the challenged evidence or the lack thereof.” *Id.* (quoting *Fields v. Reg’l Med. Ctr. of Orangeburg*, 363 S.C. at 26, 609 S.E.2d at 509. *See also Peterson v. Nat’l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) (“Defects in an expert witness’ education and experience go to the weight, not the admissibility, of the expert’s testimony.”).

A. Dr. Harrison is Qualified to Give Expert Testimony in the Area of Economics.

A court must determine that an expert’s testimony satisfies three requirements before such testimony is admitted during the trial: (1) “whether ‘the subject matter is beyond the ordinary knowledge of the jury’”; (2) “the expert must have ‘acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter’”; and (3) “the substance of the testimony must be reliable.” *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

The record establishes that Dr. Harrison was qualified to testify in this matter. Dr. Harrison is a professor at Georgia State University where he holds two positions: the C.V. Starr Chair in Risk Management and Insurance and the Director of the Center for the Economic Analysis of Risk. (R. pp. 675, 3084-3099; Hr'g Tr. 236:15-23; Resp't Ex. 5.) Dr. Harrison teaches and researches in numerous areas in the field of economics, to include applied economics:

Applied economics is that part of economics that uses theories from economics but applies them, whether it's in environmental economics, it's in international trade, it's in public finance or in applications to the law. So it uses economic theories and ties them to real world data and activities that you see in the economy usually using statistics.

(R. pp. 676-678; Hr'g Tr. 237:3-7, 237:23-238:7, 238:25-239:7.) Most of his courses have "dealt with applied economics" and most of his publications "in a sense would be applied economics."

(R. p. 682; Hr'g Tr. 243:2-3, 243:10-11.) In fact, as noted by the Chamber in its amicus brief, Dr. Harrison's curriculum vitae is quite "impressive." (Chamber's Br., p. 10.)

After hearing Dr. Harrison's testimony regarding his educational and professional background, accompanied by his extensive curriculum vitae, the ALC qualified Dr. Harrison as **an expert in applied economics.** (R. pp. 696, 3084-3099; Hr'g Tr. 257:17-24, Resp't Ex. 5.)

The Court: Mr. Maybank . . . the State has offered him as an expert in the area of applied economics. Obviously, from his C.V. and his testimony, he is definitely qualified as an expert in this areas – in that area, and I am going to allow him . . . to provide expert testimony.

(R. p. 696; Hr'g Tr. 257:17-24.)

Pursuant to Rule 702, SCRE, Dr. Harrison provided information to the ALC that assisted it in the evaluation of the facts. For example, Dr. Harrison assisted the ALC in understanding Dish

DBS's testimony about its activities by distinguishing between Dish DBS's intermediate or prior activities and its income producing activities. (R. pp. 693, 702-705, 708-709, 712, 714-715; Hr'g Tr. 254:11-21, 263:18-265:9, 266:16-23, 269:21-270:14, 273:18-20, 273:20-22, 275:13-17, 276:10-12.) Dish DBS argued that its income should be apportioned based upon cost-of-performance factors, and Dish DBS's lay and expert witnesses testified that the cost activities it performs outside of South Carolina are the income producing activities in this matter. (R. pp. 577, 630-633, 763-766; Hr'g Tr. 138:3-21, 191:13-194:1; 324:1-327:25.) Dr. Harrison's testimony aided the ALC in understanding the economic impact or significance of these necessary, but intermediate, activities and how these activities may differ from the "income-producing activities" referenced in S.C. Code Ann. § 12-6-2295(A)(5) (2014).

Further, because neither § 12-6-2295(A)(5) nor any other South Carolina apportionment statute define the term "income-producing activity," Dr. Harrison assisted the ALC to "determine a fact at issue." Rule 702, SCRE. As noted by the ALC in its Order Denying Cross Motions for Summary Judgment ("Summary Judgment Order"), "at this stage in the litigation, there are insufficient facts to determine what [Dish DBS's] income-producing activities are and the extent to which those activities take place in South Carolina." (R. p. 71; Summ. J. Order, p. 10.) Dr. Harrison provided significant insight and understanding from an economic perspective of the activities of Dish DBS and which activities were income-producing.

Contrary to the Chamber's argument, the ALC did not "disregard" Dish DBS's claimed income-producing activities "pursuant to Dr. Harrison's testimony." (Chamber's Br., p. 4.) Rather, the ALC found that Dish DBS itself did not provide the court with sufficient evidence to support its claimed income-producing activities. (R. p. 22; Amended Final Order, p. 26.) Further,

with regard to the evidence Dish DBS did put forward with regard to these activities, the ALC concluded that Dish DBS' reliance on such activities was misplaced pursuant to established case law in South Carolina. (R. pp. 25-27; Amended Final Order, pp. 21-23.)

Finally, the Chamber asserts that it "takes no position on the substances of the tax dispute" yet subsequently argues "the 'cost of performance test' inherently looks at income producing activity to identify the costs incurred while performing the activities."¹ (Chamber's Br., p. 4.) This statement is Dish DBS' primary legal argument in this appeal – that costs of performance should be used in sourcing the subscription revenue received by Dish DBS from South Carolina customers.² Whether or not the costs of performance test "looks at income producing activity to identify the costs incurred" is wholly irrelevant in this matter. South Carolina is not a cost of performance state, and the ALC concluded that costs of performance do not apply in this matter. *See* Summ. Judgment Order ("South Carolina is, at the very least, not a strict cost of performance state." (R. p. 68, Summ. J. Order, p. 7.)) Further, the ALC noted that § 12-6-2295(A)(5) "focuses solely on the extent the 'income-producing activity' is performed in this State." (R. p. 69; *Id.* at

¹ Despite the Chamber stating that it takes no position as to the substantive tax issues in this matter, the Chamber asserts that "it is strongly in the interest of the Chamber that South Carolina businesses are utilizing the proper method to apportion their taxes. While the Department agrees with such statement, whether or not Dish DBS is "utilizing the proper method to apportion their taxes" is not any issue before this Court. Rather, this case deals with the proper sourcing of income to South Carolina. Dish DBS did not challenge the Department's use of the statutory appointment method pursuant to S.C. Code Ann. § 12-6-2290 (2014).

² The Chamber's Brief should not be allowed to further the substantive legal arguments of Dish DBS. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term 'amicus curiae' means friend of the court, not friend of a party.")

8.) The ALC's determination is entirely consistent with the Department's position in this matter: the focus is and has always been on the income producing activity of the business or industry at issue. To that end, Dr. Harrison's expertise in applied economics was relevant and helpful to the ALC in evaluating the economic activities of Dish DBS and how those activities relate to the income producing activity of Dish DBS, as required by § 12-6-2295(A)(5).

B. The Chamber's Amicus Brief Mischaracterizes Dr. Harrison's Testimony or Takes Such Testimony Out of Context to Achieve the Result it Desires.

The Chamber next asserts that Dr. Harrison testified that "Petitioner's only income producing activity was the mailing of the bill" and argues that "he is relying on a specific theory of taxation that is unsupported by the economic community." (Chamber Br., p. 13.) This is incorrect and a mischaracterization of Dr. Harrison's testimony. A review of the transcript establishes that Dr. Harrison did not state that Dish DBS' income-producing activity was the mailing of the bill. Rather, Petitioner's counsel made such statement:

Petitioner's counsel: Okay. And – all right. And so in your opinion then, the income-producing activity is the mailing of the bill, correct?

Dr. Harrison: **No, it's actually providing the – it's providing the programming services**, which is then leading to . . . is associated with you paying the bill. If you didn't pay the bill, let's assume, and it's not exactly instantaneous, but more or less at the same time you would not get the programming services. The difference between those is timing is not really critical."

(R. p. 723; Hr'g Tr. 284:19-285:7) (emphasis added). Dr. Harrison noted that the "timing" of two activities may be the same, but he unequivocally testified throughout the hearing that Dish DBS' income-producing activity is the delivery of the service into the subscriber's home and onto the

subscriber's television. (R. pp. 703-704, 708-709, 712, 714, 715, 720-721; Hr'g Tr. 264:12-265:9, 269:21-270:14, 273:16-22, 275:7-19, 276:5-18, 281:21-282:3.)

C. The Record and Dr. Harrison's Curriculum Vitae Demonstrates That His Opinion is Supported by the Economic Community.

The Chamber next asserts that Dr. Harrison's opinions are not based on reliable methodology because "no economic treatise supports his testimony that Petitioner's only income producing activity was the mailing of the bill." (Chamber's Br., p. 13.) As discussed above, the Chamber mischaracterizes Dr. Harrison's testimony, as he did not state that the mailing of the bill was Dish DBS's only income producing activity in this matter. Further, although the Chamber cites case law stating that the court will "not allow the admission of an expert's testimony which 'was rejected in the scientific community'", the Chamber's next sentence acknowledges that "Dr. Harrison's testimony is not rejected by the economics profession." Chamber's Br., p. 14 (*citing Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010)).

Moreover, during the administrative hearing, Dr. Harrison provided specific publications that support his opinion in this matter:

Petitioner's Counsel: Okay. And what you've just said comes out of economic treatises. You didn't just make that up? That's based upon your Ph.D. in economics, correct?

Dr. Harrison: It's my general understanding of economic principles. That's right.

Q: Okay. And so that would be found in leading economic treatises, correct?

A: Well, not specifically about Dish TV, but ----

Q: Well, right.

A: But the principles of how you talk about final products or intermediate products. I have a – for example, I have a publication that's on my C.V. that I could rely on. It's in the "Journal of the American Statistical Association" or what's called "Input Output Analysis," which is the field that defines that you mean by intermediate products, intermediate activities and final products. So I can rely on my own publication in a primary journal in statistics in the world.

(R. p. 715; Hr'g Tr. 276:19-277:14.) Further, as demonstrated by the exchange below, Dr. Harrison provided the names of additional treatises to Petitioner's counsel during the hearing. Notably, Dr. Harrison did not provide the names of any economic treatises that discuss the narrow issue of sourcing pursuant to South Carolina inclusion of the term "income-producing activity" as that is a "term of art in the law" in South Carolina. (R. p. 727; Hr'g Tr. 288:13-14.) Dr. Harrison further testified that his expertise is economics and thus the publications and treatises he relies upon use terms or definitions relied upon by economists and accountants:

Petitioner's counsel: But your – you just gave us a good definition of income-producing activities. They don't include taking my credit card. And that's based upon scientific applied economics principles, correct?

Dr. Harrison: Yes, indeed. Yes, indeed.

Q: Okay. So we could pick up a treatise and it would tell us just that?

A: Sure. Most of the standard principles of economic treatises would talk about – would talk about income and expenses.

Q: Okay. And during your deposition you told me two of the important treatises were welfare, economics and applied microeconomic theory, correct?

A: No, they were two, but they're not the ones I just referred to. I was just talking about principles of economics, textbooks. Those are specialist textbooks that occurred to me at the time that you asked me on the deposition. The textbooks I would probably refer

you to to be educated on these principles would be, for example, a book, "Economics," by Joe Stiglitz, a Nobel Prize winner. I actually worked on that book, on that textbook by producing the instructor's manual. I know it very well. It's a major principles of economics textbook.

Q: But that book doesn't talk about income-producing activities for state tax purposes, does it?

A: No, it doesn't use narrow terms like that. It does use the terms that you are asking me about, and that is the definition of income, the definition of cost, the definition of revenues, and most importantly, how those differ between economists and accountants, because as I said, one has to pay attention to that.

(R. pp. 718-720; Hr'g Tr. 279:25:281:12.)

Q: Okay. Now you've testified on your definition of income-producing activity. And at your deposition I asked you for a couple of treatises that you based your testimony on, and you cited "Welfare and Economic" and "Advanced Microeconomic Theory." Can you point out to where they define income-producing activities?

A: Those wouldn't be ----

Q: Either of them.

A: Those wouldn't be the places to look. Those are much more specialist graduate textbooks. I think I also referred to Principles of Economics textbooks. Those would be the ones that would be most likely to define those terms.

Q: And I asked you ---

A: And if I may, they don't use the term income-producing activity.

Q: Right.

A: **But I understand that's a term of art in the law here.** [The textbooks] all talk about income and they all talk about revenues and costs.

(R.pp. 726-727; Hr'g Tr. 287:19-288:15.) (emphasis added).

The Chamber concedes that the subject matter of income-producing activities is beyond the ordinary knowledge of the jury, which satisfies the first requirement of *Graves*. *Graves*, 401 S.C. 63, 735 S.E.2d 650; Chamber's Br., p. 13. As demonstrated through his curriculum vitae and testimony, Dr. Harrison is well-qualified to testify in the area of applied economics, and thus satisfies the second requirement of *Graves*. Finally, his testimony is based upon recognized economic treatises that discuss relevant topics such as income and expenses or costs, and the Chamber acknowledged that Dr. Harrison's testimony has not been rejected by the economics profession. (Chamber's Br., p. 14.) Thus, his testimony meets the three requirements of *Graves*, and such testimony assisted the ALC – as the finder of fact – to determine what Dish DBS' income-producing activity is in South Carolina. *Graves*, 401 S.C. 63, 735 S.E.2d 650.

In its Brief, the Chamber further asserts that Dr. Harrison “has not been engaged by any other state's department of revenue or taxation.” *Id.* Whether or not he has been engaged by any other state's department of revenue or taxation is not relevant in this matter. Moreover, Dr. Harrison's curriculum vitae only indicates his involvement in matters that are not protected by disclosure provisions or confidentiality agreements. *See e.g.*, S.C. Code Ann. § 12-54-240(B) (discussing when matters related to a taxpayer's return may be publicly disclosed by certain individuals or agencies). Finally, there is nothing in the record to suggest that Dr. Harrison has not been engaged by any other state's department of revenue or taxation. This is purely speculation by the Chamber. Testimony not presented to the lower court is not appropriate for consideration by the appellate court. *See* SCACR 210(c) (“The Record shall not, however, include any matter

which was not presented to the lower court or tribunal.”); SCACR 210(b) (“[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.”).

D. Dish DBS Had Every Opportunity to Present Testimony or Evidence to Rebut Dr. Harrison’s Testimony.

Counsel for Dish DBS attended *DIRECTV*’s administrative hearing before Judge Anderson and observed Dr. Harrison’s testimony in that matter. During the discovery phase of this matter, Counsel for Dish DBS also deposed Dr. Harrison regarding his opinion and expected testimony on behalf of the Department. Dish DBS subsequently filed a motion *in limine* to strike Dr. Harrison as an expert witness in Dish DBS’ administrative hearing based upon Dr. Harrison’s testimony in *DIRECTV*. In its motion *in limine*, Dish DBS asserted that the ALC erred in denying its Motion *in Limine* to exclude Dr. Harrison because any testimony from Dr. Harrison regarding the “economic reasonableness” of an apportionment statute is not relevant in the matter. Notably, the Department did not ask *any* questions to Dr. Harrison during Dish DBS’ hearing as to whether South Carolina’s apportionment statute is “economically reasonable.” In fact, the only questions or reference to the “economic reasonableness” of any relevant statute in this matter came from Dish DBS’s counsel. (R. pp. 693, 695; Hr’g Tr. 254:14-18; 256:9-14.) Accordingly, the ALC did not err in denying Dish DBS’s Motion *in Limine* to exclude Dr. Harrison’s testimony on “economic reasonableness.”

Moreover, despite observing Dr. Harrison’s testimony in *DIRECTV* and deposing him in this matter, Dish DBS did not proffer an expert witness in the area of economics at the Administrative Law Court. The Chamber now attempts to have this Court disregard a qualified expert witness who testified on behalf of the Department. Dish DBS made a strategic decision by declining to offer an expert witness to rebut the testimony Dish DBS knew Dr. Harrison was

prepared to give at the administrative hearing. Dish DBS was given every opportunity to present testimony or evidence to contradict Dr. Harrison's "unqualified" opinion. (Chamber's Br., p. 13.) *See Leventis v. S.C. Dep't of Health & Env'tl. Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (noting the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof). Therefore, because Dish DBS requested the contested case hearing, it has the burden of proof to show by a preponderance of the evidence that the Department's tax assessment is incorrect. *See Anonymous (M-156-90) v. State Bd. of Med. Exmr's*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding the standard of proof in "administrative hearings is generally a preponderance of the evidence"). Dish DBS failed to do so in this matter.

II. RECENT COURT DECISIONS ESTABLISH THAT THE TRIAL COURT APPROPRIATELY AND ULTIMATELY DETERMINES WHETHER DR. HARRISON'S TESTIMONY IS RELEVANT.

The Chamber next argues that the Department's "reliance" on Dr. Harrison in various cases is "inappropriate." (Chamber's Br., p. 5.) First, the Chamber is improperly seeking a determination from this Court to allow the Chamber to choose what expert witnesses the Department must use in future litigation. Second, the Chamber fails to recognize that it is the trial court's decision of who may be offered as an expert witness during the hearing. Further, once the expert has been qualified and admitted by the trial court, the trial court can then accept or reject the expert's testimony. *See Berkeley Elec. Coop, Inc. v. S.C. Pub. Svc. Comm'n*, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991) (stating "[w]here the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value). Moreover, "[a] trier of fact is not compelled to accept an expert's opinion, but may give it the weight he determines it deserves. *Florence County Dep't of Social Servs. v. Ward*, 310 S.C. 69, 72-3, 425 S.E.2d 61, 63

(Ct. App. 1992). Additionally, the trier of fact may accept the testimony of one expert over that of another.” *S.C. Cable Television Ass’n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). A review of the cases cited by the Chamber regarding Dr. Harrison’s testimony establishes that courts have not agreed with Dr. Harrison’s opinion in each case; rather, the court considers all the testimony and evidence presented by the parties when making its determination.

First, the Chamber cites to *ESA Services, LLC, v. South Carolina Department of Revenue*, Docket No. 08-ALJ-17-0047-CC, in which Dr. Harrison testified as an expert witness on behalf of the Department. In this matter, the Court ultimately ruled against the Department’s position and held for the taxpayer. Despite the Chamber’s instance that Dr. Harrison’s testimony is always relied upon by the ALC, this case alone establishes that the ALC does not view Dr. Harrison’s testimony as conclusive and irrefutable.³ In fact, it is evidence that the ALC is the finder of fact and can choose to accept or reject an expert’s testimony.

Similarly, the Chamber cites to *Duke Energy Corp. v. South Carolina Department of Revenue*, (2016), in which Dr. Harrison testified as an expert witness on behalf of the Department. The ALC, and ultimately the South Carolina Supreme Court, ruled in favor of the Department’s position. While neither the ALC nor the Supreme Court directly cite to his testimony from the administrative hearing, neither court criticizes Dr. Harrison’s testimony or opinion.

The Chamber next cites to *CarMax Auto Superstores West Coast v. South Carolina Department of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014) and *Rent-A-Center West, Inc. v. South Carolina Department of Revenue*, 418 S.C. 320, 792 S.E.2d 260 (Ct. App. 2016), other cases in

³Similarly, the ALC ruled against the Department in *Rent-A-Center Texas, LP v. South Carolina Department of Revenue*, Docket No. 09-ALJ-17-0206-CC (Jan. 6, 2012), another case in which Dr. Harrison testified on behalf of the Department.

which Dr. Harrison provided expert testimony for the Department. In both cases, the appellate courts ultimately concluded the Department had not met its burden of proving that the standard appointment method did not fairly reflect the extent of the taxpayer's business activity in South Carolina. In *CarMax*, the Supreme Court concluded that the Department "described what it did rather than cite any evidence justifying what it did." *CarMax*, 411 S.C. at 90, 767 S.E.2d at 200.

More specifically, the Supreme Court noted that the lower court, in ruling for the Department, "**relied on testimony from an auditor** that the business structure of CarMax West and CBS is often 'linked with tax minimization strategies.'" *Id.* at 90, 767 S.E.2d at 201 (emphasis added). Further, "[e]ven if these findings accurately characterize CarMax West's motives, they do not provide a sound evidentiary basis to support the conclusion that the statutory formula did not fairly represent CarMax West's business in South Carolina." *Id.* at 90-91, 767 S.E.2d at 201. The *Rent-A-Center* court found that the Department presented the same level of evidence as it did in *CarMax*, and likewise concluded the Department failed to meet its burden. *Rent-A-Center*, 418 S.C. at 333, 792 S.E.2d at 267.

The administrative hearings in both *CarMax* and *Rent-A-Center*⁴ consisted of several Department witnesses – not just Dr. Harrison. The Department had the burden to prove its assessments were correct. Dr. Harrison's role in the administrative hearings – like any other expert witness – is to assist the court in determining or understanding a fact at issue. Thus, the decisions of the appellate courts in *CarMax* and *Rent-A-Center* reflect the Department's failure to meet its

⁴In *Rent-A-Center*, the Court of Appeals chose to accept the testimony provided by the taxpayer's expert witness. *Rent-A-Center*, 418 S.C. at 333, 792 S.E.2d at 267; see *S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992) (concluding court may accept the testimony of one expert over that of another.)

burden of proof. There is no analysis or statements contained in either *CarMax* or *Rent-A-Center* that Dr. Harrison is not qualified to provide expert testimony in the area of economics.

Finally, the Chamber cites to *DIRECTV, Inc. v. South Carolina Department of Revenue*, 421 S.C. 59, 804 S.E.2d 633, (Ct. App. 2017), *cert. denied* May 2, 2018, and states the Court of Appeals “relied heavily on Dr. Harrison’s interpretation of section 12-6-2290.” Dr. Harrison assisted the court in identifying Dish DBS’ income-producing activities as § 12-6-2295(A)(5) does not provide for the definition of “income-producing activities.” Dr. Harrison, as an economist, assisted the ALC to understand the evidence or to determine a fact in issue – what is Dish DBS’ income-producing activity in this matter. Dr. Harrison did not provide a legal interpretation of any statute; rather, he assisted the court, from an economic perspective, to determine a fact in issue. Moreover, the Chamber has not argued why the Court of Appeals was incorrect to rely upon Dr. Harrison’s testimony in *DIRECTV*. Instead, the Chamber makes general statements and conclusions that Dr. Harrison is not qualified “in this area under both the South Carolina Rules of Evidence and the *Daubert* standard.”⁵

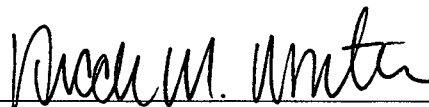
⁵ First, the Department reiterates that Dr. Harrison was not qualified “in the area of state taxation.” The Department would concur that Dr. Harrison is not an expert in “state taxation.” Dr. Harrison is a recognized economist and as such, he was qualified in the area of “applied economics” for his opinion regarding the economic perspective of Dish DBS’ income-producing activities.

Second, despite the Chamber conceding in its brief that South Carolina has “declined to explicitly adopt the *Daubert* standard”, the Chamber requests the Court to rule “on whether he is a qualified witness in this area under both the South Carolina Rules of Evidence and the *Daubert* standard. (Chamber’s Br., pp. 11, 9.) *See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) (South Carolina Supreme Court declining to adopt *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Because South Carolina has explicitly declined to adopt the *Daubert* standard, it is neither appropriate nor necessary for this Court to engage in the *Daubert* analysis.

CONCLUSION

For the reasons stated above, the Department objects to the Chamber's Amicus Brief because it is filed primarily to have this Court allow the Chamber to choose which expert witnesses it believes the Department must use in future litigation. Further, the Chamber's brief mischaracterizes Dr. Harrison's testimony, includes speculative opinion testimony, and includes flawed analyses of recent Department of Revenue cases in which Dr. Harrison testified on behalf of the Department. Accordingly, the Department respectfully requests that this Court disregard the Chamber's Amicus Brief in its entirety.

Respectfully submitted,



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Columbia, South Carolina
June 4, 2018

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Honorable Shirley C. Robinson, Administrative Law Judge

Case No. 14-ALJ-17-0285-CC
Appellate Case No. 2016-000968


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

v.

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

PROOF OF SERVICE

I, Jean O'Connor, hereby certify that I have caused to be mailed a copy of Respondent South Carolina Department of Revenue's Response Brief to the Amicus Curiae Brief of the South Carolina Chamber of Commerce regarding the above-referenced case, by depositing the same in the United States Mail, postage prepaid, on June 4, 2018, addressed to the attorney of records, Burnet R. Maybank, III, Esquire, and James P. Rourke, Esquire, NEXSEN PRUET, LLC, P.O. Drawer 2426, Columbia, SC 29202, and Charles T. Speth, II, Esquire, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 2142 Boyce Street, Suite 401, Columbia, SC 29201-3266, and Steve A. Matthew, Haynsworth Sinkler Boyd, P.A., Post Office Box 11889, Columbia, SC 29211-1889, and by hand delivery to the Court of Appeals, 1220 Senate Street, Columbia, SC 29201.



Jean O'Connor